

## OVERSIZE PARTICIPATION AGREEMENT

This Agreement is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2005, by and between the City of College Station, a Texas home rule municipal corporation (hereinafter "CITY"), and BCS Hospitality Development, L.P., a Texas Limited Partnership, Kendall Gillum and Brendan Gilyan (hereinafter "OWNERS").

WHEREAS, OWNERS own and have developed property within the City of College Station, more particularly described as Lots 5 through 10, Block 18 of Southwood Valley Section 4-B Subdivision (hereinafter "Property") as depicted and described on the final plat approved by the Planning and Zoning Commission on January 6, 1977; and a Vicinity Map is attached hereto as Exhibit A; and

WHEREAS, CHAPTER 9, CITY OF COLLEGE STATION CODE OF ORDINANCES requires that OWNERS 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 of College Station Utility Master Plan requires an eight inch (8") water line run parallel to State Highway 6 Frontage Road as detailed in Exhibit B; and

WHEREAS, OWNERS have submitted an oversize cost participation request for water line improvements constructed that were in excess of the required sizing for the development; and

WHEREAS, the City Engineer has reviewed the data, reports and analysis provided by OWNERS' engineers and determined that OWNERS' request for 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 and 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 77840

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;

Contract No. \_\_\_\_\_

**1.4 Certificate of Completion/Compliance.** As defined in Section 1702 of the INTERNATIONAL BUILDING CODE, 2003 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 OWNERS, 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 OWNERS** means **BCS Hospitality Development, L.P., a Texas Limited Partnership**, whose principal office is located at 6329 Gun Club Road, Temple, Texas 76501, as to Lots 8, 9 and 10, Block 18, Southwood Valley, Section 4-B, College Station, Texas; and **Kendall Gillum and Brendan Gilyan**, also located at 6329 Gun Club Road, Temple, Texas 76501, as to Lots 5, 6 and 7, Block 18, Southwood Valley, Section 4-B in College Station, Texas.

**1.8 Property** means Lots 5 through 10, Block 18 of the Southwood Valley Section 4-B Subdivision, College Station, Brazos County, Texas, as depicted and described on the final plat approved by the Planning and Zoning Commission on January 6, 1977. A vicinity map is provided as **Exhibit A** attached hereto and incorporated herein by reference.

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

## II. OVERSIZE COST PARTICIATION

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

1. The construction cost difference between an eight-inch (8") water line and a six-inch (6") water line.

**2.2** The total cost of the project is \$110,271.00. CITY agrees to cost participate with OWNERS for the actual construction cost not to exceed 27.26646% or \$30,067.00 of the specified improvements, whichever is less. The CITY's participation does not exceed 30% of the Project. Therefore, this Project was not required to be competitively bid under SECTION 252.002 et seq. of the TEXAS LOCAL GOVERNMENT CODE as amended.

**2.3** The detailed total cost of the improvements is attached hereto and incorporated herein as **Exhibit C**

**2.4** OWNERS warrant and certify by the signing of this Agreement that the amount OWNERS have submitted for reimbursement is the actual cost of constructing and installing the improvements specified in this request as approved by the City Engineer or his delegate. Any amount in excess of the actual cost of the improvements is unauthorized and OWNERS shall be liable for the immediate repayment of any excess funds. The City Engineer or his delegate has certified that each of following applicable terms and conditions have been met for the approval of the City's cost participation to oversize the sewer line:

- (1) the Final Completion of the improvements in accordance with the Approved Plans;
- (2) issuance of Certificates of Completion and Acceptance;
- (3) OWNERS' 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 and updated within sixty (60) days of the date of this Agreement;
- (6) lien releases or subordinations from all lenders as required by the CITY

**2.5** **Oversize Participation Payment.** OWNERS have submitted the written application for oversize participation payment within thirty (30) days after Final Completion

**2.6** The CITY will pay oversize participation funds in one payment within thirty (30) days after CITY's approval of this Agreement.

**2.7** **Reports, books and other records.** OWNERS shall make their books and other records related to the project available for inspection by the CITY. OWNERS 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 C of this Agreement. The submission of these reports and information shall be the responsibility of the OWNERS and shall be certified by OWNERS' Licensed Professional Engineer at OWNERS' 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.**

**OWNERS agree 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 OWNERS 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 OWNERS.**

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

**OWNERS 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.**

**OWNERS assume 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, OWNERS' 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 OWNERS.**

#### **IV. PROJECT AND CONSTRUCTION**

**4.1 Right to Inspect the Work.** The City Engineer has inspected the improvements for compliance with the Approved Plans during construction and has issued Certificates of Acceptance and Completion. In the event that any of the work or materials furnished is not in strict accordance with the Approved Plans, OWNERS shall correct or cause to be corrected at its sole cost and expense any defective or nonconforming work.

