

the Engineer at logical points in the development of the design to the City for review and approval. The City will perform interim design reviews of the Plans and Specifications and provide any written comments to Gables within ten working days of submittal, unless additional time will be required due to the requirement of reviews by multiple City departments or additional time will be required in connection with the site plan or permit review and approval process. In the event that such additional time is required, the City will notify Gables in writing of the additional time requested for the review, which may not exceed an additional five working days for the review of interim design submittals or the additional time required for the site plan review and approval process. Once approval is obtained, no material changes may be made to the Plans and Specifications without following the change order procedure described in Section 3.02(a)(8) hereof.

b. The City will perform site plan and permitting reviews in a timely manner and in accordance with City requirements, including but not limited to Section 25-5-114 of the City Code.

c. After approval of the Plans and Specifications and, subject to reimbursement as described in this Agreement and subject to all of the other terms and conditions of this Agreement and the Master Agreement, Gables agrees to construct the Improvements.

d. Subject to reimbursement as described in this Agreement, Gables agrees to construct the Improvements in a good and workmanlike manner and in all material respects substantially in accordance with the Plans and Specifications and all applicable laws, regulations, and ordinances, including (but with respect only to those Improvements that are subject to reimbursement under Section 5.02 hereof) the City's MBE/WBE requirements.

e. Gables or Gables' Construction Manager or other agent will serve as the manager for the construction of the Improvements.

Section 4.02 Schedule of Construction.

a. Gables will construct the Improvements at one time or in phases, as reasonably approved by the City, on a timely basis as is needed in connection with the development of the Project and adjacent public infrastructure.

b. Gables will begin construction of the Improvements during the construction of the first phase of development of the Project and subject to the provisions of the Master Agreement.

Section 4.03 Construction Duties of Gables.

Subject to all of the terms and conditions of this Agreement, including, without limitation, Section 1.03 hereof (limiting the applicability of the City's minority-owned and women-owned business enterprise procurement program), Gables (or Gables' Engineer, Construction Manager, or other agent) will:

a. solicit public invitations for bids for the construction of the portion of the Improvements subject to reimbursement, following all applicable state laws and regulations and City Codes, regulations and procedures to which the City must adhere that pertain to competitive bidding procedures for Construction Contracts. This requirement includes compliance with the minority-owned and women-owned business enterprise procurement program found in Chapters 2-9 of the City Code and Chapter 252 of the Texas Local Government Code or at the option of Gables, substantial compliance with the requirements of Section 271.116 of the Texas Government Code and the other applicable provisions of the Code related to competitive sealed proposals for those Improvements, which may be constructed for less than \$1,500,000.00;

b. prepare the Construction Contract to comply, in all material respects, with all applicable laws, regulations, ordinances, City procedures, and the terms of this Agreement. The Construction Contract must include general conditions that include the following provisions:

1. reasonable warranties, and insurance, payment and performance bonding requirements, as more fully set forth in Exhibit "E" hereto;
2. include the City as an approved future assignee to the Construction Contract, together with the applicable Plans and Specifications, with the ability of the City, as assignee, to complete the Improvements, if Gables fails to complete the Construction Contract; and
3. certificates of insurance evidencing that the required insurance has been obtained and that the City has been designated as an additional insured under Endorsement CG2010 (or equivalent approved by the City Risk Manager) with respect to all liability coverages to the extent allowed by law;

c. award the Construction Contract to the lowest responsible bidder (who is duly qualified and can meet the construction schedule) for those Improvements that are subject to reimbursement hereunder, following construction contract competitive bidding procedures set forth in Chapter 252 of the Texas Local Government Code (or as applicable Section 271.116 of the Code) and the minority-owned and women-owned business enterprise procurement program found in Chapters 2-9 of the City Code, as applicable; prior to entering into any other contract for the provision of construction, demolition, material generation or non-professional services (eg., services other than design, surveying, etc.) to satisfy Gables obligations hereunder, Gables will in good faith solicit bids for such items from at least three qualified entities, review all timely submitted bids in good faith and select the entity to provide such item which in Gables discretion represents the best overall value for the Improvements taking into account all relevant factors and circumstances or will use the process set forth in Section 271.116 of the Code and select the entity providing the "best value," taking into consideration the enumerated evaluation criteria;

d. obtain all required permits, consents, inspections, tests, and authorizations necessary for construction of the Improvements; provided, however, that the City will cooperate with Gables in obtaining those items listed herein;

- e. provide the City with a copy of the Construction Contract and any additional documents pertaining to the Construction Contract on or about the time they have been signed, and thereafter provide copies of any documents amending or replacing any of said documents;
- f. submit all changes to the Plans and Specifications and change orders to the Construction Contract to the City for its review and approval prior to the commencement of any work incorporating the change, which approval will not be unreasonably withheld or delayed;
- g. ensure that all change orders submitted for the Construction Contract, either singularly or in the aggregate, do not increase the portion of the Construction Contract cost subject to City reimbursement by more than twenty five percent of the original contract amount;
- h. make timely payment to the Engineer and Contractor for work properly performed concerning the Improvements in accordance with the terms and provisions of the applicable contract with the Engineer or the Construction Contract (including any provisions related to statutory retainage and withheld amounts due to improper work or punch list items);
- i. arrange and coordinate materials testing with each Contractor and provide the City with all testing information; if the City reasonably determines that the work needs to be corrected or rejected or requires special testing because of unforeseen circumstances, the City will promptly notify Gables and Gables will take appropriate action to remedy the identified problem;
- j. reject all work found not to conform to minimum requirements of the Construction Contract and the applicable Plans and Specifications, and advise the Engineer and the City of work that Gables determines should be corrected or rejected or which requires special testing, adjustment, or inspection for approval;
- k. arrange and observe with the Contractor all acceptance testing, if applicable, for the Improvements and notify the City and the Engineer of the schedule and results of the testing;
- l. maintain master job files of correspondence, reports of conferences, shop drawings, samples, reproductions of the applicable Plans and Specifications, change order, addenda, daily inspection reports, additional or revised drawings, and other related construction documents;
- m. coordinate the preparation of letters indicating Substantial Completion for the Improvements with the Engineer, together with the submission to the Contractor of a list of observed items requiring completion or correction;
- n. ensure access and permit the City to inspect the construction of the Improvements

at all reasonable times during construction until final acceptance of the Improvements by the City;

o. conduct and coordinate final inspection of the Improvements with the Engineer and the City inspector; transmit a final list of items to be completed or repaired, if any, and observe Contractor correction of the same;

p. prepare and submit to the City monthly during construction of the Improvements a report regarding minority-owned and women-owned business enterprise participation in the construction of the Improvements; and

q. within thirty (30) days after final completion and acceptance of the Improvements by the City in writing, provide the City with complete sets of the Plans and Specifications, certified "as-built", by the Engineer in accordance with the requirements of this Agreement. The City's acceptance of the Improvements shall be governed by this Agreement and the requirements of the City Code. As a condition of final acceptance of the Project by the City, Gables will provide the City with:

1. an assignment to the City of all warranties, guarantees, maintenance bonds, or like assurances of performance applicable to the Improvements, but not to Gables' Project, after final acceptance by the City;
2. copies of separate books of accounts, accurately documenting costs and expenses incurred in connection with the Improvements; and
3. a written, sealed statement from the Engineer certifying that the Improvements have been constructed in accordance with the Plans and Specifications (subject to approved change orders) in all material respects.

Section 4.04 Duties of the City

The City will:

(a) review the Plans and Specifications, in a timely manner as set forth in Section 4.01 above, for substantial compliance with the requirements of this Agreement and applicable City procedures and Standards, and will approve all Plans and Specifications that comply with these requirements in all material respects, within a reasonable period of time after submission;

(b) inspect the Improvements within two (2) days for an interim inspection and ten (10) days for a final inspection after a request for inspection is received, and, if completed in accordance with the terms of the Plans and Specifications and this Agreement in all material respects, will certify the Improvements as being in compliance with City Standards and specifications, and issue a final acceptance letter. The final acceptance letter will be the effective date of "completion" for the purposes of this Agreement. The inspections and certifications will be conducted in accordance with

standard City policies, procedures, and requirements;

(c) provide timely written Notice to Gables within two working days whenever a completed inspection reveals that an item of the Improvements is not constructed or completed in accordance with the Plans and Specifications or is otherwise materially defective. The Notice will specifically detail any deficiencies. The foregoing notwithstanding, inspection of construction by the City is not a guaranty that construction of the Improvements is free from defects or complies with all applicable laws. In the event of a dispute regarding any notice of failure to complete the construction of the Improvements in accordance with the applicable plans and specifications, either party may request in writing a dispute resolution meeting with the City's Project Manager. The meeting will be held within three business days of such a request and the Parties agree that the recommendations of the Project Manager will be given due consideration in the resolution of the dispute. If the Parties are not satisfied with the recommendations of the Project Manager, the matter may be appealed to the Director of the applicable City department with jurisdiction over the Improvements in question and thereafter to mediation, as allowed by this Agreement; and

(d) reimburse Gables for the engineering design and construction costs of the Improvements, in accordance with the provisions of Article V hereof within 30 days after final acceptance.

Section 4.05 City's Right to Construct Improvements on Default of Gables.

a. Subject to the provisions of the Master Agreement, including, without limitation, those pertaining to lender protection, notice and cure periods, and public health and safety, if Gables begins but does not complete construction of the Improvements materially in accordance with the Plans and Specifications and the terms and provisions in this Agreement, the City has the right, but not the obligation, to complete the construction of the Improvements.

b. If the City elects to complete the Improvements, all plans, designs, easements, real and personal property, and Improvements produced or installed by Gables or its Engineers or Contractors within the City's property prior to the take over of construction of the Improvements by the City, will become the property of the City.

c. Gables grants to the City a nonexclusive right and easement to enter the Property to the most limited extent as may be necessary for the purpose of performing Gables' construction obligations pertaining to the Improvements under this Agreement in accordance with its terms and provision and in accordance with the notice and cure periods contained in this Agreement.

d. If Gables is terminated pursuant to Section 11.01 of the Master Agreement, the City will reimburse Gables for its prorata share of the work performed in accordance with the plans and specifications and the terms of this Agreement to the date of such termination, subject to the receipt of acceptable close-out information, including the contractor's invoice for services rendered to the date of termination.

ARTICLE V COSTS AND REIMBURSEMENT

Section 5.01 Gables' Initial Responsibility for Improvements Costs.

Gables will initially pay all costs associated with the design and construction of the Improvements in a timely manner as provided in this Article V.

Section 5.02 Cost Reimbursement.

The City will reimburse Gables the portion of the design and construction costs of the Improvements described herein, approved in accordance with this Agreement, as specified in attached Exhibit "F", in accordance with the terms of this Article V, after Gables has constructed and the City has accepted the Improvements described herein for operation and maintenance. The City's participation in the cost of the Improvements may include third party contributions. The City will be responsible for reimbursing Gables for a portion of the costs of such design and construction up to the not to be exceeded amount of THREE HUNDRED TWENTY FOUR THOUSAND SIX HUNDRED FIFTY EIGHT AND NO/100 DOLLARS (\$324,658.00) without reallocation by the City Manager of the total amount of City funding set forth in the Master Agreement or further authorization by the Austin City Council. The City acknowledges that so-called "scope-creep" and market forces may result in bids which exceed the present estimates and the presently available funding.

Section 5.03 Report of the Project Costs Required.

- a. On or before the date of final acceptance of the Improvements, Gables will submit a report to the City of the total costs of the Improvements that includes reasonable supporting information. Gables agrees to provide all information and documents in its possession or immediate control reasonably required by the City for proper processing and for accurate accounting and documentation of actual Project costs.
- b. The City will verify and determine the final total cost amount and will certify the amount due to Gables for the Project. If the City determines that the amount due to Gables is the same as the amount submitted by Gables, the City will have 30 days after receipt of all supporting information or the date of final acceptance of the Project, (whichever is later), in which to make the payment to Gables. If the City determines that the amount owing to Gables is less than the amount submitted by Gables, the City will: (i) notify Gables of the discrepancy within twenty days of Gables' submittal to the City; (ii) provide Gables with all supporting documentation upon which the discrepancy is based; and (iii) work diligently and in good faith to resolve the discrepancy within the ensuing ten days. If the Parties are unable to resolve the discrepancy, either Party may refer the matter to mediation in accordance with Article VII.
- c. If Gables allows work to commence on a change order that effects a material change of the Plans and Specifications for any approved phase before receiving the approval of the applicable City department(s) for the change order, any additional costs incurred on that change order may not be eligible for reimbursement, if the City reasonably determines that the change in the Project is

materially unacceptable.

