

**DEVELOPMENT FINANCING AGREEMENT BY AND AMONG  
THE CITY OF PFLUGERVILLE, TEXAS,  
REINVESTMENT ZONE NUMBER ONE, CITY OF PFLUGERVILLE, TEXAS,  
AND TERRABROOK FALCON POINTE, L.P.**

This **AGREEMENT** (this "Agreement"), effective as of the Effective Date, is made by and among the **CITY OF PFLUGERVILLE, TEXAS**, a municipal corporation and a home rule city in the State of Texas (the "City"); **REINVESTMENT ZONE NUMBER ONE, CITY OF PFLUGERVILLE, TEXAS**, a reinvestment zone created by the City pursuant to Chapter 311, Texas Tax Code (the "Zone"); and **TERRABROOK FALCON POINTE, L.P.**, a Delaware limited partnership (the "Developer").

**RECITALS**

**WHEREAS**, the City created the Zone pursuant to Chapter 311, Texas Tax Code (the "TIRZ Act"); and

**WHEREAS**, the Board of Directors of the Zone ("Zone Board") and the City Council of the City each approved and adopted the Final Project Plan and Reinvestment Zone Financing Plan for the Zone dated November 22, 2011 (the "TIRZ Plan"); and

**WHEREAS**, the Developer and the City will each construct certain public works and improvements to implement the TIRZ Plan, and the Zone will reimburse the Developer and the City all or a portion of the Project Costs (defined below) of such public works and improvements in accordance with this Agreement; and

**WHEREAS**, the City, the Zone, and the Developer desire to provide for the development and financing of the certain projects set forth below to implement the TIRZ Plan; and

**WHEREAS**, the City, the Developer, and the Zone Board have determined that it is in their best interests to contract with each other with regard to the Projects (defined below) to provide for the efficient and effective implementation of certain aspects of the TIRZ Plan;

**NOW, THEREFORE**, for and in consideration of the premises and the mutual covenants and agreements herein contained, the City, the Zone, and the Developer agree as follows:

**I.  
DEFINITIONS**

The terms "Agreement," "City," "Developer," "TIRZ Plan," "TIRZ Act," "Zone," and "Zone Board" have the meanings set forth in the preamble hereof, and the

following capitalized terms shall have the meanings provided below, unless otherwise defined or the context clearly requires otherwise. For purposes of this Agreement the words “shall” and “will” are mandatory, and the word “may” is permissive.

“Auditor” shall mean the firm of independent certified public accountants employed by the Zone to audit the Zone’s annual financial statements and reimbursements to developers.

“Bonds” shall mean the bonds, notes and other obligations of the Zone payable in whole or in part from a pledge of all or a part of the Tax Increment Fund.

“Available Funds” shall have the meaning defined for it in **Section III.E.**, below.

“City Council” shall mean the City Council of the City.

“City Manager” shall mean the City Manager of the City, or designee.

“City Projects” shall mean the Projects intended to be constructed by the City, described in **Exhibit A**.

“Developer Projects” shall mean the Projects intended to be constructed by the Developer, described in **Exhibit A**.

“Effective Date” shall mean the latest of the execution of this Agreement by the City Council and the TIRZ Board.

“Force Majeure” shall mean circumstances which are beyond the reasonable control of the applicable party (which circumstances may include, without limitation, pending or threatened litigation, acts of God, war, acts of civil disobedience, fire or other casualty, shortage of materials, adverse weather conditions [such as, by way of illustration and not limitation, severe rain storms or below freezing temperatures, or tornadoes] labor action, strikes or similar acts.

“Interest” shall mean simple interest that accrues from the date of each advance of funds by the Developer for a Project until paid for a maximum period of five years from the completion of such Project. For all Projects financed by Bonds, the interest rate will be the rate on the Bonds sold to fund such Project. For Projects that are not financed by Bonds, the interest rate will be one percentage point above the highest average interest rate reported by the *Daily Bond Buyer* in its weekly “20 Bond Index” during the one-month period ending 30 days prior to the date of the such reimbursement.

“Land Acquisition Costs” shall mean those costs expended for the purpose of acquiring land for Commercial, Retail and Office space within the Zone, including

supporting closing cost expenses, incidental site specific supporting infrastructure and the value of land contributed for such purpose.

“Project” or “Projects” shall mean the various public works and improvements and programs contained in the TIRZ Plan and listed on **Exhibit A**.

“Project Costs” shall mean those costs of Projects and other costs for which payment can be made pursuant to the TIRZ Act that are identified in the TIRZ Plan, plus Interest, excluding insurance, and as further identified herein.

“Project Manager” shall mean the Developer for a Developer Project or the City for a City Project.

