CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

DATE: April 6, 2015

ITEM: Resolution - Approval of Indemnity and Hold Harmless Agreement – Fareway Stores, Inc.

FINANCIAL IMPACT: None

BACKGROUND: A condition of approval for the construction of the Fareway store at 4th Street and Grand Avenue required Fareway to construct a storm sewer for public use. The storm sewer was constructed by Fareway using non-gasketed pipe which did not conform to the construction plans. To avoid economic waste, Fareway has provided an Indemnity and Hold Harmless Agreement to the City, a copy of which is attached, for any damage related to the installed pipes.

OUTSTANDING ISSUES (if any): None

RECOMMENDATION:

Adopt Resolution approving the Indemnity and Hold Harmless Agreement with Fareway Stores, Inc.

Lead Staff Member: Brian Hemesath, Engineering Services

STAFF REVIEWS

Department Director	Richard J. Scieszinski, City Attorney RJS
Appropriations/Finance	
Legal	
Agenda Acceptance	RTJ

PUBLICATION(S) (if applicable)

Published In	
Dates(s) Published	

SUBCOMMITTEE REVIEW (if applicable)

Committee			
Date Reviewed			
Recommendation			Split

RESOLUTION NO._____

AUTHORIZING APPROVAL AND ACCEPTANCE OF INDEMNITY AND HOLD HARMLESS AGREEMENT WITH FAREWAY STORES, INC. RELATED TO STORM SEWER CONSTRUCTION

WHEREAS, on April 21, 2014 the City Council of the City of West Des Moines approved a site plan with Fareway Stores, Inc. for private improvements, including the construction of a public and private storm sewer; and

WHEREAS, on June 14, 2014 the City Engineer administratively approved the public improvement construction plans for the public storm sewer; and

WHEREAS, construction of the public and private storm sewer was not done in accordance with the approved plans and specifications, such plans requiring the sewer pipe to include gaskets at the joint of the pipes; and

WHEREAS, in order to avoid economic waste but to address the potential deficiency in construction of the storm sewer and the potential damages to the City and the public that may arise from the deficiency, the Owner has provided the City an Indemnification and Hold Harmless Agreement, which the City has agreed to accept.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA THAT:

1. The Indemnification and Hold Harmless Agreement between Fareway Stores, Inc. and the City of West Des Moines is approved and accepted.

2. The Mayor is authorized to sign the Agreement on behalf of the City and the City Clerk is directed to attest to the Mayor's signature.

3. The Agreement shall be filed with the Polk County Recorder.

PASSED AND ADOPTED this 6th day of April, 2015.

_____
Steven K. Gaer, Mayor

ATTEST:

_____
Ryan T. Jacobson
City Clerk

Prepared by: B. Hemesath, Engineering Services, P. O. Box 65320, West Des Moines, IA 50265-0320, (515) 222-3620
When Recorded, Return to: City Clerk, City of West Des Moines, P. O. Box 65320, West Des Moines, IA 50265-0320
Address Tax Statement to: Not applicable

INDEMNITY/HOLD HARMLESS AGREEMENT

This Agreement is made and entered into this _____day of _____, 2015, by and between Fareway Stores, Inc. (hereinafter known as the "Owners"), and the City of West Des Moines, Iowa, an Iowa municipal corporation (the "City").

WITNESSETH:

WHEREAS, the Owners are the owner of a parcel of land located in West Des Moines, Iowa, and legally described as:

Lot 9, McCurnin Place, an Official Plat in the City of West Des Moines, Polk County, Iowa and Lot 1, Roto Rooter Plat 1, an Official Plat in the City of West Des Moines, Polk County, Iowa.

WHEREAS, on April 21, 2014, the City Council approved a Site Plan Permit for a grocery store which included the demolition of a building and parking lot and development of the site including but not limited to construction of a new building, public and private storm sewer and parking lot; and

WHEREAS, on June 14, 2014, the City Engineer administratively approved public improvement construction plans for the public storm sewer associated with the above-mentioned site plan; and

WHEREAS, said public storm sewer was constructed by the Owner using non-gasketed pipe which does not conform to approved construction plans; and

WHEREAS, leaving said non-gasketed pipe in place could cause damage to the Owners' parking lot in the form of settlement, pavement damage, etc.; and

WHEREAS, the Owners have agreed to enter into an Indemnification/Hold Harmless Agreement with the City of West Des Moines; and

WHEREAS, the Owners have agreed to indemnify and hold the City harmless from any and all liability, damages, claims, costs, expenses, interest, and reasonable attorney's fees directly related to the omission of the pipe gaskets be determined to have caused the problem; and

WHEREAS, in consideration for the above indemnification and hold harmless and pursuant to the Storm Sewer Easement agreement executed by and between City and Owners and as recorded on Book 15302 and Page 923 by the Polk County Recorder, City and Owners' agree to restore the storm sewer pipe and surrounding property

pursuant to the terms therein and as confirmed herein.

