

STATE OF TEXAS)
COUNTY OF TRAVIS)

**COST REIMBURSEMENT AGREEMENT:
(North I-35 Business Park, L.P.)**

THIS COST REIMBURSEMENT AGREEMENT ("Agreement") is made and entered into by and between the **City of Austin**, a Texas municipal corporation chartered under Article XI, Sec. 5 of the Texas Constitution (the "**City**") and **North I-35 Business Park, L.P.**, a Texas limited partnership and sole owner of the Property described below (the "**Owner**").

**ARTICLE I
RECITALS**

1.01. North I-35 Business Park, L.P. has acquired a certain tract comprised of approximately 45 acres (the "**Property**") located west of IH-35 North approximately 1,900 feet north of the intersection of IH-35 North and Wells Branch Parkway commonly known as the "**Wells Branch Center**" the same being more particularly shown on **Water Service Extension Request No. 2289** attached hereto as **Exhibit A** and incorporated by reference for all purposes ("**SER No. 2289**"). The Property is located within the extraterritorial jurisdiction of the City, except for approximately 0.27 acre which is within the corporate limits of the City, within the City's Desired Development Zone, and within the City's Utility and Impact Fee Service Areas in the Walnut Creek Watershed.

1.02. In order to obtain approval for City water utility services for the Property, the Owner made written application for approval of water utility service extensions with the Director of the Austin Water Utility (the "**Director**") and requested reimbursement for the water line extensions necessary to connect the Property to existing City water facilities.

1.03. More particularly, in **SER No. 2289**, the Owner made application for approval of City water utility service sufficient to provide an estimated peak hour flow of approximately **627 gallons per minute ("gpm")** for the mixed use development proposed to be constructed within the Property. The Director determined that the requested extension of City water utility service to the Property will require the developer of the Property to construct:

(a) **Phase One Water Improvements (limited to development below the 830 foot (MSL) contour requiring a fire flow of 1,500 gpm or less, unless otherwise approved by the Austin Fire Department, and up to four 1-inch water meters or equivalent):** includes the construction of approximately **930 linear feet of 16-inch water main** extending from a point of connection to the existing 8-inch City water main at the southern property line of the Property (the 16-inch Phase Two Water Improvements to be constructed to the southern property line pursuant to Subsection 1.03 (b)(2) below may be constructed simultaneously with the Phase One Water Improvements), then north along IH-35 North to a point of connection with an existing 8-

inch water line at the northern property line of the Property. The Phase One Water Improvements are not reimbursable; and

(b) Phase Two Water Improvements (to serve remaining development within the Property): includes:

(1) the construction of approximately **450 linear feet of 24-inch water main** extending from a point of connection to the existing 24-inch City water main at the eastern right of way line of IH-35 North and FM 1825, then west across IH-35 North to a point of connection with an existing 8-inch water line and the proposed 16-inch water line described below at the western frontage road of IH-35 North;

(2) the construction of approximately **530 linear feet of 16-inch water main** from the 24-inch water main improvements described above at the western right-of-way line of IH-35 North, then north along the IH-35 North to a point of connection with the Phase One 16-inch water main (the 16-inch Phase One Water Improvements may be constructed simultaneously with the Phase Two Water Improvements); and

(3) abandonment of the segment of existing 8-inch water line between the 24-inch connection point on the south and the 16-inch connection point on the north. The 16-inch Phase Two Water Improvements and the abandonment of the existing 8-inch water line between the 24-inch connection point on the south and the 16-inch connection point on the north are not reimbursable;

all as more particularly shown on **SER No. 2289** attached **EXHIBIT A** (the "**Water Project**").

1.04. By a motion of the Austin City Council adopted **January 15, 2004**, the City Council:

(a) authorized the construction of the water facilities described above that are needed to connect the **Property** to the City's existing water system; and

(b) authorized the City Manager or his designee to negotiate and execute an agreement with Owner setting forth terms and conditions whereunder the Owner would design and construct, and the City would reimburse the Owner for the actual construction costs ("hard costs") incurred for the 24-inch water main described in the Water Project in an amount **not to exceed \$216,000**.

1.05. **North I-35 Business Park, L.P.**, as Owner and developer of the Property, has agreed to construct the Water Project to meet the needs of the Property as well as the surrounding area and to finance the design and construction of said water facilities in accordance with this Agreement, **SER No. 2289** and the City Council approval of **January 15, 2004**.

NOW THEREFORE, in consideration of these premises, the mutual covenants of each party, and other good and valuable consideration, the receipt and sufficiency of which are acknowledge, the City and Owner agree as follows:

ARTICLE II CONSTRUCTION AND OPERATION OF THE WATER PROJECT

2.01. Owner's Agreement to Design the Water Project. In anticipation of reimbursement in accordance with the terms and conditions of this Agreement, Owner agrees to retain a registered professional engineer duly licensed in the State of Texas (the "**Project Engineer**") to prepare the engineering design, plans and specifications for the Water Project (the "**Plans and Specifications**") in conformance with the City of Austin design criteria and construction standards in effect at the time the plans and specifications are submitted to the City for approval. The Plans and Specifications will address the sizing, routing, materials selection, cost estimates, proposed construction schedule, easements, and such other and further information as the Director deems necessary or advisable. The Plans and Specifications were approved by the Director as part of site plan no. SP-05-1628D which was released on November 16, 2005. The Plans and Specifications require annual re-approval by the Director. The Owner has been actively pursuing the annual re-approvals, the most recent of which was obtained on August 7, 2008. The engineering and design for the Water Project was procured by the Owner at the Owner's sole expense, without reimbursement from the City. The City will advertise for bids for the construction work employing the City's procurement processes and the Plans and Specifications approved by the Director. The Plans and Specifications for the Water Project will be submitted to the Director prior to the City advertising for bids for the construction of the Water Project.

