

## DEVELOPER PARTICIPATION AGREEMENT

This agreement (the “Agreement”) is entered into effective \_\_\_\_\_, 2024 (the “Effective Date”) by and between the City of San Marcos, a Texas municipal corporation (the “City”), and Lennar Homes of Texas Land and Construction, Ltd., a Texas limited partnership (the “Developer”).

### I. RECITALS

**1.1** Section 212.071 of the Texas Local Government Code authorizes the City to participate with a developer of a subdivision or land in the cost to construct public improvements.

**1.2** The Developer is developing a tract of land known as River Bridge Ranch Phase 1A in San Marcos, Hays County, Texas (the “Development”). The Developer is obligated under applicable ordinances to construct and dedicate certain public improvements necessary to support the Development.

**1.3** The City has determined that there is a public need to coordinate on the construction of adjacent improvements beyond what is required for the Development and, therefore, wishes to contract with the Developer to provide for the construction and allocation of costs for such coordination. The improvements needed for the Development and the additional improvements requested by the City are, collectively, the “Improvements.”

### II. AGREEMENT

In consideration of the mutual benefits to and obligations of the parties under this Agreement, the parties agree to the following terms and conditions:

#### 2.1 Design and Construction of Improvements

**2.1.1 Construction.** The Improvements will be constructed by the Developer according to the final plans and specifications acceptable to and approved by the City in accordance with the City’s applicable ordinances, standards and processes.

**2.1.2 Project Manager.** The Developer will act as project manager in the construction of the Improvements. If the plans for the Improvements are required to be sealed by a professional engineer, the Developer will ensure that the construction is carried out under the direct supervision of a professional engineer registered in the State of Texas. All project management, development, contractor, subcontractor and engineering costs shall be the sole responsibility of the City.

**2.1.3 Independent Contractor.** The Developer shall be solely responsible for selecting, supervising and paying the construction contractor(s) or subcontractors and for complying with all applicable laws, including but not limited to all requirements concerning workers compensation and construction retainage. The parties agree and understand that all contractors, employees, volunteers and personnel furnished or used by

the Developer in the installation of the Improvements shall be the responsibility of the Developer and shall not be deemed employees or agents of City for any purpose.

*2.1.4 Performance Bond.* Developer, at City's sole cost and expense, will execute a performance bond to ensure completion of the Improvements. The bond must be executed by a corporate surety in accordance with the Chapter 2253 of the Texas Government Code.

*2.1.5 Warranty.* The contract with the contractor will provide for at least a one-year warranty against defects in materials and workmanship. This warranty obligation shall be covered by any performance or payment bonds required of the contractor under the terms of the construction contract and this Agreement.

*2.1.6 Completion and Acceptance.* The date of completion shall be the date on which the City accepts the Improvements in accordance with the City's applicable ordinances, standards and processes and provides notice of such acceptance in writing to the Developer. Prior to the City's acceptance of the Improvements, Developer shall, among other applicable requirements, provide to the City a one-year warranty from the contractor against defects in materials and workmanship in the Improvements and a notarized affidavit stating that all bills for labor, materials, and incidentals incurred have been paid in full, that any claims from manufacturers, materialmen and subcontractors have been released, and that there are no claims pending of which Developer has been notified.

*2.1.7 Pump and Haul Option for Delay in Completion.* In the event that the City is unable to provide approval of the wastewater collection, transportation, treatment and disposal services to the Development infrastructure installed by Developer or such improvements are not fully operational due to the inability to connect to other offsite municipal and water and wastewater infrastructure necessary to serve the Development sufficient to accommodate the allocated living unit equivalents for such Development, City hereby consents to allow the Developer to provide temporary collection, transportation, treatment, and disposal of wastewater from the Property utilizing the pumping of wastewater for vehicular transport to an offsite point of disposal, i.e., pump and haul method, pursuant to the terms and conditions of a separate temporary pump and haul wastewater services and disposal agreement between Developer and City. In no event, however, shall such delay by City require temporary pump and haul services be longer than six (6) months.

*2.1.8 Change Orders.*

(a) All extra work or change to the work (each, a "change order") may be requested by Developer in writing and shall include an itemization of the requested change, together with the estimated extra work or changes to the scope of work cost of the changes and shall be submitted to City ("request for change order"). Upon submission of the request for change order, the City shall provide its written approval or disapproval within five (5) business days or such request for change order shall be deemed approved by the City. Any disapproval shall specifically state the reason for disapproval and Developer can revise and resubmit the request for change order in the procedures stated above until approved.(b) Following

written approval of request for change order by City, Developer shall deliver to City a change order in the required City form for mutual execution.