NOW, THEREFORE, in consideration of the premises, the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is expressly acknowledged by all parties, the City, and the Owners hereby agree as follows:

Hold-Harmless. The Owners shall fully defend, indemnify and hold the City harmless from any and all losses, damages, or expenses, both to person and property, including court costs and reasonable attorneys' fees, which the City, the Owner or third persons may suffer, incur or sustain or for which the City may become liable which arise or grow out of the omission of the gaskets from the public storm sewer outlined above.

Restoration of Owners' Property. Owners' shall repair or replace, at its sole cost and expense, the paved surfaces, landscaped areas, and private and public utilities located on Owners' property due to settlement above or near the sewer pipe. City shall repair or replace, at its sole cost and expense, the sewer pipe due to settling of the pipe or the joints being misaligned or if other issues arise specific to the sewer pipe.

Running of Benefits and Burdens. The terms and conditions of this Indemnity/Hold Harmless Agreement are binding upon the Owners including, but not limited to, future owners, developers, successors-in-interest, lessees or occupants. All provisions of this instrument, including benefits and burdens, run with the land and are binding upon and inure to the heirs, assigns, successors, tenants and personal representatives of the parties hereto.

Representations and Warranties. The Owners covenant with the City that they hold the above described legal property by good and marketable title, free and clear of liens, easements and encumbrances, except as noted hereon, and that the Owners have a good right and lawful authority to make and execute this Indemnity/Hold Harmless Agreement. The Owners warrant and defend this Indemnity/Hold Harmless Agreement against the lawful claims of all persons.

Jurisdiction and Venue. The Owners agree that the District Court in and for the State of Iowa shall have exclusive jurisdiction over the subject matter and enforcement of the terms and conditions of this Indemnity/Hold Harmless Agreement and said parties shall consent to the jurisdiction of Polk County, Iowa.

Words and Phrases. Words and phrases herein shall be construed as in the singular or plural number, and as masculine, feminine, or neuter gender, according to the context.

Parties. The term "City" as used herein shall refer to the City of West Des Moines, Iowa, its elected officials, agents, employees, officers, and contractors. The term "Owners" shall refer to Fareway Stores, Inc., their assigns, successors-in-interest and lessees, if any.

Paragraph Headings. The paragraph headings in this Agreement are included solely for convenience and shall not affect, or be used in connection with, the interpretation of this Agreement.

Integration/Construction. This Agreement shall constitute the entire agreement between the parties regarding the subject matter hereof, and no amendments or additions to this Agreement shall be binding unless in writing and executed by the Owners and the City. This Agreement has been fully negotiated at arms length between the signatories hereto, and after advice by counsel and other representatives chosen by such signatories such signatories are fully informed with respect thereto; no such signatory shall be deemed the scrivener of this Agreement; and, based on the foregoing, the provisions of this Agreement and the Exhibits hereto shall be construed as a whole according to their common meaning and not strictly for or against any party.

Recording. This instrument shall be recorded in the Office of the Polk County Recorder. Cost of

recording shall be the responsibility of the Owners.

IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the date first written above.

Fareway Stores, Inc.

By: _____

Name: Garrett S. Piklapp

Title: VP/Secretary/General Counsel

STATE OF Iowa)
) SS:
COUNTY OF Boone)

On this 25TH day of MARCH, 2015, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared GARRETT S. PIKLAPP, to me personally known, who being by me duly sworn, did say that he is the VP/SECRETARY/GEN.COUN of Fareway Stores, Inc., executing the within and foregoing instrument, that no seal has been procured by the company and that the execution of said instrument to be voluntary act and deed of said owners by them voluntarily executed.

_____

Notary Public in and for the State of Iowa

NOTARIAL SEAL IOWA

CRAIG A. SHEPLEY
COMMISSION NO. 146681
MY COMMISSION EXPIRES
3-31-18

CITY OF WEST DES MOINES, IOWA

_____
Steven K. Gaer, Mayor

Attest:

_____
Ryan Jacobson
City Clerk

STATE OF IOWA)
)SS:
COUNTY OF POLK)

On this _____ day of _____, 2011, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Steven K. Gaer and Ryan Jacobson, to me personally known, who being by me duly sworn, did say that they are the Mayor and City Clerk, respectively, of the City of West Des Moines, a Municipal Corporation executing the within and foregoing instrument, that the seal of the City of West Des Moines, Iowa, has been affixed hereto; and that said instrument was signed and sealed on behalf of the Municipal Corporation of the City of West Des Moines, Iowa, by authority of its City Council by Resolution duly adopted and that said Mayor and City Clerk as such officers acknowledged the execution of said instrument to be the voluntary act and deed of the City of West Des Moines, Iowa by it and them voluntarily executed.

_____
Notary Public in and for the State of Iowa