2.02. Owner's Agreement to Construct the Water Project. Owner agrees to commence construction of the Water Project within 90 days of the award of the approved construction contract and to exercise reasonable diligence to assure the substantial completion of the Water Project in conformance with the approved plans and specifications and this Agreement **within one (1) year** from the award of the construction contract subject to Force Majeure. The Owner shall fund the construction of the Water Project at their sole expense subject to cost reimbursement described herein for actual hard construction costs for the 24-inch water line in accordance with the terms of this Agreement. The completion date for the Water Project may be extended by the Director for good cause, as determined by the Director. All other water facilities required to provide City water utility service to the Property, or individual tracts within the Property, shall be designed and constructed at the sole expense of the Owner, without reimbursement from the City, in accordance with the approved Service Extension Request ("**SER**") approved for the Property. Upon the completion of construction of the Water Project by the Owner, and final acceptance thereof by the City, the Water Project will be owned, operated, and maintained by the City as part of the City's water utility system.

2.03. Owner Responsible for Soft Costs. Owner shall be solely responsible for payment of all "soft" costs for engineering, design, project management, inspections, financing, interest, fiscal security, permitting, accounting, insurance, permits, Owner's legal services, easements and all other "soft" costs and construction of the Water Project without reimbursement thereof by the City.

2.04. Owner to Act as Project Manager for Construction. Owner will serve as the Project Manager for the construction of the Water Project. The City acknowledges that the Owner may retain a qualified third party to assist in the execution of its duties as Project Manager for construction of the Water Project but the Owner shall be and remain responsible under this Agreement for the performance of same as between the Owner and the City.

2.05. Duties of Owner. Concerning the Water Project, the Owner agrees to:

(a) engage the services of a Texas licensed engineer, the Project Engineer to prepare plans and specifications for the Water Project;

(b) enter into a contract with the Project Engineer for the engineering design of the Water Project;

(c) ensure that the Plans and Specifications for the Water Project:

(1) conform to the City design criteria and construction standards in effect at the time the Owner submits the Plans and Specifications to the Director for approval;

(2) are submitted to the Director for review and approval before the City advertises for bids for construction of the Water Project;

(3) are accompanied by an Engineering Report discussing the sizing, routing, materials selection, cost estimates, proposed construction schedule, easements, anticipated volumes of flow and such other and further information that the Director deems necessary or advisable for proper review and assessment of the Plans and Specifications; and

(4) include all necessary documentation required by the Director for proper review and assessment of the Plans and Specifications;

(d) permit the City to use the Plans and Specifications approved by the Director, to solicit and publish invitations for bids for the construction of the Water Project following standard City bidding practices and procedures, including the minority-owned and women-owned business enterprise procurement program found in Title 2 of the Austin City Code, as amended, and Chapters 212 and 252, Texas Local Government Code, as amended;

(e) resubmit the Utility Plans and Specifications to the Director for review and approval prior to bidding the Water Project if a period of more than twelve (12) months pass after the Director has approved the Plans and Specifications, and before the project is bid;

(f) prepare and submit to the Director for review and approval all construction contracts and proposed construction schedules for the Water Project (the "**Construction Contract**") before execution; include general conditions in the Construction Contract no less stringent than those used by the City's Department of Public Works and Transportation including, without limitation;

(1) those regarding warranties, insurance, and bonding requirements;

(2) provisions including the City as an approved future assignee of the Owner with the ability to complete the project in the event Owner fails to complete the Construction Contract and the City exercises its right to complete the Water Project upon default of the Owner;

(3) a certificate of insurance evidencing that the City has been designated as an additional insured with respect to all liability coverages according to the City's Standard General Conditions;

(g) after approval by the Director, award the Construction Contract for the Water Project to a qualified construction contractor (the "**Construction Contractor**") in accordance with standard City construction contract procedures, including the minority-owned and women-owned business enterprise procurement program found in Title 2 of the Austin City Code, as amended;

(h) obtain all required permits, consents, variances, easements, inspections, tests, and authorizations necessary for construction of the Water Project;

(i) submit all payment and performance bonds and other documents required for the Construction Contract and this Agreement and then arrange a preconstruction meeting with the Construction Contractor, Project Engineer, and the City after the award of the Construction Contract and before the beginning of construction;

(j) monitor the Water Project costs to effect the completion of construction according to the estimated construction costs and undertake such corrective action as the City and the Owner mutually agree upon as necessary to assist in controlling project costs;

(k) review all change orders to the Construction Contract, including any which may be requested by the City on the reimbursable parts of the Water Project only, and submit said change orders along with the Project Engineer's recommendations to the Director for review and approval; prohibit work on change orders that the Director has not approved unless required for an emergency; and ensure that change orders for the

Water Project, either singly or in accumulation with others so approved, do not increase the Construction Contract costs by more than twenty per cent (20%);

(l) monitor activities of the Construction Contractor and the day-to-day progress of construction of the Water Project to encourage the timely and efficient completion of the Water Project following the approved Plans and Specifications and construction schedule, subject to Force Majeure;

(m) provide assistance to the Davis-Bacon inspector, if any, including allowing on-site interviews of employees of the Construction Contractor and review of the weekly payroll records;

(n) review inspection reports, conduct field inspections, and coordinate with approved inspectors and the Construction Contractor to cure defects and deficiencies in the construction before final acceptance;

