

**CITY OF MIDLAND, TEXAS  
BRIEFING SESSION AGENDA  
January 28, 2014 - 9:30 AM  
BASEMENT CONFERENCE ROOM  
300 North Loraine  
Midland, Texas**

These items, as well as any other items on the regular posted agenda for the City Council Meeting on this date, may be discussed:

1. Receive a presentation from Administrative Services on the City's Compensation and Classification Study.

## AGENDA FOR CITY COUNCIL MEETING

January 28, 2014 – 10:00 AM

Council Chamber - City Hall

The Midland City Council agenda is posted for public notice at least 72 hours prior to the Tuesday meetings. All requests to be placed on the Council agenda by the public must be submitted to the City Manager, in writing, at least one week before the Council meetings. Such written requests must be in sufficient detail to identify the subject matter as well as the contact person who will represent the matter before the Council. The City Council reserves the right to not consider matters over which the City has no jurisdiction.

### **OPENING ITEMS**

1. Invocation - Reverend Pat Bryant, Travis Baptist Church
2. Pledge of Allegiance

### **PRESENTATIONS**

3. Presentation of special events, organizations, individuals, or periods of time including, but not limited to:
  - a. Receive a presentation from Midland Retired Seniors Volunteer Program.

### **PUBLIC COMMENT**

4. Receive public comments where individuals may address the City Council on City related issues and projects. Any deliberation of or decision by the City Council regarding the item being discussed shall be limited to a motion to place the item on the agenda for a subsequent meeting. (Please limit remarks to no more than three minutes per person.)

### **CONSENT AGENDA**

5. Consider a motion approving the following minutes:
  - a. Special meeting of January 13, 2014.
  - b. Regular meeting of January 14, 2014.



6. Consider a resolution authorizing the execution of a contract with MUSCO Lighting LLC, of Oskaloosa, Iowa for labor, material, equipment and supervision necessary to purchase and install ball field lighting for Hogan Park Fields #1, #2, #8, and Simons Field through Buyboard at a total cost of \$773,400.00; this item was not bid but purchased through a Cooperative Purchasing Program; and appropriating funds. (PURCHASING) (2014-018)
7. Consider a resolution authorizing and directing the City Manager to issue a request for qualifications for a construction manager at risk for the new Municipal Court building. (PURCHASING) (2014-019)
8. Consider a resolution authorizing the execution of an amendment to Resolution No. 2012-244 authorizing the City Manager to execute and approve on behalf of the City of Midland all contracts and agreements with the State of Texas, represented by the Texas Department of Transportation and such other parties as shall be necessary for the implementation of the project described as Midland Airpark Hangar Expansion; and appropriating funds; said amendment to include constructing 12 T-hangars at the Midland Airpark Airport with drainage improvements to the existing hangars thereby increasing the total cost estimates for this project. (AIRPORTS) (2014-020)
9. Consider a resolution authorizing the execution of an amendment to the Non-Exclusive Commercial Fixed Base Operator Lease Agreement between the City of Midland, Texas and Basin Aviation, Incorporated, at Midland Airpark Airport. (AIRPORTS) (2014 - 021)
10. Consider a resolution approving the Midland Development Corporation's payment in the amount of \$53,643.20 to Crosswind Communications, LLC for promotional services. (CITY MANAGER'S OFFICE) (2014 - 022)
11. Consider a resolution approving the amended Fiscal Year 2013-2014 budget of the Midland Development Corporation, a Type A corporation as authorized by Chapter 504 of the Texas Local Government Code. (CITY MANAGER'S OFFICE) (2014 - 023)
12. Consider a resolution approving an Economic Development Agreement between the Midland Development Corporation and Orbital Outfitters, Ltd., as authorized by Chapter 501 of the Texas Local Government Code. (CITY MANAGER'S OFFICE) (2014 - 024)
13. Consider a resolution approving a Sublease Agreement between the Midland Development Corporation and Orbital Outfitters, Ltd. regarding certain real property located at Midland International Airport and described as a 1.28-acre tract of land located in Lot 1A, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas. (CITY MANAGER'S OFFICE) (2014 - 025)

14. Consider a resolution authorizing the execution of a Lease Agreement with the Midland Development Corporation regarding certain real property at Midland International Airport and described as a 1.28-acre tract of land located in Lot 1A, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas. (CITY MANAGER'S OFFICE) (2014 - 026)
15. Consider a resolution approving an amendment to the Declaration of Protective Covenants applicable to Entrada Enterprise Park located in Midland International Airport Industrial Park, Section 5, Midland, Midland County, Texas; and ordering recordation. (CITY MANAGER'S OFFICE) (2014 - 027)
16. Consider a resolution calling a special election for one City Council Member-at-Large; providing for use of accessible voting systems; establishing election precincts for said election; and establishing polling places for said election; said election shall be held on May 10, 2014, with early voting to begin on April 28, 2014. (CITY SECRETARY'S OFFICE) (2014 - 028)
17. Consider a resolution authorizing the execution of an agreement with the Midland-Odessa Urban Transit District, the City of Odessa, the City of Midland, and McDonald Transit Associates, Incorporated, related to the management and operation of a motorbus system in the City of Odessa and the City of Midland; and the City Manager and City Attorney are authorized to make non-substantive modifications to the agreement as long as the intent is not changed. (CITY MANAGER'S OFFICE) (2014 - 029)
18. Presentation of schedule for Fiscal Year 2014/2015 Community Development Block Grant (CDBG) Program Funding Cycle. (DEVELOPMENT SERVICES)

## **SECOND READINGS**

19. Consider an ordinance on second reading changing the zoning classification by amending Chapter One, Title XI, of the City Code of Midland, Texas, by permitting a 40.498-acre tract of land out of Sections 37, 38 and 48, Block 40, T-1-S, T&P RR Co. Survey, a 5.954-acre tract of land out of Section 37, Block 40, T-1-S, T&P RR Co. Survey, and a 0.270-acre tract of land out of Section 37, Block 40, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas, which is presently zoned FD, Future Development District, in part, and PD, Planned District for a Housing Development, in part, to be used as an Amended Planned District for a Housing Development (Generally located on the east side of the south extension of Avalon Drive, approximately 700 feet south of Hall of Fame Boulevard); providing for such use to be subject to certain special conditions and restrictions as set out herein; containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2,000.00); and ordering publication. (DEVELOPMENT SERVICES) (First reading held on November 26, 2013) (9210)

20. Consider an ordinance on second reading changing the zoning classification by amending Chapter One, Title XI, of the City Code of Midland, Texas, by permitting a 21.85-acre tract of land out of Section 11, Block "X", H.P. Hilliard Survey, City and County of Midland, Texas, which is presently zoned AE, Agriculture Estate District, to be used as a PD, Planned District for a Housing Development (Generally located on the west side of North State Highway 349, west of Pueblo); containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2,000.00); and ordering publication. (DEVELOPMENT SERVICES) (First Reading Held on January 14, 2014) (9218)
21. Consider an ordinance on second reading changing the zoning classification by amending Chapter One, Title XI, of the City Code of Midland, Texas, by permitting Lots 2 and 3, Block 1, the Vineyard Addition, Section 3, City and County of Midland, Texas, which is presently zoned O-1, Office District, to be used as a PD, Planned District for an Office Center (Generally located on the west side of Holiday Hill Road, approximately 800 feet north of Sherwood Drive); providing for such use to be subject to certain special conditions and restrictions as set out herein; containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2,000.00); and ordering publication. (DEVELOPMENT SERVICES) (First Reading Held on January 14, 2014) (9219)
22. Consider an ordinance on second reading changing the zoning classification by amending Chapter One, Title XI, of the City Code of Midland, Texas, by permitting Lot 1A, Block 2, Gateway Plaza, Section 3, City and County of Midland, Texas, which is presently zoned PD, Planned District for a Shopping Center, to be used as an Amended Planned District (Generally located on the southeast corner of the intersection of Liberty Drive and Starboard Drive); providing for such use to be subject to certain special conditions and restrictions as set out herein; containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2,000.00); and ordering publication. (DEVELOPMENT SERVICES) (First Reading Held on January 14, 2014 ) (9220)
23. Consider an ordinance on second reading vacating and abandoning a 0.126-acre portion of Holiday Hill Road right-of-way adjacent to Lot 1, Block 2, Grandridge Park Addition, Section 1, City and County of Midland, Texas (Generally located on the west side of the intersection of Holiday Hill Road and North Loop 250 West); adopting the appraisal by the City Manager of \$8,235.00; retaining a General Public Utility Easement; and ordering recordation by the City Secretary. (DEVELOPMENT SERVICES) (First Reading Held on January 14, 2014) (9221)

24. Consider an ordinance on second reading amending Title III, "Departments", Chapter 1, "Water Department", Section 2, "Rates," of the City Code of Midland, Texas, so as to change the rates charged for water and sewer services; containing a cumulative clause; containing a savings and severability clause; and ordering publication; and the City Manager shall notify all customers outside the City limits as required by state law; and rescinding Ordinance Number 9214 on the date this ordinance becomes effective. (UTILITIES)(First Reading Held on January 14, 2014) (9222)

## **PUBLIC HEARINGS**

25. At approximately 10:30 A.M. hold a public hearing and consider an ordinance changing the zoning classification by amending Chapter One, Title XI, of the City Code of Midland, Texas, by permitting a 302.19-acre tract of land which is presently zoned AE, Agriculture Estate District, to be used as a PD, Planned District for a Housing Development; by permitting a 15.83-acre tract of land which is presently zoned AE, Agriculture Estate District, to be used as an O-1, Office District; said tracts being out of Section 12, Block 39, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas (Generally located on the east side of State Highway 349, approximately 840 feet north of Arapahoe Road); containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2,000.00); and ordering publication. (DEVELOPMENT SERVICES) (9223)
26. At approximately 10:33 A.M. hold a public hearing and consider an ordinance changing the zoning classification by amending Chapter One, Title XI, of the City Code of Midland, Texas, by permitting Lots 1-12, Block 40, Belmont Addition, City and County of Midland, Texas, which is presently zoned MH, Manufactured Home Dwelling District, in part, and LR-2, Local Retail District, in part, to be used as a PD, Planned District for a Shopping Center (Generally located on the southeast corner of the intersection of Rankin Highway and West Gist Avenue); providing for such use to be subject to certain special conditions and restrictions as set out herein; containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2,000.00); and ordering publication. (DEVELOPMENT SERVICES) (9224)
27. At approximately 10:36 A.M. hold a public hearing and consider a request for the annexation of a 37.09-acre tract of land out of Sections 7 and 8, Block 40, T-2-S, T&P RR Co. Survey, Midland County, Texas. (Generally on the northeast corner of the intersection of FM 1788 and Loop 40.) (DEVELOPMENT SERVICES)
28. At approximately 10:39 A.M. hold a public hearing and consider a request for the annexation of Lot 3, Block 5, Pecan Acres Addition, Section 5 and of Lots 4A and 4B, Block 5, Pecan Acres Addition, Section 7, Midland County, Texas.

(Generally located on the north side of Trenton Drive, approximately 550 feet east of Trobaugh Boulevard.) (DEVELOPMENT SERVICES)

29. At approximately 10:42 A.M. hold a public hearing regarding a proposed oil and gas permit to Callon Petroleum Operating Company (Operator), for a Permit to Drill an Oil & Gas Well within the City Limits, (Pecan Acres 23 #7) located 660 feet from south line and 1911 feet from east line, Section 23, Block 40, T-1-S, T&P RR Co. Survey, Midland County, Texas. (Generally located on the west side of Golden Gate Drive, approximately 660 feet north of Briarwood Avenue.) (DEVELOPMENT SERVICES)

### **DEVELOPMENT SERVICES**

30. Consider an ordinance amending Title IV, "Building Regulations", Chapter 1, "Building Code", of the City Code of the City of Midland, Texas, and adopting the 2012 International Building Code as the Building Code of the City of Midland, Texas, for the purpose of regulating the construction, alteration, repair, equipment, use and occupancy, location, maintenance, removal and demolition of buildings and structures or any appurtenance connected or attached to such building or structure; providing for the inspection of said buildings or structures, providing for the issuance of permits for the construction, alteration, repair, equipment, use and occupancy, removal and demolition of said buildings or structures and collection of inspection fees therefor; establishing minimum floor elevations for certain structures; requiring cash deposits to insure site clearance after removal or demolition of structures; containing a cumulative clause; containing a savings and severability clause; providing for a maximum fine or penalty of two thousand (\$2000.00) dollars; and establishing an effective date of April 1, 2014; and ordering publication. (DEVELOPMENT SERVICES) (9225)
31. Consider an ordinance amending Title IV, "Building Regulations", Chapter 3, "Plumbing Code", of the City Code of the City of Midland, Texas, and adopting the 2012 International Plumbing Code as the Plumbing Code of the City of Midland for the purpose of regulating the installation, alteration, and maintenance of all piping and plumbing within the corporate limits of the City of Midland; providing for the inspection of said piping and plumbing; providing for the issuance of permits for the installation of said piping and the collection of inspection fees therefor; providing for the bonding of persons engaged in the business of installing, repairing and maintaining said piping or plumbing; providing for appeals; containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2000.00); establishing an effective date of April 1, 2014; and ordering publication. (DEVELOPMENT SERVICES) (9226)
32. Consider an ordinance amending Title IV, "Building Regulations", Chapter 4, "Gas Code", of the City Code of the City of Midland, Texas, and adopting the 2012 International Fuel Gas Code as the Gas Code of the City of Midland;

providing minimum standards, provisions and requirements for gas piping and appliances; providing for the issuance of permits for the installation of said piping and appliances and the collection of inspection fees therefor; providing for bonding of persons engaged in the business of installing, repairing and maintaining said piping and appliances; regulating use of existing piping and appliances; providing for certificates of approval for piping work; providing for appeals; containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2,000.00); establishing an effective date of April 1, 2014; and ordering publication. (DEVELOPMENT SERVICES) (9227)

33. Consider an ordinance amending Title IV, "Building Regulations", Chapter 10, "Mechanical Code", of the City Code of Midland, Texas, and adopting the 2012 International Mechanical Code as the Mechanical Code of the City of Midland for the purpose of providing minimum standards, provisions and requirements for safe installation and maintenance of mechanical systems within the corporate limits of the City of Midland, Texas; providing for the inspection of said mechanical systems; providing for the issuance of permits for the installation of said mechanical systems and the collection of inspection fees therefor; providing for appeals; containing a cumulative clause; containing a savings and severability clause; providing for a maximum penalty or fine of two thousand dollars (\$2000.00); establishing an effective date of April 1, 2014; and ordering publication. (DEVELOPMENT SERVICES) (9228)
34. Consider an ordinance amending Title IV, "Building Regulations", Chapter 11, "Residential Code", of the City Code of the City of Midland, Texas, and adopting the 2012 edition of the International Residential Code, as the Residential Building Code for the City of Midland, Texas, for the purpose of regulating and controlling the design, construction, quality of materials, erection, installation, alteration, repair, location, relocation, replacement, Addition to, use or maintenance of one-and two-family dwellings and townhouses in the City of Midland, Texas, providing for the issuance of permits, the review of plans, the inspection of footings and foundations and framing, the collection of inspection fees therefor; containing a cumulative clause; containing a savings and severability clause; providing for a maximum fine or penalty of two thousand dollars (\$2,000.00); ordering publication; and establishing an effective date of April 1, 2014. (DEVELOPMENT SERVICES) (9229)

### **MISCELLANEOUS**

35. Consider an ordinance authorizing the issuance of "City of Midland, Texas, Tax and Limited Pledge Revenue Certificates of Obligation, Series 2014"; levying an ad valorem tax upon all taxable property within the City and providing for a limited pledge of the net revenues of the City's Waterworks and Sewer System for the payment of said Certificates; prescribing the terms and details of such Certificates and resolving other matters incident and related to the issuance,

sale, security, payment and delivery of said Certificates, including the approval of a Paying Agent/Registrar Agreement and the approval and distribution of an Official Statement pertaining thereto; and providing an effective date. (FINANCE) (9230)

36. Consider an ordinance authorizing the issuance of "City of Midland, Texas, General Obligation Refunding Bonds, Series 2014"; specifying the terms and features of said bonds; levying a continuing direct annual ad valorem tax for the payment of said bonds; providing for the redemption of certain outstanding obligations of the City; and resolving other matters incident and related to the issuance, sale, payment, and delivery of said bonds, including the approval and execution of a Paying Agent/Registrar Agreement and the approval and distribution of an Official Statement; and providing an effective date. (FINANCE) (9231)
37. Consider a motion approving a proposed preliminary plat of The Pines at Mira Vista, being a 21.85-acre tract of land out of Section 11, Block "X", H. P. Hilliard Survey, City and County of Midland, Texas. (Generally located on the west side of N. State Hwy 349, west of Pueblo.) (DEVELOPMENT SERVICES)
38. Consider a motion appointing a Mayor Pro Tempore.
39. Consider a motion making an appointment to the Tax Increment and Reinvestment Zone Board, Midland Development Corporation, Planning and Zoning Commission and consider motions making appointments to all other boards and commissions.

### **EXECUTIVE SESSION**

40. Pursuant to Texas Government Code §551.101, the Council will hold an Executive Session which is closed to the public to discuss the following matters as permitted under the following Texas Government Code Sections:
  - a. Section 551.074 Personnel Matters
    - a.1. Deliberate the employment, evaluation, compensation and duties of the City Manager, the City Attorney, the City Secretary, the Municipal Court Presiding Judge and the Municipal Court Associate Judge.
  - b. Section 551.072 Deliberation Regarding Real Property.
    - b.1. Discuss the purchase, exchange, lease or value of real property described as Lot 1 less 7.87 acres, Block 1, Westridge Park Addition, Section 1, an addition to the City of Midland, Midland County, Texas.

c. Section 551.071 Consultation with the City Attorney

- c.1. Discuss contemplated litigation involving approximately 508 acres of real property located in Section 28, Block 40, T-1-S, T&P RR Co. Survey, Midland County, Texas.

Respectfully Submitted,

Courtney B. Sharp  
City Manager

MEETING ASSISTANCE INFORMATION: The Midland City Hall and Council Chamber are wheelchair accessible. If you need special assistance to participate in this meeting, please contact the City Secretary's Office at (432) 685-7430. Notification 48 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to this meeting.



**MIDLAND CITY COUNCIL  
MINUTES  
January 13, 2014**

The City Council convened in a Special Session at the Midland Center, Midland, Texas, at 10:05 a.m. on January 13, 2014.

Council Members present: Mayor W. Wesley Perry, Council Member Jerry Morales (At-Large), Council Member Scott Dufford (At-Large), Mayor Pro Tem Jeff Sparks (District 1), Council Member John Love (District 2), Council Member John James (District 3), and Council Member Michael Trost (District 4).

1. Conduct Swearing-In Ceremony and all ancillary matters related thereto for the newly-elected Council Members.

The Midland Police Department Honor Guard presented the colors followed by the Pledge of Allegiance to the United States Flag.

The invocation was led by Monsignor Larry Droll of St. Ann's Catholic Church.

Mayor Perry presented a clock to outgoing Council Members Michael Trost and John James and thanked them for their dedicated service to the City of Midland.

Mayor Elect Jerry Morales presented a plaque and clock to outgoing Mayor Wes Perry and flowers to Roni Perry.

City Secretary Amy Turner administered the Oath of Office to newly elected Council Member Sharla Hotchkiss, District 3.

Judge Elizabeth Leonard of the 238th District Court administered the Oath of Office to newly elected Council Member J.Ross Lacy, District 4.

City Secretary Amy Turner administered the Oath of Office to newly elected Mayor Jerry F. Morales.

All of the business at hand having been completed, the meeting adjourned at 10:42 a.m.

PASSED AND APPROVED the 28th day of January, 2014.

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Jerry F. Morales, Mayor

ATTEST:

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Amy M. Turner, City Secretary

**MIDLAND CITY COUNCIL  
MINUTES  
January 14, 2014**

**BRIEFING SESSION**

The City Council convened in a Briefing Session in the basement conference room, City Hall, Midland, Texas, at 9:05 a.m. on January 14, 2014.

Council Members present: Mayor Jerry F. Morales, Council Member Scott Dufford (At-Large), Mayor Pro Tem Jeff Sparks (District 1), Council Member John Love (District 2), Council Member Sharla Hotchkiss (District 3), and Council Member J.Ross Lacy (District 4).

Staff members present: City Manager Courtney Sharp, City Attorney Keith Stretcher, Deputy City Manager Tommy Hudson, Assistant City Manager Jim Nichols, Assistant to the City Manager Robert Patrick, City Secretary Amy Turner, Development Services Director Charles Harrington, Police Chief Price Robinson, Finance Director Pam Simecka, Downtown Development Director Genora Young, Director of Airports Marv Esterly, Assistant Director of Airports Justine Ruff, Building Official Steve Thorpe, and Public Information Officer Sara Higgins.

2. Receive an update from Jay Edwards of Midland County Freshwater District No. 1 regarding the Clear Water Ranch Project.

Jay Edwards of Midland County Freshwater District No. 1 gave a brief overview of the project noting that the Clear Water Ranch was purchased last year and is located on the south end of Kermit. It has high quality water and will be blended with T-Bar water. A pump station will push the water through the transmission line and tie in at the southern end of T-Bar. It is expected to last as long as T-Bar.

Mr. Edwards provided a progress update on all aspects of the project noting that now the City has completed their water rate study the financing end of the project can move forward. The project is similar to T-Bar and is using many of the same companies. They expect to close financing in May and complete the project by the end of the year.

City Manager Sharp noted that Agenda Item No. 33 extends the deadline to December 31 and No. 33 deals with the rate structure asking for an increase of 5% in October 2014 and a 4.5% increase in October of 2015. These increases are expected to clear up the deficit in the water fund so approval can be obtained for this project from TCEQ.

1. Receive a presentation from Code Administration regarding possible changes to the mobile vendor ordinance.

Assistant City Manager Jim Nichols reported he was contacted about ordinances of rules of mobile food vendors. After discussing the issue with the City Manager, it was decided it was worth looking at. Today's purpose is to share some options and get feedback of where to go from here.

Building Official Steve Thorpe has had requests from several vendors to operate more freely throughout City and inquiries from several Council Members and vendors about some mobile food vendors not adhering to the current rules. He explained that currently permits are obtained from the Police Department and allow for vending for three days from a specific location for a \$4 fee. The police enforce the ordinance.

Mr. Thorpe shared pictures of current vendors who are operating in violation to current rules, some of whom have no permits. He reviewed some of the suggestions for changes and answered questions about the potential of a mobile food vendor park.

Council expressed interest in working with local restaurant owners and mobile food vendors to discuss the ideas presented. A suggestion was made to implement a mobile food vendor association that can police themselves. Another suggestion was made to implement a fine.

The foregoing agenda items were discussed by the City Council with no formal action taken. The Briefing Session was adjourned at 9:55 a.m.

### **REGULAR SESSION**

The City Council convened in regular session in the Council Chamber, City Hall, Midland, Texas, at 10:03 a.m., January 14, 2014.

Council Members present: Mayor Jerry F. Morales, Council Member Scott Dufford (At-Large), Mayor Pro Tem Jeff Sparks (District 1), Council Member John Love (District 2), Council Member Sharla Hotchkiss (District 3), and Council Member J.Ross Lacy (District 4).

