

City of Houston, Texas Ordinance No. 2010-184

AN ORDINANCE AMENDING SECTION 47-164 OF THE CODE OF ORDINANCES, HOUSTON, TEXAS, RELATING TO DEVELOPER PARTICIPATION CONTRACTS; MAKING FINDINGS AND CONTAINING PROVISIONS RELATED TO THE SUBJECT; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY.

* * * * *

WHEREAS, development in the City of Houston has been slowed by the current condition of the real estate market; and

WHEREAS, under the current economic conditions, many developers are not able to meet the current requirements of their developer participation contracts; and

WHEREAS, many of the original developers are requesting additional term extensions to complete the requirements of the contracts; and

WHEREAS, some developers have abandoned the projects under the developer participation contracts; and

WHEREAS, new developers, funding institutions and construction contractors desire to complete projects under the original developer participation contracts that have expired or been abandoned; and

WHEREAS, the current requirements under Section 47-164: (1) do not allow additional term extensions to address the current economic conditions; (2) do not allow new developer participation contracts for completion of existing projects that are abandoned; and (3) bar developers from any additional developer contracts for one year following a default; and

WHEREAS, it is in the city's interest for proposed development to be completed and tax value created by the sale of new homes within the city, and

WHEREAS, City Council desires to amend Section 47-164 of the Code of Ordinances to allow the Director of Public Works and Engineering to extend developer participation contracts to address the current real estate conditions, including contracts executed prior to the effective date of this Ordinance, to execute new development assistance contracts to complete projects that are abandoned, and remove the one year bar to execute new contracts following a default due to the current real estate market;

NOW, THEREFORE,

* * * * *

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the findings and recitals contained in the preamble of this Ordinance are declared to be true and correct and are hereby adopted and made a part of this Ordinance.

Section 2. That the second paragraph of Subsection (4) of Section 47-164 of the Code of Ordinances, Houston, Texas, is hereby amended by deleting "Provided, however, the director may not extend either of the time periods described in (b) and (c) by more than one year" and replacing it with the following:

"The director may extend the developer participation contract term, including the time limits set out in (b) and (c) for a period of three years ("initial extension") for the following reasons:

- (i). Serious illness or death of developer or developer's immediate family.
- (ii). Local, State, or Federally recognized housing sales slowdown caused by economic conditions, such as a depression or recession that affects housing sales in the Houston metropolitan area.

Thereafter, the director may authorize one subsequent extension for up to one more year if, in the director's reasonable judgment, the economic conditions described in section 4(ii) above continue to exist, and the developer has completed construction of the Project and at least 25% of the housing units, but has been unable to sell the housing units according to subsection 3(a) above. Provided

however, the total contract term extension shall not exceed four years, unless approved by city council.”

Section 3. That Subsection (4) of Section 47-164 of the Code of Ordinances, Houston, Texas, is hereby amended to number the second and third paragraphs (i) and (ii) respectively and to add the following paragraph (iii):

“(iii) In no case shall the City’s total combined payments under the original developer participation contract and the developer assistance contract exceed the total amount set out in the original developer participation contract. In no case shall the city pay for anything under the developer assistance contract that it has already paid for under the original developer participation contract. Funds appropriated for a developer assistance contract shall not exceed the remaining funds under the original developer participation contract for the same development.”

Section 4. That Subsection (5) of Section 47-164 of the Code of Ordinances, Houston, Texas, is hereby deleted in its entirety and replaced with the following:

“Contingent upon city council’s having appropriated sufficient funds to pay for such contracts, the city council delegates to the director the

authority to approve and to the mayor the authority to execute the following, using standard forms approved by city council:

- (i) Developer participation contracts, and
- (ii) Development assistance contracts with a successor developer for a project described in an original developer participation contract upon which the original developer has defaulted, or with the original developer when its default on the original developer participation contract is solely due to its failure to meet the construction or home sales deadlines set out herein.

When a developer participation contract application or a request for extension thereto or a development assistance contract application is administratively complete, but at least ten days prior to approval by director, the department shall provide the members of the city council notice of the scope and location of the proposed project as well as contact information for the developer.”

Section 5. That Subsection (9) of Section 47-164 of the Code of Ordinances, Houston, Texas, is hereby deleted in its entirety and replaced with the following:

“Except as provided in subsection 5 above, in the event a developer defaults under a developer participation or assistance contract, the developer shall be barred from any additional developer contract for a period of a year following the default.”

Section 6: The City Council approves and authorizes the mayor to execute standard developer assistance contracts in substantially the form of the document attached hereto as Exhibit "A."

Section 7. The City Council approves the developer participation checklist in substantially the form of document attached hereto as Exhibit "B".

Section 8. This ordinance shall be effective five days after its passage by city council.

Section 9. That if any provision, section, subsection, sentence, clause or phrase of this ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this ordinance or their applicability to other persons or sets of circumstances shall not be affected thereby, it being the intent of the city council in adopting this ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this ordinance are declared to be severable for that purpose.