(o) provide monthly and final reports to the Director setting forth the status of the Water Project, costs to date, problem areas, including anticipated construction delays, and recommendations for problem resolution as appropriate;

(p) arrange and coordinate materials testing with the Construction Contractor and the City, reject all work found not to conform to minimum requirements of the Construction Contract documents, and advise the Project Engineer and the City of work that Owner determines should be corrected or rejected or which requires special testing, adjustment, or inspection for approval. Owner will also provide the testing information to the City. If the City reasonably determines that the work needs to be corrected or rejected or which requires special testing, the City will notify Owner and Owner will take timely action to remedy the identified problem;

(q) arrange and observe with the Construction Contractor all acceptance testing (including, without limitation, pressure testing, infiltration/inflow, bacteriological testing, etc.) and notify the City and the Project Engineer of the conduct of the same;

(r) notify the City and the Project Engineer of defects and deficiencies found in the work and instruct the Construction Contractor to correct such defects and deficiencies;

(s) ensure access and permit the City's inspectors and other authorized representatives to inspect the construction at all times during the construction and the contractor's one (1) year warranty period following construction;

(t) prepare certificates of substantial completion for Project Engineer concurrence; submit to the Construction Contractor a list of observed items requiring completion or correction;

(u) conduct and coordinate final inspection of the Water Project in the presence of the Project Engineer and the City inspector; transmit a final list of items to be completed or repaired to the Construction Contractor; and observe the Construction Contractor correcting the items;

(v) arrange preparation of a certificate of project completion by Project Engineer according to contract documents and approved change orders, and submit it to the Director for review and approval of a concurrence letter;

(w) within thirty (30) days after final completion and acceptance of the Water Project by the City, provide to the City as-built drawings for the Water Project prepared and duly sealed by the Project Engineer;

(x) assign all warranties, guarantees, maintenance bonds, or like assurances of performance to the City after final acceptance of the Water Project by the City;

(y) make timely payment to the Project Engineer and Construction Contractor for work performed in connection with the Water Project;

(z) maintain master job files of correspondence, reports of conferences, shop drawings, samples, reproductions of contract documents, change orders, addenda, daily inspection reports, additional or revised drawings, and other related documents;

(aa) keep separate books of account, accurately documenting costs and expenses incurred in connection with the Water Project; submit actual cost data and support documentation to the City for all design and construction costs; close out records for the Water Project; and deliver all records and documentation to the City; and

(bb) secure easements for those portions of the Water Project to be constructed on private property acceptable in form and content to the City Attorney and the Director; provided, however, that the City agrees to provide reasonable assistance, at the expense of the Owner, to obtain easements for those portions of the Water Project, if any, that traverse private lands that are not located within the Property as defined above and that are not otherwise owned by the Owner, or their affiliated persons or entities.

2.06. Posting of Fiscal Security. In regard to fiscal security for the Water Project, the parties agree as follows:

(a) Owner will post fiscal security (the "**Fiscal Security**") in accordance with the City's policies and ordinances to secure the completion of the reimbursable portion of the Water Project in accordance with the terms of this Agreement;

(b) Owner agrees to post Fiscal Security for the reimbursable portion of the Water Project within ten (10) days of the award of the Construction Contract for the Water Project;

(c) the City acknowledges that it will accept a Fiscal Security in the form of either a separate irrevocable letter of credit, performance bond obtained by the Owner in addition to the bond the Contractor is required to obtain, or cash deposit sufficient to cover one hundred per cent (100%) of the actual Construction Contract award amount for the reimbursable portion of the Water Project; and

(d) Fiscal Security posted by the Owner for the reimbursable portion of the Water Project must comply with all applicable policies and requirements of the City and state law.

2.07. Reduction of Fiscal Security. The City agrees to allow a reduction in the amount of Fiscal Security in a Letter of Credit, reducing the total amount of the Letter of Credit by the amount of each construction draw, upon completion of the work funded by each construction draw in accordance with the terms of this section. As a discrete portion of the construction of the Water Project funded by a single construction draw is completed, the City agrees that the Fiscal Security posted by Owner may be reduced by an amount equal to the single construction draw for that discrete portion of the Water Project construction, at the written request of Owner, and if Owner is not then in default under the Agreement or the letter of credit or other obligations relating to the Water Project, the City shall complete, execute, and deliver to the issuer of the Letter of Credit a reduction letter verifying the completion of the discrete portion of the Water Project in question and documenting that the amount of the Fiscal Security has been reduced by stating the balance of the Fiscal Security remaining after the reduction described by the first sentence of this paragraph. The City shall not be required to authorize or process reductions in the Fiscal Security more frequently than every thirty (30) days.

2.08. Owner Responsibility for Engineering Review and Inspection Fees. Owner is responsible for paying for all engineering review and inspection fees and other inspection fees of the Water Project. The City's Public Works and Transportation Department will establish the estimated amount of engineering review and inspection fees applicable to the Water Project in accordance with the City's usual and customary requirements and procedures for same. If the amount deposited, based on the estimated construction amount is greater than the amount of the cost of inspection, the City shall release any of the deposited amount after final acceptance of the Water Project. If the amount deposited is less than the actual cost of inspection, Owner shall pay the City the remaining balance within thirty (30) days of being invoiced by the City. The sum of \$20,025.94 in inspection fees has already been deposited to the City by Owner.

2.09. City's Option to Construct Water Project Upon Default of Owner. If Owner has commenced construction but fails or refuses to complete the construction of the Water Project according to the Plans and Specifications by the required completion date (one year from the date of the Construction Contract award), such failure or refusal shall be considered an event of default and, after giving notice of default and reasonable opportunity to cure as hereinafter provided, the City will have the right, but not the

obligation, to draw on the Fiscal Security posted by Owner and complete the Water Project. Reasonable delays in construction not reasonably within the control of the Owner and about which Owner has notified the City in writing will not constitute default under this Agreement.

