



CITY of NOVI CITY COUNCIL

Agenda Item 3
February 9, 2015

SUBJECT: Consideration of a request from Interphase Land Development for reduction of the Financial Guarantee amounts required by Chapter 26.5 of the Novi City Code for the Casa Loma Site Condominium Development from \$1,428,180.50 to \$1,180,750.00

SUBMITTING DEPARTMENT: Community Development Department *JMS*

CITY MANAGER APPROVAL: *[Signature]*

BACKGROUND INFORMATION:

Chapter 26.5 of the Novi City Code was adopted on 2008 to establish the authority and procedures for requiring, accepting, and enforcing performance guarantees, in order to assure that development projects are completed and maintained in accordance with city standards, requirements, and approval conditions.

This Ordinance was created with the input of the development community and specifies procedures and requires financial guarantees that must be in place prior to the start of a development project. These financial guarantees protect the residents of Novi from the possible expense if the City had to complete an unfinished project due to developer default or nonperformance. Nearly every development initiated after the adoption of 26.5 has complied with these requirements. Deviations, when approved by City Council, have been for projects requiring Completion Agreements (i.e. Sri Venkateswara Temple and Cultural Center).

The Casa Loma Site Condominium development is comprised of 10 single family home sites established as part of a site condominium. The project is located between Eight Mile and Nine Mile Roads west of Beck Road.

This project is subject to the provisions of Chapter 26.5 of the Novi City Code referenced above, and requires the posting of Financial Guarantees equal to 150% of the cost of improvement prior to scheduling of the project Pre-construction meeting that allows start of physical development work on the site.

The developer is requesting a reduction from the required \$1,428,180.50 (1.5 x \$952,120.00 estimated completion cost) to a total performance guarantee amount of \$1,180,750.00 (approximately 1.2 x \$952,120.00 estimated completion cost). This represents a requested waiver of \$247,400.50.

The chapter of the City Code referenced above requires posting of Financial Guarantees in cash or Letter of Credit. The Ordinance provisions also allow for certain alternative guarantees in the form of Surety Bonds under certain circumstances. These alternative forms of guarantees may provide the City with less protection than a cash bond or letter of credit. This is due to the ability of the surety provider to contest any claim and the difficulty the City may encounter in enforcing completion of a contract between the developer

and contractor, of which the City was not a party. Staff has worked with the developer to enable posting of surety bonds for the construction of utility improvements as well as site landscaping. These surety bonds total \$930,750.00. The balance of the proposed reduced total Financial Guarantee of \$1,180,750.00 would be made up by \$250,000.00 in cash or letter of credit.

The 150% multiplier to the estimated cost of construction for a development site is critical in the event the developer fails to perform and the City has to step in to complete the project in accordance with the approved site plan. This protects not only the purchasers and future residents of the development, but also the residents of the City in general. This issue is being brought before the City Council as the ultimate authority for exceptions to the Ordinance under Section 26.5-12:

The city council may authorize exceptions to the requirements and conditions as set forth in this chapter, including, but not limited to, the form, timing, waiver, or reduction of performance guarantee amounts...

Community Development recommends denying the Applicant's request for the following reasons:

1. The Applicant has not shown that the literal application of the substantive requirement to post would result in exceptional, practical difficulty to the applicant because the Applicant has not provided significant facts distinguishing their circumstances from all other applicants subject to the requirements of Chapter 26.5. The fact that the site improvements are costly and there are only 10 units to divide costs between is similar to many other small site condominium developments in Novi.
2. The alternative proposed by the applicant would not be adequate for the intended use and would substantially deviate from the performance that would be obtained by strict enforcement of the standards because even though the Applicant has agreed to complete some of the required site improvements before September 1, 2015, including water, sanitary sewer, storm sewer and site landscaping, those improvements are guaranteed by surety bonds specific to those improvements in the amount of \$930,750.00 which will be released upon completion of inspections of those specific improvements. Pursuant to the attached Engineering estimate, the \$397,270 (\$292,900 (roads) and \$104,370 (sidewalks and other paving)) cost of completing the remaining site improvements, including, most significantly, paving for the roads and sidewalks, would significantly exceed the remaining \$250,000 available to the City for completion. Furthermore, since paving and street acceptance cannot be completed while home construction is on-going, and will not likely occur until 9 out of 10 of the homes are constructed, the cost of completing paving will probably increase even more than the current estimate.
3. The granting of the variance would be detrimental to the public health, safety or welfare, and would be injurious to adjoining or neighboring property, and contrary to the overall purpose and goals of Chapter 26.5 since the City would not have nearly enough financial guarantees on hand to be assured that paving repairs and completion, and sidewalk installation would be completed. This would impact public health, safety and welfare because the development may have roads that do not meet minimum standards, and/or are in disrepair. Furthermore, sidewalks are required to meet minimum public health, safety and welfare standards.