“Reimbursement Audit” shall mean a report prepared (generally in accordance with the rules of the Texas Commission on Environmental Quality related to the Audit of Municipal Utility Districts) by the Auditor calculating and approving the reimbursement to the Developer or the City for funds advanced for the design and construction of a particular TIRZ Project.

“Tax Increment” shall have the meaning defined for it in the TIRZ Act, as applied to the Zone.

“Tax Increment Fund” shall mean the Tax Increment Fund created by the City for the Zone including any subaccount therein into which all Tax Increments shall be deposited by the City.

## **II. DEVELOPMENT OF PROJECTS**

**A. Agreement to Reimburse Project Costs.** If the applicable Project Manager follows the procedures set forth in **Section II.C** below and obtains all required authorizations and approvals, the Zone shall reimburse such Project Manager for all amounts advanced for Project Costs pursuant to this Agreement in accordance with **Article III** hereof.

**B. Project Manager.** The applicable Project Manager shall report to the Zone Board periodically to provide updates on the status of all Projects underway. The Project Manager agrees that it shall design and construct or cause to be designed and constructed the Projects subject to the terms of the TIRZ Plan and this Agreement.

### **C. Process for Project Development.**

(1) Before initiating the design or construction of a Project, the Project Manager shall make a presentation to the Zone Board. Such presentation shall specify: (i) the Project to be initiated, and its eligibility for reimbursement under this Agreement,

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(ii) the estimated cost to design and construct such Project, including any land costs as determined under Sec. III.C, and (iii) the estimated time to complete such Project.

(2) After the presentation described above, the Project Manager shall diligently proceed to design the particular Project or cause such Project to be designed. The Project Manager shall be responsible for obtaining all governmental approvals and permits, including approvals and permits from the City. The Project Manager shall submit the plans and specifications for the Project and all contract documents to the City Manager for review and approval prior to advertisement along with a certification from the Project Manager that that such project is consistent with the TIRZ Plan and all applicable requirements of governmental entities having jurisdiction over the facilities proposed. Upon receipt of approval by the City Manager of the plans and specifications, the Project Manager shall proceed to advertise for bids for the construction of the particular Project. Approval by the City Manager under this subsection may be evidenced by the issuance of a permit by the City; if a City permit is not required for the Project, City Manager's approval may be evidenced by a written approval letter.

(3) The Project Manager shall follow the competitive bidding requirements applicable to the City for all Projects, unless specifically authorized to follow another procedure by the City Manager and the Zone Board. The Project Manager will provide documentation to the City Manager verifying compliance with competitive bidding requirements in connection with each Project prior to contract award by the Project Manager.

(4) Upon receipt of bids, the Project Manager shall present to the City Manager: (i) a summary of the bids, (ii) a comparison of such bids to the estimated cost to construct the particular Project, and (iii) a recommendation of the Project Manager's engineer for award of a construction contract in accordance with applicable law. The Project Manager shall not proceed to award a construction contract for a particular Project until the earlier of either (A) approval or disapproval of the recommended bidder by the City Manager, or (B) ten days following presentation of such material to the City Manager. In accordance with Chapter 2253 of the Texas Government Code, the Developer shall, prior to beginning construction on Project or phase of a Project, cause its general contractor or general contractors to obtain payment and performance bonds, in the whole amount of each prime contract, naming the City as the Obligee, in accordance with Chapter 2253 for the Project or phase of the Project in their respective contracts. The Developer shall obtain said bond in the event the general contractor or general contractors fail to procure said bond. The Developer shall submit evidence of payment and performance bonds as a condition of eligibility for reimbursement under this Agreement. The Developer shall submit the original payment and performance bonds to the City for inspection and retention immediately upon obtaining them, and shall attach copies of the bonds as a condition of eligibility for reimbursement under

this Agreement. Without limiting other material breaches, failure of the Developer to comply with this section or Chapter 2253 of the Texas Government Code is a material breach of this Agreement, and the City may terminate this Agreement and exercise any and all remedies allowed under law. In the event it becomes necessary to enforce such bonds, the City and the Developer will timely provide such notices and take such actions as are reasonably necessary to do so.

(5) The Project Manager shall diligently proceed to supervise and construct the particular Project and pay all Project Costs related thereto substantially in accordance with federal, state and local laws and ordinances, the Project Plan, the Financing Plan and the plans and specifications approved by the appropriate department of the City and the Board. At each meeting of the Zone Board, the Project Manager shall provide reports regarding the progress of construction and the Project Manager's receipt and payment of pay estimates and change orders. The Developer shall allow the City and /or the Board reasonable access to the Project for inspections during and upon completion of the construction of the Project, and documents and records necessary for the City and/or the Board to assess the Developer's compliance with this Agreement.