In the event the City elects to complete the Water Project, all Plans and Specifications, designs, easements, real and personal property, and improvements acquired, produced or installed in aid of completing the Water Project by Owner or their engineers or contractors before such default will become the property of the City and, in such event, Owner will provide such documentation to the City on the City's request within five (5) business days. To the extent the City draws upon the fiscal security provided under this Agreement to complete the construction of the Water Project, the City will nevertheless reimburse Owner under this Agreement for those hard construction costs previously incurred by Owner and the construction costs paid for with the proceed of the Fiscal Security that are reimbursable under this Agreement, except that the City may deduct from the reimbursement any expenses incurred by the City in connection with the completion of the remainder of the Water Project because of Owner's default.

2.10. City's Option to Terminate if Construction Has Not Commenced. If Owner has not awarded a Construction Contract within two (2) years of the effective date of this Agreement, or if the Owner has awarded a Construction Contract but has not commenced construction of the Water Project within one (1) year from the date of the award of the Construction Contract, and if the City has not elected to draw on the Fiscal Security for the Water Project in order to complete the Water Project, the City will have the right, at the sole discretion of the Director, to terminate this Agreement and withdraw its approval of SER No. 2289 relating to the Property.

If either the City or Owner elects to terminate this Agreement because of a default by the other party that remains uncured after notice and opportunity to cure given in accordance with this Agreement, or if this Agreement expires of its own terms before completion and acceptance of the Water Project, the City will have no obligation to provide water utility service to the Property until the Water Project, or an alternative project acceptable to the City, is constructed and accepted (except for up to four 1-inch meters that may be served from the Phase One Water Improvements, as noted in this Agreement and SER No. 2289). Owner shall not be entitled to reimbursement for any costs or expenses previously incurred in connection with the Water Project if the Agreement is terminated as a result of a default by the Owner.

2.11. Release and Return of Fiscal Security. Except as provide in 2.07 the City agrees to promptly release the fiscal Security in the following events:

(a) if either the City or Owner elect to terminate this Agreement (except that the Fiscal Security shall not be released in the event that the City elects to take over and complete the Water Project on the default of Owner);

(b) if the City elects not to exercise its right and option to complete the Water Project by commencing or resuming construction of the Water Project within one (1) year of the date of the City's notice to Owner of Owner's default; or

(c) upon final acceptance of the Water Project by the City.

ARTICLE III FUNDING AND REIMBURSEMENT OF PROJECT COSTS

3.01. Estimated Project Costs. The City and Owner have estimated the actual construction costs for the 24-inch water main described in the Water Project to be **\$216,000**. The parties acknowledge and agree that the actual costs for the 24-inch water main described in the Water Project may be greater or less than **\$216,000**.

3.02. Owner's Agreement to Fund Design and Construction of Water Project. Subject to reimbursement of the actual hard construction costs for the 24-inch water main described in the Water Project under the provisions of this Agreement, Owner agrees to fund and timely pay all costs associated with the engineering, design, construction, financing, accounting, project management, inspection, legal services and other costs associated with the completion of the Water Project in accordance with this Agreement.

3.03. City's Agreement to Reimburse Actual Hard Construction Costs.

(a) subject to completion of the 24-inch water main described in the Water Project by Owner and final acceptance thereof by the City, the City agrees to reimburse the actual hard construction costs of the 24-inch water main described in the Water Project, including change orders associated with the approved plans for the Water Project improvements approved by the Director according to this Agreement, up to the maximum not-to-exceed amount of **\$216,000** authorized by the City Council. Owner will bear all "soft" costs for engineering, design, financing, interest, accounting, project management, inspection, fiscal security, legal expenses and other costs incurred by it in connection with completing construction of the Water Project without reimbursement from the City;

(b) if the actual hard construction costs are less than the estimated amount, the City agrees to reimburse the actual hard construction costs that are eligible for reimbursement under this Agreement and the City Council approval of **January 15, 2004**. The actual construction costs do not include engineering, design, financing, interest, project management, inspection, accounting, legal services or costs of securing fiscal security, and other costs not associated with the actual construction of the Water Project. In the event the actual hard construction costs are greater than the estimated amount of **\$216,000**, Owner agrees that it will be responsible for those additional costs, as well as all "soft" costs associated with the Project without reimbursement from the City;

(c) if the actual hard construction costs for the 24-inch water main described in the Water Project are anticipated to exceed **\$216,000** and Owner desires to be reimbursed for that amount, it will need to make written request for City Council approval of the additional amounts. The City is not obligated to pay any additional amount until Council approval, if any, and the City makes no representation or assurance that City Council approval for additional amounts will be forthcoming. Provided, the City Water Utility staff will reasonably assist the Owner in making the request to the City Council for reimbursement of the actual hard construction costs exceeding \$216,000;

(d) if Owner allows work to commence on a change order before receiving the Director's prior written approval, any costs incurred on that change order that are not so approved in advance by the Director are not eligible for reimbursement;

(e) the City agrees to pay Owner the cost reimbursement payments in one (1) lump sum payment, without interest, on March 1 of the second year following the year in which the City finally accepts the work; and

(f) Owner agrees to provide all information and documents reasonably required by the City's Water and Water Utility for proper and timely processing and for accurate accounting and documentation of actual project costs.

