



City Council Memorandum

To: Mayor Fasbender & City Councilmembers
From: John Hinzman, Community Development Director
Date: October 16, 2023
Item: Authorize Signature – Encroachment Agreement – Miller – 751 Bohlken Drive

Council Action Requested:

Authorize signature of the attached Encroach Agreement to allow construction of a pool within a drainage and utility easement on property owned by Brian and Jennifer Miller located at 751 Bohlken Drive. A simple Council majority is necessary for action.

Background Information:

The subject property is encumbered by a large drainage and utility easement across the backyard prohibiting construction of the proposed pool. City Staff has reviewed the proposed use and supports construction of the pool within the easement. The License to Encroach would allow for the proposed use only, and would prohibit any future encroachments within the easement. It would also hold the City harmless from any future claims and demands for use of that portion of the easement.

The City Council approved a similar encroachment agreement in 2019 for 743 Bohlken Drive.

Financial Impact:

Issuance of the license will allow for a property improvement and increase in valuation.

Advisory Commission Discussion:

N\A

Council Committee Discussion:

N\A

Attachments:

- Location Map
- License to Encroach

LOCATION MAP



**ENCROACHMENT AGREEMENT RELATING TO LANDOWNER POOL
AND RELATED IMPROVEMENTS ON A PORTION OF 751 BOHLKEN
DRIVE IN THE CITY OF HASTINGS, DAKOTA COUNTY, MINNESOTA**

THIS AGREEMENT (“Agreement”) is made, entered into and effective this ____ day of _____, 2023 by and between the City of Hastings, a Minnesota municipal corporation, and Brian J. Miller and Jennifer M. Miller, husband and wife.

Subject to the terms and conditions hereafter stated and based on the representations, warranties, covenants, agreements and recitals of the parties, the parties do hereby agree as follows:

ARTICLE 1
DEFINITIONS

1.1 Terms. The following terms, unless elsewhere specifically defined herein, shall have the following meanings as set forth below.

1.2 City. “City” means the City of Hastings, a Minnesota municipal corporation.

1.3 Landowner. “Landowner” means Brian J. Miller and Jennifer M. Miller, their successors and assigns in interest with respect to the Encroachment Property.

1.4 City Easement. “City Easement” means the City’s drainage and utility easement located on the Encroachment Property.

1.5 Encroachment Property. “Encroachment Property” means the following real property owned by Landowner and located in the City of Hastings, Dakota County, Minnesota:

Lot Thirteen (13), Block One (1), South Oaks of Hastings 2nd Addition according to the recorded plat thereof, Dakota County, Minnesota.

PID #:19.71026.01.130
(Torrens No. 169056)

1.6 Landowner Improvements. “Landowner Improvements” means Landowner’s pool and related improvements on a portion of the Encroachment Property, as depicted on Exhibit A, attached hereto and incorporated herein.

1.7 Utility Costs. “Utility Costs” means all costs incurred by the City, (whether performed by the City or its agents or contractors), for the inspection of and access to and repair, maintenance and replacement of the City’s Easement and the placement of additional improvements in the City Easement. Utility Costs, include, without limitation: excavation costs, labor costs, costs of removing fill, costs of re-burying any improvements, re-compacting the soils over the City Easement, restoring the City Easement area, and all engineering and attorneys’ fees incurred in connection therewith. Utility Costs also include the costs of temporarily removing the Landowner Improvements and subsequently replacing the Landowner Improvements in the City Easement, if such costs have not already been paid by the Landowner.

1.8 Pre-Encroachment Costs. “Pre-Encroachment Costs” means a reasonable estimate by the City of the costs the City would have incurred for Utility Costs if the Landowner Improvements did not exist.

1.9 Cost Differential. “Cost Differential” means the difference between the Pre-Encroachment Costs and the Utility Costs in light of the existence of the Landowner Improvements. The City’s determination of the amount of the Cost Differential shall be binding on the Landowner. The City’s determination shall be appropriately supported by cost estimates obtained from independent contractors or engineers.

ARTICLE 2 **RECITALS**

- 2.1** Landowner owns the Encroachment Property.
- 2.2** The Encroachment Property has been developed with Landowner Improvements.
- 2.3** The City Easement lies within the Encroachment Property.
- 2.4** The City has established written policies prohibiting certain private encroachments and improvements within drainage and utility easements within the City.
- 2.5** Landowner has located the Landowner Improvements within the City Easement.
- 2.6** Subject to the terms of this Agreement, the City is willing to allow the Landowner Improvements to remain within the City Easement if the following conditions are met:

- (a) The Landowner maintains the Landowner Improvements.
- (b) The Landowner agrees to pay the City any Cost Differential relating to inspections, access, repair, maintenance and replacement of City Easement and the placement of any additional improvements by Landowner in the City Easement.
- (c) The Landowner agrees to temporarily remove the Landowner Improvements in the event the City has need to access the area where the Landowner Improvements exist in order for the City to inspect, repair, maintain, and replace the City Easement or construct additional improvements in the City Easement.