- d. In any event, subject to the applicable not to be exceeded amount and notwithstanding anything to the contrary contained herein, the City will reimburse Gables the amounts not in dispute then owing to Gables.

ARTICLE VI CONSTRUCTION

Section 6.01 Conditions for City Ownership and Maintenance of the Improvements.

After the City's final acceptance of the Improvements, the City will own and maintain the Improvements, subject to the Contractor's one-year warranty and provisions of 6.02 below, except that Gables expressly shall have certain ordinary and ongoing maintenance responsibilities for any portions of the Improvements described to be the maintenance responsibility of Gables in the Master License Agreement.

Section 6.02 Warranty.

a. Upon Substantial Completion of the Improvements and as a condition precedent to final acceptance by the City, Gables will transfer to the City all warranties for the Improvements, including the Contractor's one year warranty and any warranty bond and any other warranty or rights Gables has in connection with the Plans and Specifications as they relate to the Improvements, excluding any portion of such warranty pertaining to Gables' Project. Except as may otherwise be specifically provided in this Agreement or any other Agreement, Gables in no way guarantees either the performance or quality of the work undertaken or materials used by any contractor or subcontractor undertaking construction pursuant to this Agreement or any Other Agreement, and **GABLES HEREBY DISCLAIMS ANY AND EVERY WARRANTY OR GUARANTY OF PERFORMANCE, QUALITY, SUITABILITY FOR ANY AND EVERY PARTICULAR PURPOSE WHATSOEVER, AND THE CITY HEREBY ACKNOWLEDGES AND ACCEPTS SUCH DISCLAIMER.**

b. Gables will be responsible for any material damage (ordinary wear and tear excepted) to the Improvements accepted by the City for operation and maintenance for one year following acceptance by the City, but only to the extent that the damage was caused directly by Gables or its Contractor during construction of the Improvements or Project.

Section 6.03 No Liens Permitted.

Gables will make timely payment for all aspects of properly performed engineering, design, construction work (including inspection fees), and for all materials and services relating to the Improvements in accordance with the applicable Construction Contract(s) and design services contracts for the Improvements. Gables will not suffer or permit the filing, perfection, or execution of any lien or encumbrance on the Improvements, and will cause any such lien to be released of record by payment, deposit, bond, or order of court of competent jurisdiction. Gables will have the right to contest any claim asserted in connection with the design and construction

of the Improvements described herein, including the right to contest such claim in any court of competent jurisdiction. Gables shall secure the release within ninety days of the recordation of any lien or encumbrance. The foregoing notwithstanding any lien disputed by Gables may be bonded, as applicable, by the payment and performance bonds provided by the Contractor for the Improvements or otherwise bonded or secured by other fiscal, including a letter of credit, acceptable to the City Law Department within sixty days of its recordation.

Section 6.04 Agreement May be Pledged as Collateral.

Gables may pledge this Agreement as collateral for the purpose of securing financing from one or more lenders for the Improvements. Gables or its lender will provide documentation of the use of this Agreement as collateral to the City Law Department for its review and approval, which approval will not be unreasonably withheld or delayed.

ARTICLE VII GENERAL PROVISIONS

Section 7.01 Interpretation of this Agreement, and Entire Agreement.

The Parties agree that in the event of any conflict between provisions of this Agreement and of the Master Agreement, the provisions of this Agreement shall control, provided, however, that notwithstanding the foregoing, (i) the General Provisions of Article XI of the Master Agreement shall apply to and control this Agreement, as if more fully set forth herein, and (ii) the mortgagee protection provisions of the Master Agreement (Article X thereof) shall apply to and control this Agreement. Subject to the foregoing, this Agreement shall, in the event of any dispute over its meaning or application, be interpreted fairly and reasonably, and neither more strictly for or against either Party.

Section 7.02 No Waiver.

No waiver of any provision of this Agreement will be deemed to constitute a waiver of any other provision or any other agreement between the Parties. No waiver of any provision of this Agreement will be deemed to constitute a continuing waiver unless expressly provided for by written amendment to this Agreement, nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent defaults of the same type. The failure at any time to enforce this Agreement or any covenant by the City, the Gables, or their successors or assigns, whether the violations are known or not, shall not constitute a waiver or estoppel of the right to do so.

Section 7.03 Governmental Authority.

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 the Improvements constructed under the terms of this Agreement which are to be operated and maintained by the City, except as specifically waived or modified herein or by specific action of

the City Council, nor its duty to provide for the public health, safety, and welfare in the operation and maintenance of the same.

Section 7.04 Expiration of Reimbursement.

The reimbursement described herein shall be available to Gables until the completion of construction of all of the Improvements, but not longer than ten (10) years from the date of this Agreement, which time period is subject to extension by mutual agreement.

This Agreement shall be binding upon and inure to the benefit of the Parties and their representatives, successors, and assigns.

SIGNATURE PAGES FOLLOW.

Executed to be effective on _____, 2005.

APPROVED AS TO FORM:

By: _____

Assistant City Attorney

CITY OF AUSTIN:

By: _____
Toby Hammett Futrell
City Manager

APPROVED AS TO CONTENT:

By: _____
Sue Edwards, Director
Economic Growth and Redevelopment Services

By: _____
Austan Librach,
Economic Growth and Redevelopment Services

STATE OF TEXAS §
 §

COUNTY OF TRAVIS §

THIS INSTRUMENT was acknowledged before me on this _____ day of _____, 2005, by Toby Hammett Futrell, as City Manager of the City of Austin, a Texas municipal corporation, on behalf of said municipal corporation.
(SEAL)

Printed/Typed Name of Notary
My Commission Expires: _____

**LION GABLES REALTY LIMITED
PARTNERSHIP, a Delaware limited
partnership**

By: Gables GP, Inc.
a Texas corporation,
its sole general partner

By: _____
Ben Pisklak, Vice-President

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

THIS INSTRUMENT was acknowledged before me this ____ day of _____, 2005, by Ben Pisklak, Vice-President, of Gables GP, Inc., a Texas corporation, general partner of Lion Gables Realty Limited Partnership, a Delaware limited partnership, of said corporation and partnership.

(SEAL)

Printed/Typed Name of Notary
My Commission Expires: _____

- Exhibit "A": Legal Description of Property
- Exhibit "B": The Project
- Exhibit "C": Improvements
- Exhibit "D": WPDR Cost Participation Criteria
- Exhibit "E": Insurance and Bond Requirements
- Exhibit "F": Cost Participation

EXHIBIT 'A'

2.582 ACRE
LUMBERMEN'S INVESTMENT
CORPORATION

FN 04-272(MM)
JULY 30, 2004
BPI JOB NO. 1159-01.92

DESCRIPTION

OF 2.582 ACRES OF LAND SITUATED IN THE CITY OF AUSTIN, TRAVIS COUNTY, TEXAS, OUT OF OUTLOT 11, DIVISION 2 OF THE ORIGINAL CITY OF AUSTIN, BEING A PORTION OF THAT CERTAIN 3.19 ACRE TRACT CONVEYED TO LUMBERMEN'S INVESTMENT CORPORATION BY DEED OF RECORD IN VOLUME 12038, PAGE 535 OF THE REAL PROPERTY RECORDS OF TRAVIS COUNTY, TEXAS; SAID 2.582 ACRES BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING, at a 1/2 inch iron rod found at the southeasterly corner of that certain 1.94 acre tract being Lot A, Jetco Partners International Resubdivision One, a subdivision of record in Book 53, Page 184A of the Plat Records of Travis County, Texas, same being the southwesterly corner of said 3.19 acre tract, also being in the agreed upon Boundary line between Lumbermen's Investment Corporation and the City of Austin of record in Document No. 2001013549 of the Official Public Records of Travis County, Texas for the southwesterly corner hereof;

THENCE, leaving said Boundary Line Agreement of record, along the common line of said 3.19 acre tract and said Lot A, Jetco Partners International Resubdivision One, the following four (4) courses and distances:

- 1) N26°28'47"E, a distance of 222.40 feet to a 1/2 inch iron rod found;
- 2) N65°11'45"W, a distance of 53.96 feet to a 1/2 inch iron rod found;
- 3) N36°00'59"E, a distance of 153.54 feet to a 1/2 inch iron rod found;
- 4) N31°18'32"E, a distance of 22.34 feet to a 1/2 inch iron rod found, being the northeasterly corner of said Lot A, Jetco Partners International Resubdivision One, same being in the westerly line of Missouri Pacific Railroad Right-of Way;

THENCE, N31°37'22"E, a distance of 6.92 feet to a 1/2 inch iron rod found at the northwesterly corner of said 3.19 acre tract, being in the westerly line of the Missouri Pacific Railroad Right-of-Way (R.O.W. Varies) and the northwesterly corner hereof, being the point of curvature of a non-tangent curve to the right;

EXHIBIT 'A'

FN NO. 04-272 (MM)
JULY 30, 2004
PAGE 2 OF 2

THENCE, along said non-tangent curve to the right, along a portion of the northerly line of said 3.19 acre tract, being a portion of the westerly line of the Missouri Pacific Railroad Right-of-Way, having a radius of 520.00 feet, a central angle of $57^{\circ}48'02''$, an arc length of 524.58 feet and a chord which bears $S25^{\circ}50'12''E$, a distance of 502.62 feet to a PK nail set in concrete for the northeasterly corner hereof;


THENCE, leaving the westerly line of Missouri Pacific Railroad right-of-way, over and across said 3.19 acre tract the following two (2) courses and distances;

- 1) $S20^{\circ}22'13''W$, a distance of 45.27 feet to a cotton spindle set for the southeasterly corner hereof;
- 2) $N74^{\circ}57'47''W$, a distance of 321.98 feet to a calculated point in the southerly line of said 3.19 acre tract, same being the aforementioned Boundary Line Agreement of record;

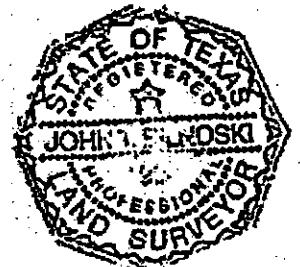
THENCE, $N49^{\circ}56'23''W$, along said Boundary Line Agreement of record, being the southerly line hereof, a distance of 62.77 feet to the POINT OF BEGINNING, containing an area of 2.582 acres (112,470 sq. ft.) of land, more or less, within these metes and bounds.

