

OVERSIZE PARTICIPATION AGREEMENT

This Agreement is entered into this _____ day of _____, 200__, by and between the **City of College Station**, a Texas home rule municipal corporation (hereinafter "CITY"), and **Kenny Cotten's, LLC**, a Texas Limited Liability Company (hereinafter "OWNER").

WHEREAS, OWNER owns, has subdivided, platted and is developing property within the City of College Station, more particularly described as Lot 1 and Lot 2, Block 1 of the Cotten's Subdivision (hereinafter "Property") as depicted and described on the final plat approved by the Planning and Zoning Commission on September 16, 2004, a copy of which is attached hereto as **Exhibit A**; and

WHEREAS, CHAPTER 9 of the CITY OF COLLEGE STATION CODE OF ORDINANCES requires that OWNER conform to the CITY's standards and master plans for streets and utilities and pay for all costs of materials and installation of streets, alleys, sidewalks, drainage, and utilities except where the CITY agrees to participate in the cost of oversize of such improvements; and

WHEREAS, the CITY's Thoroughfare Plan requires Dartmouth Drive to be a Minor Arterial which extends through the Cotten's Subdivision; and

WHEREAS, the City of College Station Utility Masterplan requires a twelve inch (12") water line run parallel to Dartmouth Drive; and,

WHEREAS, OWNER has requested that CITY cost participate in street and water improvements; and

WHEREAS, the City Engineer has reviewed the data, reports and analysis provided by OWNER's engineers and determined that OWNER's request for street and utility participation qualifies for participation funding under the criteria established in CHAPTER 9, SECTION 9, CITY OF COLLEGE STATION CODE OF ORDINANCES;

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

I. DEFINITIONS

1.1 Approved Plans means the plans and specifications that meet the requirements of this Oversize Participation Agreement, the City of College Station Codes and Ordinances and any other applicable laws and that have been submitted to, reviewed and approved by the City of College Station Development Services Department, the City Engineer.

1.2 CITY or College Station means the City of College Station, a Texas home rule municipal corporation located at 1101 Texas Avenue, College Station, Texas 77842.

1.3 Certificate of Acceptance: A certificate issued by the City Engineer stating that the construction conforms to the plans, specifications and standards contained in or referred to in CHAPTER 9 of the CITY OF COLLEGE STATION CODE OF ORDINANCES.

1.4 Certificate of Completion/Compliance. As defined in Section 1702 of the INTERNATIONAL BUILDING CODE, 2000 Edition, as adopted and amended by the City Council of the City of College Station, a certificate stating that work was done in compliance with approved construction documents/Approved Plans.

1.5 Effective Date. The date on which this Agreement is signed by the last party whose signing makes the Agreement fully executed.

1.6 Final Completion. The term "Final Completion" means that all the work on the Project has been completed, all final punch list items have been inspected and satisfactorily completed, all payments to materialmen and subcontractors have been made, all documentation, and all closeout documents have been executed and approved by the OWNER, Certificates of Completion and Acceptance have been issued for the Project, all Reports have been submitted and Reporting Requirements have been met, and DEVELOPER has fully performed any other requirements contained herein.

1.7 OWNER means Kenny Cotten's, LLC, a Texas Limited Liability Company whose principal office is located at 5541 Bear Lane, Suite 111, Corpus Christi, TX 78405.

1.8 Property means Lots 1 and 2, Block 1, Cotten's Subdivision, College Station, Brazos County, Texas, as depicted and described on the final plat approved by the Planning and Zoning Commission on September 16, 2004, a copy of which is attached hereto as **Exhibit A**.

1.9 Project means the construction of the Dartmouth Road improvements and the water improvements as detailed in **Exhibit B** attached hereto and incorporated herein by reference.

II. OVERSIZE COST PARTICIPATION

2.1 CITY agrees to cost participate to oversize the improvements as follows:

1. The difference between the construction of a thirty-eight foot (38') wide Minor Collector and a seventy-four foot (74') wide Minor Arterial.
2. The difference between an eight inch (8") water line and a twelve inch (12") water line.

2.2 The total cost of the project is \$409,684.25 CITY agrees to cost participate with OWNER for the actual construction cost not to exceed 19% or \$77,654.55 of the specified improvements, whichever is less. If the CITY's participation exceeds 30% of the Project, then the Project must be competitively bid under SECTION 252.002 et seq. of the TEXAS LOCAL GOVERNMENT CODE as amended. If the CITY participation exceeds 30% of the Project, the CITY shall be responsible for advertising and obtaining bids or negotiating proposals for the construction of the Project. The OWNER shall pay for all costs associated with advertising, printing, and distributing plans and specifications for the Project.