Section 10. That there exists a public emergency requiring that this ordinance be passed finally on the date of its introduction as requested in writing by the mayor; therefore, this ordinance shall be passed finally on such date and shall take effect five days after its passage and approval by the mayor.

PASSED AND APPROVED this 3rd day of March, 20 10.

Annis D. Parker
Mayor of the City of Houston

Prepared by Legal Dept. To Wigner
Senior Assistant City Attorney
Requested by Public Works and Engineering Department
L.D. File No. _____

AYE	NO	
✓		MAYOR PARKER
....	COUNCIL MEMBERS
✓		STARDIG
	ABSENT	JOHNSON
✓		CLUTTERBUCK
✓		ADAMS
✓		SULLIVAN
✓		HOANG
✓		PENNINGTON
✓		GONZALEZ
✓		RODRIGUEZ
✓		COSTELLO
✓		LOVELL
	ABSENT DUE TO BEING ILL	NORIEGA
✓		BRADFORD
✓		JONES
CAPTION	ADOPTED	

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CAPTION PUBLISHED IN DAILY COURT
REVIEW
DATE: MAR 09 2010

MAY 017 Rev. 12/09

EXHIBIT "A"

DEVELOPMENT ASSISTANCE CONTRACT

THIS DEVELOPMENT ASSISTANCE CONTRACT ("Contract") is made on the Countersignature Date by and between the **CITY OF HOUSTON, TEXAS** ("City"), a municipal corporation and home-rule city of the State of Texas principally situated in Harris County, acting by and through its governing body, the City Council and _____ ("Successor Developer"), a _____ doing business in the State of Texas.

The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

City
Director of Department of Public Works
and Engineering
or Designee
City of Houston
P.O. Box 1562
Houston, Texas 77251

Successor Developer

PREAMBLE

WITNESSETH:

WHEREAS, the Successor Developer intends to develop a tract located within the municipal boundaries of the City; and

WHEREAS, the Successor Developer has paid all impact fees required by the City for such development for _____; and

WHEREAS, it is necessary to construct the project described in Exhibit "A" (the "Project"); and

WHEREAS, the City executed a Developer Participation Contract with _____[include Original Developer name here] (Contract No. _____) on _____[date] for reimbursement for the construction of water, sanitary and storm sewer mains for _____; and

WHEREAS, [provide the current status of the original DPC]; and

WHEREAS, the Original Developer has defaulted on the Developer Participation Contract, which has terminated for default; and

WHEREAS, construction of the Project commenced on _____ and is [complete/partially complete or provide the current status]; and

WHEREAS, the City has/has not reimbursed the Original Developer for the costs of water and sanitary mains and _____homes for the costs of storm sewer on _____; and

WHEREAS, the City has agreed to participate in the completion of the Project in an amount not to exceed the remaining reimbursement under the Original DPC Contract; and

NOW, THEREFORE, the City and the Successor Developer hereby agree to the terms and conditions of this Contract. This Contract consists of the following sections:

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Exhibit "A": Description of Project

Exhibit "B": Request for Reimbursement of Eligible Storm Drainage Costs

All of the above described sections and exhibits are hereby incorporated into this Contract by this reference for all purposes.

IN WITNESS HEREOF, the City and the Successor Developer have executed this Contract in multiple copies, each of which is an original.

ATTEST/SEAL (if a corporation):
WITNESS (if not a corporation):

[Name of Successor Developer]

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____
Tax I.D. No. _____

ATTEST/SEAL:

CITY OF HOUSTON, TEXAS
Signed by:

City Secretary

Mayor

APPROVED:

COUNTERSIGNED BY:

Director, Department of Public
Works and Engineering

City Controller

APPROVED AS TO FORM:

DATE COUNTERSIGNED:

Assistant City Attorney
L.D. File No. _____

I. DEFINITIONS

"City" is identified in the Preamble and includes its successors and assigns.

"Closing" is described in Article III.

"Code of Ordinances" is the City of Houston Code of Ordinances.

"Construction Date" is described in Article IVA.

"Countersignature Date" means the date the City Controller countersigns this Development Assistance Contract .

"Detention Facility Allocation" means the total cost of a Detention Facility constructed pursuant to a Developer Participation Contract or Development Assistance Contract under §47-164 of the Code of Ordinances divided by the total number of lots projected by the Successor Developer to be served by such facility, regardless of whether the lots were or will be developed in conjunction with this Contract.

"Development Assistance Contract" means this agreement.

"Successor Developer" is identified in the Preamble and is the owner of the Property identified in Exhibit "A". Successor Developer also includes any successor in title to any portion of the Property, except to Retail Purchaser, but any Developer that is not an assignee of this Contract is subject only to the agreement required under Subsection II E (4) below.

"Director" means the Director of Public Works and Engineering or such person as he or she may designate for the purpose of administering this Contract.