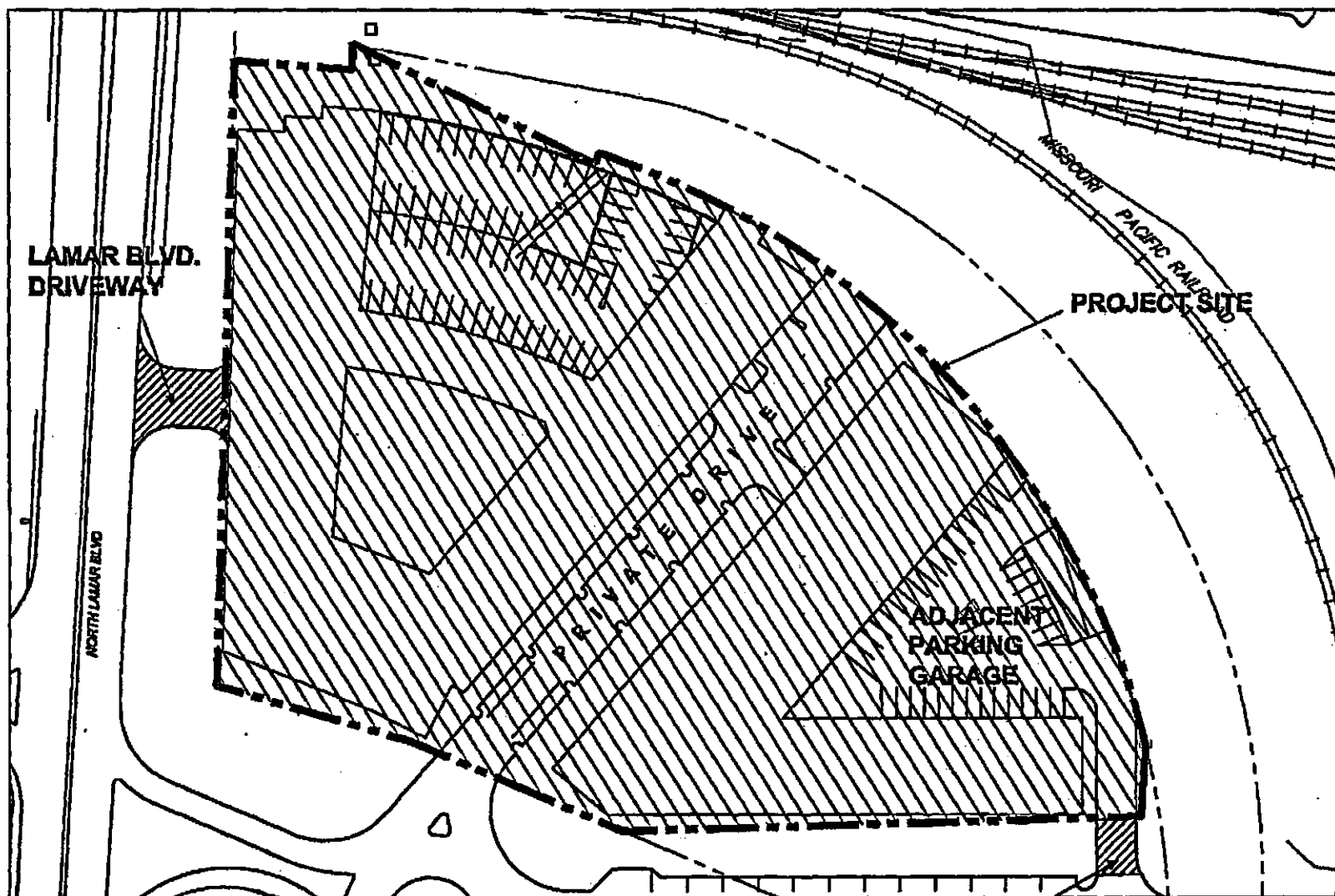
I, JOHN T. BILNOSKI, A REGISTERED PROFESSIONAL LAND SURVEYOR, DO HEREBY CERTIFY THAT THE PROPERTY DESCRIBED HEREIN WAS DETERMINED BY A SURVEY MADE ON THE GROUND UNDER MY DIRECTION AND SUPERVISION. A LAND TITLE SURVEY WAS PREPARED TO ACCOMPANY THIS FIELDNOTE DESCRIPTION.

BURY & PARTNERS, INC.
ENGINEERS-SURVEYORS
3345 BEE CAVES ROAD, SUITE 200
AUSTIN, TEXAS 78746


JOHN T. BILNOSKI
NO. 4998
STATE OF TEXAS

7/30/04
DATE

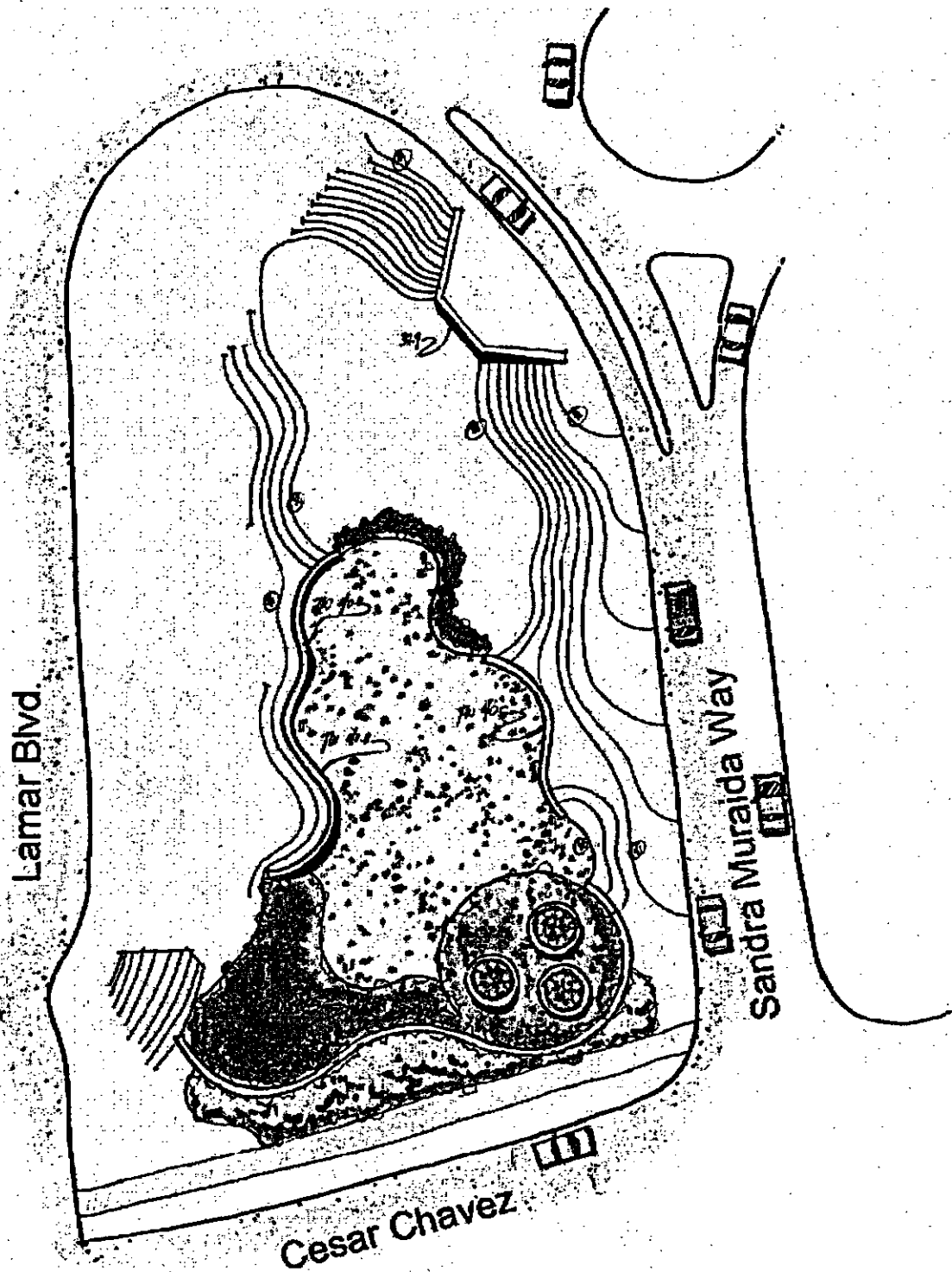




PROPOSED JOINT
ACCESS DRIVE

EXHIBIT B

Exhibit C



Sand Beach Improvements

Conceptual Water Quality Bio-filtration Meadow Design

EXHIBIT C OF 'D'
PAGE 2

Biofiltration Meadow Description:

The biofiltration meadow will address pollutant removal for the 4.5 acre Property and City property. The contributing drainage areas to the meadow are shown on Exhibit E. The biofiltration meadow will be a partial sedimentation design. A minimum water quality volume of 33,600 cubic feet is required. Design drawdown time is recommended to be 40-48 hours. A maximum ponding depth of 6 feet is recommended. Existing soil will need to be removed and replaced with filtration media approved by the City of Austin and Gables. An underdrain system is required. Vegetation will be determined by a landscape designer in consultation with John Gleason from the City of Austin. A splitter box should be provided that limits inflow velocities and conveys flow in a dispersed, sheet or plug-flow manner. Detention will be provided for the 2-year return event. Less frequent return events shall be routed around the pond and conveyed to Town Lake.

EXHIBIT 'D'

Museum Park Plaza Biofiltration System

Overview

The proposed biofiltration system for the Museum Park Plaza area presents an important opportunity to identify key design issues for this new type of treatment system, for which there is currently no design criteria in the City's Environmental Criteria Manual. Because of this lack of criteria and because a wide variety of design procedures are being used, the City has decided to use the Museum Park Plaza project as a pilot template for developing criteria. This is further justified because the City may be contributing significant funds towards this project, thus has a strong vested interest in its design and performance. A proposed procedure with criteria is provided at the end of this document.

Basis for Design and COA Cost Contribution to Museum Park Plaza Project

The primary purpose of the proposed biofiltration system is to reduce pollutant loads discharged to Town Lake. Typically filtration-type systems should also be designed to reduce erosive flows and to increase infiltration/recharge but, as the site does not discharge to a creek, these are not design goals for this project. There is uncertainty as to whether filtration-type controls can be used for flood control, with the exception of the 2-year return period storm. For this site flood control is not a design objective.

The City proposes to use two sets of criteria for establishing design parameters for the biofiltration system and to determine its cost participation in the project. One is the target pollutant removal level and the other is cost-effectiveness.

For the target pollutant level determination the City proposes using a procedure that estimates pollutant loads for the entire project area (both those that drain to the pond site and those that do not), calculates the pollutant removal by the treatment system, and compares those loads against target conditions. Determining the target pollutant removal is somewhat complicated because much of the development area is required to provide water quality treatment (no fee-in-lieu), while treatment for the remainder of the area would fall into the retrofit category; "retrofit" meaning that the City's goal is to maximize pollutant removal given site and budgetary constraints. Part of the area associated with this project does not drain to the pond site, i.e., the Sand Beach portion that will remove existing impervious cover and the new entrance road to the east off of Cesar Chavez (it is assumed that 20% of this new road is associated with Museum Park Plaza and 80% with the future Seaholm project). The assumed breakdown of treatment areas is shown in the table and graphic in the following pages.

Two sets of target pollutant removal goals apply to this site. One is the treatment required for new and re-development, i.e., equivalent to sedimentation-filtration. *It is assumed that biofiltration will provide equivalent treatment if the required water quality*

volume is provided (per Environmental Criteria Manual) and the design drawdown time is at least 40 hours. The other treatment goal, derived from the Town Lake study and

Museum Park Plaza Areas

| Area | Drains to Pond Site? | Assumed Treatment Category | Assumed Treatment Responsibility | Est. Area from COA GIS delineation (ac) | Est. Current Impervious Cover | Est. Future Impervious Cover |
|--|----------------------|----------------------------|----------------------------------|---|-------------------------------|------------------------------|
| 3RD STREET | Y | Retrofit | COA | 1.34 | 95% | 100% |
| SANDRA MURAILDA | Y | Required | COA | 2.09 | 45% | 60% |
| PARKLAND/POND | Y | Retrofit | COA | 1.17 | 7% | 0% |
| CRESCENT GARAGE | Y | Required | PRIVATE | 0.81 | 0% | 100% |
| CRESCENT PARKING LOT | Y | Required | PRIVATE | 0.19 | 0% | 100% |
| CRESCENT/RR | Y | Retrofit | PRIVATE | 1.35 | 3% | 3% |
| LAMAR ROW S | Y | Retrofit | COA | 0.56 | 70% | 70% |
| LAMAR ENTRANCE MPP | Y | Required | PRIVATE | 0.19 | 8% | 85% |
| LAMAR ROW N | Y | Retrofit | COA | 0.18 | 0% | 28% |
| SAND BEACH | N | None | COA | 2.74 | 42% | 5% |
| NEW ROAD EAST OF RR | N | Required | PRIVATE | 0.08* | 3% | 90% |
| AUSTIN CHILDRENS MUSEUM | Y | Required | PRIVATE | 1.08 | 76% | 100% |
| MUSEUM PARKING | Y | Required | PRIVATE | 0.15 | 22% | 100% |
| CONDOS & MF | Y | Required | PRIVATE | 3.26 | 19% | 100% |
| Total | | | | 15.20 | 35% | 60% |
| Total to Pond Site (excluding Pond itself) | | | | 11.20 | 37% | 78% |

* Estimated total area is 0.42 acre, but only 20% "assigned" to Museum Park Plaza (0.08 ac); the remainder (80%) is associated with future Seaholm project



Watershed Protection Master Plan, is to reduce the *current* pollutant load by at least 25% for the constituents total suspended solids (TSS), total organic carbon (TOC), total nitrogen (TN), and total phosphorus (TP). For this analysis only TSS will be used as it is also the basis for the department's cost-effectiveness performance measure. The treatment system as a whole must provide pollutant removal sufficient to meet both the ECM treatment requirements and the Town Lake goals. The following equation is proposed for this purpose:

$$(1) LR_{total} = LR_{req} + LR_{ret} + LR_{sb}$$

- Where LR_{total} is the total TSS load removed for the entire project area in lb/yr
- LR_{req} is the TSS load removed for the areas that require treatment (i.e., no fee-in-lieu)
- LR_{ret} is load removed for the retrofit areas (i.e., existing development)
- LR_{sb} is the load removed for the Sand Beach area resulting from removal of the old Sandra Muraida Drive's impervious cover, and calculated as the different between current and future loads

The term LR_{total} will then be checked against the Town Lake goal, i.e., at least a 25% reduction in current TSS loads.

