

CUNSTRUCTION FUNDING AGREEMENT  
COLORADO SAND DRIVE  
BID ALTERNATES 1 & 2  
CITY OF PFLUGERVILLE, TEXAS

**THIS CONSTRUCTION FUNDING AGREEMENT** (hereinafter referred to as “Agreement”) by and between the **CITY OF PFLUGERVILLE**, Texas, a Texas home rule municipal corporation (hereafter referred to as “City”) and **CORNERSTONE AT KELLY LANE, LLC**, a Texas limited liability company (hereinafter referred to as “Cornerstone”) is entered into to be effective the \_\_\_\_\_ day of \_\_\_\_\_, 2013 (effective date).

**Whereas**, the City is owner of approximately 5.920 acres of real property more particularly described on **Exhibit “A”** hereto (hereinafter referred to as the “Right of Way”); and

**Whereas**, the City has proposed to the Colorado Sand roadway project, (the “Project”) within the Right of Way; and

**Whereas**, the Project proposed by the City includes a 2 lane section of Colorado Sand Drive ; and 2 lane Sections of Autumn Slate and Copper Mine Drive; and

**Whereas**, Cornerstone is the owner and/or developer of adjacent property to the Right of Way within the John Davis Survey No. 13 A-231 as described on Exhibit A; and

**Whereas**, in order to further enhance the project to serve the needs of the public and enhance the public spaces in and around Cornerstone, Cornerstone has agreed to voluntarily fund certain alternate construction options in accordance with the Project bid documents for the construction of a 4 lane Section of Colorado Sand Drive, instead of the planned 2 lane section, between Kelly Lane and Copper Mine Drive (hereinafter referred to as “Bid Alternate 1”) and construction of wastewater infrastructure along Colorado Sand Drive (hereinafter referred to as “Bid Alternate 2”); and

**Whereas**, the City and Cornerstone agree that the provisions in this Agreement substantially advance a legitimate interest of the City; and

**Whereas**, Cornerstone may elect to record this Agreement in the Real Property Records of Travis County, Texas.

**NOW THEREFORE**, for and in consideration of the promises and the agreements set forth herein, and other good and valuable consideration, the sufficiency of which is agreed and acknowledged, the City and Cornerstone hereby agree as follows:

**ARTICLE 1**  
**Authority & Binding Representations**

1. The recitals, above, are incorporated by reference herein. By executing this agreement the same and shall constitute a valid and binding obligation of City to provide certain services, administration and personnel associated with construction of the Project as provided by this Agreement. Cornerstone's execution and performance of this Agreement constitutes a valid and binding obligation of Cornerstone to pay to the City, certain costs of construction associated with the Bid Alternate 1 and Bid Alternate 2 as provided by this Agreement.

**ARTICLE 2**  
**Bid Alternatel and Bid Alternate 2**

1. Bid Alternate 1 of the Project consists of construction of 2 additional lanes along Colorado Sand to the ultimate 4 lane Section. Bid Alternate 2 of the Project consists of construction of wastewater infrastructure along Colorado Sand to service all adjacent tracts of land.
2. Bid Alternate 1 and Bid Alternate 2 costs include all costs incurred for sewer, street and related improvements.
3. To fund this Agreement, Cornerstone agrees to contribute costs via Escrow to complete Bid Alternate 1 and Bid Alternate 2 as summarized below:
  - a. Bid Alternate 1 in the amount of \$402,192.47
  - b. Bid Alternate 2 in the amount of \$266,312.50
  - c. Bid Alternate 1 &2 change order contingency in the amount 25 percent of the total, equaling \$167,126.24.
4. Cornerstone agrees any additional cost or costs savings realized in completing the Bid Alternate 1 and Bid Alternate 2 illustrated in paragraphs 1 and 2 above shall be the sole fiscal responsibility of Cornerstone.
5. In accordance with the terms of Article III (entitled "Escrow Agreement"), the City shall serve as Project Manager.

**ARTICLE 3**  
**ESCROW AGREEMENT**

1. The Escrow Terms and Conditions attached as Exhibit "B" is incorporated into this Agreement as if recited verbatim, setting forth the agreed terms and conditions used to manage the Project, Bid Alternate 1 and Bid Alternate 2.