Staff members present at the annex table: City Manager Courtney Sharp, City Attorney Keith Stretcher, Deputy City Manager Tommy Hudson, and Assistant City Manager Jim Nichols.

The Agenda Items were heard in the following order: 1, 2, 3, 4, 10, 11, 14, 16, 17, 18, 19, 20, 5, 6, 7, 8, 9, 12, 13, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35.

### **OPENING ITEMS**

1. Invocation - Pastor Robert Pase, Grace Lutheran Church
2. Pledge of Allegiance the United States Flag and Texas State Flag.

### **PRESENTATIONS**

3. Presentation of special events, organizations, individuals, or periods of time including, but not limited to:
  - a. Mayor Morales recognized the 2013 Christmas Parade Float Winners. Third place - Kent Kwik and Grace Lutheran Church; Second place - Crazy 8 Motorsports; First place - Girl Scouts of the Desert Southwest; Overall Award for Best Lighted Float - American Eagle Logistics LLC; Best City Department - Community Services. Special volunteer recognition - Joel Hawkins.

- b. Council Member Sparks presented a Proclamation for Crime Stoppers Month.

## **PUBLIC COMMENT**

4. Receive public comments where individuals may address the City Council on City related issues and projects. Any deliberation of or decision by the City Council regarding the item being discussed shall be limited to a motion to place the item on the agenda for a subsequent meeting. (Please limit remarks to no more than three minutes per person.)

Steven Garcia and Derek Shield of Yellow House Machinery addressed Agenda Item No. 8 asking that all bids not be rejected because there was adequate opportunity to object to the specifications. No objections were made until after the bids were opened. They did not want the City to set a precedent.

## **CONSENT AGENDA**

Council Member Dufford moved to approve Consent Agenda items 5 - 20 excluding 5a, 6, 7, 8, 9, 12, 13, 15; seconded by Council Member Lacy. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

10. Approved a resolution approving the Assignment, Assumption and Release Agreement of current Rental Car Lease Agreement from Lewis Transportation Group, LLC, dba Dollar Rent a Car/Thrifty Car Rental, to DTG Operations, Inc., (corporate owner of The Hertz Corporation). (AIRPORTS)

### **RESOLUTION NO. 2014-005**

RESOLUTION AUTHORIZING THE CITY MANAGER TO NEGOTIATE, APPROVE AND EXECUTE AN ASSIGNMENT, ASSUMPTION AND RELEASE AGREEMENT BETWEEN THE CITY OF MIDLAND, TEXAS, AND LEWIS TRANSPORTATION GROUP, LLC, D/B/A DOLLAR RENT A CAR/THRIFTY CAR RENTAL, A UTAH CORPORATION AND DTG OPERATIONS, INCORPORATED, AN OKLAHOMA CORPORATION REGARDING OPERATING A RENTAL CAR CONCESSIONS AT THE MIDLAND INTERNATIONAL AIRPORT

11. Approved a resolution authorizing the City Manager to negotiate, approve and execute an amendment to the agreement with the Midland County Fresh Water Supply District No. 1. (CITY ATTORNEY'S OFFICE)

### **RESOLUTION NO. 2014-006**

RESOLUTION AUTHORIZING THE CITY MANAGER TO NEGOTIATE, APPROVE AND EXECUTE AN AMENDMENT TO THE AGREEMENT WITH THE MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1 REGARDING THE DEVELOPMENT OF THE CLEARWATER RANCH IN WINKLER COUNTY, TEXAS; AND THE CLEARWATER RANCH IS APPROXIMATELY 6,745.7 ACRES, MORE OR LESS

14. Approved a resolution authorizing the annexation of property totaling approximately 4.99 acres into the Downtown Midland Management District. (DOWNTOWN

DEVELOPMENT)

RESOLUTION NO. 2014-009

RESOLUTION AUTHORIZING THE ANNEXATION OR INCLUSION OF APPROXIMATELY 4.99 ACRES INTO THE DOWNTOWN MIDLAND MANAGEMENT DISTRICT; SAID PROPERTY BEING FURTHER DESCRIBED AS LOT 1A, BLOCK 109, SECTION 6, ORIGINAL TOWN ADDITION, CITY OF MIDLAND, MIDLAND COUNTY, TEXAS AND LOTS 4, 5, 6R, 7R, 8 THROUGH 12, BLOCK 93, ORIGINAL TOWN ADDITION, CITY OF MIDLAND, MIDLAND COUNTY, TEXAS

16. Consider the following items:

- a. Approved a motion on a request by West Company of Midland, Inc. for the Lost Mountain Addition — Section 4 to approve items requested for deferral in the amount of \$34,307 and to accept \$8,577 in lieu of the associated public improvement guarantee. The subject property is located along the Passage Way right-of-way alignment approximately 1300 feet west of the future Garfield Street alignment.
- b. Approved a resolution authorizing the execution of a Public Improvement Development Agreement with 4C Stables, Inc. for the future design and construction of water distribution and paving improvements to serve the Lost Mountain Addition — Section 4; and appropriating funds therefor; said agreement being authorized by Section 395.081 of the Texas Local Government Code.

RESOLUTION NO. 2014-011

RESOLUTION AUTHORIZING THE EXECUTION OF A PUBLIC IMPROVEMENT DEVELOPMENT AGREEMENT WITH 4C STABLES, INC. FOR PAVING IMPROVEMENTS TO PASSAGE WAY AND WATER DISTRIBUTION IMPROVEMENTS TO LOST MOUNTAIN ADDITION, SECTION 4; AND APPROPRIATING FUNDS THEREFOR; SAID AGREEMENT BEING AUTHORIZED BY SECTION 395.081 OF THE TEXAS LOCAL GOVERNMENT CODE

17. Approved a resolution to accept Midland Development Corporation funds in the amount of \$300,000 and allocate funds in order for the City of Midland to design and construct a 36"Ø bore under Interstate 20 at Midkiff Road, and appropriate funds. (ENGINEERING SERVICES)

RESOLUTION NO. 2014-012

RESOLUTION APPROVING AN ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE MIDLAND DEVELOPMENT CORPORATION AND THE CITY OF MIDLAND FOR THE INSTALLATION OF A BORE AND WATER MAIN UNDER INTERSTATE 20 NEAR MIDKIFF ROAD, AS AUTHORIZED BY CHAPTER 501 OF THE TEXAS LOCAL GOVERNMENT CODE; AND APPROPRIATING FUNDS THEREFOR

18. Approved a resolution to accept Midland Development Corporation funds in the amount of \$200,000 and allocate funds in order for the City of Midland to design and construct a 36"Ø bore under Interstate 20 at Midland Road, and appropriate funds. (ENGINEERING

SERVICES)

RESOLUTION NO. 2014-014

RESOLUTION APPROVING AN ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE MIDLAND DEVELOPMENT CORPORATION AND THE CITY OF MIDLAND FOR THE INSTALLATION OF A BORE AND WATER MAIN UNDER INTERSTATE 20 NEAR MIDLAND DRIVE, AS AUTHORIZED BY CHAPTER 501 OF THE TEXAS LOCAL GOVERNMENT CODE; AND APPROPRIATING FUNDS THEREFOR

19. Approved a resolution approving a Right of Way License with Dawson Geophysical to conduct a 3D geophysical survey on 5 acres of City property located at Section 43, Block 40, T-1-S, T&P RR Co. Survey, Midland County, Texas. (UTILITIES)

RESOLUTION NO. 2014-015

RESOLUTION AUTHORIZING THE EXECUTION OF A SIX-MONTH TEMPORARY RIGHT-OF-WAY LICENSE WITH DAWSON GEOPHYSICAL COMPANY, FOR SEISMIC TESTING ACROSS CITY-OWNED PROPERTY IN SECTION 43, BLOCK 40, T-1-S, MIDLAND COUNTY, TEXAS, NEAR FM 1788

20. Approved a resolution approving a Right of Way License with Dawson Geophysical to conduct a 3D Geophysical Survey on 4,539.67 acres of City property located at T-Bar Ranch. (UTILITIES)

RESOLUTION NO. 2014-016

RESOLUTION AUTHORIZING THE EXECUTION OF A SIX-MONTH TEMPORARY RIGHT-OF-WAY LICENSE WITH DAWSON GEOPHYSICAL COMPANY, FOR SEISMIC TESTING ACROSS CITY-OWNED PROPERTY IN BLOCK C-24, SECTIONS 2, 3, 4, 5, 6, 7, 12, 17 AND 18, LOVING COUNTY, TEXAS, AT T-BAR RANCH

The following items were pulled from Consent Agenda and considered individually.

5. Consider a motion approving the following minutes:
  - a. Regular meeting of December 17, 2013.

Council Member Love moved to approve the minutes of the Regular meeting of December 17, 2013; seconded by Council Member Dufford. The motion carried by the following vote: AYE: Love, Sparks, Morales, Dufford. NAY: None. ABSTAIN: Hotchkiss, Lacy. ABSENT: None.

6. Consider a resolution amending authorized representatives on City of Midland Texpool Investment Account. (FINANCE)

RESOLUTION NO. 2014-001

RESOLUTION AMENDING THE AUTHORIZED REPRESENTATIVES OF THE CITY OF MIDLAND, TEXAS, REGARDING INVESTMENTS OF PUBLIC FUNDS; AND THAT PAM SIMECKA, THE CITY'S NEW DIRECTOR OF FINANCE, REPLACES BOB MCNAUGHTON AS A REPRESENTATIVE OF THE CITY OF MIDLAND ON THE TEXAS LOCAL GOVERNMENT INVESTMENT POOL (TEXPOOL/TEXPOOL PRIME)

Council Member Love asked who the other signers on the account were and inquired if they previously were on the account.

Finance Director Pam Simecka reported Thomas Howell is the Comptroller and Charlene Fox is the Accounting Manager and that they were both previously on the other resolution as signers. She emphasized the only change was removing retired Finance Director Bob McNaughton and adding her name.

Council Member Love moved to adopt Resolution No. 2014-001; seconded by Council Member Lacy. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

7. Consider a resolution approving the sale of real property described as Lot 8, Block 21, Midland Heights Addition, (generally known as 1208 West New Jersey Street) for the Community Development Division. (PURCHASING)

RESOLUTION NO. 2014-002

RESOLUTION AUTHORIZING THE SALE OF REAL PROPERTY DESCRIBED AS LOT 8, BLOCK 21, MIDLAND HEIGHTS ADDITION, AN ADDITION TO THE CITY OF MIDLAND, MIDLAND COUNTY, TEXAS, (GENERALLY KNOWN AS 1208 WEST NEW JERSEY STREET, CITY OF MIDLAND, MIDLAND COUNTY, TEXAS), TO SOLEDAD F. NIETO OF MIDLAND, TEXAS, FOR \$70,000.00; AUTHORIZING THE CITY MANAGER TO NEGOTIATE AND EXECUTE DEED DOCUMENTS; ALL CLOSING COSTS TO BE BORNE BY SOLEDAD F. NIETO; CLOSING SHALL BE CONDUCTED AT LONE STAR ABSTRACT & TITLE CO., INC. OF MIDLAND, TEXAS; AND ORDERING RECORDATION BY THE CITY SECRETARY; AND THE CITY MANAGER IS HEREBY AUTHORIZED TO SELECT THE TYPE OF DEED TO TRANSFER THE PROPERTY; AND PRIOR TO CLOSING, SOLEDAD F. NIETO SHALL PAY ALL MUNICIPAL UTILITY LIENS AGAINST THE PROPERTY; AND THE CITY OF MIDLAND SHALL RESERVE THE MINERALS, IF ANY, IN THE DEED

Council Member Love asked what liens existed and in what amounts. Community Development Manager reported a title search revealed there was one water lien in the amount of \$271.

Council Member Love moved to adopt Resolution No. 2014-002; seconded by Council Member Sparks. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

8. Consider a resolution rejecting all bids received for the purchase of two backhoes, two 3-CY rubber tire loaders and two motor graders and authorizing re-advertisement for bids for the Garage Division. (PURCHASING)

RESOLUTION NO. 2014-003

RESOLUTION REJECTING ALL BIDS RECEIVED FOR BID NO. 7248-14 FOR THE PURCHASE OF 2 BACKHOES, 2-3 CY RUBBER TIRE LOADERS, AND 2 MOTOR GRADERS; AND AUTHORIZING RE-ADVERTISEMENT FOR BIDS FOR THE GARAGE DIVISION

Council Member Dufford noted he wanted staff to respond to the question of precedent

setting expressed by the gentlemen during public comment.

Assistant to the City Manager Robert Patrick reported that in specifications they try to ensure that at least two local vendors are able to bid. The specs that went out were too specific and basically limited it so only John Deere could be bid. Therefore it created an unfair advantage for one of the vendors. The City reserves the right on all bids to reject all bids. In this particular situation, staff felt rejecting all bids was the right thing to do by eliminating an unfair advantage.

Council Member Dufford moved to adopt Resolution No. 2014-003; seconded by Council Member Love. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

9. Consider a resolution approving the purchase of a single axle cab and chassis with pothole patcher body from Southwest International Trucks, Inc. through Buyboard contract #358-10 for a total cost of \$153,982.60. (PURCHASING)

RESOLUTION NO. 2014-004

RESOLUTION APPROVING THE PURCHASE OF A SINGLE AXLE CAB AND CHASSIS WITH POTHOLE PATCHER BODY FROM SOUTHWEST INTERNATIONAL TRUCKS, INC. THROUGH BUYBOARD AT A TOTAL COST OF \$153,982.60; THIS ITEM WAS NOT BID BUT PURCHASED THROUGH A COOPERATIVE PURCHASING PROGRAM

Council Member Love asked if the purchase was a replacement or a new item. Transportation Manager Gary Saunders reported it was the replacement of a piece of equipment from 1996 and was an upgrade.

Council Member Dufford moved to adopt Resolution No. 2014-004; seconded by Council Member Lacy. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

12. Consider a resolution authorizing the City Manager to negotiate, approve and execute the MOUTD Management Services Agreement with McDonald Transit Associates, Inc. (CITY MANAGER'S OFFICE)

RESOLUTION NO. 2014-007

RESOLUTION AUTHORIZING THE CITY MANAGER TO NEGOTIATE, APPROVE AND EXECUTE A CONTRACT BETWEEN THE MIDLAND-ODESSA URBAN TRANSIT DISTRICT AND MCDONALD TRANSIT ASSOCIATES, INCORPORATED, THE CITY OF ODESSA, AND THE CITY OF MIDLAND; THIS CONTRACT IS A MANAGEMENT CONTRACT FOR THE MOTORBUS TRANSPORTATION SYSTEM LOCATED IN MIDLAND COUNTY AND ECTOR COUNTY, TEXAS; AND RESCINDING RESOLUTION NUMBER 2013-426

Council Member Lacy noted he needed to see changes to the contract before he would feel comfortable voting for the item. Council Member Love asked what the changes were.

City Attorney Stretcher noted that this item was originally approved by Council in November. Since that time changes were discussed with the City of Odessa and



McDonald Transit. He reported there is no contract and the subject resolution authorizes the City Manager to negotiate, approve and execute a contract. If Council desires to see the contract before it is approved he suggested an amendment be made to authorize the City Manager to negotiate and bring back the contract to Council for approval.

Council Member Sparks suggested that since it is a legal document the City Attorney should negotiate and bring back the contract.

City Manager Sharp reported that when EZ Rider was first set up, Odessa took the lead on the legal and financial side and they were dependent on Odessa to negotiate the contract and terms. The changes that have been suggested besides correcting typos are to add additional language at the request of McDonald Transit for insurance purposes. The management fees are scheduled to increase from the first year at \$162,000 to \$180,000 by the 5th year of the contract noting it does not increase the City's commitment of \$250,000 per year.

City Attorney Stretcher noted he would keep the City Manager and Council Members informed of the progress, and would bring back for Council approval at the January 28 meeting.

Council Member Sparks moved to adopt Resolution No. 2014-007 with the amendment to have the City Attorney negotiate the contract and bring back for Council approval at the next meeting; seconded by Council Member Lacy. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

13. Consider a resolution authorizing an amendment to the contract with Permian Basin Petroleum Museum not to exceed \$250,000 to promote tourism and the hotel industry in Midland. (CITY SECRETARY'S OFFICE)

#### RESOLUTION NO. 2014-008

RESOLUTION AUTHORIZING THE EXECUTION OF A CONTRACT WITH THE PERMIAN BASIN PETROLEUM MUSEUM IN AN AMOUNT NOT TO EXCEED \$250,000.00 FOR ADVERTISING, PROMOTION AND SOLICITATION OF OIL INDUSTRY ACTIVITIES IN THE CITY OF MIDLAND; AND TO PROMOTE TOURISM AND THE CONVENTION AND HOTEL INDUSTRY

Council Member Dufford noted he pulled the item because he would like the representatives from the Petroleum Museum to speak about their renovations and to consider increasing their match.

Kathy Shannon, 1611 W. Pecan, reported the museum is undergoing an \$18 million renovation where they are completely redoing their east and north wings. They are the top museum and top tourist attraction in Midland and attract about 40,000 visitors each year. Their new exhibit will address the massive changes in technology that has brought the current boom Midland is experiencing and they are hoping to better highlight the industry. The exhibit is \$12 million and they are also doing another \$6.5 million of infrastructure improvements. They have currently raised \$15.6 million.

Council Member Dufford moved to adopt Resolution No. 2014-008 with the amendment

to increase the matching grant to up to \$500,000; seconded by Council Member Hotchkiss. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

15. Consider a resolution authorizing a Right-of-Way Agreement and a Surface Damage Agreement with WTG Gas Processing, LP, for the installation and maintenance of one (1) pipeline, not to exceed twelve (12) inches in diameter, for petroleum and petroleum by-products, located in Block 39, Section 36, T-1-S, T&P RR Survey Co, Martin County, Texas. (ENGINEERING SERVICES)

#### RESOLUTION NO. 2014-010

RESOLUTION AUTHORIZING A RIGHT-OF-WAY LICENSE BETWEEN THE CITY OF MIDLAND, TEXAS AND WTG GAS PROCESSING; SAID RIGHT-OF-WAY LICENSE IS FOR ENTERING THE CITY OF MIDLAND'S RIGHT-OF-WAY FOR THE PURPOSE OF PLACING, INSTALLING, CONSTRUCTING, OPERATING, REPAIRING, MAINTAINING, REPLACING AND REMOVING A POLY PIPELINE FOR PETROLEUM AND PETROLEUM BY PRODUCTS AND TO HAVE THE RIGHT OF INGRESS AND EGRESS AT CONVENIENT POINTS FOR SUCH PURPOSE; THE PROPERTY IS LOCATED WITHIN THE CITY OF MIDLAND RIGHT-OF-WAY, SECTION 36, BLOCK 39, T-1-N, T&P RR CO. SURVEY, MARTIN COUNTY, TEXAS; THE LICENSE TERM IS FOR FIVE (5) YEARS, COMMENCING WITH THE DATE OF THIS LICENSE AND SHALL AUTOMATICALLY RENEW AT THE END OF THE TERM FOR ONE ADDITIONAL FIVE (5) YEAR TERM UPON 120 DAYS WRITTEN REQUEST PRIOR TO EXPIRATION

Engineering Services Director Jose Ortiz reported he received a call from the applicant requesting changes to the contract. Staff is asking the item be moved to a future date.

Council Member Dufford moved to defer the item to an indefinite time; seconded by Council Member Love. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

## SECOND READINGS

21. Consider an ordinance on second reading on a request by Sam's Real Estate Business Trust for a zone change from PD, Planned District for a Shopping Center to an Amended Planned District on Lot 1A, Block 2, Westridge Park Addition, Section Three less 2.352-acres, City and County of Midland, Texas. (Generally located on the northeast corner of the intersection of Tradewinds Boulevard and Westridge Boulevard.) (DEVELOPMENT SERVICES) (First reading held on December 17, 2013.)

#### ORDINANCE NO. 9215

AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING LOT 1A, BLOCK 2, WESTRIDGE PARK ADDITION, SECTION THREE LESS 2.352 ACRES, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED PD, PLANNED DISTRICT FOR A SHOPPING CENTER, TO BE USED AS AN AMENDED PLANNED DISTRICT (GENERALLY LOCATED ON THE NORTHEAST CORNER OF THE INTERSECTION OF TRADEWINDS BOULEVARD AND WESTRIDGE BOULEVARD); PROVIDING FOR SUCH USE TO BE SUBJECT TO CERTAIN SPECIAL CONDITIONS AND RESTRICTIONS AS SET OUT HEREIN;

CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION

Deputy City Secretary Adriana Moreno read the caption of Ordinance No. 9215.

Council Member Sparks moved to approve the second and final reading of Ordinance No. 9215 in accordance with the Charter of the City of Midland; seconded by Council Member Lacy.

Council Member Hotchkiss noted she would abstain from voting on items that were approved while she was on Planning & Zoning.

The motion carried by the following vote: AYE: Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: Hotchkiss. ABSENT: None.

22. Consider an ordinance on second reading on a request by Sunrise at Fairgrounds, LLC for a zone change from PD, Planned District for a Shopping Center to an Amended Planned District on Lot 2, Block 84, East Midland Addition, Section 16, City and County of Midland, Texas. (Generally located on the west side of N. Fairgrounds Road, approximately 950 feet south of Golf Course Road.) (DEVELOPMENT SERVICES) (First reading held on December 17, 2013.)

#### ORDINANCE NO. 9216

AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING LOT 2, BLOCK 84, EAST MIDLAND ADDITION, SECTION 16, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED PD, PLANNED DISTRICT FOR A HOUSING DEVELOPMENT, TO BE USED AS AN AMENDED PLANNED DISTRICT (GENERALLY LOCATED ON THE WEST SIDE OF NORTH FAIRGROUNDS ROAD, APPROXIMATELY 950 FEET SOUTH OF GOLF COURSE ROAD); PROVIDING FOR SUCH USE TO BE SUBJECT TO CERTAIN SPECIAL CONDITIONS AND RESTRICTIONS AS SET OUT HEREIN; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION

Deputy City Secretary Adriana Moreno read the caption of Ordinance No. 9216.

Council Member Sparks moved to approve the second and final reading of Ordinance No. 9216 in accordance with the Charter of the City of Midland; seconded by Council Member Dufford. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

23. Consider an ordinance on second reading on a request by Raquel Alvarado for a Specific Use Permit with Term for the sale of all alcoholic beverages, for on-premises consumption, in a restaurant, on a 4.896-acre tract of land out of Section 33, Block 39, T-1-S, T&P RR Co Survey, City and County of Midland, Texas. (Generally located on the southeast corner of the intersection of South Midkiff Road and West Wall Street.) (DEVELOPMENT SERVICES) (First reading held on December 17, 2013.)

#### ORDINANCE NO. 9217

AN ORDINANCE CHANGING THE ZONING USE CLASSIFICATION OF THE PROPERTY DESCRIBED AS A 4.896-ACRE TRACT OF LAND OUT OF SECTION 33, BLOCK 39, T-1-S, T&P RR CO. SURVEY, CITY AND COUNTY OF MIDLAND, TEXAS (GENERALLY LOCATED ON THE SOUTHEAST CORNER OF THE INTERSECTION OF SOUTH MIDKIFF ROAD AND WEST WALL STREET), WHICH IS PRESENTLY ZONED LR-3, LOCAL RETAIL DISTRICT, IN PART, AND C-3, COMMERCIAL DISTRICT, IN PART, BY PERMITTING SAID PROPERTY TO BE USED UNDER A SPECIFIC USE PERMIT WITH TERM FOR THE SALE OF ALL ALCOHOLIC BEVERAGES IN A RESTAURANT FOR ON-PREMISES CONSUMPTION; MAKING SAID PERMIT SUBJECT TO CERTAIN CONDITIONS AND RESTRICTIONS CONTAINED HEREIN; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION

Deputy City Secretary Adriana Moreno read the caption of Ordinance No. 9217.