The terms LR_{ret} and LR_{sb} will be used in conjunction with the City's cost-effectiveness criteria to determine the City's cost participation in the project; these terms in essence represent the "public benefit" of this project, at least in terms of reducing water pollution. The cost-effectiveness is the ratio of annualized BMP cost to annual average TSS Load removed, and the current criteria is \$1.00 per lb of TSS removed. If a project is calculated to have a cost-effectiveness \leq \$1.00 per lb TSS removed it is considered to be a feasible project; if greater than \$1.00 then less feasible, if much greater than \$1.00 then not feasible. A 25-year period is used for calculating the annualized cost. For the Museum Park Plaza the City's cost participation (COACP) is thus calculated as the following:

$$(2) COACP = (LR_{ret} + LR_{sb}) * 25$$

For example if the project results in $LR_{ret} + LR_{sb}$ equal to 2500 lb/yr, then COACP would equal \$62,500.

Equation (2) assumes that the City does *not* contribute to annual operation and maintenance costs for the biofiltration system. One justification for this assumption is that the pond site is currently public parkland, and the conversion of parkland to another purpose is seen as a significant contribution by the City.

Estimating Pollutant Loads

Pollutant loads are calculated using the equation:

$$(3) L = DA * P * R_v * C * 0.2267$$

- Where L is TSS load in lb/yr
- DA is drainage area in acres
- P is annual average rainfall (in.)
- R_v is the runoff coefficient
- C is the mean TSS concentration
- 0.2267 is a conversion factor

This analysis will use data and assumptions from the City's Master Plan process, which used more recent and accurate information than that in the City's Environmental Criteria Manual. The value of P will be set at 31.08 in/yr, C = 80 mg/L for undeveloped land and 170 mg/L for developed land, and R_v calculated as $0.3428 IC^2 + 0.5677 IC + 0.0125$, where IC is the impervious cover (fraction).

Removal efficiencies will be predicted assuming that the biofiltration system is equivalent to sedimentation-sand filtration. Currently the City assumes the latter to provide 90% TSS removal for the portion of runoff captured (aka "annual capture volume" (ACV), which is estimated from modeling). Currently the City is using a probabilistic methodology (Adams and Papa) for estimating ACV. The ACV will vary with the water quality volume (WQV) and treatment rate (QT) of the BMP. For the areas that require treatment and that are draining to the pond site, estimated to be 7.77 acres at 89% impervious cover, a WQV of 1.19" is required; the Adams and Papa model predicts about 93% ACV, thus the annual average removal efficiency is estimated to be $0.9 * 0.93 = 0.84$, or 84%. For the retrofit analysis the same procedure will be used, except that the size of the biofiltration system will be varied, which will change the ACV prediction. The entire drainage area to the biofiltration system is estimated to be 11.2 acres at 78% IC (excludes pond site itself),

Given the above assumptions and procedures, the estimated pollutant loads for the project area by the equation (1) variables are:

| Area | Acres | Current IC | Future IC | Current TSS Load (lb/yr) | Future TSS Load (lb/yr) | Future TSS Load Removed (lb/yr) | Future TSS Load Discharged (lb/yr) |
|---|-------|------------|-----------|--------------------------|-------------------------|---------------------------------|------------------------------------|
| Areas Required to Treat Runoff in Drainage Area | 7.77 | 31% | 89% | 2,234 | 7,440 | 6,233 | 1,207 |
| New Road East of RR* | 0.08 | 3% | 90% | 1 | 80 | 67 | 13 |
| Retrofit Areas in Drainage Area | 3.43 | 50% | 53% | 1,800 | 1,937 | TBD | TBD |
| Pond Site | 1.17 | 7% | 0% | 75 | 0 | 0 | 0 |
| Sand Beach | 2.74 | 42% | 5% | 1,024 | 64 | 960** | 64 |
| Total | 15.20 | 35% | 59% | 5,135 | 9,521 | TBD | TBD |
| Total to Pond Site | 11.20 | 37% | 78% | 4,034 | 9,377 | TBD | TBD |

TBD – To Be Determined

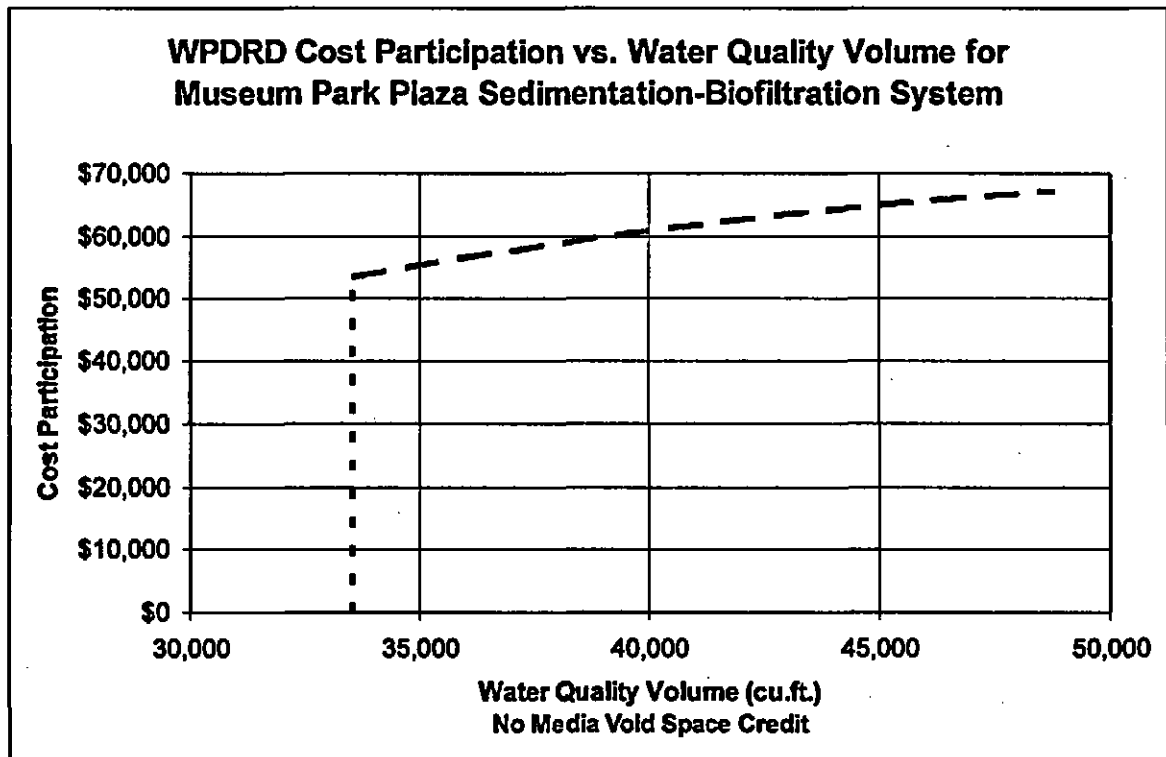
* This area is singled out because it is not in the drainage area to the pond site; only 0.08 ac "assigned" to Museum Park Plaza and remaining 80% associated with future Seaholm development. It is assumed that runoff treatment will be required for this area, i.e., no fee-in-lieu.

** for Sand Beach area, where current Sandra Muraida Drive is planned to be removed, the load removal is calculated as the current load minus the future load, which accounts for the impervious cover removal.

From the table it can be surmised that the Town Lake goal should readily be met by this project, i.e., the current load of 5,135 lb/yr should be reduced by at least 25%, or a discharge of 3,851 lb/yr ($5135 * (1 - .25)$). The maximum future load discharged to Town Lake from the project area is estimated as 3,221 lb ($= 9,521 - (6,233 + 67)$), or a 37% reduction from the current load.

Design and City's Cost Participation Recommendations

Based on the above assumptions and the procedure described below, the City evaluated a number of design scenarios in order to determine an appropriate level of cost participation by the Watershed Protection Department. The level of participation is a function of water quality volume, as shown in the following graphic.



The following assumptions and criteria were used for deriving this figure:

- Water quality treatment is assumed to be required for much of the site, as identified in the table above, thus only certain areas fall into the “retrofit” category.
- The pond must have a minimum water quality volume of 33,600 ft³, the volume required for the areas that require treatment and that drain to the pond site, i.e., 7.77 acres @ 89% impervious cover, thus a water quality volume of 1.19” or 33,600 ft³.
- \$24,000 of the cost contribution reflects removal of impervious cover from the old Sandra Muraida Drive, which is predicted to reduce pollutant loads to Town Lake by 960 lb/yr.
- Cost contributions above \$24,000 reflect the pollutant load removal provided by the biofiltration system. This portion of the cost contribution is based on pollutant load removal greater than 6,233 lb/yr; the 6,233 lb/yr value is the estimated load removal for the areas in the pond drainage area that are required to treat runoff (i.e., no fee-in-lieu).
- The Watershed Protection and Development Review Department does not contribute any annual operation and maintenance costs.
- The biofiltration size and design parameters should be within the range of those described below, based on a Darcy’s Law sizing procedure; any significant deviation may affect the City’s cost participation.

Biofiltration Design Criteria Issues

As this site may be a template for future biofiltration projects, the following relevant issues were identified.

Biofiltration vs. Bioretention - Because of the size of the drainage area and the ponding depths, and because infiltration is not feasible due to soil permeability, this is considered to be a *biofiltration* project.

Functions - The project will only address pollutant removal and not erosion control or flood control. Erosion control would be provided as a result of the extended detention and/or infiltration of water quality volume but, since this site does not discharge to a creek, erosion control is not required. Flood control may not be feasible for these type of systems due to legal and technical constraints, with the exception of the 2-year return period event. Section 25-8-213 of the City’s Land Development Code requires isolation of the water quality volume, which may prohibit the use of filtration systems for flood control. Technically the high velocities, water depths, and debris levels associated with larger storm events may damage the treatment system. For the Museum Park Plaza site flood control is not a major concern and will not be a design goal (except for routing flood flows around pond).

Splitter Box - A splitter box should be provided and designed to limit inflow velocities such that trapped pollutants will not be resuspended and erosion is prevented. Runoff should be conveyed into the treatment system in a dispersed manner (e.g., flow spreader).

Pretreatment – Pretreatment is highly recommended and either “Partial” or “Full” sedimentation designs can be used, at the designer’s discretion. If a “partial” system is

used the separating wall between the two chambers must be porous; the use of a vegetated "hedgerow" can be considered as an alternative to a hard surface (e.g., gabion wall). The "partial" sedimentation chamber must hold at least 20% of the water quality volume. A "full" system requires that the entire water quality volume be captured in the sedimentation basin, with an outlet designed to release this volume over 24 hours to the filtration basin. While somewhat larger in size the "full" systems protect the filtration media from clogging better than the "partial" systems. The sedimentation and filtration basins should have a L:W ratio $\geq 2:1$ in order to maximize hydraulic efficiency (i.e., no dead storage or short-circuiting).