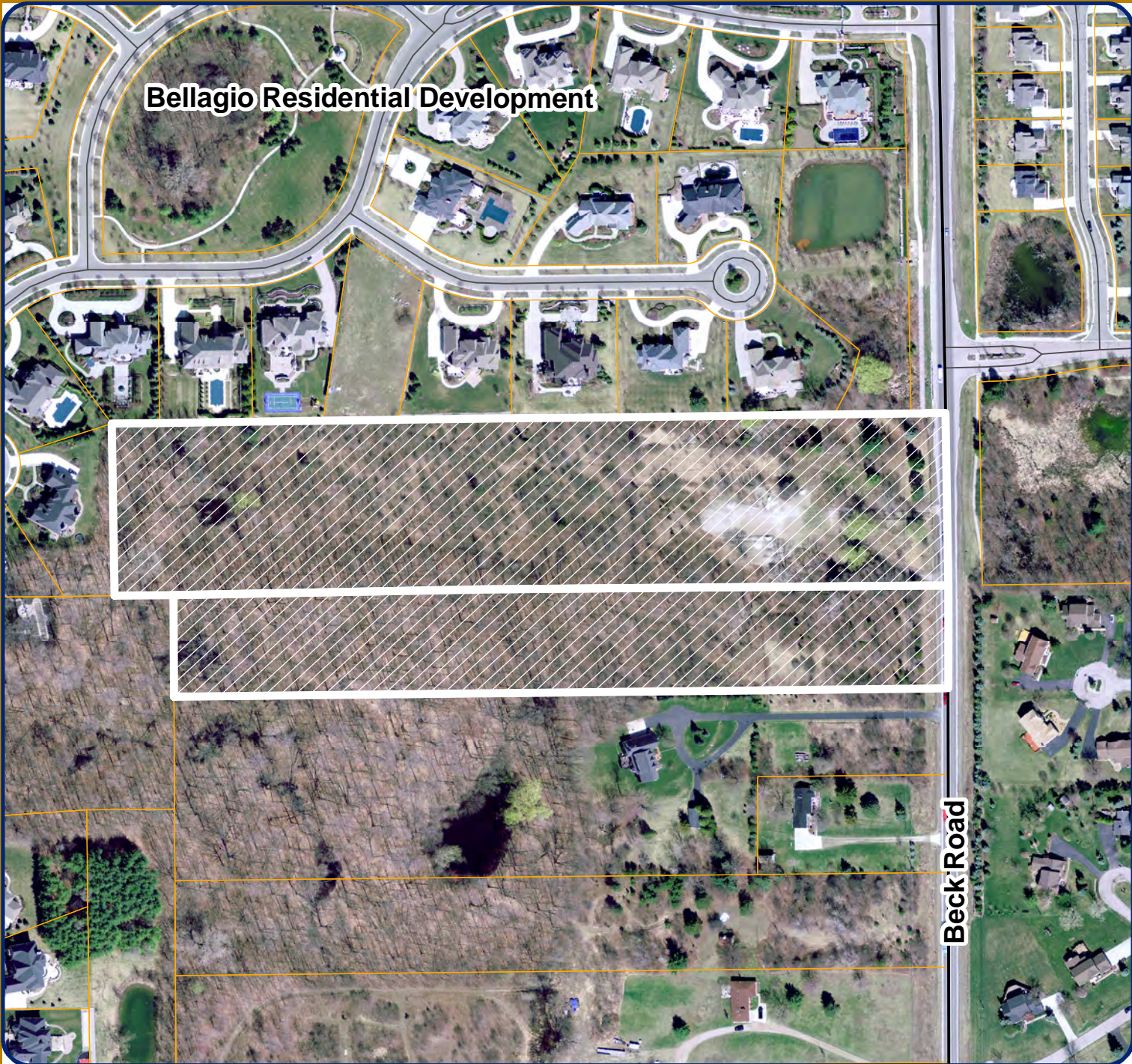
RECOMMENDED ACTION Denial of a request from Interphase Land Development for reduction of the Financial Guarantee amounts required by Chapter 26.5 of the Novi City Code for the Casa Loma Site Condominium Development from \$1,428,180.50 to \$1,180,750.00