(6) The Project Manager shall be required to present change orders exceeding the lesser of either (i) ten percent of the total Project contract amount, or (ii) \$50,000 to the City Manager for approval. The City Manager shall approve change orders if they are consistent with the TIRZ Plan.

(7) Upon completion of the particular Project, an appropriate interest in the real property upon which the Project is constructed shall be conveyed to the City or other public entity responsible for operation and maintenance of such Project, and the City will accept such Project upon the completion thereof in accordance with approved plans and specifications. The Developer shall, at its own cost and expense, maintain or cause to be maintained, the Project until acceptance by the City, as evidenced by written acceptance by the appropriate City administrator, and for one (1) year after said acceptance of the Project.

(8) Upon completion of the particular Project, the Project Manager shall present a project summary to the Zone Board, including: (i) a summary of construction costs, including all pay estimates and change orders, and (ii) evidence of final acceptance by the public entity responsible for operation and maintenance. The Project Manager shall also promptly present or require presentation to the Auditor all information, such as invoices, pay estimates and cancelled checks, necessary or convenient for the preparation of a Reimbursement Audit. The Auditor shall then prepare a Reimbursement Audit with respect to the Project.

(9) Upon approval by the Zone Board of the Reimbursement Audit for the particular Project, reimbursement for the particular TIRZ Project is approved and such Project is in line for reimbursement from Available Funds or Bonds in accordance with **Article III** hereof.

(10) If the City intends to be reimbursed for Project Costs from tax-exempt Bond proceeds, the City shall adopt a resolution stating its intent to be so reimbursed at the time of incurring reimbursable Project Costs. Such resolution shall be in a form acceptable to the Zone's bond counsel.

**D. Plan approvals.** If plans are approved for a Project by the City as described in Section C, above, the Project is authorized to go forward as otherwise provided in this Agreement; provided that, in addition to such process, for the South Tract Regional Pond, the Developer agrees that it shall submit preliminary plans to the Zone Board for approval prior to the commencement of final design of the improvements. The Zone Board shall approve such preliminary plans if they are substantially consistent with the depictions thereof in the TIRZ Plan.

**E. Economic Development Land Costs.** The Developer and the City agree that certain land located within the Zone may be either conveyed by the Developer or acquired by a third party for the contribution to the economic development of the Zone in accordance with the TIRZ Plan, subject to the eligibility of such costs to be reimbursed with Bond proceeds, as determined by the Attorney General of Texas. The Developer and the City agree that the Developer and any applicable third party may request reimbursement of Land Acquisition Costs (at a price to be negotiated at the time) for approved designated land within the Zone. To be eligible for reimbursement under this Subsection, the land and associated Land Acquisition Costs must be (i) consistent with an economic development program adopted in accordance with the TIRZ Plan and the TIRZ Act, and (ii) agreed to and approved in writing by the City, the Zone Board and the entity that owns the land that is the subject of the economic development proposal, which approvals shall be totally subject to the discretion of each such party.

**F. Timing of Project construction.** The Developer will commence the construction of the Developer Projects on or before the dates specified for such Developer Projects in **Exhibit A**, unless the Developer and the Zone Board agree otherwise in writing, and will proceed with reasonable diligence to completion. The date for commencement of a Developer Project shall be tolled during any period resulting from a delay caused by the City or the Zone, or during any period of Force Majeure. If a Developer Project does not commence timely, the Zone Board may (but is not required to) remove the delayed Developer Project from the list of eligible Developer Projects contained in **Exhibit A**.

**G. Cost of Utilities.** Developer shall pay, or cause to be paid, monthly rates and charges for all utilities (including but not limited to water, electricity, and sewer services) used by Developer in all areas owned by Developer during construction of the Project, and for so long as Developer owns those areas.

**H. INDEMNIFICATION. DEVELOPER SHALL INDEMNIFY THE CITY, THE BOARD AND THEIR RESPECTIVE OFFICIALS AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES, DAMAGES, CAUSES OF ACTIONS, SUITS AND LIABILITIES ARISING OUT OF THE DEVELOPER'S AND THE DEVELOPER'S GENERAL CONTRACTOR'S ACTIONS RELATED TO THE CONSTRUCTION OF THE PROJECTS.**

The Developer shall also require its general contractor or general contractors working on the Projects to indemnify the City, the Board and their respective officials and employees from and against any and all claims, losses, damages, causes of actions, suits and liabilities arising out of their actions related to the performance of this Agreement, utilizing the same indemnification language contained herein, in its entirety.

