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RESOLUTION NO. R-50-04

RESOLUTION APPROVING A STORM SEWER EASEMENT AGREEMENT

WHEREAS, the City of Wheaton has approved a residential subdivision for a property commonly known as "Parkview Estates"; and

WHEREAS, in order to provide proper storm water drainage for Parkview Estates, the developer Ten Talents, Inc. has secured a Storm Water Sewer Easement from the Wheaton Park District; and

WHEREAS, the Corporate Authorities of the City of the Wheaton deem it necessary and appropriate to accept the Storm Water Sewer Easement granted by the Wheaton Park District to Ten Talents, Inc. upon completion of the same in order to have and maintain proper control over storm water in and around the Parkview Estates subdivision.

NOW, THEREFORE, be it resolved by the Mayor and the City Council of the City of Wheaton, DuPage County, Illinois, that the Mayor is hereby authorized to sign, and the City Clerk is hereby directed to attest to that certain Storm Water Sewer Easement Agreement attached hereto and incorporated herein as a fully set forth as Group Exhibit A. The Mayor is further authorized and the City Clerk is hereby directed to further attest to any documents deemed necessary and appropriate by the City Attorney in order to effectuate the terms of said Storm Water Sewer Easement Agreement.

ADOPTED this 19th day of July, 2004.



Mayor

ATTEST:

Erin M. Connelley
City Clerk

Roll Call Vote:

Ayes:

Councilman Mouhelis
Councilman Bolds
Councilwoman Corry
Councilman Johnson
Mayor Carr
Councilwoman Johnson
Councilman Mork

Nays:

None

Absent:

None

Motion Carried Unanimously

STORM SEWER EASEMENT AGREEMENT

THIS STORM SEWER EASEMENT AGREEMENT ("Agreement") is made and entered into on July 19, 2004, 2004, by and between the **Wheaton Park District**, County of DuPage, State of Illinois, an Illinois park district and unit of local government ("Grantor"), **Ten Talents, Inc.**, County of DuPage, State of Illinois, an Illinois corporation ("Grantee") and the City of Wheaton, a municipality of the State of Illinois ("City").

RECITALS:

- a. Grantor is the owner in fee simple of certain real property located in DuPage County, Illinois, commonly known as Atten Park (the "Park Property").
- b. Grantee is the developer of property south of the Park Property known as Park View Estates (the "Development Property").
- c. Grantor has extended a water main along Shaffner Road in the City of Wheaton, to the Park Property, at its sole expense, which water main extension will also benefit the Development Property
- d. Grantee desires to obtain an easement ("Storm Sewer Easement") on, over and under the portion of the Park Property legally described in **Exhibit A**, attached to and incorporated by reference in this Agreement ("Easement Property"), for the purposes of constructing, installing and operating a storm sewer line and appurtenant structures (the "Storm Sewer Line") to improve area drainage on the Development Property.
- e. Grantor will be able to connect a storm water outfall located on the Park Property to the Storm Sewer Line which will assist with drainage of stormwater on the Park Property, free of charge to Grantor.
- f. Grantee has agreed it will pay the sum of Twenty-Five Thousand and 00/100's Dollars (\$25,000.00) to Grantor as consideration for the benefit derived by Grantee from Grantor's construction of the water main extension and in consideration of Grantor's granting of the Storm Sewer Easement and entering into this Agreement.
- g. Grantor has determined that it is in Grantor's and the public's interest to enter into this Agreement.
- h. Grantor has the authority to grant such an easement pursuant to Article 8-11 of the Park District Code of the State of Illinois (70 ILCS 1205/8-11).
- i. City has agreed to assume ownership and maintenance obligations of the Storm Sewer Line upon its completion in accordance with City requirements, provided Grantee assigns the easement granted herein to City.

j. Grantor, Grantee and City desire to formally establish their respective rights and obligations with respect to the ownership, installation, construction, use, maintenance, and repair of the Storm Sewer Line.

