

TRANSPORTATION AND NATURAL RESOURCES
STEVEN M. MANILLA, P.E., COUNTY EXECUTIVE

700 Lavaca Street-5th Floor
Travis County Administration Building
P.O. Box 1748
Austin, Texas 78767
Phone: (512) 854-9383
Fax: (512) 854-4697

April 22, 2014

MEMORANDUM

TO: Members of the Commissioners Court

FROM: Steven M. Manilla, P.E., County Executive

SUBJECT: Amendment #2 to Braker Lane II Participation Agreement
(FM 973 to Taylor Lane)

Proposed Motion:

Consider and take appropriate action on a request to approve Amendment #2 to Participation Agreement with Club Deal 120 Whisper Valley L.P., for the completion of Braker Lane from FM 973 to Taylor Lane, in Precinct One.

Summary and Staff Recommendation:

In 2007, Travis County entered into Participation Agreements with the developer of Whisper Valley to build Braker Lane, a CAMPO arterial road, between FM 973 and Taylor Lane. The developer is to donate right-of-way and complete engineering design and road construction by certain dates. The county is to use general obligation bond funds from the 2005 bond election to reimburse the developer for 50% of eligible costs of design and construction.

Several other developers entered into similar agreements with the county. Due largely to dismal financial conditions, most of the developers did not meet the deadlines set forth in their Participation Agreements and received Court approval of contract time extensions and other revisions to their agreements. The significant amendments now requested by the Whisper Valley developer include: revising the budget as approved by the Court in October 2013; changing the construction phasing; and, including several non-reimbursable developer expenses. The project completion date will remain the original date of June 30, 2016.

TNR recommends approval of Amendment #2 to the Whisper Valley Participation Agreement so that this important arterial road can be completed before increasing development in the area overwhelms the existing roadway network.

Budgetary and Fiscal Issues

A Participation Agreement was entered into by Club Deal 120 Whisper Valley L.P. (Developer) and the county in 2007. The total project cost was estimated to be \$13 million and the county's maximum participation amount was set at \$6.5 million (50% of total project cost). The recession that began in 2008 made it extremely difficult to obtain traditional financing. The Developer sought and was approved by the City of Austin to create a Planned Unit Development and a Public Improvement District that allowed the sale of bonds to finance the Developer's share of the project cost. The project was initially bid in December 2012. The low bid came in significantly over the budget. A value engineering analysis was performed and the project was rebid in August 2013. The low bid still came in substantially higher than the budgeted amount. A larger project budget was requested by TNR and approved by the Court in October 2013. Amendment #2 revises the Participation Agreement to reflect that change. The Court-approved county funds for the project are now \$10,059,709.00, making the total public-private project budget approximately \$20,119,418.00 for which eligible costs are to be split 50:50 between the Developer and the county unless otherwise agreed to in this amendment. Such exceptions include the Developer's agreement to pay higher shares of Construction Management Services, intersection improvements at Taylor Lane, and construction bid overrun amounts.

The issue of who pays for overruns on the Public-Private Partnerships was discussed by the Court at the October 2013 voting session when a budget increase was approved. The original agreement placed responsibility for all overruns with the Developer, with the option of either paying 100% of the overrun or terminating the project. The Developer indicated that termination would be their option of choice. TNR recommended completing the project for the reasons indicated herein and the Court agreed. The Developer has agreed to pay \$200,000.00 for Taylor Lane intersection improvement costs; 100% of the Construction Manager's engineering task fees; and, 100% of a construction contract bid overrun amount, if one occurs, up to 5% of the total project budget.

Issues and Opportunities:

Whisper Valley is in a part of the SH 130 corridor that will experience intense development in the near future. The 2005 general obligation bond funds committed by the county under this Participation Agreement will help fund construction of Braker Lane, which is the main road passing through the Whisper Valley development.

There are currently 2011 bond funds available to improve Taylor Lane and Blake Manor Road which will help distribute the anticipated traffic volumes and loads coming from and going to this large development.