### **III. FINANCING AND REIMBURSEMENT OF PROJECT COSTS**

**A. Creation, Operation and Administration.** The Developer and the City agree to advance all funds needed for the operation and administration of the Zone, including, but not limited to, legal fees, engineering fees, consultant fees, market study costs, publication expenses, and government fees, as requested by the Zone Board until the Zone has sufficient Available Funds to cover such costs. Such expenses are Project Costs and are eligible for reimbursement in accordance with the TIRZ Plan and this Agreement.

**B. Design and construction of Projects.** The Developer and City agree to pay or cause to be paid all design, construction and related costs necessary to design and construct the Projects. Such payments are Project Costs and are eligible for reimbursement in accordance with the TIRZ Plan and this Agreement

**C. Cost of land.** The Project Manager's cost of land related to each Project is a Project Cost and is eligible for reimbursement at the Project Manager's costs for acquisition of such land plus the Project Manager's costs of carry for such land, or (if the Zone Board requests such an appraisal) the value as determined by an independent professional appraiser, whichever is lesser. "Costs of Carry" include interest paid and taxes paid on such land. Right of way for thoroughfares, and easements (other than easements acquired from a landowner other than the Developer) are not included as a Project Cost.

Without regard to the above, land for the South Tract Regional Pond shall be eligible for reimbursement only to the extent that it exceeds the minimum amount of land that would be required of the Developer for detention purposes under applicable City development regulations.

**D. Project completion.** The Zone, the City and the Developer agree that only one-hundred-percent complete Projects for which Reimbursement Audits have been completed in accordance with this Agreement may be reimbursed.

**E. Flow of funds.** The Parties agree that Tax Increment generated within the Zone shall be applied in the following order of priority:

(1) Five percent of Tax Increment to pay City administrative expenses, as described in the Plan.

(2) City service payments equal to \$250 per single family residence in the Zone, whereas town homes and multi-family units are counted as 70 percent of a residential unit.

(3) Other reasonable operating and administrative expenses of the Zone not covered by the City's five percent administrative fee, including, but not limited to reasonable attorney's fees.

(4) Debt service payments, including reserve fund requirements, paying agent and trustee fees and other related Bond costs, with respect to outstanding Bonds.

(5) Remaining funds (the "Available Funds") available for commitment to future Bonds and available for direct payment to the Developer and the City in accordance with this Article.

(6) At the City's option, any amounts due and payable under this Agreement against any debt (including taxes) lawfully due and owing to the City from the Developer regardless of whether the amount due arises pursuant to the terms of this Agreement or otherwise, and regardless of whether or not the debt has been reduced to judgment by a court.

**F. Funding of reimbursements.** The Developer and the City will be reimbursed by the Zone for any Projects approved for reimbursement pursuant to the procedures set forth herein. The Zone shall reimburse the Developer and the City for actual Project Costs as shown in the Reimbursement Audit from the Available Funds or from the proceeds of Bonds sold to finance such Projects, with each payment to be applied first to the payment of accrued interest and the remainder applied to the principal owing to the Developer and the City. Except for Projects financed with Bond proceeds, cash payments will be made annually on or about October 1 of each year until



all amounts owed to the Developer and the City are paid in full. The obligation of the Zone to reimburse the Developer and the City hereunder shall constitute a special obligation of the Zone payable solely from the Available Funds or Bonds payable from Tax Increment as and to the extent provided in this Agreement. Advances by the Developer and the City do not give rise to a charge against the general credit or taxing powers of the City or any other taxing unit and are not payable except as provided in this Agreement. The Developer and the City shall not have the right to demand payment out of any funds of the Zone other than Bond proceeds or the Available Funds.

**G.** The rights of the Developer and the City in and to the Available Funds for reimbursement hereunder are subject only to (i) the rights of any holders of bonds, notes or other obligations that have been heretofore or are hereafter issued by the City or any other participating taxing unit that are payable from and secured by a general levy of ad valorem taxes throughout the taxing jurisdiction of the City or any other participating taxing unit, and (ii) the rights of any of the holders of Bonds that are hereafter issued or incurred and which are secured by a pledge of the Tax Increment Fund, the proceeds of which are used to fully pay the Project Costs, including all Developer and City advances and accrued interest thereon as set forth in this Agreement. Except in the event sufficient Tax Increment increase does not occur within the term of the Zone to generate sufficient revenue to repay the Developer or City advance, it shall be the obligation of the Zone to reimburse the Developer and the City as set forth in this Agreement from the Available Funds until such time as the Developer and City advances and accrued interest thereon incurred pursuant to this Agreement, have been fully repaid or provision for payment thereon to the Developer and the City shall have been made in accordance with their terms. The Developer and City advances constitute a special obligation of the Zone payable solely from the Available Funds as and to the extent provided in this Agreement.