	1	2	Y	N
Mayor Gatt				
Mayor Pro Tem Staudt				
Council Member Casey				
Council Member Markham				

	1	2	Y	N
Council Member Mutch				
Council Member Poupard				
Council Member Wrobel				

Casa Loma JSP13-52

Location



Bellagio Residential Development

Beck Road

Map Legend

Subject Property



City of Novi
Planning Division
Community Development Dept.
45175 W Ten Mile Rd
Novi, MI 48375
cityofnovi.org

Map Author: Kristen Kapelanski
Date: 03-17-14
Project: Casa Loma JSP13-52

MAP INTERPRETATION NOTICE

Map information depicted is not intended to replace or substitute for any official or primary source. This map was intended to meet National Map Accuracy Standards and use the most recent, accurate sources available to the people of the City of Novi. Boundary measurements and area calculations are approximate and should not be construed as survey measurements performed by a licensed Michigan Surveyor as defined in Michigan Public Act 132 of 1970 as amended. Please contact the City GIS Manager to confirm source and accuracy information related to this map.

INTERPHASE LAND DEVELOPMENT LLC

January 12, 2015

Mr. Charles Boulard
Community Development Director - City of Novi
45175 W. Ten Mile Road
Novi, MI 48375

Cc: Mr. Victor Cardenas - Assistant City Manager - City of Novi

RE: Site Improvement Bonding Requirements - Casa Loma Site Condominium

Dear Mr. Boulard,

Please accept this correspondence as Interphase Land Development's appeal to the City of Novi for the modification of the bonding requirements to develop the recently approved Casa Loma project.

It has always been our vision to develop this property into an exclusive and upscale enclave of estate sized lots and luxury homes. Our team has paid slavish attention to all of the details that provide for a truly magnificent upscale residential development. We also have exceeded the minimum standards in the ordinance, and designed a community that includes significant luxury amenities such as a continuous, densely landscaped, and treed boulevard; gated front entry; and many other features that are included in this very exclusive community of only 10 home sites. It is sure to be, and we look forward to partnering with the City to create, one of the most prestigious locations in Novi to call home.

Per the City of Novi Code of Ordinances, Sec 1-12. - General Appeal, the City may grant a variance to the bonding requirements for a development based upon considerations found in the ordinance.

Following are considerations that are relevant to the section of the ordinance that govern our request;

(1) A literal application of the substantive requirement would result in exceptional, practical difficulty to the applicant;

The substantive requirement for fully satisfying the required financial guarantees is prohibitively costly given the relative size, scale, and timing of this development. All of the project's financial requirements are met, with money secured for the development of the project, including contingencies. Considering that there are only 10 units to share the burden, adding additional financial guarantees per the strict application of the Code presents an exceptional and practical

INTERPHASE LAND DEVELOPMENT LLC

difficulty to Interphase. Interphase has spent over 90 days attempting to obtain acceptable bond language with various bonding agreements, and being rejected by multiple sureties due to the language in the City's bonding agreement. Through multiple discussions with various underwriters and the City's legal counsel we were able to find common ground on the verbiage which the City and the Surety could agree and were able to persuade one Surety to underwrite the largest portion of the improvements. Sinacola Construction is providing the mass grading, sanitary sewer, storm sewers, and water main construction. They are posting a bond of \$678,780.00. Great Oaks Landscaping is performing all the landscaping on the site and their bond is \$252,750. Interphase is posting \$250,000 in cash or letter of credit. The City of Novi will have \$1,180,750 in financial guarantees Vs the current requirement of \$1,428,180.50. With these bonds in place, we are seeking and asking for a reduction of only \$247,430.50 in financial guarantees.

(2)The alternative proposed by the applicant will be adequate for the intended use and shall not substantially deviate from the performance that would be obtained by strict enforcement of the standards; and

The alternative proposed is a reduction of the financial guarantee to approximately 120% of the cost to construct rather than 150% of the cost of the improvements. Casa Loma is a relatively small development; with a very short window of major construction activity. The financing required to fully develop the site is in place and ready for funding of the construction draws. This site will only require 63 working days to completely build out through landscaping. More importantly, the majority of the site improvements and associated costs (and associated guarantees) will be completed within the first 45 days. Novi's potential exposure to nonperformance of the developer, or any of the contractor trades is dramatically reduced compared to other developments. Other developments have substantially longer construction cycles; might be phased; mostly contain over 10 units; or may include improvements intended to be dedicated to the City (among many other sources of risk). Furthermore, as an additional incentive for Interphase to complete the development on time, 5 of the 10 lots have been reserved by future buyers who are very anxious to build their custom home immediately. Home design drawings are complete for one of the future buyers. The remaining home sites are very likely to sell quickly and are likely to be reserved in short order. This places additional incentive for Interphase to complete the development in order to commence construction of the homes.