The Developer has moved forward with the first phase of the project for which original funding is available. However, to complete the two phases of the project, an amendment to the Participation Agreement is needed to reflect the higher approved budget, revised phasing, and revised cost sharing.

The current Participation Agreement, as amended, requires the Developer to complete four new lanes of Braker Lane part way between FM 973 and Taylor Lane and two lanes of temporary roadway to link it to Taylor Lane. The intent of the temporary two lanes was to provide dual access to the Whisper Valley development as home building progresses. The temporary two lane road was anticipated to be used for about two years after which it would be converted to a four lane roadway

matching the Phase 1 construction. To help keep costs down the Developer and TNR propose to avoid the cost of temporary improvements, or the cost of improvements that would need to be partially reconstructed, by eliminating the temporary road altogether. Phase 2 would therefore consist only of extending the four lane configuration to Taylor Lane.

The sole access to Whisper Valley will be from FM 973 until Phase 2 of Braker Lane is completed to Taylor Lane. This single access configuration is temporary and could exist until June 30, 2016 when the connection to Taylor Lane is to be completed. The risk is that FM 973, at the proposed Braker Lane intersection, is within the 100-yr floodplain and as such it could at times be temporarily closed due to flooding. Those that will be directly affected by such a closure will be the residents of any new homes built and occupied in Whisper Valley between the completion of Phase 1 and Phase 2, which is anticipated to be less than a two year period. In the long term, there is area-wide support for improving FM 973 from US 290 at Manor to a point south of the Braker Lane intersection. Such improvement would include minimizing the potential for future road closures due to flooding.

Background:

Braker Lane II project consists of extending Braker Lane approximately 12,650' in multiple phases from FM 973 to Taylor Lane. It is in the 2035 CAMPO plan where it is planned to be a four lane arterial roadway. In July 2005, the Court adopted guidelines for the public/private partnership projects that were to be included in the 2005 bond election. The guidelines state that the Developer must dedicate right-of-way and pay half the cost of a four lane road across property owned or controlled by the Developer.

Required Authorizations:

Tom Nuckols, Chris Gilmore, County Attorney's Office
Jessica Rio, PBO

Attachment:

October 2013 Approved Budget Increase

CC:

Cynthia McDonald, Donna Williams-Jones, and Isabelle Lopez, TNR Financial Services
Allan Miller, Auditors Office
Cyd Grimes, Purchasing Agent

AMENDMENT NUMBER TWO TO

BRAKER LANE (FM 973 TO TAYLOR LANE) ROAD PARTICIPATION AGREEMENT

This Amendment Number Two To Braker Lane (FM 973 To Taylor Lane) Road Participation Agreement ("Amendment") is entered into between Travis County, Texas (the "County") and Club Deal 120 Whisper Valley L.P., a Delaware limited partnership (the "Developer"). The County and the 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 Amendment and to perform its obligations under this Amendment without the further approval or consent of any other person or entity.

Recitals

WHEREAS, the County and the Developer entered into that certain Participation Agreement dated November 19, 2007 ("Braker Lane (FM 973 to Taylor Lane) Road Participation Agreement" or the "Agreement") pertaining to the proposed construction of Braker Lane from Farm to Market 973 ("FM 973") to Taylor Lane, specified in the Capital Area Metropolitan Planning Organization 2030 Plan to be a 4-lane divided arterial (as described in the Agreement, the "Project");

WHEREAS, the Agreement establishes the nature and extent of improvements to be constructed, the cost obligations of the respective Parties for the Project, and further provides for the possible termination of the Agreement by the County if certain conditions are not met by the dates specified in the Agreement;

WHEREAS, on or about November 5, 2010, the County and the Developer amended the Agreement by Amendment Number One Braker Lane (FM973 To Taylor Lane) Road Participation Agreement (hereinafter "Amendment Number One") to change certain completion dates for portions of the Project and to make other amendments to the Agreement;

WHEREAS, the Parties desire to amend the Agreement and Amendment Number One through this Amendment Number Two to amend: 1) certain provisions regarding the interim phasing commencement and completion dates; 2) the Project budget; 3) certain provisions regarding the Developer's conveyance of the real property interests for the Project; 4) certain provisions regarding the posting of Fiscal Security; and 5) certain other miscellaneous amendments.

