

DEVELOPER PARTICIPATION CONTRACT

This Contract is made and entered into on this the _____ day of _____, 2017, by and between the City of Mansfield, a Texas municipal corporation (hereinafter called "City"), and HMH Garden Heights, LP, a Texas limited partnership (hereinafter called "Developer").

WHEREAS, Subchapter C of Chapter 212 of the Texas Local Government Code allows a municipality to be exempted from competitive bidding procedures in cases where the municipality enters into a contract with a developer of a subdivision of land in the municipality, in which the municipality agrees to participate in the cost of public improvement projects related to the development; and

WHEREAS, the City has enacted Ordinance No. OR-1621-07, which establishes guidelines to be followed in such contracts; and

WHEREAS, the Developer is developing a project known as Garden Heights, Phase Four, a residential development in the City of Mansfield (the "Project"), that has been platted and is under construction plan review, has frontage on the north side of National Parkway where there is a necessary large capacity storm drainage route, and along this alignment an open channel will be an undesirable drainage feature due to steep slopes, maintenance needs and potential risk to the National Parkway roadway; and

WHEREAS, in conjunction with developing the Project, the Developer will be constructing certain infrastructure improvements, including an approximate 780 feet of underground box culvert as the appropriate alternative to open channel drainage along National Parkway; and

WHEREAS, it is recognized that it is in the best interest of the citizens of the City of Mansfield to extend the underground box culvert west of Sage Drive, thereby further decreasing the negative impacts to National Parkway; and

WHEREAS, the box culvert extension is a component of the ultimate design and construction necessary for the future widening of National Parkway; and

WHEREAS, the City and the Developer agree to share the expense of these underground drainage improvements as permitted by Subchapter C, and as set forth in this Contract.

NOW, THEREFORE, for the promises and consideration stated herein, the parties do hereby agree as follows:

I. PUBLIC IMPROVEMENTS

(a) Construction of Public Improvements. The Developer hereby agrees to construct all public improvements required for the Garden Heights, Phase Four development, including streets, utilities, drainage, sidewalks, street signage, and all other required improvements, in accordance with all applicable ordinances or other regulations of the City including the City's Subdivision Ordinance, and in accordance with plans and specifications which have been

approved by the City and described on Exhibit A attached to and fully incorporated herein (the “Public Improvements”).

(b) The Developer shall employ a civil engineer licensed to practice in the State of Texas and acceptable to the City for the design and preparation of plans and specifications for the construction of the Public Improvements. The Developer agrees that its engineer assumes and shall be fully responsible for the adequacy and accuracy of the design, plans, and specifications.

(c) Should Developer desire to replace the engineer or the contractor selected to construct the Public Improvements, Developer agrees to first obtain City’s consent, such consent not to be unreasonably withheld or delayed. It shall not be unreasonable for the City to require that the engineer or contractor have sufficient experience and staffing to complete the project.

(d) No work on the Public Improvements shall commence until the plans and specifications for the work have been reviewed and released by the City Engineer. Construction of the Public Improvements shall be subject to review by the City Engineer to evaluate conformance with the construction plans, project specifications, and any applicable City standards.

(e) Upon completion of construction of the Public Improvements required by this Contract, the Developer shall deliver to the City a set of as-built construction plans of the Public Improvements, in a form satisfactory to the City Engineer.

II. CITY FINANCIAL PARTICIPATION

(a) The City hereby agrees to participate in a portion of the cost of the Public Improvements, in accordance with the terms and conditions of this Contract and subject to all applicable laws, regulations, and ordinances.

(b) The Developer shall commission the design and construction of the underground box culvert storm drain system under the alignment of National Parkway from its current location to the west boundary of Garden Heights, Phase Four (the “Underground Drainage Improvements”). The City agrees to be responsible for that portion of the construction cost of the Underground Drainage Improvements west of Sage Drive, approximately 405 linear feet. The maximum cost participation by the City is \$380,000. The participation by the City will be in the form of Roadway Impact Fee credits for the total number of lots within Phase Four ($73 \times \$2,200 = \$160,600$), and a cash payment to the Developer in an amount not to exceed \$219,400 at the time of City acceptance of all public improvements for Garden Heights, Phase Four. The cost participation by the City will be the actual cost for the described extension of the Underground Drainage Improvements west of Sage Drive, but not to exceed \$380,000. The Roadway Impact Fee credits will be applied at time of building permit fee collection, not in the form of a cash payment from City.