(c) The Developer may issue written change orders to the City via email, mail, or by hand. Change orders shall not be effective until executed by the Developer and City. Upon mutual execution of such change orders Developer may commence the work described in the change order. Failure of City to execute and return to Developer any such change order within one (1) business day after receipt thereof shall constitute City's deemed approval of such change order, and, in such event, without further written notice from City, developer shall commence the work set forth in the change order.

## **2.2 Cost Participation**

*2.2.1 Cost Participation Amount.* The City is paying for the Improvements in an amount not to exceed \$2,340,876.46 for those portions of the work requested by the City as itemized in Exhibit "A." . If private engineers or consultants are required, those expenses shall be paid by the City of San Marcos.

*2.2.2 Limits of Participation.* Except as to the costs attributable to the oversizing of the Improvements requested by the City, the City's cost participation shall not exceed 30 percent of the Developer's total contract price for the Improvements.

*2.2.3 Application for Payment.* The Developer shall submit a written application for City participation payment after the City's acceptance of the Improvements. The application for payment to the City shall be for the lesser of the amount of the actual costs associated with the City's portion of the Improvements or the City's participation amount as stated in paragraph 2.2.1. The application for payment shall be in a form acceptable to City and must include a breakdown of actual costs of the Improvements with supporting documentation, including all payment receipts and any other documentation reasonably requested by the City to support the City's expenditure of public funds.

*2.2.4 City Payment.* Subject to all applicable ordinances, standards and processes, the City will pay its participation funds in one payment within 30 days after receipt of a complete (as determined by the City) written application for participation payment from Developer.

*2.2.5 Payments to Subcontractors and Suppliers.* The Developer shall be solely and exclusively responsible for compensating any of its contractors, employees, subcontractors, materialmen and/or suppliers of any type or nature whatsoever and insuring that no claims or liens of any type will be filed against any property owned by the City arising out of or incidental to the performance of any service performed pursuant to this Agreement. In the event a statutory lien notice is sent to the City, the Developer shall, where no payment bond covers the work, upon written notice from the City, immediately

obtain a bond at its expense and hold City harmless from any losses that may result from the filing or enforcement of any said lien notice.

## **2.3 GOVERNMENTAL IMMUNITY, INDEMNITY AND RELEASE**

**2.3.1 *No Waiver of Immunity.*** The City's execution of and performance under this Agreement will not act as a waiver of any immunity of the City to suit or liability under applicable law. The parties acknowledge that the City, in executing and performing this Agreement, is a governmental entity acting in a governmental capacity.

**2.3.2 *Indemnity and Release.*** Developer agrees to and shall indemnify, hold harmless, and defend City and its officers, agents, and employees from and against any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation, court costs, expert fees and attorney's fees, for injury to or death of any person, or for damage to any property, or for breach of contract, arising out of or in connection with the work done by Developer, its officers, employees, agents and contractors, under this Agreement, regardless of whether such injuries, death, damages or breach are caused in whole or in part by the negligence of City, any other party indemnified hereunder, or the Developer.

**2.3.3 *Indemnity and Hold Harmless as to Subcontractors.*** The Developer shall indemnify and hold the City harmless from any claims of suppliers or subcontractors of Developer for improvements constructed or caused to be constructed by the Developer.

**2.3.4 *Indemnity and Hold Harmless as to Others.*** The Developer shall indemnify and hold the City harmless from any and all injuries to or claims of adjacent property owners or occupants resulting from or relating to the Developer's performance under this Agreement.

**2.3.5 *Release.*** The Developer assumes full responsibility for the work to be performed hereunder, and releases, relinquishes and discharges the City, its officers, agents and employees, from all claims, demands, and causes of action of every kind and character, including the cost of defense therefore, for any injury to or death of any persons and any loss of or damage to any property that is caused by, alleged to be caused by, arising out of, or in connection with, the Developer's work to be performed hereunder. This release shall apply whether or not said claims, demands, and causes or action are covered in whole or in part by insurance and regardless of whether or not said claims, demands, and causes of action were caused in whole or in part by the negligence of the City, any other party released hereunder, or the Developer.

