



# Travis County Commissioners Court Agenda Request

**Meeting Date:** February 12, 2013

**Prepared By:** Steve Manilla **Phone #:** 854-9383

**Division Director/Manager:**

A handwritten signature in black ink, appearing to read "Steve Manilla", written over the text "Division Director/Manager:".

**Department Head/Title:** Steven M. Manilla, P.E., County Executive-TNR

**Sponsoring Court Member:** Commissioner Davis, Precinct One

## **AGENDA LANGUAGE:**

Consider and take appropriate action on the following requests in Precinct One:

- A) Termination of a Participation Agreement between Travis County and private developers ; and
- B) Termination of the Interlocal Cooperation Agreement with the City of Austin for improvements to Braker Lane.

## **BACKGROUND/SUMMARY OF REQUEST:**

The Participation Agreement recognized that the Project is divided into five phases to be constructed by different parties. The property over which Phase 1 of Braker Lane must pass is owned by a family salvage business, not developers. Phase 1 is to be constructed by TxDOT at their cost with the county paying for the right-of-way (ROW). Phase 1 is scheduled to receive state construction funding in September 2013. Phases 2 through 4 were to be constructed by Austin-Boise Ventures, LP, a Texas limited partnership and Wild Horse Investments, Ltd., a Texas limited partnership. A third Developer, J&T Development Group, was to become a partner but that did not come to fruition. The owner of Phase 5 property is a Developer as well, but it has expressed no interest in cost sharing construction costs since first approached in 2006. As such, the Phase 5 Developer was not a signatory to the Participation Agreement and it was assumed that Phase 5 would be completed as the property develops, possibly through funding agreements with the city and county.

On July 12, 2005 the Court adopted principles and basic requirements for the construction of public/private partnership projects that were being considered for the 2005 bond referendum. Braker Lane is one of six public-private partnership projects that were approved by the Court. The remaining five include Pecan Street, Decker Lake Road, Slaughter Lane, Parmer Lane, and Braker Lane 2. Pecan Street has been completed; Decker Lake Road and Slaughter Lane are under contract for construction; Parmer Lane is partially completed and the remainder is under design; and, Braker Lane 2 received bids for a construction contract in mid-December 2012. With the exception of Pecan Street, all projects were delayed for financial reasons.

The Guidelines were revised in December 2012 to allow more options for Developers that are still struggling to obtain financing for these voter-approved projects. Nevertheless, in the Braker Lane case the new owners of the property are unwilling to take on the responsibility of a private sector party to a County Public Private Partnership agreement.

#### Summary of Request:

The Braker Lane improvement project was initiated when the county included it as a Tier 1 public-private partnership project in the 2005 Bond referendum. The basic terms of the Participation Agreement are that the Developer donates all ROW within its control and shares the engineering and construction costs. Prior to the bond referendum the City of Austin indicated willingness to pay 1/3 of the construction costs. Legal staff of the city and county developed an Interlocal Agreement that was approved by both governing bodies in 2007. The Developer partners consisted of Austin-Boise Ventures, LP, a Texas limited partnership, and Wild Horse Investments, Ltd., a Texas limited partnership.

The private parties failed to complete the project because they were unable to obtain financing when the economic downturn occurred during the mid-2000's timeframe. None of the original private party signatories controls the property today. The property is now under the control of Allied Waste Services (a subsidiary of BFI) and Titan Capital Investments. County funds allocated to this project were issued in 2007 and 2008. No county or city funds were expended on the project other than the county's cost of acquiring the ROW for Phase 1 of the 5-phase project. Phase 1 involves the realignment of SH 3177 (Decker Lane) and it is to be completed by TxDOT.

City funds were to come from savings on their 2000 Bond Program. The city and county do not have enough available funds to pay all costs that the original Developers were to pay plus acquire ROW that was originally expected to be donated.

The city has advised TNR that it has already redirected its funds to shovel ready projects. Furthermore, in December 2012 the City of Austin annexed a portion of the property within which Braker Lane is to be built. City consent will now be needed to complete the project in the future. The city has prepared a "Termination of Interlocal Cooperation Agreement" for county signature (attached). The Termination agreement has been reviewed by the County Attorney's Office.

The current property owners are not willing to take on the role of the developer parties in a new Participation Agreement.

This is an Arterial Roadway in the 2035 CAMPO Plan. It is an important project because the surrounding area is expected to grow quickly as the economy improves. The effects of a continued delay will be somewhat mitigated by the completion of other transportation improvements in this vicinity.

### **STAFF RECOMMENDATIONS:**

### **ISSUES AND OPPORTUNITIES:**

This project consisted of extending Braker Lane approximately 9000' in five phases from US 290 at Harris Branch Parkway south to SH 130 at the Blue Bluff Road (future Parmer Lane) interchange. It will pass through the Wildhorse Ranch Planned Unit Development, which is in the City of Austin Desired Development Zone. A portion of the property was annexed in December 2012 (see attached map). Annexation by the city means that the county will need the city's consent to build that portion of the roadway that is now within their corporate limits.

Braker Lane is in the 2035 CAMPO plan where it is planned to be a 4-lane arterial roadway. With the termination of these agreements, and reallocation of funds, completion of the road will now likely occur as the properties are developed, and possibly through future agreements with the city, the landowners, and the county.

TNR asked TxDOT to provide an interchange for Braker Lane and Harris Branch Parkway at US 290 when their US 290 E toll road project is constructed. TxDOT agreed to this request and stipulated that it would pay for designing and constructing the realignment of approximately 4000' of Decker Lane. In exchange the county agreed to acquire the ROW needed for the realignment through a July 2008 Advanced Funding Agreement with TxDOT. The county acquired the ROW and the realignment essentially became Phase 1 of the Braker Lane project. This realignment will provide a more efficient roadway to serve the area, including the County Exposition Center. Additionally, TxDOT asks that the county assume responsibility for the 4000' long section of existing Decker Lane that would no longer be a part of FM 3177. This section of existing state highway is in very good condition and will not create an extraordinary burden on Travis County road maintenance programs. In exchange the county will have an interchange at Harris Branch Parkway/Braker Lane which will provide a safer, more direct, and still fully state-maintained route from US 290 to the County Exposition Center.

### **FISCAL IMPACT AND SOURCE OF FUNDING:**

The 2005 Bond program and this agreement with the developer and an interlocal agreement with the City of Austin were to provide engineering, ROW, and construction funds for the project. The total county allocation to the project is

\$4,930,000 of which approximately \$3,730,000 remains. The bonds for the project were issued in 2007 and 2008 and were partially used for Phase 1 ROW acquisition.

Bond language states that unused funds from this project will first be spent to complete all other 2005 Proposition 1 bond funded projects. After all 2005 Prop 1 projects are completed the Court may allocate the remaining funds to any county road, road drainage, or road bridge project.

City staff advised TNR that they have reallocated their funds that were to be used for this project. They had earmarked their share of construction funds for the project in 2007 and, with no progress being made, they are compelled to use their funds for other pressing needs.

**EXHIBITS/ATTACHMENTS:**

- Braker Lane Participation Agreement
- COA Interlocal Agreement
- City of Austin Dec 2012 Annexation Map
- COA Termination of Braker Lane Agreement

**REQUIRED AUTHORIZATIONS:**

Cynthia McDonald	Financial Manager	TNR	854-4239
Steve Manilla	County Executive	TNR	854-9429
Tom Nuckols	County Attorney	County Attorney's Office	

**CC:**

Jessica Rio	PBO		
Nicki Riley	Auditor's Office		

: :  
**3101 - Public Works/CIP-**

TERMINATION OF BRAKER LANE EXTENSION  
INTERLOCAL COOPERATION AGREEMENT  
CITY OF AUSTIN AND TRAVIS COUNTY

State of Texas

County of Travis

This Termination of Interlocal Cooperation Agreement is made and entered into by and between the City of Austin, Texas (the "City") and Travis County, Texas (the "County"), hereinafter collectively referred to as the "Parties", upon the premises and for the consideration stated herein.

WHEREAS, the Parties entered into that certain Braker Lane Extension Interlocal Cooperation Agreement dated \_\_\_\_\_, 2007, (the "Interlocal") for the construction of and cost participation in the extension of a new section of Braker Lane as a four lane arterial (the "Project"); and

WHEREAS, the County entered into that certain Braker Lane Participation Agreement with Austin Boise Ventures, LP, Wildhorse Investments, Ltd., and J&T Development Group ("Developers") in connection with the construction of and cost participation in the "Project; and

WHEREAS, the Developers have been unable to perform their obligations under the Participation Agreements; and

WHEREAS, premises considered, the City desires to participate in the cost of the development and construction of the Project; and

WHEREAS, the Parties intend to conform to this Agreement in all respects with the Interlocal Cooperation Act, Texas Government Code Section 791.001, et seq.;

NOW, THEREFORE, the Parties agree as follows:

1. Termination. Premises considered, the Parties hereby terminate the Interlocal Agreement and the Parties are released from any and all obligations under the Agreement.
2. Effective Date. This termination takes effect upon the last date of due execution of the Agreement by the County and the City.

CITY OF AUSTIN, TEXAS

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Authorized Representative

Date: \_\_\_\_\_

Approved as to Form:

\_\_\_\_\_  
Assistant City Attorney

TRAVIS COUNTY, TEXAS

By: \_\_\_\_\_

Samuel T. Biscoe, County Judge

Date: \_\_\_\_\_

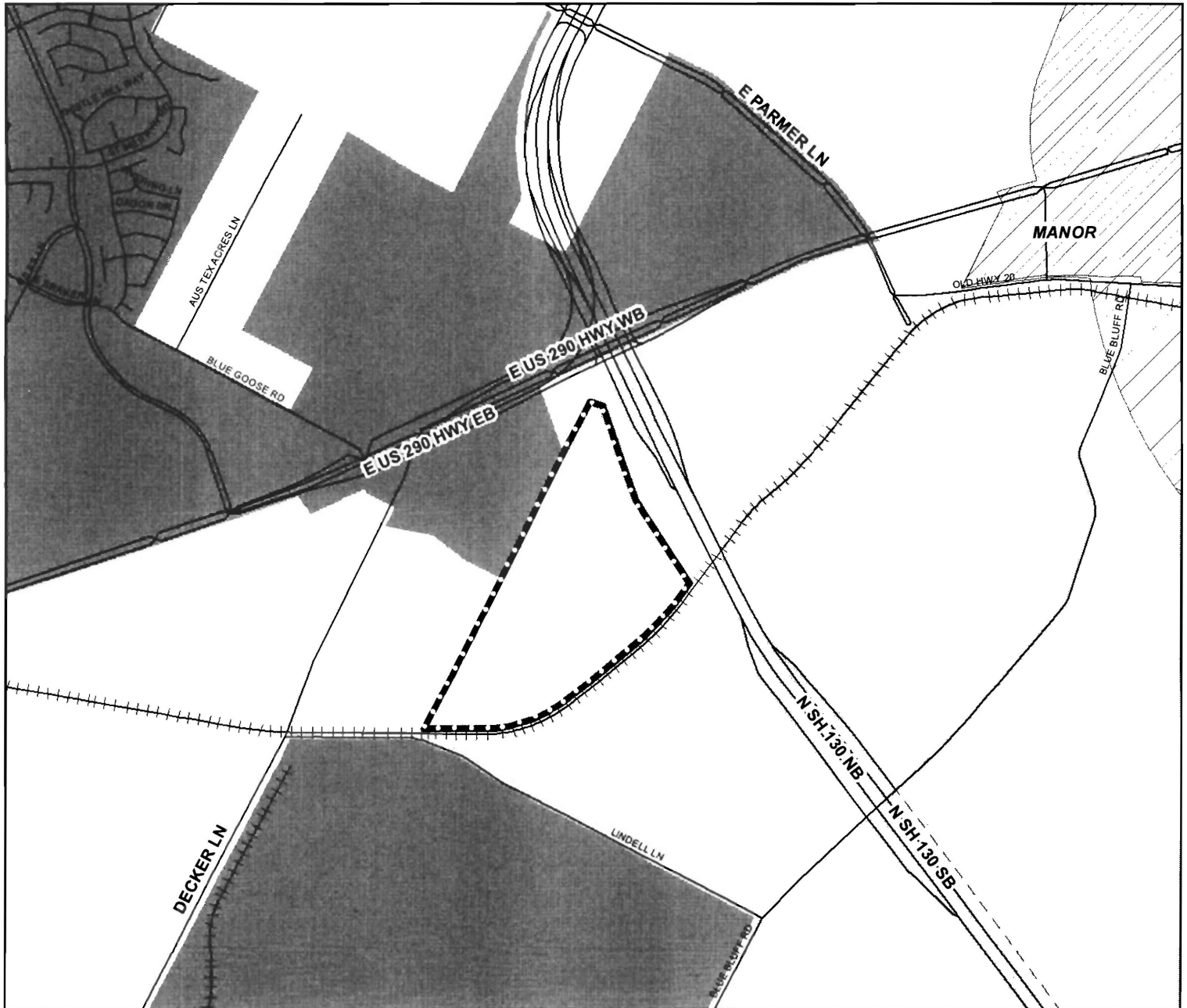


# FULL PURPOSE ANNEXATION NOTICE

Please inform the appropriate members of your organization that on November 8, 2012, the Austin City Council approved the following full purpose annexation:

Case No.	Name	Ordinance No.	Effective Date
C7a-2012-0010	Wells Fargo Tract	20121108-033	December 17, 2012

If you have questions regarding this release, you may contact Virginia Collier at (512) 974-2022 or Jackie Chuter at (512) 974-2613.



## Legend

- Annexation Area
- Street - Existing
- Street - Planned
- Railroad

### Current Jurisdiction

- Austin Full Purpose
- Austin Limited Purpose
- Austin ETJ

- Austin ETJ - Ag Agmt
- Other City
- Other ETJ
- County Boundary

0 1,000 2,000 Feet

1 inch = 2,000 feet



Zip Code Affected:  
78653

This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.

This product has been produced by the Planning and Development Review Department for the sole purpose of geographic reference. No warranty is made by the City of Austin regarding specific accuracy or completeness.

Sources: All data by COA unless otherwise provided

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**BRAKER LANE  
PARTICIPATION AGREEMENT**

This agreement ("Agreement") is entered into between Travis County, Texas (the "County"), Austin-Boise Ventures, LP, a Texas limited partnership ("ABV"), Wild Horse Investments, Ltd., a Texas limited partnership ("WHI"), and subject to Section 14(k), J & T Development Group, a Texas limited partnership ("J & T"). (ABV, J & T, and WHI are sometimes herein collectively the "Developer"). The County and Developer are sometimes hereinafter individually referred to as a "Party" and collectively referred to as the "Parties." Each of the Parties confirms that it has the authority and ability to enter into this Agreement, and to perform its obligations under this Agreement, without the further approval or consent of any other person or entity.

Recitals

WHEREAS, ABV owns land in the unincorporated area near the Wild Horse Ranch Planned Unit Development (the "PUD") that will be developed for residential, commercial, or other uses, as those tracts are generally described or depicted on Exhibit A ("ABV Tracts");

WHEREAS, WHI owns land in the unincorporated area within and near the PUD that will be developed for residential, commercial, or other uses, as those tracts are generally described or depicted on Exhibit A ("WHI Tracts"). The ABV Tracts and the WHI Tracts are sometimes hereinafter collectively referred to as "Developer's Land";

WHEREAS, Developer's Land is adjacent to a portion of the proposed extension of Braker Lane, which in this area is specified in the Capital Area Metropolitan Planning Organization ("CAMPO") 2030 Plan to be a 4-lane divided arterial (CAMPO ID# 734-14);

WHEREAS, as a condition of County approval of development in the unincorporated area, WHI and ABV are generally obligated under Chapter 30, Austin/Travis County Subdivision Regulations to mitigate the traffic impacts of the development by contributing proportionally to the construction of the roadway improvements in the CAMPO 2030 Plan;

WHEREAS, the Braker Lane extension will become a County road, and the County desires that it be constructed with capacity to handle not only WHI's and ABV's present development but future traffic loads as well;

WHEREAS, WHI and ABV are willing to construct their respective phases of the Braker Lane extension with the additional roadway capacity ("the Project"), subject to all of the terms and conditions of this Agreement, if they are reimbursed for it;

WHEREAS, Section 232.105 of the Texas Local Government Code provides that a commissioners court may contract with a developer of land in the unincorporated area to construct public improvements, and this Agreement is being entered into pursuant to,



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and is in compliance with, Section 232.105 since the County's costs are attributable to the oversizing of the road and to less than thirty percent of any component of the Project that does not constitute such oversizing ; and

WHEREAS, the Developer is meeting its obligations under the County's 2005 bond order to pay for at least fifty percent (50%) of a four lane divided arterial road;

WHEREAS, the County shall participate with WHI in the costs of Phases Two and Four, as defined herein, and shall participate with ABV in the costs of Phase Three, as defined herein, and to the extent possible, the construction of and payment for Phases Two and Four and Phase Three will be handled as two separate arrangements notwithstanding that both are addressed in this Agreement;

NOW, THEREFORE, in consideration of the mutual promises, covenants, obligations and benefits set forth in this Agreement, the Parties agree as follows:

Section 1. The Project.

(a) The Project shall include and be designed and constructed with the following features ("Project Design Features") as shown on Exhibit A:

- (i) New four (4) lane divided road from US Highway 290 at Harris Branch Parkway to State Highway 130 at Parnell Lane with:
  - (A) right of way width depending on design requirements, but no less than one hundred fourteen (114) feet, plus slope and drainage easements;
  - (B) road consisting of two (2) asphalt pavement sections thirty two (32) feet wide, each pavement including:
    - (1) two (2) twelve (12) feet wide travel lanes;
    - (2) one and a half (1.5) feet wide Portland cement concrete curb and gutter along both edges of each section;
    - (3) a five (5) feet wide bicycle lane along the outside edge of each section; and
  - (C) number and locations of median breaks to be proposed by the Developer and determined by the County according to applicable public safety standards.
- (ii) Pavement structure with a design life of twenty (20) years based on geotechnical engineering produced by the Project Engineers.
- (iii) Design speed of forty five (45) miles per hour.