**H.** The Zone shall issue Bonds to reimburse the Developer, and may issue Bonds to reimburse the City, upon the following circumstances:

(1) Projected Tax Increment, less administrative costs of the Zone and City service payments described in the TIRZ Plan, generates sufficient funds to provide for debt service for Bonds already issued, as well as the proposed Bonds, with a coverage factor reasonably required by underwriters of similarly situated tax increment bonds;

(2) A reserve fund equal to maximum annual debt service may be funded from the bond proceeds;

(3) Adequate cash or capitalized interest, if necessary, shall be set aside to assure payment of the bonds through the date of the next Tax Increment payment; and

(4) The minimum bond size shall be \$1.5 million par amount of Bonds for each issuance.

I. At the time of any payment of Bond proceeds or Available Funds for repayment of Project Costs, the parties will determine the total amount of unpaid advances, described in approved Reimbursement Audits, from both the City and the Developer, and the percentage of such unpaid Project Costs due to each. Such payment shall be divided between the City and the Developer based on each's percentage of unpaid Project Costs eligible for reimbursement so determined.

J. The Zone shall not issue Bonds in accordance with this Article unless the resulting debt service requirements on all Zone obligations may be paid in full when due from all money then on deposit in or thereafter required to be deposited to the Tax Increment Fund during the term of such Zone obligations, assuming that (a) the rates at which property taxes are levied by all taxing units required to make deposits to the Tax Increment Fund do not change from the rates at which they most recently levied property taxes, and (b) the assessed value of taxable property (net of exemptions) within the Zone does not change from the amount then most recently estimated or certified by the Travis County Appraisal District, (c) all amounts deposited (or required to be deposited) to the Tax Increment Fund bear interest at the City's investment rate until expended.

#### IV. CITY, ZONE AND DEVELOPER COVENANTS

A. **The City.** The City hereby represents and warrants to the Developer that the City has full constitutional and lawful right, power and authority, under currently applicable law, to execute and deliver and perform the terms and obligations of this Agreement, and all of the foregoing have been or will be duly and validly authorized and approved by all necessary City proceedings, findings and actions. Accordingly, this Agreement constitutes the legal, valid and binding obligation of the City, is enforceable in accordance with its terms and provisions and does not require the consent of any other governmental authority.

B. **The Zone.** The Zone hereby represents and warrants to the Developer that the Zone has full constitutional and lawful right, power and Zone, under currently applicable law, to execute and deliver and perform the terms and obligations of this Agreement, and all of the foregoing have been or will be duly and validly authorized and approved by all necessary Zone proceedings, findings and actions. Accordingly, this Agreement constitutes the legal, valid and binding obligation of the Zone, is enforceable in accordance with its terms and provisions and does not require the consent of any other governmental Zone.

**C. The Developer.** The Developer hereby represents and warrants to the Zone and the City that the Developer has full lawful right, power and authority to execute and deliver and perform the terms and obligations of this Agreement and all of the foregoing have been or will be duly and validly authorized and approved by all necessary actions of the Developer.

**V.  
INSURANCE**

**A.** Throughout the term of this Agreement, Developer shall, at its expense, maintain in full force and effect, the following insurance:

**B.** A policy of insurance for bodily injury, death, and property damage insuring against all claims, demands or actions relating to the Developer's performance of its obligations pursuant to this Agreement with (1) a policy of comprehensive general liability (public) insurance with a minimum combined single limit of not less than \$1 Million Dollars per occurrence for bodily injury and property damage with an aggregate of not less than \$2 Million Dollars; (2) policy of automobile liability insurance covering any vehicles owned and/or operated by the Developer, its officers, agents, and employees, and used in the performance of its obligations hereunder with a minimum of \$1 Million Dollars; and (3) statutory Worker's Compensation Insurance covering all employees involved in the performance of its obligations hereunder.

**C.** All insurance and certificate(s) of insurance shall contain the following provisions: (1) name the City, its officers, agents and employees as additional insured's as to all applicable coverage with the exception of Worker's Compensation Insurance; (2) provide for at least thirty (30) days prior written notice to the City for cancellation, non-renewal, or material change of the insurance; (3) provide for a waiver of subrogation against the City for injuries, including death, property damage, or any other loss to the extent the same is covered by the proceeds of insurance.

**D.** All insurance companies providing the required insurance shall be authorized to transact business in Texas and rated at least "A" by AM Best or other equivalent rating service and must be acceptable to the City.

**E.** A certificate of insurance evidencing the required insurance shall be submitted prior to beginning construction of a Project.