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, and other good and valuable consideration, the receipt of which is hereby acknowledged, Grantor, Grantee and the City agree as follows:

1. **Grant of Easement for Installation and Construction.** Grantor hereby grants and conveys to Grantee, without covenants or warranties of any kind, and subject to the terms, conditions and obligations contained in this Agreement, an easement, together with the right of access across the property for necessary men and equipment to perform the work or maintenance thereon, on over and under the Easement Property for the purposes of installing, constructing, reconstructing, maintaining, repairing and operating the Storm Sewer Line, and all appurtenant structures, (the "Construction and Maintenance Activities"), which Storm Sewer Line shall be constructed of reinforced concrete pipe, be constructed at a depth of at least three (3) feet below the surface of the ground, and no part of which is above the surface of the ground, and shall be no greater than twelve inches in diameter and approximately one hundred and thirty (130) feet long on the Easement Property, all as shown on the drawing contained in **Exhibit B**, attached to and incorporated by reference in this Agreement.
2. **Grant of Temporary Construction License.** Grantor further grants to Grantee a temporary license to enter upon the Park Property for the purpose of conducting the Construction and Maintenance Activities or as may be reasonably necessary to effectuate said Construction and Maintenance Activities, subject to the following provisions:
 - (a) Grantee shall receive written approval from Grantor prior to the commencement of the initial excavation or construction activity on the Park Property, and such approval shall not be unreasonably withheld or delayed. Grantor and Grantee shall reasonably cooperate with respect to the commencement, timing and location of such activity so as not to disturb or interfere with Grantor's and the public's activities on the Park Property.
 - (b) Except in the event of a bona fide emergency, Grantee shall obtain written approval from Grantor prior to the commencement of any Construction and Maintenance Activities on the Park Property, and such approval shall not be unreasonably withheld or delayed. In the event of a bona fide emergency, Grantee shall give Grantor notice of the commencement and anticipated duration of such emergency Construction and Maintenance Activities by telephone as soon as possible. Grantor and Grantee shall reasonably cooperate with respect to the commencement, timing and location of such Construction and Maintenance Activities so as not to disturb or interfere with Grantor's and the public's activities on the Park Property.
 - (c) Grantor shall have the exclusive right to designate the route for machinery and equipment across the Park Property and the placement of materials on the Park Property, for all Construction and Maintenance Activities.
 - (d) Grantee shall not leave any equipment, machinery, or materials unattended or overnight on the Park Property except with the prior written permission of Grantor given for the specific

instance requested, and Grantor shall have no liability or responsibility for the safety or condition of said equipment, machinery or materials.

- (e) Grantee shall not leave open any ditches or trenches on the Park Property overnight, without the prior written permission of Grantor.
- (f) In recognition of the fact that the Park Property shall continue to be accessible to and used by the public during the Construction and Maintenance Activities on the Easement Property and the Park Property, Grantee shall take, or otherwise cause its contractors to take, all reasonable precautions in the performance of the work necessary or desirable in order to protect the public safety and welfare, including without limitation, the erection of barricades where appropriate.

3. **Construction and Maintenance of Storm Sewer Line.** Grantee at its sole cost and expense, shall construct the Storm Sewer Line in a good, workmanlike and safe manner, in strict accordance with City of Wheaton requirements, and shall maintain the Storm Sewer Line and keep it in good repair and in a safe condition at all times. If Grantee fails to so maintain the Storm Sewer Line, Grantor shall have the right, but not the obligation, to perform such maintenance and repairs and Grantee shall pay Grantor's costs therefor, on demand. Grantee shall have no obligation to construct, reconstruct, repair or maintain Grantor's storm water outfall or any pipes or drainage structures located on the Park Property but not on the Easement Property.

4. **Duty to Restore.** After entry upon the Park Property for the purposes stated herein and upon completion of any work resulting therefrom, Grantee, at its sole cost and expense, shall restore the Park Property to the condition as when first entered, including without limitation replacing any pavement, asphalt, fencing or landscaping, and the proper compaction of the ground to prevent subsidence. If Grantee fails to so restore, Grantor shall have the right, but not the obligation, to make such restoration and Grantee shall pay Grantor's costs therefor, promptly upon demand.

5. **Assignment and Transfer.** Upon completion of the Storm Sewer Line and all restoration work and acceptance of the same by Grantor and the City, Grantee shall assign its interest in the easement granted herein as well as dedicate ownership of the Storm Sewer Line to the City, all as further described in Paragraph 21 of this Agreement. At no time prior to assignment or transfer, or there after, shall the Grantor place any permanent buildings, change the elevation or grades or place within the easement any obstructions that divert, obstruct or modify the drainage pattern without the approval of the City of Wheaton, its successors or assigns.