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

Section 1. Amendments.

- 1.1. Exhibit A (Developers Land) in the November 19, 2007 Agreement is replaced with the Exhibit A appended hereto.

1.2. The fifth recital in the Agreement is deleted in its entirety and substituted with the following:

WHEREAS, the Commissioners Court has allocated from such bond funding, an amount up to Ten Million Fifty Nine Thousand Seven Hundred Nine Dollars (\$10,059,709) as its aggregate participatory share for the necessary public improvements contemplated by the Agreement; and

1.3. Section 1(a)(ii) of the Agreement is deleted in its entirety and substituted with the following:

(ii) Pavement structure with a design life of twenty (20) years based on geotechnical engineering produced by the Project Engineer. The proposed pavement structure, previously approved by the County, consists of 2" D-GR HMA (TY D), 6" D-GR HMA (TY B), 16" Flexible Base, Geogrid reinforcement, placed on 12" Lime Treated Subgrade as detailed in the geotechnical report provided by Raba-Kistner Consultants, dated September 6, 2012. The pavement structure may be modified to other specifications as approved by the Parties.

1.4. Section 1(b) of the Agreement is deleted in its entirety and substituted with the following:

(b) The Project will be constructed as follows:

(i) It is anticipated that the Developer will construct the entire Project in two phases (each phase referred to herein as "Phase"). Such Phases will be constructed at different times as depicted in Exhibit A, as follows:

(A) Phase One – new construction of a four (4) lane divided road beginning at the east side of FM 973, approximately 800 ft. south of the northwest corner of the Developer's Land running in a southeast direction. Phase One New Construction includes both Phase 1A and Phase 1B. Phase 1A ends at the completion point depicted in Exhibit A. Developer is currently paying for Phase One construction with the proceeds of public improvement district bonds issued by the City of Austin. If any proceeds remain unexpended upon completion of Phase 1A, Developer shall use them to pay to construct as much of Phase 1B as possible. The terminus of Phase 1B shall be the terminus of Phase One New Construction.

(B) Phase Two – new construction of a four (4) lane divided road beginning at the terminus of the Phase One New Construction and continuing in a southeast direction to its intersection with Taylor Lane ("Phase Two New Construction"). Phase Two New Construction shall include certain deceleration lanes and turn lanes and signalization at its intersection with Taylor Lane as described in the Traffic Impact Analysis

dated July 29, 2009 Prepared by Bury+Partners, Inc, hereinafter referred to as ("Taylor Lane Intersection Improvements"), it being further understood that Developer shall be solely responsible for the construction costs of the Taylor Lane Intersection Improvements, including those costs charged by the Project Engineer and Project Manager in connection therewith, without contribution or reimbursement from the County but only to the extent the aggregate of such costs do not exceed the sum of Two Hundred Thousand Dollars (\$200,000.00). To the extent the aggregated costs for the Taylor Lane Intersection Improvements exceed the sum of Two Hundred Thousand Dollars (\$200,000.00), any such excess cost shall be equally shared by the Developer and the County. It is further understood by the Parties that the costs of the Taylor Lane Intersection Improvements which exceed Two Hundred Thousand Dollars (\$200,000.00) are included in the new Agreed Limit set out in section 1.12 below.