3.04. Report of Project Costs Required. Within thirty (30) days of final acceptance of the Water Project by the City, Owner will submit a written report to the Director of the total costs incurred by Owner for the Water Project that includes supporting information documenting all amounts paid for which reimbursement is claimed and verifying that Owner has complied with the City's procurement policies and other requirements of this Agreement in the construction of the Water Project under this Agreement. The City will use the report to determine and verify the amount of actual hard construction costs eligible to be reimbursed to Owner for the Water Project. If the Director determines the Owner's report to be incomplete or otherwise insufficient to determine the actual hard construction costs eligible for reimbursement, the Director will notify the Owner of the particulars in which its documentation is deficient within thirty (30) days of the date of Owner's submission of its report of project costs and the Owner will timely provide all additional information reasonably required by the Director to determine the actual hard construction costs eligible for reimbursement.

3.05. Obligation of the City. The obligations of the City under this Agreement to make payments in any fiscal year shall constitute a current expense for that fiscal year payable solely from the revenues of the Austin Water Utility for that fiscal year. The obligation of the City to make payments does not constitute a general obligation or indebtedness of the City for which the City is obligated to levy or pledge any form of taxation.

ARTICLE IV OWNERSHIP OF FACILITIES

4.01. City to Own, Operate and Maintain Water Project. From and after the time of final completion of the Water Project by Owner and City's inspection and final acceptance of same, the City will own, operate, and maintain the Water Project as part of the City's water system and shall be responsible for all costs associated with same.

4.02. Owner's Delivery of Instruments of Transfer, Other Project Documentation. Within thirty (30) days after the time of the completion and final acceptance of the Water Project, Owner agrees to execute and deliver to the City such bills of sale, assignments, or other instruments of transfer requested by the City, in a form and content acceptable to the Director and the City Attorney, to evidence the City's ownership of same. Within said thirty (30) day period, Owner will also deliver to the City all bonds, warranties, guarantees and other assurances of performance, record drawings, easements, project manuals and all other documentation related to the Water Project that is within the custody and control of Owner.

4.03. No Liens Permitted. Owner will make timely payment to its engineers, contractors and materialmen for all aspects of the work and for all materials and services relating to the Water Project including, without limitation, all costs for engineering, design, construction (including inspection fees), project management, financing, interest, fiscal security, insurance and all other costs for labor, materials and services relating to the Water Project. Owner will not cause, suffer, or permit the filing, perfection, or execution of any mechanics lien or other encumbrance against the Water Project or any portion thereof.

Nothing in this Section prohibits Owner from withholding payment for any work that Owner, as Project Manager, deems defective or unacceptable. In that event, Owner has the right to withhold payment even if, in the exercise of that right, a lien or other encumbrance is perfected against the Water Project. However, if any lien or other encumbrance is filed against the Water Project, or any part of it, due to work performed or materials furnished by or at the request of Owner, Owner will cause the same to be fully and promptly discharged and released of record by payment, deposit, bond, or order of a court of competent jurisdiction or otherwise. Owner will secure the release of the lien or other encumbrance within thirty (30) days after the filing or perfection thereof, unless the parties mutually agree in writing to additional time. Owner agrees that the City will not accept any improvement burdened by any lien or other encumbrance and the City will not be obligated to provide water utility service to the Property until the lien or encumbrance is removed.

4.04. Agreement May be Pledged as Collateral. Owner may pledge its right to payment under this Agreement as collateral for purposes of securing financing from one or more lenders for the Water Project. Owner or the lender will provide such documentation to the City Law Department for its review and approval. The City agrees to execute such documents as may be reasonably required by the lender to perfect their security interest in the collateral (as defined in the Texas Business & Commerce Code) provided such instruments do not amend, modify, diminish or prejudice the City's rights

and interests under this Agreement or cause additional burden, expense or detriment of any kind to the City.

ARTICLE V

PROVISION OF UTILITY SERVICE FROM THE WATER PROJECT

5.01. City's Policies and Ordinances Apply to Service Within the Property. The parties agree that, from and after final acceptance of the Water Project by the City, the City will provide utility service to customers within the Property subject to the conditions stated in this Agreement and the City's policies and ordinances, as amended. Nothing in this Agreement will be construed to limit, restrict, modify, or abrogate the City's governmental authority or ordinances respecting the operation and maintenance of its water systems nor its duty to provide at all times for the public health, safety, and welfare in the operation and maintenance of the same.

5.02. Service Extension Request and Development of the Project. The City's service extension policies and ordinances apply to service within the Property. The City and Owner additionally acknowledge that:

(a) prior to execution of this Agreement, the Director has approved **SER No. 2289**, attached as **Exhibit A**;

(b) this Agreement will not be construed to guarantee water service if later proposed plans for development within the Property will require greater water service capacity than was indicated by the Owner in its request for approval of the Water Project or Owner's in their applications for approval of **SER No. 2289**;

(c) this Agreement will not be construed to guarantee water service if later proposed development within the Property requires approval of additional water approach facilities or additional water line extensions or other to obtain water service not addressed by this Agreement or **SER No. 2289** approved for the Property;

(d) this Agreement will not be construed to create or confer upon Owner, its successors and assigns, any ownership rights in or monopoly regarding capacity in the Water Project, whether total or partial, after final acceptance of the Water Project by the City;

(e) this Agreement in no way obligates the City to approve service extension requests or approach main facilities not conforming to the requirements of the City's policies and ordinances nor otherwise binds, restricts or limits the governmental powers of the City with respect to the approval or denial of the same;

(f) this Agreement does not exempt Owner from the requirements of any ordinance applicable to development within the Property;

(g) this Agreement sets out terms and conditions for cost reimbursement for the water facilities described herein as the Water Project and does not address nor guarantee approval of any proposed land uses or any particular development density, intensity, level of buildout or percentage of impervious cover;

