

**Developer Participation Agreement for the Construction of
Certain Storm Water Improvements for Future Ridge Road**

(Wilmeth Ridge South Subdivision)

This Developer Participation Agreement for the Construction of Certain Storm Water Improvements for Future Ridge Road (the "Agreement") is made and entered into as of this ____ day of _____, 2020 (the "Effective Date"), by and between **W/J WILMETH RIDGE, LP**, a Texas limited partnership, ("Developer") and the **CITY OF MCKINNEY, TEXAS** ("McKinney" or the "City"), sometimes referred to collectively as the "Parties," on the terms and conditions hereinafter set forth.

WHEREAS, Developer is constructing an approximately 89 lot residential subdivision on approximately 49.153 acres of land (the "Wilmeth Ridge South Subdivision") on property located south of Wilmeth Road (County Road 161) and east of future Ridge Road in the City of McKinney, Texas; and

WHEREAS, Developer is constructing certain items of public infrastructure including certain sanitary sewer line improvements, water line improvements, storm drainage improvements and roadway improvements (the "Developer's Public Improvements"); and

WHEREAS, Developer has entered into agreements with a General Contractor for the construction of the Developer's Public Improvements necessary for its development of the Wilmeth Ridge South Subdivision (the "Contract"), which improvements when completed will be dedicated to the public; and

WHEREAS, City desires that certain storm water improvements and related infrastructure improvements necessary to serve the Wilmeth Ridge South Subdivision and adjacent areas, (the "McKinney Public Improvements") identified in Exhibit A attached hereto and incorporated herein by reference be constructed by Developer, and has requested that the scope of work under the Contract be modified to include the McKinney Public Improvements; and

WHEREAS, the construction of the Developer's Public Improvements together with the McKinney Public Improvements (collectively referred to as the "Public Improvements") by Developer will benefit McKinney and improve the ability to provide necessary services to the properties located adjacent thereto; and

WHEREAS, Texas Local Government Code, Section 212.071, et seq., authorizes McKinney to contract with Developer and participate in the cost of construction for public improvements so long as the limit of participation does not exceed thirty percent (30%) of the total Contract price and the improvements are related to the development; and

WHEREAS, McKinney has determined that the cost of the McKinney Public Improvements when added to the cost of the Developer's Public Improvements (the sum of which is referred to herein as the "Total Contract Price") does not exceed thirty percent (30%) of the Total Contract Price.

NOW, THEREFORE, in consideration of the covenants and conditions contained in this Agreement, McKinney and Developer agree as follows:

1. Recitals Incorporated.

All of the foregoing recitals are hereby found to be true and correct and they are hereby approved and incorporated into the body of this Agreement as if copied in their entirety.

2. Representation of Developer.

Developer hereby represents, avers and warrants that it has been designated as, and is working in the capacity of, the developer of the Wilmeth Ridge South Subdivision.

3. Addendum to Contract to include McKinney Public Improvements.

This Agreement, when executed by Developer and McKinney, will constitute an addendum to the Contract so that the scope of work set forth in Exhibit B, attached hereto and incorporated herein for all purposes, for the McKinney Public Improvements will be added to and incorporated in the scope of work set forth in the Contract, for which McKinney shall share responsibility for payment. Developer and McKinney agree that the McKinney Public Improvements shall be constructed in strict accordance with the design plans approved by the City Engineer and on file in the office of the City Engineer.

4. Public Improvements to be Constructed by Developer.

Within thirty (30) days from the Effective Date of this Agreement and in coordination with the construction of the Developer's Public Improvements, Developer shall direct its general contractor to commence construction of the McKinney Public Improvements. All Public Improvements shall be constructed in accordance with plans and specifications therefor which conform to the ordinances and regulations of, and are approved by, McKinney. The McKinney Public Improvements shall be completed and finally accepted by the City within fourteen (14) months of beginning construction, subject to force majeure delays. During the construction process, Developer shall require its general contractor to comply with all ordinances and regulations governing the installation of the Public Improvements. This Agreement shall in no manner be construed as an

exemption or waiver by McKinney in favor of Developer, or its contractors, subcontractors, and/or suppliers, of any of the ordinances or regulations relating to the design, construction or warranty of any of the Public Improvements.

