

## DEVELOPER PARTICIPATION AGREEMENT

This Developer Participation Agreement (“Agreement”) is entered into effective \_\_\_\_\_, 2020 (“Effective Date”) by and between the **City of San Marcos**, a Texas municipal corporation (the “City”), and **Lemuel Allen Jr.** (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 ***Posey Road Wastewater Extension*** in San Marcos, Hays County, Texas (“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 it is consistent with the public infrastructure plans of the City and that there is a public need to participate in this construction in order to provide wastewater services to a currently unserved area of the City and ETJ and, therefore, wishes to contract with the Developer to provide for the construction and allocation of costs for such improvements. 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 and 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.

**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 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.

## **2.2 Cost Participation**

*2.2.1 Cost Participation Amount.* The City is cost participating in the Improvements in an amount not to exceed \$850,247.85 for those portions of the work additionally requested by the City as itemized in Exhibit "A." The Developer will be responsible for paying the remainder of the costs for the Improvements.

*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 65 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, except to the extent such injuries, death, damages or breach are caused by the City.

**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 of action are covered in whole or in part by insurance, but not to the extent said claims, demands, and causes of action were caused in whole or in part by the negligence of the City.

## **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:**

**City of San Marcos,**  
a Texas municipal corporation

**DEVELOPER:**

Lemuel Allen Jr.

By: \_\_\_\_\_  
Bert Lumbreras, City Manager

\_\_\_\_\_  
Lemuel Allen Jr.

## EXHIBIT A

### Description of and Itemized Cost Estimate for all Improvements

#### Posey Road Wastewater Cost Breakdown Exhibit

Segment		8" Gravity Flow	12" Gravity Flow	48" Manholes	18" Boring	24" Boring	Extra Depth LF
Linear Footage Calculations	A1		400	1			
	A2		2100	6		300	425
	A3		460	1		300	100
	A4	1720		5			250
	A5	0		0			
	A6						
	B1	1290		3			750
	B2	750		2			
Total		3750	2960	18	0	600	1525

  

Owner	Tract	GPM	% of total	% of A1	% of A2	% of A3	% of A4	% of A5	% of A6	% of B1	% of B2
Warren	1A	61	12%	12%	13%	15%	25%				
Warren	1B	50	10%	10%	11%	13%				33%	
D2000	2	75	15%	15%	16%	19%	30%	41%			
Allen	3	50	10%	10%	11%	13%				33%	50%
Gunnarson	4A	50	10%	10%							
Gilbert	4B	60	12%	12%	13%						
Kinloch	4C	45	9%	9%	10%	11%	18%	24%	41%		
CKDM	4D	30	6%	6%	7%	8%	12%	16%	27%		
Herry	4E	35	7%	7%	8%	9%	14%	19%	32%		
Herry	4F	50	10%	10%	11%	13%				33%	50%
Total		506	100%	100%	100%	100%	100%	100%	100%	100%	100%

  

Segment	8" Gravity Flow	12" Gravity Flow	48" Manholes	18" Boring	24" Boring	Extra Depth	Item	Cost
A1	\$ -	\$ 36,000.00	\$ 5,800.00	\$ -	\$ -	\$ -	8" Gravity Flow	\$ 80.00
A2	\$ -	\$ 189,000.00	\$ 34,800.00	\$ -	\$ 150,000.00	\$ 4,250.00	12" Gravity Flow	\$ 90.00
A3	\$ -	\$ 41,400.00	\$ 5,800.00	\$ -	\$ 150,000.00	\$ 1,000.00	48" Manholes	\$ 5,800.00
A4	\$ 137,600.00	\$ -	\$ 29,000.00	\$ -	\$ -	\$ 2,500.00	18" Boring	\$ 425.00
A5	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	24" Boring	\$ 500.00
A6	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	Extra Depth	\$ 10.00
B1	\$ 103,200.00	\$ -	\$ 17,400.00	\$ -	\$ -	\$ 7,500.00		
B2	\$ 60,000.00	\$ -	\$ 11,600.00	\$ -	\$ -	\$ -		
Total		\$ 300,800.00	\$ 266,400.00	\$ 104,400.00	\$ -	\$ 300,000.00	\$ 15,250.00	\$ 986,850.00

  

Hard Costs	\$ 986,850
Engineering	\$ 175,000
Contingency	\$ 98,685
GC Fees	\$ 98,685
Project Total	\$ 1,359,220

  

Owner	Tract	Soft Costs	Hard Costs A1	Hard Costs A2	Hard Costs A3	Hard Costs A4	Hard Costs A5	Hard Costs A6	Hard Costs B1	Hard Costs B2	Total
Warren	1A	\$ 44,890.45	\$ 5,039.13	\$ 50,572.48	\$ 30,530.81	\$ 41,931.30	\$ -	\$ -	\$ -	\$ -	\$ 172,964.17
Warren	1B	\$ 36,795.45	\$ 4,130.43	\$ 41,452.85	\$ 25,015.25	\$ -	\$ -	\$ -	\$ 42,700.00	\$ -	\$ 150,103.99
D2000	2	\$ 55,193.18	\$ 6,195.65	\$ 62,179.28	\$ 37,537.88	\$ 51,554.88	\$ -	\$ -	\$ -	\$ -	\$ 212,660.87
Allen	3	\$ 36,795.45	\$ 4,130.43	\$ 41,452.85	\$ 25,015.25	\$ -	\$ -	\$ -	\$ 42,700.00	\$ 35,800.00	\$ 185,903.99
Gunnarson	4A	\$ 36,795.45	\$ 4,130.43	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 40,925.89
Gilbert	4B	\$ 44,154.55	\$ 4,956.52	\$ 49,743.42	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 98,854.49
Kinloch	4C	\$ 33,115.91	\$ 3,717.39	\$ 37,307.57	\$ 22,522.73	\$ 30,932.93	\$ -	\$ -	\$ -	\$ -	\$ 127,596.52
CKDM	4D	\$ 22,077.27	\$ 2,478.26	\$ 24,871.71	\$ 15,015.15	\$ 20,621.95	\$ -	\$ -	\$ -	\$ -	\$ 85,064.35
Herry	4E	\$ 25,756.82	\$ 2,891.30	\$ 29,017.00	\$ 17,517.68	\$ 24,058.94	\$ -	\$ -	\$ -	\$ -	\$ 99,241.74
Herry	4F	\$ 36,795.45	\$ 4,130.43	\$ 41,452.85	\$ 25,015.25	\$ -	\$ -	\$ -	\$ 42,700.00	\$ 35,800.00	\$ 185,903.99
Total		\$ 372,370.00	\$ 41,800.00	\$ 378,050.00	\$ 198,200.00	\$ 169,100.00	\$ -	\$ -	\$ 128,100.00	\$ 71,600.00	\$ 1,359,220.00

  

SUMMARY	Owner	Cost	Percentage
	Warren	\$ 323,068.16	24%
	Allen	\$ 185,903.99	14%
	CoSM	\$ 850,247.84	63%