(c) The parties agree that the not-to-exceed amount established by subsection (b) of this Article II establishes the maximum dollar amount to be paid by the City under this Contract, but that the City’s actual payment to Developer shall be determined according to Developer’s

actual costs of completing the Public Improvements if the actual costs are less than the not-to-exceed amount.

III. INSURANCE AND BONDS

(a) The Developer shall obtain or cause the Contractor to obtain and shall furnish to the City policies or proof of insurance which must meet the Requirements for Developer's Insurance set forth in Exhibit B attached to and fully incorporated into this Contract.

(b) Prior to initiating any construction of the Public Improvements, the Developer shall provide the City with one original and one quality copy of the following construction bonds:

(1) Performance Bond. A good and sufficient Performance Bond in an amount equal to one hundred percent (100%) of the total cost of the Public Improvements, guaranteeing the full and faithful execution of the work and performance of this Contract and for the protection of the City against any improper execution of the work or the use of inferior materials.

(2) Payment Bond. A good and sufficient Payment Bond in an amount equal to one hundred percent (100%) of the total cost of the Public Improvements, guaranteeing payment for all labor, materials and equipment used in the construction of the Public Improvements.

(3) Maintenance Bond. A good and sufficient Maintenance Bond in an amount equal to one hundred (100%) of the total cost of the Public Improvements, guaranteeing the maintenance in good condition of the Public Improvements for a period of two (2) years from and after the date that a Letter of Acceptance is issued from the City indicating that the Public Improvements have been completed by the Developer and accepted by the City.

(c) Each of the above bonds shall be in a form acceptable to the City. Any surety company through which a bond is written shall be duly authorized to do business in the State of Texas, and the City, shall retain the right to reject any surety company for any work under this Contract regardless of such company's authorization to do business in the State of Texas.

IV. PAYMENT BY CITY

The City shall reimburse the Developer for its actual costs in constructing the Underground Drainage Improvements in an amount not to exceed the amount set forth in Article II of this Contract. The Developer shall make monthly reports to the City Engineer, accompanied by all invoices and other supporting documentation, and with certification provided by the Engineer of Record, as to the quantities and costs of the associated work performed. The City's agreed share of the costs of the project shall be paid within sixty (60) days of issuance of a Letter of Acceptance, as provided in Article V of this Contract. Payment shall be subject to the City's verification of the costs of the Underground Drainage Improvements and that the work has been completed in accordance with the plans and specifications.

V. ACCEPTANCE OF PUBLIC IMPROVEMENTS

(a) Acceptance of the Public Improvements by the City shall be only by a Letter of Acceptance signed by the City Engineer. The City will not issue a Letter of Acceptance until the Public Improvements are completely constructed (Final Completion) to the satisfaction of the City Engineer. However, upon Substantial Completion, the City Engineer shall present a "punch list" indicating those outstanding items and deficiencies that need to be addressed for Final Completion of the Public Improvements.

(b) Upon issuance of a Letter of Acceptance, title to all Public Improvements mentioned herein above shall be vested in the City and the Developer relinquishes any right, title or interest in and to such Public Improvements or any part thereof. It is understood and agreed that the City shall have no liability or responsibility in connection with such Public Improvements until the Letter of Acceptance is issued. By acceptance of the Public Improvements and payment to Developer, City does not waive any claims arising from the work.

VI. MISCELLANEOUS

(a) The Developer agrees to comply with all federal, state and local laws, rules, or regulations that apply to its performance under this Contract.

(b) This Contract shall be subject to Texas law and any action or proceeding brought to construe or enforce this Contract shall be filed in the courts of Tarrant County, Texas.

(c) Except as hereinafter expressly provided, this Contract or any part hereof or any interest herein shall not be assigned by the Developer without the express written consent of the City, and any attempted assignment by Developer shall be null and void. Developer may, without the City's consent, assign this Contract to any Affiliate of Developer so long as Developer has control of the Affiliate. The term "control" means, with respect to an entity that is a corporation, the ownership, directly or indirectly, of more than fifty percent of the voting securities of such entity, or with respect to an entity that is not a corporation, the power to direct the management or policies of such entity, whether by operation of law, by contract or otherwise. Any assignment shall provide that the assignee is subject to the terms and conditions of this Agreement.