5. Participation by McKinney in Cost of Public Improvements.

The Total Contract Price for the Public Improvements to be constructed by Developer under the Contract, after the inclusion of the McKinney Public Improvements, is approximately Three Million One Hundred Forty-Eight Thousand Three Hundred Dollars (\$ 3,148,300.00) (the "Total Contract Price"), which amount includes the costs incurred, or to be incurred, by Developer for testing, surveying and constructing the Public Improvements. McKinney agrees to participate in the cost of the Public Improvements as more fully described in the attached Exhibit B, which is incorporated herein for all purposes, up to and not to exceed a lump sum amount of **One Hundred Forty-Two Thousand Three Hundred Ninety-Nine Dollars and Thirty-One Cents (\$ 142,399.31)** (the "McKinney Share"). **Notwithstanding the foregoing, in no event shall the McKinney Share exceed thirty percent (30%) of the Total Contract Price.** Developer shall submit to McKinney such documentation as McKinney shall reasonably request, from time to time, to evidence the lump sum amount of the McKinney Public Improvements and the Total Contract Price, including, but not limited to, its books and records relating to all expenditures related to the Public Improvements.

6. Payment by McKinney for the McKinney Public Improvements.

Developer shall submit to McKinney draw requests (the "Draw Requests") and the invoices relating to testing, surveying and other expenses directly incurred by Developer in furtherance of the construction of the McKinney Public Improvements (the "Invoices"), no more frequently than monthly, and McKinney agrees to pay each Draw Request within ten (10) days following the receipt thereof, provided that the Draw Request shall be certified by the project engineer and the Draw Request and Invoice shall include a certification by Developer that the amount of such Draw Request and/or Invoice, as the case may be, relates only to the McKinney Public Improvements. During said ten (10) day period, McKinney shall have the right to verify that the Draw Request and Invoice submitted to the City for payment relate to the McKinney Public Improvements and otherwise conform to the conditions set forth in this Agreement, and McKinney agrees to give written itemized notice of any objections thereto to Developer within said ten (10) day period.

7. Default.

In the event any party fails to comply with the terms of this Agreement, the other party has the right to enforce the terms of this Agreement by specific performance or by any other remedy available to it at law or in equity; provided,

however, in no event shall any party be liable for speculative, consequential or punitive damages.

8. Notice.

Any notice to be given or to be served upon a party hereto in connection with this Agreement must be in writing and may be given by certified or registered mail, recognized overnight carrier, such as Federal Express, or hand delivered with a signed receipt reflecting such hand delivery, and shall be deemed to have been given and received when a certified or registered letter containing such notice, properly addressed with postage prepaid, is deposited in the United States mail, and if given otherwise than by certified or registered mail, it shall be deemed to have been given and delivered to and received by the party (or such party's agent or representative) to whom it is addressed, upon delivery to the address specified below. All notices shall be given to the parties hereto at the address set forth below. Any party hereto may, at any time by giving two (2) days written notice to the other parties, designate any other address in substitution of the foregoing address to which such notice shall be given.

If Notice to Developer:

W/J WILMETH RIDGE, LP
Attn: Christopher Jackson
600 N. Pearl Street, Suite 650
Dallas, Texas 75201

If Notice to McKinney:

Paul G. Grimes
City Manager
City of McKinney
222 N. Tennessee St.
McKinney, Texas 75069

9. Venue.

This Agreement shall be construed under and in accordance with the laws of the State of Texas and is specifically performable in Collin County, Texas. Exclusive venue shall be in state Developer court in Collin County, Texas.

10. Severability.

In case any one or more provisions contained in this Agreement shall be for any reason held invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not effect any other provision hereof, and it is the intention of the parties to this Agreement that in lieu of each provision that is

found to be illegal, invalid or unenforceable, a provision be added to this Agreement which is legal, valid and enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.

11. No Waiver of Governmental Immunity.

Nothing contained in this Agreement shall be construed as a waiver by McKinney of its governmental immunity with regard to any matter other than City's obligations to Developer that are specifically enumerated in this Agreement.

12. Indemnity.

DEVELOPER SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS CITY COUNCIL, OFFICERS, EMPLOYEES, AND AGENTS FROM AND AGAINST ALL CITATIONS, CLAIMS, COSTS, DAMAGES, DEMANDS, EXPENSES, FINES, JUDGMENTS, LOSSES, PENALTIES OR SUITS, WHICH IN ANY WAY ARISE OUT OF, RELATE TO, OR RESULT FROM THE CONSTRUCTION OF THE MCKINNEY PUBLIC IMPROVEMENTS AND THAT ARE CAUSED BY THE INTENTIONAL ACTS OR NEGLIGENT ACTS OR OMISSIONS OF THE DEVELOPER, OR ANY OFFICERS, AGENTS, EMPLOYEES, CONTRACTORS OR SUBCONTRACTORS, AND ANY OTHER THIRD PARTIES FOR WHOM OR WHICH DEVELOPER IS LEGALLY RESPONSIBLE.