Sizing Procedure – Darcy's Law approach is recommended, as described below, for determining the biofiltration and sedimentation areas and volumes. The size of the treatment system can be varied to meet project constraints (e.g., available area, budget). For this site the biofiltration surface area should be in the range of 4,500 – 10,000 ft² for the "Partial" system and 2,500 – 6,000 ft² for the "Full" system, depending on ponding depth and water quality volume.

Water Quality Volume – A minimum volume of 33,600 ft³ is required.

Design Drawdown Time – 40 to 48 hours is recommended in order to provide adequate runoff treatment, i.e., equivalent to sedimentation-sand filtration systems.

Ponding Depth – 2 feet is proposed; increasing the pond depth should be considered (up to 6 feet); filtration area generally decreases with increasing ponding depth.

Depth of Filtration Media – The 2 feet proposed is acceptable. Sand filters typically are 1.5 feet deep. The additional depth for the biofiltration system should enhance pollutant removal and encourage more vigorous plant growth.

Void Space Credit Towards Water Quality Volume – Credit is not recommended for this type of treatment system, but could be allowed for bioretention systems. Reasons for not allowing void space credit:

- The pond will be receiving sediment-laden runoff that will decrease void space volume over time, as evidenced in many sand filters in the Austin area. For bioretention systems (small drainage area, shallow inflow and ponding levels), partial credit may be allowable; but 100% credit is not recommended due to potential loss of void space due to siltation and plant root systems.
- No credit for void spaces is given for sand filters by the City, or by other jurisdictions that allow similar types of filtration systems, thus it could be argued that a local precedent has already been established.
- If credit is given the designer must be careful to account for the effects on design drawdown time (see Darcy's Law sizing procedure below).

Biofiltration Media Characteristics – Soils test indicate that the in-situ soil is not appropriate for biofiltration because of very low permeability rates. The existing soil will

need to be removed and an alternative filtration media installed. Specifications for the media will need to be determined.

Biofiltration Media Hydraulic Conductivity – For design purposes, the effects of sediment deposition and other factors should be accounted for, and a conservative hydraulic conductivity should be assumed. Monitored sand filters in Austin have been reported to have values of 2 – 5 ft/day after being in operation for several months to years, whereas values of 100-200 ft/day are typically reported when tested with sediment-free water. Thus, in-field values are typically >90% lower than permeability tests or published literature. It is recommended that the biofiltration media be tested for hydraulic conductivity and the City of Austin has tested a variety of media; in most cases the hydraulic conductivity is less than that for sand. However, it is hypothesized that biofiltration systems will be comparable to sand because of the effects of the plant root system and the likelihood that they will be inspected and maintained more often due to their visibility and landscape functions. Pending actual monitoring data the City thus proposes the following default assumptions for biofiltration media, subject to site-specific considerations:

- “Partial” sedimentation-biofiltration system, assume $k = 2$ ft/day
- “Full” sedimentation-biofiltration system, assume $k = 3.5$ ft/day

Underdrain System – It is recommended that an underdrain system be installed because of the low permeability of the adjacent and underlying soil. The designer will need to address concerns about the possibility of the vegetation root system invading the underdrain system. The system could be design to create a saturated layer in the filtration media, which could promote a more robust microorganism population and denitrification.

“Overflow” Sand Bed – Some recent designs in Austin have incorporated a sand bed inside the biofiltration chamber in order to provide a mechanism for draining the pond in case the biofiltration media fails. If used it is recommended that the sand bed be located at the far end of the biofiltration media, and placed 6” or more above that media.

Vegetation – This is to be determined by landscape designer, in consultation with John Gleason from the City. The frequency of inundation should be estimated to provide guidance for vegetation selection. Be aware of weed control needs and size of plantings. Care should be taken to protect the biofiltration underdrain system from being damaged by plant root systems. Vegetation can also be incorporated into the sedimentation basin.

Mulch Layer – Not recommended because of the inflow velocities and ponding depth; will tend to float or otherwise be washed out of the system.

Proposed Procedure For Sizing Biofiltration Systems

A Darcy's Law procedure is proposed because it is appropriate for this type of treatment system, and accounts for important design variables.

Darcy's Law:

$$Q = k * i * A_f$$
$$= k * (H + L)/L * A_f$$

- Where Q is design treatment rate and can be assumed equal to the Water Quality Volume (WQV) divided by the design drawdown time T (40 – 48 hr).
- k is the hydraulic conductivity of the biofiltration media; assumed to be 2 ft/day for "Partial" systems and 3.5 ft/day for "Full" systems
- i is the hydraulic gradient = (H + L)/L
- H is the ponding depth over the filtration media (ft). For design purposes assume the average H value is ½ the maximum ponding depth (Hmax).
- L is the biofiltration media depth (ft).
- A_f is the filtration or biofiltration surface area (sq.ft.).

The proposed sizing procedure is to define target WQV and T values, set k, H and L, and solve for the required filtration area:

$$A_f = (WQV * L) / (k * ((H_{max}/2) + L) * T)$$

As can be seen, as k, H, and T increase, A_f decreases. As WQV and/or L increase (other factors being equal), T increases. The design process may have to be an iterative one whereby WQV, T, H, and L are varied until an acceptable configuration is determined.

EXHIBIT E

Insurance and Bond Requirements

A. General Requirements

Gables shall forward certificates of insurance with the endorsements required below to the City as verification of coverage prior to commencement of any professional or construction services hereunder, EXCEPT that Gables shall have in place a policy of commercial general liability insurance meeting the requirements of this Agreement commencing on the Effective Date. To the extent that the specific endorsements referenced herein are unavailable or that equivalent endorsements are available, the substitution of equivalent endorsements will be permitted subject to the reasonable approval of the City.

Gables shall not commence work until the required insurance is obtained and has been reviewed by the City. Approval of insurance by the City does not relieve or decrease the liability of Gables hereunder and is not a limitation of liability on the part of Gables.

Gables must submit certificates of insurance for all contractors and/or subcontractors to the City prior to the commencement of design or construction work on the Improvements and the City will review and approve the certificates, which comply with the requirements of this Agreement, within five days of receipt.

Gables' and all contractor's and subcontractor's insurance coverage must be written by companies licensed to do business in the State of Texas at the time the policies are issued and must be written by companies with A.M. Best ratings of B+VII or better. The City will accept workers' compensation coverage written by the Texas Workers' Compensation Insurance Fund.

All endorsements naming the City as additional insured, waivers, and notices of cancellation endorsements as well as the Certificate of Insurance must contain the following information:

Attn: Director, Public Works
City of Austin
P. O. Box 1088
Austin, Texas 78767

The "other" insurance clause must not apply to the City where the City is an additional insured shown on any policy. It is intended that policies required in this Agreement, covering both the City and Gables, be considered primary coverage as applicable.

If insurance policies are not written for amounts specified in this Agreement, Gables, contractors and subcontractors must carry umbrella or excess liability insurance for any differences in amounts specified. If excess liability insurance is provided, it must follow the form of the primary coverage.

The City shall be entitled, upon request and without expense, to receive certified copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision

or modification of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of the parties hereto or the underwriter on any such policies.

Gables shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of this Agreement.

Gables and any contractor or subcontractor responsible for maintaining insurance shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. All deductibles or self-insured retentions must be disclosed on the certificate of insurance.

The City may review the insurance requirements set forth herein during the Term and may make reasonable adjustments to insurance coverages, limits, and exclusions when reasonably deemed necessary and prudent by the City based upon applicable changes in statutory law, court decisions, the claims history of the industry or financial condition of the insurance company(ies) and Gables.

The insurance coverages specified below are required minimums and are not intended to limit the responsibility or liability of Gables.

B. Specific Requirements

Worker's Compensation and Employers' Liability Insurance. Coverage must be consistent with statutory benefits outlined in the Texas Worker's Compensation Act (Art. 8308-1.01 et seq. Tex. Rev. Civ. Stat.). The minimum policy limits for Employer's Liability are \$1,000,000 bodily injury each accident, \$1,000,000 bodily injury by disease policy limit and \$1,000,000 bodily injury by disease each employee.

- (a) Gables', its contractor's and subcontractor's policy shall apply to the State of Texas and include these endorsements in favor of the City:
 - (i) Waiver of Subrogation, Form WC 420304
 - (ii) Thirty days Notice of Cancellation, Form WC 420601

Commercial General Liability Insurance. The minimum bodily injury and property damage per occurrence are \$1,000,000 for coverages A and B.

- (a) The policy must contain the following provisions:
 - (i) Blanket contractual liability coverage for liability assumed under this contract and all contracts related to this project.
 - (ii) Independent contractor's coverage.
 - (iii) Products/completed operations liability for the duration of the warranty period.

(b) The policy must also include these endorsements in favor of the City:

- (i) Waiver of Subrogation, endorsement CG 2404
- (ii) Thirty days notice of cancellation, endorsement CG 0205
- (iii) The City listed as an additional insured, endorsement CG 2010

Business Automobile Liability Insurance. Gables, its contractor and subcontractor shall provide coverage for all owned, non-owned and hired vehicles with a minimum combined single limit of \$1,000,000 per occurrence for bodily injury and property damage,

(a) The policy must include these endorsements in favor of the City of Austin:

- (i) Waiver of subrogation, endorsement TE 2046A
- (ii) Thirty days notice of cancellation, endorsement TE 0202A
- (iii) The City listed as an additional insured, endorsement TE 9901B

Property Insurance. If any of the City's property is in the care, custody or control of Gables, then Gables shall provide property coverage on an "all risk of physical loss" form. The coverage must be provided on a replacement cost basis for the 100% value of the City's property. If property is being transported or stored off site by Gables, then transit and storage coverage must also be provided. The City shall be endorsed onto the policy as a loss payee.

Hazardous Material Insurance. If applicable, for work that involves asbestos or any hazardous materials or pollution defined as asbestos, any contractor or subcontractor responsible for such work must comply with the following insurance requirements in addition to those specified above:

- (a) Provide an asbestos abatement endorsement to the commercial general liability policy with minimum bodily injury and property damage limits of \$1,000,000 per occurrence for coverages A&B and products/completed operations coverage with a separate aggregate of \$1,000,000. This policy must not exclude asbestos or any hazardous materials or pollution defined as asbestos, and must provide "occurrence" coverage without a sunset clause. The policy must provide 30 day notice of cancellation and waiver of subrogation endorsements in favor of Gables and The City.
- (b) Any contractor or subcontractor responsible for transporting asbestos or any hazardous materials defined as asbestos shall provide pollution coverage. Federal law requires interstate or intrastate transporters of asbestos to provide an MCS 90 endorsement with a \$5,000,000 limit when transporting asbestos in bulk in conveyances of gross vehicle weight rating of 10,000 pounds or more. Interstate transporters of asbestos in non-bulk in conveyances of gross vehicle weight rating of 10,000 pounds or more must provide an MCS 90 endorsement with a \$1,000,000 limit. The terms "conveyance" and "bulk" are defined by Title 49

CFR 171.8. All other transporters of asbestos shall provide either an MCS 90 endorsement with minimum limits of \$1,000,000 or an endorsement to their Commercial General Liability Insurance policy which provides coverage for bodily injury and property damage arising out of the transportation of asbestos. The endorsement must, at a minimum, provide a \$1,000,000 limit of liability and cover events caused by the hazardous properties of airborne asbestos arising from fire, wind, hail, lightening, overturn of conveyance, collision with other vehicles or objects, and loading and unloading of conveyances.

- (c) The contractor shall submit complete copies of the policy providing pollution liability coverage to Gables and the City.

Performance and Payment Bonds. In substantial compliance with the provisions of Chapter 2253 of the Texas Government Code, Gables shall require its general contractor, within 30 days from and after notification of the award of the contract, and before commencement of construction of the Additional Improvements, to furnish and deliver to the City, legally issued surety bonds in a form approved by the City, with the City and Gables named as co-obligees. The furnishing and delivery of such bonds within the periods mentioned is a condition precedent to the commencement of the construction of the Additional Improvements and, upon the failure of the general contractor to so furnish and deliver all of the same in form, tenor and execution and with sureties satisfactory to the City, no rights obtain thereunder to Contractor, no construction of the Additional Improvements may commence or continue and, if construction has commenced without compliance with the requirements of this paragraph, all construction activities must immediately be suspended and Gables will be in material default under this Agreement.