Council Member Love moved to approve the second and final reading of Ordinance No. 9217 in accordance with the Charter of the City of Midland; seconded by Council Member Sparks.

Assistant to the City Manager Robert Patrick answered a question about the difference in the ordinance versus the memo as to the seating capacity. He noted the applicant is increasing their seating capacity which explains the difference.

The motion carried by the following vote: AYE: Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: Hotchkiss. ABSENT: None.

#### **PUBLIC HEARINGS**

24. At approximately 10:30 A.M. hold a public hearing regarding a proposed oil and gas permit to HighSky Partners, LLC (Operator), for a Permit to Drill an Oil & Gas Well within the City limits, (Ramcon No. 1201D) located 1,476 feet from south line and 1,784 feet from west line, Section 12, Block "X", H.P. Hilliard Survey, Midland County, Texas. (Generally located on the east side of State Highway 349, approximately 1,476 feet north of the east extension of Mockingbird Lane.) This is a public hearing only. No further action will be taken. (DEVELOPMENT SERVICES)

Oil & Gas Compliance Officer Ron Jenkins gave a brief overview of the item noting this application is one of four on the same site area. The Oil & Gas Advisory Committee reviewed the application and made recommendations to fix the application. HighSky Partners addressed the issues. The applicant is requesting a waiver from the Road Repair Agreement because they will not be using any City streets but only the State Highway. There will be four directional wells from the same site spaced about 50 feet apart.

Mayor Morales opened the public hearing at 10:58 a.m. There being no one present wishing to speak, the public hearing was immediately closed. No further action was taken on this item.

25. At approximately 10:33 A.M. hold a public hearing regarding a proposed oil and gas permit to HighSky Partners, LLC (Operator), for a Permit to Drill an Oil & Gas Well within the City limits, (Cowden No. 1202D) located 1,476 feet from south line and 1,834 feet from west line, Section 12, Block "X", H.P. Hilliard Survey, Midland County, Texas. (Generally located on the east side of the State Highway 349, approximately 1,476 feet north of the east extension of Mockingbird Lane.) This is a public hearing only. No further action will be taken. (DEVELOPMENT SERVICES)

Oil & Gas Compliance Officer Ron Jenkins gave a brief overview of the item noting it is the exact same information as the previous item. He noted that the developer and the operator have worked out an agreement for the location of flow lines. He explained that before staff comes to Council they try to have a land use agreement in place that both parties are comfortable with. He noted that the land development will need to get a variance.

Mayor Morales opened the public hearing at 11:00 a.m. There being no one present wishing to speak, the public hearing was immediately closed. No further action was taken on this item.

26. At approximately 10:36 A.M. hold a public hearing regarding a proposed oil and gas permit to HighSky Partners, LLC (Operator), for a Permit to Drill an Oil & Gas Well within the City limits, (Cowden No. 1203D) located 1,476 feet from south line and 1,884 feet from west line, Section 12, Block "X", H.P. Hilliard Survey, Midland County, Texas. (Generally located on the east side of the State Highway 349, approximately 1,476 feet north of the east extension of Mockingbird Lane.) This is a public hearing only. No further action will be taken. (DEVELOPMENT SERVICES)

Oil & Gas Compliance Officer Ron Jenkins gave a brief overview of the item noting it was the exact same information as the other wells.

Mayor Morales opened the public hearing at 11:00 a.m. There being no one present wishing to speak, the public hearing was immediately closed. No further action was taken on this item.

27. At approximately 10:39 A.M. hold a public hearing regarding a proposed oil and gas permit to HighSky Partners, LLC (Operator), for a Permit to Drill an Oil & Gas Well within the City limits, (Ramcon No. 1204D) located 1,476 feet from south line and 1,934 feet from west line, Section 12, Block "X", H.P. Hilliard Survey, Midland County, Texas. (Generally located on the east side of the State Highway 349, approximately 1,476 feet north of the east extension of Mockingbird Lane.) This is a public hearing only. No further action will be taken. (DEVELOPMENT SERVICES)

Oil & Gas Compliance Officer gave a brief overview of the item noting it was the same information as the previous three wells.

Mayor Morales opened the public hearing at 11:01 a.m. There being no one present wishing to speak, the public hearing was immediately closed. No further action was taken on this item.

28. At approximately 10:42 A.M. hold a public hearing and consider an ordinance on a request by Stanley Beard/ Corky Allen for a zone change from AE, Agriculture Estate

District to PD, Planned District for a Housing Development on a 21.85-acre tract of land out of Section 11, Block "X", H.P. Hilliard Survey, City and County of Midland, Texas. (Generally located on the west side of North State Highway 349, west of Pueblo.) (DEVELOPMENT SERVICES)

ORDINANCE NO. 9218

AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING A 21.85-ACRE TRACT OF LAND OUT OF SECTION 11, BLOCK "X", H.P. HILLIARD SURVEY, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED AE, AGRICULTURE ESTATE DISTRICT, TO BE USED AS A PD, PLANNED DISTRICT FOR A HOUSING DEVELOPMENT (GENERALLY LOCATED ON THE WEST SIDE OF NORTH STATE HIGHWAY 349, WEST OF PUEBLO); CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION

Development Services Director Charles Harrington gave a brief overview of the item noting a request was made on behalf of the applicant to rezone the property to allow for smaller lots noting alleys would be included as part of this development continuation.

Council Member Lacy asked what the average square footage was. Development Services Director Harrington noted it was significantly larger. Council Member Dufford noted it has to be a minimum of 2,300 square feet.

Mayor Morales opened the public hearing at 11:05 a.m.

John Newton, 4908 N. Midkiff, reported he was the engineer on the project. He stated the lots would be a minimum of 5,000 square feet and a minimum building area of 2,300 square feet. He described some of the common areas and the entrance that would include 20 foot pines with a six foot fence made of split face CMU of natural earth tones. The development would be similar to the Mira Vista subdivision located to the south.

Corky Allen, 5001 Mira Vista Circle, reported the vision is a Mira Vista style house with smaller lot sizes because they are trying to be very water conscious but will still have pretty landscaping. Midland is suffering for nicer homes and their goal is to fulfill that need. He reported there are some bigger lots and they will accommodate requests for larger homes. There will be both single and two story homes.

There being no one else wishing to speak, the public hearing was closed at 11:10 a.m.

Deputy City Secretary Adriana Moreno read the caption of Ordinance No. 9218.

Council Member Sparks moved approval of the first of two readings of Ordinance No. 9218 in accordance with the Charter of the City of Midland; seconded by Council Member Love. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

29. At approximately 10:45 A.M. hold a public hearing and consider an ordinance on a request by Pulman, Cappuccio, Puller, Benson & Jones, LLP for a zone change from O-1, Office District to PD, Planned District for a Office Center on Lots 2 and 3, Block 1,

The Vineyard Addition, Section 3, City and County of Midland, Texas. (Generally located on the west side of Holiday Hill Road, approximately 800 feet north of Sherwood Drive.) (DEVELOPMENT SERVICES)

ORDINANCE NO. 9219

AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING LOTS 2 AND 3, BLOCK 1, THE VINEYARD ADDITION, SECTION 3, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED O-1, OFFICE DISTRICT, TO BE USED AS A PD, PLANNED DISTRICT FOR AN OFFICE CENTER (GENERALLY LOCATED ON THE WEST SIDE OF HOLIDAY HILL ROAD, APPROXIMATELY 800 FEET NORTH OF SHERWOOD DRIVE); PROVIDING FOR SUCH USE TO BE SUBJECT TO CERTAIN SPECIAL CONDITIONS AND RESTRICTIONS AS SET OUT HEREIN; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION

Development Services Director Charles Harrington gave a brief overview of the item noting the applicant is wanting to rezone lots to allow for more height and will protect the adjoining properties to the east. Planning & Zoning passed this item unanimously.

Mayor Morales opened the public hearing at 11:13 a.m.

Buck Benson, 6101 Holiday Hill Road, reported that due to a demand for office space they will be building a three-story office building on the far end of the property.

There being no one present wishing to speak, the public hearing was closed at 11:14 a.m.

Deputy City Secretary Adriana Moreno read the caption of Ordinance No. 9219.

Council Member Lacy moved approval of the first of two readings of Ordinance No. 9219 in accordance with the Charter of the City of Midland; seconded by Council Member Sparks. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

30. At approximately 10:48 A.M. hold a public hearing and consider an ordinance on a request by Jeff Benson for a zone change from PD, Planned District for a Shopping Center to Amended Planned District, on Lot 1A, Block 2, Gateway Plaza, Section 3, City and County of Midland, Texas. (Generally located near the southeast corner of the intersection of Liberty Drive and Starboard Drive.) (DEVELOPMENT SERVICES)

ORDINANCE NO. 9220

AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING LOT 1A, BLOCK 2, GATEWAY PLAZA, SECTION 3, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED PD, PLANNED DISTRICT FOR A SHOPPING CENTER, TO BE USED AS AN AMENDED PLANNED DISTRICT (GENERALLY LOCATED ON THE SOUTHEAST CORNER OF THE INTERSECTION OF LIBERTY DRIVE AND STARBOARD DRIVE); PROVIDING FOR

SUCH USE TO BE SUBJECT TO CERTAIN SPECIAL CONDITIONS AND RESTRICTIONS AS SET OUT HEREIN; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION

Development Services Director Charles Harrington gave a brief overview of the item noting the applicant was constructing additional storage to house concession items. The building would be of similar construction at a lower height. The item was reviewed and received unanimous approval at Planning & Zoning.

Mayor Morales opened the public hearing at 11:17 a.m. There being no one present wishing to speak, the public hearing was immediately closed.

Deputy City Secretary Adriana Moreno read the caption of Ordinance No. 9220.

Council Member Love moved approval of the first of two readings of Ordinance No. 9220 in accordance with the Charter of the City of Midland; seconded by Council Member Sparks. The motion carried by the following vote: AYE: Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: Hotchkiss. ABSENT: None.

31. At approximately 10:51 A.M. hold a public hearing and consider a resolution on a request by Arcelia Renteria for an extension for a Special Temporary Land Use Permit for a Manufactured Home on Lot 9, Block 1, Holloway, City and County of Midland, Texas. (Generally located on the east side of Terrell Street, approximately 150 feet south of Cuthbert Avenue.) (DEVELOPMENT SERVICES)

#### RESOLUTION NO. 2014-017

RESOLUTION AUTHORIZING A TEMPORARY SPECIAL PERMIT FOR A MANUFACTURED HOME ON LOT 9, BLOCK 1, HOLLOWAY, CITY AND COUNTY OF MIDLAND, TEXAS (GENERALLY LOCATED ON THE EAST SIDE OF TERRELL STREET, APPROXIMATELY 150 FEET SOUTH OF CUTHBERT AVENUE)

Development Services Director Charles Harrington gave a brief overview of the item noting the applicant was requesting an additional two years due to medical reasons. The original permit was issued in 2005 and was renewed in 2007, 2009 and 2011. He noted a doctor's prescription was included in the packet showing the need for continued service. No letters of objection had been received and Planning & Zoning recommended approval.

Mayor Morales opened the public hearing at 11:20 a.m.

Areli Ruiz, 1204 N. Terrace, asked council to issue the permit.

There being no one present wishing to speak, the public hearing was closed at 11:21 a.m.

Council Member Love moved to adopt Resolution No. 2014-017; seconded by Council Member Dufford. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.



## MISCELLANEOUS

32. Consider an ordinance on a request by Kevin Leary & Borgata Partners, LLC for the vacation of a 0.126-acre portion of the right-of-way of Holiday Hill Road adjacent to Lot 1, Block 2, Grandridge Park Addition, Section 1, City and County of Midland, Texas. (Generally located on the west side of the intersection of Holiday Hill Road and North Loop 250 West.) (DEVELOPMENT SERVICES)

### ORDINANCE NO. 9221

AN ORDINANCE VACATING AND ABANDONING A 0.126-ACRE PORTION OF HOLIDAY HILL ROAD RIGHT-OF-WAY ADJACENT TO LOT 1, BLOCK 2, GRANDRIDGE PARK ADDITION, SECTION 1, CITY AND COUNTY OF MIDLAND, TEXAS (GENERALLY LOCATED ON THE WEST SIDE OF THE INTERSECTION OF HOLIDAY HILL ROAD AND NORTH LOOP 250 WEST); ADOPTING THE APPRAISAL BY THE CITY MANAGER OF \$8,235.00; RETAINING A GENERAL PUBLIC UTILITY EASEMENT; AND ORDERING RECORDATION BY THE CITY SECRETARY

Development Services Director Harrington gave a brief overview of the item noting that this will vacate an excess portion of street right of way to allow for additional parking. Engineering has no problems with abandoning this right of way.

Council Member Hotchkiss expressed concern about traffic backing up into the street at other Starbucks locations and asked if this would cure that problem.

Andrew Mellon, 1909 W. Wall, reported that is the exact reason for this request. It will allow for an extra lane for queuing noting this should help with that situation. Construction will begin as soon as the permit is issued.

Deputy City Secretary Adriana Moreno read the caption of Ordinance No. 9221.

Council Member Love moved approval of the first of two readings of Ordinance No. 9221 in accordance with the Charter of the City of Midland; seconded by Council Member Hotchkiss. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

33. Consider amending Ordinance 9214, Title III, "Departments", Chapter 1, "Water Department" Section 2 "Rates", Subsection (A) "Customers Inside of City Limits", of the City Code of Midland, Texas and ordering publication. (UTILITIES)

### ORDINANCE NO. 9222

AN ORDINANCE AMENDING TITLE III, "DEPARTMENTS", CHAPTER 1, "WATER DEPARTMENT", SECTION 2, "RATES," OF THE CITY CODE OF MIDLAND, TEXAS, SO AS TO CHANGE THE RATES CHARGED FOR WATER AND SEWER SERVICES; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; AND ORDERING PUBLICATION; AND THE CITY MANAGER SHALL NOTIFY ALL CUSTOMERS OUTSIDE THE CITY LIMITS AS REQUIRED BY STATE LAW; AND RESCINDING ORDINANCE NUMBER 9214 ON THE DATE THIS ORDINANCE BECOMES EFFECTIVE

Deputy City Secretary Adriana Moreno read the caption of Ordinance No. 9222.

Council Member Lacy moved approval of the first of two readings of Ordinance No. 9222 in accordance with the Charter of the City of Midland; seconded by Council Member Love.

Council Member Sparks reported that this item does not change the water rates for this year. City Manager Courtney Sharp noted this item will address the Attorney General's concern regarding the deficit and will go into effect October 2015.

The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

34. Consider a motion making appointments to the Planning and Zoning Commission, Midland Development Corporation, and the Tax Increment and Reinvestment Zone Board, and appointing a Chair to the Tax Increment and Reinvestment Zone Board.

Council Member Dufford moved to appoint Brent Hilliard to replace Laura Roman on the Midland Development Corporation; seconded by Council Member Lacy. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

Council Member Lacy moved to appoint John Kennedy as the Chair of the Tax Increment Reinvestment Zone Board; seconded by Council Member Love. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

Council Member Love moved to change Chase Gardaphe and Becky Ferguson from alternates to regular members on the Planning & Zoning Board; seconded by Council Member Hotchkiss. The motion carried by the following vote: AYE: Hotchkiss, Love, Sparks, Morales, Dufford, Lacy. NAY: None. ABSTAIN: None. ABSENT: None.

Council Member Love moved to appoint Joshua Sparks to the Planning & Zoning Board; seconded by Council Member Lacy. The motion carried by the following vote: AYE: Hotchkiss, Love, Morales, Dufford, Lacy. NAY: None. ABSTAIN: Sparks. ABSENT: None.

Discussion ensued about recommending Becky Ferguson as Chair of Planning & Zoning and Robert Rendall as chair of the Midland Development Corporation.

## **EXECUTIVE SESSION**

35. Mayor Morales reported that pursuant to Texas Government Code §551.101, the Council will hold an Executive Session which is closed to the public to discuss the following matters as permitted under the following Texas Government Code Sections:

a. Section 551.072 Deliberation Regarding Real Property.

- a.1. Discuss the sale, lease and value of approximately 396 acres of real property located in Sections 14 and 15, Block 39, T-1-S, Midland, Midland County, Texas.

Mayor Morales recessed the meeting to Executive Session at 11:44 a.m.

All of the business at hand having been completed, the meeting adjourned at 12:44 p.m.

PASSED AND APPROVED the 28th day of January, 2014.

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Jerry F. Morales, Mayor

ATTEST:

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Amy M. Turner, City Secretary



# City Council Agenda

Approved for Agenda:  
THudson  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Regina Stephenson, Purchasing Manager

**SUBJECT:** Consider a resolution authorizing a contract for labor, material, equipment and supervision necessary to purchase and install Ball Field Lighting for Hogan Park Fields #1, #2, #8 and Simons Field from MUSCO Lighting, LLC through Buy Board contract 346-10, in the amount of \$773,400.00 for the Community Services Department and appropriating funds therefore.

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## **Purpose:**

Approval of a resolution authorizing a contract for the purchase and installation of ball field lighting at Hogan Park Fields #1, #2, #8 and Simons Field.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

\$773,400.00 from the Hotel/Motel Tax Fund

## **Discussion:**

Upgrading the lighting at ball fields #1, #2, #8 and Simons Field at Hogan Park will facilitate the use of these ball fields by extending the playing time each day and will allow for additional ball games. This purchase is available through the Buyboard. We are members of this cooperative and Subchapter F, Section 271.102 of the Local Government Code provides that a local government may participate in a cooperative purchasing program and that purchasing goods or services under Subchapter F satisfies any state law requiring the local government to seek competitive bids for those purchases. Please see the attached memo from Tina Jauz, Community Services Director, for further discussion.

Therefore, please consider a resolution authorizing a contract for the purchase and installation of ball field lighting at Hogan Park Fields #1, #2, #8 and Simons Field from Musco Sports Lighting, LLC of Oskaloosa, Iowa through Buyboard Contract 346-10 for a total cost of \$773,400.00.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION AUTHORIZING THE EXECUTION OF A CONTRACT WITH MUSCO LIGHTING LLC, OF OSKALOOSA, IOWA FOR LABOR, MATERIAL, EQUIPMENT AND SUPERVISION NECESSARY TO PURCHASE AND INSTALL BALL FIELD LIGHTING FOR HOGAN PARK FIELDS #1, #2, #8, AND SIMONS FIELD THROUGH BUYBOARD AT A TOTAL COST OF \$773,400.00; THIS ITEM WAS NOT BID BUT PURCHASED THROUGH A COOPERATIVE PURCHASING PROGRAM; AND APPROPRIATING FUNDS**

**WHEREAS**, the Buyboard is a cooperative purchasing agency with which the City participates with on purchases through a cooperative purchasing program in accordance with TEX. LOC. GOV'T CODE § 271.102; and

**WHEREAS**, MUSCO Lighting, LLC has submitted a total proposed cost to the City of \$773,400.00 for labor, material, equipment and supervision necessary to purchase and install Ball Field Lightning for Hogan Park Fields #1, #2, #8, and Simons Field through Buyboard as shown on the quote attached hereto as Exhibit "A" and incorporated herein for all legal purposes; and

**WHEREAS**, the Council finds the price proposed by MUSCO Lighting, LLC, Inc. through Buyboard for said labor, material, equipment and supervision necessary to purchase and install Ball Field Lightning for Hogan Park Fields #1, #2, #8, and Simons Field to be fair and reasonable; and

**WHEREAS**, the City Council finds it to be in the public interest to authorize a contract with MUSCO Lighting, LLC, for said labor, material, equipment and supervision necessary to purchase and install Ball Field Lightning for Hogan Park Fields #1, #2, #8, and Simons Field through Buyboard;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the Mayor and City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, a contract with

MUSCO Lighting, LLC, for labor, material, equipment and supervision necessary to purchase and install Ball Field Lightning for Hogan Park Fields #1, #2, #8, and Simons Field in the amount of \$773,400.00, said contract being on file in the office of the City Secretary, referenced by the date and number of this Resolution.

**SECTION TWO.** That upon proper receipt of invoices or statements approved by the City Manager, the City Treasurer is hereby authorized and directed to pay MUSCO Lighting, LLC, the amount of \$773,400.00 for the work referenced herein from the Hotel/Motel Tax Fund (090) Unappropriated Fund Balance (5650) to the Field Lighting Project (9079).

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

\_\_\_\_\_  
Courtney Sharp, City Manager

APPROVED AS TO CONTENT  
AND COMPLETENESS:

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Regina Stephenson, Purchasing Manager

APPROVED AS TO CONTENT  
AND COMPLETENESS:

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Tina Jauz, Community Services Director

APPROVED ONLY AS TO FORM:

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Keith Stretcher, City Attorney



CONTRACT  
Contract No. 7479-14

THIS CONTRACT, effective the 29th day of January, 2014, by and between the City of Midland, hereinafter referred to as the "City", and Musco Sports Lighting, LLC, hereinafter referred to as the "Contractor", is made for the following considerations:

1. **Cost:** Total Proposal: \$ 773,400.00 DOLLARS
2. **Scope of Work:** The Contractor shall perform all work described for labor, material, equipment and supervision necessary for the purchase and installation of Ball Field Lighting for Hogan Park Fields #1, #2, #8 and Simons Field in the following documents, attached hereto and incorporated herein by reference for all legal purposes.

EXHIBIT A..... Specifications, Proposal or Cost Summary  
EXHIBIT B..... Intentionally Omitted  
EXHIBIT C..... Bonding instructions for Public Works Contract of \$50,000 and more  
EXHIBIT D..... Wage Scale

3. **City:** The words "City's Representative" or "representative" shall mean Tina Jauz or her designee under whose supervision these contract documents, including the plans and specifications, were prepared, or who may inspect work performed under this Contract; or such other representative, supervisor, or inspector as may be authorized by the City to act in any particular capacity under this Contract.

4. **The City's Representative** may make periodic visits to the site to observe the progress and quality of the executed work and to determine, in general, if the work is proceeding in accordance with the contract documents. City's representative will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work, nor will such representative be responsible for the construction means, methods, techniques, sequences or procedures, or the safety precautions incident thereto. City's representative will not be responsible for the Contractor's failure to perform the work in accordance with the contract.



5. **Contractor:** Unless otherwise stipulated, the Contractor shall provide and pay for all materials, supplies, machinery, equipment, tools, superintendence, labor, insurance, and all water, light, power, fuel, transportation and all other facilities necessary for the execution and completion of the work covered by the contract documents. Unless otherwise specified, all materials shall be new, and both workmanship and materials shall be of a good quality. The Contractor shall, if required, furnish satisfactory evidence as to the kind and quality of materials.

5.1. The Contractor shall, at its expense, obtain all permits and licenses necessary for the performance of this contract and pay all fees and taxes required by law, and comply with all laws, ordinances, rules and regulations governing the Contractor's performance of the contract, including all environmental laws and regulations, whether state or federal.