**F.** City shall be entitled, upon request, and without expense, to receive copies of the policies and all endorsements to existing insurance coverage consistent with the terms of this Article. City shall be entitled during the term of this Agreement to require the Developer to increase the amount of required insurance if at any time during the term of this Agreement it is determined that the existing insurance coverage is not sufficient to cover the then existing liabilities and contingencies. Upon such request by City,

Developer shall exercise reasonable efforts to accomplish such changes in policy coverage, and shall pay the cost thereof.

G. Without limiting any of the other obligations or liabilities of the Developer, the Developer shall require its general contractors, at the general contractor's own expense, to maintain during the term of this Agreement, the required insurance including the required certificate and policy conditions as stated herein.

## VI. EMPLOYMENT OF UNDOCUMENTED WORKERS

During the term of this Agreement, the Developer agrees not to knowingly employ any undocumented workers and if convicted of a violation under 8 U.S.C. Section 1324a (f), Developer shall repay the amount of the reimbursements received by the Developer as of the date of such violation within 120 business days after the date the Developer is notified by the City of such violation, plus interest at the rate periodically announced by the Wall Street Journal as the prime or base commercial lending rate, or if the Wall Street Journal shall ever cease to exist or cease to announce a prime or base lending rate, then at the annual rate of interest from time to time announced by Citibank, N.A. (or by any other New York money center bank selected by the City) as its prime or base commercial lending rate, from the date of such notice until paid.

## VII. GENERAL PROVISIONS

A. **Time of the essence.** Time is of the essence of this Agreement. The parties will make every reasonable effort to expedite the subject matters hereof and acknowledge that the successful performance of this Agreement requires their continued cooperation.

**B. Default and Remedies.**

(1) Failure of the Developer to meet any deadlines under this Agreement shall give the Zone the right to remove from eligibility for reimbursement the Project for which the applicable deadline was not met.

(2) A party shall be deemed in default under this Agreement (which shall be deemed a breach hereunder) if such party fails to materially perform, observe or comply with any of its covenants, agreements or obligations hereunder or breaches or violates any of its representations contained in this Agreement.

(3) Before any failure of any party to perform its obligations under this Agreement shall be deemed to be a breach of this Agreement, the party claiming such

failure shall notify, in writing, the party alleged to have failed to perform of the alleged failure and shall demand performance. No breach of this Agreement may be found to have occurred if performance has commenced to the reasonable satisfaction of the complaining party within 30 days of the receipt of such notice and thereafter diligently pursued until completion. Upon a breach of this Agreement, the non-defaulting party, in any court of competent jurisdiction, by an action or proceeding at law or in equity, may secure the specific performance of the covenants and agreements herein contained, may be awarded damages for failure of performance, or both. Except as otherwise set forth herein, no action taken by a party pursuant to the provisions of this Article or pursuant to the provisions of any other Article of this Agreement shall be deemed to constitute an election of remedies; and all remedies set forth in this Agreement shall be cumulative and non-exclusive of any other remedy either set forth herein or available to any party at law or in equity. Each of the parties shall have the affirmative obligation to mitigate its damages in the event of a default by the other party.

(4) Notwithstanding anything in this Agreement which is or may appear to be to the contrary, if the performance of any covenant or obligation to be performed hereunder by any party is delayed as a result of Force Majeure the time for such performance shall be extended by the amount of time of such delay.

**C. Personal liability of public officials.** To the extent permitted by State law, no public official or employee shall be personally responsible for any liability arising under or growing out of this Agreement.

**D. Notices.** Any notice sent under this Agreement (except as otherwise expressly required) shall be written and mailed or sent by rapid transmission confirmed by mailing written confirmation at substantially the same time as such rapid transmission, or personally delivered to an officer of the receiving party at the following addresses:

If to the Zone:

Reinvestment Zone Number One, City of Pflugerville, Texas  
c/o City of Pflugerville, Texas  
P.O. Box 589  
Pflugerville, Texas 78660  
Attn: Chairman, Board of Directors

If to the City:

City of Pflugerville, Texas  
P.O. Box 589

Pflugerville, Texas 78691  
Attention: City Manager

If to the Developer:

Terrabrook Falcon Pointe, L.P.  
13809 Research, Suite 475  
Austin, Texas 78750  
Attention: Rainer Ficken

With copies to:

Timothy Austin  
Allen Boone Humphries Robinson LLP  
3200 Southwest Freeway  
Suite 2600  
Houston, Texas 77027

Each party may change its address by written notice in accordance with this Section. Any communication addressed and mailed in accordance with this Section shall be deemed to be given when so mailed, any notice so sent by rapid transmission shall be deemed to be given when receipt of such transmission is acknowledged, and any communication so delivered in person shall be deemed to be given when received for, or actually received by, an authorized officer of the City, the Zone or the Developer, as the case may be.