(3)The granting of the variance will not be detrimental to the public health, safety or welfare, nor injurious to adjoining or neighboring property, nor contrary to the overall purpose and goals of the chapter or article containing the regulation in question.

Granting this variance will have no bearing on the public health, safety or welfare. This is an approved project, which will be developed in conformity with the approved plan, and any and all regulations concerning the development. All issues with adjoining and neighboring property owners have been fully resolved, and have no bearing on the instant application. The overall purpose and goal of the regulation is to ensure the timely completion of the approved project, and to eliminate potential exposure for the City of Novi in the event that any such failure should occur. For the reasons stated above, we believe that facts and circumstances warrant a finding that no such risk is present, and that the purpose and goals of the regulation is fully satisfied.

INTERPHASE LAND DEVELOPMENT LLC

In conclusion, I have been working with Beth Saarela to satisfy the bonding portion of the financial guarantee requirements for Casa Loma and we are entering into an agreement that was proposed by the City to utilize our subcontractors bonding to protect both Interphase and the City.

We are prepared and eager to move forward toward the pre-con meeting and ultimately the completion of the improvements for this community. I believe we are required to present our cause to the City Council also, if that is the case I would appreciate your guidance as to the process needed to be followed.

Thanks again for your time.

Sincerely,



Bill Bye
Senior Consultant
Interphase Land Development LLC



This plan is a landscape strategy and is to be used in conjunction with the site plan. It is not a construction document. The owner and architect shall be responsible for the accuracy of the data and information used in this plan.

Project #: 100000 Date: 02/20/2018
 Scale: 1"=40' Designer: INTERPHASE LAND DEVELOPMENT LLC
 Drawn By: JAL Checked By: ST

PROJECT: CASA LOMA
 CLIENT: CASA LOMA CO., INC. 10015 400TH AVE
 SHEET: SITE AND STREET TREE PLAN
 DATE: INTERPHASE LAND DEVELOPMENT LLC

INTERPHASE LAND DEVELOPMENT LLC
 10015 400TH AVE, SUITE 100
 FARMINGTON, NM 87401
 (505) 825-1000
 www.interphaseland.com





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Elizabeth Kudla Saarela
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www.johnsonrosati.com

January 23, 2015

Charles Boulard, Director
CITY OF NOVI
Community Development
45175 W. Ten Mile Road
Novi, MI 48375

RE: Casa Loma – Performance Guarantees

Dear Mr. Boulard:

We have received and reviewed the Developer's request to reduce the amount of Performance Guarantees posted to guarantee installation of site improvements for the Casa Loma residential site condominium development from the required \$1,428,180.50 (1.5 x \$952,120.00 estimated completion cost) to a total performance guarantee amount of \$1,180,750.00 (approximately 1.2 x \$952,120.00 estimated completion cost). You have asked us to provide background information relating to the request, as well as the standards pursuant to which this type of request would be considered under applicable ordinances.

Based on information provided by the Developer, it is our understanding that the request is based on the difficulty that the Developer has had with obtaining financial guarantees in the form of surety bonds and/or letters of credit. Developer has indicated that it has pledged a significant amount of cash toward payment of contractors through its construction mortgage agreement and therefore does not have additional cash (or letter of credit opportunities) to post with the City. Additionally, although the project is a relatively small project (10 units), the proposed site improvements such as site landscaping are proposed to be more elaborate and costly than comparable sized projects.

So far, we have worked with Developer to enable it to post an alternative form of surety bond for the construction of water, sanitary and storm sewer improvements, as well as site landscaping. As an alternative to the Developer posting a surety bond in favor of the City, the City will become an additional or "dual obligee" of the Developer's contractors' surety bonds. This means that if the Developer's contractors default on completion of the improvements secured by these bonds, the City may make a claim on the bonds with similar rights to the Developer under the bonds.