"Eligible Construction Costs" means the full cost of materials, labor and related testing necessary for construction of the Main, as well as cost of construction management performed by independent contractors of Successor Developer and the actual costs of publishing notice of bids for construction of the Project in accordance with Local Government Code Section 252.041 or

any successor statute, but excludes all costs of lift stations and applicable permits of all kinds, which shall not be reimbursed by the City under this Contract.

"Eligible Costs" means Eligible Design, Construction, Over Sizing, and where applicable, Storm Drainage Costs. Eligible Costs may also include any otherwise Eligible Costs incurred by the Original Developer that Successor Developer can document to the Director's satisfaction that Successor Developer has paid to Original Developer or on behalf of Original Developer.

"Eligible Design Costs" means the full cost of survey, design, and related testing services necessary for the water and wastewater Main, which services are performed by independent contractors to the Successor Developer, but excludes the cost of applicable permits of all kinds, which shall not be reimbursed by the City under this Contract.

"Eligible Over Sizing Costs" means the actual incremental costs of design and construction of water and wastewater Main sized at the request of the Director in excess of the capacity necessary for the residential units to be served by the Project.

"Eligible Storm Sewer Drainage Costs" means, for new low or moderate cost single family homes only, the actual cost, not to exceed \$3,000 per lot including allowable interest, of design, testing, and construction of storm sewer drainage for each lot. It includes either (a) the Detention Facility Allocation for each lot or (b) the portion of any required flood control impact fee attributable to such lot. The cost of applicable permits of all kinds is excluded from Eligible Storm Sewer Drainage Costs and will not be reimbursed under this Contract.

"Engineer of Record" means the registered engineer who sealed the original City approved drawings.

"Interest Rate" means 5.1 %.

"Low or Moderate Cost" has the meaning set out in Section 47-164 (3) of the City of Houston Code of Ordinances.

"Main" means water, wastewater and storm water facilities eligible for reimbursement under Section 47-164 of the Code of Ordinances.

"Project" is defined in Exhibit "A".

"Property" is the land described in Exhibit "A".

"Related Entity" means, with respect to any party which has been a Successor Developer hereunder: (i) any spouse, parent, child, grandchild, brother or sister of such Successor Developer; or (ii) any person or entity (A) that directly or indirectly controls or is controlled by or is under common control with such Successor Developer, (B) that is an officer of, partner in or trustee of, or serves in a similar capacity with respect to, such Successor Developer or of which such Successor Developer is an officer, partner or trustee, or with respect to which such Successor Developer serves in a similar capacity, or (C) that is the beneficial owner, directly or indirectly, of 10% or more of any class of equity securities of such Successor Developer or of which such Successor Developer is directly or indirectly the owner of 10% or more of any class of equity securities.

"Retail Purchaser" is a fee title purchaser of one Single Family Residence within the Property, who actually resides at the Single Family Residence.

"Single Family Residence" has the meaning set out in Section 42-1 of the City of Houston Code of Ordinances.

II. DUTIES OF SUCCESSOR DEVELOPER

A. Water, Wastewater, and Storm Sewer Capacity; Engineering Drawings

Before the Director executes this contract, Successor Developer shall show proof that it has (i) obtained all necessary water and wastewater and storm drainage capacity for the Project as required by the Director; (ii) prove ownership of the property on which the Project is to be constructed; and (iii) confirm the Director is in receipt of the following: original permits, performance, payment, surface restoration, and maintenance bonds, and the original Notice to Proceed. If applicable, the Successor Developer shall require the contractor to obtain from the Director each permit required to construct the Project before execution of this Contract. If applying for Eligible Storm Sewer Drainage Costs, Successor Developer shall furnish the Director with pre-qualifying information requested by the Director.

B. Construction of the Project

(1) Successor Developer shall comply with the final plat approved by the City under the Original DPC.

(2) If construction of the Project is not complete, Successor Developer shall require its construction Contractor(s) to complete construction of the Project in a good and workmanlike manner in accordance with the engineering design created by the Engineer of Record and approved by the Director prior to construction. Any required changes to the approved design must be approved by the Director and Engineer of Record. The Successor Developer shall provide all engineering required for the completion of construction of the Project and shall confirm or provide, if applicable, Record Drawings have been or will be filed with the Director; perform any necessary inspections or testing of the Project, and confirm Main acceptance, if applicable.

(3) The Successor Developer shall require its construction contractor(s) to provide to the City performance and payment bonds in accordance with the requirements of §212.073 of the Texas Local Government Code and §2253 of the Government Code. The amount of the performance and payment bonds shall be the full cost of the Original construction necessary to complete the Project. The Successor Developer shall also require its contractor(s) to provide one-year maintenance and surface restoration bonds as required by the original permit and any additional construction necessary to complete the Project are provided to the Director. The Successor Developer and the City shall be dual obligees for the performance and payment bonds (Successor Developer is primary obligee), and the City shall be the obligee for the maintenance and surface restoration bonds. Successor Developer shall submit original duplicates of these bonds on form re-approved by the City Legal Department, to the Office of the City Engineer prior to award of the construction contract for the Project. Provided, if the City does not approve or request corrections to the bonds within ten working days of its receipt of the bonds, the Successor Developer may award the construction contract for the Project.