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- (iv) Any bridges are to be designed according to minimum applicable Texas Department of Transportation (TXDOT) standards.
- (v) Twenty (20) feet wide grass medians.
- (vi) Outside the PUD, six (6) feet wide sidewalks on both sides of the road certified to meet all applicable accessibility standards. Inside the PUD, a six (6) feet wide sidewalk on the west side of the road and an eight (8) feet wide sidewalk or stabilized decomposed granite path on the east side of the road, all certified to meet all applicable accessibility standards.
- (vii) Mitigation for environmental impacts as, and to the extent, required by applicable law based on the environmental, archeological and endangered species studies by the Project Engineers.
- (viii) Erosion/sedimentation/water quality controls, revegetation, stormwater management during construction, and permanent stormwater management and water quality controls as required by Chapter 30, Austin/Travis County Subdivision Regulations.
- (ix) Guardrails and traffic control devices and markings, both during construction and permanent, as required by TXDOT's Manual of Uniform Traffic Control Devices and sound engineering principles and practices.
- (x) All necessary relocations or adjustments of utilities or other infrastructure, subject to payment or reimbursement by any person legally obligated to bear the cost of such costs relocations or adjustments.
- (xi) Compliance with any applicable County policies, procedures, and requirements for acceptance of the Project for maintenance.
- (xii) Realignment of existing Decker Lane at its intersection with the Project.
- (xiii) Graded to accommodate Capital Metropolitan Transportation Authority ("CMTA") requirements for either a grade-separated or at-grade crossing at the intersection of the Project and the CMTA (Austin and Southwestern Railroad) rail line ("Rail Crossing").
- (xiv) Controlled intersection with signage and conduit installed for a future traffic signal at the intersection of the Project and both existing Decker Lane and, unless a grade-separated crossing is constructed, at the Rail Crossing.

(b) The Project will be constructed in the following phases as generally depicted on Exhibit A.

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- (i) Phase One: From future Decker Lane east to existing Decker Lane ("Phase One").
- (ii) Phase Two: From the eastern terminus of Phase One to the common boundary between the WHI Tract and the ABV Tract ("Phase Two").
- (iii) Phase Three: From the eastern terminus of Phase Two to a point ten feet (10') west of the Rail Crossing ("Phase Three A"), and from the eastern terminus of Phase Three A to the centerline of the Rail Crossing ("Phase Three B").
- (iv) Phase Four: From the common boundary between the WHI Tract and the Quarterman Tract west to a point ten feet (10') east of the Rail Crossing ("Phase Four A"), and from the western terminus of Phase Four A to the centerline of the Rail Crossing ("Phase Four B").
- (v) Phase Five: From the eastern terminus of Phase Four to State Highway 130/Parmer Lane.
- (vi) Each of the Phases shall be designed so that each Phase and any sub-Phase thereof can be constructed separately, provided that a Developer shall not construct a Phase or sub-Phase unless a connection is provided to a publicly maintained roadway either directly or indirectly via another Phase. If both two or more of the Phases are able to be funded by the Developers contemporaneously, then such Phases will be developed at the same time as a single project and constructed under a single construction contract. If only one of the Developers is able to fund its share, then such funding Developer's Phase will be constructed at that time and the other Developer's Phase(s) will be constructed under a different construction contract at such time as the other Developer funds it. The provision of this Section 1(b)(vi) shall control over any contrary provision in this Agreement.
- (vii) To the extent possible, and except as otherwise expressly provided, this Agreement shall be construed so that it can be read separately for each Phase and sub-Phase.
- (viii) As long as any such realignment does not materially increase costs and provides for the Project to connect with U.S. Highway 290 at Harris Branch Parkway at its northern terminus and with State Highway 130 at Parmer Lane at its southern terminus as described in Section 1(a)(1), the Developers (together or individually) may propose minimal alternative alignments for the Project to avoid engineering or right-of-way problems.

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- (c) If the permanent stormwater management controls described in Section 1(a)(viii) will be used to manage any stormwater from the Developer's Land in addition to the stormwater from the Project, the Developer whose land is draining to the stormwater controls shall maintain the permanent stormwater management controls described in Section 1(a)(viii) pursuant to the agreement attached as Exhibit B which shall be executed and recorded in the Travis County real property records before construction of the Project begins.
- (d) Subject to the terms of this Agreement, WHI shall have the rights and obligations of the Developer with respect to Phases Two and Four and ABV shall have the rights and obligations of the Developer with respect to Phase Three, and for their respective Phases WHI and ABV shall each:
  - (i) cause the Project Engineer, as defined below, to provide and deliver the Developer and the County all necessary Engineering Services and Deliverables, as defined below, that are necessary to design the Project as required by this Agreement; and
  - (ii) cause the Construction Contractor, as defined below, to construct the Project as required by this Agreement.
- (e) In consideration of Developer's performance under Subsection (d), the County will reimburse the Developer as follows:
  - (i) The County will reimburse the Developer fifty percent (50%) of actual costs incurred for all necessary Engineering Services and Deliverables for design of the Project.
  - (ii) The County will reimburse the Developer thirty three and one third percent (33 1/3%) of actual costs incurred under the Construction Contract and for inspections, testing, and all other approved construction costs for the Project.
  - (iii) For Project Manager Services, as defined below, the Developer shall pay the Project Manager no more than four percent (4%) of the Developer's actual costs incurred under the Construction Contract ("Project Management Fee") and the County will reimburse the Developer fifty percent (50%) of the Project Management Fee.
- (f) Except as expressly provided otherwise in this Agreement, each Party shall bear one hundred per cent (100%) of the costs of performing its obligations under this Agreement, including overhead, contract procurement or review, reviewing Engineering Services and Deliverables, and any other costs incurred by a Party under this Agreement.
- (g) If CMAA does not approve Final Plans and Specifications for the Rail Crossing with a construction cost less than Eight Hundred Thousand Dollars (\$800,000) by July 31, 2008, the County may terminate this Agreement. If the County

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terminates this Agreement because such a Rail Crossing is not approved and a Developer chooses to construct a portion of Braker Lane in the location of one of the Phases without cost participation by the County or City, such portion of Braker Lane may, at such Developer's option and subject to future regulatory requirements, initially be constructed as a two (2) lane rather than a four (4) lane divided arterial.

- (h) The Parties anticipate that the County may execute an interlocal agreement with the City of Austin ("City") under which, in addition to the County's reimbursement under Section 1(e)(ii), the City would provide funds to reimburse the Developer an additional thirty three and one third percent (33 1/3%) of the Developer's actual costs incurred under the Construction Contract and for inspections, testing, and all other approved construction costs for the Project ("Interlocal Agreement"). If the County and the City have not executed such an Interlocal Agreement by December 31, 2007, this Agreement shall automatically terminate unless prior thereto the Developers send the County written notice that Developers elect to proceed with development of the Project without the anticipated reimbursement by the City and bear all costs of the Construction Contract, inspections, testing, and other costs that are not reimbursed by the County under Section 1(e)(ii).
- (i) If the County and the City execute the Interlocal Agreement, unless otherwise provided therein the Project shall comply with and be designed and constructed according to the City's requirements for design standards, permit reviews, review time periods, and permitting fee requirements, and the Developer acknowledges that County approval of Engineering Services and Deliverables may be delayed if necessary due to pending City reviews.
- (j) The County's obligation to pay any sum to the Developers under this Agreement is contingent on both CMTA's prior approval of Final Plans and Specifications for the Rail Crossing described in Subsection (g) and either the County's and City's prior execution of the Interlocal Agreement or the Developer's prior written election under Subsection (h) to proceed with development of the Project without the anticipated reimbursement by the City and bear all costs of the Construction Contract, inspection, testing, and other costs that are not reimbursed by the County under Section 1(e)(ii).

#### Section 2. Project Management.

- (a) The Developer shall be responsible for managing development of the Project. The Developer may contract with the Project Engineer or another person to serve as Developer's agent for providing project management services ("Project Manager"). The Developer shall submit copies of any proposed contract with the Project Manager to the County for approval. The County shall have ten (10) business days after such submission within which to make any comments to the form of the contract, and if no such comments are received by Developer within said ten (10) day period, the County shall be deemed to have approved the form

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of contract. The Developer shall obtain from the Project Manager and provide to the County a collateral assignment of the Developer's rights under the contract with the Project Manager in the form attached as Exhibit C, which authorizes the County to utilize the services of the Project Manager to complete the Project if the Developer fails to do so as provided in this Agreement.

- (b) The Project Manager will ensure timely and satisfactory completion of the Project, including performing construction administration services listed in Exhibit D; assuring the project scope is accurately defined and adhered to; identifying and planning for all obstacles to the completion of the project; planning and conducting design and preconstruction conferences; monitoring and reporting on the design and construction schedules and budgets; monitoring and reporting on the design and construction quality; providing the County with prior notice of major items of work during construction, otherwise coordinating among the Parties and other persons and entities involved in the Project on an ongoing basis; and, generally ensuring that the Project is satisfactorily completed on time and within budget (collectively, "Project Manager Services"). The Project Manager shall provide all files for the Project to the County within thirty (30) days after completion of the construction of the Project, including all addenda and change orders, record drawings, pay requests, and payment records. The County may require the Developer to replace the Project Manager if it does not satisfactorily perform its responsibilities related to the Project.

### Section 3. Project Engineering Services.

- (a) The Developer will contract with Jones & Carter, Inc. and/or another engineering firm acceptable to the County to assist and serve as Developer's agent in performing all necessary engineering, including design, surveying, geotechnical, and traffic analysis services, utility relocation coordination, and other engineering services for the respective Phases of the Project (the "Project Engineer"), as required by this section and Exhibits E and F. The Developer shall submit copies of the proposed contract with the Project Engineers to the County for approval. The County shall have ten (10) business days after such submission within which to make any comments to the form of the contract, and if no such comments are received by Developer within said ten (10) day period, the County shall be deemed to have approved the form of contract. In their contract, the Project Engineer must acknowledge that the Project is a public works project on public property. Developer shall in a timely manner pay all amounts due to the Project Engineer for the engineering services rendered in association with this Agreement. The County may require the Developer to replace Project Engineer if Project Engineer does not satisfactorily perform any and all responsibilities related to the Project. The design of the Project will be subject to approval by the County, and all other governmental agencies with jurisdiction.
- (b) The Developer will also obtain from the Project Engineer and provide to the County a collateral assignment of the Developer's rights under the contract with the Project Engineer in the form attached as Exhibit C, which authorizes the

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County to utilize the services of the Project Engineer to complete the Project if the Developers fail to do so as provided in this Agreement.

(c) The Developer shall cause the Project Engineer to produce and provide to Developers and the County all engineering services and deliverables to the extent necessary to complete the Project with the required Project Design Features, including:

- (i) completed specific work product/plan stage documents for review;
- (ii) final bid-ready plan sets and project manual with specifications ("Final Plans and Specifications");
- (iii) geotechnical report;
- (iv) engineer's opinion of construction costs, project schedule, and critical path method, updated and submitted with each submittal;
- (v) record drawings (as-builts) for the final project within thirty (30) working days after completion of the construction of the Project or the Project Engineer's contract;
- (vi) all required permits to start and complete Project;
- (vii) required tracts' schematic, and parcel drawings and right-of-way strip map for right of way and easement acquisitions;
- (viii) survey services with electronic and soft copy of survey on NAD 83 or as determined by the County;
- (ix) environmental report(s), and copies of all such reports used in the design of the Project shall be submitted to the County;
- (x) engineering and drainage study report;
- (xi) design calculations;
- (xii) electronic copy of above deliverables, where applicable (all drawings and e-files must be in a format compatible with County CADD applications and text documents must be in Microsoft Word format);
- (xiii) complete project file within thirty (30) working days after completion of the construction of the project or the Project Engineer's contract; and
- (xiv) any other service or producing any other deliverable necessary to complete the Project with the required Project Design Features, taking into consideration the customary requirements for projects of a similar nature as the Project or special requirements based on any unique aspects of the Project (collectively, "Engineering Services and Deliverables").

(d) All Engineering Services and Deliverables shall meet customary professional standards applicable to the service or deliverable or the Project, based on the Project's nature and location and participants, and are subject to approval by the County based on compliance with this Agreement, cost effectiveness, sound engineering principles and practices, and applicable legal requirements, which approval shall not be unreasonably denied, delayed, or conditioned. The County shall use reasonable efforts to respond to a request for approval within ten (10) working days after any Engineering Services and Deliverables are submitted and

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shall notify the other Party in writing if an Engineering Service and Deliverable is not satisfactory. All Engineering Services and Deliverables shall become the property of the County.

- (a) Developer shall cause the Project Engineers (each of them) and any subcontractor of the Project Engineers performing work on the Project to purchase professional errors and omissions liability insurance (contractual liability included) with a limit of at least Five Hundred Thousand Dollars (\$500,000) including the cost of claims and that covers claims arising from errors and omissions in the design and engineering of the Project for claims asserted within a period of five (5) years of the completion of the Project. Developer shall provide a copy of the insurance policy upon Developer's execution of this Agreement. Except for (i) Developer's obligation to provide the errors and omissions liability insurance required by this Section 3(e), and (ii) Developer's liability (in the event and to the extent that the cost of damage or loss is not covered by liability insurance otherwise required by this Section 3(e)) for the below specified percentage ("Developer's Liability Percentage") for the costs, damages, or losses (a) that are caused by the Project Engineers with respect to Engineering Services and Deliverables including, but limited to, surveying and/or the Final Plans and Specifications including, but not limited to, the negligence of the Project Engineers and/or surveyors retained by the Project Engineers, and (b) that are the result of deficiencies, errors and/or omissions and/or negligence of the Project Engineers and/or surveyors retained by the Project Engineers discovered within two (2) years of the acceptance of the Project by the County, Developer will have no liability to the County and/or its successors for costs, damages, or losses caused by the Project Engineers with respect to Engineering Services and Deliverables including, but not limited to surveying, and/or the Final Plans and Specifications including, but not limited to, the negligence of the Project Engineers, and the County and its successors shall otherwise look solely to the Project Engineers and/or the errors and omissions liability insurance for any such costs, damages, or losses excluded from Developer's responsibility hereby:

Developer Liability Percentage for the purposes of this Section 3(e): collectively, sixty six and two thirds percent (66 2/3%) (being WHI's 66 2/3% liability for Phase Two and Four costs, damages, and liabilities, and ABV's 66 2/3% liability for Phase Three costs, damages and liabilities), unless the County and the City execute the Interlocal Agreement in which case the Developer Liability Percentage shall be reduced by the percentage of reimbursement assumed by the City under the Interlocal Agreement. The Parties acknowledge that WHI shall be solely liable for any such Developer's liability on Phase Two and Four and ABV shall be solely liable for any such Developer's liability on Phase Three.

- (f) The Developer shall submit invoices for Engineering Services and Deliverables as provided in Section 8(g) and the County shall reimburse the Developer as provided in Section 8(h). If the Developer elects to commence engineering work before the County has received bond proceeds for the Project sufficient to fund



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its obligation to reimburse the Developer as provided in Section 8(h), the County's obligation to make payments as specified in Section 8(h) is suspended until the County has received bond proceeds for the Project. When the County receives bond proceeds for the Project, the Developer shall submit an invoice for and the County shall pay all suspended payments to the maximum extent of such bond proceeds.

(g) By December 1, 2008, WHI shall for Phases Two and Four and ABV shall for Phase Three submit to the County for approval three (3) copies of the Final Plans and Specifications and all Invoices from the Project Engineer and a detailed summary of the work completed and sums paid by WHI and ABV for the Engineering Services and Deliverables for each such Phase. The County shall issue any required permits for Phase One A within twenty (20) days of the Developer's submittal of Final Plans and Specifications.

(h) The County hereby waives all review, permit and inspection fees in connection with the Project.

Section 4. Designated Representatives.

(a) The County and Developer each designate the individual specified below ("Designated Representative") to represent them and to act on their behalf with respect to the subject matter of this Agreement. Each Designated Representative will have authority to determine and interpret the policies and exercise the discretion of the Party it represents, and a Party may rely on the decisions and representations made by the other Party's Designated Representative with respect to the subject matter of this Agreement, except as provided by Section 14(d), below. Each Designated Representative may further designate other representatives to transmit instructions and receive information on the Designated Representative's behalf.

County: Joe Gleselman (or successor), Executive Manager, Transportation and Natural Resources Department

WHI: John Lloyd

J & T: Jeff Turner

ABV: Mark Drinkard

(b) The Developer will require its agents to report regularly to, and to cooperate and coordinate with, the County's Designated Representatives. Each Party will require its Designated Representative and agents to cooperate and coordinate with one another, including but not limited to meeting with and or reporting information to one another regarding any aspect of the Project, either at regular intervals or at other times determined by the County, and reviewing and commenting in a timely manner on work products associated with the Project.



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Section 5. Real Property Interests.

- (a) The Project shall be constructed in public rights-of-way and/or easements ("Real Property Interests") conveyed to the County, or to another public entity acceptable to the County with a right of entry or license to allow construction of the Project. The Real Property Interests include the stormwater management agreement required under Section 1(c).
- (b) The Developers shall each convey to the County their respective Real Property Interests for Phases Two through Four. The County shall acquire the Real Property Interests for Phases One and Five as provided in Subsection (d). Each Party shall bear its own costs of conveying or acquiring the Real Property Interests that this Agreement obligates it to secure, including but not limited to closing costs, costs of document preparation, surveying, appraisals, title insurance premiums, title curative work, and litigation costs.
- (c) The Developers shall each cause their respective Real Property Interests for Phases Two through Four to be conveyed free of all liens, encumbrances, and title defects unacceptable to the County, by deeds or other instruments acceptable to the County, and with title insurance issued by a title company acceptable to the County. Any title insurance policy shall list the County as insured party, and shall be for an amount based upon the fair market value of the interests conveyed, as reasonably determined by the County.
- (d) The County shall attempt to acquire the Real Property Interests for Phases One and Five at a cost not more than Seven Hundred Twenty Thousand Dollars (\$720,000) (the "ROW Cost Limit"). If the County is able to acquire the Real Property Interests not owned or controlled by the Developer by July 31, 2008, at a total price not exceeding the ROW Cost Limit, the County will until December 1, 2010, reserve the unexpended portion of the ROW Cost Limit for construction of Phases Two through Four, if needed, and if not needed for Phases Two through Four, then for Phases One and/or Five.
- (e) The County's obligation to pay a Developer any sum under this Agreement for that Developer's Phase is contingent on prior acquisition by the County of all Real Property Interests necessary for construction of that Phase.

