# ROADWAY IMPROVEMENT AGREEMENT

**STATE OF TEXAS** §
§
**COUNTY OF TRAVIS** §

This Roadway Improvement Agreement (Agreement) is made and entered into by and between the City of Austin (City), a home rule city and municipal corporation situated in Travis, County Texas, and SP Meadows South, Ltd., a Texas Limited Partnership (Requestor).

**WHEREAS,** Requestor owns a certain tract of real property located along the I-35 southbound frontage road at Southpark Meadows Retail Center south of E. Slaughter Lane and

**WHEREAS**, in connection with the development of its property, Requestor desires certain roadway improvements within a right-of-way maintained by the State of Texas; and

**WHEREAS**, the Texas Department of Transportation (TxDOT) has established a system under which a request by a private entity for construction in a state-maintained right-of-way must be sponsored by a local government; and

**WHEREAS**, TxDOT requires that the local government sponsor enter into an agreement with TxDOT for the improvements under which TxDOT agrees to construct the improvements and the local government agrees to pay for improvements; and

**WHEREAS,** Requestor desires the City to serve as the local sponsor for construction of the desired improvements and desires to provide the City with all funds necessary for construction of the improvements; and

**WHEREAS,** the City finds that it is in the public interest for the City to serve as the local sponsor.

**NOW THEREFORE,** in consideration of the foregoing premises, the mutual covenants set forth in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City and Requestor agree as follow:

**Section 1. Improvements.** The improvements to be constructed by TxDOT and for which the City shall serve as the local sponsor are described in Exhibit A of this Agreement (Improvements).

**Section 2. Responsibility of City.** The City agrees to serve as the local sponsor for construction of the Improvements and agrees to enter into an Advanced Funding Agreement with TxDOT (TxDOT AFA) for construction of the Improvements. As the local sponsor, the City shall receive funds from Requestor for construction of the Improvements and shall deliver the funds to TxDOT when requested by TxDOT as payment for construction of the Improvements. The City shall only be required to make payments to TxDOT from funds provided by Requestor, pursuant to the terms and conditions of the TxDOT AFA. The City does not agree and is not required under this Agreement to make payments for the Improvements from funds other than those funds provided by Requestor.

Under the process established by TxDOT for construction of improvements in a state-maintained right-of-way, TxDOT manages both the bidding process for award of construction agreements and the construction of improvements. The City has no responsibility for these activities as they relate to construction of the Improvements.

The City shall provide Requestor with a copy of the TxDOT AFA, copies of all requests for payment by TxDOT for the Improvements as well as copies of any other documentation pertaining to the Improvements, when requested by the Requestor.

**Section 3. Responsibility of Requestor.**

A. Plans and Specifications. The Requestor is responsible for providing all plans and specifications for the Improvements to TxDOT and for securing TxDOT approval of the plans and specifications. All costs associated with the plans and specifications, including engineering costs, are the responsibility of the Requestor. The City is not responsible for any of the costs associated with preparation and approval of the Improvement plans and specifications.

B. Permits. The Requestor is responsible for securing all permits required for construction of the Improvements and for the costs associated with the permits. The City is not responsible for costs associated with permitting of the Improvements.

C. Utility Coordination and Relocation. The Requestor is responsible for planning and coordinating construction around utilities to mitigate the need to relocate existing facilities, including determining the location of existing utilities and designing the Improvements to minimize relocation (utility coordination). The Requestor is responsible for the costs associated with the utility coordination process and the relocation of utilities necessitated by construction of the Improvements. The City is not responsible for costs associated with utility coordination and relocation required for construction of the Improvements.

D. Improvement Costs. The Requestor shall provide the City with funds sufficient to cover all costs associated with construction of the Improvements. The funds must be provided in accordance with this section.

1. Requestor has provided to the City funds equal to the amount shown on Exhibit B of the Agreement, which includes:

    a. the estimated construction cost approved by TxDOT, including fees and administrative costs;

    b. an amount equal to 5 percent of the estimated construction cost approved by TxDOT to cover City fees and administrative costs associated with serving as the local sponsor; and

    c. an amount equal to 50 percent of the estimated construction cost approved by TxDOT to serve as a contingency fund (see Subsection E of this section).