Payment Bond. Gables shall require the general contractor to provide a payment surety bond legally issued, meeting the approval of the City Law Department, in an amount not less than 100% of the total contract price of the Construction Costs, conditioned upon the prompt, full, and complete payment of all subcontractors and suppliers.

Performance Bond. Gables shall require contractor to provide a performance surety bond legally issued, meeting the approval of the City Law Department, in an amount not less than 100% of the total contract price of the Construction Costs, conditioned upon the prompt, full and complete performance by the general contractor of these covenants and agreements contained in the contract documents.

EXHIBIT F

Cost Participation in Improvements








City costs and contributions may include third party funding.

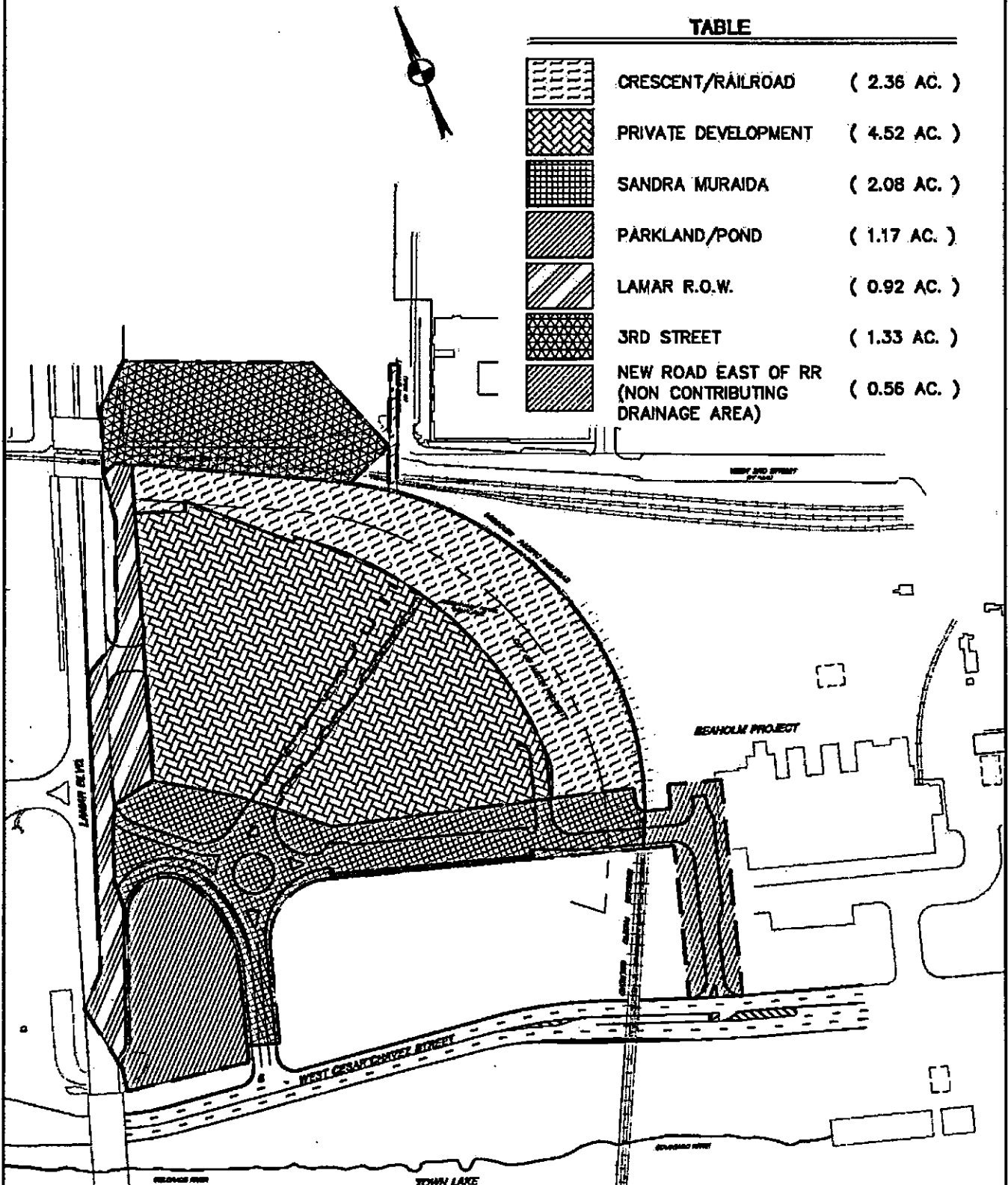
Public/Private Bio-Filtration Meadow

- a. Presently estimated hard and soft costs \$721,462**
- b. Proportionate Shares**
 - Gables: 55%**
 - City: 45%**
- c. Total Estimated Shares**
 - Gables: \$396,804**
 - City: \$324,658**

*** The eligible costs for reimbursement will include the so-called "hard costs" of construction, as evidenced by the amounts paid to the general contractor for the performance of the Work, and the so-called "soft costs" of the fees to be paid under this Agreement, design fees, permit and inspection fees, the construction management fee, and other professional services fees, but will exclude the costs of Gables' financing and Gables' accounting and legal fees.**

TABLE

| | | |
|---|--|--------------|
|  | CRESCENT/RAILROAD | (2.36 AC.) |
|  | PRIVATE DEVELOPMENT | (4.52 AC.) |
|  | SANDRA MURAIDA | (2.08 AC.) |
|  | PARKLAND/POND | (1.17 AC.) |
|  | LAMAR R.O.W. | (0.92 AC.) |
|  | 3RD STREET | (1.33 AC.) |
|  | NEW ROAD EAST OF RR (NON CONTRIBUTING DRAINAGE AREA) | (0.56 AC.) |



b Bury+Partners
ENGINEERING SOLUTIONS
2345 Bee Caves Road, Suite 200
Austin, Texas 78746
Tel. (512)326-0011 Fax (512)326-0325
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**CONTRIBUTING DRAINAGE
AREA MAP**

GABLES RESIDENTIAL

EXHIBIT E

DATE: 11/10/05

SCALE: 1"=200'

DRAWN BY: DAZ

FILE: G:\659\23\EXH\65923EXH109

PROJECT No: 659-23.00

EXHIBIT F

COMMUNITY FACILITIES AND COST REIMBURSEMENT AGREEMENT FOR RIGHT OF WAY IMPROVEMENTS

STATE OF TEXAS

COUNTY OF TRAVIS

This Community Facilities and Cost Reimbursement Agreement for Right-of-Way Improvements ("Agreement") is made by and between the City of Austin, a home rule city and municipal corporation situated in Travis and Williamson Counties, Texas (the "City"), and Lion Gables Realty Limited Partnership, a Delaware limited partnership ("Gables"). The City and Gables are each sometimes referred to individually herein as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, Gables has contracted with Lumbermen's Investment Corporation ("Lumbermen's") to purchase those two tracts of land comprising approximately 4.524 acres, located on the eastern side of Lamar Boulevard between the Union Pacific Railroad and adjoining City real property, as more particularly described in Exhibit "A" (the "Property").

1. WHEREAS, Gables currently intends to develop a mixed-use project on the Property that may include, but not necessarily be limited to, residential, retail, office, and non-commercial uses, as generally depicted on Exhibit "B" (the "Project").

WHEREAS, the City and Gables currently intend to design and construct (i) public streets with an attendant storm water drainage system, adjacent sidewalks, curb ramps, and related streetscape improvements and landscaping, (ii) traffic improvements, including turn lanes, striping and signage, and (iii) traffic signals, including conduit and fiber optic line, together with other related improvements, in accordance with applicable City Standards, as defined herein, including but not limited to the City's Transportation Criteria Manual, subject to City review and approval, and in the locations shown on Exhibit "C" hereto, (the "Improvements").

WHEREAS, in separate Community Facilities and Cost Reimbursement Agreements, the Parties have provided for the design and construction of other improvements, including but not limited to a regional bio-filtration meadow to accept the storm water drainage from the Improvements and the Project.

2. WHEREAS, the Parties presently desire to coordinate the development and construction of the Improvements in connection with the development and construction of the Project.

3. WHEREAS, the City has allocated funding (the "Funding") for the design and

construction of the Improvements, including funding from the proceeds of the City's Interlocal Agreement with the Capital Metropolitan Transportation Authority, as passed and approved by the Austin City Council on May 23, 2003.

4. WHEREAS, the Parties have entered into a Master Agreement (the "Master Agreement") of even date herewith, which Master Agreement, together with all exhibits attached thereto, sets forth the obligations of the Parties with respect to the development and construction of the various improvements described therein.

5. WHEREAS, the use and meaning of the capitalized terms in this Agreement (including, without limitation, the terms "Project" and "Gables") shall be the same as the use and meaning of those same terms as defined in the Master Agreement, unless this Agreement expressly defines the term otherwise.

6. WHEREAS, the City will reimburse Gables from the Funding a percentage of the cost of construction of the Improvements.

7. WHEREAS, the City and Gables desire to enter into this Agreement in accordance with the Master Agreement to further describe and implement the development and construction of the designated Improvements and the reimbursements authorized by the Ordinance, as defined below.

NOW, THEREFORE, in consideration of these premises, the mutual covenants set forth herein and other good and valuable consideration, the receipt and sufficiency of which both parties acknowledge, the City and Gables agree as follows:

ARTICLE I

DEFINITIONS AND INTERPRETATION

Section 1.01 Additional Definitions.

- a. Bidding Documents means the Plans and Specifications together with the proposed Construction Contract for the Improvements.
- b. Construction Contract means the construction contract executed by Gables for the construction of the Improvements.
- c. Contractor means the bidder with whom Gables contracts for the construction of the Improvements.
- d. Effective Date means the date of execution of this Agreement.
- e. Engineer means the engineer hired by Gables, in Gables' discretion on the basis of a qualifications-based selection process, to undertake the tasks described in Section 3.02 of this Agreement.

- f. Notice means any formal notice or communication required or permitted to be given by one Party to another by this Agreement.
- g. Ordinance means the Ordinance enacted by the City Council of the City of Austin on the date of approval of the Master Agreement and this Agreement by the City in support of the development and construction of the Improvements and the allocation of the Funding thereto`.
- h. Plans and Specifications mean plans and specifications prepared by the Engineer for the construction of the Improvements as described herein.
- i. Substantial Completion means that the Improvements have been completed in accordance with the Plans and Specifications, in all material respects, to the point of being usable for the purpose intended, as certified by the Engineer to the City and as determined by the City in the ordinary course of its inspections of such Improvements.

Section 1.02 Interpretation of Terms, and Incorporation of Exhibits.

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 pertinent purposes as though fully copied and set forth at length; and
- (c) References to any document means that document as amended or as supplemented from time to time; and references to any party means that party, its successors, and assigns.

Section 1.03 Compliance with Certain City Bidding Requirements.

Notwithstanding any provision of this Agreement to the contrary, Gables' obligation to comply with the City's minority-owned and women-owned business enterprise procurement program set out in the City's Code, or any other similar law or regulation, including any provisions requiring award of a construction contract to a low bidder or any other particular bidder, shall apply only in the context of construction of the Improvements that are subject to reimbursement by the City as set out in this Agreement. In all other aspects of construction of the Project, Gables may choose its consultants, contractors, and other agents in its sole and absolute discretion, provided, however, that Gables is aware of and may consider the City's Minority and Women's Business Ordinance in making its decisions regarding other aspects of construction of the Project.

ARTICLE II GABLES AUTHORITY & RESPONSIBILITY

Section 2.01 Required Information.

At the time of execution of this Agreement, as a condition precedent, Gables has provided the City with appropriate evidence of authority, authorizing Gables' execution and performance of this Agreement, the receipt of such evidence the City hereby acknowledges.

Section 2.02 Design and Construction Responsibility.

- a. Notwithstanding any other provision in this Agreement to the contrary, Gables' responsibility to design and construct the Improvements is contingent upon the pre-construction conditions set forth in Article IX of the Master Agreement, which are incorporated herein by reference,
- b. Notwithstanding any other provision in this Agreement to the contrary, Gables' obligation to construct and maintain the Improvements is contingent upon its commencement of construction of the Project, timely reimbursement by the City hereunder, and as provided in Section 8.05 and Article IX of the Master Agreement. Once commenced, Gables shall diligently prosecute the construction of the Improvements to completion.