Section 6. Construction Contract Procurement.

- (a) Within thirty (30) days of County approval of the Final Plans and Specifications, the Developer shall submit an invitation for bids to and solicit bids for a contract to construct the Project in substantial conformance with the standard competitive bidding requirements of the County. The invitation for bids shall include the Final Plans and Specifications and written notice of the requirements of Section 7 and may be phased as provided in Section 1(b). The Developer shall submit the

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invitation for bid and a list of proposed bidders to the County for approval in advance. The Developer shall provide the County with all responses to the bid solicitation.

- (b) If the bid determined by the Developer to be the lowest responsive and responsible bid exceeds Nine Hundred Eighty Six Dollars (\$986) per linear foot for the portion of the road excluding the Rail Crossing and Eight Hundred Thousand Dollars (\$800,000) for the Rail Crossing ("Agreed Limit"), the County may require the Developer to reject all bids for the Project or Phase as excessive and solicit bids a second time. If bids are rejected as excessive, the Developers shall require the Project Engineer, in consultation with the Developers and the County, to modify the Final Plans and Specifications employing value engineering principles in a manner designed to secure a lower bid, while still meeting applicable standards without impairing the functionality of the Project or violating sound engineering principles or practices or applicable legal requirements. The modified Final Plans and Specifications shall be subject to approval by the County and Developer, which approval shall not be unreasonably denied, delayed, or conditioned. Based on the modified Final Plans and Specifications, the Developer shall repeat the bid solicitation in an effort to secure a lower acceptable bid. If the second bid solicitation fails to produce an acceptable bid not exceeding the Agreed Limit, either the Parties may mutually agree to repeat the bid solicitation and value engineering process until an acceptable bid is received, or Developer may choose to pay one hundred percent (100%) of the amount by which the lowest responsive and responsible bid exceeds the Agreed Limit without reimbursement by the County by giving written notice thereof to the County. If Developer does not give such notice within thirty (30) days after receipt of bids exceeding the Agreed Limit, and the Parties have not mutually agreed to re-bid after further value engineering, any of the Parties may elect to terminate this Agreement without further recourse. Any deadline in this Agreement affected by a value engineering and rebidding process shall be extended by the amount of time required for that process. Payment to the Project Engineer, if any, for value engineering and resulting changes to the construction documents, shall be subject to approval by the County and the Developer, which approval shall not be unreasonably denied, delayed, or conditioned.
- (c) The Developer shall select the lowest responsive and responsible bidder and submit copies of the proposed construction contract to the County for approval. The County shall have ten (10) business days after such submission within which to make any comments on the contract, and if no such comments are received by Developer within said ten (10) day period, the County shall be deemed to have approved the contract. Provided the Developer has first obtained the Capital Metropolitan Transportation Authority's written approval of Final Plans and Specifications for the At-Grade Crossing, the Developer shall execute the approved contract, which shall be referred to herein as the "Construction Contract." The contractor under the Construction Contract shall be referred to herein as the "Construction Contractor."

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(d) Within ten (10) days after execution of the Construction Contract, the Developer will provide to the County a copy of the executed Construction Contract and any related documents, including any assignment, certificate, or other documents required under Section 7. The Developer will also provide copies of any subsequent documents amending or otherwise relating to the Construction Contract; however, no amendments or change orders to the Construction Contract as approved by the County may be made without the County's approval.

Section 7. Special Provisions Applicable to Construction Contract.

(a) The Developer will also obtain from the Construction Contractor and provide to the County a collateral assignment of the Developer's rights under the Construction Contract, in the form attached as Exhibit C, which authorizes the County to exercise the Developer's rights under the Construction Contract and to complete the Project if the Developer fails to do so as provided in this Agreement.

(b) The Parties acknowledge that the Project is a County road project and involves construction of public improvements. Accordingly, the Project will be constructed and all right-of-way, easements, equipment, materials and supplies will be acquired in the name of or on behalf of the County. However, the Developer shall ensure that all construction contracts and other agreements contain a provision that each contractor, materialman or supplier will look solely to the Developer for payment of all sums coming due thereunder and that the County will have no obligation to any such party, but will only be obligated to reimburse the Developer in the time and manner required under this Agreement.

(c) The Developer shall include the County's Historically Underutilized Businesses Program goals with the Invitation for bid and Final Plans and Specifications and ensure that they are part of the bids.

(d) The Developer shall ensure that payment and performance bonds are obtained and kept in place for the Project in compliance with Chapter 2253, Texas Government Code.

(e) All tangible personal property to be purchased for use in construction of the Project and all taxable services to be performed for the design, management and construction of the Project are subject to the sales tax provisions of Section 151.311, Texas Tax Code. The County will provide its employer identification number and any other information reasonably required to obtain an exemption of sales tax for the Project and the labor and materials incorporated into the Project upon the Developer's request.

(f) The Developer acknowledges that the County is a political subdivision of the State of Texas and is subject to the provisions of Chapter 2258, Subchapter B, Texas Government Code, pertaining to prevailing wage rates. The Developer



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will ensure that the Construction Contractor pays not less than the prevailing wage rates established by the County to workers employed on the Project and complies with all applicable provisions of Chapter 2258, Subchapter B, Texas Government Code, including the recordkeeping required therein.

- (g) The Developer will ensure that the Construction Contractor provides worker's compensation insurance coverage for workers employed on the Project and obtains a certificate from each subcontractor, relating to the coverage of the subcontractor's employees, in accordance with Section 406.096, Texas Labor Code. The Developer will ensure that the Construction Contractor maintains a comprehensive general liability and automobile liability insurance policy naming the County as additional insureds, with a waiver of subrogation in favor of the County, and with minimum limits of One Million Dollars (\$1,000,000) per occurrence and Three Million Dollars (\$3,000,000) in the aggregate. The Developer shall cause the Construction Contractor to provide the County with written certificates of compliance with the foregoing requirements.
- (h) The Construction Contractor will be required to implement and maintain all applicable or customary safety precautions and programs in connection with the construction of the Project.

Section 8. Construction of Project.

- (a) Before the applicable date in Subsection (d) for beginning construction of the Project, the Developer will:
  - (i) cause to be conveyed or dedicated all the Real Property interests, including, if necessary, the stormwater management agreement under Section 1(c);
  - (ii) execute the Construction Contract;
  - (iii) submit to the County payment and performance bonds, insurance certificates, collateral assignments, and all other documents required to be submitted under this Agreement;
  - (iv) deposit with the County either cash or a letter of credit for the Developer's non-reimbursable costs under Section 1(u) in a form acceptable to the County in an initial amount equal to the County's estimate of the Developer's non-reimbursable share of costs under Section 1(e) ("Fiscal Security") to secure completion of the Project as provided in Section 13, provided that the letter of credit may be a reducing letter of credit that provides for reduction of the amount as the Developer incurs and pays such non-reimbursable costs; and
  - (v) issue notice to proceed with construction of the Project to the Construction Contractor.

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- (b) Before the applicable date in Subsection (d) for beginning construction of the Project, if the County and the City have executed the Interlocal Agreement, the County will estimate the City's share of costs under the Interlocal Agreement and require the City to deposit with the County cash in that amount ("City Construction Funds"). The County shall use the City Construction Funds either to pay to the Developer the City's share of the reimbursement due the Developer under the Interlocal Agreement or to complete construction of the Project under Section 13.
- (c) If the requirements of Subsections (a) are not met with respect to an individual Phase of the Project, the County may terminate this Agreement with respect to such Phase and be relieved of any obligation to pay any amount under this Agreement as to such Phase. If the County and City have executed the Interlocal Agreement but the City does not post the City Construction Funds for a Phase, or if a Developer has defaulted on its obligations for a Phase, a Developer not in default may elect to post such City Construction Funds and/or fulfill the defaulting Developer's obligations for the Phase by giving written notice thereof to the County. If a nondefaulting Developer does not give such notice within thirty (30) days after written notice from the County of intent to terminate this Agreement, the County may terminate this Agreement with respect to the Phase.
- (d) Construction of Phases Two and Three A shall commence before May 1, 2009. Construction of Phases Three B and Four shall commence before December 1, 2010 (respectively "Construction Start Date"). However, if as of the applicable Construction Start Date, the County has not received bond proceeds sufficient to fund its obligation to reimburse the Developer as provided in Section 8(g) for the Phase, the Developer may elect either to postpone commencement of construction of that Phase until the County notifies the Developer of its receipt of such bond proceeds or to proceed with construction. If the Developer elects to proceed with construction, the County's obligation to make payments as specified in Section 8(g) is suspended until the County has received sufficient bond proceeds. When it receives bond proceeds for such Phase, the County shall pay the Developer all suspended payments that previously came due to the maximum extent of such bond proceeds. The Developer must cause Phases Two and Three A to be complete and accepted by the County by February 1, 2010, and Phases Three B and Four to be complete and accepted by the County by September 1, 2011. However, if the Developer postpones commencement of construction because the County has not received bond proceeds, the foregoing deadlines for completion shall be extended by a period of time equal to the period of time between the applicable Construction Start Date and the date the County notifies the Developer of its receipt of such bond proceeds. Failure to commence or complete construction of Phases Two and Three A by the applicable Construction Start Date set forth in this Subsection (d) shall not constitute a default hereunder with respect to Phase Three B and Four, and vice versa, and provided the requirement of Section 1(b)(vi) to connect to a publicly maintained road is met, a Developer who timely commences construction of a Phase hereunder may continue to construct its Phase pursuant

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to the terms of this Agreement regardless of another Developer's failure to timely commence or complete construction of another Phase.

- (e) Subject to its rights to be reimbursed as provided in this Agreement, the Developer will:
- (i) construct, and require its Construction Contractor and subcontractors to diligently pursue construction of, the Project in a good and workmanlike manner and, in all material respects, in accordance with this Agreement and the approved Final Plans and Specifications and all applicable laws, regulations, and ordinances; and
  - (ii) promptly pay all costs of the Project as they become due, including all costs of design, engineering, materials, labor, construction, project management and inspection arising in connection with the Project and all payments arising under any contracts entered into for the construction of the Project, subject to any applicable retainage requirements and amounts withheld due to improper work or punch list items.
- (f) The Developer assumes the risk for design and construction of the Project in a good and workmanlike manner for the amount of the Construction Contract and all work and material used in the construction must be free from defects and fit for its intended purpose. Any modifications that would materially change the Final Plans and Specifications or the amount of the Construction Contract will be subject to the Developer's and County's approval within ten (10) business days after receipt of notice of the proposed changes, which approval will not be unreasonably denied, delayed, or conditioned. If the County and Developer determine that, through no fault of the Developer and based on cost effectiveness, sound engineering principles and practices, or applicable legal requirements, it is not possible to complete the Project as described in Section 1, without modifications to the approved Final Plans and Specifications or the amount of the Construction Contract, the Developer will, in coordination with the County, cause to be prepared any required changes to the Final Plans and Specifications and any required change orders to the Construction Contract, and the County will reimburse the Developer for the Developer's actual cost of any required Engineering Services and Deliverables and actual costs of any required change orders to the Construction Contract as provided in Section 1(a).
- (g) The Developer will submit an invoice to the County each month which details the sums paid by the Developer and due to be reimbursed by the County for engineering, construction, and other services and work performed during the previous calendar month, including:
- (i) copies of all draw requests from contractors included in the invoice, a detailed summary of the work completed and an affidavit of bills paid and partial lien waiver;

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(ii) the cumulative amount of all draw requests to date;

(iii) the Developer's, County's, and (if the County and City executed the Interlocal Agreement) City's respective portions of the current draw requests in accordance with Section 1(e) and the calculations used to arrive at that allocation; and

(iv) the cumulative amounts paid by the Developer and reimbursed by the County and (if the County and City executed the Interlocal Agreement) City under this Agreement through the date of the accounting.

(h) If the services and work described in the invoice were rendered in compliance with this Agreement, the County will make payment to the Developer within thirty (30) days of receipt of each invoice, subject to Section 11. In the event changes or corrections are required to any invoice prior to payment, a request for additional information will be made by the County within ten (10) days of receipt of the invoice.

Section 9. County Inspection. The County may observe or inspect all work done and materials furnished at times and places and using procedures determined by the County. The County will notify the Developer and Project Manager if any observation reveals that any part of the Project is not constructed or completed in accordance with the final approved Final Plans and Specifications or this Agreement or is otherwise materially defective. This notice will specifically detail any deficiencies. If such notice indicates that work or material may not comply with the final approved Final Plans and Specifications or the requirements of this Agreement, the County may require the Developer to require the Construction Contractor to suspend work until the County is satisfied any defect is or will be remedied, which suspension and remedial work will be without delay damages, remobilization costs, or other additional costs to the Developer or the County.

Section 10. Completion of Project.

(a) The Project Manager will prepare a written notice of substantial completion and certify that the Project or any Phase thereof has been constructed in accordance with the approved construction documents and forward the notice to the Developer and County. The County will conduct a final inspection of the Project or Phase within ten (10) business days after receiving the written notice of substantial completion. If completed in accordance with the terms of the final approved Final Plans and Specifications and this Agreement in all material respects, the County will certify the Project or Phase as being in compliance and issue a notice of final acceptance to the Developer.

(b) Upon final acceptance of the Project or Phase by the County, all warranties for the Project or Phase will be transferred to the County and the Developer will execute any documents reasonably required to evidence such assignment. The Construction Contractor will be responsible for any defects in workmanship or





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materials (ordinary wear and tear excepted) in the Project or Phase for one year following acceptance by the County. The Developer must provide or cause the Construction contractor to provide the County with a one (1) year Construction Contractor's warranty and maintenance bond as a condition to final acceptance of the Project or Phase, which will be in a form approved by the County, such approval not to be unreasonably denied, delayed, or conditioned.

- (c) Within thirty (30) days of final acceptance of the Project or Phase by the County, the Developer and the Project Manager will deliver all plans including as built plans, specifications, and files pertaining to the Project or Phase, which materials will be the property of the County, and the Developer shall submit to County a final statement of any and all claims for payment or credit the Developer desires to have taken into account in the final accounting under Section 11.

#### Section 11. Retainage and Final Accounting.

- (a) Until completion of the final accounting under Subsections (b) and (c), the County will withhold five percent (5%) retainage on payments attributable to the Construction Contract and fifteen percent (15%) of the Project Manager's fee. The retained amounts will be released and paid by the County upon completion of the final accounting, resolution of any pending claims or contingent liabilities arising from the Project, and delivery to the County of the warranty documentation, construction files, as built, affidavit of bills paid and final lien waivers, and other documents required to be submitted under this Agreement.
- (b) Within thirty (30) days after the Project is complete or this Agreement is terminated, the Developer shall render a final written accounting of any and all costs to be paid or born by, or credited or refunded to, any Party under this Agreement, taking into account any amount the County has previously paid as provided herein and subject to adjustment after resolution of any pending claims or contingent liabilities arising from the Project. The Developer shall send a copy of such accounting to the County. The County and (if the County and City have executed the Interlocal Agreement) the City shall have the right to audit the Developer's records and shall request any such audit, or any adjustments or corrections, within thirty (30) days of receipt of the accounting.
- (c) After the Developer has sent any corrected or adjusted final accounting to the County and (if the County and City have executed the Interlocal Agreement) City, the County shall pay any amount it owes no later than thirty (30) days after receipt of such final accounting. The Developer shall refund any amounts due the County within twenty (20) days after delivery of the adjusted final accounting.

#### Section 12. Correction of Defects; Claims.

Conveyance of the Project to the County will not relieve the Developer of liability for satisfaction of any unpaid claim for materials or labor. The County will be under no

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obligation to challenge any claim for unpaid labor or materials; however, if the Developer fails to promptly resolve any claim, the County may elect to do so and, in this event, will have full rights of subrogation.

Section 13. County Completion of Project.

- (a) If the Developer begins, but does not diligently pursue timely completion of, construction of the Project materially in accordance with this Agreement for any reason, the County has the right, but not the obligation, to draw on the Fiscal Security and complete the construction of the Project either pursuant to the Construction Contract and the collateral assignments or otherwise. Before exercising this right, the County will send the Developer written notice specifying the deficiency in the Developer's performance and the actions required to cure the deficiency. If the Developer does not cure the deficiency within ten (10) days (or such time as reasonably may be required to cure the deficiency provided the Developer promptly begins, and diligently pursues, such cure), the County may proceed with construction of the Project.
- (b) If the County elects to complete the Project, all plans, designs, rights-of-way, easements, real and personal property conveyed, produced, or installed within the public right-of-way prior to the take-over of construction of the Project by the County, will become the property of the County to the reasonable extent necessary to allow the County to complete and maintain the Project.
- (c) The Developer hereby grants to the County a nonexclusive right and easement to enter the property of the Developer to the reasonable extent necessary for construction of the Project under this Agreement in accordance with its terms and provisions and in accordance with the notice and cure periods contained in this Agreement.

Section 14. Miscellaneous.

- (a) Any notice given hereunder by any Party to another must be in writing and may be effected by personal delivery or by certified mail, return receipt requested, when mailed to the appropriate Party's Designated Representative, at the addresses specified, with copies as noted below:

County: Joe Gieselman (or successor)  
 Executive Manager, TNR  
 P.O. Box 1748  
 Austin, Texas 78767

Copy to: David Escamilla (or successor)  
 Travis County Attorney  
 P.O. Box 1748  
 Austin, Texas 78767  
 Attn: File No. 163.1088



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Developer: ABV  
c/o Mark Drinkard  
810 Heritage Center Circle, Suite A  
Round Rock, TX 78664

Copy to: Drenner & Golden Stuart Wolf  
301 Congress, Suite 1200  
Austin, TX 78701  
Attn: Steve Metcalfe

Developer: WHI  
c/o John Lloyd  
4111 Lakelace Lane  
Austin, Texas 78746

*/ Pete Dwyer  
9900 Hwy 290 E  
Manor TX 78653*

Copy to:

Developer: J & T  
c/o Jeff Turner  
410 North Burnet Street  
Manor, Texas 78653

Copy to: Keating, O'Toole, Hemphill, and Dolezal, LLP  
700 Lavaca Street, Suite 1000  
Austin, Texas  
Attn: Bill Hemphill

The Parties may change their respective addresses for purposes of notice by giving at least five days written notice of the new address to the other Party. If any date or any period provided in this Agreement ends on a Saturday, Sunday or legal holiday, the applicable period will be extended to the next business day.