Because surety bonds, in general, provide the City with less protection than a cash bond or letter of credit as a result of the surety having some discretion to make judgment calls as to (1) validity of the claim; (2) options for a remedy; and, (3) timing of the payment on claims, we have worked with the contractor's surety to make the bond more specific as to response time and available remedies. Additionally, we have prepared a "Performance Guarantee Agreement" that the Developer would be required to sign in conjunction with provision of the bonds that would limit the timeframe for completion to September 1, 2015 for the improvements secured by the alternative bonds, and would ensure that the Developer cooperates with respect to claims on the bonds made by either the City or the Developer.

The two alternative bonds being provided through the Developer's contractors total \$930,750.00 of the Developer's total \$1,428,180.50 obligation. In addition to the alternative bonds, the Developer has proposed to post \$250,000 in cash or letter of credit, and has requested a waiver of the remaining \$247,400.50 required in accordance with Chapter 26.5 of the Code.

Chapter 26.5 of the City of Novi Code, regarding, "Performance Guarantees," governs the posting of performance guarantees to secure the completion of site improvements for development projects. Section 26.5-7 provides standards regarding the "form and amount" of performance guarantees to be posted:

Sec. 26.5-7. - Form and amount.

At the time of issuance of the initial permit for improvement under subsection 26.5-5(a) above, and before conducting any preconstruction meetings, the building official shall require the applicant to deposit a performance guarantee in the amount of one hundred fifty (150) percent of the estimated cost of the improvements for which the guarantee is required. The guarantee shall be a single guarantee posted by and in the name of the applicant encompassing all required improvements and shall be in the form of cash, certified check, or irrevocable bank letter of credit for all amounts up to two hundred fifty thousand dollars (\$250,000.00). To the extent that amounts required to be deposited are at any time in excess of two hundred fifty thousand dollars (\$250,000.00), such excess amounts may be posted by and in the name of the applicant as a separate guarantee, in any form allowed under the definition of "performance guarantee" in section 26.5-4, relating to all required improvements. In unusual or unique circumstances affecting the applicant's ability to post the guarantee, the building official may accept a separate guarantee for a particular improvement if the guarantee is posted as a joint guarantee with a person or entity other than the applicant who has a contractual obligation to the applicant to post such guarantee. Maintenance guarantees posted pursuant to section 26.5-10 (including those described in sections 26.5-33, 26.5-37, 26.5-39, and 26.5-40) may be posted by a third party who performed the work guaranteed.

Section 26.5-7 authorizes the City Building Official to accept the dual obligee surety bonds under unique circumstances. In this case, based on the Developer's indication that the work secured by the bonds will be completed within a relatively short timeframe, and because the additional Agreement signed by the Developer will provide the City with some additional assurances and control over the bonds, acceptance of the alternative bonds appears to fit within the "unique circumstances" giving the Building Official discretion to accept the bonds, as contemplated by the ordinance.

As a separate issue, per Section 26.5-12 of the City of Novi Code, approval of a *reduction* of the overall bond amount is within City Council's authority to consider pursuant to the general variance standards of the Code:

Sec. 26.5-12. - Exceptions; written completion agreement required.

The city council may authorize exceptions to the requirements and conditions as set forth in this chapter, including, but not limited to, the form, timing, waiver, or *reduction* of performance guarantee amounts.

The city council may also authorize the issuance of permits, approvals, or temporary certificates of occupancy before all requirements for issuance under this chapter have been met, where the applicant has demonstrated that unusual or unique circumstances exist, that work is proceeding toward completion, and that any delay in completion is not unreasonable or dilatory. *In reaching this determination, the standards of section 1-12 of this Code shall apply.* In addition, the council shall consider such factors as the size and nature of the development project and the existence of matters beyond the control of the applicant (such as weather conditions, delay in securing permits/approvals from other regulatory agencies, or unforeseen economic events or conditions). If any such exceptions are granted, a written completion agreement may be required, in a form to be established by the city. {Emphasis Added}

Section 1-12 of the Code provides the general variance standards for City Council to consider in conjunction with the fact of Developer's proposal:

Sec. 1-12. - General appeal.

(a) Where any chapter or article of this Code does not provide procedures for appeals from determinations made in the administration of such chapter or article, the appeal procedures provided herein shall apply.

(b) An appeal may be taken to the city council by any person adversely affected by, and claiming error in, any order, requirement, permit, decision or refusal of an administrative official carrying out or enforcing the provisions of this Code. Such an appeal shall be filed with the city clerk within ten (10) days of the determination from which the appeal is made.