## **2.4 Miscellaneous**

2.4.1 *Entire Agreement; Amendment; Assignment.* This Agreement constitutes the entire agreement between the parties hereto and may be amended only by a written document signed by the parties. This Agreement shall be binding upon the successors and assigns of the parties. The assignment of all or part of this Agreement by a party is not valid without the written consent of the other party.

2.4.2 *Subject to Ordinances and Laws.* This Agreement and the obligations of the parties hereunder are subject to all valid and applicable ordinances, fees (including City impact fees and/or pro rata fees), rules, regulations, and laws of all governmental agencies having lawful jurisdiction over them.

2.4.3 *Applicable Law and Venue.* This Agreement shall be governed and construed under and in accordance with the laws of the State of Texas. Jurisdiction and venue for any matter arising out of this Agreement shall be in Hays County, Texas. Jurisdiction and venue in federal court for matters arising out of this Agreement shall be in the United States District Court for the Western District of Texas, Austin Division.

2.4.4 *Severability.* If any the provision of this Agreement is held to be invalid or unenforceable by a court of proper jurisdiction, the holding will not affect any other provisions of this Agreement if the Agreement can be given effect without the invalid provision. The Parties will construe the Agreement as if the invalid or unenforceable provision had not been contained in this Agreement.

2.4.5 *Books and Records.* All of the Developer's books and other records related to the design, bidding and construction of the Improvements shall be available for inspection by the City.

EXECUTED to be effective as of the Effective Date first written above.

**CITY:**

**DEVELOPER:**

LENNAR HOMES OF TEXAS LAND AND CONSTRUCTION, LTD., a Texas limited partnership

By: U.S. Home, LLC, a Delaware limited liability company, its general partner

By: \_\_\_\_\_  
Stephanie Reyes, City Manager

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT A**

Description of and Itemized Cost Estimate for all Improvements

[NEXT PAGE]