2.3 OWNER's engineer's detailed cost estimate of the improvements is attached hereto and incorporated herein as **Exhibit B**.

2.4 This Agreement and payments made hereunder are contingent upon but not limited to the each of following terms and conditions:

- (1) the Final Completion of the improvements in accordance with the Approved Plans and specifications;
- (2) issuance of Certificates of Completion and Acceptance;
- (3) OWNER's compliance with all City Codes, Ordinances and standards relating to the Property and its subdivision and development;
- (4) dedication of the land for the right-of-way either by plat or by general warranty deed;
- (5) a current title report as of the date of land dedication;
- (6) lien releases or subordinations from all lenders as required by the CITY.

2.5 Oversize Participation Payment. OWNER shall submit the written application for oversize participation payment within thirty (30) days after Final Completion or OWNER shall be ineligible to receive the oversize participation payment specified in this Agreement and CITY's obligation to cost participate shall terminate without any liability. Applications may not be submitted prior to Final Completion.

2.6 The CITY will pay oversize participation funds in one payment within thirty (30) days after receipt of a complete written application for oversize payment from OWNER.

2.7 Reports, books and other records. OWNER shall make its books and other records related to the project available for inspection by the CITY. **OWNER** shall submit to the CITY any and all information or reports requested to verify the expenditures submitted for oversize participation eligibility including but not limited to bid documents, payment applications, including any supporting information, cancelled checks, copies of construction and engineering documents, as determined by the City Engineer in his sole discretion, for the verification of the cost of the infrastructure detailed in **Exhibit B** of this Agreement. The submission of these reports and information shall be the responsibility of the OWNER and shall be certified by OWNER's Licensed Professional Engineer at OWNER's expense and signed by an authorized official of the entity.

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 consent to suit, waive its governmental immunity, or the limitations as to damages under the Texas Tort Claims Act.

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, 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 OWNER under this 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 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 OWNER.

IV.
PROJECT AND CONSTRUCTION

4.1 Right to Inspect the Work. The CITY may inspect the improvements for compliance with the Approved 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 withhold funds until the nonconforming work conforms to the Approved Plans.

4.2 Independent Contractor. 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.

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.

4.3 Payment for materials and labor. 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 OWNER's expense and hold the CITY harmless from any losses that may result from the filing or enforcement of any said lien notice.

4.4 Affidavit of bills paid. Prior to the issuance of a Certificate of Acceptance of the improvements, 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.

4.5 This Agreement does not alter, amend modify or replace any other requirements contained in the Code of Ordinances, Unified Development Code, or other applicable law.

V. GUARANTEE OF PERFORMANCE

5.1 The OWNER shall execute performance and payment bonds for the construction of the improvements to ensure completion of the project and payment of subcontractors. The bonds must be executed by a corporate surety in accordance with CHAPTER 2253, TEXAS GOVERNMENT CODE. The bonds shall be in the total amount of the contract price as approved by the City.

VI. GENERAL PROVISIONS

6.1 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.

6.2 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.

6.3 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.

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

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

Kenny Cotten's, LLC
719 Upper Broadway, Suite 201
Corpus Christi, TX 78401

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

With copies to:
City Attorney and City Manager
1101 Texas Avenue
College Station, TX 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.

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

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

Executed this _____ day of _____, 200__.

KENNY COTTEN'S, LLC

CITY OF COLLEGE STATION

BY: _____
Printed Name: _____
Title: _____

BY: _____
Ron Silvia, Mayor

ATTEST:

Connie Hooks, City Secretary

APPROVED:

Thomas E. Brymer, City Manager

Lawrence Carrell

City Attorney

Jeff Kersten, Finance and Strategic Planning
Director

THE STATE OF TEXAS)
) ACKNOWLEDGMENT
COUNTY OF BRAZOS)

Before me, the undersigned authority, on this day personally appeared _____
_____ as _____ of KENNY COTTEN'S, LLC, a Texas
limited liability company, known to me to be the person whose name is subscribed to the
foregoing instrument, and acknowledged to me that he executed the same for the purposes and
consideration therein expressed.

Given under my hand and seal of office on this the ____ day of _____, 200_.

Notary Public in and for the
State of Texas

THE STATE OF TEXAS)
)
COUNTY OF BRAZOS)

ACKNOWLEDGMENT

Before me, the undersigned authority, on this day personally appeared Ron Silvia as Mayor of the City of College Station, a Texas home-rule municipal corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the ____ day of _____, 200_.

Notary Public in and for the
State of Texas