- (b) As used in this Agreement, whenever the context so indicates, the masculine, feminine, or neuter gender and the singular or plural number will each be deemed to include the others.
- (c) This Agreement contains the complete and entire Agreement between the Parties respecting the Project, and supersedes all prior negotiations, agreements, representations, and understandings, if any, between the Parties. This Agreement may not be modified, discharged, or changed except by a further written agreement, duly executed by the Parties. However, any consent, waiver, approval or other authorization will be effective if signed by the Party granting or making such consent, waiver, approval, or authorization.

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- (d) No official, representative, agent, or employee of the County has any authority to modify this Agreement, except pursuant to such express authority as may be granted by the governing body of the County.
- (e) The Parties agree to execute such other and further instruments and documents as are or may become necessary or convenient to effectuate and carry out the purposes of this Agreement.
- (f) If performance by any Party of any obligation under this Agreement is interrupted or delayed by reason of unforeseeable event beyond its control, whether such event is an act of God or the common enemy, or the result of war, riot, civil commotion, sovereign conduct other than acts of the County or City under this Agreement, or the act of conduct of any person or persons not a party or party hereto, then such Party will be excused from such performance for such period of time as is reasonably necessary after such occurrence to remedy the effects thereof.
- (g) To the extent allowed by law, each Party will be responsible for, and will indemnify and hold harmless the other Parties, their officers, agents, and employees, from any and all claims, losses, damages, causes of action, lawsuits or liability resulting from, the indemnifying Party's acts or omissions of negligence or misconduct or in breach of this Agreement, including but not limited to claims for liquidated damages, delay damages, demobilization or remobilization costs, or claims arising from inadequacies, insufficiencies, or mistakes in the Final Plans and Specifications and other work products or any other materials or services a Party provides under this Agreement. Each Party will promptly notify the others of any claim asserted by or against it for damages or other relief in connection with this Agreement.
- (h) Before attempting to terminate this Agreement for default, the Party alleging the default shall notify the other Parties in writing of the nature of and the means of curing the default. No Party may terminate this Agreement without providing the defaulting Party a reasonable amount of time to cure the default. The Parties acknowledge that in the event of default on any obligation under this Agreement, remedies at law will be inadequate and that, in addition to any other remedy at law or in equity, each Party will be entitled to seek specific performance of this Agreement.
- (i) This Agreement will be construed under the laws of the State of Texas and all obligations of the Parties hereunder are performable in Travis County, Texas. Any suits pursued relating to this Agreement will be filed in a court of Travis County, Texas.
- (j) Any clause, sentence, provision, paragraph, or article of this Agreement held by a court of competent jurisdiction to be invalid, illegal, or ineffective will not impair, invalidate, or nullify the remainder of this Agreement, but the effect thereof will be confined to the clause, sentence, provision, paragraph, or article so held to be invalid, illegal, or ineffective.

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- (k) This Agreement will be binding upon and inure to the benefit of the Parties hereto and their respective legal representatives, successors, and assigns and shall be a covenant running with the Property. J & T shall become a Party only upon acquisition title to any portion of Developer's Land, and thereupon shall assume the rights and obligations of the conveying Developer with respect to such portion acquired, and the conveying Developer shall be relieved of the same. Otherwise, no Party may assign its rights or obligations under this Agreement without the written consent of the other Party; however, the Developer may grant a security interest in and collaterally assign all sums to be paid to the Developer under this Agreement to any lending institution making a loan to the Developer for purposes of payment of the costs of the Project, and the County expressly consents to any such security interest or collateral assignment. Any Party may record in the Official Public Records of Travis County a memorandum of this Agreement.
- (l) Except as otherwise expressly provided herein, nothing in this Agreement, express or implied, is intended to confer upon any person, other than the Parties hereto, any benefits, rights or remedies under or by reason of this Agreement.
- (m) This Agreement is effective upon execution by all the Parties. This Agreement may be executed simultaneously in one or several counterparts, each of which will be deemed an original and all of which together will constitute one and the same instrument. The terms of this Agreement will become binding upon each Party from and after the time that it executes a copy hereof. In like manner, from and after the time it executes a consent or other document authorized or required by the terms of this Agreement, such consent or other document will be binding upon such Party.
- (n) As required by Chapter 32, Travis County Code, simultaneously with execution of this Agreement the Developer shall execute the ethics affidavit attached hereto as Exhibit G. In addition, the Developer hereby certifies that the Developer is not in violation of Section 176.006, Local Government Code.
- (o) The following exhibits are attached to and incorporated into this Agreement for all purposes:

- |                   |                                       |
|-------------------|---------------------------------------|
| Exhibit A:        | The Property                          |
| Exhibit B:        | Stormwater Management Agreement       |
| Exhibit C:        | Collateral Assignment                 |
| Exhibit D:        | Construction Administration Services  |
| Exhibits E and F: | Engineering Services and Deliverables |



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Exhibit G: Ethics Affidavit

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in multiple copies, each of equal dignity.

COUNTY:

Samuel T. Biscoe  
Samuel T. Biscoe, County Judge  
Date: 12-19-06

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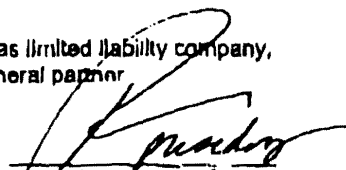
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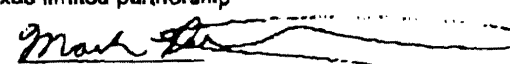
**DEVELOPER:**


**Wild Horse Investments, Ltd.,**  
a Texas limited partnership

By: . LLC,  
a Texas limited liability company,  
its general partner

By:   
Name: PETER A. DWYER  
Title: Managing Member  
Date: 12/11/06

**Austin-Bolso Ventures, LP,**  
a Texas limited partnership

By:   
Meior, LLC  
a Texas limited liability company,  
its general partner

By:   
Name: Mark Drinkard  
Title: Manager  
Date: 12-8-06

**J & T Development Group, LP,**  
a Texas limited partnership

By: \_\_\_\_\_  
Blue Bluff Ventures, LLC  
a Texas limited liability company,  
its general partner

By: \_\_\_\_\_  
Name: Jeff Turner  
Title: Manager  
Date: \_\_\_\_\_

**DEVELOPER:**

**Wild Horse Investments, Ltd.,**  
a Texas limited partnership

By: \_\_\_\_\_, LLC,  
a Texas limited liability company,  
its general partner


By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Managing Member  
Date: \_\_\_\_\_

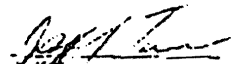
**Austin-Boise Ventures, LP,**  
a Texas limited partnership

By: \_\_\_\_\_  
Maori, LLC  
a Texas limited liability company,  
its general partner

By: \_\_\_\_\_  
Name: Mark Drinkard  
Title: Manager  
Date: \_\_\_\_\_

**J & T Development Group, LP,**  
a Texas limited partnership

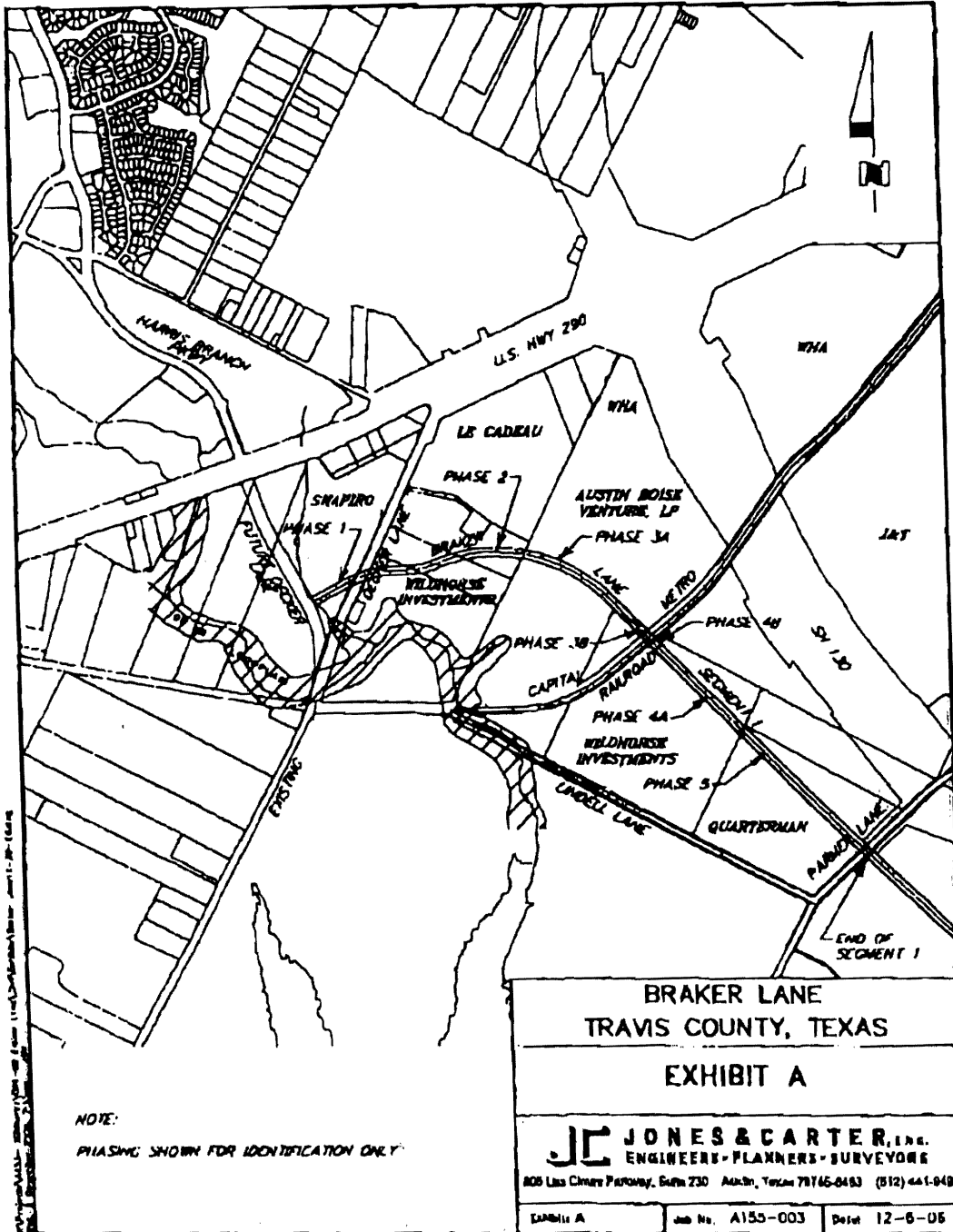
By:   
Blue Bluff Ventures, LLC  
a Texas limited liability company,  
its general partner

By:   
Name: Jeff Turner  
Title: Manager  
Date: 12.11.06



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**EXHIBIT B**

**STORMWATER MANAGEMENT AGREEMENT**

**DECLARATION OF EASEMENTS AND RESTRICTIVE COVENANTS  
REGARDING THE MAINTENANCE OF DRAINAGE FACILITIES**

This Declaration of Easements and Restrictive Covenants Regarding the Maintenance of Drainage Facilities (the "Declaration"), is executed this \_\_\_\_ day of \_\_\_\_\_, 2006, by \_\_\_\_ ("Declarant").

**GENERAL RECITALS:**

A. Declarant is the owner of land (the "Property") in Travis County, Texas, described in EXHIBIT A attached and incorporated by reference.

B. Definitions.

1. Owners. The term "Owner" means, individually, and the term "Owners" means, collectively, Declarant and all future owners of the fee interest of any portion of the Property (whether such fee interest is obtained through a purchase from Declarant or through a purchase at a foreclosure sale or trustee's sale or through a deed in lieu of foreclosure) and their successors and assigns.

Facilities. The term "Facilities" means those drainage facilities that convey and receive stormwater runoff from the Property and Braker Lane and that are more particularly described on EXHIBIT A attached and incorporated by reference.

C. Declarant has agreed to impose upon the Property these covenants and conditions for the benefit of the Property and Braker Lane Street and has agreed to accept the responsibility for maintenance of the Facilities in accordance with the terms hereof.

NOW, THEREFORE, it is hereby declared that the Property be subject to the following covenants, conditions and restrictions which shall run with the Property and shall be binding upon all parties having right, title, or interest in or to such portion of the Property or any part, their heirs, successors, and assigns and shall inure to the benefit of each owner. Each contract, deed or conveyance of any kind conveying those portions of such Property shall conclusively be held to have been executed, delivered, and accepted subject to the following covenants, conditions and restrictions, regardless of whether or not the same are set out in full or by reference in said contract, deed or conveyance.

**SPECIFIC AGREEMENTS AND RESTRICTIONS:**

1. Recitals Incorporated. The above Recitals and all terms defined therein are incorporated into this Declaration for all purposes.

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2. **Maintenance.** The Owners shall maintain the Facilities in a good and functioning condition in accordance with the requirements of the City of Austin and/or Travis County (the "City and/or County"), including standards specified in the regulations of the City and/or County, as amended from time to time. The portion of the Property on which the Facilities are located may not be used for any purpose inconsistent with or detrimental to the proper operation of the Facilities. Each Owner shall be jointly and severally liable for the maintenance of the Facilities.
3. **Easement to the Owners.** Each individual Declarant hereby grants and conveys and by these presents does GRANT AND CONVEY unto the other individual Declarant and all Owners, a non-exclusive easement for the inspection, monitoring, operation, maintenance, replacement, upgrade and repair, as applicable, of the Facilities in, upon and across portions of the Property as more particularly described in EXHIBIT B attached hereto and incorporated by reference (the "Easement Tract").

TO HAVE AND TO HOLD the same perpetually to the Owners and its successors and assigns, together with the privilege at any and all times to enter the Easement Tract for the purpose of operating, inspecting, monitoring, maintaining, replacing, upgrading and repairing, as applicable, the Facilities. This easement is made and accepted subject to all easements, covenants, restrictions, liens, and other encumbrances of record in Travis County, Texas affecting the Easement Tract.

4. **Easement to Travis County.** Declarant hereby grants and conveys and by these presents does GRANT AND CONVEY unto Travis County, whose address is P.O. Box 1748, Austin Texas 78767, Ann. Transportation and Natural Resources Department, a non-exclusive easement for the inspection, monitoring, operation, maintenance, replacement, upgrade and repair, as applicable, of the Facilities in, upon and across the Easement Tract.

TO HAVE AND TO HOLD the same perpetually to Travis County and its successors and assigns, together with the privilege at any and all times to enter the Easement Tract for the purpose of operating, inspecting, monitoring, maintaining, replacing, upgrading and repairing, as applicable, the Facilities. This easement is made and accepted subject to all easements, covenants, restrictions, liens, and other encumbrances of record in Travis County, Texas affecting the Easement.

5. **Notice.** The City and/or County shall give the Owners thirty (30) days' prior written notice of the City and/or County's intent to enter any of the above described easement areas for the purpose of operating, maintaining, replacing, upgrading, or repairing, as applicable, the Facilities; provided, however, that in the event of an emergency, the City and/or County shall be required to give prior notice within a reasonable period of time. Reasonableness shall be determined in accordance with the nature of circumstances of the emergency. The City and/or County shall have the right to enter any of the above described easement areas

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without prior written notification for the purposes of monitoring and inspection only.

6. Breach Shall Not Permit Termination. Notwithstanding anything to the contrary contained herein, no breach of this Declaration shall entitle the Owners to cancel, rescind or otherwise terminate this Declaration, but such limitations shall not affect in any manner any other rights or remedies which the Owners may have hereunder by reason of any breach of this Declaration.

7. Excusable Delays. Whenever performance is required of the Owners, the Owners shall use all due diligence to perform and take all reasonable and necessary measures in good faith to perform; provided, however, that if completion of performance is delayed at any time by reasons of acts of God, war, civil commotion, riots, strikes, picketing, or other labor disputes, unavailability of labor or material, damage to work in progress by reason of fire or other casualty, or any other cause beyond the reasonable control of the Owner (financial inability, imprudent management or negligence excepted), then the time for performance as herein specified will be extended by the amount of delay actually so caused.

8. Existing Encumbrances. The easement and other rights granted or created by this Declaration are subject to any and all matters of record affecting the Property.

9. General Provisions.

A. Insurance. This Declaration and the restrictions created hereby shall inure to the benefit of and be binding upon the Owners, and their successors and assigns. If the Declarant conveys all or any portion of the Property, the Declarant shall thereupon be released and discharged from any and all further obligations, if any, under this Declaration that it had in connection with the property conveyed by it from and after the date of recording of such conveyance, but no such sale shall release the Declarant from any liabilities, if any, actual or contingent, existing as of the time of such conveyance.

B. Duration. This Declaration takes effect upon County acceptance of the part of Braker Lane within the Property. Unless terminated in accordance with Paragraph 9(K) below, this Declaration shall remain in effect in perpetuity.

C. Non-Merger. This Declaration shall not be subject to the doctrine of merger, even though the underlying fee ownership of the Property, or any parts thereof, is vested in one party or entity.

D. Severability. The provisions of this Declaration shall be deemed independent and severable, and the invalidity or partial invalidity of any



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provision or portion hereof shall not affect the validity or enforceability of any other provision.

