

## OVERSIZE PARTICIPATION AGREEMENT

This Agreement is entered into this \_\_\_\_\_ day of September, 2004, by and between the **City of College Station**, a Texas home rule municipal corporation (the "CITY") and **DB Autumn Chase, LP**, a Texas Limited Partnership. (the "OWNER").

WHEREAS, DB Autumn Chase, LP is the OWNER of the property more particularly described as the Autumn Chase Subdivision as shown on the Final Plat of the Autumn Chase Subdivision, a copy of which is attached hereto as **Exhibit A**; and,

WHEREAS, the OWNER is proposing to construct the Cornell Drive Extension with associated drainage and utilities to serve this property, a copy of the construction documents are attached hereto as **Exhibit B**; and,

WHEREAS, the City's Thoroughfare Plan shows Cornell Drive as a Major Collector street extending through the property connecting Brentwood Street to Manuel Street; and,

WHEREAS, a Major Collector is defined in the City of College Station Subdivision Regulations as a forty-eight foot (48') wide street cross section contained within a seventy foot (70') wide right-of-way as amended by Ordinance No. 2269 of October 9, 1997; and,

WHEREAS, a Traffic Impact Study completed by Jeff Milburn, P.E., has indicated that the development proposed by the OWNER, nor the current or future traffic patterns warrant the construction of a Major Collector; and,

WHEREAS, the Traffic Impact Study indicates that a Minor Collector consisting of a thirty-nine foot (39') wide street cross section contained within a sixty foot (60') right-of-way is the largest street cross section warranted at this location; and,

WHEREAS, the Manuel Street and Cornell intersection currently floods with depths well in excess of that allowed by the current City of College Station Drainage Policy and Design Guidelines; and,

WHEREAS, the construction of Manuel Street did not provide for a proper drainage outfall for the concentrated flow nor is there a drainage easement on the adjoining downstream property to accommodate this concentrated flow; and,

WHEREAS, this drainage from Manuel Street has adversely affected the adjoining downstream property; and,

WHEREAS, the OWNER was required to remedy the Manuel Street flooding and improper outfall situation; and,

WHEREAS, the City of College Station Subdivision Ordinance provides for City participation in streets and drainage facilities if they are in excess of that required by the development; and,

WHEREAS, the City Engineer has determined that this request for street and drainage participation is appropriate, and meets the intent of Section 9 of the Subdivision Ordinance; and,

WHEREAS, the costs of the oversize participation for the street and drainage systems are \$40,586.00 and \$51,457.00, respectively; and,

WHEREAS, the City Council considered and approved this Development Agreement on September 23, 2004;

NOW, THEREFORE, for and in consideration of the recitations above and in consideration of the promises and covenants herein expressed, the parties hereby agree and covenant as follows:

I.  
DETERMINATION OF RESPONSIBILITY  
AND USE OF FUNDS

OWNER shall be responsible for the cost of a thirty-eight foot (38') wide Minor Collector roadway, the extent of which is shown on the Autumn Chase Subdivision Final Plat. CITY shall be responsible for the construction cost to oversize the above street from a thirty-eight foot (38') wide Minor Collector to a forty-eight foot (48') wide Major Collector.

CITY shall also be responsible for the actual value of the undeveloped land in excess of that required for the Minor Collector. This constitutes the difference between a right-of-way width of sixty feet (60') for a Minor Collector and seventy feet (70') for a Major Collector for a distance of five hundred fifty feet (550').

OWNER shall be responsible for the cost of a combination twenty-four inch (24") and thirty inch (30") storm sewer for the overall drainage system which is contained in the Cornell right-of-way. CITY shall be responsible for the construction of two additional ten foot (10') inlets and junction box as well as the size increase in the storm sewer system to a combination thirty inch (30"), thirty-six inch (36") and forty-two inch (42") storm sewer system.

**EXHIBIT C** outlines cost participation of both the OWNER and the CITY.

The word "funds" as used in the Agreement shall mean any and all oversize participation money that is received by OWNER from the CITY pursuant to this Agreement.

OWNER shall only use the funds for the sole purpose of constructing and installing the improvements specified in this request and approved by the Director of Development Services or his delegate.

This Agreement and payments made hereunder are contingent upon:

- (1) the use of the funds as specified herein; and,
- (2) the completion of the project in accordance with the plans and specifications submitted to and approved by the Director of Development Services or his delegate and the City Engineer (hereinafter "plans").

**II.**  
**OVERSIZE PARTICIPATION AMOUNT**

The total estimated cost of the project is **FOUR HUNDRED TWENTY-EIGHT THOUSAND FOUR HUNDRED THIRTY-SEVEN AND 75/100 DOLLARS (\$428,437.75)**, of which the CITY may pay no more than thirty percent (30%) or **ONE HUNDRED TWENTY-EIGHT THOUSAND FIVE HUNDRED THIRTY-ONE AND 33/100 DOLLARS (\$128,531.33)**, without the project being publicly bid. The total oversize participation obligation of the CITY under this agreement is for **NINETY-TWO THOUSAND FORTY-THREE AND NO/100 DOLLARS (\$92,043.00)**. Payment shall be made in accordance with Section V herein.