2. If the amount of the contract awarded by TxDOT for construction of the Improvements is greater than the estimated cost of construction approved by TxDOT, the Requestor shall provide to the City an amount equal to the difference between the contract amount and the estimated cost (difference amount). The Requestor shall provide the difference amount in addition to and regardless of the amount of funds provided for the contingency fund described in Subsection D.1. and Subsection E. of this section. The requestor shall provide the difference amount not later than thirty calendar days after receipt of a notice from the City requesting the difference amount. Not withstanding the foregoing, if the amount of the bid to be accepted by TxDOT for the construction of the Improvements is greater than the estimated cost of the construction approved by TxDOT by more than twenty percent, then the City will, at the request of the Requestor, use

reasonable efforts to cause the TxDOT AFA to be terminated and return any escrow account funds to the Requestor.

3. If the final cost of the Improvements charged to the City by TxDOT exceeds the amount of funds provided by Requestor to the City under Subsections D.1. and D.2. of this section, the Requestor shall provide to the City any additional amount required for construction of the Improvements not later than thirty calendar days after receipt of a notice from the City requesting the additional amount.

4. Any charges assessed against the City by TxDOT for reasons other than those addressed in Subsections D.1., D.2., and D.3. of this Agreement in connection with the City's position as the local sponsor for construction of the Improvements shall be paid from funds provided by the Requestor under this section. If charges assessed by TxDOT exceed the amount of the funds provided by Requestor, Requestor shall provide to the City an amount sufficient to cover the assessed charges not later than thirty calendar days after receipt of a notice from the City requesting the additional amount.

E. Contingency Fund. The Requestor shall provide to the City an amount equal to 5 percent (5%) of the estimated cost of construction approved by TxDOT to serve as a contingency fund. The Contingency fund shall be maintained by the City until completion of the Improvements to pay for any costs charged to the City by TxDOT associated with the construction of the Improvements or in any way with the City's position as local sponsor, including construction cost overruns and additional TxDOT and City administrative fees.

**Section 4. Escrow Account.** Funds provided by the Requestor to the City under this Agreement shall be held in an interest-bearing escrow account until the funds are delivered to TxDOT. Funds may be paid to TxDOT from the escrow account for any charges assessed in connection with construction of the Improvements. Any funds remaining in the escrow account after all costs for construction of the Improvements have been assessed by and paid to TxDOT, together with all interest earned on the account will be returned to Requestor.

**Section 5. Failure of Requestor to Provide Funds.** If the Requestor fails to provide funds for the construction of the Improvements as provided by this Agreement, the City is released from any obligation under this Agreement to make payments to TxDOT for the Improvements. Any charges assessed by TxDOT against the City after termination of an agreement with TxDOT shall be paid from funds provided by the Requestor under Section 3 of this Agreement, provided the City is not in default of this Agreement. If the escrow account established to hold funds for the Improvements does not contain sufficient funds to cover all assessed charges, the Requestor shall provide to the City any additional amount required for assessed charges not later than 30 calendar days after receipt of notice from the City requesting the additional amount.

**Section 6. Indemnification.** The Requestor shall indemnify and hold harmless the City and City officials, employees, successors and assigns from any claims, losses, damages, causes of action, suits and liability of any kind arising:

1. out of or in connection with construction of the Improvements;

2. from the failure of Requestor to provide funds to the City in accordance with this Agreement; or

3. from the termination by the City or TxDOT of any agreement between the City and TxDOT concerning construction of the Improvements, providing the City is not in default of this Agreement or the TxDOT AFA.

**Section 7. Acquisition and Provision of Land.** The Requestor is responsible for acquiring and providing all land that is required for construction of the Improvements. The City is not required under this Agreement to acquire property for construction of the Improvements.

**Section 8. General Provisions.**

A. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns, including without limitation, any receivers, administrators, or trustees in bankruptcy.

B. Severability. If any word, phrase, clause, sentence, paragraph, section or other portion of this Agreement is held to be invalid for any reason by a court or agency of competent jurisdiction, the remainder of the Agreement shall not be affected by the invalidity and shall be construed as if the invalid portion was not contained in the Agreement. The provisions of this Agreement are expressly deemed severable for this purpose.