(d) **THE DEVELOPER and ITS SUCCESSORS and ASSIGNS DO HEREBY FULLY RELEASE AND AGREE TO, INDEMNIFY, HOLD HARMLESS AND DEFEND THE CITY, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES FROM ALL CLAIMS, SUITS, JUDGMENTS, AND DEMANDS OF ANY NATURE WHATSOEVER, FOR PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING DEATH, RESULTING FROM OR IN ANY WAY CONNECTED WITH THIS AGREEMENT OR THE CONSTRUCTION OF PUBLIC IMPROVEMENTS OR THE FAILURE TO SAFEGUARD THE CONSTRUCTION WORK, OR ANY OTHER ACT OR OMISSION OF THE DEVELOPER RELATED THERETO, WHICH ACCRUE PRIOR TO ACCEPTANCE OF THE IMPROVEMENTS BY THE CITY, WHETHER OR NOT CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF THE CITY, ITS OFFICERS, AGENTS OR EMPLOYEES, PROVIDED HOWEVER THAT NEITHER DEVELOPER NOR ITS SUCCESSORS OR ASSIGNS WILL BE LIABLE TO THE**

CITY OR ANY OTHER INDEMNIFIED PARTY FOR SUCH PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

(e) Notwithstanding any provision to the contrary, approval by the Director of Public Works or other City employee of any plans, designs or specifications submitted by the Developer pursuant to this Agreement shall not constitute or be deemed to be a release of the responsibility and liability of the Developer, his engineer, employees, officers or agents for the accuracy and competency of their design and specifications. Such approval shall not be deemed to be an assumption of such responsibility and liability by the City for any defect in the design and specifications prepared by the consulting engineer, his officers, agents, servants or employees, it being the intent of the parties that approval by the Director of Public Works signifies the City's approval on only the general design concept of the facilities and improvements to be constructed. In this connection, the Developer shall for a period of ten years after the acceptance by the City of the completed construction project, indemnify and hold harmless the City, its officers, agents, servants and employees, from any loss, damage, liability or expense on account of damage to property and injuries, including death, to any and all persons which may arise out of any defect, deficiency or negligence of the engineer's designs and specifications incorporated into any improvements constructed in accordance therewith, and the Developer shall defend at his own expense any suits or other proceedings brought against the City, its officers, agents, servants or employees, or any of them, on account thereof, to pay all expenses and satisfy all judgments which may be incurred by or rendered against them or any of them in connection herewith.

(f) This Contract may be changed or modified only with the written consent of the Developer and the City.

(g) The provisions of this Contract are severable and, in the event any word, phrase, sentence, paragraph, section or other provision of this Contract, or the application thereof to any person or circumstance, shall ever be determined by a court of competent jurisdiction to be invalid, illegal, or unenforceable for any reason, the remainder of this Contract shall remain in full force and effect and the application thereof to any other person or circumstance shall not be affected thereby. The invalid, illegal or unenforceable provision shall be rewritten by the parties to this Agreement to accomplish the parties' original intent as nearly as possible.

(h) The Developer agrees to make available to the City for inspection all of its books and records related to the Project and to allow the City access to the Project during construction for the purpose of periodic inspection of the construction work.

(i) Any notice and/or statement required or permitted to be delivered shall be deemed delivered by depositing it in the United States mail, certified with return receipt requested, postage prepaid, addressed to the appropriate party at the following addresses, or at such other addresses provided by the parties in writing:

DEVELOPER:

HMH Garden Heights, LP
1038 Texan Trail
Grapevine, Texas 76051
Attention: Bruce French

CITY:

Bart VanAmburgh, P.E.
Director of Public Works
City of Mansfield
1200 E. Broad Street
Mansfield, Texas 76063

(j) The prevailing party in the adjudication of any proceeding relating to this Agreement shall be authorized to recover its reasonable and necessary attorney's fees pursuant to Sec. 271.159 of the Texas Local Government Code.

(k) This Contract may be executed in multiple identical counterparts which when taken together shall constitute one and the same identical original instrument.