(4) Successor Developer shall acquire all lands and rights-of-way necessary to construct and/or complete the Project. Successor Developer shall coordinate with the City and other utilities to minimize the possibility of damage to utilities in the Project area. Upon completion of the Project, Successor Developer shall ensure that the Project is free and clear of all liens and encumbrances, including but not limited to mechanics liens and purchase money security interests and any liens placed by contractors of the Original Developer.

(5) Successor Developer must award the contract for construction of the Project on the basis of competitive bids. Successor Developer shall follow bidding requirements of Chapter

252 of the Texas Local Government Code (lowest responsible bidder) unless the construction contract (including the unreimbursed amount) is less than \$50,000.

(6) Successor Developer shall keep the Director reasonably informed regarding the progress of completion of the Project as required by the Director. Successor Developer shall notify and provide reasonable documentation for the Director for the following events: (1) advertisement for bids, (2) award of construction contract (including copies of bonds and insurance), (3) Notice to Proceed, (4) default of the contractor (if it occurs), and (5) completion of the Project such that it is ready for inspection by the City. The Project shall not be considered complete, and Successor Developer or its contractor shall not connect the Project to the City's utility system until the Director issues a certificate of final completion.

(7) The Successor Developer must provide a release from all construction contractors that construction contractors and subcontractors were paid or there are no outstanding liens on the Project or any of the houses constructed pursuant to the Original DPC before execution of this Contract.

(8) The Project shall be commenced and completed by the Successor Developer in the time periods required by Article IV.

C. INDEMNIFICATION

SUCCESSOR DEVELOPER COVENANTS AND WARRANTS THAT IT WILL PROTECT, DEFEND, AND HOLD HARMLESS THE CITY, ITS EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY, THE "CITY") FROM ANY AND ALL THIRD PARTY CLAIMS, DEMANDS, AND LIABILITY, INCLUDING DEFENSE COSTS, RELATING IN ANY WAY TO DAMAGES, CLAIMS, OR FINES ARISING BY REASON OF OR IN CONNECTION WITH THE ACTUAL OR

ALLEGED NEGLIGENCE OR OTHER ACTIONABLE PERFORMANCE OR OMISSION OF THE SUCCESSOR DEVELOPER (INCLUDING SUCCESSOR DEVELOPER'S CONTRACTORS AND SUBCONTRACTORS) IN CONNECTION WITH OR DURING THE PERFORMANCE OF THE DUTIES UNDER THIS CONTRACT. SUCCESSOR DEVELOPER FURTHER EXPRESSLY COVENANTS AND AGREES TO PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY FROM ALL CLAIMS, ALLEGATIONS, FINES, DEMANDS, AND DAMAGES RELATING IN ANY WAY TO THE ACTUAL OR ALLEGED JOINT AND/OR CONCURRENT NEGLIGENCE OF THE CITY AND SUCCESSOR DEVELOPER'S CONTRACTORS AND SUBCONTRACTORS) ARISING OUT OF OR RELATED TO THIS CONTRACT, WHETHER SUCCESSOR DEVELOPER IS IMMUNE FROM LIABILITY OR NOT, FOR A PERIOD OF UP TO 4 YEARS AFTER THE DATE OF CLOSING.

IT IS THE EXPRESS INTENTION OF THE PARTIES HERETO THAT THE INDEMNITY PROVIDED HEREIN IS AN CONTRACT BY THE SUCCESSOR DEVELOPER TO INDEMNIFY AND PROTECT THE CITY FROM THE CITY'S OWN NEGLIGENCE WHERE SAID NEGLIGENCE IS AN ALLEGED OR ACTUAL CONCURRING PROXIMATE CAUSE OF ANY ALLEGED THIRD-PARTY HARM.

THE INDEMNITY PROVISION PROVIDED HEREIN SHALL HAVE NO APPLICATION TO ANY CLAIM OR DEMAND WHERE BODILY INJURY, DEATH, OR DAMAGE RESULTS ONLY FROM THE SOLE NEGLIGENCE OF THE CITY UNMIXED WITH ANY FAULT OF THE SUCCESSOR DEVELOPER.

NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, THE LIABILITY OF THE SUCCESSOR DEVELOPER UNDER THIS INDEMNITY PROVISION SHALL NOT EXCEED \$1,000,000 PER OCCURRENCE.

D. Insurance

Successor Developer shall maintain in effect certain insurance coverage, which is described below. Successor Developer may satisfy this requirement through insured policies in the name of its Contractor.