5.2. All work shall be done and all materials furnished in strict conformity with the contract and specifications.

6. **Minor Work Not Mentioned:** All minor detail of the work not specifically mentioned in the Specifications but obviously necessary for the proper completion of the work, such as the proper connection of new work to old, shall be considered as incidental to and a part of the work for which the prices are named in the contract. The Contractor will not be entitled to any additional compensation therefor unless specifically stated otherwise. Otherwise the term "extra work" as used in this contract shall mean and include all work that may be required by the City to be done by the Contractor to accomplish any alteration or addition to the work as shown on the Specifications.

6.1. Contractor shall perform all extra work under the direction of the City's Representative when presented with a written work order signed by the City's Representative, subject, however, to the right of the Contractor to require written confirmation of such extra work order by the City. Payment for extra work shall be as agreed in the work order.

7. **Safety:** The Contractor shall at all times exercise reasonable precaution for the safety of employees and others on or near the work and shall comply with all applicable provisions of federal, state and municipal laws. All machinery and equipment and other physical hazards shall be guarded in accordance with federal, state or municipal laws or regulations.

8. **INDEMNITY: THE CONTRACTOR SHALL INDEMNIFY AND HOLD HARMLESS AND DEFEND THE CITY AND ALL OF THE CITY'S OFFICERS, AGENTS AND EMPLOYEES FROM ALL SUITS, ACTIONS, CLAIMS, DAMAGES, PERSONAL INJURIES,**

LOSSES, PROPERTY DAMAGE AND EXPENSES OF ANY CHARACTER WHATSOEVER, INCLUDING ATTORNEY'S FEES, BROUGHT FOR OR ON ACCOUNT OF ANY INJURIES OR DAMAGES RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS OR PROPERTY, ON ACCOUNT OF ANY NEGLIGENT ACT OF THE CONTRACTOR, THEIR AGENTS OR EMPLOYEES, OR ANY SUBCONTRACTOR, IN THE EXECUTION, SUPERVISION AND OPERATIONS GROWING OUT OF OR IN ANY WAY CONNECTED WITH THE PERFORMANCE OF THIS CONTRACT, AND CONTRACTOR WILL BE REQUIRED TO PAY ANY JUDGMENT WITH COSTS WHICH MAY BE OBTAINED AGAINST THE CITY OR ANY OF ITS OFFICERS, AGENTS OR EMPLOYEES, INCLUDING ATTORNEY'S FEES.

8.1. THE CONTRACTOR SHALL INDEMNIFY AND HOLD HARMLESS AND DEFEND THE CITY AND ALL OF THE CITY'S OFFICERS, AGENTS AND EMPLOYEES FROM ALL SUITS, ACTIONS, CLAIMS, DAMAGES, PERSONAL INJURIES, ACCIDENTAL DEATH, PROPERTY DAMAGE, LOSSES, AND EXPENSES OF ANY CHARACTER WHATSOEVER INCLUDING ATTORNEY'S FEES, BROUGHT FOR OR ON ACCOUNT OF ANY INJURIES OR DAMAGES RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS OR PROPERTY, ON ACCOUNT OF ANY NEGLIGENT ACT OF THE CITY, THE CITY'S OFFICERS, AGENTS AND EMPLOYEES, WHETHER SUCH NEGLIGENT ACT WAS THE SOLE PROXIMATE CAUSE OF THE INJURY OR DAMAGE OR A PROXIMATE CAUSE JOINTLY AND CONCURRENTLY WITH THE CONTRACTOR OR THE CONTRACTOR'S EMPLOYEES, AGENTS OR SUBCONTRACTORS NEGLIGENCE IN THE EXECUTION, SUPERVISION AND OPERATIONS GROWING OUT OF OR IN ANY WAY CONNECTED WITH THE PERFORMANCE OF THIS CONTRACT, AND CONTRACTOR WILL BE REQUIRED TO PAY ANY JUDGMENT WITH COSTS WHICH MAY BE OBTAINED AGAINST THE CITY OR ANY OF ITS OFFICERS, AGENTS OR EMPLOYEES, INCLUDING ATTORNEY'S FEES.

8.2. THE CONTRACTOR AGREES THAT HE WILL INDEMNIFY AND SAVE THE CITY HARMLESS FROM ALL CLAIMS GROWING OUT OF ANY DEMANDS OF SUBCONTRACTORS, LABORERS, WORKMEN, MECHANICS, MATERIALMEN, AND FURNISHERS OF MACHINERY AND PARTS THEREOF, EQUIPMENT, POWER TOOLS, ALL SUPPLIES, INCLUDING COMMISSARY INCURRED IN THE FURTHERANCE OF THE PERFORMANCE OF THIS CONTRACT. WHEN CITY SO DESIRES, THE CONTRACTOR

SHALL FURNISH SATISFACTORY EVIDENCE THAT ALL OBLIGATIONS OF THE NATURE HEREINABOVE DESIGNATED HAVE BEEN PAID, DISCHARGED OR WAIVED. THE CONTRACTOR, ITS SURETIES AND INSURANCE CARRIERS SHALL DEFEND, INDEMNIFY AND SAVE HARMLESS THE CITY AND ALL OF ITS OFFICERS, AGENTS AND EMPLOYEES FROM ALL SUITS, ACTIONS, OR CLAIMS OF ANY CHARACTER WHATSOEVER, BROUGHT FOR OR ON ACCOUNT OF ANY INJURIES OR DAMAGES RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS OR PROPERTY, ARISING FROM ANY ACT OF THE CONTRACTOR OR ANY SUBCONTRACTOR, THEIR AGENTS OR EMPLOYEES, IN THE EXECUTION AND SUPERVISION OF THIS CONTRACT, AND WILL BE REQUIRED TO PAY ANY JUDGMENT WITH COSTS WHICH MAY BE OBTAINED AGAINST THE CITY OR ANY OF ITS OFFICERS, AGENTS, OR EMPLOYEES INCLUDING ATTORNEY'S FEES.

9. **Start of Work:** The Contractor shall commence work no later than ten (10) days after receipt of the execution of this document or other written release to proceed and shall complete such work no later than 30-45 calendar days after release to proceed.

10. **Clean Up:** Contractor shall promptly remove from the City's premises all materials condemned by the City's Representative on account of failure to conform to the contract, whether actually incorporated in the work or not, and Contractor shall at its own expense promptly replace such condemned materials with other materials conforming to the requirements of the contract. Contractor shall also bear the expense of restoring all work of other contractors damaged by any such removal or replacement. If Contractor does not remove and replace any such condemned materials within a reasonable time after a written notice by the City, City may remove and replace such at Contractor's expense.

11. **Warranty:** Neither the final payment nor any provision in this contract shall relieve the Contractor of responsibility for faulty materials or workmanship, and he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one (1) year from the date of substantial completion. The City shall give notice of observed defects with reasonable promptness.

12. **Remedy:** The City may, on account of subsequently discovered evidence, withhold whole or part of any payment to such extent as may be necessary to protect itself from loss on account of:

12.1. Defective work not remedied; or

12.2. Claims filed or reasonable evidence indicating possible filing of claims; or

12.3. Failure of the Contractor to make payments promptly to subcontractors or for material or labor which the City may pay as an agent for the Contractor; or

12.4. Damages to another contractor or subcontractor.

When the above grounds to withhold payment are removed, or the Contractor provides a surety bond satisfactory to the City, which will protect the City in the amount withheld, payment shall be released.

13. **Funding Out:** In the event no funds or insufficient funds are appropriated and budgeted or are otherwise unavailable in any fiscal period for contract payments due under the contract, then this contract shall terminate on the last day of the fiscal period for which full appropriations were made, without penalty or expense to the City of any kind whatsoever.

14. **Wage Scale:** The Contractor agrees to pay all workmen in his employ no less than the generally prevailing wage rate for employees of similar category in the Permian Basin Area, as is depicted in the wage rate scale attached hereto as EXHIBIT D, and incorporated herein by reference for all legal purposes.

14.1. If applicable, the Davis-Bacon Act, 29 CFR 5.5, and any related acts or regulations are hereby incorporated by reference and made a part of this Contract, and all terms and requirements under said laws, by such incorporation, are made terms and requirements of this Contract, to which the parties to this Contract have agreed to be bound.

15. **PROMPT PAY ACT** - The City and Contractor agree that Texas Government Code, Chapter 2251, Payment for Goods and Services (the "Prompt Pay Act") does not waive governmental immunity.

16. **Payment:** After all work is completed by the Contractor, including all Change Orders altering the original scope and amount of said contract are completed, and the City has inspected and approved that the work is completed and in compliance with the contract and all subsequent Change Orders, the City shall thereafter issue payment to the Contractor in the amount of the contract and all Change Orders. The City shall be the final judge of when the work is completed by the Contractor. The City, in its sole discretion, shall determine if the work under the contract and under any Change Orders has been done to the City's requirements. The City may make periodic payments to the Contractor, however such periodic payments may only be made pursuant to this paragraph, and only after all work

and all Change Orders are completed by the Contractor and approved by the City.

17. **No Third Party Beneficiary:** The City's approval of this contract does not create a third party beneficiary. There is no third party beneficiary to this contract. No person or entity who is not a party to this contract shall have any third party beneficiary or other rights hereunder.

18. **WAIVER OF ATTORNEY FEES:** BY EXECUTING THIS CONTRACT, CONTRACTOR AGREES TO WAIVE AND DOES HEREBY KNOWINGLY, CONCLUSIVELY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY CLAIM IT HAS OR MAY HAVE IN THE FUTURE AGAINST THE CITY, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THE CONTRACT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THE CONTRACT. THE CONTRACTOR SPECIFICALLY AGREES THAT IF THE CONTRACTOR BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS CONTRACT, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS CONTRACT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET. SEQ., AS AMENDED), OR CHAPTER 271 OF THE TEXAS LOCAL GOVERNMENT CODE, THE CONTRACTOR AGREES TO ABANDON, WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH CONTRACTOR MIGHT OTHERWISE BE ENTITLED.

CONTRACTOR AGREES THAT THIS IS THE VOLUNTARY AND INTENTIONAL RELINQUISHMENT AND ABANDONMENT OF A PRESENTLY EXISTING KNOWN RIGHT. THE CONTRACTOR ACKNOWLEDGES THAT IT UNDERSTANDS ALL TERMS AND CONDITIONS OF THE CONTRACT. THE CONTRACTOR FURTHER ACKNOWLEDGES AND AGREES THAT THERE WAS AND IS NO DISPARITY OF BARGAINING POWER BETWEEN THE CITY AND THE CONTRACTOR. THIS SECTION SHALL NOT BE CONSTRUED OR INTERPRETED AS A WAIVER OF SOVEREIGN IMMUNITY.

THE CONTRACTOR AND THE CITY ARE RELYING ON THEIR OWN JUDGMENT. EACH PARTY HAD THE OPPORTUNITY TO DISCUSS THIS CONTRACT WITH COMPETENT LEGAL COUNSEL PRIOR TO ITS EXECUTION.

19. **Sovereign Immunity:** By executing this contract the City is not waiving its right of sovereign immunity. The City is retaining its immunity from suit. The City is not granting consent to be sued by legislative resolution or action.

**THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.**

20. **Insurance**

Contractor shall at all times during the term of this Contract maintain and keep in full force and effect insurance in the following types and minimum amounts with companies authorized to do business in the State of Texas:

Commercial General Liability (including Contractual liability):

-Personal Injury: \$1,000,000.00 per person  
\$1,000,000.00 per occurrence

-Property Damage: \$500,000.00 per occurrence

Business Automobile Liability: \$250,000.00 combined single limit -  
Personal Injury and Property Damage

Worker's Compensation: Statutory limits

Employers' Liability: \$500,000.00 per accident or occurrence

The Commercial General Liability shall be on a per project aggregate, including completed operations, and shall be on an occurrence basis.

The Business Automobile Liability insurance provided by Contractor shall cover any auto for bodily injury and property damage, including owned vehicles, hired and non-city vehicles, and employee non-ownership, and the amount of such policy shall be a minimum of \$250,000.00 covering any vehicle used for the execution of the work that is the subject of this Contract.

The Workers' Compensation coverage provided by Contractor shall inure to the benefit of employees injured during the course and scope of their employment by Contractor pursuant to this Contract.

All insurance required pursuant to this Contract shall provide for a waiver of subrogation in favor of the City. All insurance required pursuant to this Contract, except for Worker's Compensation Insurance, shall name the City as an additional insured on a claims occurred basis. City shall be provided the notice by Contractor's insurance provider not later than thirty (30) days prior to any reduction or termination of such coverage.

Contractor shall contractually require all contractors, subcontractors, and sub-subcontractors that work on any portion of the work that is the subject of this Contract to obtain insurance coverage that

meets or exceeds the policy requirements and minimum amounts specified herein. All contractors, subcontractors, and sub-subcontractors shall obtain insurance policies that provide blanket waivers of subrogation in favor of the City of Midland and policies that name the City of Midland as an additional insured on a claims occurred basis (except workers compensation).

The parties agree that, prior to the execution of the Contract, Contractor shall provide one or more certificates of insurance specifically stating that these requirements have been met and subject to the approval of the City. The City shall not be required to provide any insurance whatsoever pursuant to this Contract.

The Contractor certifies that the certificate of insurance provided as required herein complies with the requirements of Senate Bill 425, passed during the 82<sup>nd</sup> regular session of the Texas Legislature, and effective January 1, 2012.

21. **Assignment:** Contractor shall not, either directly or indirectly, assign all or any part of this Contract or any interest, right or privilege herein, without the prior written consent of the City. The issue on whether or not to grant consent to an assignment is in the sole discretion of the City.

22. **RELEASE: NOTWITHSTANDING ANY OTHER PROVISIONS, CONTRACTOR HEREBY RELEASES, ACQUITS, RELINQUISHES AND FOREVER DISCHARGES CITY, CITY'S EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS, CLAIMS, DAMAGES, OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH CONTRACTOR HAS OR MIGHT HAVE IN THE FUTURE, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, QUANTUM MERUIT, CLAIMS UNDER THE DUE PROCESS AND TAKINGS CLAUSES OF THE TEXAS AND UNITED STATES CONSTITUTIONS, TORT CLAIMS, OR CITY'S NEGLIGENCE.**

23. **Governing Law and Venue:** This Contract shall be governed by the laws of the State of Texas. All performance and payment made pursuant to this Contract shall be deemed to have occurred in Midland County, Texas. Exclusive venue for any claims, suits or any other action arising from or connected in any way to this Contract or the performance of this Contract shall be in Midland County, Texas. The obligations and undertakings of each of the parties to this Contract shall be deemed to have occurred in Midland County, Texas.

24. **Independent Contractor:** It is expressly understood and agreed that Contractor shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant

or employee of the City; that Contractor shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors; that the doctrine of respondeat superior shall not apply as between City and Contractor, its officers, agents, employees, contractors and subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between City and Contractor. No person performing any of the work and services described hereunder by Contractor shall be considered an officer, agent, servant or employee of the City. Further, it is specifically understood and agreed that nothing in this Contract is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. Contractor shall be an independent contractor under this Contract and shall assume all of the rights, obligations and liabilities, applicable to it as such independent contractor hereunder. The City does not have the power to direct the order in which the work is done. The City shall not have the right to control the means, methods or details of the Contractor's work. Contractor shall assume exclusive responsibility for the work. Contractor is entirely free to do the work in its own way.

**25. Notice of Alleged Breach; Statutory Prerequisites:** As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Contract, Contractor or his legal representative, shall give the City Manager, or any other reasonable official of the City, notice in writing (consisting of one original and seven copies of notice attached to a copy of this Contract) of such damages, duly verified, within one-hundred twenty (120) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which the Contractor will settle, the physical and mailing addresses of Contractor at the time and date the claim was presented and the physical and mailing addresses of Contractor for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom the Contractor relies to establish its claim; and a failure to so notify the City Manager within the time and manner provided herein shall exonerate, excuse and except the City from any liability whatsoever. The City is under no obligation to provide notice to Contractor that Contractor's notice is insufficient. The City reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to



Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, Contractor's failure to comply with the requirements herein shall perpetually bar Contractor's claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless if the City has actual or constructive notice or knowledge of said claim or alleged damages. Contractor agrees that the requirements of this entire Contract are reasonable.

26. **Consideration:** The terms of this Contract are supported by good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties named herein.

27. **Termination At Will:** The City may terminate this Contract at will for no or any reason upon giving at least one hundred eighty (180) days written notice to the Contractor. The parties to this Contract understand and agree that it is in the City's sole discretion to cancel the Contract during the term of the Contract without penalty to the City. The Contractor has no expectation and has received no guarantees that this Contract will not be terminated before the end of the Contract term. The parties have bargained for the flexibility of terminating this Contract upon tender of the requisite notice at any time during the term of the Contract. All work and services under the Contract shall be suspended upon termination of the Contract becoming effective.

City of Midland

CONTRACTOR

\_\_\_\_\_  
Courtney B. Sharp, City Manager

APPROVED ONLY AS TO FORM

\_\_\_\_\_  
Keith Stretcher, City Attorney

ATTEST

\_\_\_\_\_  
Amy M. Turner, City Secretary

Contractor Corporate Acknowledgment: Contract No. 7479-14

STATE OF TEXAS           §  
                                          §  
COUNTY OF MIDLAND   §

BEFORE ME, the undersigned authority, on this day personally appeared \_\_\_\_\_, an officer of Musco Sports Lighting, LLC, known to me to be the person and official whose name is subscribed to the forgoing instrument, and acknowledged to me that he executed the same as the act and deed of said corporation, for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public, State of Texas



**Hogan Park Fields  
Midland, Texas  
Date: 12/5/2013  
To: David Sanchez, Park Superintendent**

**Park/Rec & Field Lighting #346-10  
Buy Board Vendor # 528**

***Quotation Price\****

Musco's Light Structure Green™ as described below, delivered to the job site and installed per the scope of work below:

|                |                                                |
|----------------|------------------------------------------------|
| \$165,500..... | Hogan Field 1 (300' Radius Field)              |
| \$5,000 Adder  | PE-Stamped Electrical Drawing                  |
| <br>           |                                                |
| \$165,500..... | Hogan Field 2 (300' Radius Field)              |
| \$5,000 Adder  | PE-Stamped Electrical Drawing                  |
| <br>           |                                                |
| \$189,900..... | Hogan Field 8 (300' LF, 325' CF, 300' RF)      |
| \$5,000 Adder  | PE-Stamped Electrical Drawing                  |
| <br>           |                                                |
| \$232,500..... | Hogan Simons Field (320' LF, 385' CF, 330' RF) |
| \$5,000 Adder  | PE-Stamped Electrical Drawing                  |

**\* Additional 3% discount if Purchase Order is delivered prior to 12/31/2013.**

***Equipment Description***

Light Structure Green™ System delivered to your site in Five Easy Pieces™

- Pre-cast concrete bases
- Galvanized steel poles
- UL Listed remote electrical component enclosures
- Pole length wire harness
- Factory-aimed and assembled luminaires

Also Includes:

- Energy savings of more than 50% over a standard lighting system
- 50% less spill and glare light than Musco's prior industry leading technology
- Musco Constant 25™ product assurance and warranty program that eliminates 100% of your maintenance costs for 25 years, including labor and materials
- Guaranteed constant light level of 50/30 Foot-Candles for 25 years, +/- 10% per IESNA RP-06-01
- One group re-lamp at the end of the lamps' rated life, 5000 hours
- Control Link® Control & Monitoring System for flexible control and solid management of your lighting system
- Lighting Contactors sized for on site voltage and phase

Sales tax, if applicable, is not included as part of this quote.

***Pricing furnished is effective for 60 days unless otherwise noted and is considered confidential.  
Divulging technical or pricing information to competitive vendors will result in removal from the bid list.***

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### **Payment Terms**

Terms to be determined with the Musco Credit Department.

**Late payment will be subject to service charges of 1 ½% per month (18% APR).**

Musco will make every effort to coordinate shipment so that delivery corresponds with the customer's payment schedule. We will expect payment within the terms described above unless there is a written statement from Musco's corporate headquarters stating the acceptance of different terms.

**Delivery to the job site from the time of order, submittal approval, and confirmation of order details including voltage and phase, pole locations is approximately 30-45 days. Due to the built-in custom light control per luminaire, pole locations need to be confirmed prior to production. Changes to pole locations after the product is sent to production could result in additional charges.**

### **Notes**

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Quote is based on:

- Shipment of entire project together to one location
- Field size of Outfield Radius
- Structural code and wind speed = 2009 IBC, 90 MPH, Class C
- Confirmation of pole locations prior to production

Scope of work to be attached at later date.

Thank you for considering Musco for your sports-lighting needs. Please contact me with any questions.

Richard Wadlow  
Sales Representative  
Musco Sports Lighting, LLC  
PO Box 260  
2107 Stewart Road  
Muscatine, Iowa 52761  
Phone: 866-552-1591  
E-mail: [Richard.wadlow@musco.com](mailto:Richard.wadlow@musco.com)

Fax: 800-374-6402

## **EXHIBIT C**

### ***Bonding Requirements***

The successful bidder shall be required to furnish a Performance & Payment Bond\* for bids in excess of \$50,000.00, in an amount equal to one hundred percent (100%) of the total contract price, such bond to be executed in five (5) original counterparts by a Corporate Surety authorized to do business in the State of Texas and acceptable to the City of Midland. All bonds must be executed on forms contained in these contract documents. The form of agreement which the successful bidder, as contractor, will be required to execute is also included herewith. The form of agreement and the form of the bonds should be carefully examined by the bidder.

A certified check, cashier's check, bank money order, issued by a bank satisfactory to the Owner, or a bidder's bond on the form provided, in the amount of five percent (5%) of the largest possible lump sum bid submitted, payable without recourse to the owner, must accompany the bidder's proposal, as a guaranty that the bidder will enter a contract and execute the required payment bond and guaranty in the forms provided within fifteen (15) days after notice of award of contract to him. Bids or proposals without the required bid guaranty will not be considered. All bid sureties and payment bonds shall name the City of Midland as Obligee.

\*A cash security such as a cashier's check for 100 % of the contract amount may be supplied in lieu of the Performance and Payment Bonds. The check will be returned un-cashed upon satisfactory completion of the work and evidence of payment of all obligations due for the contract.

## PAYMENT BOND

STATE OF TEXAS       §  
                                  §  
COUNTY OF MIDLAND   §

SURETY'S NO. \_\_\_\_\_

KNOW ALL MEN BY THESE PRESENTS, THAT \_\_\_\_\_,

\_\_\_\_\_ of the City of \_\_\_\_\_ County of \_\_\_\_\_,  
and State of \_\_\_\_\_ as Principal, and \_\_\_\_\_

\_\_\_\_\_ (hereinafter called the Surety(s)), as Surety(s), are held and firmly bound unto the City of Midland, Texas, a home rule municipal corporation of Midland County, Texas, (hereinafter called the Obligee), in the amount of \_\_\_\_\_ DOLLARS, (\$ \_\_\_\_\_), for the payment whereof the said Principal and Surety bind themselves and their heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a certain written contract with the Obligee, dated the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, to \_\_\_\_\_,

\_\_\_\_\_ which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal shall pay all claimants supplying labor and material to him or a subcontractor in the prosecution of the work provided for in said contract, then this obligation shall be null and void; otherwise, it is to remain in full force and effect.