**E. Amendments and waivers.** Any provision of this Agreement may be amended or waived if such amendment or waiver is in writing and is approved by the City, the Zone and the Developer. No course of dealing on the part of the parties nor any failure or delay by the parties with respect to exercising any right, power or privilege pursuant to this Agreement shall operate as a waiver thereof, except as otherwise provided in this Agreement.

**F. Invalidity.** In the event that any of the provisions contained in this Agreement shall be held unenforceable in any respect, such unenforceability shall not affect any other provisions of this Agreement and, to that end, all provisions, covenants, agreements or portions of this Agreement are declared to be severable.

**G. Successors and assigns.** No party to this Agreement shall have the right to assign its rights or obligations under this Agreement or any interest herein, without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed.

**H. Exhibits, titles of articles, sections and subsections.** The exhibits attached to this Agreement are incorporated herein and shall be considered a part of this Agreement for the purposes stated herein, except that in the event of any conflict between any of the provisions of such exhibits and the provisions of this Agreement, the provisions of this Agreement shall prevail. All titles or headings are only for the convenience of the parties and shall not be construed to have any effect or meaning as to the agreement between the parties hereto. Any reference herein to a section or subsection shall be considered a reference to such section or subsection of this Agreement unless otherwise stated. Any reference herein to an exhibit shall be considered a reference to the applicable exhibit attached hereto unless otherwise stated.

**I. Applicable law.** This Agreement is a contract made under and shall, be construed in accordance with and governed by the laws of the United States of America and the State of Texas, and any actions concerning this Agreement shall be brought in either the Texas State Courts of Travis County, Texas or the United States District Court for the Southern District of Texas.

**J. Entire agreement.** This written agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

**K. Term and Termination.** This Agreement shall be in force and effect from the effective date of this Agreement for a term expiring on the earlier of December 31, 2041 or (ii) the date that the Developer and the City have been repaid in full for all eligible Project Costs.

**L. Approval by the parties.** Whenever this Agreement requires or permits approval or consent to be hereafter given by any of the parties, the parties agree that such approval or consent shall not be unreasonably withheld or delayed.

**M. Counterparts.** This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same agreement.

**N. Interpretation.** This Agreement has been jointly negotiated by the parties and shall not be construed against a party because that party may have primarily assumed responsibility for the drafting of this Agreement.

**O. Independent Contractors.** It is expressly understood and agreed by the Developer that in performing its services hereunder it shall at no time be acting as agents of the City or the Board and that all consultants or contractors engaged by the Developer shall be independent contractors of the Developer. The Developer

understands and agrees that the City and the Board shall not be liable for any claims that may be asserted by any third party occurring in connection with services performed by the Developer under this Agreement unless such claims are due to the fault of the City or the Board.

**P. INDEMNIFICATION.** THE DEVELOPER COVENANTS AND AGREES TO FULLY INDEMNIFY AND HOLD HARMLESS, THE CITY AND THE BOARD AND THEIR RESPECTIVE ELECTED AND APPOINTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS AND REPRESENTATIVES, INDIVIDUALLY OR COLLECTIVELY, FROM AND AGAINST ANY AND ALL COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES, FINES, PENALTIES, PROCEEDINGS, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY AND SUITS OF ANY KIND AND NATURE, INCLUDING BUT NOT LIMITED TO , PERSONAL INJURY OR DEATH AND PROPERTY DAMAGES, MADE UPON THE CITY OR THE BOARD DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO THE DEVELOPER'S NEGLIGENCE, WILLFUL MISCONDUCT OR CRIMINAL CONDUCT IN ITS ACTIVITIES UNDER THIS AGREEMENT, INCLUDING ANY SUCH ACTS OR OMISSIONS OF THE DEVELOPER, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, CONSULTANT OR SUB-CONSULTANTS OF THE DEVELOPER, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES WHILE IN THE EXERCISE OR PERFORMANCE OF THE RIGHTS OR DUTIES UNDER THIS AGREEMENT, ALL WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY OR THE BOARD UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. THE PROVISIONS OF THIS INDEMNIFICATION ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND ARE NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY. THE DEVELOPER SHALL PROMPTLY ADVISE THE CITY AND THE BOARD IN WRITING OF ANY CLAIM OR DEMAND AGAINST THE CITY OR THE BOARD AND SHALL SEE TO THE INVESTIGATION AND DEFENSE OF SUCH CLAIM OR DEMAND AT THE DEVELOPER'S COST TO THE EXTENT REQUIRED UNDER THE INDEMNITY IN THIS PARAGRAPH. THE CITY AND THE BOARD SHALL HAVE THE RIGHT, AT THEIR OPTION AND AT THEIR OWN EXPENSE, TO PARTICIPATE IN SUCH DEFENSE WITHOUT RELIEVING THE DEVELOPER OF ANY OF ITS OBLIGATIONS UNDER THIS PARAGRAPH.