**III.**  
**GOVERNMENTAL IMMUNITY, INDEMNIFICATION AND RELEASE**

CITY is a political subdivision of the state and enjoys governmental immunity. By entering into this Agreement, CITY does not waive its governmental immunity, the limitations as to damages under the Texas Tort Claims Act or give its consent to suit.

OWNER agrees to and shall indemnify, hold harmless, and defend the 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 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 OWNER under this Oversize Participation Agreement, regardless of whether such injuries, death, damages or breach are caused in whole or in part by the negligence of the CITY, any other party indemnified hereunder, or the OWNER.

OWNER shall indemnify and hold the CITY harmless from any claims of suppliers or subcontractors of OWNER for improvements constructed or caused to be constructed by OWNER.

OWNER shall indemnify and hold the CITY harmless from any and all injuries to or claims of adjacent property owners resulting from or relating to their performance under this Agreement.

OWNER 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, OWNER'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 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 OWNER.

#### IV. PLANS, SPECIFICATIONS, INSPECTION, AND CONSTRUCTION

The CITY may inspect the improvements for compliance with the Plans during construction. In the event that it is determined by the CITY that any of the work or materials furnished is not in strict accordance with the approved plans, the CITY may stop work on the project and withhold funds until the nonconforming work conforms with the Plans.

OWNER 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.

OWNER 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, OWNER shall, where no payment bond covers the work, upon written notice from the CITY, immediately obtain a bond at its expense and hold the CITY harmless from any losses that may result from the filing or enforcement of any said lien notice.

The parties to this Agreement agree and understand that all employees, volunteers, personnel and materials furnished or used by OWNER in the installation of the specified improvements shall be the responsibility of OWNER and shall not be deemed employees or agents of the CITY for any purpose.

Prior to final acceptance of the project, OWNER shall provide the CITY 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 the OWNER has been notified.

#### V. OVERSIZE PARTICIPATION PAYMENT

The oversize participation funds will be paid to the OWNER in one payment within thirty (30) days of final completion, the issuance of a certificate of completion, and/or acceptance by the City Engineer and submittal of an application for payment by the

OWNER. To apply for payment, OWNER shall submit a written request to the City Engineer. Payment will be contingent upon:

1. The City's receipt of a deed for the land; and,
2. An updated title report; and,
3. Lien subordinations from all lenders.

## VI. GUARANTEE OF PERFORMANCE

The OWNER must execute a performance bond for the construction of the improvements to ensure completion of the project. The bond must be executed by a corporate surety in accordance with Chapter 2253, Government Code. The bond shall be in the amount of the improvements as estimated by the City Engineer and reduced by the amount of Oversize Participation approved by the City of College Station City Council.

## VII. GENERAL PROVISIONS

Amendments. No amendment to this Agreement shall be effective and binding unless and until it is reduced to writing and signed by duly authorized representatives of both parties.

Choice of law and Venue. This Agreement has been made under and shall be governed by the laws of the State of Texas. Performance and all matters related thereto shall be in Brazos County, Texas, United States of America.

Authority to enter into Agreement. Each party represents that it has the full power and authority to enter into and perform this Agreement. The person executing this Agreement on behalf of each party has been properly authorized and empowered to enter into this Agreement. The person executing this Agreement on behalf of OWNER represents that he or she is authorized to sign on behalf of OWNER and agrees to provide proof of such authorization to the CITY upon request.

Agreement read. The parties acknowledge that they have read, understand and intend to be bound by the terms and conditions of this Agreement.

All notices and documents required herein shall be sent and provided to the parties at the addresses and telephone numbers listed below:

DB Autumn Chase, LP  
5810 Tom Wooten Drive  
Austin, TX 78731

City of College Station  
City Engineer  
P.O. Box 9960  
College Station, Texas 77842

All notices and documents shall be deemed received when mailed with sufficient postage and deposited in a regular mailbox of the United States Post Office. The parties may change addresses upon thirty (30) days' written notice sent certified mail, return receipt requested.

Assignment. This Agreement and the rights and obligations contained herein may not be assigned by OWNER without the prior written approval of the CITY.

Default. In the event of a material breach of this Agreement by OWNER, the CITY may terminate this Agreement and exercise any and all legal remedies available to it.

Executed this the \_\_\_\_\_ day of September, 2004.

DB AUTUMN CHASE, LP

CITY OF COLLEGE STATION

BY: \_\_\_\_\_

BY: \_\_\_\_\_

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

Ron Silvia, Mayor

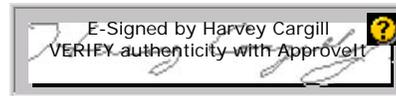
Title: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Connie Hooks, City Secretary

APPROVED:

\_\_\_\_\_  
Thomas E. Brymer, City Manager



\_\_\_\_\_  
City Attorney

\_\_\_\_\_  
Jeff Kersten, Finance and Strategic  
Planning Director