- 1.5. (C) For Phase One New Construction and Phase Two New Construction, the Developer will construct four (4) lanes of the Project, along with curb and gutter on both sides of each divided two-lane section of the roadway (as agreed upon between the County and developer), a five foot (5') wide bike lane on one side of each divided two-lane section (in a location reasonably acceptable to the County), sidewalks, and drainage facilities necessary to accommodate runoff from the roadway and the upslope of the roadway. Section 1(e)(iii) of the Agreement is deleted in its entirety and substituted with the following:

(iii) For Project Manager Services, as defined below, the Project Manager may be paid or receive no more than four percent (4%) of the actual construction costs incurred under the Construction Contract for the first Thirteen Million Dollars (\$13,000,000) expended thereunder and three percent (3%) of the actual construction costs incurred under the Construction Contract for all sums over Thirteen Million Dollars (\$13,000,000) ("Project Management Fee") and the County will pay or reimburse the Developer fifty percent (50%) of the Project Management Fee. The Developer shall engage the services a Texas Registered Professional Engineer to oversee Construction Phase Services listed on Exhibit E that must be performed by such an engineer. Project Management Fees shall be those incurred by the Project Manger during the construction phases of the Project as are envisioned in Exhibit E, and do not include fees of the Project Manager incurred during the design phase of the Project, it being understood that Project Management Fees incurred during the design phase shall constitute part of Engineering Services and are subject to reimbursement as Engineering Services as set forth herein. Project Management Fees shall exclude all costs of Developer engaging the services of a Texas Registered Professional Engineer to perform any of the Construction Phase Services listed on Exhibit E that must be performed by such an engineer. Developer shall be solely responsible for payment of Construction Phase Service fees as charged by Bury + Partners or Developer's consultant engineer for the performance any of the Construction Phase Services listed on Exhibit E

that must be performed by an engineer, other than materials testing and inspection services.

1.6. Section 2 (a) of the Agreement is deleted in its entirety and substituted with the following:

(a) The Developer shall be responsible for managing development of the Project. The person providing project management services ("Project Manager") may be the Developer or the Developer may contract with the Project Engineer or another person to serve as Developer's agent for providing such services. The County has approved Sheffield Asset Management Company as Project Manager. The Developer shall submit copies of the contract with the Project Manager to the County. 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 D**, 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.

1.7. Section 3(g) of the Agreement is deleted in its entirety and substituted with the following:

(g) Developer has previously submitted to the County and the County has approved the Final Plans and Specifications for Phase One New Construction of the Project and a detailed summary of the work completed and sums paid by the Developer for the Engineering Services and Deliverables and County has approved and accepted same. The County shall reimburse Developer the amount provided in Section 1(e)(i) incurred to such date pursuant to the procedure set forth in Section 8(g).

1.8. Section 3(h) and (i) of the Agreement are deleted their entirety and substituted with the following:

(h) The County has previously issued the required permits for Phase One New Construction. Final Plans and Specifications for Phase Two New Construction shall be submitted by Developer to the County in a timely manner so as to allow Developer to meet the construction completion dates for those Phases as set forth in Section 8(c). The County shall issue any required permits for Phase Two New Construction within three weeks of the Developer's submittal of Final Plans and Specifications meeting all County standards.

1.9. Section 3(j) of the Agreement is renumbered as Section 3(i) but is otherwise unchanged.

1.10. Section 4(a) of the Agreement is amended so as to reflect that the Designated Representative for the County is Steve Manilla, County Executive, Transportation and Natural Resources Department

1.11. Section 5(a) and (b) of the Agreement are deleted in its entirety and substituted with the following:

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). If the County determines that construction of utilities for Phase Two New Construction needs to commence before construction of the remainder of Phase Two New Construction commences, the Developer shall convey the necessary Real Property interests for that Phase Two New Construction when utility construction is ready to commence. In any event, the Real Property Interests for Phase Two New Construction will occur only after County has approved all Final Plans and Specifications therefor.
- (b) The Parties acknowledge that the Developer has conveyed to the County the Real Property Interests for the Phase One New Construction. For Phase Two New Construction, the Developer shall timely convey or cause to be conveyed to the County all Real Property Interests for Phase Two New Construction in the manner described in section 5(a) above. The Developer shall bear all 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, closing costs, and litigation costs. The Parties acknowledge and agree that the County is not responsible for reimbursement to the Developer of any part of the construction cost of Phase 1A, 1B, or Phase Two until such time as Developer has conveyed to the County the Real Property Interests for that Phase.