C. Cooperation. The parties to this Agreement agree to cooperate at all times in good faith to effectuate the purposes and intent of this Agreement.

D. Entire Agreement. This Agreement contains the entire agreement of the parties and supersedes all prior or contemporaneous understandings or representations, whether oral or written, respecting the subject matter of this Agreement.

E. Amendments. Any amendment of this Agreement must be in writing and signed by the authorized representative of each party to this Agreement.

F. No Amendment of Other Agreements. Unless otherwise expressly stipulated in this Agreement, this Agreement is separate from and is not an amendment or modification of any other agreement between the parties.

G. Applicable Law. This Agreement shall be construed under and in accordance with Texas law.

H. Venue. Venue for any action arising hereunder shall be in Travis County, Texas.

I. Notices. Notices to be provided under this Agreement is sufficient if forwarded by hand-delivery or via U.S. Postal Service, postage prepaid, to the address of a party as shown below:

| **CITY OF AUSTIN:** | **REQUESTOR:** |
|---|---|
| Jose (Joe) R. Ramos Jr., P.E.<br>Acting Director, Public Works<br>City of Austin<br>P.O. Box 1088<br>Austin, Texas 78767-1088 | Will Marsh<br><br>221 W. 6th Street, Suite 1300<br><br>Austin, Texas 78751 |

J. Effective Date. This Agreement shall be effective from the date of execution by the authorized representative of each party.

**APPROVED AS TO FORM:** **CITY OF AUSTIN:**

_____ By:_____
Assistant City Attorney Jose (Joe) R. Ramos, Jr., P.E.,
Acting Director, Public Works

Date: _____

R**EQUESTOR:**

SP MEADOWS SOUTH, LTD., a Texas Limited Partnership

By: _____
Andrew R. Pastor
Executive Vice President, EGP Retail Management. L.L.C.

Date:_____

**STATE OF TEXAS** §
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This Roadway Improvement Agreement between the CITY OF AUSTIN and SP MEADOWS SOUTH, LTD., concerning the construction of improvements within a right-of-way maintained by the State of Texas was acknowledged before me on this ___ day of _____, _____, by _____, as _____, of the CITY OF AUSTIN, a Texas municipal corporation, on behalf of the municipal corporation.

(SEAL)

_____
Notary Public, State of Texas

_____
Printed/Typed Name of Notary

My Commission Expires:_____

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This Roadway Improvement Agreement between the CITY OF AUSTIN and SP MEADOWS SOUTH, LTD. concerning the construction of improvements within a right-of-way maintained by the State of Texas was acknowledged before me on this ___ day of _____, _____, by _____, as _____, of _____,c on behalf of the partnership.

(SEAL)

_____
Notary Public, State of Texas

_____
Printed/Typed Name of Notary

My Commission Expires:_____

## Exhibit A

The project involves the construction of auxiliary lanes, storm drains, curb & gutter and associated ancillary improvements along the I-35 southbound frontage at Southpark Meadows Retail Center south of E. Slaughter Lane.

**Exhibit B**

1. TxDOT

| | | | |
|---|---|---|---|
| A. | Estimated Construction Cost (Bid items) | | $1,145,607.82 |
| B. | Construction Engineering & Inspection (13% of construction cost listed in 1.A.) | | $ 148,929.00 |
| C. | TxDOT Direct Costs (1% of construction cost listed in 1.A.) | | $ 11,456.08 |
| | | **Sub-Total** | **$1,305,992.92** |
| D. | TxDOT Indirect Costs (4.21% of Construction, Construction Engineering & Inspection, and Direct costs listed in 1.A., 1.B, and 1.C. ) | | $ 54,982.30 |
| | | **TxDOT Total** | **$1,360,975.22** |

2. City of Austin

| | | | |
|---|---|---|---|
| A. | City of Austin Administrative and Indirect Costs (5% of construction cost listed in 1.A.) | | $ 57,280.39 |
| B. | Contingency Funding (5% of construction cost listed in 1.A.) | | $ 57,280.39 |
| | | **City of Austin Total** | **$ 114,560.78** |
| | | **GRAND TOTAL** | **$1,475,536.00** |