- E. Entire Agreement. This Declaration and the exhibits attached hereto contain all the representations and the entire agreement between the parties to this Declaration with respect to the subject matter hereof. Any prior correspondence, memoranda or agreements are superseded in total by this Declaration and the exhibits attached hereto. The provisions of this Declaration shall be construed as a whole according to their common meaning and not strictly for or against any Owner.
- F. Captions. The captions preceding the text of each section and subsection hereof are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Declaration.
- G. Governing Law; Place of Performance. This Declaration and all rights and obligations created hereby shall be governed by the laws of the State of Texas. This Declaration is performable only in the county in Texas where the Property is located.
- H. Notices. Any Notice to the Owners or the City and/or County shall be in writing and given by delivering the same to such party in person, by expedited, private carrier services (such as Federal Express) or by sending the same by registered or certified mail, return receipt requested, with postage prepaid to the intended recipient's last known mailing address. All notices under this Declaration shall be deemed given, received, made or communicated on the date personal delivery is effected or, if mailed, on the delivery date or attempted delivery date shown on the return receipt.
- I. Negation of Partnership. None of the terms or provisions of this Declaration shall be deemed to create a partnership between or among the Declarant, any Owner, or the City and/or County in their respective businesses or otherwise; nor shall it cause them to be considered joint ventures or members of any joint enterprise.
- J. Enforcement. If any person, persons, corporation, or entity of any other character shall violate or attempt to violate this Declaration, it shall be lawful for the City and/or County, its successors and assigns, to prosecute proceedings at law, or in equity, against said person, or entity violating or attempting to violate such covenant and to prevent said person or entity from violating or attempting to violate such covenant. The failure at any time to enforce this Declaration by the City and/or County, its successors and assigns, whether any violations hereof are known or not, shall not constitute a waiver or estoppel of the right to do so.

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K. Modification and Amendment This Declaration may only be modified, amended or terminated upon the filing of such modification, amendment or termination in the Official Records of Travis County, Texas, executed, acknowledged and approved by the Executive Manager of the Travis County Transportation and Natural Resources Department; and (c) the Owners of the Property.

Executed to be effective this \_\_\_\_ day of \_\_\_\_\_, 2006.

DECLARANT:

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

STATE OF TEXAS

COUNTY OF TRAVIS

This instrument was acknowledged before me on this the \_\_\_\_ day of \_\_\_\_\_, 2006, by \_\_\_\_\_ in his capacity as \_\_\_\_\_ of \_\_\_\_\_ and on behalf of same.

\_\_\_\_\_  
Notary Signature

STATE OF TEXAS

COUNTY OF TRAVIS

This instrument was acknowledged before me on this the \_\_\_\_ day of \_\_\_\_\_, 2006, by \_\_\_\_\_ in his capacity as \_\_\_\_\_ of \_\_\_\_\_ and on behalf of same.

\_\_\_\_\_  
Notary Signature

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EXHIBIT C

COLLATERAL ASSIGNMENT

COLLATERAL ASSIGNMENT OF CONTRACT AND CONTRACT RIGHTS

DATE: \_\_\_\_\_, 200\_

ASSIGNOR:

ASSIGNOR'S ADDRESS:

BENEFICIARY: Travis County, Texas

BENEFICIARY'S ADDRESS: P.O. Box 1748, 411 West 13<sup>th</sup> Street, Austin, Texas 78767

PARTICIPATION AGREEMENT: The \_\_\_ Participation Agreement between Assignor and Assignee dated \_\_\_\_\_, 200\_.

CONTRACT: All of Assignor's right, title, and interest (but not Assignor's duties or obligations) in and to the following described contracts (collectively, the "Contracts"):

- (a) The Construction Contract between \_\_\_\_\_ and Assignor dated as of \_\_\_\_\_, 200\_, a copy of which is attached hereto as Exhibit "A";
- (b) The Engineering Contract between \_\_\_\_\_ and Assignor dated as of \_\_\_\_\_, 200\_, a copy of which is attached as Exhibit "B"; and
- (c) The Project Management Contract between \_\_\_\_\_ and Assignor dated as of \_\_\_\_\_, 200\_, a copy of which is attached as Exhibit "C";

1. Agreement. Subject to the terms and conditions of this Collateral Assignment of Contract and Contract Rights (this "Assignment"), in consideration of the sum of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which Assignor acknowledges, Assignor hereby grants, assigns, transfers, and conveys to Beneficiary the Contracts, and all powers, benefits, right, title, and interest accruing and to accrue to Assignor and to which Assignor is or may hereafter become entitled to by virtue of the Contracts.

2. Secured Obligations. This assignment is made to Beneficiary to secure the performance by Assignor of all of Assignor's duties and obligations under the Participation Agreement.

3. License. Beneficiary hereby grants to Assignor a limited license (the "License") to exercise and enjoy all of Assignor's rights and benefits under the Contracts. Upon the occurrence of an Event of Default (as defined below), Beneficiary will have the complete right, power and authority hereunder, then or thereafter, to

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terminate the License in its own name or in the name of Assignor, to exercise and enjoy all of Assignor's rights and benefits under the Contracts.

4. Assumption Date. Upon the occurrence of an Event of Default, as defined below, Secured Party may, at its option, assume Assignor's rights under the Contracts, subject to the terms and conditions of this Assignment, as of the date of such default or at any time thereafter while such default continues (the "Assumption Date").
  - (a) After the Assumption Date, all of Assignor's rights and benefits under the Contracts will terminate without notice of any kind to Assignor, and Beneficiary will succeed to all of Assignor's rights, benefits, duties and obligations under the Contracts.
  - (b) The other parties to the Contracts will recognize and affirm to Beneficiary as if Beneficiary had originally been a party to such Contracts. In the event of a conflict between the terms of the Contracts and the terms of the Participation Agreement, the terms of the Participation Agreement will control.
  
5. Assignor's Representations and Warranties and Related Covenants. Assignor represents and warrants to Beneficiary as follows:
  - (a) Assignor's execution, delivery and performance of this Assignment does not require the consent or approval of any governmental body or other regulatory authority and are not in contravention of, or in conflict with, any law or regulation or any term or provision of the Contracts. This Assignment is a valid, binding and legally enforceable obligation of Assignor in accordance with its terms, except to the extent, if any, that enforceability may be affected or limited by creditors' rights, legislation and court decisions of general application.
  - (b) The execution and delivery of this Assignment is not, and the performance of this Assignment will not be, in contravention of, or in conflict with, any agreement, indenture or undertaking to which Assignor is a party or by which Assignor or any of its property is or may be bound or affected, and do not and will not cause any security interest, lien or other encumbrance to be created or imposed or accelerated upon or in connection with any such property.
  - (c) To the Assignor's current actual knowledge, there is no litigation or other proceeding pending against or affecting Assignor or its properties which, if determined adversely to Assignor, would have a materially adverse effect on Assignor's financial condition, properties or operations. Assignor is not in default in any materially adverse manner with respect to any law, restriction, order, writ, injunction, decree or demand of any court or other governmental or regulatory authority or with respect to any

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agreement, indenture or undertaking to which it or any of its property is bound or affected.

- (d) Except for this Assignment (which Assignor has authority to grant): Assignor has not previously assigned, transferred, conveyed, sold, pledged or hypothecated any of the Contracts.

6. Assignor's Agreements. Assignor agrees as follows:

- (a) To perform all of its obligations under the Participation Agreement.
- (b) To perform or cause to be performed each and every obligation and duty imposed upon Assignor by the Contracts and to not do any act or not omit to do any act which would constitute a breach of, default under or noncompliance with the Contracts.
- (j) Not to execute any amendment or modification of the Contracts or otherwise change or alter any of the terms and provisions of the Contracts without Beneficiary's prior written consent.
- (l) To promptly notify Beneficiary of the occurrence of any event which constitutes a breach of, default under, or noncompliance with, or which with the passage of time, notice, or both, will constitute a breach of, default under, or noncompliance with any of the terms and provisions of the Contracts.
- (m) To send, with reasonable promptness, to Beneficiary copies of any and all notices of default, breach or material alteration sent or received by Assignor under the Contracts or in connection with Assignor's interest in the Contracts.

7. Events of Default. Assignor will be in default under this Assignment upon the happening of any one or more of the following events or conditions (an "Event of Default"):

- (a) Any event of default which occurs under the Participation Agreement which is not cured within any applicable grace or notice and opportunity to cure period.
- (b) Breach of, noncompliance with, or default by Assignor in any of its agreements under this Assignment which is not cured within 15 days after notice of such breach, noncompliance or default, provided that such 15-day cure period will be extended if such breach, noncompliance or default cannot be reasonably cured within 15 days, provided that Assignor commences to cure such breach, noncompliance or default within the 15-day period and thereafter diligently prosecutes such cure to completion.

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- (c) Material breach of, noncompliance with, or default under any of the terms and provisions of the Contracts which is not cured within any applicable grace or notice and opportunity to cure period.

8 Beneficiary's Rights and Remedies.

- (a) Assignor hereby irrevocably appoints Beneficiary as Assignor's true and lawful agent and attorney-in-fact, with full power of substitution, in Beneficiary's own name or in the name of Assignor, for Beneficiary's sole use and benefit, but at Assignor's cost and expense, to exercise, upon the occurrence of an Event of Default, all or any of the following powers and rights with respect to the Contracts (without any obligation on the part of Beneficiary to exercise any of the following powers and rights): (1) to demand, receive, collect, sue and give acquittance for, settle, compromise, compound, prosecute or defend any action or proceeding with respect to the Contracts; (2) to exercise, enforce, enjoy, carry out, receive, and/or perform any and all rights, powers, duties, benefits, obligations and remedies of Assignor with respect to and arising under the Contracts; provided, however, Beneficiary's exercise of or Beneficiary's failure to exercise any such authority will in no manner affect Assignor's liability hereunder or under the Participation Agreement, and provided, further, that Beneficiary will be under no obligation or duty to exercise any of the powers hereby conferred upon it and will be without liability for any act or failure to act in connection with the preservation of any rights under any of the Contracts. The agency and authority hereby granted and created is an agency coupled with an interest.
- (b) Upon the occurrence of an Event of Default and at any time thereafter, Beneficiary will have the rights and remedies provided by law.
- (c) All recitals in any instrument of assignment or any other instrument executed by Beneficiary incident to the Contracts or any part thereof will be full proof of the matters stated therein and no other proof will be requisite to establish full legal propriety of the action taken by Beneficiary or of any fact, condition or thing incident thereto, and all prerequisites of such action will be presumed conclusively to have been performed or to have occurred.
- (d) Assignor waives demand, notice, protest, and all demands and notices of any action taken by Beneficiary under this Assignment.

10. General. Assignor and Beneficiary agree as follows:

- (a) Upon the full performance of Assignor's obligations under the Participation Agreement, this Assignment and the interests created hereby will terminate. Upon termination of this Assignment, Beneficiary will, at Assignor's



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sole cost and expense, execute and deliver to Assignor such documents as Assignor will reasonably request to evidence such termination.

- (b) Beneficiary is not, by entering into this Assignment or accepting the assignment of and security interest in the Contracts, assuming or agreeing to assume any obligation or liabilities on the part of Assignor under the Contracts.
- (c) Beneficiary's remedies hereunder are cumulative, and the exercise of any one or more of the remedies provided for herein will not be construed as a waiver of any of Beneficiary's other remedies.
- (d) Notice mailed to Assignor's address as reflected above, or to Assignor's most recent changed address on file with Beneficiary, at least ten (10) days prior to the related action, will be deemed reasonable.
- (e) THIS ASSIGNMENT HAS BEEN MADE IN, AND THE INTEREST GRANTED HEREBY IS GRANTED IN, AND BOTH WILL BE GOVERNED BY, THE LAWS OF THE STATE OF TEXAS IN ALL RESPECTS, INCLUDING WITHOUT LIMITATION MATTERS OF CONSTRUCTION, VALIDITY, ENFORCEMENT AND PERFORMANCE. This Assignment may not be modified, altered or amended except in writing duly signed by an authorized representative of Beneficiary and by Assignor. If any provision of this Assignment is rendered or declared illegal or unenforceable by reason of any existing or subsequently enacted statute, rule or regulation, or by order of or judgment of a court, any and all other terms and provisions of this Assignment will remain in full force and effect as stated and set forth herein.
- (f) All notices, demands, requests and other communications required or permitted hereunder will be in writing and may be personally served or sent by mail, and if given by personal service, it will be deemed to have been given upon receipt, and if sent by mail, it will be deemed to have been given upon its deposit in the mail, postage prepaid, registered or certified, return receipt requested, addressed to Assignor or Beneficiary, as the case may be. The addresses of the parties to this Assignment are set forth on page 1 of this Assignment. Any of the parties to this Assignment will have the right to change their respective addresses by designating a new address in a written notice to the other parties as herein required.
- (g) This Assignment may be executed in multiple original counterparts.

EXECUTED this \_\_\_ day of \_\_\_\_\_, 200\_

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**BENEFICIARY:**

**TRAVIS COUNTY, TEXAS**

By: \_\_\_\_\_  
Samuel T. Biscoe, County Judge  
Date: \_\_\_\_\_

**ASSIGNOR:**

\_\_\_\_\_

**CONSENTED TO BY:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

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**EXHIBIT D**

**CONSTRUCTION ADMINISTRATION SERVICES**

**1. Coordination and Pre-Construction Meeting Services**

**(a) Technical Submittals and Samples**

Prepares for the coordination meeting with the County and the Developer a list of all technical submittals required by the Construction Contractor. This list shall be distributed at the pre-construction meeting.

**(b) Permits**

Prepares for the coordination meeting, a list of all permits to be obtained by the Construction Contractor. This list shall be distributed at the pre-construction meeting.

**(c) Material Testing and Inspections**

Prepares for the coordination meeting recommendations for the project construction and material testing protocols.

**(d) Pre-construction Submittals**

Provides review comments on Construction Contractors' pre-construction submittals to the Construction Contractor at the pre-construction meeting. Pre-construction submittals include the Construction Contractor's construction schedule, division of contract, subcontractor list, material supplier list, or any special submittals requested of the Construction Contractor prior to the pre-construction meeting.

**2. Administrative Tasks**

- (a) Prepares draft agenda for pre-construction meeting.
- (b) Determines the project communication, reporting, submittal approval/rejection protocol, and documentation requirements.
- (c) Conducts weekly job site meetings. Determines the format for scheduling and conducting, and recording construction meeting minutes.
- (d) Reviews and becomes knowledgeable of any required Developer or County construction administration processes.
- (e) Records meeting minutes.
- (f) Maintains Project construction records consisting of all correspondence related to the construction of the project including but not limited to:
  - (i) all approved technical submittals and a technical submittal checklist;
  - (ii) all approved field orders and change orders;
  - (iii) contract specifications and drawings;
  - (iv) daily log ;

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- (v) job meeting minutes;
  - (vi) clarifications drawings;
  - (vii) daily progress reports; and,
  - (viii) processed pay requests
- (g) The daily log, as a minimum, shall contain information regarding weather conditions, ambient temperatures, Construction Contractor manpower levels, sub-Construction Contractors manpower levels, daily hours of inspection, travel time, conversations, work items being performed, material delivery information and other observations.
- (h) Daily logs must be completed and include a statement as to whether or not the Construction Contractor is behind schedule or delaying the progress of the work and, if so, the steps the Construction Contractor should take to get back on schedule. Copies of daily logs shall be made available to the County upon request.
- (i) Maintain complete files of all Project-related documents at the Project site.
- (j) Upon the completion of each calendar month, furnish the County and the Developer with a typed statement summarizing the status of the work. In the event the work is behind schedule, the statement shall also delineate what efforts the Construction Contractor must take to get back on schedule. A copy of this statement shall also be delivered to the Construction Contractor.
- (k) After the Project has been completed, submit the Project files, along with the original daily logs to TNR.

### 3 Construction Phase Services

#### (a) Submittals

Process submittals, including receipt, review of, and appropriate action on shop drawings, samples and other submittals. Provide recommendations for the County and Developer approvals of "or equal" substitutions along with any recommended cost adjustments.

#### (b) Contract Modifications

For modifications required by the County and/or the Developer to resolve design errors or omissions, the Project Manager shall coordinate with the Project Engineer to provide the following services: Provide recommendations to the County and/or the Developer concerning potential changes and modifications to the project, which are encountered during construction. Identify and investigate feasible alternatives, to the extent practical, and prepare necessary plans, details, etc. required to obtain firm cost and schedule

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impact statements from the Construction Contractor. Evaluate the Construction Contractor's impact statements and in conjunction with the Developer and the County negotiate costs for any contemplated changes with the Construction Contractor. The Project Manager shall prepare and distribute change orders and jointly sign all Change Orders with the County and the Developer

(c) Construction Contractor Pay Requests

Upon receipt of a pay request from a Construction Contractor, jointly review each line item with the Construction Contractor and advise the Construction Contractor's representative of any discrepancies or conflicts in the pay requests. Verify the accuracy of quantities of installed, delivered, and stored materials. Advise the County and the Developer of any issues that may warrant withholding, reducing, or delaying payment to the Construction Contractor and provide supporting documentation

(d) Interpretation of the Contract Documents

Upon request, provide interpretation or clarification of the construction documents to the County, the Developer, or the Construction Contractor. Determine an acceptable method for communicating interpretations and clarifications directly to the Construction Contractor beforehand.

(e) Observation

Site visits are to be performed to the extent necessary to:

- (i) Observe, document, and report to the County, the Developer, and the Construction Contractor whether the project is being constructed in accordance with the contract documents.
- (ii) Observe, document, and report to the County, the Developer, and the Construction Contractor whether the proper measure of unit price bid quantities is being implemented, and confirm percentage completion of lump sum items.
- (iii) Observe, document, and report to the County and the Developer the progress of the Construction Contractor and resources committed to the project by the Construction Contractor.

(f) Materials Testing and Inspections

- (i) Establish and administer a materials sampling and testing program to provide quality control and compliance with the construction plans and specifications. Utilizing the list of required testing developed from the construction documents, jointly develop with the Project Engineer and the Construction Contractor a testing program for the project. The testing

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program must designate what services are to be provided by the Project Engineer and the Construction Contractor. Compensation for testing services provided by the Project Engineer is to be included in the Project Engineer's fees for Construction Administration services. Services shall include, but not be limited to soils compaction testing, concrete cylinder compression strength tests, gradation analysis, miscellaneous shop inspection, and other testing required by the construction contract documents, or as specifically requested by the County and the Developer. A copy of the proposed testing program shall be prepared for review by the County and the Developer prior to beginning work.

- (ii) Review all laboratory and field-testing results to determine whether results are in compliance with the construction contract documents and provide recommendations for correction of substandard materials and workmanship revealed during testing.

(k) Claims

Assist TNR and the Developer with claim reviews and negotiations upon request and with the preparation of related correspondence and documentation.