**4.2 Independent Contractor.** OWNERS 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 OWNERS in the installation of the specified improvements shall be the responsibility of OWNERS and shall not be deemed employees or agents of the CITY for any purpose.

**4.3 Payment for materials and labor.** OWNERS are 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, OWNERS shall, where no payment bond covers the work, upon written notice from the CITY, 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.** OWNERS have provided the City Engineer 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 OWNERS have 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 OWNERS executed performance and payment bonds for the construction of the improvements to ensure completion of the project and payment of subcontractors executed by a corporate surety in accordance with CHAPTER 2253, TEXAS GOVERNMENT CODE. The bonds were issued 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 OWNERS represent that he or she is authorized to sign on behalf of OWNERS and agree 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.

6.4 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:

BCS Hospitality Development, L.P.  
6329 Gun Club Road  
Temple, Texas 76501

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

Kendall Gillum  
Brendan Gilyan  
6329 Gun Club Road  
Temple, Texas 76501

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

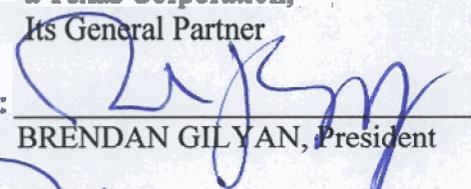
Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

BCS HOSPITALITY DEVELOPMENT, L.P.  
A Texas Limited Partnership

CITY OF COLLEGE STATION

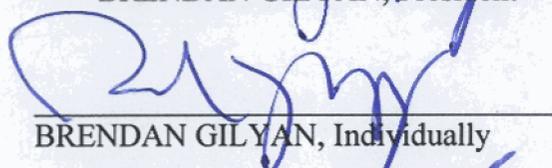
By: TEXAS HI-SKY, INC.,  
a Texas Corporation,  
Its General Partner

BY: \_\_\_\_\_  
RON SILVIA, Mayor

BY:   
BRENDAN GILYAN, President

ATTEST:

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

  
BRENDAN GILYAN, Individually

APPROVED:

  
KENDALL GILLUM, Individually

\_\_\_\_\_  
Glenn Brown, Interim City Manager

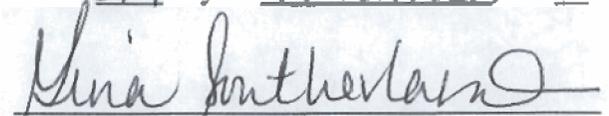
  
City Attorney

THE STATE OF TEXAS )  
 )  
COUNTY OF BRAZOS )

ACKNOWLEDGMENT

Before me, the undersigned authority, on this day personally appeared BRENDAN GILYAN, President of TEXAS HI-SKY, INC., a Texas corporation, General Partner of BCS HOSPITALITY DEVELOPMENT, L.P., 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 for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the 29 day of November, 2005.

  
Notary Public in and for the State of Texas

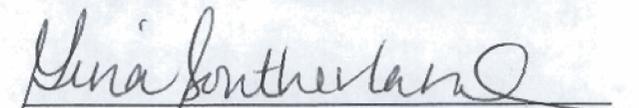


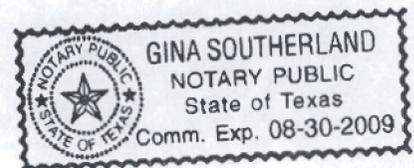
THE STATE OF TEXAS )  
 )  
COUNTY OF BRAZOS )

ACKNOWLEDGMENT

Before me, the undersigned authority, on this day personally appeared BRENDAN GILYAN, 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 29 day of November, 2005.

  
Notary Public in and for the State of Texas

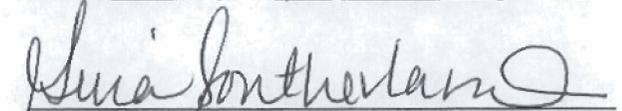


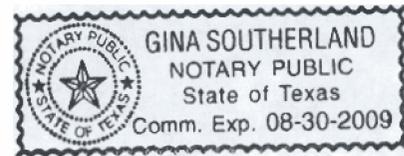
THE STATE OF TEXAS )  
 )  
COUNTY OF BRAZOS )

ACKNOWLEDGMENT

Before me, the undersigned authority, on this day personally appeared KENDALL GILLUM, 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 29 day of November, 2005.

  
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