**ARTICLE 4**  
**TERM**

1. In no event will the term of this Agreement exceed five (5) years.

**ARTICLE 5**  
**MISCELLANEOUS**

1. Successor and Assigns. This Agreement shall be binding upon and insure to the benefit to the respective legal representatives, successors, assigns, heirs and devisees of the parties. No party may convey or assign its interest in this Agreement to any person entity without consent of the other parties. All assignees will be subject to all of the obligations, covenants and conditions applicable to the assignor under this Agreement. Upon an assignment of a party's entire interest under this Agreement, the other parties shall recognize the assignee as the assignor's proper successor, the assignee shall have all of the assigned rights, benefits and obligations of assignor under and pursuant to this Agreement, and assignor shall be relieved of all of its obligations under this Agreement that relate to acts or omissions which occur or accrue following the effective date of such conveyance or assignment.
2. Severability. If any portion of this Agreement is held invalid or inoperative, then so far as is reasonable and possible, the remainder of this Agreement shall be given the intent manifested by the portion held invalid or inoperative. The failure by any party to enforce against any other party any term or provision of this Agreement shall be deemed not to be a waiver of such party's right to enforce against any other party the same or any other such term or provision. In the even any provisions of this Agreement are illegal, invalid or unenforceable under present or future laws, then in that event, it is the intention to the parties that the remainder of this Agreement shall not be affected. It is also the intention of the parties to this Agreement that in lieu of each clause and provision that is found to be illegal, invalid or unenforceable, a provision be added to this Agreement which is legal, valid or enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.
3. Governing Law. This Agreement shall be governed, construed, applied, and enforced in accordance with the laws of the State of Texas, and shall be performable with venue in Travis County, Texas.
4. Amendments. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought.
5. Time. Time is of the essence in the performance of this Agreement.
6. Attorney Fees. Should any party employ attorneys to enforce any of the provisions hereof, the party losing in any final judgment agrees to pay to the prevailing party all reasonable costs, charges and expenses, including reasonable attorneys' fees, expended or incurred in connection therewith.
7. Notices. All notices hereunder must be in writing and shall be deemed delivered on the day personally delivered or on the third day from the day sent by registered mail or certified mail, return receipt requested with the U.S. Postal Service, or on the day after the day sent by national overnight courier, to the parties at the following addresses, or at such other addresses as shall be specified by notice.

If to the City:

City of Pflugerville  
Attention: City Manager  
100 East Main Street  
P.O. Box 589  
Pflugerville, Texas 78691-0589

With Copy to:  
City Attorney  
P.O. Box 589  
Pflugerville, Texas 78691-0589

If to Cornerstone:

Cornerstone at Kelly Lane, LLC  
Attn: Larry Mellenbruch, Manager  
P.O. Box 1199  
Bastrop, Texas 78602

8. Construction. The parties acknowledge that the parties and their counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any exhibits or amendments hereto.
9. Counterpart Execution. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all such counterparts shall constitute one Agreement.
10. Representation and Warranties by Cornerstone. If Cornerstone is a limited partnership or limited liability company, Cornerstone as the case may be, warrants, represents, covenants and agrees that it is duly organized, validly existing and in good standing under the laws of the state of its formation or organization and is duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary power and has received all necessary approvals to execute and deliver the Agreement, and the individual executing the Agreement on behalf of Cornerstone, as the case may be, has been duly authorized to act for and bind Cornerstone.
11. Payment of Debt or Delinquency to the State or Political Subdivision of the State. Pursuant to Chapter 38, City of Pflugerville Code of Ordinances, Cornerstone as the case may be, agrees that any payments owing to City under the Agreement may be applied directly toward any debt or delinquency that Cornerstone, as the case may be, owes City of Pflugerville, State of Texas or any political subdivision of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.
12. Texas Family Code Child Support Certification. Cornerstone certifies that the limited partners or members are not delinquent in child support obligations and therefore is not ineligible to receive the award of or payments under this Agreement and acknowledges that payment under this Agreement may be withheld if this certification is inaccurate and

any such inaccuracy is not rectified within thirty (30) days of written notice specifying such inaccuracy.