(h) Contract Enforcement

Examine Construction Contractor workmanship, materials, progress, and overall compliance with requirements of the contract documents and immediately report any observed deficiencies to the Construction Contractor, the County, and the Developer. Communicate to the Construction Contractor, the County, and the Developer what may be necessary to effect corrective action. Document deficiencies and actions taken by Construction Contractor to correct them. Assist the County and the Developer with evaluating impacts of potential contract termination upon project costs and schedule.

(i) Contract Termination

Upon request, assist the County and the Developer with completion of an assessment of the status of the Construction Contractor's contract, the development of an agreement with the Construction Contractor's Surety to complete the work, and preparing and holding a pre-construction meeting with the replacement Construction Contractor. Unless otherwise specified in the contract, these services shall be considered additional scope of work for which the scope, methodology, and fee must be negotiated with the County and the Developer before proceeding.

(j) Project Acceptance and Close-out

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- (i) Jointly perform with the County the Developer, and the Construction Contractor substantial completion and final inspections and compile and distribute related punch requiring correction. When properly completed, submit O&M manuals to lists.
- (ii) Compile and review for completeness all Operation and Maintenance Manuals to be submitted by the Construction Contractor and inform Construction Contractor of any deficiencies .
- (iii) Review and comment on final pay request and supporting close-out documents, and provide recommendation for approval or rejection to the County and the Developer
- (iv) Upon Project completion, obtain the original drawings from the Project Engineer, incorporate all as-built conditions on the original drawings and provide a copies to the County and the Developer at project close-out.

4. Post Construction Services

(a) Warranty Period Services

- (i) Meet with County and the Developer upon request during the warranty period to investigate problems with material, equipment, and/or workmanship that may arise. Determine whether or not such problems are warranty issues or design issues and recommend solutions.
- (ii) Coordinate and attend with the County and the Developer a final warranty inspection no less than sixty days prior to expiration of Construction Contractor warranty period. Develop list of deficiencies, if any, and determine if deficiencies are caused by inferior workmanship, equipment, and/or materials or caused by other reasons. Provide recommendations for resolving each deficiency. Complete a follow-up inspection with the County to determine whether deficiencies have been corrected by the Construction Contractor prior to expiration of the warranty period.



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**EXHIBIT E****ENGINEERING SERVICES & DELIVERABLES:****PROJECT DESIGN**

- I. The Project Engineer shall provide professional services to produce both Preliminary Plan Documents and final plans, specifications and estimates for construction documents for the Project. These services generally will include, but are not limited to the following; storm water drainage system analysis and design (may include water quality and detention); preparing schematic and final right-of-way and easement parcel exhibits; preparing construction documents; completing land surveys, geotechnical investigations and reports with analysis needed for pavement design, structure foundation design, and evaluating slope stability; completing alignment and intersection plans and analysis; developing roadway signage and pavement marking plans, traffic control plans, and plans for utility relocation and landscaping; completing environmental assessments and mitigation plans; monitoring project cost and applying cost recovery methodologies such as value engineering; attending and leading public meetings; and, acquiring all appropriate regulatory permits and clearances.
  - a) The Project Engineer will perform the following services:
    - (i) Develop all Plans, Specifications, and Estimates (PS&B documents) within the project's allotted budget, to standards stipulated by Travis County.
    - (ii) Develop and submit a construction cost estimate at each phase of the design project.
    - (iii) Use generally recognized engineering methodology and standards of care.
    - (iv) For each required permit, either obtain the permit or identify the permit for the Construction Contractor and direct the Construction Contractor to obtain it.
    - (v) Conduct and provide reports for all applicable environmental studies, evaluations, assessments, and calculation/negotiations for mitigation.
    - (vi) Establish and provide a detailed project design task completion. Monitor and provide task completion report to the Developer and the County.
    - (vii) Produce a utility relocation plan and coordinate ALL utility relocation efforts with the appropriate utility company.
    - (viii) Provide on call or total technical assistance during the bidding and construction periods.
    - (ix) Prepare appropriate displays and attend meetings with Travis County staff, regulatory agencies, and public groups, both as a technical advisor and as a project presenter.
    - (x) Provide all geotechnical reports and analysis.
    - (xi) Provide required services, as determined by the County and the Developer, for construction administration.
  - (b) The Project Engineer will provide six specific work products with each requiring a separate "Notice to Proceed" under the same contract Authorization to proceed to the

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next work product or phase must be in writing in the form of a "Notice to Proceed". The required work products include Work Product 1, 30% complete design documents; Work Product 2, 60% complete design documents; Work Product 3, 90% complete construction documents; Work Product 4, the 100% bid-ready set of construction documents; Work Product 5, Construction bidding and award services; and Work Product 6, Construction Administration Services. Work Product 6 shall be optional and included at the discretion of the Developer and the County. Work Products 1 through 4 shall be submitted for review and written notice-to-proceed must be issued before proceeding to the next Work Product. The review process shall consist of submitting two sets of the plans 22" by 34", specifications, and estimates of probable construction costs to the Developer and TNR when the design and construction documents are 30%, 60%, 90% and 100% completed. Allow two weeks for the Developer and TNR to review and provide written comments and/or approval for each submittal. Submit two sets final check sets and allow one week for the Developer and TNR to review and provide written comments and/or approval.

- (i) Work Product 1: 30% complete design documents.
- The 30% submittal should be presented in two phases if alternative analyses are included in the scope of work. The first phase will be the results of the analyses and the Project Engineer's recommendations. The second phase will be the 30% complete design documents for the selected alternative. Public meetings may be required in the development of Work Product 1. The 30% design submittal is to include preliminary engineering for the design elements required to fully address the project scope. The requirements for the 30% design submittals shall as a minimum include the following:
- A. Cover sheet indicating project name and #; site location; design speed; project limits with beginning and ending stations; names and signature blocks for the project owner/partners; symbology legend; and the proposed index of drawings to be included in the plan set.
  - B. Site layout drawing;
  - C. Typical sections showing proposed and existing conditions.
  - D. Plan and profile sheets showing existing conditions and how design speed, site distance, drainage, and environmental requirements are planned to be met as well as the proposed type and location of any significant structures to be included;
  - E. Cross-sections for roadways showing existing ground conditions and depicting proposed conditions based upon preliminary alignments and typical sections;
  - F. Identification of limits of construction and properties that could be affected by the proposed construction;
  - G. Identification of existing easements and utilities that could be affected by the proposed construction;
  - H. Engineer's estimate of costs along with an explanation of the method used and any assumptions that were made. Recommended changes for the parties to consider if a problem has been identified that could adversely affect the project schedule or budget

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- I. Preliminary list of required regulatory approvals and right-of-way takings
- J. Updated project schedule with status tracking

Total projected time for completion of Work Product 1 is sixty (60) calendar days.

(ii) Work Product 2: 60% complete design documents:

The 60% complete documents should address all major design issues and set direction for completion of the construction documents. A public meeting may be required. The requirements for the 60% design submittals shall as a minimum include the following:

- A. Completed site layout drawings
- B. Drawings that represent all items of work in the scope of services for the project including coordinates for proposed alignment (no blank pages or missing pages). Revised typical sections and cross sections to reflect more complete design
- C. Draft specifications;
- D. Proposed construction schedule and sequence of work
- E. list of permits required and schedule for obtaining all permits/approvals/utility coordination required prior to bidding
- F. Engineering calculations, studies, and reports used in design (drainage report, geotechnical report, environmental studies & reports, slope stability analysis, preliminary quantities, structural design, etc.)
- G. Drawings should demonstrate coordination between prime consultant and sub-consultants (no missing design components to be provided by sub-consultants)
- H. Engineer's estimate of costs along with an explanation of the method used and any assumptions that were made. Recommended changes for the parties to consider if a problem has been identified that could adversely affect the project schedule or budget
- I. Draft ROW strip maps, sketches, & field notes. Final ROW documents to be submitted within 30 days of receiving review comments from Travis County, if required.
- J. Updated project schedule with status tracking.

Total projected time for completion of Work Product 2 is sixty (60) calendar days.

(iii) Work Product 3: 90% complete construction documents:

Provide construction documents that are virtually "ready to bid" with minor revisions, no outstanding design issues, all work coordinated and illustrated on the drawing. A public meeting may be required. The requirements for the 90% design submittals shall as a minimum include the following:

- A. Complete set of construction drawings with all details, cross-sections, profiles, quantities, and title sheet
- B. Full set of detailed specifications and index in bid-ready format (Microsoft Word format)

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- C. Detailed breakdown cost estimate and associated bid schedule in County format
- D. Calculations for unit price quantities and final engineering design calculations
- E. List of permits secured and any permits/approvals pending.
- F. Final utility company costs and documentation from each utility contacted
- G. Final construction schedule/sequence of work.

Total projected time for completion of Work Product 3 is thirty (30) calendar days.

- (iv) Work Product 4: 100% complete construction documents:  
Provide final plans, specifications, estimates, quantities, bid schedule, permits, and verification of property acquisitions and/or right-of-entries for the construction contract, and a list of any outstanding issues to be resolved before or during project bidding process (total projected time is 165 calendar day after notice to proceed date)

Total projected time for completion of Work Product 4 is fifteen (15) calendar days.

- (v) Work Product 5: Construction Contract bidding and award services:  
Provide assistance with responding to bidder questions, preparing addenda, tabulating and evaluating bids, and providing recommendation for award.

Total projected time for completion of Work Product 5 is to be determined at the time the project is approved for bidding.

- (vi) Work Product 6: Construction Phase Services:  
Construction phase services are to be provided in accordance with Exhibit E throughout the period of construction to provide technical interpretations and clarifications of the contract documents; to provide technical reviews and approvals of construction submittals; to observe that the work is proceeding in accordance with the contract documents and to document the progress and effort; to prepare, reproduce, and distribute supplemental drawings and specifications in response to requests for information by the Construction Contractor; to inform the Construction Contractor, the County and the Developer immediately upon identifying unacceptable deviations from the contract documents and document such deviations; to resolve problems which arise during performance of the work by the Construction Contractor; and, to perform all other duties that are included in the contract. Construction phase services shall extend through the Construction Contractor's warranty of construction, starting after the County and the Developer issue the project Completion Certificate or from the date of the notice of Substantial Completion. The



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warranty period during which the Project Engineer's services shall be provided shall not exceed one year unless otherwise specified herein.

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**EXHIBIT F****ENGINEERING SERVICES & DELIVERABLES:  
UTILITY RELOCATION SERVICES**

1. Research records of properties within project limits of construction
  - a) identify all utility companies that serve the properties
  - b) identify easements on the property and obtain descriptions and copies of any dedication instruments and plats
  - c) identify owners of utilities and contact information
2. Obtain existing condition and proposed improvement information from utility companies
  - a) determine type, size, and approximate location of existing utilities.
    - (i) interview appropriate utility company representatives
    - (ii) obtain as-built drawings if available
  - b) determine future plans for utility work within the limits of construction
    - (i) interview appropriate utility company representatives
    - (ii) if available, obtain preliminary utility engineering plans and schedule for future improvements
    - (iii) If no engineering plans are available, obtain description of proposed improvements including design criteria that will be used including but not limited to:
      - A) utility assignment
      - B) depth requirements
      - C) design requirements for separation from other utilities, structures, or activities
3. Review project design information for existing and potential conflicts
  - a) plan sheets showing existing and proposed conditions for roadways, bridges, buildings, utilities, topography, fences, walls, storm sewer systems, etc.
  - b) profile sheets showing existing and proposed conditions
  - c) detail sheets for foundations showing size and depth requirements
  - d) cross sections showing existing ground and proposed improvement including excavations, embankments, drainage channels, etc
4. Coordinate the relocation, protection, upgrading or abandonment of utilities
  - a) Identify with the County's Project Managers apparent conflicts between existing or proposed utilities and the project improvements shown in the design documents.
  - b) Provide copies of design documents to all utility service providers along with list of conflicts identified.
    - i) maintain database of utility companies provided with design information, contact persons and numbers, information transmittals, written and verbal communications, and any other pertinent information showing who was involved in the coordination, the decisions made, and the time taken to complete the process
    - ii) meet with utility company representatives to determine their proposed method for reconciling conflicts and communicate the information to the County
    - iii) meet with the County and County Attorneys and/or the utility company representatives and other public entities as needed to assist with reconciling conflicts between utilities and the proposed improvements, and record and distribute minutes of such meetings

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- iv) prepare draft of elements to be included in any utility agreements or memorandum of understandings to be developed between the County and utility service providers. Include responsibilities for relocation, upgrading, or protection; specifics related to costs, scheduling, sizes and types, vertical and horizontal locations; and, any special construction and/or protection requirements.
- v) provide documentation of correspondence and coordination effort to the County upon completion of assignment

5. Additional Services, if approved by the County:

- a) field check locations of above ground utilities and visible components of below ground utilities and mark locations relative to existing topographic features on mapping to be provided by the County.
- c) provide, or contract with companies that can provide, underground utility locating services.
- d) hand excavate to verify location of utilities
- e) represent the County at Austin Area Utility Coordinating Committee meetings
- f) attend pre-construction and construction meetings
- g) provide documentation and testimony as needed to help resolve claims related to utility work or property condemnation cases.

(P)



US

10-30-07

Davis

# 20

Travis County Commissioners Court Agenda Request

Voting Session October 30, 2007

Work Session

I. A. Request made by: Joseph P. Gieselman, TNR Executive Manager Phone # 854-9434

B. Requested Text:  
Consider and take appropriate action on request to approve an Interlocal Cooperation Agreement with the City of Austin for the Braker Lane 2005 Bond project (US 290 at Harris Branch Parkway to SH 130 at Parmer Lane), in Precinct 1

C. Approved by: Ron Davis, Commissioner Precinct 1

II. A. Backup memorandum and exhibits should be attached and submitted with this Agenda Request (Original and eight (8) copies of agenda request and backup).

B. Please list all of the agencies or officials names and telephone numbers that might be affected or be involved with the request. Send a copy of this Agenda Request and backup to them:

III. Required Authorizations: Please check if applicable:

- Planning and Budget Office (473-9106)
- Additional funding for any department or for any purpose
- Transfer of existing funds within or between any budget line item
- Grant
- Human Resources Department (473-9165):
- A change in your department's personnel (reclassifications, etc.)
- Purchasing Office (473-9700)
- Bid, Purchase Contract, Request for Proposal, Procurement
- County Attorney's Office (473-9415)
- Contract, Agreement, Policy & Procedure

FILED  
OCT 31 11 PM 2:20  
CLERK  
TRAVIS COUNTY TEXAS

AGENDA REQUEST DEADLINE: This Agenda Request complete with the backup memorandum and exhibits should be submitted to the County Judge's Office no later than 5:00 PM on Tuesday for the following week's meeting. Late or incomplete requests may be deferred to the next subsequent meeting.

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**TRANSPORTATION AND NATURAL RESOURCES DEPARTMENT**

JOSEPH P. GIESELMAN, EXECUTIVE MANAGER

411 W. 13th St.  
Eleventh Floor  
P.O. Box 1748  
Austin, Texas 78767  
(512) 854-9383  
FAX (512) 854-4626

October 23, 2007

**MEMORANDUM**

**TO:** Members of the Commissioners' Court

**THROUGH:** Joseph P. Gieselman, Executive Manager

**FROM:** Steve Manilla, P.E., TNR Public Works Director

**SUBJECT:** Interlocal Cooperation Agreement with City of Austin for Braker Lane Public-Private Project

FILED  
OCTOBER 23 2007  
COUNTY CLERK  
STATE OF TEXAS

**Proposed Motion:**

Consider and take appropriate action on request to approve an Interlocal Cooperation Agreement with the City of Austin for the Braker Lane 2005 Bond project (US 290 at Harris Branch Parkway to SH 130 at Parmer Lane), in Precinct 1

**Summary and Staff Recommendations:**

The Braker Lane improvement project was initiated when the County included it as a Tier 1 public-private partnership project in the 2005 Bond referendum. Upon approval of the bond referendum the County and the Developer were required to enter into a Participation Agreement before December 31, 2006 and it was accomplished on December 19, 2006. The basic terms of the Participation Agreement are that the Developer donates all right-of-way within its control and shares the engineering and construction costs for the roadway sections to be constructed within its property. Prior to the bond referendum the City of Austin indicated willingness to pay 1/3 of the construction costs. As such, the County budgeted for 33% of the construction cost and 50% of the engineering costs. Subsequently, legal staff of the City and County has developed the attached Interlocal Cooperation Agreement. The Interlocal Agreement is to be presented to the City Council at a December 2007 meeting.

TNR recommends approval of the Interlocal Cooperation Agreement.

**Budgetary and Fiscal Impacts:**

The 2005 Bond program, the Participation Agreement with the developer, and this Interlocal Agreement with the City of Austin will provide engineering, right-of-way, and construction funds for the project. The estimated construction cost for the project is approximately \$8,000,000 of which the City will provide \$2,670,000 for construction costs; the Developer will provide 50% of design costs and 33% of construction costs for that portion of the roadway that crosses its property; and, the County will provide the remainder. The County's current cash flow for this project provided \$700,000 of initial construction funds in March 2007 and will provide an additional \$3,400,000 in March 2008. Under the terms of the Participation Agreement all costs attributable to the County are contingent upon the availability of County funds. City staff has indicated that their funds are currently available. The Developer will be required to post fiscal security for its share of the construction costs prior to awarding the construction contract.

**Issues and Opportunities**

The area served by the Braker Lane, Parmer Lane, Decker Lake Road, and Braker Lane (Tier II) 2005 bond projects is in the City of Austin Desired Development Zone. These projects will provide transportation infrastructure needed to move traffic through the region as the Wildhorse Ranch PUD, Indian Hills, Whisper Valley, and other developments evolve, generating thousands of vehicle trips per day.

The Interlocal Cooperation Agreement supplements the previously approved Developer Participation Agreement by providing City funds for 33% of construction costs. The City retains approval authority over the expenditure of their funds and may inspect the construction as it progresses prior to approving invoices and change orders.

This project consists of constructing approximately 9000' of 4-lane roadway in five phases from US290 at Harris Branch Parkway south to SH130 at the Blue Bluff Road (future Parmer Lane) interchange. The Participation Agreement provides for design and construction of three of the five phases. It is in the 2030 CAMPO plan where it is planned to be a 4-lane arterial roadway. Completion of the roadway under the terms of the Participation Agreement is consistent with the CAMPO plan.

