

ORDINANCE NO. 20060608-008

AN ORDINANCE AUTHORIZING THE CITY MANAGER TO NEGOTIATE AND EXECUTE THE FOURTH AMENDMENT TO THE CONSENT AGREEMENT WITH THE NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. 1 TO ESTABLISH A MONTHLY CREDIT ON WATER AND WASTEWATER BILLS FOR CERTAIN CUSTOMERS; AMENDING ORDINANCE NO. 20050912-004 TO ESTABLISH THE WATER AND WASTEWATER CREDIT; AND WAIVING THE REQUIREMENTS OF CITY CODE SECTION 2-5-2 RELATING TO ECONOMIC IMPACT STATEMENTS, SECTION 2-5-45 RELATING TO A RATE CHANGE PUBLIC HEARING, SECTION 15-9-4 RELATING TO PUBLIC NOTICE OF A PROPOSED RATE OR CLASSIFICATION CHANGE, AND SECTION 25-9-253 RELATING TO BOARD AND COMMISSION REVIEW.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The City Council authorizes the City Manager to negotiate and execute a Fourth Amendment to the Agreement Concerning Creation and Operation of the Northwest Austin Municipal Utility District No. 1 (Amendment to Consent Agreement) in substantially the form attached as shown in Attachment 1.

PART 2. The council amends the Fiscal Year 2005-06 Fee Schedule, Exhibit "A" of Ordinance No. 20050912-004 to amend the current rate credit for Northwest Austin Municipal Utility District No. 1 in the Austin Water Utility fee schedule to read:

Northwest Austin MUD No. 1 [~~Water and Wastewater~~] Rate Credit

Each single-family residential customer located within the Northwest Austin Municipal Utility District No. 1 receives a monthly adjustment subtracting \$35.33 [~~\$37.68~~] from their water and wastewater bills. If the individual customer's monthly total of the water and wastewater bill is less than \$35.33 [~~\$37.68~~], no carryover shall be allowed. This adjustment will continue until the current bond indebtedness of the District is retired or September 1, 2026, whichever is earlier.

PART 3. The rates in this ordinance take effect on the first billing cycle after the parties have executed the Amendment to the Consent Agreement.

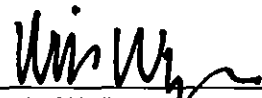
PART 4. In adopting the rates in this ordinance, the council waives the requirements of City Code Section 2-5-2 (*Economic Impact Statement*), City Code Section 2-5-45 (*Public Hearing on Determination of City Utility and Garbage Rates*), City Code Section 15-9-4 (*Changes to Rate Schedule or Classification*), and City Code Section 25-9-253 (*Board and Commission Review; Council Action*).

PART 5. This ordinance takes effect on June 19, 2006.

PASSED AND APPROVED

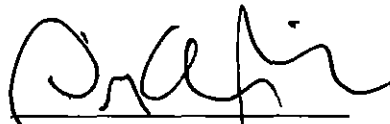
_____, June 8 _____, 2006

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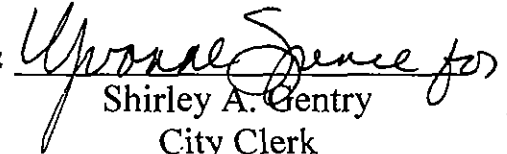
Will Wynn
Mayor

APPROVED:



David Allan Smith
City Attorney

ATTEST:



Shirley A. Gentry
City Clerk

ATTACHMENT 1

FOURTH AMENDMENT TO AGREEMENT CONCERNING CREATION AND OPERATION OF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. 1

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

This Fourth Amendment to the Agreement Concerning Creation and Operation of Northwest Austin Municipal Utility District No. 1 (the "Fourth Amendment") is made and entered into by and between the City of Austin, Texas (the "City"), a Texas municipal corporation acting by and through its duly authorized City Manager or her designee; Northwest Austin Municipal Utility District No. 1 (the "District") a conservation and reclamation district created and operating as a municipal utility district pursuant to Article 16, §59 of the Texas constitution and Texas Water Code, Chapters 49 and 54; Canyon Creek Land, Ltd. ("CCLL"), a Texas Limited Partnership, acting by and through its duly authorized general partner, CAPTEX Land Corporation, a Texas corporation; and Canyon Creek Option, Ltd. ("CCOL"), a Texas limited partnership, acting by and through its duly authorized general partner, CAPTEX Land Corporation, a Texas corporation (hereinafter collectively referred to as the "Developers").