<b>Lennar Homes of Texas</b>					
<b>13620 N. FM 620, Building B, Suite 150</b>					
<b>Austin, Texas 78717</b>					
<b>ENGINEER'S PRELIMINARY COST ESTIMATE</b>					
Project Mgr:	Daniel Ryan, P.E.				
Project Engr:	LJA Engineering, Inc. TBPE F-1386				
Project:	River Bridge Ranch - Offsite COSM Waterline				
<b>Off-Site Water (COSM)</b>					
101S-A	9.1	AC	PREPARING RIGHT OF WAY	\$6,320.00	\$ 57,512.00
210S-A	2.0	CY	FLEXIBLE BASE (GRAVEL DRIVEWAY)	\$1,890.00	\$ 3,780.00
433S-C	1,174	SF	TYPE II P.C. CONCRETE DRIVEWAY	\$16.00	\$ 18,784.00
501S-18	44	LF	JACKING OR BORING 18-INCH STEEL PIPE, 0.375-INCH THICK, ASTM A139, COMPLETE IN PLACE	\$744.00	\$ 32,736.00
501S-24	762	LF	JACKING OR BORING 24-INCH STEEL PIPE, 0.375-INCH THICK, ASTM A139, COMPLETE IN PLACE	\$593.00	\$ 451,866.00
509S-1	5,861	LF	TRENCH EXCAVATION SAFETY PROTECTIVE SYSTEMS, (ALL DEPTHS)	\$0.50	\$ 2,930.50
510-AW-6DI	0	LF	PIPE, 6-INCH DIA., DUCTILE IRON (ALL DEPTHS), INCLUDING EXCAVATION & BACKFILL	\$0.00	\$ -
510-AW-8PVC	92	LF	PIPE, 8-INCH DIA., PVC C900 DR14 W/ RJ (ALL DEPTHS), INCLUDING EXCAVATION & BACKFILL	\$139.00	\$ 12,788.00
510-AW-12PVC	5,589	LF	PIPE, 12-INCH DIA., PVC C900 DR14 (ALL DEPTHS), INCLUDING EXCAVATION & BACKFILL	\$131.00	\$ 732,159.00
510-AWRJ-12PVC	392	LF	PIPE, 12-INCH DIA., PVC C900 DR14 W/ RESTRAINED JOINT	\$153.00	\$ 59,976.00
SS 5100	762	LF	PIPE, 12-INCH DIA., PVC C900 DR14 W/ TRENCHLESS INSTALLATION (RESTRAINED JOINT)	\$152.00	\$ 115,824.00
510-AW-18RCP	138	LF	PIPE, 18-INCH RCP, INCLUDING EXCAVATION & BACKFILL	\$142.00	\$ 19,596.00
510-AW-24STEEL	0	LF	PIPE, 24-INCH DIA., STEEL ASTM-A134 3/8 INCH THICK, INCLUDING EXCAVATION & BACKFILL	\$0.00	\$ -
510-SWUS-W 1	7	EA	1" DIA. SHORT WATER UNMETERED SERVICE	\$1,900.00	\$ 13,300.00
510-W30X12	1	EA	PRESSURE TAPS, 30-INCH X 12-INCH (TAPPING SLEEVE AND VALVE)	\$13,000.00	\$ 13,000.00
510-JW12X12	1	EA	WET CONNECTIONS, 12-INCH X 12-INCH DIA.	\$3,090.00	\$ 3,090.00
510-KW	2.0	TON	DUCTILE IRON FITTINGS	\$6,690.00	\$ 13,380.00
511S-A12	11	EA	VALVES, RESILIENT-SEATED GATE, 12-INCH DIA.	\$5,230.00	\$ 57,530.00
511S-B	15	EA	FIRE HYDRANT WITH 6-INCH GATE VALVE	\$9,730.00	\$ 145,950.00
511S-J	9	EA	PERMANENT DISINFECTION WATER SAMPLE PORT	\$2,900.00	\$ 26,100.00
604S-D	9	AC	NATIVE SEEDING FOR EROSION CONTROL, HYDRAULIC PLANTING	\$5,320.00	\$ 47,880.00
605S-A	619	SY	SOIL RETENTION BLANKET, CLASS 1, TYPE A	\$3.00	\$ 1,857.00
610S-A	529	LF	TREE PROTECTION FENCE, TYPE-A CHAIN LINK	\$5.00	\$ 2,645.00
638S	210	LF	ROCK BERM	\$32.00	\$ 6,720.00
641S	6	EA	STABILIZED CONSTRUCTION ENTRANCE	\$2,210.00	\$ 13,260.00
642S	7,310	LF	SILT FENCE FOR EROSION CONTROL	\$5.00	\$ 36,550.00
648S	1,201	LF	12" MULCH SOCK	\$9.00	\$ 10,809.00
700S-TM	1	LS	TOTAL MOBILIZATION PAYMENT (4% OF ALL ITEMS)	\$84,000.00	\$ 84,000.00
701S-T	5,948	LF	TEMPORARY FENCE, 4'-6", BARBED WIRE TXDOT TYPE A	\$14.00	\$ 83,272.00
702S-G-A	150	LF	REMOVING AND RELOCATING EXISTING WIRE FENCE, TXDOT TYPE A	\$21.00	\$ 3,150.00
702S-G-B	100	LF	REMOVING AND RELOCATING EXISTING WIRE FENCE, TXDOT TYPE B	\$21.00	\$ 2,100.00
802S-B C.I.P.	2	EA	C.I.P. PROJECT SIGN	\$1,190.00	\$ 2,380.00
803S-SF	225	LF	SAFETY FENCE	\$3.00	\$ 675.00
TXDOT 467 6531	4	EA	SET (TY II) (18 IN) (RCP) (6:1) (P)	\$2,640.00	\$ 10,560.00
TXDOT 4028 6003	3	LF	CATTLE GUARD	\$1,330.00	\$ 3,990.00
TXDOT 0552 6005	7	EA	GATE (TYPE II)	\$1,470.00	\$ 10,290.00
SP701S-TG	3	EA	TEMPORARY VEHICULAR GATE	\$1,210.00	\$ 3,630.00
SS1510	20	LF	AC PIPE REMOVAL	\$150.00	\$ 3,000.00
	1	LS	Traffic Control	\$21,000.00	\$ 21,000.00
<b>TOTAL WATER IMPOVEMENTS</b>					<b>\$ 2,128,069.50</b>
5% CONTINGENCY					\$106,403.48
5% PROJECT MANAGEMENT FEE					\$106,403.48
<b>TOTAL PROJECT COSTS</b>					<b>\$2,340,876.46</b>

**Commented [COSM1]:** List should breakout the extra costs directly attributable to the oversizing that are the City's responsibility. Also, the City should normally not pay for developer costs that would be incurred even without the oversizing. For example, the cost for a trench would be the same to the developer regardless of pipe size.

**Commented [JC2R1]:** There is no oversizing associated with this agreement so references as such have been deleted.