1.12. Section 6(b) of the Agreement is deleted in its entirety, and the following is substituted in its place:

- (b) The Project shall be bid in two Phases (Phase One New Construction, which has been bid, and Phase Two New Construction). This agreement anticipates the standards and specifications of Phase Two New Construction will be the same as Phase One New Construction. As cross section has been attached as Exhibit B and is representative of the standards. The total cost of all Phases of the Project shall not exceed Twenty Million One Hundred Nineteen Thousand Four Hundred Eighteen Dollars (\$20,119,418), (the “Agreed Limit”) inclusive of all engineering, construction, project management, and inspection and testing fees and expenses. In the event the bids determined by the Developer to be the lowest responsive and responsible for Phase Two New Construction would cause the total cost of all Phases of the Project to exceed the “Agreed Limit, the

County or Developer may decide to reject all bids as excessive and solicit bids a second time. If bids from the initial bid (or second bid if one is done) are rejected as excessive, the Developer or the County may require the Project Engineer, in consultation with the Developer and the County, to modify the Final Plans and Specifications for the Phase employing value engineering principles or other agreed-upon re-scoping of such Final Plans and Specifications 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 causing the total cost of all Phases of the Project to exceed the Agreed Limit, either the Parties may mutually agree to repeat the bid solicitation and value engineering and re-scoping process until an acceptable bid is received, or Developer shall construct Phase Two New Construction and pay one hundred percent (100%) of the amount by which the lowest responsive and responsible bid causes the total cost of all Phases to exceed the Agreed Limit without reimbursement by the County so long as the amount exceeding the Agreed Limit is within five percent (5%) of the Agreed Limit. If the amount of the lowest responsive and responsible bid for Phase Two New Construction would result in the total cost exceeding the Agreed Limit by an amount greater than five percent (5%) and the Parties have not mutually agreed to re-bid after further value engineering, either of the Parties may elect to terminate this Agreement without further recourse, save and except any Project costs accrued prior to termination shall be paid as set forth in this Agreement.. Any deadline in this Agreement affected by a value engineering, re-scoping 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.

- 1.13. Section 8(a) is deleted in its entirety, and the following is substituted in its place:

Section 8. Construction of Project.

(a) The Developer will:

- (i) cause to be conveyed or dedicated all the Real Property interests owned or controlled by the Developer including, if necessary, the stormwater management agreement under Section 1(c) for each Phase prior to the County being obligated to make any reimbursement payment to

Developer for construction of any portion of that Phase but after County approval of the Final Plans and Specifications for that Phase;

- (ii) execute the Construction Contracts for Phase One New Construction and Phase Two New Construction;
- (iii) submit to the County payment and performance bonds, insurance certificates, collateral assignments, and all other documents required to be submitted under this Agreement in connection with the particular Phase of the Project;
- (iv) provide the County with a letter from Developer's bond trustee or financial institution in a form acceptable to the County, such letter affirming that Developer has bond funds or other funds sufficient to cover the Developer's non-reimbursable costs under Section 1(e) to secure Developer's obligations for construction of the particular Phase of the Project ("**Fiscal Security**");

1.14. Section 8(c) is deleted in its entirety, and the following is substituted in its place:

- (c) The Parties concur that Phase One New Construction commenced with the Notice To Proceed issued to the Contractor on November 13, 2013.

Subject to force majeure events and satisfaction of all conditions in this Agreement, upon the completion of Phase One New Construction, Developer will diligently seek the issuance of additional Public Improvement District bonds to fund the construction of Phase Two New Construction from the current Public Improvement District encompassing Developer's property.