6. **Indemnification.**

- (i) To the fullest extent permitted by the laws of the State of Illinois, Grantee hereby agrees to defend, indemnify and hold Grantor, its park commissioners, officers, agents, and employees, harmless from and against the following:
 - (a) any and all mechanics' or materialmens' liens, or claims therefor, including reasonable attorneys' fees, paralegals' fees and costs ("Legal Expenses") for defense thereof, arising out of or in any way connected to the installation, construction, reconstruction, maintenance, repair or operation of the Storm Sewer Line; and

(b) all liabilities, claims, demands, causes of action, costs and expenses including without limitation Legal Expenses arising out of or directly or indirectly related to the use by Grantee or Grantee's officers, agents, employees, independent contractors or subcontractors of the Park Property or Easement Property, or any omission, wrongful act or negligence of Grantee or said officers, agents, employees, independent contractors or subcontractors, in, on or around the Park Property or the Easement Property, or connected to the exercise of the rights herein granted to Grantee.

(ii) To the fullest extent permitted by the laws of the State of Illinois, Grantor hereby agrees to defend, indemnify and hold the City, its officers, agents, employees and officials, from and after such time as ownership of the Storm Sewer Line is transferred to the City and the Grantee has assigned this Agreement to the City, from and against all liabilities, claims, demands, causes of action, costs and expenses including without limitation Legal Expenses paid or incurred by the City and arising out of or directly or indirectly related to the negligent acts or omissions in or about the Easement Property or the Park Property by Grantor, except to the extent such claims, demands, causes of action, costs and expenses result from the negligent acts or omissions of City, its officers, agents, employees, officials or independent contractors, it being the intent of the City and Park District that the liability of each of them under this Paragraph 6 (ii) be apportioned as to degree of fault between them.

7. Waiver. Grantor shall not be responsible or liable for injury to or for the death of any person, or for damage to, loss, theft or destruction of any materials, tools, machinery, equipment or other property, incurred or sustained as a direct or indirect result of or relating to the exercise by Grantee or Grantee's agents, employees or other persons acting on Grantee's behalf or with Grantee's consent, of the rights and privileges granted to Grantee hereunder. To the fullest extent permitted by the laws of the State of Illinois, Grantee waives any and all rights or claims Grantee may have at any time against Grantor, its park commissioners, officers, agents and employees, for injury to or the death of any person or for the damage to or destruction of any property sustained or incurred by Grantee or any person claiming by, through or under Grantee in connection with the exercise by such persons of rights and privileges granted to Grantee hereunder, even though such loss or damage may be caused by the negligence of Grantor, its park commissioners, officers, agents or employees. This waiver shall not apply to the indemnification granted to the City through paragraph 6 of this Agreement.

8. Insurance. Grantee shall secure and maintain at its expense, and shall require all of its contractors and subcontractors performing any work on its behalf in the exercise of any and all of the rights and privileges granted to Grantee hereunder to secure and maintain at their own expense, comprehensive public general liability and property damage insurance insuring against any and all claims, including all costs and expenses of defending against same, for personal injury, sickness, disease or death and for damage to or destruction of property, including the loss of the use thereof, incurred upon, in or about the Easement Property or Park Property arising out of or in connection with such work. Said policies shall be in such form, in such amounts and with such insurance companies as shall be reasonably satisfactory to Grantor. Grantor, its park commissioners, officers, agents and employees shall be named as additional insureds under each such policy of insurance and each such policy shall provide that the insurer shall provide Grantor with at least thirty (30) days prior written notice of cancellation, expiration or reduction in coverage of said insurance. Grantee shall provide to Grantor proof of any such insurance policies

prior to the commencement of any work performed by Grantee's contractors or subcontractors. Upon assignment of the easement herein granted and assumption of ownership of the Storm Sewer Line by the City, the city may provide all or a portion of these insurance requirements through self insurance or self insured retentions.