(1) Risks and Limits of Liability. Successor Developer shall maintain the following coverages and limits of liability:

<u>(Coverage)</u>	<u>(Limit of Liability)</u>
Workers Compensation	Statutory for Worker's Compensation
Employer's Liability	Bodily Injury by accident \$500,000 (each accident) Bodily Injury by Disease \$500,000 (policy limit) Bodily Injury by Disease \$500,000 (each employee)
Commercial General Liability: Including Broad Form Coverage, Contractual Liability, Bodily and Personal Injury, and Completed Operations	Bodily Injury and Property Damage, Combined Limits of \$1,000,000 each Occurrence and \$2,000,000 Aggregate
Automobile Liability Insurance (for automobiles used by the in the course of its performance under this Agreement, including Employer's Non-Ownership and Hired Auto Coverage)	\$1,000,000 combined single limit Successor Developer per Occurrence

Defense costs are excluded from the face amount of the policy.
Aggregate Limits are per 12-month policy period
unless otherwise indicated.

(2) Form of Policies. The Director may approve the form of the insurance policies, but nothing the Director does or fails to do relieves Successor Developer from its duties to

provide the required coverage under this Agreement. The Director's actions or inactions do not waive the City's rights under this Agreement.

(3) Issuers of Policies. The issuer of any policy (i) shall have a Certificate of Authority to transact insurance business in Texas or (ii) shall be an eligible non-admitted insurer in the State of Texas and have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition Best's Key Rating Guide.

(4) Insured Parties. Each policy, except those for Workers Compensation, Employer's Liability, and Professional Liability, must name the City (and its officers, agents, and employees) as Additional Insured parties on the original policy and all renewals or replacements.

(5) Deductibles. Successor Developer shall be responsible for and pay any claims or losses to the extent of any deductible amounts and waives any claim it may have for the same against the City, its officers, agents, or employees.

(6) Cancellation. Each policy must state that it may not be canceled, materially modified, or nonrenewed unless the insurance company gives the Director 30 days' advance written notice. Successor Developer shall give written notice to the Director within five days of the date on which total claims by any party against Successor Developer reduce the aggregate amount of coverage below the amounts required by this Agreement. In the alternative, the policy may contain an endorsement establishing a policy aggregate for the particular project or location subject to this Agreement.

(7) Subrogation. Each policy except Professional Liability (if required) must contain an endorsement to the effect that the issuer waives any claim or right of subrogation to recover against the City, its officers, agents, or employees.

(8) Endorsement of Primary Insurance. Each policy, except Worker's Compensation and Professional Liability (if any), must contain an endorsement that the policy is primary to any other insurance available to the Additional Insured with respect to claims arising under this Agreement.

(9) Liability for Premium. Successor Developer shall pay all insurance premiums, and the City shall not be obligated to pay any premiums.

(10) Subcontractors. Successor Developer shall require all subcontractors to carry insurance naming the City as an additional insured and meeting all of the above requirements except amount. The amount must be commensurate with the amount of the subcontract, but in no case less than \$500,000 per occurrence.

(11) Proof of Insurance.

- (a) Before issuance of the Notice to Proceed for the Project, Successor Developer shall furnish the Director with Certificates of Insurance, along with an Affidavit from Successor Developer confirming that the Certificates accurately reflect the insurance coverage maintained. If requested in writing by the Director, Successor Developer shall furnish the City with certified copies of Successor Developer's actual insurance policies.
- (b) Successor Developer shall continuously and without interruption, maintain in force the required insurance coverages specified in this Section. If Successor Developer does not comply with this requirement, the Director, at his or her sole discretion, may
 - a. immediately suspend Successor Developer from any further performance under this Agreement and begin procedures to terminate for default, or

- b. purchase the required insurance with City funds and deduct the cost of the premiums from amounts due to Successor Developer under this Agreement.

The City shall never waive or be estopped to assert its right to terminate this Agreement because of its acts or omissions regarding its review of insurance documents.

E. Sale of Property

Successor Developer shall convey the Property or portions thereof only as follows:

- (1) To Retail Purchasers by fee simple deed;
- (2) To family members within the first degree of consanguinity or affinity by lease.
- (3) To a natural person by a qualified lease. A qualified lease is any rental, lease, lease-purchase or other financial arrangement that does not convey title to the person, but only if such qualified lease is authorized by a City approved lease-purchase program; or

- (4) To a purchaser who agrees in writing:

- a. To construct only Single Family Residences on the single family residential lots covered by this Contract;
- b. To abide by the requirements of this Subsection II E; and
- c. That the City as a third-party beneficiary may enforce the provisions of this Section II E in the event the purchaser violates any of such provisions.

Once the purchaser has agreed to these conditions in the written contract, the Successor Developer shall not be held in default on account of actions by such purchases or subsequent purchasers who violate the terms of the contract executed pursuant to (4). (In the event the Successor Developer and purchaser desire to obtain an assignment of the Contract,

such Successor Developer and purchaser must obtain the written approval of the assignment from the Director.)

The Director shall monitor Successor Developer's development and sale of the Property for compliance with the Contract, including this Section II E.