DEVELOPER SHALL ALSO REQUIRE ITS GENERAL CONTRACTOR TO DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS CITY COUNCIL, OFFICERS, EMPLOYEES, AND AGENTS FROM AND AGAINST ALL CITATIONS, CLAIMS, COSTS, DAMAGES, DEMANDS, EXPENSES, FINES, JUDGMENTS, LOSSES, PENALTIES OR SUITS, WHICH IN ANY WAY ARISE OUT OF, RELATE TO, OR RESULT FROM THE CONSTRUCTION OF THE MCKINNEY PUBLIC IMPROVEMENTS OR WHICH ARE CAUSED BY THE INTENTIONAL ACTS OR NEGLIGENT ACTS OR OMISSIONS OF THE GENERAL CONTRACTOR, ITS CONTRACTORS, SUBCONTRACTORS, OR ANY OFFICERS, AGENTS OR EMPLOYEES OF THE GENERAL CONTRACTOR, ITS CONTRACTORS, SUBCONTRACTORS AND ANY OTHER THIRD PARTIES FOR WHOM OR WHICH THE GENERAL CONTRACTOR IS LEGALLY RESPONSIBLE.

BY WAY OF EXAMPLE, THE INDEMNITY PROVIDED HEREIN MAY INCLUDE PERSONAL INJURY AND DEATH CLAIMS AND PROPERTY DAMAGE CLAIMS, INCLUDING THOSE FOR LOSS OF USE OF PROPERTY. THE INDEMNITY PROVIDED HEREIN SHALL ALSO INCLUDE ATTORNEYS' FEES AND COSTS, COURT COSTS, AND SETTLEMENT COSTS AS WELL AS ANY EXPENSES, INCLUDING ATTORNEYS' FEES AND EXPENSES, INCURRED BY AN INDEMNIFIED INDIVIDUAL OR ENTITY IN ATTEMPTING TO ENFORCE THIS INDEMNITY.

The City shall have the right to approve counsel to be retained in fulfilling the obligation to defend and indemnify the City. Approved counsel shall be retained for the City within seven (7) business days after receiving written notice from the City that it is invoking its right to indemnification under this Developer Participation Agreement. If approved counsel is not retained for the City within the required time, then the City shall have the right to retain counsel and be reimbursed for all its attorneys' fees and expenses by the party whose acts and/or omissions gave rise to said claim. The City retains the right to provide and pay for any or all costs of defending indemnified items, but it shall not be required to do so.

13. Authority.

Each of the parties represents and warrants to the other that they have the full power and authority to enter into and fulfill the obligations of this Agreement.

14. Performance and Payment Bonds.

Developer shall require its general contractor to execute a performance bond in the amount of one hundred percent (100%) of the Total Contract Price for the benefit of McKinney for the construction of the Storm Water Improvements Crossing Under and Adjacent to Future Ridge Road and related infrastructure improvements to ensure the completion of the project. Developer shall also require its general contractor to execute a payment bond in the amount of one hundred percent (100%) of the Total Contract Price for the benefit of payment bond beneficiaries who have a direct contractual relationship with the Developer's general contractor and/or the Developer's general contractor's contractors and subcontractors to provide labor or material for the construction of the Public Improvements including the sanitary sewer line and related infrastructure improvements. The bond must be executed by a corporate surety in accordance with Chapter 2253, Texas Government Code. Said bonds shall be presented to and approved by the City and the City Attorney before the Developer's general contractor begins work on the Public Improvements.

15. Maintenance Bond.

Developer shall require its general contractor to furnish McKinney a good and sufficient maintenance bond in the amount of fifteen percent (15%) of the contract price of the McKinney Public Improvements, or in such amount as approved by the City Engineer, with a reputable and solvent corporate surety, in favor of McKinney, to indemnify McKinney against any repairs arising from defective workmanship or materials used in any part of the construction of McKinney Public Improvements, for a period of two (2) years from the date of final acceptance of such improvements.

