



**RCA
CITY OF AUSTIN
RECOMMENDATION FOR COUNCIL ACTION**

**AGENDA ITEM NO.: 31
AGENDA DATE: Thu 01/26/2006
PAGE: 1 of 1**

SUBJECT: Approve a resolution authorizing negotiation and execution of a contract with SPG ARBOR WALK, LP, a Texas limited partnership, to receive funds from this company and apply them towards construction of an auxiliary turn lane on Loop 1 Northbound Frontage Road.

AMOUNT & SOURCE OF FUNDING: Funding in the amount of \$373,771.34 has been provided by SPG Arbor Walk, LP to be deposited into an escrow account for this project.

FISCAL NOTE: There is no unanticipated fiscal impact. A fiscal note is not required.

REQUESTING Public Works
DEPARTMENT:

**DIRECTOR'S
AUTHORIZATION:** Sondra Creighton

FOR MORE INFORMATION CONTACT: Richard Kroger 974-7219; Laura Bohl 974-7064

PRIOR COUNCIL ACTION: N/A

BOARD AND COMMISSION ACTION: N/A

PURCHASING: N/A

MBE / WBE: N/A

SPG Arbor Walk, LP desires that an auxiliary lane be constructed on the Loop 1 Northbound Frontage Road from 0.61 mile south of Braker Lane to 0.81 mile south of Braker Lane to provide for turning movements into the proposed Arbor Walk development. Construction will consist of grading, asphaltic pavement, signing and pavement markings.

Because the proposed improvements are in State right-of-way, it is necessary that the State implement the construction project. The State is prohibited from directly entering into contracts with private entities for construction in State right-of-way. In order to construct the improvements, it is thus necessary for the City of Austin to enter into an agreement with the developer to receive their funds for the project, and to enter into an agreement with the State to provide funds received from the developer for the project.

The State will bid this project. Because construction costs have on past projects sometimes exceeded the engineer's estimate, a 50% construction cost contingency and a clause requiring additional funds from the developer as necessary to maintain this contingency are included in the agreement with the developer to protect the City from incurring any costs. Any funds not expended for the project, including interest on funds in escrow, will be returned to SPG Arbor Walk, LP after completion of the project, less City administrative and indirect costs not to exceed \$10,500.94, which are included in the agreement with the developer, but are not part of the agreement with the State.

ROADWAY IMPROVEMENT AGREEMENT

STATE OF TEXAS

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COUNTY OF TRAVIS

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This Road 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 SPG Arbor Walk, LP, a Texas limited partnership having an office at 115 West Washington Street, Indianapolis, Indiana 46204 (Requestor).

WHEREAS, Requestor has entered into a ground lease with the Board of Regents of the University of Texas System for a certain tract of real property located at the southeast corner of northbound Mopac Frontage Road and Braker Lane, just north of US 183; 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 promptly 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. Any delays by the City in releasing funds to TxDOT shall not be a default by Requestor and shall not result in any penalty against 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's approval of the plans and specifications. Any comments by TxDOT to the plans and specifications shall be promptly delivered to Requestor. 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. Bid Process and Construction. TxDOT, not Requestor, manages both the bidding process for the award of construction agreements and the construction of Improvements.
- C. 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.
- D. 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.
- E. Improvement Costs. The Requestor has provided 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 shall provide 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. The City shall deposit the funds in a separate account in accordance with the requirements of Section 4 herein.

3. 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, subject to last grammatical sentence of this Section, 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 E.1. and Subsection F. of this Section. The Requestor shall provide the difference amount not later than thirty (30) calendar days after receipt of a notice from the City requesting the difference amount. Notwithstanding 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, good faith efforts to cause the TxDOT AFA to be terminated and return any escrow account funds to the Requestor.
 4. 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 E.1. and E.3. of this Section, the City shall promptly notify Requestor and, upon taking into consideration available contingency funds, the Requestor shall provide to the City the additional amount required for construction of the Improvements not later than thirty (30) calendar days after receipt of a notice from the City requesting the additional amount.
 5. 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.
- F. Contingency Fund. The Requestor shall provide to the City an amount equal to 50 percent 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 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 administrative fees.

Any contingency fund amount remaining after completion of the Improvements shall be released and delivered to Requestor within 30 days after final acceptance of the Improvements by TxDOT and receipt of final billing information from TxDOT.