13. Notice and Cure Periods. No party may terminate this Agreement unless (i) such party provides written notice by certified mail, return receipt requested (a “Notice”) to each other party specifying a material default in the performance of a material covenant or obligations by one of the other parties (such party being referred to herein as or the “Defaulting Party”) under this Agreement and (ii) such failure is not (a) excused by the occurrence an event of Force Majeure or (b) cured by the Defaulting Party within (90)days after Notice thereof, or if such failure cannot be cured within such ninety (90) day period, the Defaulting Party has commenced remedial action to cure such failure (and continued to diligently and timely pursue the completion of such remedial action); provided, however, that (A) if such failure arises from a violation of law, then such default shall not give rise to the termination of this Agreement so long as the Defaulting Party acts in accordance with a plan of action to cure such default, which plan of action is approved by a governmental entity within one hundred and eighty (180) days after receipt by the Defaulting Party of such Notice; provided, however that the Defaulting Party shall endeavor to cause such plan to provide for cure of such default within one hundred and eighty (180) days; or (B) if such default arises from the violation of law resulting from a change in law, or a change in the interpretation or enforcement of law, by a governmental entity, then such default shall not give rise to the termination of this Agreement so long as the Defaulting Party acts in accordance with a commercially reasonable plan of action to cure such default prepared by such Defaulting Party and delivered to the other parties hereto.
14. Force Majeure. For the purposes of this Agreement, the term “Force Majeure” shall mean, and have application as provided in Exhibit “B”.
15. Mutual Assistance. The City and Cornerstone will each do all things reasonably necessary and appropriate to carry out the terms and provisions of this Agreement.
16. Exhibits. All exhibits to this Agreement are incorporate by reference for all purposes as if fully set forth herein.

**CORNERSTONE AT KELLY LANE, LLC**  
**A Texas Limited Liability Company**

By: Cornerstone at Kelly Lane, LLC

By: \_\_\_\_\_

Name: Larry Mellenbruch

Title: Manager

Date: \_\_\_\_\_

**CITY OF PFLUGERVILLE, TEXAS**

By: \_\_\_\_\_

Name: Brandon Wade

Title: City Manager

Date: \_\_\_\_\_

**ACKNOWLEDGEMENT**

THE STATE OF TEXAS §

§

COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on \_\_\_\_\_, 2013, by \_\_\_\_\_, an individual residing in Travis County, Texas.

(seal)

\_\_\_\_\_  
Notary Public Signature

\_\_\_\_\_  
Printed Name of Notary Public

My commission expires: \_\_\_\_\_

THE STATE OF TEXAS §

§

COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on \_\_\_\_\_, 2013, by Brandon Wade, City Manager of the City of Pflugerville, Texas, a Texas home-rule municipality, on behalf of said municipality.

(seal)

\_\_\_\_\_  
Notary Public Signature

\_\_\_\_\_  
Printed Name of Notary Public

My commission expires: \_\_\_\_\_

After Recording, Please Return To:  
City of Pflugerville  
Attn: Brandon E. Wade, City Manager  
P.O. Box 589, Pflugerville, Texas 78691

## EXHIBIT B

### ESCROW TERMS AND CONDITIONS By and Between Cornerstone and the City of Pflugerville

The following terms and conditions shall apply, and be incorporated into the Agreement as if recited verbatim and shall control the Parties' administration and costs of the project related to this Grant:

1. Stipulated Cost of Project: The parties hereto agree that the stipulated cost of Bid Alternate 1 and Bid Alternate 2 shall not exceed \$835,631.21.
2. Certain Definitions. When used in this Agreement, the following terms shall have the respective meanings set forth below, unless the context otherwise requires, such definitions to be equally applicable to both singular and plural of the terms defined:
  - a. "City Engineer" shall mean the City Engineer of the City of Pflugerville, Texas.
  - b. "Escrow Agent" shall be the City of Pflugerville, Texas, unless all parties agree in writing to an independent third-party to act as Escrow Agent for this project.
3. Escrow Deposit.
  - 3.1 Escrow Deposit. Cornerstone agrees to deposit with the Escrow Agent the total amount of \$835,631.21 (the "Escrow Deposit").
  - 3.2 Receipt of Escrow Deposit. Subject to Section 3.1 the Escrow Agent acknowledges receipt of the initial Escrow Deposit on the effective date of this Agreement, and agrees to retain the Escrow Deposit in the Escrow Account and to disburse the Escrow Deposit in accordance with the terms of this Agreement.
  - 3.3 Use of Escrow Deposit. Subject to the terms of Section 3 the Escrow Deposit shall be used solely for the purpose of paying for Bid Alternate 1 and Bid Alternate 2.
  - 3.4 Use of Contingency Related Funds. In the event actual costs to complete Bid Alternate 1 & Bid Alternate 2 exceed those amounts shown in Article 2, Section 3 (a) & (b) the contingency amount deposited shall be used to fund the project. Any costs paid through the use of contingency related funds shall be presented to Cornerstone for comment and approval. Any costs presented for comment and approval shall be authorized in the event no comment or approval is received by the City from Cornerstone within 5 business days after delivery of the change order or other documentation supporting the additional costs.
  - 3.5 Investment of Escrow Deposit. The Escrow Deposit if held by the City shall be held at the discretion of the City. The Escrow Deposit, if held by a third-party, shall be maintained in an interest bearing account in an institution approved by the Parties, in the name of Escrow Agent for the benefit of Cornerstone, pursuant to this Agreement (with Cornerstone's taxpayer identification number) (the "Escrow Account"). All interest earned on the Escrow Deposit shall be added to and shall be deemed to be a part of the Escrow Deposit for all purposes.



4. Release of Escrow Deposit.

4.1 Disbursement/Refund of Remaining Funds. Upon completion and City acceptance of the project, Escrow Agent shall immediately disburse to Cornerstone any balance remaining in the Escrow Account.

5. Duties of Escrow Agent.

5.1 Duties of Escrow Agent. The duties of Escrow Agent under this Agreement shall be entirely administrative, and not discretionary, and are limited specifically to the duties expressly stated herein. Escrow Agent shall not be responsible for the sufficiency, correctness, genuineness or validity of any certification, statement, release or other instrument tendered to it hereunder or with respect to the form or execution of the same, or the identity, authority, or rights of any person execution or depositing the same, and Escrow Agent shall be protected in action upon any certification, statement, release, waiver, consent, receipt of other paper or document reasonably believed by Escrow Agent to be genuine and to be signed by the proper party or parties.

5.2 Waiver. City and Cornerstone hereby waive any suit, claim, demand or cause of action of any kind which they may have or may hereafter have against Escrow Agent arising out of or relating to Escrow Agent's performance of its obligations pursuant to this Agreement, unless such suit, claim, demand or cause of action is based on Escrow Agent's willful misconduct, gross negligence, or bad faith.

5.3 Indemnity. Except for claims, demands or losses based on the Escrow Agent's gross negligence, willful misconduct or bad faith in which gross negligence, willful misconduct and bad faith are established by entry of a final judgment by a court of competent jurisdiction, City and Cornerstone hereby agree, to the extent allowed by law, to indemnify the Escrow Agent and hold it harmless from and against any and all claims, losses, costs, damages, charges, liabilities or expenses, including court costs and reasonable attorneys' fees, which the Escrow Agent may suffer or incur as a result of its acting as the Escrow Agent under this Agreement.

5.4 Fees and Expenses. Any and all permitted fees charged by the Escrow Agent in connection with this Agreement, is any, shall be paid from the Escrow Deposit, upon a proper accounting thereof by Escrow Agent to City and Cornerstone.

6. Miscellaneous.

6.1 No Partnership. City and Cornerstone expressly disclaim any intention to create by this Agreement or any acts or omissions in connection herewith a partnership, joint venture, or any other association that would create joint and several liabilities or otherwise render the parties liable as partners.

6.2 No Third-Party Beneficiary. Nothing in this Agreement, express or implied, is intended or may be construed to confer on any person or entity, other than City, Cornerstone, and Escrow Agent, and their respective successors and assigns, any right, remedy or claim by reason of this Agreement.