16. Insurance Requirements.

- (a) Before commencing work the Developer's contractor shall, at its own expense, procure, pay for and maintain the following insurance issued by an insurance company licensed with the Texas Department of Insurance and acceptable to the City of McKinney. The Developer's contractor shall furnish to the City of McKinney Purchasing Manager certificates of insurance executed by the insurer or its authorized agent stating coverages, limits, expiration dates and compliance with all applicable required provisions. Certificates shall reference the project/contract number and be addressed as follows:

Wilmeth Ridge South Subdivision –
Developer Participation Agreement
City of McKinney
Attn: Lisa Littrell
PO Box 517
McKinney, Texas 75070
Or email to:
llittrell@mckinneytexas.org

- (1) Commercial General Liability insurance with limits of liability thereunder of \$1 million per occurrence and \$5 million in the aggregate, including coverage for premises-operations, contractual liability, products and completed operations, personal and advertising injury, and property damages, as applicable. Coverage must be written on an occurrence form. The General Aggregate shall apply on a per project basis.
- (2) Workers' Compensation insurance with statutory limits; and Employers' Liability coverage with minimum limits for bodily injury: a) by accident, \$100,000 each accident, b) by disease, \$100,000 per employee with a per policy aggregate of \$500,000.
- (3) Business Automobile Liability insurance covering owned, hired and non-owned vehicles, with a minimum combined bodily injury and property damage limit of \$1,000,000 per occurrence.
- (4) Umbrella or Excess Liability insurance with minimum limits of \$5 Million each occurrence and annual aggregate for bodily injury and property damage, that follows form and applies in excess of the above indicated primary coverage (1, 2 and 3). The total limits required may be satisfied by any combination of primary, excess or umbrella liability insurance provided all policies comply with all requirements. The Developer's contractor may maintain reasonable deductibles, subject to approval by the City.

- (b) With reference to the foregoing required insurance, the Developer's contractor shall endorse applicable insurance policies as follows:
- (1) The City and its officials, employees, and officers shall be provided with a waiver of subrogation on any workers' compensation insurance coverage utilized by Developer and its contractors and subcontractors.
 - (2) The City and its respective officials, employees and officers shall be named as additional insureds on the Commercial General Liability policy and all other required insurance policies, by using endorsement CG2026 or broader; and, the City of McKinney shall be provided a defense to any and all claims and causes of action arising out of or related to this Agreement as may be provided pursuant to Developer's Contractor's general liability insurance policies.
 - (3) All insurance policies shall be endorsed to the effect that the City of McKinney will receive at least thirty (30) days' notice in advance of the cancellation effective date of any policy of insurance that is cancelled by the insurance company for any reason other than nonpayment of premium.
 - (4) All insurance policies shall be endorsed to the effect that City of McKinney will receive at least ten (10) days' notice in advance of the cancellation effective date of any policy of insurance that is cancelled by the insurance company for nonpayment of premium or by Developer's Contractor for any reason.
- (c) All insurance shall be purchased from an insurance company that meets a financial rating of B+VI or better as assigned by the A.M. BEST Company or equivalent.
- (d) The Developer's Contractor shall notify City in writing at least thirty (30) days prior to Developer's Contractor cancelling or making any material change to any coverage(s) provided in, or through, the insurance policies required under this Section VIII. Failure by Developer's Contractor to provide City the notice required hereunder may, in the sole discretion of City, be deemed a material breach of this Agreement.
- (e) The Developer's Contractor will provide City with a renewal certificate within ten (10) business days of City's written request for such certificate.

16. Conflicts of Interest.

- (a) Developer covenants and agrees that Developer and its associates and employees will have no interest, and will acquire no interest, either direct or indirect, which will conflict in any manner with the performance of the services called for under this Agreement. All activities, investigations and other efforts made by Developer pursuant to this Agreement will be conducted by employees, associates or subcontractors of Developer.
- (b) In addition, Developer shall comply with the requirements of Texas Government Code § 2252.908 by completing and submitting Form 1295 to the Texas Ethics Commission ("Commission") at the time Developer submits this signed Agreement to Owner, and as follows:

Form 1295 Filing Process: The Commission has made available on its website a new filing application that must be used to file Form 1295. The Developer must use the application to enter the required information on Form 1295 and print a copy of the completed form, which will include a certification of filing that will contain a unique certification number. An authorized agent of the Developer must sign the printed copy of the form and complete the "unsworn declaration" which includes, among other things, the date of birth and address of the authorized representative signing the form. The completed Form 1295 with the certification of filing must be filed with the Owner.

The Owner must notify the Commission, using the Commission's filing application, of the receipt of the filed Form 1295 with the certification of filing not later than the 30th day after the date the Agreement binds all parties to the Agreement. The Commission will post the completed Form 1295 to its website within seven business days after receiving notice from the Owner.