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. The City shall establish and deposit funds received from Requestor in a separate account solely to be drawn upon only for construction of the Improvements, and these funds shall not be commingled with any other funds. In the event construction of the Improvements does not occur, funds in the escrow account shall be released and returned to Requestor. 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 directly 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 TxDOT of the Agreement between the City and TxDOT concerning construction of the Improvements, provided 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, or by a national overnight express mail carrier or by facsimile (provided there is evidence of a telecopy number and of receipt) to the address of a party as shown below:

CITY OF AUSTIN:

Sondra Creighton, P.E.
Director, Public Works
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

with a copy to:

REQUESTOR:

SPG Arbor Walk, LP
c/o Simon Property Group
115 West Washington Street
Indianapolis, Indiana 46204
Attn: Curt Tappendorf

Simon Property Group
115 West Washington Street
Indianapolis, Indiana 46204
Attn: Risé A. Friedman, Esq.

- J. Requestor's Liability. In no event shall Requestor be liable for consequential or speculative damages.
- K. Counterparts. This Agreement may be executed in any number of multiple counterparts each of which will be deemed an original for all purposes, and all of which when taken together will constitute a single counterpart document with the same force and effect as if the parties had executed a single signature page.
- L. 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:

Assistant City Attorney

By: _____
Sondra Creighton, Director
Public Works

Date: _____

REQUESTOR:

SPG ARBOR WALK, L.P., a Texas limited partnership

By: SIMON PROPERTY GROUP (TEXAS), L.P., a Texas
limited partnership, its general partner

By: GOLDEN RING MALL COMPANY LIMITED
PARTNERSHIP, an Indiana limited partnership,
its general partner

By: SIMON PROPERTY GROUP
(DELAWARE), INC., a Delaware
corporation, its general partner

By: 
Richard S. Sokolov
President and Chief Operating Officer

Date: December 20, 2005

STATE OF TEXAS

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COUNTY OF TRAVIS

This Roadway Improvement Agreement between the CITY OF AUSTIN and SPG Arbor Walk, LP, 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: _____


STATE OF INDIANA

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COUNTY OF MARION

This Roadway Improvement Agreement between the CITY OF AUSTIN and SPG Arbor Walk, L.P., a Texas limited partnership, concerning the construction of Improvements within a right-of-way maintained by the State of Texas was acknowledged before me on this 20th day of December, 2005, by Richard S. Sokolov, as President and Chief Operating Officer, of Simon Property Group (Delaware), Inc., General Partner of Golden Ring Mall Company Limited Partnership, General Partner of Simon Property Group (Texas), L.P., General Partner of SPG Arbor Walk, L.P. on behalf of the corporation.

(SEAL)


Notary Public, State of Indiana

Joan Walker-Emminger
Printed/Typed Name of Notary

My Commission Expires: 2-6-13

Exhibit A

Project Location: Loop 1 Northbound Frontage Road South of Braker Lane and North of US 183 in Travis County. Actual limits can be described as from 0.61 mile south of Braker Lane to 0.81 mile south of Braker Lane.

The project involves: The construction of an auxiliary lane to provide for turning movements into a proposed development. Construction will consist of grading, asphaltic pavement, signing and pavement markings.

Exhibit B

| | |
|---|---------------------|
| Estimated Construction Cost | \$210,019 |
| Construction Engineering and Inspection (16%) | \$33,603 |
| TxDOT Administration Costs (3%) | \$6,301 |
| Indirect State Costs (3.97%) | \$8,338 |
| TxDOT TOTAL | \$258,261 |
| City of Austin Administration and Indirect Costs (5% of Estimated Construction Cost) | \$10,500.94 |
| Contingency Funding (50% of Estimated Construction Cost) | \$105,009.40 |
| CITY OF AUSTIN TOTAL | \$115,510.34 |
| GRAND TOTAL | \$373,771.34 |

RESOLUTION NO.

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

The City Manager is authorized to negotiate and execute a contract with SPG Arbor Walk, LP, a Texas limited partnership, to receive funds from this company and apply them towards construction of an auxiliary turn lane on Loop 1 Northbound Frontage Road.

ADOPTED: _____, 2006

ATTEST: _____
Shirley A. Gentry
City Clerk