(h) this Agreement will not be construed to create or confer upon Owner, or its successors or assigns, any manner of legal title to, equitable interest in, or other claim of joint ownership with respect to property, whether real, personal or mixed comprising the Water Project, or any portion thereof, after final acceptance of the Water Project by the City;

(i) this Agreement will not be construed to guarantee any particular level of water service to the Property (as the SER for the Property constitutes the City's commitment and the statement of conditions for the extension of water utility service to the Property); and

(j) if either party terminates this Agreement for any reason, the City will have no obligation to provide water service to the Property, or proposed development within the Property, until the Water Project, or alternative water facilities acceptable to the City, are constructed and receive final acceptance from the City (except for up to four 1-inch meters that may be served from the Phase One Water Improvements, as noted in this Agreement and SER No. 2289).

5.03. Transfer of Service Commitment Prohibited. This Agreement and the commitment for water service set forth in the SER approved for the Property are for development of the Property only. Owner may not assign or transfer, in whole or in part, the commitment for water service set forth in the SER or its rights and obligations under this Agreement to any other property or development. Owner has no right to limit the City in its access to or use of the water lines and appurtenances constituting the Water Project nor in its provision of water service to other customers through any of the water facilities it constructs or acquires.

ARTICLE VI. GENERAL PROVISIONS

6.01. Interpretation. Except where the context otherwise clearly requires, in this Agreement:

(a) words imparting the singular will include the plural and vice versa;

(b) all exhibits attached to this Agreement are incorporated by reference for all purposes as if fully copied and set forth at length;

(c) references to any document mean that document as amended or as supplemented from time to time; and references to any party mean that party, its successors, and assigns.

6.02. Notice of Default; Opportunity to Cure; Termination for Failure to Cure Default. Should either party allege that the other has defaulted in the performance of any obligation, the non-defaulting party will provide at least thirty (30) days written notice to the other party specifying the nature of the alleged default and provide the other party a reasonable opportunity to cure the default before exercising any legal or equitable remedy related to the alleged default. If the default is not cured within the reasonable period specified to cure the default, the non-defaulting party may terminate this Agreement, on written notice to the defaulting party and pursue such legal remedies as are available to the non-defaulting party, whether at law or in equity.

If either party terminates this Agreement for any reason permitted by this Agreement or applicable law before the substantial completion of the Water Project, then the City will have no obligation to provide water or wastewater service to the Property until the project is constructed, or an alternative project acceptable to the City is constructed.

6.03. Entire Agreement. This Agreement, including any attached exhibits, constitutes the entire agreement between the parties and supersedes all prior or contemporaneous understandings or representations, whether oral or written, respecting the subject matter of this Agreement.

6.04. Amendment. No amendment of this Agreement will be effective until the amendment has been reduced to writing, each party has duly approved it, and is signed by the authorized representatives of the parties. Any amendment will incorporate this Agreement in every particular not otherwise changed by the amendment.

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

6.06. Other Instruments, Actions. The parties agree that they will take such further actions and execute and deliver any other consents, authorizations, instruments, or documents that are necessary or incidental to achieve the purposes of this Agreement.

6.07. No Third Party Beneficiaries. Except as expressly provided in this Agreement, nothing will be construed to confer upon any person other than the parties any rights, benefits or remedies under or because of this Agreement.

6.08. No Joint Venture, Partnership, Agency. This Agreement will not be construed in any form or manner to establish a partnership, joint venture or agency, express or implied, nor any employer-employee or borrowed servant relationship by and among the parties.

6.09. Applicable Law. This Agreement will be construed under and according to the laws of the State of Texas.

6.10. Severability. The provisions of this Agreement are severable. If any court of competent jurisdiction will ever holds any word, phrase, clause, sentence, paragraph, section, or other part of this Agreement or the application of it to any person or circumstance to be invalid or unconstitutional for any reason, it will not affect the remainder of this Agreement and, in such event, this Agreement will be construed as if it had never contained such invalid or unconstitutional portion in it.

6.11. Force Majeure. If, by reasons of Force Majeure, any party will be rendered wholly or partially unable to carry out its obligations under this Agreement after its effective date, then such party will give written notice of the particulars of such Force Majeure to the other party or parties within a reasonable time after the occurrence of it. They will suspend the obligations of the party giving such notice, to the extent affected by such Force Majeure, during the continuance of the inability claimed and for no longer period, and any such party will in good faith exercise its best efforts to remove and overcome such inability.

The term "Force Majeure" as utilized in this Agreement will mean and refer to acts of God; strikes, lockouts or other industrial disturbances; acts of terrorism or other public enemies; orders of any kind of the government of the United States, the State of Texas, or any other civil or military authority; insurrections; riots; epidemics; landslides; earthquakes; lightning; fires; hurricanes; storms; floods; washouts; other natural disasters; arrests; restraint of government and people; civil disturbances; explosions; breakage or accidents to machinery, pipelines or canals; or other causes not reasonably within the control of the party claiming such inability.

6.12. Venue. Venue for any suit arising under this Agreement will be in Travis County, Texas.

6.13. Duplicate Originals. The parties may execute this Agreement in one or more duplicate originals each of equal dignity.