IT IS THE EXPRESS INTENT OF THE PARTIES TO THIS AGREEMENT THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH, TO THE EXTENT PERMITTED BY LAW IS AN INDEMNITY EXTENDED BY DEVELOPER TO INDEMNIFY, PROTECT AND HOLD HARMLESS THE CITY AND THE BOARD FROM THE CONSEQUENCES OF THE CITY AND THE BOARD'S OWN NEGLIGENCE, PROVIDED HOWEVER, THAT THE INDEMNITY PROVIDED FOR IN



THIS PARAGRAPH SHALL APPLY ONLY WHEN THE NEGLIGENT ACT OF THE CITY OR THE BOARD IS A CONTRIBUTORY CAUSE OF THE RESULTANT INJURY, DEATH, OR DAMAGE AND SHALL HAVE NO APPLICATION WHEN THE NEGLIGENT ACT OF THE CITY OR BOARD IS THE SOLE CAUSE OF THE RESULTANT INJURY, DEATH, OR DAMAGE. THE DEVELOPER FURTHER AGREES TO DEFEND, AT ITS OWN EXPENSE ON BEHALF OF THE CITY AND THE BOARD (AND IN THEIR RESPECTIVE NAMES) ANY CLAIM OR LITIGATION BROUGHT AGAINST THE CITY OR THE BOARD (AND THEIR ELECTED AND APPOINTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS AND REPRESENTATIVES) IN CONNECTION WITH ANY SUCH INJURY, DEATH, OR DAMAGE FOR WHICH THIS INDEMNITY SHALL APPLY AS SET FORTH HEREIN.

**[EXECUTION PAGES FOLLOW]**

IN TESTIMONY OF WHICH this instrument has been executed in multiple counterparts, each of equal dignity and effect, on behalf of the City, the Zone, and the Developer effective as of the date first above written.

**CITY OF PFLUGERVILLE**

\_\_\_\_\_  
Mayor

**ATTEST/SEAL:**

\_\_\_\_\_  
City Secretary

**REINVESTMENT ZONE NUMBER ONE,  
CITY OF PFLUGERVILLE, TEXAS**

\_\_\_\_\_  
Chairman, Board of Directors

**ATTEST:**

\_\_\_\_\_  
Secretary, Board of Directors

**TERRABROOK FALCON POINTE, L.P.,**  
A Delaware limited partnership

By: Westerra Management, L.L.C.,  
Authorized Representative

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## Exhibit A

### Developer Projects:

| <u>Project</u>                           | <u>Estimated Cost</u> | <u>Commencement Date</u> |
|--|-----------------------|--------------------------|
| Colorado Sand Road Segment "A" Phase One | \$2,100,000           | Date #1                  |
| Colorado Sand Road Segment "A" Phase Two | \$1,100,000           | Date #2                  |
| South Tract Regional Pond                | \$675,000             | Date #1                  |
| South Tract Lift Station                 | \$850,000             | Date #1                  |
| Lonestar Boulevard                       | \$900,000             | Date #1                  |
| Economic Development Land Cost           | \$4,500,000           | Not Applicable           |

Date #1: Commencement Date to be no later than 180 days after the Effective Date.

Date #2: Although Colorado Sand Road Segment "A" Phase Two is intended to be constructed on or about the same time of Colorado Sand Road Segment "A" Phase One, in an effort to expedite construction of Colorado Sand Road Segment "A" Phase One, the Commencement Date for Colorado Sand Road Segment "A" Phase Two shall be no later than one year following the completion of Phase One.

For purposes of this Exhibit, "Commencement Date" shall mean the date on which design professionals have been engaged (executed contract) for related project engineering with regard to the applicable Project.

### City Projects:

| <u>Project</u>  | <u>Estimated Cost</u> |
|---|-----------------------|
| Colorado Sand Road Segment "B" Phase One                | \$1,575,000           |
| Colorado Sand Road Segment "B" Phase Two                | \$800,000             |
| Colorado Sand Road Segment "B" Right of way acquisition | To Be Determined      |
| Pflugerville Parkway                                    | To Be Determined      |

The Projects listed above are defined as shown in the TIRZ Plan, as such may be amended from time to time and agreed to by the Developer and the City.