PROVIDED further that if any legal action be filed upon this Bond venue shall lie in Midland County, State of Texas.

PROVIDED further that this Payment Bond is submitted in compliance with Chapter 2253 of the Texas Government Code.

Surety, for value received, stipulates and agrees that no change, extension of time, alteration or addition to the terms of the contract, or to the work performed thereunder, or the plans, specifications or drawings accompanying the same, or any assignment of the contract as may be provided for in the instructions to bidders, shall in anywise affect its obligation on this

Bond, and it does waive notice of any such change, extension of time, alteration or addition to the terms of this contract, assignment thereof, or to the work to be performed thereunder.

IN WITNESS WHEREOF the said Principal and Surety have signed and sealed this instrument, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Principal

\_\_\_\_\_  
Surety

By \_\_\_\_\_

By \_\_\_\_\_

Address \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

APPROVED AS TO FORM:

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

NOTE: ATTACH POWER OF ATTORNEY

## PERFORMANCE BOND

STATE OF TEXAS       §  
                                  §  
COUNTY OF MIDLAND   §

SURETY'S NO. \_\_\_\_\_

KNOW ALL MEN BY THESE PRESENTS, THAT \_\_\_\_\_

\_\_\_\_\_.

(hereinafter called the principal(s)), as principal(s), and \_\_\_\_\_

\_\_\_\_\_,

(hereinafter called the Surety(s)), as Surety(s), are held and firmly bound unto the City of Midland, Texas a home rule municipal corporation of Midland County, Texas, (hereinafter called the Oblige), the amount of \_\_\_\_\_ DOLLARS, (\$ \_\_\_\_\_) for the payment whereof the said Principal and Surety bind themselves and their heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a certain written contract with the Oblige, dated the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, to furnish and deliver the following equipment:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SPECIFICALLY including in the scope of this work and bond, the additional maintenance guaranty provisions set forth in the contract conditions, which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein, as well as the Principals primary obligation to perform according to plans and specifications.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal shall faithfully perform the work in accordance with the plans, specifications,



instructions to bidders, general and special conditions and other contract documents, including any addendums thereto, then this obligation shall be void; otherwise to remain in full force and effect.

PROVIDED further that if any legal action be filed upon this Bond venue shall lie in Midland County, State of Texas.

PROVIDED further that this Performance Bond is submitted in compliance with Chapter 2253 of the Texas Government Code.

Surety, for value received, stipulates and agrees that no change, extension of time, alteration or addition to the terms of the contract, or to the work performed thereunder, or the plans, specifications or drawings accompanying the same, or any assignment of the contract as may be provided for in the instructions to bidders, shall in anywise effect its obligation on this Bond, and it does waive notice of any such change, extension of time, alteration or addition to the terms of this contract, assignment thereof, or to the work to be performed thereunder.

IN WITNESS WHEREOF the said Principal and Surety have signed and sealed this instrument, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Principal

\_\_\_\_\_  
Surety

By \_\_\_\_\_

By \_\_\_\_\_

Address \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

APPROVED AS TO FORM:

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

NOTE: ATTACH POWER OF ATTORNEY

# EXHIBIT "D"

## PREVAILING WAGE RATE SCHEDULE BUILDING CONSTRUCTION TRADES as of July 24, 2009 Attorney General, General Decision TX20080297

| <b>Classification</b>                                              | <b>Rate/hr</b> | <b>Fringes</b> |
|--------------------------------------------------------------------|----------------|----------------|
| Acoustical Installers                                              | \$ 11.18       |                |
| Boilermaker                                                        | \$ 26.02       | \$ 13.66       |
| Bricklayers                                                        | \$ 18.00       |                |
| Carpenters (Including Metal Stud Installation and Drywall Hanging) | \$ 15.17       |                |
| Cement Mason/ Concrete Finisher                                    | \$ 13.89       |                |
| Drywall Hangers                                                    | \$ 11.08       |                |
| Electrician                                                        | \$ 13.63       | \$ 1.25        |
| Elevator Mechanics                                                 | \$ 32.66       | 18.285+a       |
| Forklift Operator                                                  | \$ 22.70       | \$ 9.35        |
| HVAC mechanic (set unit only)                                      | \$ 10.00       |                |
| Ironworkers (reinforcing)                                          | \$ 20.90       | \$ 4.60        |
| Ironworkers (structural)                                           | \$ 10.84       |                |
| Laborers, Common or General                                        | \$ 8.67        |                |
| Laborer, Mason Tender - Brick                                      | \$ 9.13        |                |
| Operator, Backhoe/ Excavator                                       | \$ 13.81       |                |
| Operator, Blade/ Grader                                            | \$ 12.97       |                |
| Operator, Front End Loader                                         | \$ 12.23       |                |
| Painter (Including Drywall Finishing)                              | \$ 15.81       | \$ 4.56        |
| Plasterer                                                          | \$ 14.00       |                |
| Plumber (Including HVAC Work)                                      | \$ 19.20       | \$ 6.55        |
| Roofer                                                             | \$ 12.06       |                |
| Sheet Metal Worker (Including HVAC Work)                           | \$ 10.00       |                |
| Sprinkler Fitters                                                  | \$ 12.00       |                |
| Tile Setter                                                        | \$ 8.50        |                |
| Truck Driver                                                       | \$ 10.15       |                |
| Welders                                                            | *              |                |

\*Welders receive the rate prescribed for the craft performing the operation to which welding is incidental.

a under 5 years employment, 6% of BHR, over 5 years employment, 8%BHR.

Paid Holidays - New Year's Day, Memorial Day, Independence Day, Labor Day, Labor Day, Thanksgiving Day, The Friday after thanksgiving and Christmas Day.

Unlisted classifications needed for the work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR 5.5(a)(1)(v)).

*CITY OF MIDLAND*  
**Community Services Department  
Parks & Recreation Division  
Interoffice Memorandum**

**Date:** January 28, 2014  
**To:** Tommy Hudson, Deputy City Manager  
**From:** Tina Jauz, Community Services Director  
**Subject:** Purchase and Installation of Lighting for Four Softball/Baseball Fields

The fields at Hogan Park are scheduled for numerous tournaments during 2014, including three state tournaments. Two of these three tournaments are scheduled for Hogan Park again in 2015.

Fields #1 and #2 were built by Midland Softball Association in the 1970's. Lighting was provided with oil field pipe with lighting attached. In 2011, these lights were deemed unsafe and removed. These fields are used extensively, as the age group that plays on them is growing rapidly. Night time play is necessary in order to allow all teams equal playing opportunities.

Field #8 is located behind the Detention Center. The depth of this field was expanded to allow more teams the ability to play, but the lighting was not upgraded to accommodate the larger playing field. Therefore, the lighting at Field #8 is not safe for legal play. This field is utilized for all tournament play.

Simons Field is used extensively for High School Junior Varsity games. It is also utilized by Trinity and Midland Christian School. Several years ago, the lighting blew down in high winds, so it was removed and was not replaced.

Our growing population is resulting in greater demands on our recreational facilities. Enrollment in youth sports is growing, and lighting these fields would allow more games to be played, resulting in the ability to have more teams in the leagues and allow more participation. In addition, lighting these four fields will allow Midland to continue bringing tournaments to our city.

All four fields host enough tournaments to qualify for use of Hotel Motel funds.

The sum of \$773,400 is hereby appropriated from the Hotel/Motel Tax Fund (090) Unappropriated Fund Balance (5650) to the Field Lighting Project (9079).



# City Council Agenda

Approved for Agenda:  
THudson  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Regina Stephenson, Purchasing Manager

**SUBJECT:** Consider a resolution approving the issuance of a request for qualifications for a construction manager at risk for the new Municipal Court building.

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## **Purpose:**

Approval of a resolution authorizing the release of a request for qualifications for a construction manager at risk for the new Municipal Court building.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

Funding is not required at this time.

## **Discussion:**

Please consider approving a resolution authorizing the issuance of a request for qualifications for a construction manager at risk for the new Municipal Court building. Please see the attached memo from Jim Nichols, Assistant City Manager, for additional information.

CITY OF MIDLAND  
City Manager's Office  
Interoffice Memorandum

Date: January 28, 2014  
To: Regina Stephenson  
From: Jim Nichols, Assistant City Manager  
Subject: Solicitation of a Construction-Manager-At-Risk for the Future Court Building

The City entered into a contract with the architect firm of Brinkley Sargent Architects from Dallas to design a new municipal court building. The current facility is over 30 years old and has outlived its usefulness. It also lacks adequate space for the current staffing of the Court.

Design of the new facility has been underway since last year and during the process, the architect has recommended that the City consider using an alternative construction delivery method for the project: Construction-Manager-At-Risk (CMAR). The CMAR method varies from the more typical design-bid-build process in that the Construction Manager is hired during the design phase based on qualifications rather than the lowest bid. The selected CM works in concert with the City and the technical professionals during the design phase to ensure that the project is developed in the most appropriate and "constructible" manner possible. They also provide assistance with value engineering and cost estimates as well. The Construction Manager will then provide a guaranteed price for the project that is negotiated with the City. The project cost will not change unless unforeseen conditions are found or if the City changes the scope of the project. Though this construction cost isn't based on a low bid, the City is still expected to receive potential cost savings due to reduced likelihood for change orders during construction. Since the CMAR is part of the design process, they are aware of all issues with the project and face fewer unknowns that can lead to change orders during a more typical construction project.

The CMAR is paid for their services during the design phase, in addition to the payment received for their actual construction work. However, it is expected that the benefit of their input during design will far outweigh the financial investment.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION AUTHORIZING AND DIRECTING THE  
CITY MANAGER TO ISSUE A REQUEST FOR  
QUALIFICATIONS FOR A CONSTRUCTION  
MANAGER AT RISK FOR THE NEW MUNICIPAL  
COURT BUILDING**

**WHEREAS**, the City Council finds it to be in the public interest to issue a request for qualifications for a construction manager at risk for the new Municipal Court building;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the request for qualifications for a construction manager at risk for the new Municipal Court building is hereby approved, said request for qualifications being on file with the office of the City Secretary, referenced by the date and number of this Resolution.

**SECTION TWO.** That the City Manager or his designee is hereby authorized and directed to issue said request for qualifications for a construction manager at risk pursuant to the statutes of the State of Texas for accomplishing the work set forth therein.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

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Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

---

Courtney Sharp, City Manager

APPROVED AS TO CONTENT  
AND COMPLETENESS:

---

Regina Stephenson, Purchasing Manager

---

James R. Nichols, Assistant City Manager

APPROVED ONLY AS TO FORM:

---

Keith Stretcher, City Attorney



PURCHASING DEPARTMENT  
REQUEST FOR QUALIFICATIONS  
FOR  
CONSTRUCTION MANAGER AT RISK  
FOR THE NEW  
MIDLAND COURT BUILDING

DUE     , 2014  
BY     :00 p.m.

Bid Number



CONSTRUCTION MANAGER-AT-RISK FOR THE NEW  
MIDLAND COURT BUILDING

**REQUEST FOR QUALIFICATIONS**

The City of Midland, Texas, pursuant to the provisions of the Chapter 271, subsection 271.118 of the Local Government Code, invites the submittal of responses to this RFQ from qualified firms or team (herein after referred to as PROPOSERS) interested in providing Construction Management at Risk (herein after referred to as CMAR) services in connection with the design and construction of a new Court Building (herein after referred to as the PROJECT). The City intends to retain a highly qualified, capable firm to act as the CMAR during the design and construction of the Project for a fixed price. The City will give prime consideration to the CMAR respondent with significant, recent experience in the management of projects similar to the proposed Court Building.

Sealed submittals are to include the information requested in this package in the sequence and format prescribed. Each RFQ shall be limited to 30 single-sided pages (or 15 double sided pages) excluding front & back covers and financial information. Text shall be in minimum 10 point font & pages shall be 8 ½” x 11” format or 11” x 17” foldouts as applicable. This requirement shall be strictly enforced. Selected PROPOSERS will be requested to submit additional information concerning fees during Phase 2 of the Selection Process. The City reserves the right to negotiate with one or more parties and shall not be obligated to enter into any contract with any respondent on any terms or conditions.

Providing false or inaccurate information in the submittal is grounds for immediate rejection of the respondent regardless of what Phase of the PROJECT the discovery is made.

**THE PROJECT**

The following project narratives are to assist you in responding to the RFQ:

This project provides for construction of a new Court building of approximately 29,000 square feet located between East Illinois Avenue and East Texas Avenue bounded on the West by Baird Street (to be abandoned and included as part of the project site).

**PROJECT FUNDING**

A total budget of approximately \$12,000,000 has been set for this project which includes all FF&E [fixtures, furniture and equipment], professional service fees and soft costs, and construction costs.

**CONSTRUCTION MANAGER-AT-RISK FOR THE NEW  
MIDLAND COURT BUILDING**

**PROJECT SCHEDULE**

The preliminary project schedule shows Schematic Design to complete in February 2014 with Bidding of project to occur in August 2014. Construction is projected to begin October 2014 with an anticipated completion in October 2015.

**SCOPE OF WORK**

The anticipated scope of work to consists of the following responsibilities:

- A. The CMAR will serve as an integral team member during the design process and throughout the construction process. The selected CMAR will be required to perform the basic construction management services for the project. Furthermore, the CMAR will be used, in conjunction with the design team, as the cost estimator, project scheduler, and to apprise the Owner of phasing implications for the project. The CMAR will coordinate and cooperate with the Owner and Architect. Generally speaking, the CMAR will serve as a technical resource to the Owner throughout the project.
- B. Pre-Construction Service responsibilities include but are not limited to:
  - Schematic and design development cost estimating and value engineering
  - Manage the GMP Documentation
  - Development of a Project Schedule
  - Establish Budget by Bid Package for Construction Documents Phase
  - Prepare Sub-Contractor Bid or Proposal Packages
  - Conduct Pre-Bid Meetings
  - Receive Bids
- C. Construction Service responsibilities include but are not limited to:
  - Conduct Award of Contracts/Purchase Orders
  - Provide Coordination and Management of Sub-contractors
  - Develop and Provide Monthly Written Progress Reports
  - Provide Change Order and Contingency Funds Control
  - Establish a Quality Management Program
  - Maintain and Update Project Schedule Every Two Weeks
  - Provide for Job Safety Functions
  - Provide Accounting Functions
  - Provide Jobsite Security Functions
  - Provide Post Construction Services

|                                                                    |
|--------------------------------------------------------------------|
| CONSTRUCTION MANAGER-AT-RISK FOR THE NEW<br>MIDLAND COURT BUILDING |
|--------------------------------------------------------------------|

- Provide Value Engineering
- Post construction services including implementation of close-out procedures
- Warranty walk- through to occur one year after project completion

D. AIA Documents A133-2009 with modifications will be the Form of Agreement covering this project.

|                          |
|--------------------------|
| <b>SELECTION PROCESS</b> |
|--------------------------|

Selection of the CMAR is anticipated to include the following phases.

1. The City may establish an Evaluation Panel which will review the submittals and establish a final group to be interviewed.
2. The selected PROPOSER(S) will be notified of a set time and interview format for purposes of further consideration.
3. A final ranking of the interviewed PROPOSER(S) will be established for the purpose of final contract negotiation.
4. If a reasonable contract cannot be achieved with the preferred PROPOSER, in the opinion of the City, the PROPOSER deemed to be the next most qualified may be invited for contract negotiations. This process will continue until the City reaches an Agreement with a PROPOSER or City decides to terminate process.

Note: The City reserves the right to not enter into a contract with any respondent if it so chooses.

|                            |
|----------------------------|
| <b>EVALUATION CRITERIA</b> |
|----------------------------|

The criteria used to evaluate the RFQ responses will include, but not be limited to, the following (items listed below are not listed in order of importance):

**A. Qualifications of Firm**

Qualifications of firm, specifically as they relate to similar Projects.

**B. Team Experience on Similar Projects**

Related project experience of the firm(s) and in particular the individuals who would be assigned to this Project. The individuals who will be working on the project for pre- construction services/estimating; project manager and superintendent.

**C. Responsiveness to the RFQ**

The provision of complete and thorough responses to all questions listed in the Qualifications Questionnaire and adherence to all directions related to the RFQ response.

|                                                                            |
|----------------------------------------------------------------------------|
| <b>CONSTRUCTION MANAGER-AT-RISK FOR THE NEW<br/>MIDLAND COURT BUILDING</b> |
|----------------------------------------------------------------------------|

**D. Professional References**

The past performance and reputation of the responder.

**E. Cost Control**

Demonstrated ability for developing accurate cost estimates consistent with completed projects. Provide schematic, design development, GMP or Bid and final cost for the five most recent completed projects.

**F. Financial Capability**

Demonstrated financial capacity to complete the project.

This information should be in the form of a Financial Statement with latest Balance Sheet and Income Statement. This information should be submitted in a separate sealed envelope with same title as original package. This envelope will not count towards the 30 page maximum submittal requirement. This information will be reviewed by a Financial Representative of the City.

|                                                        |
|--------------------------------------------------------|
| <b>REQUEST FOR SEALED QUALIFICATIONS QUESTIONNAIRE</b> |
|--------------------------------------------------------|

Please provide the following information in the sequence and format prescribed by this questionnaire.

Please include an outside cover containing the name of the Project (“Request for Qualifications for Construction Management at Risk Services for the Proposed Court Building”), the name of the respondent, and the submittal date. A table of contents should be next, followed by tabbed dividers separating each of the following seven (7) sections:

**Divider #1: Letter**

The first page shall be a letter transmitting the response to the City and stating that the Proposal set forth in it remains effective for a period of 90 calendar days. At least one copy of the transmittal letter shall contain the original signature of a Partner, Principal, or Officer of the PROPOSER.

**Divider #2: Firm Information**

- a. Firm name, addresses, and telephone numbers of all firm offices.
- b. Structure of firm, i.e., sole proprietorship, partnership, corporation, and size of firm.
- c. Names of principals in firm.
- d. Primary contact.
- e. Description of firm’s organizational structure and different office locations if applicable.
- f. Statement of firm’s corporate philosophy.

|                                                                            |
|----------------------------------------------------------------------------|
| <b>CONSTRUCTION MANAGER-AT-RISK FOR THE NEW<br/>MIDLAND COURT BUILDING</b> |
|----------------------------------------------------------------------------|

**Divider #3: General Company History/Qualifications**

- a. How many years has your organization been in business in its current capacity?
- b. How many years has your organization been in business under its present name?
- c. Under what other or former names has your organization operated?
- d. Provide a brief history of the Firm's CMAR experience and the services routinely provided in-house on civic building projects.
- e. Provide an organizational chart that explains team member responsibilities.
- f. Include the resumes of all persons to be assigned to the project with their prospective roles identified.
- g. List all related design awards and recognition the Firm has received.
- h. List jurisdictions and trade categories in which your organization is legally qualified to do business and indicate registration or license numbers, if applicable.

**Divider #4: Experience and References**

1. Within this section, provide a discussion of CMAR's experience in working with Government Agencies. This PROPOSER is asked to provide no less than 3 letters of recommendation from past Clients. List all comparable Civic Projects, whether ongoing or completed, including Owner Representative contact information. Please begin with projects in Texas and projects completed by the specific office that will be managing this project. For each, please provide:
  - a. Project name and location
  - b. Year completed or anticipated to be completed
  - c. Short description of project
  - d. Names, addresses, and phone numbers of owner's project representative tasked with daily responsibilities of project.
  - e. Names, addresses and telephone numbers of project Architect
  - f. Estimated cost and final construction cost and whether or not it was within the project budget and the reason for any overruns.
  - g. Original construction schedule and actual construction time and reasons for any overrun.
2. List the categories of work that your organization normally performs with its own forces. Would you propose to do any work with your own forces or to bid all work to subcontractors?
3. List any subcontractors in which your organization has some ownership and list the categories of work those subcontractors normally perform.
4. Has your organization ever failed to complete any work awarded to it? (If the answer is yes, please attach details.)
5. Are there any judgments, claims, arbitration proceedings or suits filed or outstanding against your organization or its officers for the last 5 years? (If the answer is yes, please attach details.)

|                                                                            |
|----------------------------------------------------------------------------|
| <b>CONSTRUCTION MANAGER-AT-RISK FOR THE NEW<br/>MIDLAND COURT BUILDING</b> |
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6. Has your organization, whether under its current or previous names, filed any lawsuits or requested arbitration with regards to construction contracts within the last five years? (If the answer is yes, please attach details.)
7. Within the last 5 years, has any officer or principal of your organization ever been an officer or principal of another organization when it failed to complete a construction contract? (If the answer is yes, please attach details.)
8. List construction projects your organization has in progress (noting method of selection, i.e.: CM at Agent, Bid, Proposal or other), giving the name and location of project, owner, architect, contract amount, percent complete and scheduled completion date.

**Divider #5: Management and Organizational Approach**

Describe your management and organizational approach to the project. The following should be addressed within this description:

- a. Please describe your firm's understanding of the project.
- b. Describe how the firm will organize to perform the services.
- c. Describe your organization's concepts for working in a team relationship with the Owner and Architect during the design and construction of major projects.
- d. Describe your organization's methods for estimating costs, and for scheduling during the design/document phases.
- e. Describe how your company will benefit this project using Construction Manager-at- Risk.
- f. Describe fast track or other construction methodologies that have been utilized to expedite projects and the benefits achieved from such approaches.

**Divider #6: Cost Estimating and Fees**

1. Include a sample conceptual cost estimate prepared during the design phase of a project and a sample of the final cost estimate/breakdown used to fix the contract amount for the construction of the same project. *(The identity of the project may be concealed. The intent is to see the nature and format of the cost information provided).*
2. Describe your organization's philosophy as it pertains to pre-construction phase services. What services and process will be provided during this phase? How will the Owner & Architect be involved? Your firm would be required to make all cost information during design and construction available to Owner and Architect. Describe how this information would be furnished and how the Owner and Architect would be assured that it is complete and accurate.

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| <b>CONSTRUCTION MANAGER-AT-RISK FOR THE NEW<br/>MIDLAND COURT BUILDING</b> |
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**Divider #7: Financial Information:**

1. Attach a Financial Statement, preferably audited, including your organization's latest Balance Sheet and Income Statement showing the following items:
  - a. Current assets (e.g., cash, joint venture accounts, accounts receivable, notes receivable, accrued income, deposits, materials inventory, and prepaid expenses).
  - b. Non-current assets (e.g., net fixed assets, other assets).
  - c. Current liabilities (e.g., accounts payable, notes payable (current), accrued expenses, provision for income taxes, advances, accrued salaries and accrued payroll taxes).
  - d. Non-current liabilities (e.g., notes payable).
  - e. Capital accounts and retained earnings (e.g., capital, capital stock, authorized and outstanding shares par value, earned surplus and retained earnings).
2. Is the attached Financial Statement for the identical organization named under item 1 above? If not, explain the relationship and financial responsibility of the organization whose Financial Statement is provided (e.g., parent - subsidiary).
3. Will the organization whose Financial Statement is attached act as Guarantor of the Contract for construction?
4. Provide name, address, and phone for bank reference.
5. This information will be included in a separate sealed envelope. This information will not be part of total page limitations.

|                               |
|-------------------------------|
| <b>SUBMITTAL INSTRUCTIONS</b> |
|-------------------------------|

Sealed submittals are required. Submittals shall be delivered to \_\_\_\_\_, at the address set forth below at or before \_\_\_\_\_:00 p.m. on \_\_\_\_\_, 2014. All submittals must be labeled on the outside with the respondent's name, the name of the Project ("Request for Qualifications for Construction Manager at Risk for Construction of the new Court Building").