F. Compliance with Laws

Successor Developer shall comply with all applicable state and federal laws and regulations as well as all provisions of the City of Houston Charter and Code of Ordinances, including all applicable provisions of Chapter 47 of the Houston Code of Ordinances.

III. DUTIES OF CITY

A. Payment by City

After substantial completion of the Project, if applicable, and upon inspection and certification by the Director that construction of at least 25 percent of the housing to be served by the Project has been completed, the Director shall schedule the closing for payment to the Successor Developer ("Closing") at a time and place convenient to the parties. Successor Developer shall not seek reimbursement from the City and the City shall not pay, and at no time will the Director authorize, duplicate payments for any portion of the Project paid under the Original DPC. If Closing has occurred under the Original DPC, then Closing is not applicable under this Contract, and Successor Developer is only entitled to receive reimbursements for Eligible Drainage Costs during the Storm Water Reimbursement Period as described in subsection (8) below.

At least 30 days before the date of Closing, Successor Developer shall provide the Director of PW&E:

- (1) An accounting of all Eligible Costs, including records and vouchers for all payments made by the Successor Developer for Eligible Costs. Successor Developer shall provide all documentation of Eligible Costs as required by the Director.
- (2) A certified copy of the subdivision or development plat and all documents necessary and required by the City Attorney to vest title to the Project in the City free and clear of any encumbrances.
- (3) Record drawings of the Project signed by the Project engineer.
- (4) Construction contractor's certificate of payment to subcontractors and material suppliers.
- (5) Certificate of final completion of the Project executed by the Office of the City Engineer.
- (6) Copy of acceptance letter for the Project signed by the Office of the City Engineer.
- (7) Certification signed by the Successor Developer that it has complied with the requirements of Section II E, Sale of Property.

Within 30 days after Successor Developer completes the closing requirements, subject to the Limitation of Appropriation set out in Section B below, the City shall pay for water and wastewater Main as follows:

The Sum of:

- (a) 100 percent of the Eligible Over Sizing Costs for the Main,
- (b) 70 percent of the balance of Eligible Construction Costs for the Main,
- (c) 100 percent of the Eligible Design Costs,

(d) Interest on the reimbursement cost as calculated above at the interest rate described in Article I of this Contract for the period of time between the Successor Developer's loan disbursement and payment by the City.

(8) After Closing, for Projects serving single family housing that is sold at low or moderate cost as defined in Section 47-164 of the Code of Ordinances only, the City shall pay Successor Developer, in addition to the above costs, Eligible Storm Sewer Drainage Costs (including the Detention Facility Allocation as set out in Section IV A and interest calculated at the rate set out in Article I from the date of loan disbursement up to the Date of Closing only) up to a maximum amount of \$3,000 per lot, upon proof furnished to the Director that lot and housing unit have been sold for low or moderate cost and that the Successor Developer has complied with Section II E, Sale of Property. The City shall pay Eligible Storm Sewer Drainage Costs only for housing units completed prior to the third anniversary of the Countersignature Date ("the Storm Sewer Reimbursement Period"). In order to receive payment of such costs, the Successor Developer shall submit to the Director a "Request for Reimbursement of Eligible Storm Drainage Costs" in the form set out in Exhibit "B" in accordance with procedures and including documentation to be established by the Director. The City shall not pay and Successor Developer shall not be entitled to receive reimbursement for Eligible Storm Sewer Drainage Costs for any lots sold after the Storm Sewer Reimbursement Period expires, except as provided for the Detention Facility Allocation in Section IV A (3). The City shall never be obligated to pay Successor Developer any amount in excess of the Appropriated Funds set out for Eligible Storm Sewer Drainage Costs regardless of the number of homes sold.

B. Limit of Appropriation

(1) The City's duty to pay money to Successor Developer under this Contract is limited in its entirety by the provisions of this Section.

(2) In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has appropriated (a) the sum of \$_____ to pay money due for Eligible Design, Construction, and Over Sizing Costs, including interest, and (b) the sum of \$_____ to pay for Eligible Storm Sewer Drainage Costs, including interest, under this Contract (the "Appropriated Funds"). The City Council of the City, in its discretion, may appropriate additional funding for this Contract, but it is not obligated to do so.

IV. TERM AND TERMINATION

A. This Contract is effective on the Countersignature Date ("Effective Date") and shall remain in effect for the following terms:

(1) From the Effective Date until the actual ending date of "the Storm Sewer Reimbursement Period", which term shall not exceed 3 years.