(c) A variance may be granted by the city council from regulatory provisions of this Code when all of the following conditions are satisfied:

(1) A literal application of the substantive requirement would result in exceptional, practical difficulty to the applicant;

(2) The alternative proposed by the applicant will be adequate for the intended use and shall not substantially deviate from the performance that would be obtained by strict enforcement of the standards; and

(3) The granting of the variance will not be detrimental to the public health, safety or welfare, nor injurious to adjoining or neighboring property, nor contrary to the overall purpose and goals of the chapter or article containing the regulation in question.

(d) This section is not intended to replace appeal procedures otherwise provided in this Code, and shall have no application to those Code chapters and articles which contain specific appeal procedures.

The Developer's letter dated January 12, 2015 provides an analysis of the above standards. In short, the Developer indicates that the small size of the development makes it difficult to spread the costs of obtaining additional performance guarantees.¹ Additionally, the Developer indicates that the short completion time frame proposed for the development limits the City's exposure for the potential of having to undertake completion of improvements.

In the event that City Council finds that the standards for a variance or waiver have been met, City Council has been given the discretion under the applicable ordinances to reduce the required performance guarantee for the project.

If you have any questions, please do not hesitate to call.

Very truly yours,

JOHNSON, ROSATI, SCHULTZ & JOPPICH, P.C.



Elizabeth Kudla Saarela

EKS

¹ Although the letter also discusses the strict bonding requirements of the City with respect to obtaining surety bonds, we do not see how this issue impacts consideration of the proposed reduction since bonds have been posted for \$930,750 and additional bonds were not proposed for the remaining \$247,430.50.

Charles Boulard, Community Development Director
January 23, 2015
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C: Maryanne Cornelius, Clerk
Pete Auger, City Manager
Victor Cardenas, Assistant City Manager
Barb McBeth, Deputy Community Development Director
Tom Walsh, Building Official
Sheila Weber, Treasurer's Office
Kristin Pace, Treasurer's Office
Sarah Marchloni, Building Permit Coordinator
Aaron Staup, Construction Engineering Coordinator
Adam Wayne, Construction Engineer
Sue Troutman, City Clerk's Office
Bill Bye, Interphase Land Development
Robert Langan, Esquire
Thomas R. Schultz, Esquire



CITY OF NOVI
Engineering Division
ENGINEERING FEE DETERMINATION

Project Name: Casa Loma **Date:** 6/2/2014
Applicant: Interphase Land Development LLC **Novi SP#:** JSP13-0052

Fees effective August 6, 2012

ENGINEERING FEES				
Inspection Category		Estimated Cost of Improvement	Fee Basis	Fee
A.	Sanitary Sewer	\$69,240	9.25%	\$ 6,404.70
B.	Storm Sewer (excluding detention basin)	\$120,250	Minimum Fee-- Tier 3	\$ 9,250.00
C.	Water Main	\$130,527	Minimum Fee-- Tier 3	\$ 9,250.00
D.	Paving & Curbing in Public R.O.W.	\$292,900	6.75%	\$ 19,770.75
E.	Grading, Sidewalks, Paving and Misc. Work (not in R.O.W.)	\$104,370	2.75%	\$ 2,870.18
F.	Storm Water Detention Facilities	\$27,500	2.75%	\$ 756.25
G.	As-Built Preparation Fee -- As-builts prepared by the City Engineer (Use cost of construction of utilities and streets to be made public)	\$ 612,917.00	2.7%	\$ 16,548.76
H.	Traffic Sign Inspection (Acre)	14.91		\$ 500.00
J.	Additional Pre-Construction Meeting (#)		\$400/add'l meeting	\$ -
Engineering Inspection Fee				\$ 65,350.63
Administrative Fee (10%)				\$ 6,535.06
Fee Total				\$ 71,885.70
Incomplete Site Work Total (Subtotal for Items A Through E)				\$ 717,287.00
Lot Stakes and Monuments Refundable (Platted Subdivisions Only) \$25/monument \$10/lot stake				
Incomplete Site Work Financial Guarantee Total (1.5X)				\$ 1,075,930.50
Street Sign Financial Guarantee		Number of Signs: 29		\$ 11,600.00
Water and Sewer Maintenance Bond				\$ 49,941.75
Storm Water Performance Guarantee (1.5X)				\$ 41,250.00
Storm Water Maintenance Guarantee (Submitted After PG is Released)				\$ 2,750.00