9. **No Waiver of Privileges and Immunities.** Nothing contained in this Agreement shall be deemed to diminish or constitute a waiver of any rights, defenses or immunities which Grantor or the City, any of their park commissioners, elected officials, other officers, agents, or employees, may have under any applicable statute, at common law, or otherwise. There are no intended third party beneficiaries of this Agreement.
10. **Reservation of Rights.** Any rights to the Premises not specifically granted to Grantee in this Agreement are reserved to the Grantor, its successors and assigns.
11. **No Charges to Grantor; Payment of Charges by Grantee; Letter of Credit.** Except as otherwise specifically agreed in writing by Grantor, Grantor shall not, at any time, be subject to any charges, fees, taxes or assessments billed, assessed or levied in connection with (i) the construction, repair, maintenance or operation of the Storm Sewer Line; and (ii) the making of any connection to and use of the Storm Sewer Line by Grantor. The easement granted herein shall be in effect upon the execution of this Agreement by Grantor, Grantee and City. The Twenty-Five Thousand and 00/100's (\$25,000.00) charge which Grantor is charging Grantee for the easement shall be due and payable upon the sale of the first unit in the Development Property, provided, however, that as security for such payment on execution of this Agreement by Grantee, Grantee shall deliver to Grantor an unconditional irrevocable letter of credit, in form and substance reasonably satisfactory to Grantor, in the amount of Twenty-Five Thousand and 00/100's Dollars (\$25,000) with Grantor as the beneficiary indicating that if such first sale has not occurred by December 31, 2004, Grantor shall have the right to fully draw on such letter of credit.
12. **Termination.** Grantor reserves the right to automatically terminate the rights, licenses and easements granted to Grantee in this Agreement should Grantee or any of Grantee's agents, employees or any other persons acting on Grantee's behalf, violate the terms and conditions of this Agreement, or in the event the Storm Sewer Line ceases to be used or is otherwise abandoned for a period of at least one (1) year. Upon the occurrence of an event or condition allowing Grantor to terminate the rights, licenses and easements herein granted, Grantor may record, as evidence thereof, a statement of termination in the real estate records of DuPage County, Illinois.
13. **Running of Benefits and Burdens.** All rights, benefits, privileges and licenses granted, created or reserved herein, and all impositions, undertakings and obligations imposed herein, shall be deemed and taken to be covenants running with the land, and shall extend to, be binding upon and inure to the benefit of Grantee and Grantee's successors and assigns, and any persons from time to time owning or having an interest in the Easement Property.
14. **Entire Agreement.** This Agreement is the entire understanding and agreement of the Grantor, Grantee and the City with respect to the subject matter herein contained, and supercedes all oral or written, prior or contemporaneous agreements with respect to said subject matter.

15. **Modification.** This Agreement may not be modified, amended or altered except by a written instrument signed Grantor, Grantee and the City, prior to assignment of this Agreement to the City, and by Grantor and City after such assignment, and dated at a time subsequent to the date of this Agreement.
16. **Severability.** A final determination by a court of competent jurisdiction that any provision of this Agreement is invalid shall not affect the validity of any other provision, and any provision so determined to be invalid shall, to the extent possible, be construed to accomplish its intended effect.
17. **Applicable Law.** This Agreement shall be governed by and its provisions construed in accordance with the laws of the State of Illinois.
18. **Recordation.** This Agreement and any modifications of it may be recorded in the real estate records of DuPage County, Illinois.
19. **Notice.** Any notice required or permitted to be given pursuant to this Agreement shall be given to the following addresses or to such other addresses as Grantor, Grantee and the City may hereafter designate by like notice similarly sent. Such notice is deemed to be given when personally delivered or three (3) days after being sent registered or certified mail, return receipt requested.

If to Grantor:

Wheaton Park District
666 South Main Street
Wheaton, IL 60187
Attention: Executive Director

With a copy to:

Charlene L. Holtz
Friedman & Holtz, P.C.
11 E. Adams St., Ste. 1600
Chicago, IL 60603

If to Grantee:

Ten Talents, Inc.
P.O. Box 5051
Wheaton, IL 60189
Attention: Tim Wilson

If to City:

City of Wheaton
303 West Wesley St.
Wheaton, IL 60187

With a copy to:

James Knippen
Walsh, Knippen, Knight & Diamond
601 W. Liberty Drive
Wheaton, IL 60187

20. Due Authority. Grantor, Grantee and the City represent and warrant, each to each other, that they have the authority to execute and deliver this Agreement and that the persons executing this Agreement have been duly authorized by their respective governing boards to so execute this Agreement.
21. City of Wheaton to Assume Ownership and Maintenance. Upon completion of the Storm Sewer Line in accordance with all requirements of the City, Grantee shall assign this Agreement to the City and the City shall accept such assignment, by a written, executed assignment, a copy of which shall be delivered to Grantor, and such assignment may be recorded in the real estate records of DuPage County, Illinois. After such assignment, the City shall have all rights and obligations of Grantee under this Agreement.