FAILURE OF THE SUCCESSOR DEVELOPER TO COMPLETE PERFORMANCE OF ITS APPLICABLE OBLIGATIONS UNDER THIS CONTRACT WITHIN THE TIME PERIOD SET OUT ABOVE SHALL CONSTITUTE A DEFAULT OF THIS CONTRACT BY SUCCESSOR DEVELOPER AND SHALL TERMINATE THE CITY'S DUTY TO REIMBURSE SUCCESSOR DEVELOPER FOR ANY ELIGIBLE COSTS HEREUNDER OR FOR ANY COSTS WHATSOEVER AND SHALL CONSTITUTE A WAIVER BY SUCCESSOR DEVELOPER OF ANY RIGHT TO CLAIM SUCH REIMBURSEMENT OR ANY OTHER COSTS OR DAMAGES ARISING

OUT OF THE CONTRACT OR THE DESIGN AND CONSTRUCTION OF THE PROJECT. SUCCESSOR DEVELOPER'S FAILURE TO COMPLETE ITS OBLIGATIONS TIMELY AS SET OUT ABOVE SHALL NOT REQUIRE THE CITY TO GIVE NOTICE OF DEFAULT AS DESCRIBED BELOW OR TO GIVE SUCCESSOR DEVELOPER ANY TIME TO CURE.

(2) For Projects serving low or moderate cost single family housing only, from the Effective Date through the end of the Storm Sewer Reimbursement Period, as set out in III A above. Successor Developer shall not be entitled to reimbursement for any Eligible Storm Sewer Drainage Costs if it fails to meet the deadline established above. Successor Developer shall not be entitled to receive reimbursement for Eligible Storm Sewer Drainage Costs on any lot not built on and sold at low or moderate cost within the time period specified in this section.

Notwithstanding the foregoing, however, the City shall reimburse the Successor Developer for the Detention Facility Allocation for eligible lots with homes sold for low or moderate cost even if the Detention Facility itself was constructed under a previous Developer Participation Contract. The amount of interest payable on any Detention Facility Allocation shall never exceed the amount of interest payable on the Detention Facility Allocation pursuant to the Developer Participation Contract under which the Detention Facility was constructed.

B. For any other reason except Successor Developer's failure to complete its obligations timely, either party may terminate its performance under this Contract in the event of default by the other party and a failure by that party to cure such default after receiving notice thereof, all as provided in this Section. Default shall occur if a party fails to observe or perform any of its duties under this Participation Contract. Should such a default occur, the injured party shall deliver a written notice to the defaulting party describing such default and the proposed

date of termination. Such date may not be sooner than the 30th day following receipt of the notice. The injured party, at its sole option, may extend the proposed date of termination to a later date. If prior to the proposed date of termination, the defaulting party cures such default, then the proposed termination shall be ineffective. If the defaulting party fails to cure such default prior to the proposed date of termination, then the injured party may terminate its performance under this Contract as of such date. The Director may give such notice for the purposes of this Contract.

If the default is for a violation of Section II E, among other remedies available to the City, the City may recover from the Successor Developer all money paid to the Successor Developer under this Contract and/or debar the Successor Developer and Related Entities from Participation Contracts.

In the event this Contract is terminated due to default of the Successor Developer or the Successor Developer abandons the Project, either of which event is before the construction contractor finishes the Project, the City reserves the right to continue the construction contract and utilize any unexpended funds for this Contract to reimburse the construction contractor.

V. MISCELLANEOUS

A. Independent Contractor

Successor Developer is engaged as an independent contractor, and Successor Developer shall accomplish all of the services provided for herein in such capacity. The City of Houston shall have no control or supervisory powers as to the detailed manner or method of the Successor Developer's performance of the subject matter of this Contract. All personnel supplied or used by Successor Developer shall be deemed employees or subcontractors of Successor Developer and shall not be considered employees, agents or subcontractors of the City of Houston for any

purpose whatsoever. Successor Developer shall be solely responsible for the compensation of all such personnel, for the withholding of income, social security and other payroll taxes and for the coverage of all workers' compensation benefits.

B. Force Majeure

"Force Majeure" includes, but is not limited to, acts of God, acts of the public enemy, war, blockades, insurrection, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, and any other inability of either party to carry out its obligations under this Contract, except strikes or labor disputes and breakage or damage to machinery or equipment, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, and which by the exercise of due diligence and care such party could not have avoided.

If, because of Force Majeure any party hereto is rendered unable, wholly or in part, to carry out its obligations under this Contract, then such party shall give to the other party prompt written notice of the Force Majeure with reasonable full details concerning it; thereupon the obligation of the party given the notice, so far as they are affected by the Force Majeure, shall be suspended during, but no longer than, the continuance of the Force Majeure. The affected party shall use all possible diligence to remove the Force Majeure as quickly as possible, but his obligation shall not be deemed to require the settlement of any strike, lockout, or other labor difficulty contrary to the wishes of the party involved.

C. Severability

In the event any term, covenant or condition herein contained shall be held to be invalid by any court of competent jurisdiction, such invalidity shall not affect any other term, covenant

or condition herein contained, provided that such invalidity does not materially prejudice either the Successor Developer or the City in their respective rights and obligations contained in the valid terms, covenants or conditions hereof.

D. Entire Agreement

This Contract merges the prior negotiations and understandings of the parties hereto and embodies the entire agreement of the parties, and there are not other agreements, assurances, conditions, covenants (expressed or implied) or other terms with respect to the Project, whether written or verbal, antecedent or contemporaneous with the execution hereof.