As proposed in the Participation Agreement the project is divided into multiple phases and the first construction contract is to be awarded in the summer of 2009. The completion of the Developer's portion of the project is contingent upon the Developer obtaining Capital Metro approval for a grade-separated railroad crossing which will likely be approved because this is Cap Metro's preferred design. The construction of the partnership portion of the project is expected to take up to two and one-half years to complete once it gets started. All work under the Participation Agreement is to be completed and accepted by the County by September 1, 2011.

Approximately 4000' of the 9000' alignment is located on property not owned or controlled by the developers. The July 2005 partnership guidelines adopted by the court state that the Developer will be responsible for dedicating right-of-way and sharing the costs of construction for sections of the roadway that cross property owned or controlled by the Developer. The County bond project budget was largely based upon the County being able to cost share one-third of the construction cost of this

project and relied upon developers donating most of the right-of-way. If the County can not partner with private parties for the full length of the project there may not be adequate funds to complete the originally planned four-lane roadway. Under these circumstances TNR may utilize available funding to complete at least two lanes of the roadway for the length of the project that is not included in Participation Agreements.

The project is to provide a four-lane roadway from the US290E intersection with Harris Branch Parkway to the SH 130 interchange with Parmer Lane. TxDot is planning to provide an interchange at Harris Branch Parkway when their US290E toll road project is constructed. TxDot obtained approval to construct US290E as a toll road on October 8, 2007. While awaiting this approval they have been developing a design for realigning a 4000' section of FM3177 to make it intersect with US290E at the Harris Branch interchange. Such realignment will provide a safer, more direct, and still fully state-maintained route from US290 to the County Exposition Center and points south. If the realignment of Decker Lane is completed Braker Lane will "T" into Decker Lane approximately 1500' south of US 290. TxDot will pay for designing and constructing the realignment if the County will obtain the right-of-way. To do this the County will need to acquire 3.7 more acres of right-of-way than it would have if it made a direct connection to Harris Branch Parkway. However, under these circumstances the County's project will terminate at the realigned FM3177 instead of US 290, resulting in County construction cost savings that will more than offset the higher right-of-way cost. TxDot will ask the County to assume responsibility for the existing 4000' long section of FM3177 after the realignment has been completed. This existing section of state highway is in very good condition and will not create an extraordinary burden on Travis County road maintenance programs. TxDot also indicates that for safety and operation reasons no interchange will be provided at the existing Decker Lane (FM3177)/US290E intersection.

Residents of the Harris Branch subdivision have indicated opposition to changes that will put more traffic onto Harris Branch Parkway north of US290, an area within Austin's city limits. Harris Branch Parkway is currently a four-lane divided arterial and in the CAMPO 2030 Plan and 2025 Austin Metropolitan Area Transportation Plan it is shown to ultimately be expanded to six lanes. TNR staff has met with HOA representatives and they are most concerned that the additional traffic and the future widening will increase the risk of pedestrian-vehicle accidents, particularly since there is an elementary school located on the west side of Harris Branch Parkway and the subdivision is on the east side. They also are concerned that the current condition of the pavement on Harris Branch Parkway is not adequate to accommodate additional traffic. The pavement is comprised of concrete rather than asphalt and heaving in areas has caused poor rideability. They are also concerned about additional traffic noise. TNR staff discussed the HOA's concerns with City staff who indicated that they would investigate a variety of methods for ensuring a safe crossing at the school, which they do routinely at school crossings. They also indicated that they have no funds at this time to reconstruct Harris Branch Parkway but they will submit it for a future bond referendum. The traffic noise issue may be able to be mitigated through the future pavement rehabilitation. Also, it is anticipated that the future construction of Arterial 'A' between US290 and Parmer Lane will help to reduce the amount of traffic on Harris Branch Parkway. The HOA is also opposed to the realignment of FM3177, discussed above. Indications are that TxDot will present their realignment project at a public meeting early next year.

Under the terms of the Developer Participation Agreement the Developer will take the lead on administering the engineering and construction contracts for the segments of the project that they control. When bidding of the construction contract occurs the Developer will be required to use a competitive process and include the County's HUB goals in the bidding documents. The Developer will award and enter into the construction contract and be responsible for quality control/quality assurance throughout the construction process. The County and City will reimburse the Developer for their share of the costs for work completed by the Developer to the City's and County's satisfaction.

City and County legal staff have prepared the attached Interlocal Agreement. It is expected to be placed on a December 2007 City Council Agenda.

**Required Authorizations:**

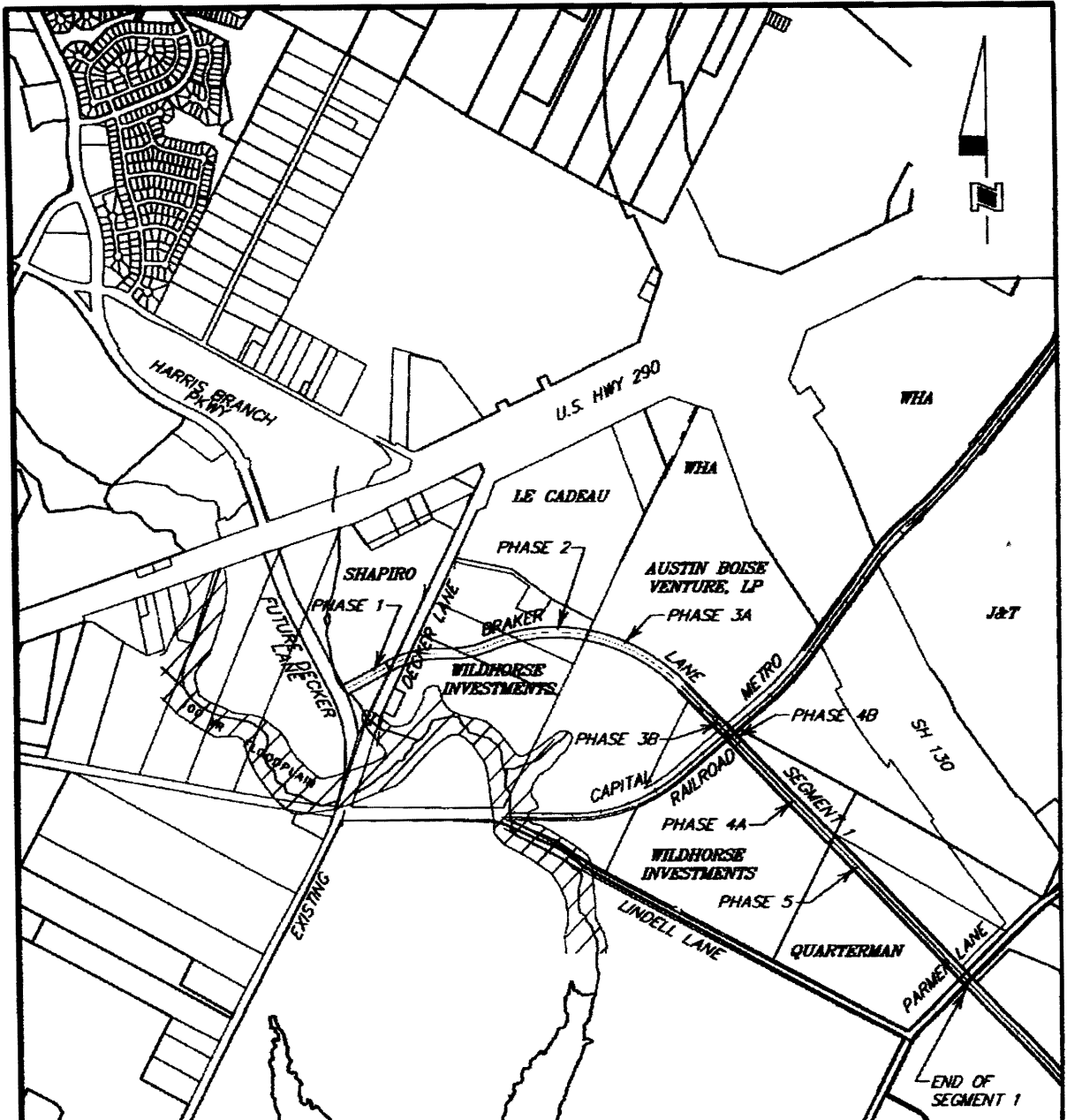
Assistant County Attorney: Christopher Gilmore

**Attachment:**

Vicinity Map

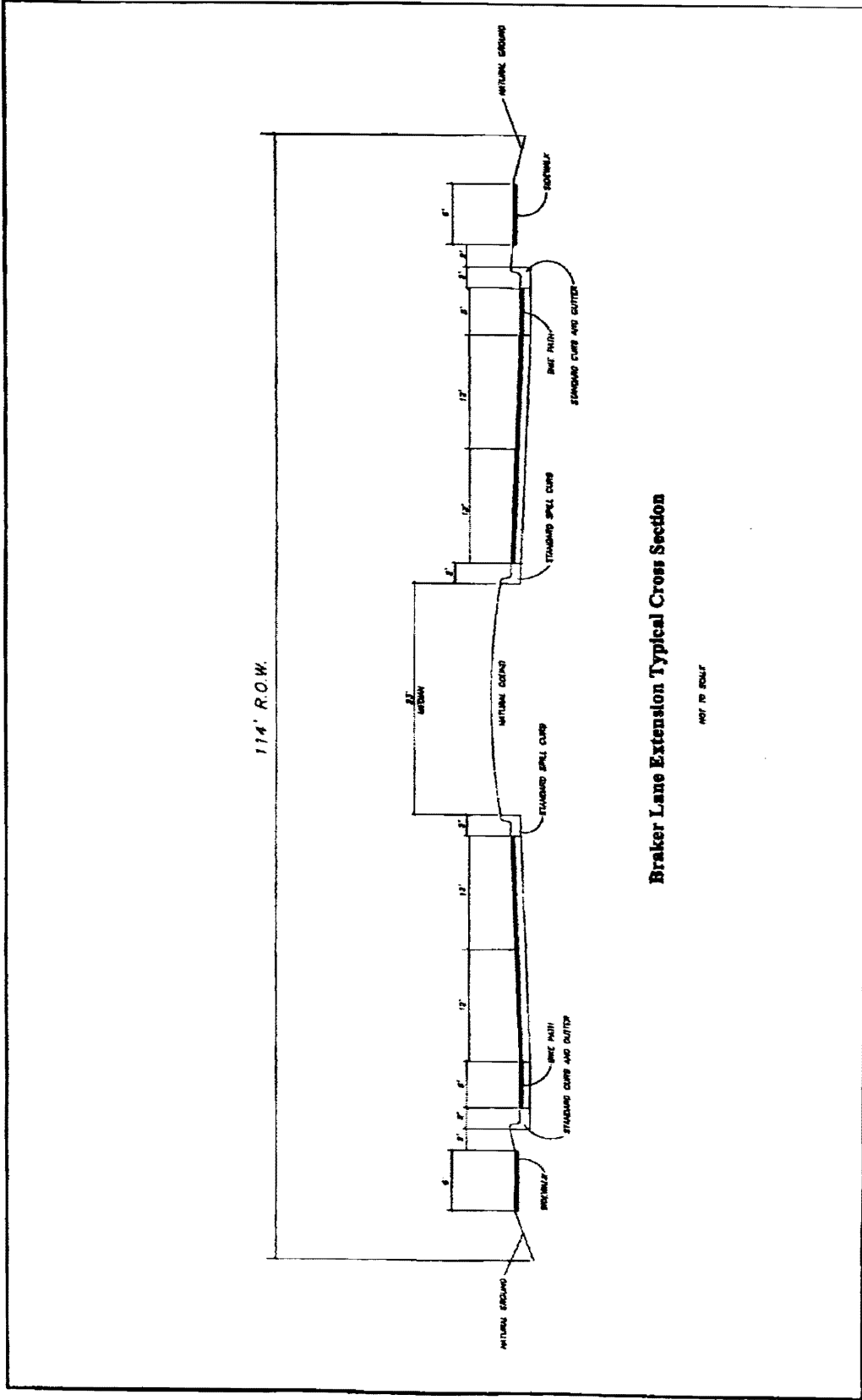
Typical Section

City of Austin Interlocal Cooperation Agreement



NOTE:  
PHASING SHOWN FOR IDENTIFICATION ONLY.

<b>BRAKER LANE</b>		
<b>TRAVIS COUNTY, TEXAS</b>		
<b>EXHIBIT A</b>		
<b>JC JONES &amp; CARTER, INC.</b> ENGINEERS • PLANNERS • SURVEYORS		
805 Las Cimas Parkway, Suite 230 Austin, Texas 78746-5493 (512) 441-9493		
Exhibit: A	Job No. A155-003	Date: 12-6-06



**Braker Lane Extension Typical Cross Section**

NOT TO SCALE

**BRAKER LANE EXTENSION  
INTERLOCAL COOPERATION AGREEMENT  
CITY OF AUSTIN AND TRAVIS COUNTY**

FILED  
CITY OF AUSTIN - 1 PM 2:20  
CLERK OF COURTS  
TRAVIS COUNTY, TEXAS

This Interlocal Cooperation Agreement is made and entered into by and between the City of Austin, Texas (the "City") and Travis County, Texas (the "County"), hereinafter collectively referred to as the "Parties", upon the premises and for the consideration stated herein.

WHEREAS, the County has entered into that certain Braker Lane Participation Agreement with Austin Boise Ventures, LP, Wildhorse Investments, Ltd., and J&T Development Group ("Developers") for the construction of and cost participation in the extension of a section of Braker Lane as a four lane arterial within right-of-way dedicated by Developer and/or as subsequently acquired (the "Project"); and

WHEREAS, the Project is located within and adjacent to the limited purposes City limits within the State Highway 130 development corridor; and

WHEREAS, a portion of the Project is located within the Limited Purpose Annexation Area of the City and is the subject to that certain Ordinance No. 020214-43 and the incorporated Regulatory Plan dated effective on February 25, 2002; and

WHEREAS, the Project forms a connecting link in the future transportation infrastructure of the City and provides for interconnectivity to other arterial highways and State Highway 130; and

WHEREAS, the Project will accommodate traffic into and out of the present and future full purpose limits of the City in excess of the traffic created by the adjacent private development, and

WHEREAS, the Project, which is generally described and depicted in attached Exhibit "A", may be developed in multiple phases, and

WHEREAS, premises considered, the City desires to participate in the cost of the development and construction of the Project; and

WHEREAS, the Parties intend to conform to this Agreement in all respects with the Interlocal Cooperation Act, Texas Government Code Section 791.001, et seq.;

NOW, THEREFORE, the Parties agree as follows:



1. Project Management.

- (a) The County will provide the project management services for the development and construction of the Project, as set forth herein. In doing so, the County will be responsible for the management of the Braker Lane Participation Agreement, which has been approved by the County and the Developers.
- (b) The Director of Public Works of the Travis County Transportation and Natural Resources Department (the "County's Director") will act on behalf of the County with respect to the Project, coordinate with the City, receive and transmit information and instructions, and will have complete authority to interpret and define the County's policies and decisions with respect to the Project. The County's Director will designate a County Project Manager and may designate other representatives to transmit instructions and act on behalf of the County with respect to the Project.
- (c) The City's Public Works Director (the "City's Director") will act on behalf of the City with respect to the Project, coordinate with the County, receive and transmit information and instructions, and will have complete authority to interpret and define the City's policies and decisions with respect to the Project. The City's Director will designate a City Project Manager and may designate other representatives to transmit instructions and act on behalf of the City with respect to the Project.
- (d) If a disagreement between City and County arises regarding engineering design, design and construction standards, plans and specifications, inspection and testing, deficiencies and remedial action, change orders, or any other requirement or provision of this Agreement, and the disagreement is not resolved by the City Project Manager and the County Project Manager, it shall be referred as soon as possible to the City's Director and the County's Director for resolution. If the Directors do not resolve the issue, it shall be referred as soon as possible to the Assistant City Manager responsible for public works and the Executive Manager of the Travis County Transportation and Natural Resources Department for resolution.
- (e) The Project may be constructed pursuant to Section 232.105, Local Government Code and Sections 791.001, Government Code.

2. Project Development.

- (a) The County will be responsible for the management of the development of the design and construction of the Project, including (i) the development of the engineering design, plans and specifications for the roadway improvements and sidewalks, (ii) the surveying, (iii) the right-of-way and easement acquisition, (iv) the construction, (v) the inspection and testing and any required permitting and environmental assessments and clearances associated with the Project, and (vi) acceptance of the completed work.
- (b) The plans and specifications for the Project shall be in accordance with the design and construction standards applicable under Title 30, Austin City Code (Austin/Travis County Subdivision Regulations), as amended by Ordinance No. 020214-43 and the incorporated Regulatory Plan dated effective February 25, 2002, unless otherwise agreed by the Parties. In addition, the County will ensure that the plans and specifications will comply with the applicable Texas Accessibility Standards.
- (c) The County will ensure that the design engineer provides professional liability, automobile liability, and general liability insurance in accordance with the standard requirements of the County for such projects, during the term of the design and construction and the County will have the County and the City named as an additional insured with respect to such general liability and automobile liability coverage.
- (d) The County and, to the extent set forth herein, the City will be responsible for the review and approval of the engineering design, plans and specifications and for construction inspection and testing for the Project. In addition, the County and, to the extent set forth herein, the City will be responsible for the review and approval of any modifications to the engineering design, plans, and specifications for the Project, during the development and construction of the Project.
- (e) A City permit and associated fees shall be required only for any part of the Project within the City's full purpose corporate limits. The application review process and fees for any such permit shall be the same as the process and fee requirements that the City applies to its own road projects. The City shall coordinate the City's review of any permit application and issuance of the permit concurrently with the City's review and approval of engineering design and plans and specifications for the Project.
- (f) The Parties will participate in joint review meetings with representatives from all affected City and County Departments in order to avoid and resolve conflicts in review comments. The City will provide a designated review team to expedite the review process.

- (g) The County shall require the contractor to immediately take any appropriate remedial action to correct any deficiencies identified by the City.