6.14. Notices. When notices or other communications are required to be given under this Agreement, the parties will give written notice to the address of the party to be noticed by either:

- (a) delivering it in person;
- (b) depositing it in the United States Mail, first class mail, postage prepaid;
- (c) depositing it with a nationally recognized courier service; or
- (d) by sending it by telefax (subject to electronic confirmation) with confirming copy sent by mail. For the purposes of notice, the addresses of the parties will, until changed as provided below, be as follows:

OWNER:

North I-35 Business Park, L.P.
c/o William D. Schultz

CITY OF AUSTIN:

Director, City of Austin Water Utility
P.O. Box 1088

P.O. Box 684309
Austin, Texas 78768
Tel. (512) 266-4749
Fax: (512) 233-0075

625 E. 10th Street
Austin, Texas 78767-1088
Tel. (512) 972-0101
Fax: (512) 972-0111

(with copy to)

William D. Schultz
P.O. Box 731
Media, Pennsylvania 19063
Tel. (512) 266-4749
Fax: (512) 233-0075

and

James M. Nias
Jackson Walker L.L.P.
100 Congress Avenue, Suite 100
Austin, Texas 78701
Tel. (512) 236-2350
Fax: (512) 236-2002

and

Carl Conley
Conley Engineering, Inc.
1301 S. Capital of Texas Highway, Suite A-230
Austin, Texas 78746
Tel. (512) 328-3506
Fax: (512) 328-3509

The parties notify each other of any changes to their respective addresses. If any date or notice period described in this Agreement ends on a Saturday, Sunday, or legal holiday, the parties will extend the applicable period for calculating the notice to the first business day following such Saturday, Sunday, or legal holiday.

6.15. Expiration of Agreement. Unless sooner terminated under the provisions of this Agreement, this Agreement shall expire of its own terms without further notice at 12:00 o'clock a.m. on the next business day following third anniversary of the effective date of this Agreement, if actual construction of the Water Project has not commenced on or before the third anniversary date of the effective date of this Agreement.

6.16. Assignment. Neither party may assign its rights or obligations under this Agreement, in whole or in part, without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed; provided, however, that Owner may assign its rights and obligations under this Agreement to an affiliate of Owner, or to the purchaser of all or a significant portion (at least 1/3) of the Property, by giving written notice to the City in accordance with the procedures set forth in this Agreement provided, however, that Owner's assignee assumes all of the rights and obligations under this Agreement without amendment or modifications of same.

6.17. Effective Date. This Agreement will be effective upon due execution by all parties.

APPROVED AS TO FORM:


Assistant City Attorney

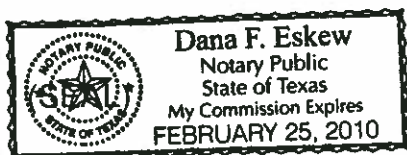
CITY OF AUSTIN:

By: 
Rudy Garza,
Assistant City Manager

Date: 2/16/09, 2009

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

THIS INSTRUMENT was acknowledged before me on this 16 day of February 2009, by Rudy Garza, Assistant City Manager of the City of Austin, a Texas municipal corporation, on behalf of said municipal corporation.




Notary Public, State of Texas

APPROVED AS TO FORM:

[Signature]
Attorney for Owner

OWNER:

North I-35 Business Park, L.P.,
a Texas limited partnership

By: North I-35 Business Park GP, L.L.C.,
a Texas limited liability company,
as General Partner

By: [Signature]
William Schultz, Manager

Date: 2/5/09, 2008

STATE OF Texas)
COUNTY OF Harris)

THIS INSTRUMENT was acknowledged before me on this 5th day of February 2009, by William D. Schultz, as Manager of North I-35 Business Park GP, L.L.C., a Texas limited liability company, acting as General Partner of North I-35 Business Park, L.P., a Texas limited partnership, on behalf of said limited partnership.