ARTICLE 3 **AGREEMENTS**

3.1 Maintenance of Landowner Improvements. Under the terms and conditions stated herein, the City authorizes the Landowner Improvements to remain in the City Easement pursuant to Exhibit A. Landowner shall not expand Landowner Improvements further into the City Easement.

Landowner shall not place any other structures, retaining walls, irrigation systems, buildings, fences, landscaping, trees or shrubs in the City Easement, except for the Landowner Improvements, without the City's written consent.

Landowner, at its own expense, shall maintain and repair the Landowner Improvements.

3.2 City Not Responsible for Landowner Improvements. Nothing contained herein shall be deemed an assumption by the City of any responsibility for construction, maintenance, replacement or repair of the Landowner Improvements.

3.3 Continuing Right to City Easement. Nothing contained herein shall be deemed a waiver or abandonment or transfer of the right, title and interest that the City holds to the City Easement.

3.4 Subordinate Position of Landowner Improvements. The Landowner Improvements are subordinate to the rights of the City in the City Easement.

3.5 Risk of Loss. Landowner understands and agrees that the Landowner Improvements within the City Easement may be adversely affected by damage caused to Landowner Improvements arising out of the City's use of the City Easement, natural events, or by cause of third parties. The parties agree that the City is not responsible for such events; the City shall have no liability to Landowner for such events.

3.6 Landowner to Bear Cost of Relocating Landowner Improvements. The City is responsible for any necessary repair and maintenance of the City Easement for drainage purposes.

The City may require the Landowner at the expense of the Landowner to temporarily remove and subsequently replace the Landowner Improvements in the City Easement in order for the City to gain access to the City Easement for the purpose of inspecting, repairing, maintaining, or replacing the City Easement or adding future improvements.

If the Landowner does not perform such tasks, the City may perform such tasks and in such case the Landowner shall reimburse the City for the City's costs and expenses. Prior to commencing such tasks, the City shall send a notice to the Landowner and allow the Landowner twenty (20) days from the date of the written notice to perform the tasks. If the Landowner has not completed the work within the twenty (20) days, then the City may proceed to perform the tasks. Once the City's costs and expenses have been determined by the City, the City shall send an invoice for such costs and expenses to the Landowner. The Landowner must pay the invoice within thirty (30) days after the date of the invoice. Such costs and expenses include, but are not limited to, costs charged the City by third parties such as contractors as well as the costs for City personnel that may have performed the work. Bills not paid shall incur the standard penalty and interest established by the City for utility billings within the City.

3.7 Emergency. Notwithstanding the requirements contained in Sections 3.6 relating to a twenty (20) day written notice to the Landowner to perform its obligations under Sections 3.6, the City shall not be required to give such notice if the City's Public Works Department determines that an emergency exists. In such instance, the City, without giving notice to the Landowner may perform the work and in such case the Landowner shall reimburse the City for the costs and expenses relating to the work. Once the City's costs and expenses have been determined by the City, the City shall send an invoice for such costs and expenses to the Landowner. The Landowner must pay the invoice within thirty (30) days after the date of the invoice. Such costs and expenses include, but are not limited to, costs charged the City by third parties such as contractors as well as the costs for City personnel that may have performed the work. Bills not paid shall incur the standard penalty and interest established by the City for utility bills within the City.

3.8 Cost Deferral. If a Cost Deferral occurs relating to the access to or inspection, maintenance, repair or replacement of the City Easement or relating to construction of new improvements in the future, then the Landowner shall pay the Cost Deferral to the City. The Landowner must make payment for the Cost Deferral within thirty (30) days after the City has sent a written invoice for the Cost Deferral to the Landowner.

3.9 Remedies. If the Landowner fails to perform its obligations under this Agreement, then the City may avail itself of any remedy afforded by law or in equity and any of the following non-exclusive remedies:

- (a) The City may specifically enforce this Agreement.
- (b) If Landowner fails to make payments under Section 3.6, 3.7 or 3.8, then the City may certify to Dakota County the amounts due as payable with the real estate taxes for the Encroachment Property in the next calendar year; such certifications may be made under Minnesota Statutes, Chapter 444 in a manner similar to certifications for unpaid utility bills. The charges shall be evenly allocated among the

Encroachment Property. The Landowner waives any and all procedural and substantive objections to the imposition of such usual and customary charges on the Encroachment Property.