**One (1)** document to be presented in PDF format in one file on a single flash drive or CD and **Five (5) paper copies** must be submitted in a sealed envelope with the following information marked plainly on the front: \_\_\_\_\_

City of Midland  
300 N Loraine  
Midland, Texas 79701

**WAIVERS  
FOR CITY OF MIDLAND MUNICIPAL COURT BUILDING  
CONSTRUCTION MANAGER-AT-RISK  
REQUEST FOR QUALIFICATIONS**

**WAIVER**

**A. WAIVER OF CLAIMS ARISING FROM THE COMPETITIVE REQUEST  
FOR QUALIFICATION PROCESS OF AWARD OF CONTRACT**

**BY SUBMITTING A STATEMENT OF QUALIFICATIONS, EACH SUBMITTER AGREES TO AND DOES HEREBY WAIVE ANY CLAIM THE SUBMITTER HAS OR MAY HAVE AGAINST THE CITY AND/OR THE CITY'S EMPLOYEES, AGENTS AND OFFICERS, ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE FOLLOWING:**

- 1. THE ADMINISTRATION, EVALUATION OR RECOMMENDATION OF ANY STATEMENT OF QUALIFICATIONS.**
- 2. WAIVER OR DELETION OF ANY OF THE REQUIREMENTS UNDER THE STATEMENT OF QUALIFICATIONS OR THE CONTRACT DOCUMENTS.**
- 3. ACCEPTANCE OR REJECTION OF ANY STATEMENT OF QUALIFICATION.**
- 4. AWARD OF CONTRACT.**

By submitting a Statement of Qualifications, the submitter acknowledges that he or she understands all terms of the proposal documents and consents to the competitive selection process and the possibility of a negative assessment. By submitting a Statement of Qualifications, the submitter acknowledges and agrees that there was and is no disparity of bargaining power between the submitter and the City.

The submitter agrees that this is the intentional relinquishment of the above listed presently existing known rights.

**B. WAIVER OF ATTORNEY FEES**

**BY SUBMITTING A STATEMENT OF QUALIFICATIONS, EACH SUBMITTER AGREES TO WAIVE AND DOES HEREBY WAIVE ANY CLAIM THE SUBMITTER HAS OR MAY HAVE AGAINST THE CITY AND/OR ITS RESPECTIVE EMPLOYEES AND REPRESENTATIVES, FOR THE AWARD OF ATTORNEY FEES, ARISING OUT OF OR IN CONNECTION WITH THE ADMINISTRATION, EVALUATION, OR RECOMMENDATION OF ANY STATEMENT OF QUALIFICATIONS, WAIVER OF ANY REQUIREMENTS**



**UNDER THIS RFP, ACCEPTANCE OR REJECTION OF ANY STATEMENT OF QUALIFICATIONS, AND AWARD OF THE CONTRACT. BY SUBMITTING A STATEMENT OF QUALIFICATIONS, THE SUBMITTER SPECIFICALLY WAIVES ANY RIGHT TO RECOVER OR BE PAID ATTORNEY'S FEES FROM THE CITY OR ANY OF THE CITY'S EMPLOYEES AND REPRESENTATIVES UNDER ANY OF THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE, SECTION 37.001, ET. SEQ., AS AMENDED).**

The submitter agrees that this is the intentional relinquishment of a presently existing known right.

By execution and submission of a Statement of Qualifications under this RFQ, the submitter hereby represents and warrants to the City that the submitter has read and understands the RFQ and the Statement of Qualifications is submitted in accordance with this RFQ. The submitter acknowledges that it understands all terms within the proposal documents, which include the waiver provisions, and that it had the right to consult with counsel regarding all of the above documents.

This section shall not be construed as a Waiver of Sovereign Immunity.

#### **SOVEREIGN IMMUNITY**

The City is not waiving its right of sovereign immunity. The City is retaining its immunity from suit. The City is not granting consent to be sued by legislative resolution or action.

**THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.**



# AIA® Document A133™ – 2009

## **Standard Form of Agreement Between Owner and Construction Manager as Constructor** where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

**AGREEMENT** made as of the \_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_  
(In words, indicate day, month and year.)

**BETWEEN** the Owner:  
(Name, legal status and address)

City of Midland, Texas  
300 North Loraine Midland, TX 79701

and the Construction Manager:  
(Name, legal status and address)

for the following Project:  
(Name and address or location)

Midland Court Building, Midland, Texas. The project consists of a new multi-level Court Building for a total project of approximately \_\_\_\_\_ s.f.

The Architect:  
(Name, legal status and address)

Brinkley Sargent Architects  
5000 Quorum Drive, Suite 600  
Dallas, Texas 75254

The Owner's Designated Representative:  
(Name, address and other information)

The Construction Manager's Designated Representative:  
(Name, address and other information)

The Architect's Designated Representative:  
(Name, address and other information)

Harold E. Sargent  
Brinkley Sargent Architects  
5000 Quorum Drive, Suite 600  
Dallas, Texas 75254

WHEREAS, the City of Midland, Texas ("Owner" and ("Construction Manager" acting as construction manager at risk) desire to enter into an Agreement under which Construction Manager will perform services relating to the Project on behalf of the Owner; and

### **ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

Init.

WHEREAS Owner and Construction Manager have agreed to enter into AIA Document A133 (2009), as basic form for that Agreement; and

WHEREAS certain terms and conditions of that Agreement need to be modified to comply with applicable laws and policies affecting Owner and Construction Manager in the construction of these projects, Owner and Construction Manager hereby agrees as follows.



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### ARTICLE 1 GENERAL PROVISIONS

#### § 1.1 The Contract Documents

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

#### § 1.2 Relationship of the Parties

The Construction Manager accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and exercise the Construction Manager's skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

#### § 1.3 General Conditions

For the Preconstruction Phase, AIA Document A201™–2007, General Conditions of the Contract for Construction, shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be as set forth in A201–2007, which document is incorporated herein by reference. The term "Contractor" as used in A201–2007 shall mean the Construction Manager.

### ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Owner and Construction

Manager may agree, in consultation with the Architect, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

## **§ 2.1 Preconstruction Phase**

**§ 2.1.1** The Construction Manager shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other.

### **§ 2.1.2 Consultation**

The Construction Manager shall schedule and conduct meetings with the Architect and Owner to discuss such matters as procedures, progress, coordination, and scheduling of the Work. The Construction Manager shall advise the Owner and the Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also provide recommendations consistent with the Project requirements to the Owner and Architect on constructability; availability of materials and labor; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

**§ 2.1.3** When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically update a Project schedule for the Owner and Architect's review and the Owner's acceptance. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule relating to the performance of the Architect's services. The Project schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities and identify items that could affect the Project's timely completion. The updated Project schedule shall include the following: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; and the occupancy requirements of the Owner.

### **§ 2.1.4 Phased Construction**

The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

### **§ 2.1.5 Preliminary Cost Estimates**

**§ 2.1.5.1** Based on the preliminary design and other design criteria prepared by the Architect, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for the Architect's review and Owner's approval. If the Architect or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

**§ 2.1.5.2** As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals agreed to by the Owner, Construction Manager and Architect, estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the Architect's review and the Owner's approval. The Construction Manager shall inform the Owner and Architect when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action.

### **§ 2.1.6 Subcontractors and Suppliers**

The Construction Manager shall develop bidders' interest in the Project.

**§ 2.1.7** The Construction Manager shall prepare, for the Architect's review and the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. If the Owner agrees to procure any items prior to the establishment of the Guaranteed Maximum Price, the Owner shall procure the items on terms and conditions acceptable to the Construction Manager. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the Construction Manager shall thereafter accept responsibility for them.

### § 2.1.8 Extent of Responsibility

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

### § 2.1.9 Notices and Compliance with Laws

The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi governmental authorities for inclusion in the Contract Documents.

### § 2.2 Guaranteed Maximum Price Proposal and Contract Time

**§ 2.2.1** At a time to be mutually agreed upon by the Owner and the Construction Manager and in consultation with the Architect, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee.

**§ 2.2.2** To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

**§ 2.2.3** The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:

- .1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- .2 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Section 2.2.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- .3 A statement of the proposed Guaranteed Maximum Price, including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;
- .4 The anticipated date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based; and
- .5 A date by which the Owner must accept the Guaranteed Maximum Price.

**§ 2.2.4** In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order.

**§ 2.2.5** The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal. In the event that the Owner and Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

**§ 2.2.6** If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which the Owner shall provide to the Architect. The



Guaranteed Maximum Price Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

§ 2.2.7 The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such costs.

§ 2.2.8 The Owner shall authorize the Architect to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in the Guaranteed Maximum Price Amendment. The Owner shall promptly furnish those revised Drawings and Specifications to the Construction Manager as they are revised. The Construction Manager shall notify the Owner and Architect of any inconsistencies between the Guaranteed Maximum Price Amendment and the revised Drawings and Specifications.

§ 2.2.9 The Construction Manager shall include in the Guaranteed Maximum Price all sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed.

## § 2.3 Construction Phase

### § 2.3.1 General

§ 2.3.1.1 For purposes of Section 8.1.2 of A201–2007, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

§ 2.3.1.2 The Construction Phase shall commence upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal or the Owner's issuance of a Notice to Proceed, whichever occurs earlier.

### § 2.3.2 Administration

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids to the Architect. The Owner shall then determine, with the advice of the Construction Manager and the Architect, which bids will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and when a specific bidder (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work, and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount and time requirement of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost-plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below.

§ 2.3.2.4 If the Construction Manager recommends a specific bidder that may be considered a "related party" according to Section 6.10, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction, according to Section 6.10.2.

§ 2.3.2.5 The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner and Architect.

§ 2.3.2.6 Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work and submittal schedule in accordance with Section 3.10 of A201–2007.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and make available to the Owner and Architect, a daily log containing a record for each day of weather, portions of the Work in progress, number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the Owner.

§ 2.3.2.8 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect and shall provide this information in its monthly reports to the Owner and Architect, in accordance with Section 2.3.2.7 above.

## § 2.4 Professional Services

Section 3.12.10 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

## § 2.5 Hazardous Materials

Section 10.3 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

## ARTICLE 3 OWNER'S RESPONSIBILITIES

### § 3.1 Information and Services Required of the Owner

§ 3.1.1 The Owner shall provide information with reasonable promptness, regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability, special equipment, systems, sustainability and site requirements.

§ 3.1.2 Prior to the execution of the Guaranteed Maximum Price Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Construction Manager may only request such evidence if (1) the Owner fails to make payments to the Construction Manager as the Contract Documents require, (2) a change in the Work materially changes the Contract Sum, or (3) the Construction Manager identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager and Architect.

§ 3.1.3 The Owner shall establish and periodically update the Owner's budget for the Project, including (1) the budget for the Cost of the Work as defined in Section 6.1.1, (2) the Owner's other costs, and (3) reasonable contingencies related to all of these costs. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner shall notify the Construction Manager and Architect. The Owner and the Architect, in consultation with the Construction Manager, shall thereafter agree to a corresponding change in the Project's scope and quality.

§ 3.1.4 Structural and Environmental Tests, Surveys and Reports. During the Preconstruction Phase, the Owner shall furnish the following information or services with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. The Construction Manager shall be entitled to rely on the accuracy of information and services furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 3.1.4.1 The Owner shall furnish tests, inspections and reports required by law and as otherwise agreed to by the parties, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.



§ 3.1.4.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 3.1.4.3 The Owner, when such services are requested, shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

§ 3.1.4.4 During the Construction Phase, the Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services.

### § 3.2 Owner's Designated Representative

The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project. The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201–2007, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 3.2.1 **Legal Requirements.** The Owner shall furnish all legal, insurance and accounting services, including auditing services, that may be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

### § 3.3 Architect

The Owner shall retain an Architect to provide services, duties and responsibilities as described in AIA Document B103™–2007, Standard Form of Agreement Between Owner and Architect, including any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement. The Owner shall provide the Construction Manager a copy of the executed agreement between the Owner and the Architect, and any further modifications to the agreement.

## ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

### § 4.1 Compensation

§ 4.1.1 For the Construction Manager's Preconstruction Phase services, the Owner shall compensate the Construction Manager as follows:

§ 4.1.2 For the Construction Manager's Preconstruction Phase services described in Sections 2.1 and 2.2:  
*(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)*

§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed within Eight ( 8 ) months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted.

§ 4.1.4 Compensation based on Direct Personnel Expense includes the direct salaries of the Construction Manager's personnel providing Preconstruction Phase services on the Project and the Construction Manager's costs for the mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions.

### § 4.2 Payments

§ 4.2.1 Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed.

§ 4.2.2 Payments are due and payable upon presentation of the Construction Manager's invoice. Amounts unpaid within 30 ( 30 ) days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Construction Manager.  
(Insert rate of monthly or annual interest agreed upon.)

.25 % one quarter

## ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager the Contract Sum in current funds. The Contract Sum is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager's Fee.

§ 5.1.1 The Construction Manager's Fee:

(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)

The Construction Manger's compensation shall be lump sum fee of \$. This lump sum fee is independent of the actual Cost of the Work for work performed pursuant to the Contract, as adjusted for changes in the Work, payable as herein provided, provided that the sum of the Cost of Work, and the Cost of the Construction Manger's fee as provided by the Contract Documents shall not exceed the Guaranteed Maximum Price.

In addition to the above compensation, the Owner agrees to reimburse the Construction Manager for Cost of Work items as follows:

Insurance

Builder's Risk Insurance

General Conditions:

On Site Project Management Staff (with burdens)

Temporary Project Construction & Utilities

Field Offices & Office Supplies

Total Compensation for these General Conditions, Insurance & Bonding is \$based on CMBL Value of \$.

§ 5.1.2 The method of adjustment of the Construction Manager's Fee for changes in the Work:

Additional Fee of % of increased change in the Cost of Work after the GMP Amendment with a reasonable adjustment to the General Conditions amount, if any, related to time or scope if the change materially affects the scope of the General Conditions amount.

§ 5.1.3 Limitations, if any, on a Subcontractor's overhead and profit for increases in the cost of its portion of the Work:

5% profit and 10% overhead if first tier subcontract and capped at 20% profit for all tiers if performed by a tier other than first tier

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not exceed eighty percent (80 %) of the AED Green Book rate (or equal).

§ 5.1.5 Unit prices, if any:

(Identify and state the unit price; state the quantity limitations, if any, to which the unit price will be applicable.)

| Item                                        | Units and Limitations | Price per Unit (\$0.00) |
|---------------------------------------------|-----------------------|-------------------------|
| As established in the GMP Amendment, if any |                       |                         |

## § 5.2 Guaranteed Maximum Price

§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it is amended from time to time. To the extent the Cost of the Work exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.

*(Insert specific provisions if the Construction Manager is to participate in any savings.)*

At the Construction Manager's sole discretion, savings may be declared during the Construction Phase, that may be re-invested in the project or reallocated to increase Owner's Contingency.

**§ 5.2.2** The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

### **§ 5.3 Changes in the Work**

**§ 5.3.1** The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Architect may make minor changes in the Work as provided in Section 7.4 of AIA Document A201–2007, General Conditions of the Contract for Construction. The Construction Manager shall be entitled to an equitable adjustment in the Contract Time as a result of changes in the Work.

**§ 5.3.2** Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Section 7.3.3 of AIA Document A201–2007, General Conditions of the Contract for Construction.

**§ 5.3.3** In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of AIA Document A201–2007 and the term "costs" as used in Section 7.3.7 of AIA Document A201–2007 shall have the meanings assigned to them in AIA Document A201–2007 and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

**§ 5.3.4** In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in the above-referenced provisions of AIA Document A201–2007 shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 5.1 of this Agreement.

**§ 5.3.5** If no specific provision is made in Section 5.1.2 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.2 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly.

## **ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE**

### **§ 6.1 Costs to Be Reimbursed**

**§ 6.1.1** The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7.

**§ 6.1.2** Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing Guaranteed Maximum Price Amendment.

### **§ 6.2 Labor Costs**

**§ 6.2.1** Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior approval, at off-site workshops.

**§ 6.2.2** Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's prior approval.

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal or other offices shall be included in the Cost of the Work, identify in Section 11.5, the personnel to be included, whether for all or only part of their time, and the rates at which their time will be charged to the Work.)*

**§ 6.2.3** Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

**§ 6.2.4** Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3 at the fixed rates not to exceed 59.04% of salaries and 34.64% of wages..

**§ 6.2.5** Bonuses, profit sharing, incentive compensation and any other discretionary payments paid to anyone hired by the Construction Manager or paid to any Subcontractor or vendor, with the Owner's prior approval.

### **§ 6.3 Subcontract Costs**

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

### **§ 6.4 Costs of Materials and Equipment Incorporated in the Completed Construction**

**§ 6.4.1** Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

**§ 6.4.2** Costs of materials described in the preceding Section 6.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

### **§ 6.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items**

**§ 6.5.1** Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Construction Manager shall mean fair market value.

**§ 6.5.2** Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling and removal. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval.

**§ 6.5.3** Costs of removal of debris from the site of the Work and its proper and legal disposal.

**§ 6.5.4** Costs of document reproductions, facsimile transmissions and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the site office.

**§ 6.5.5** That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work.

**§ 6.5.6** Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval.

## **§ 6.6 Miscellaneous Costs**

**§ 6.6.1** Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract. Self-insurance for either full or partial amounts of the coverages required by the Contract Documents, with the Owner's prior approval.

**§ 6.6.2** Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable.

**§ 6.6.3** Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.

**§ 6.6.4** Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of AIA Document A201–2007 or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

**§ 6.6.5** Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of AIA Document A201–2007 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

**§ 6.6.6** Costs for electronic equipment and software, directly related to the Work with the Owner's prior approval.

**§ 6.6.7** Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility in the Contract Documents.

**§ 6.6.8** Legal, mediation and arbitration costs, including attorneys' fees, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager after the execution of this Agreement in the performance of the Work and with the Owner's prior approval, which shall not be unreasonably withheld.

**§ 6.6.9** Subject to the Owner's prior approval, expenses incurred in accordance with the Construction Manager's standard written personnel policy for relocation and temporary living allowances of the Construction Manager's personnel required for the Work.

## **§ 6.7 Other Costs and Emergencies**

**§ 6.7.1** Other costs incurred in the performance of the Work if, and to the extent, approved in advance in writing by the Owner.

**§ 6.7.2** Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of AIA Document A201–2007.

**§ 6.7.3** Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Construction Manager and only to the extent that the cost of repair or correction is not recovered by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

**§ 6.7.4** The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document A201–2007 or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.8.

## **§ 6.8 Costs Not To Be Reimbursed**

**§ 6.8.1** The Cost of the Work shall not include the items listed below:



- .1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;
- .2 Expenses of the Construction Manager's principal office and offices other than the site office;
- .3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;
- .4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;
- .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;
- .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7;
- .7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded; and
- .8 Costs for services incurred during the Preconstruction Phase.
- .9 Delay damages or claims, unless provided elsewhere in this Agreement.

### **§ 6.9 Discounts, Rebates and Refunds**

**§ 6.9.1** Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

**§ 6.9.2** Amounts that accrue to the Owner in accordance with the provisions of Section 6.9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

### **§ 6.10 Related Party Transactions**

**§ 6.10.1** For purposes of Section 6.10, the term "related party" shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term "related party" includes any member of the immediate family of any person identified above.

**§ 6.10.2** If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3. If the Owner fails to authorize the transaction, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3.

### **§ 6.11 Accounting Records**

The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law.

## ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES

### § 7.1 Progress Payments

§ 7.1.1 Based upon Applications for Payment submitted to the Architect by the Construction Manager and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents.

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

§ 7.1.3 Provided that an Application for Payment is received by the Architect not later than the 5th day of a month, the Owner shall make payment of the certified amount to the Construction Manager not later than the 30th day of the same month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than thirty ( 30 ) days after the Architect receives the Application for Payment. *(Federal, state or local laws may require payment within a certain period of time.)*

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based on the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§ 7.1.7 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of AIA Document A201-2007;
- .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
- .3 Add the Construction Manager's Fee, less retainage of Five percent ( 5 %). The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .4 Subtract retainage of Five percent ( 5 %) from that portion of the Work that the Construction Manager self-performs;
- .5 Subtract the aggregate of previous payments made by the Owner;

Init.

- .6 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- .7 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201–2007.
- .8 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201–2007.
- .9 The progress payment amount determined in accordance with this Section shall be further modified under the following circumstances:
  - .a Add, if Final Completion of the Work is thereafter materially delayed by Owner or Owner's agents through no fault of the Construction Manager, any additional amounts payable in accordance with Section 9.10.3 of AIA Document A201-2007, as amended.
  - .b If Owner is entitled to deduct liquidated damages, or any other damages or amounts provided in the Contract Documents, including clean-up fees, then Owner shall be entitled to deduct such liquidated damages, amounts and fees due Construction Manager at any time provided it is proven that Construction Manager owes the liquidated damages or was contractually obligated to perform said clean-up.

**§ 7.1.8** The Owner and Construction Manager shall agree upon (1) a mutually acceptable procedure for review and approval of payments to Subcontractors and (2) the percentage of retainage held on Subcontracts, and the Construction Manager shall execute subcontracts in accordance with those agreements.

**§ 7.1.9** Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

**§ 7.1.10** In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Architect has made exhaustive or continuous on-site inspections; or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's auditors acting in the sole interest of the Owner.

## **§ 7.2 Final Payment**

**§ 7.2.1** Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Construction Manager when

- .1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201–2007, and to satisfy other requirements, if any, which extend beyond final payment;
- .2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment; and
- .3 a final Certificate for Payment has been issued by the Architect.
- .4 The progress payment amount determined in accordance with this Section shall be further modified under the following circumstances:
  - .a Add, if final completion of the Work is thereafter materially delayed by Owner or Owner's agents through no fault of the Construction Manager, any additional amounts payable in accordance with Section 9.10.3 of AIA Document A201-2007, as amended.
  - .b If Owner is entitled to deduct liquidated damages, or any other damages or amounts provided in the Contract Documents, including clean-up fees, then Owner shall be entitled to deduct such liquidated damages, amounts and fees due Construction Manager at any time.
  - .c If Construction Manager fails or refuses to complete the Work, or has unsettled claims with Owner, any final payment to Construction Manager shall be subject to deduction for such amounts as the Owner and Architect shall determine as the cost for completing incomplete Work and the value of unsettled claims.



The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

**§ 7.2.2** The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A201–2007. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201–2007. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

**§ 7.2.3** If the Owner's auditors report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount without seeking an initial decision pursuant to Section 15.2 of A201–2007. A request for mediation shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to request mediation within this 30-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

**§ 7.2.4** If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1.1 and not excluded by Section 6.8 to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings as provided in Section 5.2.1, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

## ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of AIA Document A201–2007.

*(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA Document A201–2007.)*

| Type of Insurance or Bond    | Limit of Liability or Bond Amount (\$0.00)                       |
|------------------------------|------------------------------------------------------------------|
| Commercial General Liability | \$3 million per occurrence/\$6 million agg./\$6 million comp ops |
| Excess Umbrella              | \$5 million per occurrence and aggregate                         |
| Pollution Liability          | \$2 million per occurrence and aggregate                         |
| Auto                         | \$3 million                                                      |
| Builder's Risk               | Replacement Value of the Project                                 |
| Payment & Performance Bonds  | 100% of the Contract Sum                                         |

## ARTICLE 9 DISPUTE RESOLUTION

**§ 9.1** Any Claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of A201–2007. However, for Claims arising from or relating to the Construction Manager's Preconstruction Phase services, no decision by the Initial Decision Maker shall be required as a condition precedent to mediation or binding dispute resolution, and Section 9.3 of this Agreement shall not apply.