3. Project Bidding & Award of Construction Contract.

The County will be responsible for overseeing the solicitation of bids for the construction of the Project based on the approved plans and specifications. Bids shall be solicited by means of a competitive process and in accordance with the County's minority and women-owned businesses policy. If the Developer solicits the bids, bids from at least three (3) reputable contractors will be solicited. The County will notify the City of the lowest responsible bidder and the amount of the bid for the Project and the City shall respond within seven (7) working days. Upon written agreement of the City, the County will approve a firm unit-price or lump sum contract for the construction of the Project with the successful bidder.

4. Additional Management Duties of the County. The County hereby covenants and agrees to provide to the City:

- (a) four (4) sets of the plans and specifications for the construction of the Project at appropriate intervals for the City's review and approval;
- (b) written responses to the City's initial plan review comments within fourteen (14) working days of receipt from the City;
- (c) written notice of the schedule for design and the advertisement for bids, award of contract, and construction of the Project;
- (d) written notice of the bid tabs for the Project;
- (e) written copy of all contracts affecting the Project, including accompanying information regarding compliance with the County's minority and women owned business policy;
- (f) a monthly itemized statement of all disbursements made and debts incurred during the preceding month relating to the Project, including copies of invoices, statements, vouchers, or any other evidence of payment of debt and accompanying information regarding compliance with the County's minority and women owned business policy;
- (g) executed change orders, jointly approved by the City and the County, related to the Project;

- (h) sufficient notice, documentation and opportunity for the City to review and jointly approve the construction contractor's application for final payment with accompanying information regarding compliance with the County's minority and women owned business policy;
- (i) a copy of any change order request related to the Project within two (2) working days of its receipt by the County, by delivery to the City's Project Manager for review and approval; and
- (h) upon satisfactory completion of construction and any applicable warranty or construction performance period, the County will accept the portion of the Project which is located within the County, and furnish the City a copy of the record drawings of the Project for the City's records.

5. Management Duties of the City. The City hereby covenants and agrees to:

- (a) review and approve the submitted plans and specifications by providing any initial comments within fourteen (14) working days of submittal, review and approve the County's responses to those initial comments within seven (7) working days, and work in good faith to resolve any outstanding issues;
- (b) expeditiously review any applicable permit applications and work in good faith to resolve any outstanding issues;
- (c) review any change order proposal for the Project and return the change order request to the County within five (5) working days of its receipt by the City's Project Manager, with a written recommendation for its disposition; respond to requests for information within three (3) working days and requests for approval of shop drawings within ten (10) working days;
- (d) at the option of the City, perform any additional independent inspection and testing on the Project in coordination with the County's inspectors and as agreed to by the County and City Project Managers, and in a timely manner; and in connection therewith, the City will designate inspectors to make any such inspections, including any joint final inspection of the completed Project with the County; the City's inspectors shall communicate any issues to the County's inspectors only, and County inspectors will in turn communicate those issues to the construction contractor;
- (e) coordinate with the City and County Project Managers, as reasonable and necessary;

- (f) immediately report any deficiencies observed in the construction of the Project in writing to the County's Project Manager;
  - (g) review and jointly approve the construction contractor's application for final payment;
  - (h) attend meetings at the request of the County's Project Manager; and
  - (i) upon satisfactory completion of construction and any applicable warranty or construction performance period, the City will accept the portion of the Project, which is located within the City.
6. **Bond and Guarantee.** All construction contracts affecting the Project shall include a payment and performance bond acceptable to and in favor of and benefiting the County and the City, for the full amount of the contract and a warranty by the contractor executed in favor of and benefiting the County and the City, for a period of one year from the date of acceptance of the Project.
7. **Liability.** To the extent allowed by Texas law, the County and the City agree that each entity is responsible for its own proportionate share of any liability for its negligent acts or omissions. In addition, the construction contractor shall be required to provide workers compensation insurance, auto liability and general liability insurance in the standard amounts required by the County. The County and the City will be included as an additional insureds on the above-referenced insurance policies and a waiver of subrogation will be provided on the auto liability, general liability and worker's compensation coverages.
8. **Financial Obligations.**
- (a) The Developer shall initially pay for engineering services and deliverables and project management and be reimbursed by the County as provided in the Developer Agreement.
  - (b) The Developer will initially pay all costs of construction of the Project, including construction, surveying, inspection, testing, and the cost of any change orders made necessary by field changes to address unanticipated conditions. The County will reimburse the Developer one third (1/3) of those costs with funds the City deposits with the County under this Agreement, not to exceed the amount of \$2,670,000.00, unless otherwise approved by the City, and one third (1/3) of those costs with the County's own funds.
  - (c) The City shall deposit \$2,670,000.00 into an escrow account with Travis County within 30 calendar days of notification to the City by the County

of the successful bidder and the bid amount, unless otherwise agreed to by the City and the County in writing.

- (d) The County shall obtain the written approval of the City for all change orders prior to the County issuing the approved change order to the Developer and/or contractor, such approval not to be unreasonably withheld or delayed. The City's Project Manager shall meet with the County's Project Manager to review the contractor's progress reports and invoices for the Project before approval by the County.
- (d) The City agrees to pay all liquidated damages, delay damages, de-mobilization costs, re-mobilization costs, and any other associated costs of the construction contract for the Project by reason of the City's non-payment of any change order within ninety (90) days of the date of submittal by the County.
- (e) The County shall promptly notify the City of any such claim for damages and the County and the City shall negotiate for the resolution of the claim. In the event that a decision is made to litigate such a claim, the City shall be solely responsible for any or all costs recited above, and the costs of litigation, including, but not limited to, attorney's fees, court costs, depositions, experts, the amount of any damages contained in a judgment or settlement, interest, and the costs of appeal.
- (f) The Parties agree to and shall provide their respective shares for the development of the Project on a timely basis in order to meet the Project schedule. If required under this Agreement, the City shall deposit any additional City funds due within ninety (90) days of receipt of invoice by the County, such invoice to be accompanied by the change order request from the construction contractor, which has been recommended for approval by the County's and the City's Project Manager.
- (g) The County Treasurer shall act as Escrow Agent for the management of the City's funds and shall deposit the funds in an interest bearing escrow account. The County shall invest the funds in accordance with the Public Funds Investment Act, and any other applicable laws or bond covenants. The interest and any unused portion of the public funds provided by the City under this agreement shall be returned to the City within 30 calendar days after the completion of the Project. The County shall provide the City, at least quarterly, with an accounting of the deposits to and disbursements from the City's escrow account. The County will make its records available, at reasonable times, to the City's auditors, or its independent financial advisors or other professionals who provide arbitrage rebate calculations to the City.

- (h) The County Treasurer shall timely pay submitted invoices for the Project. The invoices for the Project will be paid on the basis of work completed in accordance with the approved plans and specifications.
- (i) The City acknowledges that, in connection with the execution of this Agreement, it has received the analyses and recommendations required by City of Austin Ordinance No. 000824-22 establishing covenants regarding the general obligation bonds authorized under Proposition No. 1 on November 7, 2000. The City may reimburse itself for its costs incurred under this Agreement from any district assessments or taxes allocated to the payment of such costs at such time a special district is created in the area of the project and the district establishes such an assessment or tax.

9. Miscellaneous.

- (a) Force Majeure. In the event that the performance by the County or the City of any of its obligations or undertakings hereunder shall be interrupted or delayed by any occurrence not occasioned by its own conduct, whether such occurrence be an act of God, or the common enemy, or the result of war, riot, civil commotion, sovereign conduct, or the act of conduct of any person or persons not a party or privy hereto, then it shall be excused from such performance for such period of time as it reasonably necessary after such occurrence to remedy the effects hereto.
- (b) Notice. Any notice given hereunder by either party to the other shall be in writing and may be effected by personal delivery in writing or by registered or certified mail, return receipt requested when mailed to the proper party, at the following addresses:

CITY: Sondra Creighton, Director  
City of Austin Public Works Department  
505 Barton Springs Road  
Austin, Texas 78704

WITH COPY TO: Gordon Bowman  
Assistant City Attorney  
City of Austin Law Department  
301 W. 2<sup>nd</sup> Street  
Austin, Texas 78701

COUNTY: Joe Gieselman  
Executive Manager, TNR  
P. O. Box 1748  
Austin, Texas 78767

WITH A COPY TO: David Escamilla  
Travis County Attorney  
P. O. Box 1748  
Austin, Texas 78767

(c) Number and Gender Defined. As used in this Agreement, whenever the context so indicates, the masculine, feminine, or neuter gender and the singular or plural number shall each be deemed to include the others.

(d) Entire Agreement. This Agreement contains the complete and entire Agreement between the parties respecting the matters addressed herein, and supersedes all prior negotiations, agreements, representations, and understanding, if any, between the parties respecting the joint construction of the Projects. This Agreement may not be modified, discharged, or changed in any respect whatsoever except by a further agreement in writing duly executed by authorized representatives of the parties hereto. No official, representative, agent, or employee of Travis County, Texas has any authority to modify this Agreement, except pursuant to such express authority as may be granted by the Commissioners Court of Travis County, Texas. The recitals set forth above and the attached exhibits are incorporated herein.

(e) Effective Date. This Agreement takes effect upon the last date of due execution of the Agreement by the County and the City.

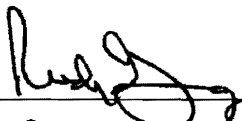
(f) Other Instruments. The Parties hereto covenant and agree that they will execute other and further instruments and documents as may become necessary or convenient to effectuate and carry out the purposes of this Agreement.

(g) Invalid Provision. Any clause, sentence, provision, paragraph, or article of this agreement held by a court of competent jurisdiction to be invalid, illegal, or ineffective shall not impair, invalidate, or nullify the remainder of this Agreement, but the effect thereof shall be confined to the clause, sentence, provision, paragraph, or article so held to be invalid, illegal, or ineffective.

(h) Current Funds. The party or parties paying for the performance of governmental functions or services shall make payments therefore from current revenues available to the paying party.



CITY OF AUSTIN, TEXAS

By: 

Name: Rudy Garza

Title: Asst. City Manager  
Authorized Representative

Date: 12-11-07

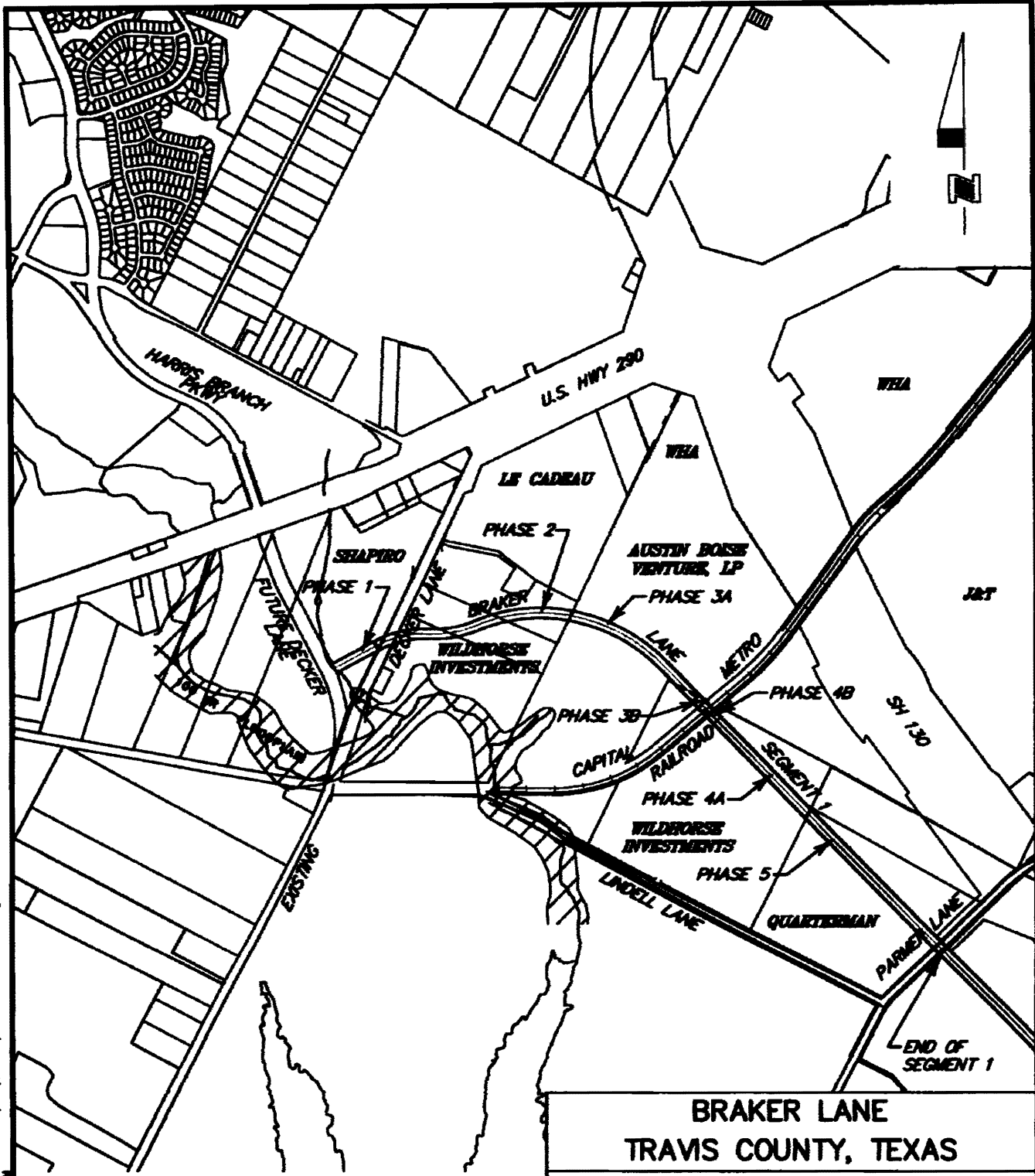
Approved as to Form:

  
Assistant City Attorney

TRAVIS COUNTY, TEXAS

By: Samuel T. Biscoe  
Samuel T. Biscoe, County Judge

Date: 12.5.07  
(cc 10.30.07)



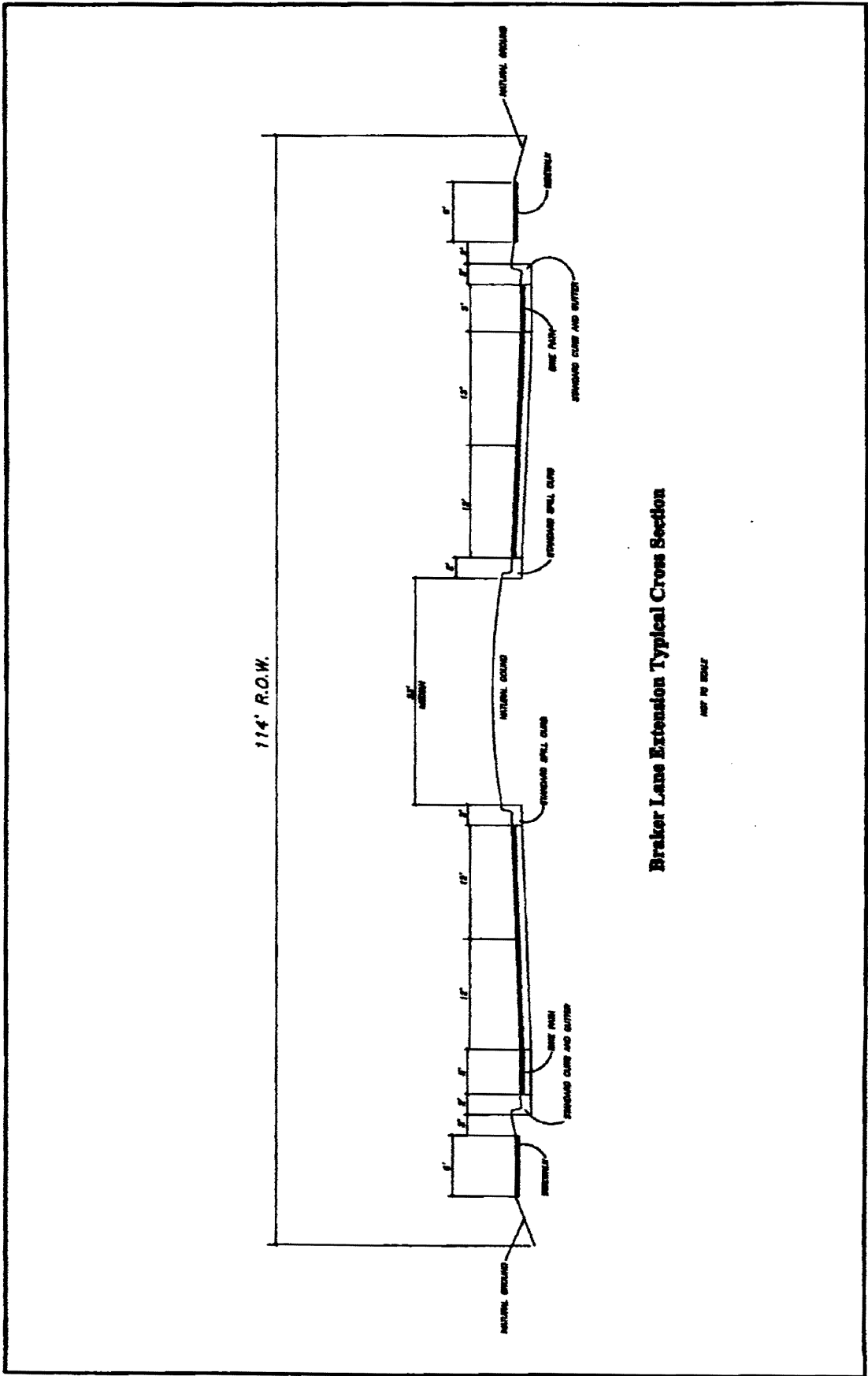
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**NOTE:**  
 PHASING SHOWN FOR IDENTIFICATION ONLY.

**BRAKER LANE**  
**TRAVIS COUNTY, TEXAS**  
**EXHIBIT A**

**JC JONES & CARTER, Inc.**  
**ENGINEERS • PLANNERS • SURVEYORS**  
 805 Las Cintas Parkway, Suite 230 Austin, Texas 78746-5493 (512) 441-9493

Exhibit A	Job No. A155-003	Date: 12-6-06
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**Braker Lane Extension Typical Cross Section**

NOT TO SCALE