Unless the context otherwise specifically requires, the term "Consent Agreement" shall mean the "Agreement Concerning Creation and Operation of Northwest Austin Municipal Utility District No. 1," as amended. The term "Canyon Creek" shall mean and refer to the Canyon Creek Development constructed by the Developers within the District.

I. RECITALS:

WHEREAS, the District was created by order of the Texas Water Commission (hereinafter the "Commission") and the creation of the District was confirmed by an election held within the District on May 7, 1988; and

WHEREAS, on or about July 18, 1989, the District; the City; and Plateau Utilities, Inc. ("Plateau"), Texas American Bank - Fort Worth, N.A. ("Texas American Bank") and Nash Phillips/Copus, Inc. ("NPC"), predecessors in interest of the Developers, entered into that certain "Agreement Concerning Creation and Operation of Northwest Austin Municipal Utility District No. 1 (the "Consent Agreement") which provides, among other things, terms and conditions for provision of water and wastewater service to the lands comprising the District, financing of District water, sewer and drainage facilities and for development of land within the District; and

WHEREAS, on or about September 11, 1990, the City, the District, Plateau and Team

Bank, as successor in interest to Texas American Bank, entered into that certain "First Amendment to the Agreement Concerning Creation and Operation of Northwest Austin Municipal Utility District No. 1" to amend certain provisions of the Consent Agreement pertaining to the provision of wastewater service; and

WHEREAS, on or about October 6, 1992, the City, the District, Team Bank and CCLL, entered into that certain "Second Amendment to the Agreement Concerning Creation and Operation of Northwest Austin Municipal Utility District No. 1," to amend certain provisions of the Consent Agreement regarding dedications of parkland, open space, a fire station site and contributions of funds for certain improvements as more particularly set forth therein; and

WHEREAS, by a succession of transactions CCLL and CCOL succeeded to the ownership of the remaining undeveloped acreage within the District together and all rights and obligations of NPC, Texas American Bank and its successor, Team Bank, under the Consent Agreement and Plateau has been dissolved and its Certificate of Public Convenience and Necessity ("CCN") revoked by the Commission; and

WHEREAS, on or about February 27, 1995, the City, the District, CCLL and CCOL, entered into that certain "Third Amendment to the Agreement Concerning Creation and Operation of Northwest Austin Municipal Utility District No. 1," to amend certain provisions of the Consent Agreement regarding wastewater service, stormwater drainage, dedications of land and development of lands within the District; and

WHEREAS, the parties herein wish to execute this "Fourth Amendment to the Agreement Concerning Creation and Operation of Northwest Austin Municipal Utility District No. 1," to amend the Consent Agreement to provide, among other things, for a monthly credit on the City of Austin water and wastewater utility bills per single family lot for customers located inside the District and for the transfer of certain property from the District to the City; and

WHEREAS, the District holds fee title to certain tracts described in Exhibit A, that comprise approximately 214.63 acres, (herein "Preserve Lands") which are dedicated for the conservation of endangered species, and which are subject to requirements set forth in the March 8, 1995 letter from the U.S. Army Corps of Engineers regarding the application for a section 404 permit under the Clean Water Act and the biological opinion from Fish and Wildlife Service attached to this letter (herein "Federal Permits"); and

WHEREAS, the City, for the purposes of overseeing compliance with the Federal Permits associated with the Preserve Lands and for protecting habitat to assure recovery of species listed under the Endangered Species Act, desires the transfer, upon execution of this agreement, of the three tracts described in Exhibit A; and