**§ 9.2** For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201–2007, the method of binding dispute resolution shall be as follows:

(Check the appropriate box. If the Owner and Construction Manager do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

☐ Arbitration pursuant to Section 15.4 of AIA Document A201–2007

☐ Litigation in a court of competent jurisdiction

☐ Other: (Specify)

### § 9.3 Initial Decision Maker

The Architect will serve as the Initial Decision Maker pursuant to Section 15.2 of AIA Document A201–2007 for Claims arising from or relating to the Construction Manager’s Construction Phase services, unless the parties appoint below another individual, not a party to the Agreement, to serve as the Initial Decision Maker.

*(If the parties mutually agree, insert the name, address and other contact information of the Initial Decision Maker, if other than the Architect.)*

## ARTICLE 10 TERMINATION OR SUSPENSION

### § 10.1 Termination Prior to Establishment of the Guaranteed Maximum Price

§ 10.1.1 Prior to the execution of the Guaranteed Maximum Price Amendment, the Owner may terminate this Agreement upon not less than seven days’ written notice to the Construction Manager for the Owner’s convenience and without cause, and the Construction Manager may terminate this Agreement, upon not less than seven days’ written notice to the Owner, for the reasons set forth in Section 14.1.1 of A201–2007.

§ 10.1.2 In the event of termination of this Agreement pursuant to Section 10.1.1, the Construction Manager shall be equitably compensated for Preconstruction Phase services performed prior to receipt of a notice of termination. In no event shall the Construction Manager’s compensation under this Section exceed the compensation set forth in Section 4.1.

§ 10.1.3 If the Owner terminates the Contract pursuant to Section 10.1.1 after the commencement of the Construction Phase but prior to the execution of the Guaranteed Maximum Price Amendment, the Owner shall pay to the Construction Manager an amount calculated as follows, which amount shall be in addition to any compensation paid to the Construction Manager under Section 10.1.2:

- .1 Take the Cost of the Work incurred by the Construction Manager to the date of termination;
- .2 Add the Construction Manager’s Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager’s Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion; and
- .3 Subtract the aggregate of previous payments made by the Owner for Construction Phase services.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. All Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.

If the Owner accepts assignment of subcontracts, purchase orders or rental agreements as described above, the Owner will reimburse or indemnify the Construction Manager for all costs arising under the subcontract, purchase order or rental agreement, if those costs would have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner chooses not to accept assignment of any subcontract, purchase order or rental agreement that would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager will terminate the subcontract, purchase order or rental agreement and the Owner will pay the Construction Manager the costs necessarily incurred by the Construction Manager because of such termination.

## **§ 10.2 Termination Subsequent to Establishing Guaranteed Maximum Price**

Following execution of the Guaranteed Maximum Price Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of AIA Document A201–2007.

**§ 10.2.1** If the Owner terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of A201–2007 shall not exceed the amount the Construction Manager would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

**§ 10.2.2** If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of A201–2007 shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, utilizing as necessary a reasonable estimate of the Cost of the Work for Work not actually completed.

## **§ 10.3 Suspension**

The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–2007. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of AIA Document A201–2007, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

## **ARTICLE 11 MISCELLANEOUS PROVISIONS**

**§ 11.1** Terms in this Agreement shall have the same meaning as those in A201–2007.

### **§ 11.2 Ownership and Use of Documents**

Section 1.5 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

### **§ 11.3 Governing Law**

Section 13.1 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

### **§ 11.4 Assignment**

The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Construction Manager shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement. Except as provided in Section 13.2.2 of A201–2007, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

**§ 11.5** Other provisions:

## **ARTICLE 12 SCOPE OF THE AGREEMENT**

**§ 12.1** This Agreement represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Construction Manager.

**§ 12.2** The following documents comprise the Agreement:

- .1 AIA Document A133–2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price
- .2 AIA Document A201–2007, General Conditions of the Contract for Construction
- .3 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed, or the following:

TBD

- .4 AIA Document E202™–2008, Building Information Modeling Protocol Exhibit, if completed, or the following:

TBD

- .5 Other documents:  
(List other documents, if any, forming part of the Agreement.)

n/a

This Agreement is entered into as of the day and year first written above.

\_\_\_\_\_  
**OWNER** (Signature)

\_\_\_\_\_  
**CONSTRUCTION MANAGER** (Signature)

\_\_\_\_\_  
City of Midland, Texas  
(Printed name and title)

\_\_\_\_\_  
(Printed name and title)

# Additions and Deletions Report for AIA<sup>®</sup> Document A133<sup>™</sup> – 2009

This Additions and Deletions Report, as defined on page 1 of the associated document, reproduces below all text the author has added to the standard form AIA document in order to complete it, as well as any text the author may have added to or deleted from the original AIA text. Added text is shown underlined. Deleted text is indicated with a horizontal line through the original AIA text.

Note: This Additions and Deletions Report is provided for information purposes only and is not incorporated into or constitute any part of the associated AIA document. This Additions and Deletions Report and its associated document were generated simultaneously by AIA software at 13:17:59 on 12/30/2013.

## PAGE 1

**AGREEMENT** made as of the \_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_

...

City of Midland, Texas  
300 North Loraine Midland, TX 79701

...

Midland Court Building, Midland, Texas. The project consists of a new multi-level Court Building for a total project of approximately \_\_\_\_\_ s.f.

...

Brinkley Sargent Architects  
5000 Quorum Drive, Suite 600  
Dallas, Texas 75254

...

Harold E. Sargent  
Brinkley Sargent Architects  
5000 Quorum Drive, Suite 600  
Dallas, Texas 75254

WHEREAS, the City of Midland, Texas ("Owner" and ("Construction Manager" acting as construction manager at risk) desire to enter into an Agreement under which Construction Manager will perform services relating to the Project on behalf of the Owner; and

WHEREAS Owner and Construction Manager have agreed to enter into AIA Document A133 (2009), as basic form for that Agreement; and

The Owner and Construction Manager agree

WHEREAS certain terms and conditions of that Agreement need to be modified to comply with applicable laws and policies affecting Owner and Construction Manager in the construction of these projects, Owner and Construction Manager hereby agrees as follows.

## PAGE 4

§ 2.1.3 When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically update a Project schedule for the Owner and Architect's review and the Owner's acceptance. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule relating to the

performance of the Architect's services. The Project schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities and identify items that could affect the Project's timely completion. The updated Project schedule shall include the following: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; and the occupancy requirements of the Owner.

#### PAGE 8

§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed within Eight ( 8 ) months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted.

#### PAGE 9

§ 4.2.2 Payments are due and payable upon presentation of the Construction Manager's invoice. Amounts unpaid within 30 ( 30 ) days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Construction Manager.

...

.25 % one quarter

...

The Construction Manger's compensation shall be lump sum fee of \$. This lump sum fee is independent of the actual Cost of the Work for work performed pursuant to the Contract, as adjusted for changes in the Work, payable as herein provided, provided that the sum of the Cost of Work, and the Cost of the Construction Manger's fee as provided by the Contract Documents shall not exceed the Guaranteed Maximum Price.

In addition to the above compensation, the Owner agrees to reimburse the Construction Manager for Cost of Work items as follows:

Insurance

Builder's Risk Insurance

General Conditions:

On Site Project Management Staff (with burdens)

Temporary Project Construction & Utilities

Field Offices & Office Supplies

Total Compensation for these General Conditions, Insurance & Bonding is \$based on CMBL Value of \$.

...

Additional Fee of % of increased change in the Cost of Work after the GMP Amendment with a reasonable adjustment to the General Conditions amount, if any, related to time or scope if the change materially affects the scope of the General Conditions amount.

...

5% profit and 10% overhead if first tier subcontract and capped at 20% profit for all tiers if performed by a tier other than first tier

...

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not exceed percent (—%) of the standard rate paid at the place of the Project eighty percent (80 %) of the AED Green Book rate (or equal).



...

As established in the GMP Amendment, if any

**PAGE 10**

At the Construction Manager's sole discretion, savings may be declared during the Construction Phase, that may be re-invested in the project or reallocated to increase Owner's Contingency.

**PAGE 11**

**§ 6.2.4** Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through ~~6.2.3~~ 6.2.3 at the fixed rates not to exceed 59.04% of salaries and 34.64% of wages..

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.9 Delay damages or claims, unless provided elsewhere in this Agreement.

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**§ 7.1.3** Provided that an Application for Payment is received by the Architect not later than the 5th day of a month, the Owner shall make payment of the certified amount to the Construction Manager not later than the 30th day of the same month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than thirty ( 30 ) days after the Architect receives the Application for Payment.

...

- .3** Add the Construction Manager's Fee, less retainage of Five percent ( 5 %). The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .4** Subtract retainage of Five percent ( 5 %) from that portion of the Work that the Construction Manager self-performs;

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- .7** Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201-2007.
- .8** Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201-2007.
- .9** The progress payment amount determined in accordance with this Section shall be further modified under the following circumstances:
  - .a** Add, if Final Completion of the Work is thereafter materially delayed by Owner or Owner's agents through no fault of the Construction Manager, any additional amounts payable in accordance with Section 9.10.3 of AIA Document A201-2007, as amended.
  - .b** If Owner is entitled to deduct liquidated damages, or any other damages or amounts provided in the Contract Documents, including clean-up fees, then Owner shall be entitled to deduct such liquidated damages, amounts and fees due Construction Manager at any time provided it is proven that Construction Manager owes the liquidated damages or was contractually obligated to perform said clean-up.

...

.4 The progress payment amount determined in accordance with this Section shall be further modified under the following circumstances:

.a Add, if final completion of the Work is thereafter materially delayed by Owner or Owner's agents through no fault of the Construction Manager, any additional amounts payable in accordance with Section 9.10.3 of AIA Document A201-2007, as amended.

.b If Owner is entitled to deduct liquidated damages, or any other damages or amounts provided in the Contract Documents, including clean-up fees, then Owner shall be entitled to deduct such liquidated damages, amounts and fees due Construction Manager at any time.

.c If Construction Manager fails or refuses to complete the Work, or has unsettled claims with Owner, any final payment to Construction Manager shall be subject to deduction for such amounts as the Owner and Architect shall determine as the cost for completing incomplete Work and the value of unsettled claims.

**PAGE 16**

|                                        |                                                                         |
|----------------------------------------|-------------------------------------------------------------------------|
| <u>Commercial General Liability</u>    | <u>\$3 million per occurrence/\$6 million agg./\$6 million comp ops</u> |
| <u>Excess Umbrella</u>                 | <u>\$5 million per occurrence and aggregate</u>                         |
| <u>Pollution Liability</u>             | <u>\$2 million per occurrence and aggregate</u>                         |
| <u>Auto</u>                            | <u>\$3 million</u>                                                      |
| <u>Builder's Risk</u>                  | <u>Replacement Value of the Project</u>                                 |
| <u>Payment &amp; Performance Bonds</u> | <u>100% of the Contract Sum</u>                                         |

**PAGE 19**

TBD

...

TBD

...

n/a

...

City of Midland, Texas



## ***Certification of Document's Authenticity***

***AIA® Document D401™ – 2003***

I, Gary Beeman, hereby certify, to the best of my knowledge, information and belief, that I created the attached final document simultaneously with its associated Additions and Deletions Report and this certification at 13:17:59 on 12/30/2013 under Order No. 3033128984\_1 from AIA Contract Documents software and that in preparing the attached final document I made no changes to the original text of AIA® Document A133™ – 2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, as published by the AIA in its software, other than those additions and deletions shown in the associated Additions and Deletions Report.

\_\_\_\_\_  
*(Signed)*

\_\_\_\_\_  
*(Title)*

\_\_\_\_\_  
*(Dated)*



# AIA® Document A201™ – 2007

## General Conditions of the Contract for Construction

### for the following PROJECT:

(Name and location or address) Midland Court Building- located in Midland, Texas. The project consists of a new multi-level Court for a total project of approximately \_\_\_\_\_ s.f.

### THE OWNER:

(Name, legal status and address)

City of Midland, Texas  
300 N. Loraine  
Midland, Texas 79701

### THE ARCHITECT:

(Name, legal status and address)

Brinkley Sargent Architect  
5000 Quorum Drive, Suite 600  
Dallas, Texas 75254

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### ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Init.

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 BASIC DEFINITIONS

#### § 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding requirements.

#### § 1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect's consultants or (4) between any persons or entities other than the Owner and the Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

##### § 1.1.2.1

Should the Contractor find discrepancies, omissions or conflicts within the Contract Documents, or be in doubt or question as to their meaning, the Contractor shall notify in writing the Architect and Owner, and Architect will issue a written addendum to all parties that is consistent with the Owner's Scope of the Work.

#### § 1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

#### § 1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by separate contractors.

#### § 1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

#### § 1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

#### § 1.1.7 INSTRUMENTS OF SERVICE

Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective professional services agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

#### § 1.1.8 INITIAL DECISION MAKER

The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2 and certify termination of the Agreement under Section 14.2.2.

### § 1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as

binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

**§ 1.2.2** Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

**§ 1.2.3** Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

**§ 1.2.4** In the event of inconsistencies between portions of the contract documents or within the contract documents; the contract documents shall be interpreted to provide the better quality or greater quantity of Work. Bring all inconsistencies to the Architect's attention, prior to installation, for Architect's interpretation.

### **§ 1.3 CAPITALIZATION**

Terms capitalized in these General Conditions include those that are (1) specifically defined, (2) the titles of numbered articles or (3) the titles of other documents published by the American Institute of Architects.

### **§ 1.4 INTERPRETATION**

In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

### **§ 1.5 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE**

**§ 1.5.1** The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and will retain all common law, statutory and other reserved rights, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

**§ 1.5.2** The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce the Instruments of Service provided to them solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants.

### **§ 1.6 TRANSMISSION OF DATA IN DIGITAL FORM**

If the parties intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions, unless otherwise already provided in the Agreement or the Contract Documents.

## **ARTICLE 2 OWNER**

### **§ 2.1 GENERAL**

**§ 2.1.1** The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

**§ 2.1.2** The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

§ 2.1.3 The Contractor stipulates and agrees that the Owner has no duty to discover any design errors or omissions in the Drawings, Plans, Specifications and other Contract Documents, and has no duty to notify Contractor of same. The Contractor has a continuing duty through Final Completion to exercise reasonable diligence to carefully study and compare Drawings and Specifications and promptly to notify the Owner and Architect regarding any conflicts among systems, design errors or omissions of which the Contractor has notice.

## § 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

*(Paragraph deleted)*

§ 2.2.2 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 2.2.3 If requested in writing by Contractor prior to the start of the Work, the Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations which are known to the Owner for the site of the Project, and a legal description of the site. Other than any metes and bounds noted in any survey provided, Owner does not guarantee the accuracy of any surveys provided. The Owner does not guarantee that utility lines of other improvements are in the exact locations as shown on plans and surveys. Contractor shall verify with the various utility companies and owners of improvements the location of such utility lines and other improvements. Any identified water, gas or sewer line, telephone, telegraph or electric wire, cable or other utility facility broken, cut or damaged by the Contractor or any of his workmen or subcontractors shall be replaced by the Contractor at his own expense, or by the responsible subcontractor at its own expense, and will not be paid for by the Owner. Repairs shall be made immediately and no other work shall be done until breaks or damages have been repaired and service restored. Any delay caused by the identified cut or break shall be solely attributed to the contractor.

§ 2.2.4 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

§ 2.2.5 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Contractor one copy of the Contract Documents for purposes of making reproductions pursuant to Section 1.5.2.

## § 2.3 OWNER'S RIGHT TO STOP THE WORK

If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or repeatedly fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3.

## § 2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

## ARTICLE 3 CONTRACTOR

### § 3.1 GENERAL

§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express

authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized representative and includes the Construction Manager or Construction Manager at Risk, if applicable.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

§ 3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

§ 3.1.4 The Contractor represents and warrants the following to the Owner (in addition to the other representations and warranties contained in the Contract Document), as an inducement to the Owner to execute this Contract, which representations and warranties shall survive the execution and delivery of the Contract and the Final Completion of the Work:

- .1 that Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete the Work and perform its obligations under the Contract Documents;
- .2 that Contractor it is able to furnish the tools, materials, supplies, equipment and labor required to timely complete the Work and perform its obligations hereunder and has sufficient experience and competence to do so;
- .3 that Contractor is authorized to do business in the State where the Project is located and properly licensed by all necessary governmental, public and quasi-public authorities having jurisdiction over it, the Work, or the site of the Project; and
- .4 that the execution of the Contract and its performance thereof are within Contractor's duly-authorized powers.

## § 3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

§ 3.2.2 The Contractor shall not be entitled to any additional time or compensation for any additional work caused by the Contractor's fault, improper construction, or by Contractor's failure to carefully study and compare the Contract Documents prior to execution of the Work. Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor has knowledge that any of the products or systems specified will perform in a manner that will limit the contractor's ability to satisfactorily perform the Work or to honor his warranty, or will result in a limitation of or interference with the Owner's intended use, then the Contractor shall promptly notify the Architect and Owner in writing, providing substantiation for his position. Any necessary changes, including substitution of materials, shall be accomplished by appropriate Modification. If the Contractor believes that additional cost or time is involved because



of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall make Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities. Contractor shall not be entitled to additional compensation for additional Work caused by Contractor's failure to carefully study and compare the Construction Documents prior to execution of the Work.

### § 3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect.

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors.

§ 3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§ 3.3.4 The Contractor shall bear full responsibility for design and execution of acceptable trenching and shoring procedures, in accordance with Texas Health & Safety Code section 756.021 et seq. To the extent that any portion of the Work requires a trench excavation exceeding five (5) feet in depth, in accordance with Texas Health & Safety Code section 756.023(a), Contractor shall fully comply, and shall require any applicable subcontractor to comply, with:

- .1 The Occupational Safety & Health Administration standards for trench safety in effect for the construction of the Work.
- .2 The special shoring requirements, if any, of the Owner.
- .3 any geotechnical information obtained by Owner for use by the Construction Manager in the design of the trench safety system.
- .4 The trench excavation safety protection shall be a separate pay item and shall be based on linear feet of trench excavated. Special shoring requirements shall also be a separate pay item, and shall be based on the square feet of shoring used. Said cost shall be included within the Contract Sum.

§ 3.3.5 It is understood and agreed that the relationship of contractor to Owner shall be that of an independent contractor. Nothing contained in this Agreement or inferable from this Agreement shall be deemed or construed to: 1) make Contractor the agent, servant or employee of the Owner; or 2) create any partnership, joint venture, or other association between Owner and Contractor. Any direction or instruction by Owner or any of its authorized representatives in respect to the Work shall relate to the results the Owner desires to obtain from the Work, and shall in no way affect Contractor's independent contractor status.

§ 3.3.6 Contractor, its subcontractors and vendors shall bear responsibility for compliance with all federal and state laws, regulations, guidelines, and ordinances pertaining to worker safety and applicable to the Work. Contractor

further recognizes that the Owner and Architect do not owe the Contractor any duty to supervise or direct his Work so as to protect the Contractor from the consequences' of his own conduct.

**§ 3.3.7** The Contractor shall properly and efficiently coordinate the timing, scheduling and routing of all Work performed by all trades and sub-contractors.

**§ 3.3.8** The Contractor shall review Subcontractor safety programs, procedures, and precautions in connection with performance of the Work. However, the Contractor's duties shall not relieve any Subcontractor(s) or any other person or entity (e.g., a Supplier), including any person or entity with who the Contractor does not have a contractual relationship, of their responsibility or liability relative to compliance with all applicable federal, state, and local laws, rules, regulations, and ordinances which shall include the obligation to provide for the safety of their employees, persons, and property and their requirements to maintain a work environment free of recognized hazards. The foregoing notwithstanding, the requirements of this Paragraph are not intended to impose upon the Contractor any additional obligations that the contractor would not have under any applicable state or federal laws, including, but not limited to any rules, regulations, or statutes pertaining to the Occupational Safety & Health Administration.

### **§ 3.4 LABOR AND MATERIALS**

**§ 3.4.1** Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

**§ 3.4.2** Except in the case of minor changes in the Work authorized by the Architect in accordance with Sections 3.12.8 or 7.4, the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.

**§ 3.4.3** The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

### **§ 3.4.4 WORKERS' COMPENSATION INSURANCE**

The Contractor shall provide Workers' Compensation Insurance coverage for all employees involved in the performance of this Contract.

Workers' Compensation - Certificates of Coverage.

The Contractor shall certify in writing that the Contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the Project, pursuant to the requirements of Texas Labor Code §406.096. The Contractor must provide a certificate of coverage to the District prior to being awarded the Contract. If the coverage period shown on the Contractor's current certificate of coverage ends during the duration of the Project, the Contractor must, prior to the end of the coverage period, file a new certificate of coverage with the District showing that coverage has been extended.

Contractor shall also require that each Subcontractor on the project provide a certificate relating to coverage of the subcontractor's employees to the Contractor, who shall provide the subcontractor's certificate to the District pursuant to the requirements of Texas Labor Code §406.096. The Contractor shall obtain from each person providing services on the Project and provide to the District a certificate of coverage prior to that person beginning work on the Project, so the District will have on file certificates of coverage showing coverage for all persons providing services on the Project; and if the coverage period on the current certificate of coverage ends during the duration of the Projects, the Contract must provide a new certificate of coverage showing an extension of coverage prior to the end of the coverage period. The term subcontractor includes persons providing services on the Project, and includes all persons or entities performing all or part of the services the Contractor has undertaken to perform on the Project, regardless of whether that person has employees. The requirement that a certificate relating to coverage pursuant to the Texas Labor Code §406.096 includes, but is not limited to, independent contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity that furnishes person to provide services on the Project. Services include, but are not limited to, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other services related to the Project. Services do not include activities unrelated to the Project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

Said certificates are required for the duration of the Project, which includes the time from the beginning of the Work on the Project until the Contractor's work on the Project has been completed and acceptable to the District. See 28 T.A.C. §110.110, forms TWCC-81, TWCC-82, TWCC-83, TWCC-84, as they may be updated or modified. The Contractor shall provide coverage based upon proper reporting of classification codes, payroll amounts, and the requirements of this Contract and state law. The Contractor is obligated to meet all legal requirements, regardless of whether or not such requirements are set out in this Contract. By executing this Contract, Contractor is representing that all employees of Contractor and subcontractors and all others who will provide services on this Project will be properly covered by workers' compensation coverage for the entire duration of the Project.

#### Workers' Compensation Insurance

Part A: Statutory Limits

Part B: Employer's Liability

\$100,000 per accident

\$100,000 disease-each employee

\$500,000 disease-policy limit

Note: Such insurance shall cover employees performing work on any and all projects including but not limited to construction, demolition, and rehabilitation. Contractor or its contractors shall maintain coverages. In the event the respective contractors do not maintain coverage, Contractor shall maintain the coverage on such contractor for each applicable contract.