Further, as an alternate means of collection, if the written billing is not paid by the Landowner, the City, without notice and without hearing, may specially assess the Encroachment Property for the costs and expenses incurred by the City. The Landowner hereby waives any and all procedural and substantive objections to special assessments for the costs including, but not limited to, notice and hearing requirements and any claims that the charges or special assessments exceed the benefit to the Encroachment Property. The Landowner waives any appeal rights otherwise available pursuant to Minnesota Statute § 429.081. The Landowner acknowledges that the benefit from the performance of tasks by the City equals or exceeds the amount of the charges and assessments for the costs that are being imposed hereunder upon the Encroachment Property.

No remedy herein conferred upon or reserved to the City 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.

3.10 Indemnification. The Landowner shall indemnify, defend and hold the City, its council, agents, consultants, attorneys, employees and representatives harmless against and in respect of any and all claims, demands, actions, suits, proceedings, losses, costs, expenses, obligations, liabilities, damages, recoveries, and deficiencies including interest, penalties and attorneys' fees, that the City incurs or suffers, which arise out of, result from or relate to any of the following:

- (a) The Landowner Improvements;
- (b) Maintenance of the Landowners Improvements;
- (c) Failure by the Landowner to observe or perform any covenant, condition, obligation or agreement on their part to be observed or performed under this Agreement; and
- (d) Use of the City Easement for Landowner Improvements.

3.11 City Duties. Nothing contained in this Agreement shall be considered an affirmative duty upon the City to perform the Landowner's obligations contained in Article 3 if the Landowner does not perform such obligations.

3.12 No Third Party Recourse. Third parties shall have no recourse against the City under this Agreement.

3.13 Recording. The Landowner shall record this Agreement with the Dakota County Recorder against the Encroachment Property and within thirty (30) days after the date of this Agreement, the Landowner shall present evidence to the City that this Agreement has been recorded.

3.14 Binding Agreement. The parties mutually recognize and agree that all terms and conditions of this recordable Agreement shall run with the Encroachment Property and shall be binding upon the heirs, successors, administrators and assigns of the parties. The obligations of the Landowner contained in this Agreement are joint and several.

3.15 Amendment and Waiver. The parties hereto may by mutual written agreement amend this Agreement in any respect. Any party hereto may extend the time for the performance of any of the obligations of another, waive any inaccuracies in representations by another contained in this Agreement or in any document delivered pursuant hereto which inaccuracies would otherwise constitute a breach of this Agreement, waive compliance by another with any of the covenants contained in this Agreement and performance of any obligations by the other or waive the fulfillment of any condition that is precedent to the performance by the party so waiving of any of its obligations under this Agreement. Any agreement on the part of any party for any such amendment, extension or waiver must be in writing. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver.

3.16 Governing Law. This Agreement shall be governed by and construed in accord with the laws of the State of Minnesota.

3.17 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

3.18 Headings. The subject headings of the sections this Agreement are included for purposes of convenience only, and shall not affect the construction of interpretation of any of its provisions.

3.19 Notice. Notice shall mean notices given by one party to the other if in writing and if and when delivered or tendered either in person or by depositing it in the United States mail in a sealed envelope, by certified mail, return receipt requested, with postage and postal charges prepaid, addressed as follows:

If to City:	City of Hastings Attention: City Administrator 101 4 th Street Hastings, MN 55033
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If to Owner: Brian R. Miller
 Jennifer M. Miller
 751 Bohlken Drive
 Hastings, MN 55033

or to such other address as the party addressed shall have previously designated by notice given in accordance with this Section. Notices shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the third day after mailing if mailed as provided above, provided, that a notice not given as above shall, if it is in writing, be deemed given if and when actually received by a party.

[The remainder of this page has been intentionally left blank.]

IN WITNESS WHEREOF, the parties have executed this Agreement the year and day first set forth above.

CITY OF HASTINGS

By: _____
Mary Fasbender, Mayor

ATTEST:

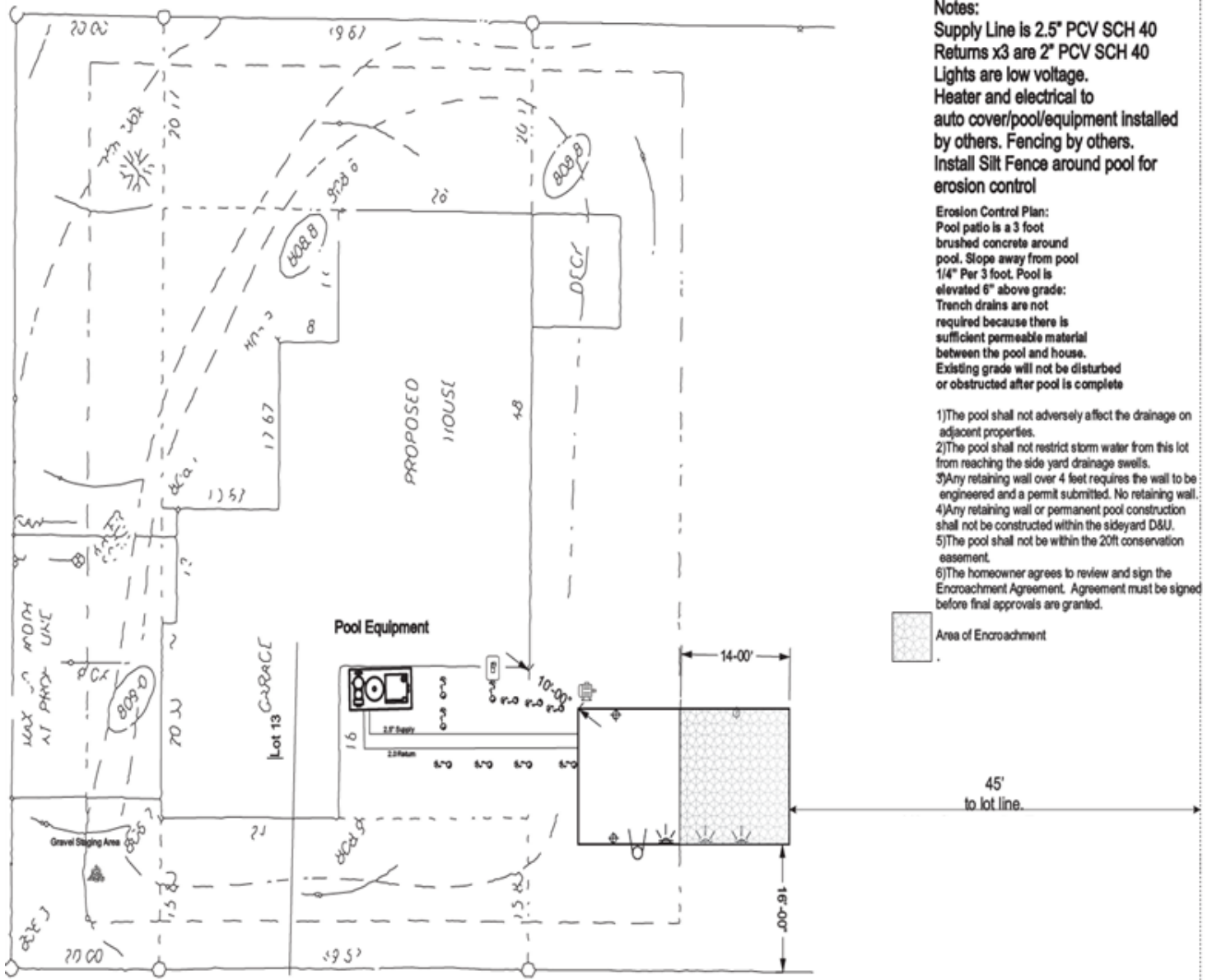
By: _____
Kelly Murtaugh, City Clerk

STATE OF MINNESOTA)
)
COUNTY OF DAKOTA)

On this ___ day of _____, 2023, before me a Notary Public within and for said County, personally appeared Mary Fasbender and Kelly Murtaugh to me personally known, who being each by me duly sworn, each did say that they are respectively the Mayor and the City Clerk of the City of Hastings, the Minnesota municipal corporation named in the foregoing instrument, and that the instrument was signed in behalf of said municipal corporation by authority of its City Council and said Mayor and City Clerk acknowledged said instrument to be the free act and deed of said municipal corporation.

Notary Public

**EXHIBIT A
CITY EASEMENT & ENCROACHMENT AREA**



Notes:
 Supply Line is 2.5" PCV SCH 40
 Returns x3 are 2" PCV SCH 40
 Lights are low voltage.
 Heater and electrical to auto cover/pool/equipment installed by others. Fencing by others.
 Install Silt Fence around pool for erosion control

Erosion Control Plan:
 Pool patio is a 3 foot brushed concrete around pool. Slope away from pool 1/4" Per 3 foot. Pool is elevated 6" above grade:
 Trench drains are not required because there is sufficient permeable material between the pool and house. Existing grade will not be disturbed or obstructed after pool is complete

- 1)The pool shall not adversely affect the drainage on adjacent properties.
- 2)The pool shall not restrict storm water from this lot from reaching the side yard drainage swells.
- 3)Any retaining wall over 4 feet requires the wall to be engineered and a permit submitted. No retaining wall.
- 4)Any retaining wall or permanent pool construction shall not be constructed within the sideyard D&U.
- 5)The pool shall not be within the 20ft conservation easement.
- 6)The homeowner agrees to review and sign the Encroachment Agreement. Agreement must be signed before final approvals are granted.

Area of Encroachment