Form 1295 Availability: Certificate of Interested Parties Form is available from the Texas Ethics Commission website at the following address:

https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm

For questions regarding and assistance in filling out Form 1295, please contact the Texas Ethics Commission at 512-463-5800.

17. Prohibition on Contracts with Companies Boycotting Israel.

In accordance with Chapter 2270, Texas Government Code, a Texas governmental entity may not enter into an agreement with a company for the provision of goods or services unless the agreement contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not

boycott Israel during the term of the agreement. Chapter 2270 does not apply to (1) a company that is a sole proprietorship; (2) a company that has fewer than ten (10) full-time employees; or (3) a contract that has a value of less than One Hundred Thousand Dollars (\$100,000.00). Unless the Developer is not subject to Chapter 2270 for the reasons stated herein, the signatory executing this Agreement on behalf of the Developer verifies by its signature on this Agreement that the Developer does not boycott Israel and will not boycott Israel during the term of this Agreement.

18. Miscellaneous.

- (a) This Agreement contains the entire agreement of the parties with respect to the matters contained herein and may not be modified or terminated except upon the provisions hereof or by the mutual written agreement of the parties to this Agreement.
- (b) This Agreement shall be deemed drafted equally by all parties hereto. The language of all parts of this Agreement shall be construed as a whole according to its fair meaning, and any presumption or principle that the language herein is to be construed against any party shall not apply.
- (c) Time is of the essence in this Agreement.

EXECUTED as of the date first above written.

CITY OF MCKINNEY, TEXAS

By: _____
PAUL G. GRIMES
City Manager

Date Signed: _____

ATTEST:

EMPRESS DRANE
City Secretary
LISA SEWELL
Deputy City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney

DEVELOPER:
W/J WILMETH RIDGE, LP,
a Texas limited partnership,

By: 

CHRISTOPHER JACKSON

Title: VP _____

Date Signed: 4.27.20 _____

STATE OF TEXAS §
COUNTY OF COLLIN §

BEFORE ME, the undersigned authority, on this day personally appeared PAUL G. GRIMES, City Manager of the CITY OF MCKINNEY, a Texas Municipal Corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he has executed the same on the City's behalf.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 2020.

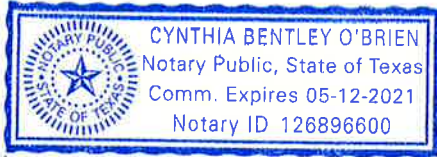
Notary Public in and for the State of Texas

STATE OF TEXAS §
COUNTY OF COLLIN §

BEFORE ME, the undersigned authority, in and for said County, Texas, on this day personally appeared CHRISTOPHER JACKSON, in his capacity as

Vice President of W/J WILMETH RIDGE, LP, a Texas limited partnership, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same on behalf of and as the act of W/J WILMETH RIDGE, LP.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 27th day of April, 2020.



Cynthia B. O'Brien
Notary Public in and for the State of Texas

EXHIBIT A

Contract between Developer & Developer's Contractor

A copy of the Contract between the Developer and Developer's Contractor incorporating the construction of the McKinney Public Improvements is on file with the Director of Engineering.

EXHIBIT B

Scope of Work for McKinney Public Improvements

City of McKinney is to pay fifty percent of the cost of the box culvert crossing under future Ridge Road, which amount payable by the City is One Hundred Thirty-Three Thousand Fifty-Three Dollars and Thirty-Three Cents (\$ 133,053.33) based on the following cost estimate subject to the thirty percent (30%) cap explained in the body of this Agreement. The general location and approved design of the box culvert is set out on the following page.

BOX CULVERT

Item No.	Q'ty	Unit	Description	Unit Price	Total
1	150	LF	4- 5'X3' RCP (CAST-IN-PLACE)	\$910.00	\$136,500.00
2	1	EA	4-5'X3' TxDOT TYPE "A" HEADWALL W/2' APRON	\$25,520.00	\$25,520.00
3	151	SY	6" - 12" ROCK RIP RAP	\$94.00	\$14,194.00
4	169	LF	5'X3' BOX CULVERT	\$237.19	\$40,085.11
5	1	EA	REMOVE EX. HEADWALL & CONNECT TO EX. 4'X3' RCB	\$2,220.65	\$2,220.65
6	1	EA	5-5'X3' CH-FW-30 HEADWALL	\$36,905.00	\$36,905.00
7	1	PER	ENGINEERING/STAKING/TESTING	8%	\$20,433.98
8	1	PER	CITY INSPECTION	3.5%	\$8,939.87
				TOTAL	\$284,798.61