WHEREAS, the City will assume the obligation of operating and maintaining the Preserve Lands consistent with the Federal Permits, with the District assuming responsibility under the Federal Permits for operating and maintaining the 191.28 acre tract described in

Exhibit B; and

WHEREAS, all parties to this agreement acknowledge the importance of the preservation of conservation values and fish and wildlife on the properties described in Exhibits A and B, which have been specifically set aside for this purpose, and further acknowledge the importance of minimizing impacts to water quality on streams that flow through these properties; and

WHEREAS, the parties to this agreement seek to formalize the promise of the Developers that coincident with issuance of the latest round of bonds for \$2,560,000 currently in progress, no further development within the District shall require the issuance of District indebtedness and as a result the heretofore authorized debt ceiling of \$21,110,000 should be forever reduced to \$16,270,000 and no refunding bond issue will be proposed that increases annual debt service requirements from the originally approved level; and

WHEREAS, the parties herein wish to amend the Consent Agreement to provide for a more clear transition date for the transfer of Trailhead Park (the "Park") to the City as contemplated in the Third Amendment to the Consent Agreement; and

WHEREAS, the District desires to make additional capital improvements to the Park to benefit the District's taxpayers and to promote the purposes of the District, and the City desires to allow the District to make such improvements prior to transfer of the title of the Park to the City; and

WHEREAS, the District has a request for issuance of bonds pending before the City, and the District and the Developers desire to have those bonds issued and the City desires to ensure compliance with prior agreements between the parties prior to the issuance of the bonds; and

WHEREAS, the parties desire to set forth terms and conditions for modification of the Consent Agreement regarding water and wastewater rates, transfer of Preserve Lands from the District to the City, limiting the amount of future bond issues by the District, cooperation between the District and the City, and modification of the Consent Agreement regarding the transition date for the transfer of the Park to the City; and

NOW, THEREFORE, for and in consideration of the foregoing premises and mutual agreements, covenants and conditions hereinafter set forth, the City, the District, and Developers hereby contract and agree as follows:

II. AMENDMENTS TO CONSENT AGREEMENT

1.01. Sections 3.2, 3.8 and 4.3 of the Consent Agreement are hereby amended to read as follows:

Section 3.2. Retail Water Supply

- (a) The City agrees to sell and deliver all water necessary for domestic and commercial purposes by users within the District on a retail basis on the same terms and conditions as it would all other customers within the City and under terms and conditions set forth below in Section 3.3 through Section 3.12, except that the terms and conditions regarding monthly credits to be subtracted from the water and wastewater bills set forth below in Section 3.8 are not customary terms and conditions for retail service provision and are not to be granted to other retail water and wastewater customers of the City.
- (b) Except for the terms and conditions set forth below in Section 3.8, the sale and provision of water to the City's customers within the District shall be nondiscriminatory and uniform with the policy or policies of the City relating to utilities inside the City's utility service area, as now in effect or hereafter amended.
- (c) The supply of water to the City's customers within the District may be reasonably limited by the City on the same basis and to the same extent as the supply of water to any other customer within the City's service area.

Section 3.8. Retail Rates and Billing.

- (a) Basic rates charged to all City customers within the District for water and wastewater and procedures for the billing, payment and collection services therefore shall be set by the City. Each customer of the City within the District shall pay the City for water and wastewater service received at the applicable inside-City retail water and wastewater rates, subject to the following provision in subsections (b)-(f).
- (b) Upon the first billing cycle following the execution of this Fourth Amendment, the City shall provide a monthly credit to be subtracted from the water and wastewater bills on each single-family residential customer located inside the District. The monthly credit shall be based on a calculation of 50% of the District's average annual debt service on its current outstanding district debt, as calculated on January 1 of each year, divided by the current number of single family platted lots (1,297).
- (c) The initial monthly credit shall be \$35.33, adjusted each January 1 as described. The water and wastewater bills are based on the customer's actual use times the City's volumetric charges.
- (d) In the event the individual customer's monthly total of the water and wastewater bill is less than \$35.33 in fiscal year 2006-2007, or is less than the recalculated monthly credit amount per Section 3.8 (b) in subsequent years, no carryover shall be allowed. No adjustment will be made on the monthly utility bill for any other City services, including electric, drainage, solid waste, and/or transportation.