E. Notices

All notices required or permitted hereunder shall be in writing and shall be deemed delivered on the third day following deposit in a United States Postal Service post office or receptacle with proper postage affixed (certified mail, return receipt requested) addressed to the respective other party at the address prescribed in the preamble of this Contract or at such other address as the receiving party may have theretofore prescribed by notice to the sending party.

F. Acceptance and Approval

An approval by a Director, or by any other instrumentality of the City, of any part of Successor Developer's performance shall not be construed to waive compliance with this Contract or to establish a standard of performance other than required by this Contract or by law. A Director is not authorized to vary the terms of this Contract.

G. Inspections and Audits

Representatives of the City shall have the right to perform, or cause to be performed, (1) audits of the books and records of the Successor Developer relating to the Project, and (2) and inspections of all places where work is undertaken in connection with the Project. The Successor

Developer shall be required to keep such books and records available for such purpose for at least three (3) years after the ceasing of its performance under this Contract. Nothing in this provision shall affect the time for bringing a cause of neither action nor the applicable statute of limitations.

H. Enforcement

The City Attorney or his or her designee shall have the right to enforce all legal rights and obligations under this Contract without further authorization. Successor Developer covenants to provide to the City Attorney all documents and records that the City Attorney deems necessary to assist in determining Successor Developer's compliance with this Contract, with the exception of those documents made confidential by federal or State law or regulation.

I. Risk of Loss

Risk of loss or damage to the Project shall pass from the Successor Developer to the City upon closing.

J. Non-Waiver

Failure of either party hereto to insist on the strict performance of any of the agreements herein or to exercise any rights or remedies accruing hereunder upon default or failure of performance shall not be considered a waiver of the right to insist on, and to enforce by any appropriate remedy, strict compliance with any other obligation hereunder or to exercise any right or remedy occurring as a result of any future default or failure of performance.

K. Business Structure and Assignments

The Successor Developer shall not assign this Contract at law or otherwise or dispose of all or substantially all of its assets without the prior written consent of the Director. If the Successor Developer desires approval of an assignment, the Successor Developer shall

immediately furnish the Director:

- (1) proof of the assignment and the name, telephone number, and address of the Assignee and a clear identification of the fees to be paid to the Assignee;
- (2) an original Affidavit of Ownership and Control of the Assignee; and
- (3) all pre-qualifying information requested by the Director.

The Successor Developer shall not delegate any portion of its performance under this Contract without obtaining prior written consent from the Director.

Nothing in this clause, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. Provided, however, the Successor Developer must provide the Directors the information described in item (1) above.

L. Survival

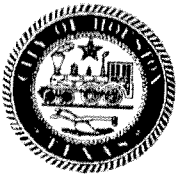
Successor Developer shall remain obligated to the City under all clauses of this Contract that expressly or by their nature extend beyond the expiration or termination of this Contract, including Sections II C (Indemnity) and II E (Sale of Property).

M. Successor Developer Debt

IF SUCCESSOR DEVELOPER, AT ANY TIME DURING THE TERM OF THIS AGREEMENT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT SUCCESSOR DEVELOPER HAS INCURRED A DEBT, THE CITY CONTROLLER SHALL IMMEDIATELY NOTIFY SUCCESSOR DEVELOPER IN WRITING. IF SUCCESSOR DEVELOPER DOES NOT PAY THE DEBT WITHIN 30 DAYS

OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FOR ANY PAYMENTS OWED TO SUCCESSOR DEVELOPER UNDER THIS AGREEMENT, AND SUCCESSOR DEVELOPER WAIVES ANY RECOURSE THEREFOR.

EXHIBIT "B"



Developer Participation Contract Checklist for Development Assistance Contract

Department of Public Works & Engineering

This checklist is for an application of Development Assistance Contract for a previous Developer Participation Contract No. _____; Countersignature Date _____; Expiration Date _____; Notice to Proceed Date _____. **

(**Please fill above blanks with proof documents, otherwise is not qualified to apply this contract.)

Please check the applicable boxes below:

Construction

- ☐ The infrastructure is not complete.
- ☐ The infrastructure is complete. The City Engineer accepted the infrastructure on _____.
- ☐ 25% of homes are not complete.
- ☐ 25% of homes are complete.
- ☐ The water and wastewater reimbursement is not complete. (The water and wastewater costs are not reimbursed.)
- ☐ The water and wastewater reimbursement is complete. (The water and wastewater costs are reimbursed.)
- ☐ _____ homes out of a total of _____ homes are reimbursed.
- ☐ _____ homes are built completely

Ownership

- ☐ An original developer is continuing to sell homes.
- ☐ A lender/contractor/investor affiliated with the original developer.
- ☐ A new developer taking over a bankrupted development.

Time

- ☐ The previous DPC contract is not extended.
- ☐ The previous DPC contract is extended.