VII. TERMINATION

This Agreement may be terminated in the following events:

(a) Except in the event of force majeure, if the Public Improvements are not completed within twenty four (24) months from the date of execution of this Contract, this Contract shall terminate and the City shall have no further obligation hereunder. "Force majeure" shall mean any act of God or the public enemy, war, riot, civil commotion, insurrection, governmental or de facto governmental action (unless caused by acts or omissions of Developer), fire, explosion or flood, and strikes. The date of completion shall be the date that a Letter of Acceptance is issued for the Public Improvements by the City.

(b) In the event that Developer constructs the Public Improvements in violation of the specifications approved by City or violates another provision of this Contract and fails to correct such violation within thirty (30) days following written notice thereof from the City to Developer, such notice to specify in reasonable detail the violations and the specific measures required to correct such violation; provided, however, if the nature of the violation is such that it cannot reasonably be cured within such 30-day period, so long as Developer commences its corrective action within such 30-day period and diligently prosecutes the same, Developer's cure period will extend for such period as may be reasonably required to effect such correction.

EXECUTED this, the _____ day of _____, 2017.

DEVELOPER
HMH Garden Heights. LP, a
Texas limited partnership

Bruce French
Vice President - Land

1038 Texan Trail
Grapevine, Texas 76051

CITY OF MANSFIELD

Clayton Chandler, City Manager

ATTEST:

City Secretary

THE STATE OF TEXAS §
COUNTY OF _____ §

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared _____, known to me as the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of the HMH Garden Heights, LP, and that he executed the same as the act of such limited partnership for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this, the _____ day of _____, 2017.

Notary Public in and for the State of Texas

My Commission Expires:

THE STATE OF TEXAS §
COUNTY OF TARRANT §

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared _____ known to me as the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of the said City of Mansfield and that he executed the same as the act of such municipal corporation for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this, the ____ day of _____, 2017.

Notary Public in and for the State of Texas

My Commission Expires:

EXHIBIT “A”
PUBLIC IMPROVEMENTS

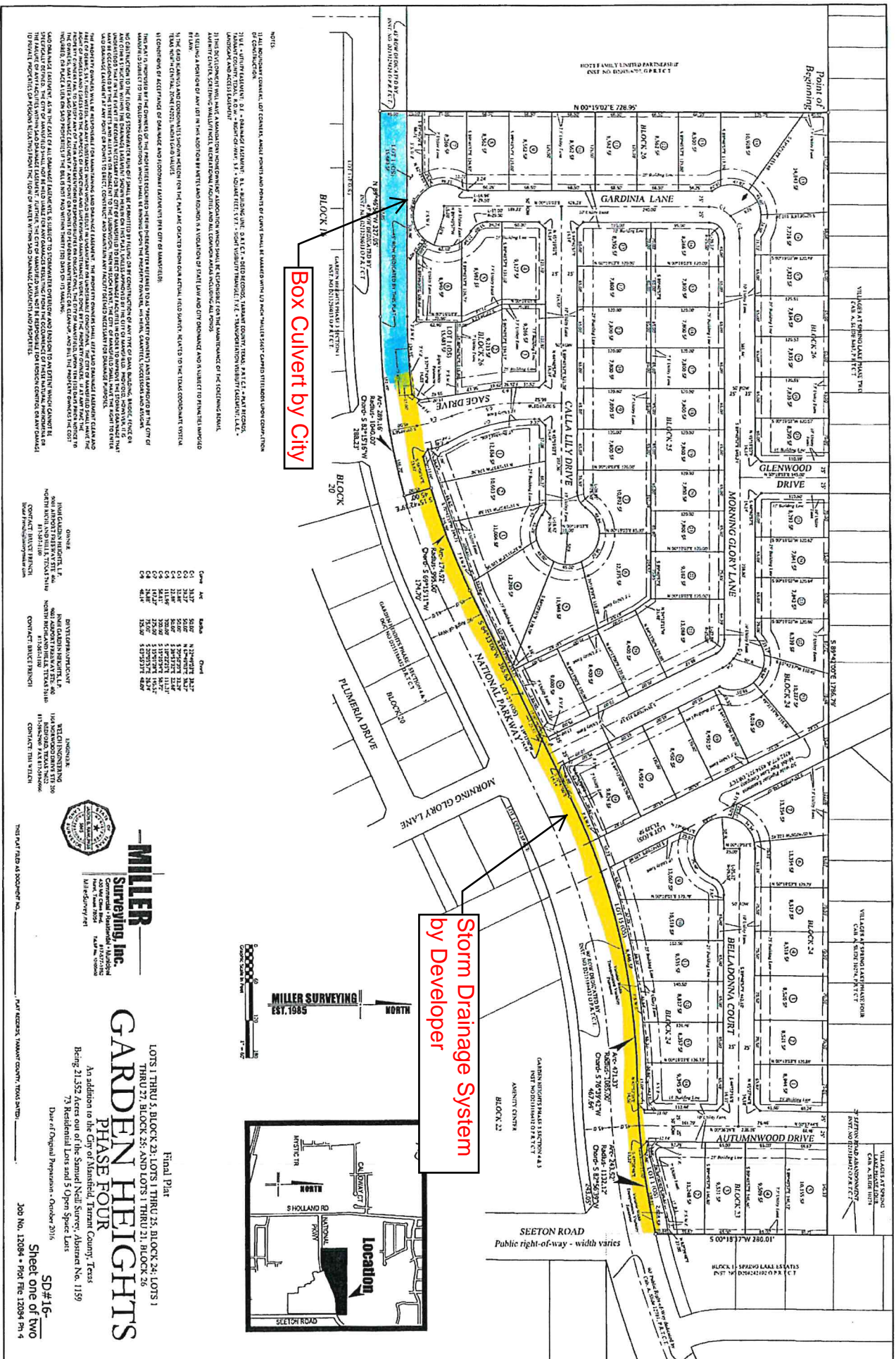


EXHIBIT “B”
REQUIREMENTS FOR DEVELOPER’S INSURANCE

I. *Developer’s Insurance*

A. Without limiting any of the other obligations or liabilities of the Developer, the Developer or the Developer’s contractor (hereinafter called “Contractor”), during the term of the Agreement, shall purchase and maintain the following minimum insurance coverages with companies duly approved to do business in the State of Texas and satisfactory to the City. In this Exhibit B, “Project” shall mean the public improvements to be constructed, in accordance with the Developer Participation Contract, by Developer or by a Contractor under Developer’s contract with a Contractor. “Developer” shall mean Developer; if Developer has contracted with a Contractor to construct the public improvements, the Contractor may submit the proof of insurance coverages required herein. Coverages shall be of the following types and not less than the specified amounts:

1. Workers’ compensation as required by Texas law, with the policy endorsed to provide a waiver of subrogation as to the City;

2. Commercial general liability insurance, including premises-operations; independent contractor’s liability, completed operations and contractual liability covering, but not limited to, the liability assumed under the indemnification provisions of this Contract, fully insuring Contractor’s (or Subcontractor’s) liability for injury to or death of City’s employees and third parties, extended to include personal injury liability coverage with damage to property of third parties, broad form property damage, with minimum limits as set forth below:

General Aggregate	\$2,000,000
Bodily Injury \$1,000,000 Each Occurrence	
Property Damage \$1,000,000 Each Occurrence	
Products–Components/Operations Aggregate	\$ 1,000,000
Personal and Advertising Injury	\$ 1,000,000
(With Employment Exclusion deleted)	
Each Occurrence	\$ 1,000,000
Contractual Liability:	
Bodily Injury	\$1,000,000 each occurrence
Property Damage	\$1,000,000 each occurrence

The policy shall include coverage extended to apply to completed operations, asbestos hazards (if this project involves work with asbestos) and ECU (explosion, collapse and underground) hazards. The completed operations coverage must be maintained for a minimum of one year after final completion and acceptance of the work, with evidence of coverage filed with City.

3. Business auto coverage insurance, covering owned, hired and non-owned vehicles, with a combined bodily injury and property damage minimum limit of \$1,000,000 per occurrence; or separate limits of \$500,000 for bodily injury (per person), and \$500,000 for property damage. Such insurance shall include coverage for loading and unloading hazards.