(SEAL) [Signature]
Notary Public, State of Texas

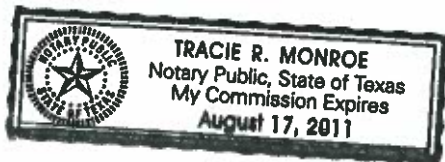
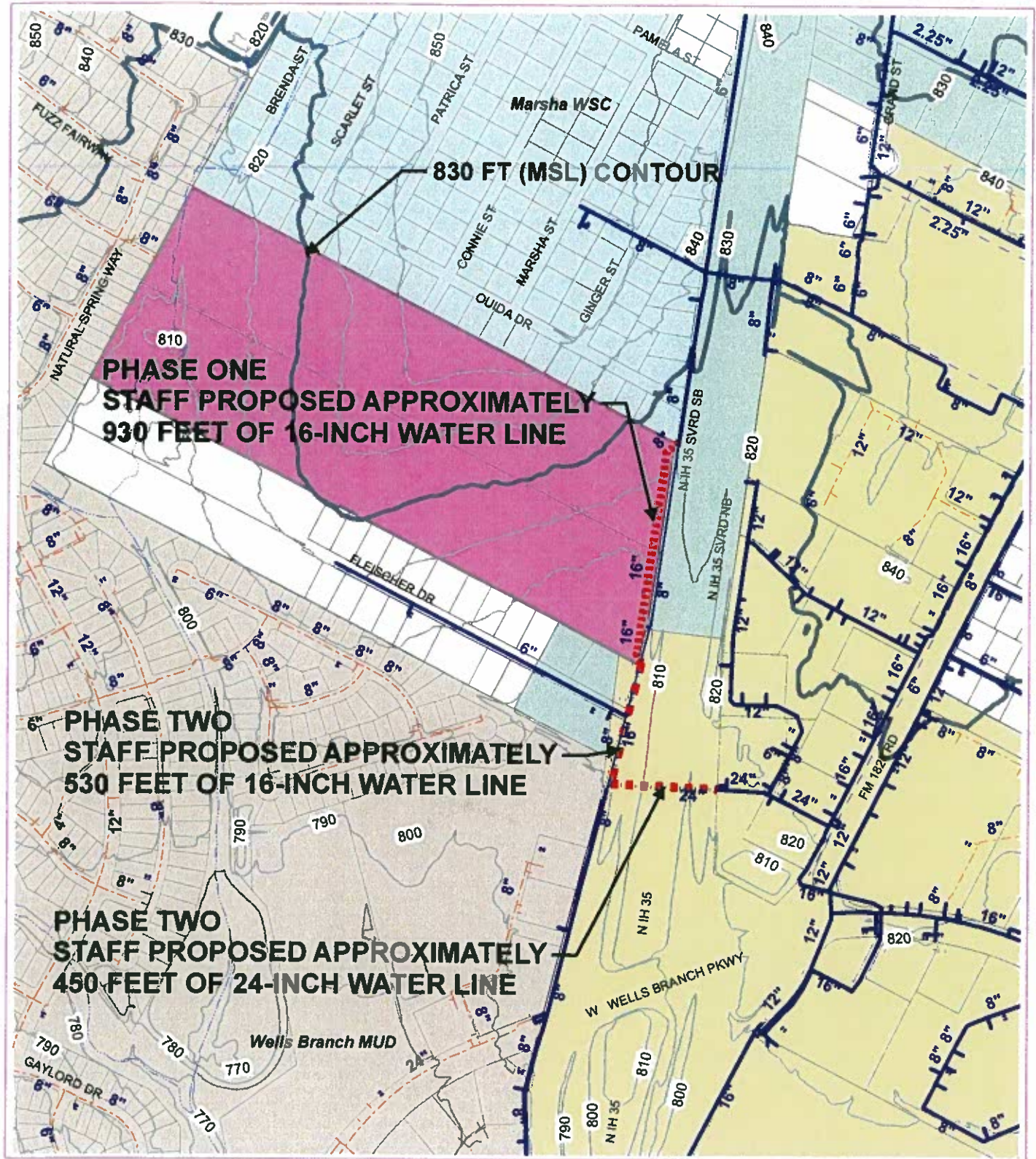


EXHIBIT A
WATER SERVICE EXTENSION NO. 2289



325 162.5 0 325 Feet

- Subject Tract
- City Limits
- Limited Purpose City Limits

■
W. S.E.R. Name: Schultz 45 Acre Tract (Revised)
W. S.E.R. Number: 2289

**WATER AND WASTEWATER
SERVICE EXTENSION
REQUEST FOR
CONSIDERATION**

206309

Name : **Schultz 45 Acre Tract (Revised)**

Service Requested : **Water**

S.E.R. No. : **2289**

Date Received : **9/18/2003**

Location : **1900' north of the IH-35 and Wells Branch Parkway intersection on the west side of IH-35**

Acres : **45**

Land Use : **Mixed**

Alt. Utility Service or S.E.R. Number : **No\2290 Council Approval**

Quad1 : **M-37**

Quad2 :

Drainage Basin : **Walnut Creek**

Pressure Zone : **NW A**

DOZ : **Yes**

Flow : (Estimated Peak Hour Flow, Gallons per Minute)

627 gpm

DWPZ : **No**

Cost Participation : **\$216,000.00**

% Within City Limits : **0**

% Within Limited Purpose : **0**

Description of Improvements:
Phase One Water Improvements

Applicant will construct approximately 930 feet of 16-inch water line from the existing 8-inch water line at the southern property line of the subject tract, north along IH-35 North to the northern property line of the subject tract and connect to the existing 8-inch water line. The existing 8-inch water line between the 16-inch connection point on the south and the 16-inch point on the north will stay in service until the Phase Two Water Improvements have been constructed.

Phase One Development Restrictions

The development of the subject tract will be limited to a fire flow requirement of 1,500 gpm or less or otherwise approved by the City of Austin Fire Department, development below the 830 ft (MSL) contour unless the applicant can demonstrate to the City of Austin Fire Department that he can meet the required fire flows, and up to four 1-inch water meters.

Phase Two Water Improvements

Applicant will construct approximately 450 feet of 24-inch water line from the existing 24-inch water line at the eastern right-of-way line of IH-35 North and F.M. 1825, west across IH-35 North, and approximately 530 feet of 16-inch water line from the 24-inch water line, north along IH-35 North to the 16-inch water line constructed in the Phase One Water Improvements. The existing 8-inch water line between the 24-inch connection point on the south and the 18-inch point on the north will need to be abandoned.

NOTE:

Pressure Reducing Valves (PRV's) may be required at the individual property connections.

Completion and acceptance of the improvements described above and the conditions set forth below:

- 1) Construction of all Service Extensions are subject to all environmental and planning ordinances.
- 2) Service Extensions are subject to the guidelines established in the Land Development Code, Section 25-9, Water and Wastewater Utility Service.
- 3) The level of service approved by this document does not imply commitment for land use.
- 4) Approval of a site plan that meets the Fire Department requirements for fire control.
- 5) The proposed water (within right-of-ways or public easements) improvements will be dedicated to the City of Austin for ownership, operation, and maintenance.
- 6) The approved Service Extension will automatically expire 120 days after date of approval unless a development application has been accepted by the Watershed Protection and Development Review Department. The Service Extension expires on the date the development expires, or if approved, on the date the development application approval expires.
- 7) City Council approval is required.

U. Lyne
Austin Water Utility, Director

10/26/06
Date

Jeffrey
Prepared By **9/28/06**

Singh P.E.
Utility Development Services, Manager **10/17/06**
Date

Technical Review **12** **9/28/06** **10/18/06 LN**