ARTICLE III
ENGINEERING DESIGN OF THE IMPROVEMENTS

Section 3.01 Agreement to Design the Improvements.

The City and Gables agree that the Improvements shall be designed by Gables in accordance with the applicable portions of the City's written, published requirements of the City Code and City rules and regulations in effect on the date of this Agreement (the "City Standards"), specifically including but not limited to the City's Transportation and Drainage Design Criteria Manuals and as further described in this Agreement.

Section 3.02 Design Duties of Gables.

Gables shall:

- a. engage the services of an Engineer to perform the following functions:
 1. prepare Plans and Specifications for the Improvements using (and ensure that the Plans and Specifications conform to) the City's design criteria and Standards applicable to the Improvements; prepare preliminary schedules and cost estimates for the construction of the Improvements; the Engineer's opinion of construction costs shall be based on materials and labor prevailing at the time of the preparation of the preliminary estimate without consideration of inflationary increases in costs with the understanding that the Engineer will not be construed to have guaranteed costs of construction, however, if either of the Parties reasonably believe that the estimates are no longer accurate, Gables will promptly obtain a revised opinion of construction costs with estimates of more accurate construction costs together with a description of the variance between the original and revised construction costs;

2. provide the City with a copy of the draft Bidding Documents;
3. if requested, attend and conduct pre-bid conferences to provide clarification and interpretation of the Bidding Documents to bidders;
4. if requested, prepare and issue addenda required to clarify the Bidding Documents;
5. if requested, attend the opening of bids at City's Contract Compliance Section, review bids, and furnish a recommendation regarding the award of the Construction Contract, within five working days following the bid opening;
6. review and approve (or take other appropriate action regarding) shop drawings and samples, the results of tests and inspections and other data that the Contractor is required to submit for conformance with the design criteria and standard specifications of the Improvements and compliance with the information given in the Project construction documents;
7. determine the acceptability of substitute materials and equipment proposed by Contractor; and receive and review (for general content as required by the applicable specification) maintenance and operating instructions, schedules, guarantees, bonds and certificates of inspection which are to be assembled by Contractor in accordance with the construction documents;
8. review change order requests relating to the Improvements and submit the change order requests along with recommendations to Gables and the City for review and approval by Gables and the City. Change orders will be reviewed and approved or rejected by the City within five business days of submittal, provided, if more information is required for the City review, the City will notify Gables within the initial five day period and will have up to an additional five days after receipt of the additional information in which to approve or reject the change order request and in the event of a dispute, the Parties will follow the same procedure outlined for dispute resolution in Section 4.04 below;
9. review any changes to the Improvements and, if necessary, design any engineering changes that may be required after construction has begun;
10. attend the final inspections of each portion of the Improvements in the presence of the City inspector and transmit a list of items to be completed or repaired to the City, Gables, and the Contractor;
11. review the Plans and Specifications of the Improvements marked to show "as built" conditions to ascertain to the best of his knowledge and belief that the reflected field changes are substantially complete and correct; and

12. after final completion of the Improvements, submit as-built documents to the City, consisting of an electronic file, one set of mylar and two sets of one-half size print record Plans and Specifications to the City certified "As Built" by the Engineer. Copies of the Project record Plans and Specifications that may be relied upon by the City are limited to the printed copies ("hard copies") that are signed and sealed by the Engineer; record Plans and Specifications on electronic files that are furnished by the Engineer to the City are only for the convenience of the City.
- b. ensure that the Plans and Specifications:
 1. conform, in all material respects, to the City design criteria and construction and material standards, as contained in the applicable City ordinances and regulations, including the City's Transportation and Drainage Criteria Manuals, for the Improvements to be constructed by Gables; and
 2. are accompanied by appropriate engineering reports, as reasonably required by the City.
 - c. engage the services of a duly qualified and experienced consultant or a duly qualified and experienced Gables employee or employee of a Gables affiliate to act as a professional construction manager ("Construction Manager") to work with the Engineer in connection with Engineer's tasks, as appropriate, and to act as a liaison with the City and with subcontractors. The City will recognize the Construction Manager as the single point of contact with Gables during the construction of the Improvements for the purposes of daily communication, resolution of routine construction matters, and construction contract administration, including but not limited to the purpose of receiving payments from the City pursuant to the Master Agreement and this Agreement. The City further recognizes and agrees that such reasonable fees as are paid by Gables to the Construction Manager in connection with construction of the Improvements are costs of constructing the Improvements, and are subject to proportionate reimbursement hereunder. Gables will charge a reasonable fee for the costs of construction administration, which will not exceed five percent (5%) of construction costs of the Improvements. The construction management fee will be documented in any requests for reimbursement with supporting information of activities undertaken and expenses incurred and the City will reimburse a portion thereof as specified in Article V.
 - d. make timely payments for work properly performed in connection with the design, construction management and contract administration of the Project in accordance with the terms of the applicable professional services agreements.

ARTICLE IV CONSTRUCTION OF THE IMPROVEMENTS

Section 4.01 Agreement to Construct the Improvements

- a. Gables will submit the Plans and Specifications for the Improvements prepared by

the Engineer at logical points in the development of the design to the City for review and approval. The City will perform interim design reviews of the Plans and Specifications and provide any written comments to Gables within ten working days of submittal, unless additional time will be required due to the requirement of reviews by multiple City departments or additional time will be required in connection with the site plan or permit review and approval process. In the event that such additional time is required, the City will notify Gables in writing of the additional time requested for the review, which may not exceed an additional five working days for the review of interim design submittals or the additional time required for the site plan review and approval process. Once approval is obtained, no material changes may be made to the Plans and Specifications without following the change order procedure described in Section 3.02(a)(8) hereof.

b. The City will perform site plan and permitting reviews in a timely manner and in accordance with City requirements, including but not limited to Section 25-5-114 of the City Code.

c. After approval of the Plans and Specifications and, subject to reimbursement as described in this Agreement and subject to all of the other terms and conditions of this Agreement and the Master Agreement, Gables agrees to construct the Improvements.

d. Subject to reimbursement as described in this Agreement, Gables agrees to construct the Improvements in a good and workmanlike manner and in all material respects substantially in accordance with the Plans and Specifications and all applicable laws, regulations, and ordinances, including (but with respect only to those Improvements that are subject to reimbursement under Section 5.02 hereof) the City's MBE/WBE requirements.

e. Gables or Gables' Construction Manager or other agent will serve as the manager for the construction of the Improvements.

Section 4.02 Schedule of Construction.

a. Gables will construct the Improvements at one time or in phases, as reasonably approved by the City, on a timely basis as is needed in connection with the development of the Project and adjacent public infrastructure.

b. Gables will begin construction of the Improvements during the construction of the first phase of development of the Project and subject to the provisions of the Master Agreement.

Section 4.03 Construction Duties of Gables.

Subject to all of the terms and conditions of this Agreement, including, without limitation, Section 1.03 hereof (limiting the applicability of the City's minority-owned and women-owned business enterprise procurement program), Gables (or Gables' Engineer, Construction Manager, or other agent) will:

a. solicit public invitations for bids for the construction of the portion of the Improvements subject to reimbursement, following all applicable state laws and regulations and City Codes, regulations and procedures to which the City must adhere that pertain to competitive bidding procedures for Construction Contracts. This requirement includes compliance with the minority-owned and women-owned business enterprise procurement program found in Chapters 5-7 of the City Code and Chapter 252 of the Texas Local Government Code or at the option of Gables, substantial compliance with the requirements of Section 271.116 of the Texas Government Code and the other applicable provisions of the Code related to competitive sealed proposals for those Improvements, which may be constructed for less than \$1,500,000.00;

b. prepare the Construction Contract to comply, in all material respects, with all applicable laws, regulations, ordinances, City procedures, and the terms of this Agreement. The Construction Contract must include general conditions that include the following provisions:

1. reasonable warranties, and insurance, payment and performance bonding requirements, as more fully set forth in Exhibit "D" hereto;
2. include the City as an approved future assignee to the Construction Contract, together with the applicable Plans and Specifications, with the ability of the City, as assignee, to complete the Improvements, if Gables fails to complete the Construction Contract; and
3. certificates of insurance evidencing that the required insurance has been obtained and that the City has been designated as an additional insured under Endorsement CG2010 (or equivalent approved by the City Risk Manager) with respect to all liability coverages to the extent allowed by law;

c. award the Construction Contract to the lowest responsible bidder (who is duly qualified and can meet the construction schedule) for those Improvements that are subject to reimbursement hereunder, following construction contract competitive bidding procedures set forth in Chapter 252 of the Texas Local Government Code (or as applicable Section 271.116 of the Code) and the minority-owned and women-owned business enterprise procurement program found in Chapters 5-7 of the City Code, as applicable; prior to entering into any other contract for the provision of construction, demolition, material generation or non-professional services (eg., services other than design, surveying, etc.) to satisfy Gables obligations hereunder, Gables will in good faith solicit bids for such items from at least three qualified entities, review all timely submitted bids in good faith and select the entity to provide such item which in Gables discretion represents the best overall value for the Improvements taking into account all relevant factors and circumstances or will use the process set forth in Section 271.116 of the Code and select the entity providing the "best value," taking into consideration the enumerated evaluation criteria;

d. obtain all required permits, consents, inspections, tests, and authorizations necessary for construction of the Improvements; provided, however, that the City will cooperate with Gables in obtaining those items listed herein;

- e. provide the City with a copy of the Construction Contract and any additional documents pertaining to the Construction Contract on or about the time they have been signed, and thereafter provide copies of any documents amending or replacing any of said documents;
- f. submit all changes to the Plans and Specifications and change orders to the Construction Contract to the City for its review and approval prior to the commencement of any work incorporating the change, which approval will not be unreasonably withheld or delayed;
- g. ensure that all change orders submitted for the Construction Contract, either singularly or in the aggregate, do not increase the portion of the Construction Contract cost subject to City reimbursement by more than twenty five percent of the original contract amount;
- h. make timely payment to the Engineer and Contractor for work properly performed concerning the Improvements in accordance with the terms and provisions of the applicable contract with the Engineer or the Construction Contract (including any provisions related to statutory retainage and withheld amounts due to improper work or punch list items);
- i. arrange and coordinate materials testing with each Contractor and provide the City with all testing information; if the City reasonably determines that the work needs to be corrected or rejected or requires special testing because of unforeseen circumstances, the City will promptly notify Gables and Gables will take appropriate action to remedy the identified problem;
- j. reject all work found not to conform to minimum requirements of the Construction Contract and the applicable Plans and Specifications, and advise the Engineer and the City of work that Gables determines should be corrected or rejected or which requires special testing, adjustment, or inspection for approval;
- k. arrange and observe with the Contractor all acceptance testing, if applicable, for the Improvements and notify the City and the Engineer of the schedule and results of the testing;
- l. maintain master job files of correspondence, reports of conferences, shop drawings, samples, reproductions of the applicable Plans and Specifications, change order, addenda, daily inspection reports, additional or revised drawings, and other related construction documents;
- m. coordinate the preparation of letters indicating Substantial Completion for the Improvements with the Engineer, together with the submission to the Contractor of a list of observed items requiring completion or correction;
- n. ensure access and permit the City to inspect the construction of the Improvements

at all reasonable times during construction until final acceptance of the Improvements by the City;

- o. conduct and coordinate final inspection of the Improvements with the Engineer and the City inspector; transmit a final list of items to be completed or repaired, if any, and observe Contractor correction of the same;
- p. prepare and submit to the City monthly during construction of the Improvements a report regarding minority-owned and women-owned business enterprise participation in the construction of the Improvements; and
- q. within thirty (30) days after final completion and acceptance of the Improvements by the City in writing, provide the City with complete sets of the Plans and Specifications, certified "as-built", by the Engineer in accordance with the requirements of this Agreement. The City's acceptance of the Improvements shall be governed by this Agreement and the requirements of the City Code. As a condition of final acceptance of the Project by the City, Gables will provide the City with:

 - 1. an assignment to the City of all warranties, guarantees, maintenance bonds, or like assurances of performance applicable to the Improvements, but not to Gables' Project, after final acceptance by the City;
 - 2. copies of separate books of accounts, accurately documenting costs and expenses incurred in connection with the Improvements; and
 - 3. a written, sealed statement from the Engineer certifying that the Improvements have been constructed in accordance with the Plans and Specifications (subject to approved change orders) in all material respects.