- (e) The credit described herein, as adjusted annually, will continue until September 1, 2026, when the last payment on the District's current debt is paid or until the debt is retired if an earlier date.
- (f) There will be no additional adjustments to the water and wastewater bills for future bond issues of the District, other than the current bond application pending before the City in the principal amount of \$2,560,000. There is no adjustment in this Consent Agreement for multi-family, commercial, large volume/industrial customers or golf courses inside the District.

Section 4.3. Wastewater Rates and Billing of the Consent Agreement is deleted.

- 1.02. Upon execution of this Fourth Amendment, the District shall transfer to the City by warranty deed, to be recorded in the county deed records, by the City, as depicted in Exhibit A, all of the District's title to the three (3) tracts of Preserve Lands described in Exhibit A that comprise approximately 214.63 acres. The property depicted in Exhibit A, after transfer to the City, remains subject to the provisions of the Consent Agreement and all amendments, validly existing easements, dedications, rights-of-way, existing restrictive covenants, continuing requirements in the Federal Permits and all presently recorded and validly existing instruments other than conveyances of the surface fee estate.
- 1.03. Upon transfer to the City of the property in Exhibit A, responsibility for paying the cost of maintenance in compliance with provisions set forth in the current Federal Permits associated with tracts in Exhibit A, shall be transferred to the City. The City and the Developers shall seek any required changes to the Federal Permits or other documents necessary to transfer the maintenance responsibilities to the City.
- 1.04. With regard to the 191.28 acre tract in Exhibit B, also subject to the Federal Permits, after the effective date of the transfer of the obligations of the Federal Permits to the District for that tract, the District shall be responsible for paying the cost of maintenance in compliance with provisions set forth in the current Federal Permits associated with that tract. The District, the Developers and the City shall seek any required changes to the Federal Permits or other documents necessary to transfer the maintenance responsibilities from the Developers to the District. After the effective date of this Fourth Amendment, the District may seek clarification or modification from the U.S. Fish and Wildlife Department and other appropriate federal agencies regarding the terms of the Federal Permits, as they apply to the 191.28 acre tract shown in Exhibit B. This clarification or modification would allow the District to maintain and improve existing trails on that tract, and to allow limited non-motorized access to that tract.
- 1.05. The property transferred from the District to the City of Austin as depicted in Exhibit A shall be forever limited in its use by a prohibition on construction as indicated in the deed restrictions in Exhibit B to the Special Warranty Deed (Real Property Records of Travis

County Texas #12477 0635). The purpose of the prohibition will be to preserve the land for endangered species and to allow limited human recreational access consistent with the Federal Permits, as amended.

- 1.06. With regard to efforts to preserve fish and wildlife and/or the minimize impacts on water quality on the properties depicted in Exhibits A and B, all parties to this Agreement agree to continue to cooperate with each other and other authorities.
- 1.07. The deed transferring the property in Exhibit A shall provide that the City consents to the District's right to enforce the current deed restrictions in a Travis County District Court and that upon dissolution of the District that the Canyon Creek Homeowners Association or other party designated by the District shall succeed to the right to enforce the current deed restrictions. The parties agree that the requirement in Section 1.07 of the Third Amendment to Agreement Concerning Creation and Operation of Northwest Austin Municipal Utility District No. 1 to impress the Preserve Lands is no longer required.
- 1.08. The City of Austin shall officially designate the property in Exhibit A transferred to the City as wildlife refuge within 30 days of the transfer of the property, invoking thereby the protections of Chapter 26 of the Texas Parks and Wildlife Code, but the City may, at its sole discretion, change such designation to parkland or recreation area, which designation shall continue to invoke the protections of the Texas Parks and Wildlife Code.
- 1.09. The Developers agree herein that coincident with issuance of the latest round of bonds for \$2,560,000 currently in progress, no further development within the District shall require the issuance of District indebtedness and as a result the heretofore authorized debt ceiling of \$21,110,000 is forever reduced to \$16,270,000 and no refunding bond issue will be proposed that increases annual debt service requirements from the originally approved level.
- 1.10. The District and the City agree to divide evenly all closing costs associated with the transfer of the Preserve Lands in Exhibit A, including, but not limited to, costs for surveying, title policy, environmental assessment, recording fees and escrow fees.
- 1.11. The provisions of Chapter 271, Texas Local Government Code, apply to lawsuits under this Agreement. In a suit to enforce this Agreement each party shall bear its own attorneys fees and court costs. The parties agree that the provisions in Section 271.159, as it exists on the effective date of this agreement, shall continue in effect as if fully set forth herein, even if that statutory provision is repealed or modified.
- 1.12. The last sentence of Section 8.3.b. of the Consent Agreement, as amended, is hereby stricken and is substituted by the following sentence which reads in its entirety:

District No. 1 agrees to convey, and the City agrees to accept at the time the District tenders, the Park and the park improvements constructed thereon to the

City, on or before March 1, 2011. District No. 1 shall continue to operate and maintain the Park and park improvements constructed thereon until the District conveys the property to the City, at which time the City will undertake all such obligations.

III. GENERAL PROVISIONS

- 2.01. All Other Provisions Remain in Effect as Written. Except as set forth in this Fourth Amendment, all other terms and conditions of the Consent Agreement, as amended, shall remain in force and effect as written.
- 2.02. Covenants Survive Closing. Unless specifically otherwise set forth in this Fourth Amendment, all covenants, promises, rights, duties and liabilities set forth in this Fourth Amendment shall survive the closing transactions contemplated by this Fourth Amendment.
- 2.03. Effective Date. Except as otherwise set forth above, this Fourth Amendment shall be effective from and after due execution hereof by the authorized representatives of the City, the District, and the Developers.
- 2.04. Duplicate Originals. This Fourth Amendment may be executed in duplicate originals each of equal dignity.

IN WITNESS WHEREOF, the authorized representatives of each party have caused this Fourth Amendment to be executed as of the dates shown below.

Approved as to form:

Assistant City Attorney

CITY OF AUSTIN:

By: _____

Name: _____

Title: _____

Date: _____

NORTHWEST AUSTIN MUNICIPAL
DISTRICT NO. 1:

By: _____

Don Zimmerman

Title: President, Board of Directors

Date: _____

CANYON CREEK LAND, LTD., a
Texas limited partnership:

By: CAPTEX Land Corporation, a Texas
corporation, its General Partner

By: _____

Name: _____

Title: _____

Date: _____

CANYON CREEK OPTION, LTD.,
a Texas limited partnership:

By: CAPTEX Land Corporation, a
Texas corporation, its General
Partner

By: _____

Name: _____

Title: _____

Date: _____

THE STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

THIS INSTRUMENT was acknowledged before me on the ____ day of _____ 2006, by _____, _____ of the City of Austin, a Texas municipal corporation, on behalf of said municipal corporation.

Notary Public, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

THIS INSTRUMENT was acknowledged before me on the ____ day of _____ 2006, by _____, President of the Board of Directors of Northwest Austin Municipal Utility District No. 1, a municipal utility district, on behalf of said district.

Notary Public, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

THIS INSTRUMENT was acknowledged before me on the ____ day of _____ 2006, by _____, President of CAPTEX Land Corporation, General Partner of Canyon Creek Land, Ltd., a Texas limited partnership, on behalf of said limited partnership.

Notary Public, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

THIS INSTRUMENT was acknowledged before me on the ____ day of _____ 2006,
by _____, President of CAPTEX Land Corporation, General Partner of
Canyon Creek Option, Ltd., a Texas limited partnership, on behalf of said limited Partnership.

Notary Public, State of Texas

L:\Construction-Land-Water\CS\MUD\Northwest Austin MUD #1—4th Amendment to Consent Agreement re Rates\NWA MUD 4th Amend
Consent June 1, 2006