The Developer shall cause all of the Project to be completed and accepted by the County on or before June 30, 2016. Notwithstanding anything to the contrary, if the Developer fails to comply with the dates or other requirements set forth in this section (and such failure is not the result of the County's failure to timely approve plans, permits, construction draws or conduct inspections), but the Developer is under construction on Phase Two and Developer has funding in place for completion of the Project, then Developer and County staff will recommend to the County Commissioners Court a reasonable extension of time to complete the Project. Such extension, if granted by the County Commissioners Court will be memorialized in an Amendment to this Agreement. Otherwise, the County may terminate this Agreement and reallocate any unencumbered County bond funding for the Project to other County projects, save and except any funds due to Developer for work completed prior to termination so long as Developer has timely submitted documentation supporting such amounts due. If the County terminates this Agreement pursuant to this Section 8(c), the County shall be deemed to have elected not to complete the Project and will have no obligation to pay any amount under this Agreement,

save and except any amounts owed to the Developer under this Agreement prior to the County's termination.

1.15. Section 11(a) of the Agreement is modified so as to raise the retainage on payments attributable to the Construction Contract from five percent (5%) to ten percent (10%).

1.16. Section 13(a) of the Agreement is deleted in its entirety, and the following is substituted in its place:

Section 13. County Completion of Project.

(a) If the Developer begins, but does not diligently pursue timely completion of, construction of any Phase of the Project materially in accordance with this Agreement for any reason, the County has the right, but not the obligation, to complete the construction of that particular Phase 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 sixty (60) 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 Phase of the Project.

1.17. Section 14 of the Agreement is revised to replace the County's Designated Representative to:

Steve Manilla
County Executive, TNR
P.O. Box 1748
Austin, Texas 78767

and to reflect the correct address for additional notice to:

Greg Hudson
Hudson & O'Leary LLP
1010 MoPac Circle, Suite 201
Austin, Texas 78746

and delete delivery of notices to:

Taurus of Texas Holdings, LP
c/o Douglas Gilliland
9285 Huntington Square
North Richland Hills, Texas 76182

- 1.18. The seventh recital in Amendment Number One is revised to replace the reference to the "Executive Manager of the Transportation and Natural Resource Department" with "County Executive, Transportation and Natural Resources Department.
- 1.19. Sections 1.3, 1.4, 1.5 and 1.6 of Amendment Number One are hereby deleted and superseded by the provisions contained in this Amendment.

Section 2. Miscellaneous.

- 2.1 Capitalized terms used in this Amendment that are not specifically defined in this Amendment have the meanings specified in the Agreement.
- 2.2 Except as otherwise set forth in this Amendment, the Agreement and Amendment Number One will remain in full force and effect in accordance with their original terms and be binding on the Parties and their respective heirs, executors, administrators, successors, and assigns.
- 2.3 This Amendment may be executed in one or more counterparts, each of which will be deemed an original, but all of which will constitute one and the same Amendment.
- 2.4 A telecopied facsimile of a duly executed counterpart of this Amendment will be sufficient to evidence the binding agreement of each party to the terms of this Amendment. However, the Parties each agree to promptly return an original, duly executed counterpart of this Amendment following the delivery of a telecopied facsimile.

IN WITNESS WHEREOF, the Parties hereto have executed this Amendment in multiple copies, each of equal dignity, and the Amendment will be effective as of the later date set forth below (the "Effective Date").