IN WITNESS WHEREOF, Grantor, Grantee and the City have executed this Agreement as of the date first above written.

GRANTOR

WHEATON PARK DISTRICT

By: _____
President, Board of Park Commissioners

Attest: _____
Secretary

(Seal)

CITY

CITY OF WHEATON

By: C. James Carr
Signature: C. James Carr
Title: Mayor

Attest:

By: Emily M. Connelly
City Clerk

GRANTEE

TEN TALENTS, INC.

By: T. Wilson
President

Attest: _____
Secretary

(Corporate Seal)

STATE OF ILLINOIS)
)
COUNTY OF DUPAGE)

I, the undersigned, a Notary Public in and for said County and State, do hereby certify that _____, personally known to me to be the President of the Board of Park Commissioners of the Wheaton Park District, an Illinois park district and unit of local government, and _____, personally known to me to be the Secretary of said Wheaton Park District, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that, as said President and Secretary, they signed, sealed and delivered the said instrument in their respective official capacities, pursuant to authority given by the Board of Park Commissioners of said park district as the free and voluntary act and deed of said park district, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this _____ day of _____, 2004.

Notary Public

(Seal)

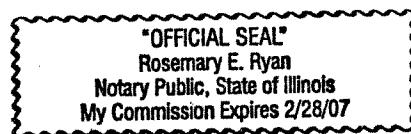
STATE OF ILLINOIS)
)
COUNTY OF DUPAGE)

I, the undersigned a Notary Public in and for said county and state, do hereby certify that Tim Wilson, personally known to me to be the President of Ten Talents, Inc., a Illinois corporation, and _____, personally known to me to be the _____ of said corporation, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as President and _____ of said corporation, they signed, sealed and delivered the said instrument in their respective official capacities, pursuant to authority given by the board of directors of said corporation as the free and voluntary act and deed of said corporation for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 20th day of JULY, 2004.

Rosemary C. Hyatt
Notary Public

(Seal)



STATE OF ILLINOIS)
)
COUNTY OF DUPAGE)

I, the undersigned, a Notary Public in and for said County and State, do hereby certify that C. James Carr, personally known to me to be the Mayor of the City of Wheaton, a municipality of the State of Illinois, and Emily M. Consolazio, personally known to me to be the City Clerk of said City of Wheaton, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that, as said Mayor and City Clerk, they signed, sealed and delivered the said instrument in their respective official capacities, pursuant to authority given by the City Council of said municipality as the free and voluntary act and deed of said municipality, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 21st day of JULY, 2004.

Rosemary C. Ryan
Notary Public

(Seal)

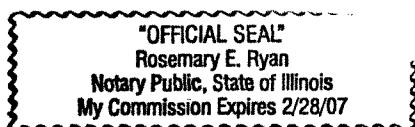


EXHIBIT A

Legal Description of Easement Property

A 10 foot public utility easement the centerline of which is described as follows; commencing at the southeast corner of Lot 2 in Heirloom Acres, according to the Plat of Subdivision thereof in Section 25, Township 39 North, Range 10, East of the Third Principal Meridian, recorded July 27, 1955 as document number 766669 in the office of the Recorder of Deeds of DuPage County, Illinois, being also the centerline of the Shaffner Road right of way and the east line of the northeast quarter of said Section 25; thence westerly along the south line of said Lot 2, a distance of 33.21 feet to the westerly right of way line of Shaffner Road; thence north along said right of way line, a distance of 30.42 feet for the place of beginning of said centerline; thence westerly at an angle from south to west of 91 degrees 39 minutes 54 seconds, a distance of 139.09 feet to a point that is 18.72 feet north of the south line of said Lot 2 s measured perpendicular to said south line and being the terminus of said centerline.

Common Address: Atten Park, Wheaton, Illinois 60187

Permanent Index Number: _____

EXHIBIT B
Drawing of Storm Sewer Line
See attached

This instrument prepared by and after recording to be returned to:

Carol L. Gloor
Friedman & Holtz, P.C.
11 E. Adams Street
Suite 1600
Chicago, IL 60603