Section 4.04 Duties of the City

The City will:

- (a) review the Plans and Specifications, in a timely manner as set forth in Section 4.01 above, for substantial compliance with the requirements of this Agreement and applicable City procedures and Standards, and will approve all Plans and Specifications that comply with these requirements in all material respects, within a reasonable period of time after submission;
- (b) inspect the Improvements within two (2) days for interim inspection and ten (10) days for a final inspection after a request for inspection is received, and, if completed in accordance with the terms of the Plans and Specifications and this Agreement in all material respects, will certify the Improvements as being in compliance with City Standards and specifications, and issue a final acceptance letter. The final acceptance letter will be the effective date of "completion" for the purposes of this Agreement. The inspections and certifications will be conducted in accordance with

standard City policies, procedures, and requirements;

(c) provide timely written Notice to Gables within two working days whenever a completed inspection reveals that an item of the Improvements is not constructed or completed in accordance with the Plans and Specifications or is otherwise materially defective. The Notice will specifically detail any deficiencies. The foregoing notwithstanding, inspection of construction by the City is not a guaranty that construction of the Improvements is free from defects or complies with all applicable laws. In the event of a dispute regarding any notice of failure to complete the construction of the Improvements in accordance with the applicable plans and specifications, either party may request in writing a dispute resolution meeting with the City's Project Manager. The meeting will be held within three business days of such a request and the Parties agree that the recommendations of the Project Manager will be given due consideration in the resolution of the dispute. If the Parties are not satisfied with the recommendations of the Project Manager, the matter may be appealed to the Director of the applicable City department with jurisdiction over the Improvements in question and thereafter to mediation, as allowed by this Agreement; and

(d) reimburse Gables for the engineering design and construction costs of the Improvements, in accordance with the provisions of Article V hereof within 30 days after final acceptance.

Section 4.05 City's Right to Construct Improvements on Default of Gables.

a. Subject to the provisions of the Master Agreement, including, without limitation, those pertaining to lender protection, notice and cure periods, and public health and safety, if Gables begins but does not complete construction of the Improvements materially in accordance with the Plans and Specifications and the terms and provisions in this Agreement, the City has the right, but not the obligation, to complete the construction of the Improvements.

b. If the City elects to complete the Improvements, all plans, designs, easements, real and personal property, and Improvements produced or installed by Gables or its Engineers or Contractors within the public right-of-way prior to the take over of construction of the Improvements by the City, will become the property of the City.

c. Gables grants to the City a nonexclusive right and easement to enter the Property to the most limited extent as may be necessary for the purpose of performing Gables' construction obligations pertaining to the Improvements under this Agreement in accordance with its terms and provision and in accordance with the notice and cure periods contained in this Agreement.

d. If Gables is terminated pursuant to Section 11.01 of the Master Agreement, the City will reimburse Gables for its prorata share of the work performed in accordance with the plans and specifications and the terms of this Agreement to the date of such termination, subject to the receipt of acceptable close-out information, including the contractor's invoice for services rendered to the date of termination.

ARTICLE V COSTS AND REIMBURSEMENT

Section 5.01 Gables' Initial Responsibility for Improvements Costs.

Gables will initially pay all costs associated with the design and construction of the Improvements in a timely manner as provided in this Article V.

Section 5.02 Cost Reimbursement.

The City will reimburse Gables the portion of the design and construction costs of the Improvements described herein, approved in accordance with this Agreement, as specified in attached Exhibit "E", in accordance with the terms of this Article V, after Gables has constructed and the City has accepted the Improvements described herein for operation and maintenance. The City's participation in the cost of the Improvements may include third party contributions. The City will be responsible for reimbursing Gables for a portion of the costs of such design and construction up to the not to be exceeded amount of ONE MILLION FIVE HUNDRED NINETEEN THOUSAND NINE HUNDRED EIGHTY-THREE AND NO/100 DOLLARS (\$1,519,983.00) without reallocation by the City Manager of the total amount of City funding set forth in the Master Agreement or further authorization by the Austin City Council. The City acknowledges that so-called "scope-creep" and market forces may result in bids which exceed the presently estimates and the presently available funding.

Section 5.03 Report of the Project Costs Required.

- a. On or before the date of final acceptance of the Improvements, Gables will submit a report to the City of the total costs of the Improvements that includes reasonable supporting information. The report must segregate the costs of the traffic signal improvements from the cost of the other Improvements. Gables agrees to provide all information and documents in its possession or immediate control reasonably required by the City for proper processing and for accurate accounting and documentation of actual Project costs.
- b. The City will verify and determine the final total cost amount and will certify the amount due to Gables for the Project. If the City determines that the amount due to Gables is the same as the amount submitted by Gables, the City will have 30 days after receipt of all supporting information or the date of final acceptance of the Project, (whichever is later), in which to make the payment to Gables. If the City determines that the amount owing to Gables is less than the amount submitted by Gables, the City will: (i) notify Gables of the discrepancy within twenty days of Gables' submittal to the City; (ii) provide Gables with all supporting documentation upon which the discrepancy is based; and (iii) work diligently and in good faith to resolve the discrepancy within the ensuing ten days. If the Parties are unable to resolve the discrepancy, either Party may refer the matter to mediation in accordance with Article VII.
- c. If Gables allows work to commence on a change order that effects a material change of the Plans and Specifications for any approved phase before receiving the approval of the applicable City department(s) for the change order, any additional costs incurred on that change order may not be eligible for

reimbursement, if the City reasonably determines that the change in the Project is materially unacceptable.

- d. In any event, subject to the applicable not to be exceeded amount and notwithstanding anything to the contrary contained herein, the City will reimburse Gables the amounts not in dispute then owing to Gables.

ARTICLE VI CONSTRUCTION

Section 6.01 Conditions for City Ownership and Maintenance of the Improvements.

After the City's final acceptance of the Improvements, the City will own and maintain the Improvements, subject to the Contractor's one-year warranty and provisions of 6.02 below, except that Gables expressly shall have certain ordinary and ongoing maintenance responsibilities for any portions of the Improvements described to be the maintenance responsibility of Gables in the Master License Agreement.

Section 6.02 Warranty.

a. Upon Substantial Completion of the Improvements and as a condition precedent to final acceptance by the City, Gables will transfer to the City all warranties for the Improvements, including the Contractor's one year warranty and any warranty bond and any other warranty or rights Gables has in connection with the Plans and Specifications as they relate to the Improvements, excluding any portion of such warranty pertaining to Gables' Project. Except as may otherwise be specifically provided in this Agreement or any other Agreement, Gables in no way guarantees either the performance or quality of the work undertaken or materials used by any contractor or subcontractor undertaking construction pursuant to this Agreement or any Other Agreement, and **GABLES HEREBY DISCLAIMS ANY AND EVERY WARRANTY OR GUARANTY OF PERFORMANCE, QUALITY, SUITABILITY FOR ANY AND EVERY PARTICULAR PURPOSE WHATSOEVER, AND THE CITY HEREBY ACKNOWLEDGES AND ACCEPTS SUCH DISCLAIMER.**

b. Gables will be responsible for any material damage (ordinary wear and tear excepted) to the Improvements accepted by the City for operation and maintenance for one year following acceptance by the City, but only to the extent that the damage was caused directly by Gables or its Contractor during construction of the Improvements or Project.

Section 6.03 No Liens Permitted.

Gables will make timely payment for all aspects of properly performed engineering, design, construction work (including inspection fees), and for all materials and services relating to the Improvements in accordance with the applicable Construction Contract(s) and design services contracts for the Improvements. Gables will not suffer or permit the filing, perfection, or execution of any lien or encumbrance on the Improvements, and will cause any such lien to be released of record by payment, deposit, bond, or order of court of competent jurisdiction. Gables

will have the right to contest any claim asserted in connection with the design and construction of the Improvements described herein, including the right to contest such claim in any court of competent jurisdiction. Gables shall secure the release within ninety days of the recordation of any lien or encumbrance. The foregoing notwithstanding any lien disputed by Gables may be bonded, as applicable, by the payment and performance bonds provided by the Contractor for the Improvements or otherwise bonded or secured by other fiscal, including a letter of credit, acceptable to the City Law Department within sixty days of its recordation.

Section 6.04 Agreement May be Pledged as Collateral.

Gables may pledge this Agreement as collateral for the purpose of securing financing from one or more lenders for the Improvements. Gables or its lender will provide documentation of the use of this Agreement as collateral to the City Law Department for its review and approval, which approval will not be unreasonably withheld or delayed.

ARTICLE VII GENERAL PROVISIONS

Section 7.01 Interpretation of this Agreement, and Entire Agreement.

The Parties agree that in the event of any conflict between provisions of this Agreement and of the Master Agreement, the provisions of this Agreement shall control, provided, however, that notwithstanding the foregoing, (i) the General Provisions of Article XI of the Master Agreement shall apply to and control this Agreement, as if more fully set forth herein, and (ii) the mortgagee protection provisions of the Master Agreement (Article X thereof) shall apply to and control this Agreement. Subject to the foregoing, this Agreement shall, in the event of any dispute over its meaning or application, be interpreted fairly and reasonably, and neither more strictly for or against either Party.

Section 7.02 No Waiver.

No waiver of any provision of this Agreement will be deemed to constitute a waiver of any other provision or any other agreement between the Parties. No waiver of any provision of this Agreement will be deemed to constitute a continuing waiver unless expressly provided for by written amendment to this Agreement, nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent defaults of the same type. The failure at any time to enforce this Agreement or any covenant by the City, the Gables, or their successors or assigns, whether the violations are known or not, shall not constitute a waiver or estoppel of the right to do so.

Section 7.03 Governmental Authority.

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 the Improvements constructed under the terms of this Agreement which are to be operated and maintained by the City, except as specifically waived or modified herein or by specific action of

the City Council, nor its duty to provide for the public health, safety, and welfare in the operation and maintenance of the same.

Section 7.04 Expiration of Reimbursement.

The reimbursement described herein shall be available to Gables until the completion of construction of all of the Improvements, but not longer than ten (10) years from the date of this Agreement, which time period is subject to extension by mutual agreement.

This Agreement shall be binding upon and inure to the benefit of the Parties and their representatives, successors, and assigns.

SIGNATURE PAGES FOLLOW.

Executed to be effective on _____, 2005.

APPROVED AS TO FORM:

By: _____

Assistant City Attorney

CITY OF AUSTIN:

By: _____
Toby Hammett Futrell
City Manager

APPROVED AS TO CONTENT:

By: _____
Sue Edwards, Director
Economic Growth and Redevelopment Services

By: _____
Austan Librach,
Economic Growth and Redevelopment Services

STATE OF TEXAS §
 §

COUNTY OF TRAVIS §

THIS INSTRUMENT was acknowledged before me on this ____ day of _____, 2005, by Toby Hammett Futrell, as City Manager of the City of Austin, a Texas municipal corporation, on behalf of said municipal corporation.
(SEAL)

Printed/Typed Name of Notary
My Commission Expires: _____

**LION GABLES REALTY LIMITED
PARTNERSHIP, a Delaware limited
partnership**

By: Gables GP, Inc.
a Texas corporation,
its sole general partner

By: _____
Ben Pisklak, Vice-President

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

THIS INSTRUMENT was acknowledged before me this ____ day of _____, 2005, by Ben Pisklak, Vice President, of Gables GP, Inc., a Texas corporation, general partner of Lion Gables Realty Limited Partnership, a Delaware limited partnership, of said corporation and partnership.

(SEAL)

Printed/Typed Name of Notary
My Commission Expires: _____

Exhibit "A": Legal Description of Property
Exhibit "B": The Project-
Exhibit "C": Improvements
Exhibit "D": Insurance and Bond Requirements
Exhibit "E": Cost Participation