4. Property Insurance (Builder's All Risk)

a. Developer shall purchase and maintain, or require its contractor to purchase and maintain, at all times during the term of its Contract with the Developer, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial contract price, plus value of subsequent contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made, or until no person or entity other than the City has an insurable interest in the property required by this paragraph to be covered, whichever is later. This insurance shall include interests of the City, the Contractor, subcontractors and sub-subcontractors in the Project.

b. Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Contractor's services and expenses required as a result of such insured loss.

c. If the insurance required by this paragraph requires deductibles, the Developer shall pay costs not covered because of such deductibles.

d. This property insurance shall cover portions of the work stored off the site, and also portions of the work in transit.

e. Owner's Protective Liability Insurance:

(i) Developer, or Developer's Contractor shall obtain, pay for and maintain at all times during the prosecution of the work under the contract between the Contractor and the Developer, an Owner's protective liability insurance policy naming the City as insured for property damage and bodily injury, which may arise in the prosecution of the work or Contractor's operations under the contract.

(ii) Coverage shall be on an "occurrence" basis, and the policy shall be issued by the same insurance company that carries the Developer or Contractor's liability insurance with a combined bodily injury and property damage minimum limit of \$1,000,000 per occurrence.

f. “Umbrella” Liability Insurance: Developer shall obtain, pay for and maintain umbrella liability insurance during the term of the Contract between the Contractor and the Developer, insuring Contractor for an amount of not less than \$5,000,000 per occurrence for bodily injury and property damage that follows form and applies in excess of the primary liability coverages required herein above. The policy shall provide “drop down” coverage where underlying primary insurance coverage limits are insufficient or exhausted.

II. *Policy Endorsements*

A. Each insurance policy to be furnished by Developer under this Agreement shall include the following conditions by endorsement to the policy:

1. name the City as an additional insured as to all applicable policies under endorsement Form GC2010 or broader;

2. each policy shall require that 30 days prior to cancellation, non-renewal or any material change in coverage, a notice thereof shall be given to City by certified mail. If the policy is canceled for nonpayment of premium, only 10 days written notice to City is required;

3. the term “City” shall include all authorities, boards, bureaus, commissions, divisions, departments and offices of the City and individual members, employees and agents thereof in their official capacities, and/or while acting on behalf of the City;

4. the Developer’s policies will be primary and noncontributory. The City’s other insurance will be excess coverage and not contribute to the primary coverage. .

III. *Special Conditions*

A. Insurance furnished by the Developer shall be in accordance with the following requirements:

1. any policy submitted shall not be subject to limitations, conditions or restrictions deemed inconsistent with the intent of the insurance requirements to be fulfilled by Developer. The City’s decision thereon shall be final;

2. all policies are to be written through companies duly licensed to transact that class of insurance in the State of Texas; and

3. all liability policies required herein shall be written with an “occurrence” basis coverage trigger.

B. Developer agrees to the following:

1. Developer waives subrogation rights for loss or damage against the City and agrees to include this provision in its contract with its contractors. Each insurance policy shall provide for a waiver of subrogation against the City, it being the intention that the insurance

policies shall protect all parties to the contract and be primary coverage for all losses covered by the policies;

2. Companies issuing the insurance policies and Developer shall have no recourse against the City for payment of any premiums or assessments for any deductibles, as all such premiums and deductibles are the sole responsibility and risk of the Developer;

3. Approval, disapproval or failure to act by the City regarding any insurance supplied by the Developer shall not relieve the Developer of full responsibility or liability for damages and accidents as set forth in this Agreement. Neither shall bankruptcy, insolvency or denial of liability by the insurance company exonerate the Developer from liability;

4. Deductible limits on insurance policies exceeding \$10,000 require approval of the City;

5. Any of such insurance policies required under this section may be written in combination with any of the others, where legally permitted, but none of the specified limits may be lowered thereby;

6. Developer shall require its Contractor to provide notice of any actual or potential claim or litigation that would affect required insurance coverages to the City in a timely manner;

7. Developer agrees to require its Contractor to either require its Subcontractors to maintain the same insurance coverage and limits as specified for the Developer or coverage of Subcontractors shall be provided by the Contractor; and

8. Prior to the effective date of cancellation of any policy, Developer shall deliver to the City a replacement certificate of insurance or proof of reinstatement.

9. All policies shall be written by carriers with a financial rating by A.M. Best of A or better.