COUNTY:

Samuel T. Biscoe, County Judge

Date: _____

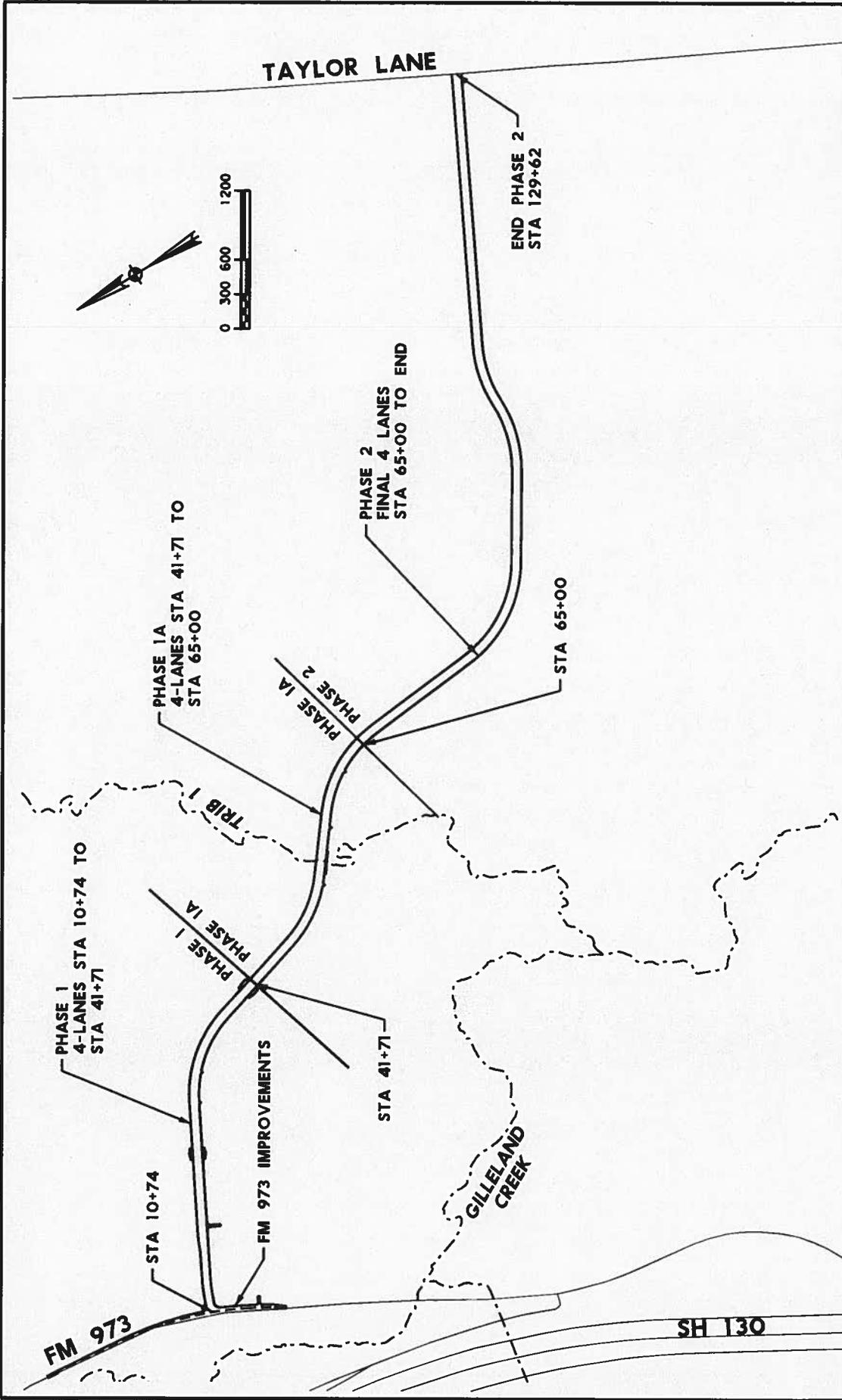
DEVELOPER:

Club Deal 120 Whisper Valley, L.P.
a Delaware limited partnership

By: _____, LLC,
a Delaware limited liability company,
its general partner

By: _____
Douglas H. Gilliland,
Managing Member

Date: _____



**BRAKER LANE EXTENSION
EXHIBIT A**

BURY

221 West Sixth Street, Suite 600
Austin, Texas 78701
Tel: (512) 328-0011 Fax: (512) 328-0025
Toll Free: 1-800-392-6343
Copyright © 2013