#### Workers' Compensation – Other Requirements

The Contractor shall post a notice at every project site, in the text, form and manner set out by the Texas Department of Labor that informs all persons providing services under this Contract that they are required to be covered by workers' compensation and stating how a person may verify that such coverage exists and report a lack of coverage.

### **§ 3.4.5 ASBESTOS OR ASBESTOS CONTAINING MATERIALS: LEAD FREE MATERIAL IN POTABLE WATER SYSTEM; HAZARDOUS MATERIAL CERTIFICATION; EMERGENCIES**

#### Asbestos or Asbestos Containing Materials

Contractor shall submit to Owner's Representative or Engineer a written certification addressed to the Owner that all materials used in the construction of this Project contain less than one tenth of one percent (0.10%) by weight of asbestos and for which it can be demonstrated that, under reasonably foreseeable job site conditions, will not release asbestos fibers in excess of 0.1 fibers per cubic centimeter. The written certification shall further state that, should asbestos fibers be found at this Project in concentrations greater than 0.1 fibers per cubic centimeter, then Contractor will be responsible for determining which materials contain asbestos fibers and shall take all necessary and best practices corrective action to remove those materials from the Project, at no additional cost to the Owner. The written certification shall be dated, shall reference this specific Project and shall be signed by not less than two (2) officers of the Contractor. Final Payment shall not be made until this written certification has been received.

#### Lead-Free Material in Potable Water System

Prior to final payment or payment of retainage, the Contractor and each subcontractor involved with the potable water system shall furnish a written certification that the potable water system is "lead-free." The written certification shall further state that should lead be found in the potable water system built under this Contract, then Contractor shall be responsible for determining which materials contain lead and shall take all necessary corrective action to remove the lead from the Project, at no additional cost to the Owner. The written certification shall be dated, shall reference this specific Project and shall be signed by not less than two (2) officers of the Contractor. Final Payment shall not be made until this written certification has been received.

#### Hazardous Materials Certification

The Contractor shall provide written certification that no materials used in the Work contain lead or asbestos materials in them in excess of amounts allowed by federal, state or local standards, laws, codes, rules and regulations, or the Federal Environmental Protection Agency (EPA) standards and/or the Federal Occupational Safety and Health Administration (OSHA) standards. All standards shall be followed. In case of conflict, the most restrictive standards shall apply. The Contractor shall provide this written certification as part of the submittals required for Final Payment. The written certification shall be dated, shall reference this specific Project and shall be signed by not less



than two (2) officers of the Contractor. Final Payment shall not be made until this written certification has been received.

#### Emergencies

In an emergency affecting the safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent damage, injury or loss.

### § 3.5 WARRANTY

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or otherwise. The Contractor further warrants that Contractor shall perform the Work in a good and workmanlike manner, continuously and diligently in accordance with generally accepted standards of construction practice for construction of projects similar to the Project, except to the extent the Contract Documents expressly specify a higher degree of finish or workmanship, in which case the standard shall be the higher standard. All material shall be installed in a true and straight alignment, level and plumb; patterns shall be uniform; and jointing of materials shall be flush and level, unless otherwise directed in writing by the Architect. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. Notwithstanding anything in the Contract Documents to the contrary, Owner and Contractor expressly agree that the warranties stated herein shall mean the individual warranties associated with each particular Work within the Project, and each such individual warranty shall run from the Substantial Completion date. Contractor's express warranty is in addition to, and not in lieu of, Owner's other available remedies. All required warranties on equipment, machinery, materials, or components shall be submitted to the Architect on the manufacturer's or supplier's approval forms for delivery to the Owner. The warranties set out in this Section are not exclusive of any other warranties or guarantees set out in other places in the Contract Documents or expressed or implied under applicable law.

**§ 3.5.1** Contractor shall certify that the Project has been constructed in general conformance with the Architect's and Engineer's plans, specifications, and Construction Documents, as modified from time to time pursuant to the terms of the Contract Documents.

**§ 3.5.2** The Contractor agrees to assign to the Owner, at the Time of final Completion of the Work, to be effective no later than the Time of final Completion, any and all manufacturers' and suppliers' warranties relating to materials and labor used in the work and further agrees to perform the Work in such a manner so as to preserve any and all such warranties. All forms will be required to be submitted prior to Final Payment.

**§ 3.5.3** The warranties of Contractor provided in Paragraphs 3.5.1, 3.5.2 shall in no way limit or abridge the warranties of the suppliers of equipment and systems which are to comprise a portion of the Work and all such warranties shall be in form and substance as required by the Contract Documents. Contractor shall take no action or fail to act in any way which results in the termination or expiration of such third party warranties or which otherwise results in prejudice to the rights of Owner under such warranties. Contractor agrees to provide all notices required for the effectiveness of such warranties and shall include provisions in the contracts with the providers and manufacturers of such systems and equipment whereby Owner shall have a direct right, but not a duty, of enforcement of such warranty obligations.

**§ 3.5.4** Contractor shall maintain a complete and accurate schedule of the date(s) of Substantial Completion, the date(s) of Final Completion, and the dates upon which the warranty on each phase or building will expire. Contractor shall provide a copy of such schedules to Owner and Architect. Prior to termination of the warranty period, Contractor shall accompany Owner and Architect on re-inspection of each Work in the project and contractor shall be responsible for correcting any warranty items which are observed or reported during the warranty period. Contractor shall proceed with such warranty work without interruption until accepted by Owner and Architect, even though such work should extend beyond the warranty period.

### § 3.6 TAXES

Owner is an exempt entity under the tax laws of the State of Texas. The Owner represents that this Project is eligible for exemption from the State Sales Tax on tangible personal property and material incorporated in the Project, provided that the Contractor fulfills the requirements of the Limited Sales, Excise and Use Tax Rules and Regulations. For the purpose of establishing exemption, it is understood and agreed that the Contractor may be required to segregate materials and labor costs at the time a Contract is awarded, and will accept a Certificate of Exemption from the Owner. Contractor shall obtain Certificates of Resale from their suppliers shall make the Contractor or Sub-Contractor responsible for absorbing the tax, without compensation from Owner. Contractor shall pay all necessary local, county and state taxes, income tax, compensation tax, social security and withholding payments as required by law. Contractor hereby RELEASES, INDEMNIFIES AND HOLDS HARMLESS Owner from any and all claims and demands made as a result of the failure of Contractor or any Subcontractor to comply with the provisions of any or all such laws and regulations.

### § 3.7 PERMITS, FEES, NOTICES AND COMPLIANCE WITH LAWS

§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

§ 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

§ 3.7.3 If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

§ 3.7.4 The Contractor shall pay directly all temporary utility charges, temporary tap charges, and temporary water meter charges as established in the GMP Amendment. After consultation with the Owner, the Contractor shall also obtain all permits and approvals, and pay all fees and expenses, if any, associated with national Pollutant Discharge Elimination Systems (NPDES) regulations administered by the Environmental protection Agency (EPA) and local authorities, if applicable, that require completion of documentation and/or acquisition of a "land Disturbing Activities Permit" for the project. Also after consultation with the Owner, the Contractor shall obtain all permits and approvals, and pay all fees and expenses, if any, associated with Storm Water Pollution Prevention and Pollution Control Plan (SWPPP) regulations administered by the Texas Commission on Environmental Quality (TCEQ) and local authorities. Reimbursable expenses shall not include any fines or penalties assessed against the Contractor, Contractor's sub-contractors, the Project, or the Owner, unless SWPPP is installed as directed by the Owner's engineer or consultant.

§ 3.7.5 **Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

§ 3.7.6 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall

continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

### § 3.8 ALLOWANCES

§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

- .1 Allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and
- .3 Whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness.

### § 3.9 SUPERINTENDENT

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor.

§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the name and qualifications of a proposed superintendent. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to the proposed superintendent or (2) that the Architect requires additional time to review. Failure of the Architect to reply within the 14 day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed.

### § 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

§ 3.10.2 The Contractor shall prepare a submittal schedule, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

### § 3.11 DOCUMENTS AND SAMPLES AT THE SITE

The Contractor shall maintain at the site for the Owner one copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and one copy of approved Shop Drawings, Product Data, Samples and similar required

submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

### **§ 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES**

**§ 3.12.1** Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

**§ 3.12.2** Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

**§ 3.12.3** Samples are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

**§ 3.12.4** Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. Their purpose is to demonstrate the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

**§ 3.12.5** The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors.

**§ 3.12.6** By submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

**§ 3.12.7** The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect.

**§ 3.12.8** The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

**§ 3.12.9** The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice, the Architect's approval of a resubmission shall not apply to such revisions.

**§ 3.12.10** The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop



Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents. A registered Architect must prepare plans and specifications for all the Work, as governed by the Texas Occupations Code Chapter 1051; and a registered Engineer must prepare plans, specifications and estimates for all Work governed by Texas Occupations Code Chapter 1001. In the event that Contractor retains a licensed design professional under the terms of this Section, Contractor shall require that the licensed design professional carry comprehensive general liability and errors and omissions insurance coverage in the same amounts and forms as required of the Architect on this Project. In the event that the licensed design professional retained by the Contractor will be conducting on-site services or observations, the licensed design professional shall also carry worker's compensation insurance and comprehensive automobile liability in the same amounts and forms as required of the Architect on this Project.

### **§ 3.13 USE OF SITE**

The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

### **§ 3.14 CUTTING AND PATCHING**

**§ 3.14.1** The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents.

**§ 3.14.2** The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

### **§ 3.15 CLEANING PROJECT SITE**

**§ 3.15.1** The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project.

**§ 3.15.2** If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.

**§ 3.15.3** The Contractor shall clean the premises on a daily basis. Cleaning the premises shall mean that the premises and surrounding areas are free from accumulation of waste materials, rubbish, or trash caused by operations under the Contract.

Contractor shall provide on-site containers for the collection of waste materials, debris, rubbish and trash and shall periodically remove waste material, debris, rubbish and trash from the Site and dispose of all such material at a legal disposal area away from the site. The proper disposal of all such materials is the sole responsibility of the Contractor. Contractor shall not allow the on-site containers to overflow.

All cleaning operations shall occur so as to ensure that the contaminants resulting from the cleaning process will not fall on newly coated or newly painted surfaces. At the completion of the Work, the Contractor shall remove waste materials, rubbish, or trash and the Contractor's tools, construction equipment, machinery or other materials from or around or near the Project site.

Any hazardous, dangerous or flammable materials shall be removed from the site immediately. All unpacking materials, all packing case lumber or other packing materials, wrapping or other similar flammable waste shall be collected and removed from the building and premises. Care shall be taken by all workers not to mark, soil, or otherwise deface any finished portion of the Work or any District property. In the event any finished portion of the Work or any District property does become defaced by workers, the Contractor or any of the Subcontractors shall clean and restore such surfaces to their original condition.

After construction is complete, Contractor shall employ skilled workers for final cleaning. Contractor shall require those workers to remove grease, mastic adhesive, dust, dirt, stains, fingerprints, labels and other foreign materials from all sight exposed interior and exterior surfaces; wash and shine glazing and mirrors; polish glossy surfaces to a clear shine; vacuum clean carpeted and similar soft surfaces; clean (damp mop with clean mop and water) resilient and hard surface floors repeating as necessary until no visible residue remains on floors; clean plumbing fixtures to a sanitary condition; clean surfaces of all equipment and remove excess lubrication; clean permanent filters replace disposable filters in ventilating systems if units were operated during construction and clean ducts, blowers, and coils; clean light fixtures; remove waste, foreign matter and debris from roofs, gutters, areas ways and drainage ways; remove waste, debris, and surplus materials from the site; remove stains, spills, and foreign substances from paved areas; and broom clean exterior concrete and paved surfaces and rake clean the grounds.

### § 3.16 ACCESS TO WORK

The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located. Contractor shall ensure that the Work, at all times, is performed in a manner that affords Owner reasonable access, both vehicular and pedestrian, to the site of the Work and all adjacent areas. The Work shall be performed in such a manner that public areas adjacent to the Site of the Work shall be free from all debris, building material and equipment likely to cause hazardous conditions. Without limitation of any other provision of the Construction Documents, Contractor shall use its reasonable efforts to minimize any interference with the occupancy or beneficial use of any area or building adjacent to the site of the Work or the building, in the event of partial occupancy. The presence of the Owner, Architect or their representatives does not constitute acceptance or approval of the Work.

### § 3.17 ROYALTIES, PATENTS AND COPYRIGHTS

The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

### § 3.18 INDEMNIFICATION

**§ 3.18.1** TO THE FULLEST EXTENT PERMITTED BY LAW THE CONTRACTOR SHALL WAIVE AND RELEASE CLAIMS AGAINST AND SHALL INDEMNIFY AND HOLD HARMLESS THE OWNER, ARCHITECT, OWNER'S CITY COUNCIL MEMBERS, ARCHITECT'S CONSULTANTS, OWNER'S CONSULTANTS, AND OFFICER'S AGENTS AND EMPLOYEES OF ANY OF THEM FROM AND AGAINST CLAIMS, DAMAGES, LOSSES, CAUSES OF ACTION, SUITS, JUDGMENTS AND EXPENSES. INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES, ARISING OUT OF OR RESULTING FROM PERFORMANCE OF THE WORK, PROVIDED THAT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS ATTRIBUTABLE TO BODILY INJURY, SICKNESS, DISEASE OR DEATH, OR TO INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY (INCLUDING THE WORK ITSELF), BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY WILLFUL OR NEGLIGENT ACTS OR OMISSIONS OF THE CONTRACTOR, A SUBCONTRACTOR, ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM, ANYONE THEY CONTROL OR EXERCISE CONTROL OVER, OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE, REGARDLESS OF WHETHER OR NOT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED IN PART BY ANY WILLFUL OR NEGLIGENT ACTS OR OMISSIONS OF OWNER OR OWNER'S CONSULTANTS OR OTHER INDEMNIFIED PARTIES SUCH OBLIGATION SHALL NOT BE CONSTRUED TO NEGATE, ABRIDGE, OR REDUCE OTHER RIGHTS OR OBLIGATIONS OF INDEMNITY THAT WOULD OTHERWISE EXIST AS TO A PARTY OR PERSON DESCRIBED IN THIS SECTION 3.18. ALL COSTS AND EXPENSES SO INCURRED BY ANY OF THE INDEMNIFIED PARTIES IN THAT EVENT SHALL BE REIMBURSED BY CONTRACTOR TO INDEMNIFIED PARTIES, AND ANY COST AND EXPENSES SO INCURRED BY INDEMNIFIED PARTIES SHALL BEAR INTEREST UNTIL REIMBURSED BY CONTRACTOR, AT THE RATE OF INTEREST PROVIDED TO BE PAID BY THE JUDGMENT UNDER THE LAWS OF THE STATE OF TEXAS.

**§ 3.18.2** IN CLAIMS AGAINST ANY PERSON OR ENTITY INDEMNIFIED UNDER THIS SECTION 3.18 BY AN EMPLOYEE OF THE CONTRACTOR, A SUBCONTRACTOR, ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE, THE INDEMNIFICATION OBLIGATION UNDER SECTION 3.18.1 SHALL NOT BE LIMITED BY A LIMITATION ON AMOUNT OR TYPE OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR THE CONTRACTOR OR A SUBCONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS.

**3.18.3** THE PROVISIONS OF ARTICLE 3.18 IN ITS ENTIRETY SHALL SURVIVE THE COMPLETION, TERMINATION OR EXPIRATION OF THIS CONTRACT.

## **ARTICLE 4 ARCHITECT**

### **§ 4.1 GENERAL**

**§ 4.1.1** The Owner shall retain an architect lawfully licensed to practice architecture or an entity lawfully practicing architecture in the jurisdiction where the Project is located. That person or entity is identified as the Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

**§ 4.1.2** Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

**§ 4.1.3** If the employment of the Architect is terminated before completion of the Work, the Owner shall employ a successor architect as to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect.

**§ 4.1.4** Except as expressly provided herein, the Contractor shall not be relieved of Contractor's obligation to perform the Work in strict accordance with the Construction Documents and Contract Documents by the duties, responsibilities or activities of the Architect.

### **§ 4.2 ADMINISTRATION OF THE CONTRACT**

**§ 4.2.1** The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

**§ 4.2.2** The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1. The Owner is entitled to reimbursement from the Contractor for amounts paid to the Architect for site visits made necessary by the fault of the Contractor or by defects and deficiencies in the Work unless through their normal course of observations and construction administration obligations.

**§ 4.2.3** On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

### **§ 4.2.4 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION**

Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be

through the Architect. Communications by and with Sub-contractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner. However, Owner reserves the right to communicate directly with the Contractor.

§ 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work. Architect and/or Contractor shall promptly notify, orally and in writing, the other party and owner of any fault or defect in the Project or nonconformance with Construction Documents or the Contract Documents they may respectively discover and each, upon discovery of the defect or nonconformance, shall be responsible for notifying the other party and Owner of those corrective actions they respectively take; provided, however, Contractor shall have no duty to notify Owner of discoveries made or actions taken by Architect. Testing or inspections required by this section shall be conducted subject to the requirements of Chapter 271 of the Texas Local Government Code.

§ 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Sections 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and issue a final Certificate for Payment pursuant to Section 9.10.

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

§ 4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions rendered in good faith.



§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. The Architect shall be the sole interpreter of the design intent with respect to such matters, but the Architect's authority with respect thereto shall not contravene any other rights of the Owner ascribed to the Owner by other provisions of the Contract.

§ 4.2.14 The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

## ARTICLE 5 SUBCONTRACTORS

### § 5.1 DEFINITIONS

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

### § 5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

§ 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to any such proposed person or entity or (2) that the Architect requires additional time for review. Failure of the Owner or Architect to reply within the 14-day period shall constitute notice of no reasonable objection. All qualified sub-contractors, shall be procured in accordance with Texas Local Government Code Chapter 271, as applicable. A notice of no reasonable objection shall in no way relieve the Contractor from full responsibility for performance and completion of the Work and its obligations under the Contract Documents. The Contractor shall be full responsible for the performance of its subcontractors, including those recommended or approved by the Owner.

§ 5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work and was rejected without a reasonable objection, if one was requested, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

§ 5.2.4 The Contractor shall not substitute a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such substitution.

### § 5.3 SUBCONTRACTUAL RELATIONS

By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written

request of the Subcontractor, identity to the Subcontractor terms and conditions of the proposed subcontract agreement that may be a variance with the Contract documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

**§ 5.3.1** Neither the Owner nor the Architect shall be obligated to pay or to insure the payment of any monies to Subcontractors due to any non-payment to the Contractor or non-payment of Subcontractors by the Contractor. Notwithstanding any provisions contained in the Contract Documents to the contrary, it is hereby acknowledged and agreed that Owner has in no way agreed, expressly or implicitly, nor will Owner agree, to allow any Subcontractor or other material man or workman employed by Contractor the right to obtain a personal judgment or to create a lien against Owner for the amount due from the Contractor. In the event of any termination of the Contract in accordance with Article 14, Subcontractors' remedies shall be limited to Contractor's remedies under this Contract except as required by law. Contractor shall be responsible for any claim of a Subcontractor for Work executed under the Contract except Claims for which Owner has liability under this Contract. Notwithstanding anything to the contrary in this Contract. Subcontractors and their Sub-subcontractors have no direct cause of action against Owner unless the Owner accepts assignment under Article 5.4.1 below.

**§ 5.3.2** Contractor shall promptly notify Owner and Architect of any material defaults by any Subcontractor.

#### **§ 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS**

**§ 5.4.1** Each subcontract agreement for a portion of the Work may be assigned by the Contractor to the Owner, at the option of the Owner, by the Contractor to the Owner, provided that

- .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

If Owner accepts such assignment, it does not remove any obligation or claim of subcontractors already incurred prior to Owner's acceptance of assignment, upon Contractor.

**§ 5.4.2** Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

**§ 5.4.3** Upon such assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity.

**§ 5.4.4** Such assignment shall not constitute a waiver by Owner of its rights against Contractor, including, but not limited to, claims for defaults, delays or defects for which a Subcontractor or material vendor may also be liable. Owner shall only be responsible for compensating Subcontractors for Work performed or material furnished from and after the date on which the Owner gives written notice of its acceptance of the subcontract agreement. Owner shall not be responsible for any Work performed or materials furnished by Subcontractors prior to the date of Owner's written notice of acceptance.

#### **ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS**

##### **§ 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS**

**§ 6.1.1** The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Article 15.

**§ 6.1.2** When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

**§ 6.1.3** The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other

separate contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights that apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

## § 6.2 MUTUAL RESPONSIBILITY

§ 6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractors completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a separate contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of Owner's separate contractor's delays, improperly timed activities, and damage to the Work or defective construction. All construction costs and damage resulting from the Contractor's or Owner's separate contractors as the case may be, negligence, lack of oversight, inattention to detail, failure to investigate or failure to follow the Construction Documents or Contract Documents will be borne by the Contractor or Owner's separate contractors, as the case may be.

§ 6.2.4 The Contractor shall promptly remedy damage the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5.

§ 6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

## § 6.3 OWNER'S RIGHT TO CLEAN UP

If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

## ARTICLE 7 CHANGES IN THE WORK

### § 7.1 GENERAL

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

## § 7.2 CHANGE ORDERS

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

- .1 The change in the Work;
- .2 The amount of the adjustment, if any, in the Contract Sum; and
- .3 The extent of the adjustment, if any, in the Contract Time.

## § 7.3 CONSTRUCTION CHANGE DIRECTIVES

§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 Unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 As provided in Section 7.3.7.

§ 7.3.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 7.3.5 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.6 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.7 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the method and the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.7 shall be limited to the following:

- .1 Costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .2 Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 Costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .5 Additional costs of supervision and field office personnel directly attributable to the change.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Architect will prepare a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

#### § 7.4 MINOR CHANGES IN THE WORK

The Architect has authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes will be effected by written order signed by the Architect and shall be binding on the Owner and Contractor.

### ARTICLE 8 TIME

#### § 8.1 DEFINITIONS

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

#### § 8.2 PROGRESS AND COMPLETION

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance.

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§ 8.2.4 If Construction Manager fails to achieve Substantial Completion of the Work within thirty (30) days of the required date of Substantial Completion, as said date may be extended as provided herein, Owner will sustain damages and loss as a result of such failure. The exact amount of such damages will be extremely difficult to ascertain. The Construction Manager has agreed to be liable to the extent of and as limited by this Section.

The Owner shall be entitled to retain or recover from the Contractor, as liquidated damages and not as a penalty, \$2,500 per calendar day, for each calendar day that Substantial Completion is delayed beyond thirty (30) days of the required date of Substantial Completion, as said date may be extended as provided herein, such damages to commence upon thirty (30) days from the required date of Substantial Completion, as said date may be extended herein, and continuing until the calendar day (ending at midnight) that the required completion is achieved. Such liquidated



damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work.

Construction Manager shall not be liable for any delay or liquidated damages provided it substantially completion the Project within thirty (30) days from the required date of Substantial Completion, as said date may be extended as provided herein.

### § 8.3 DELAYS AND EXTENSIONS OF TIME

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

## ARTICLE 9 PAYMENTS AND COMPLETION

### § 9.1 CONTRACT SUM

The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents subject to paragraph 5.2.1 of the A133.

### § 9.2 SCHEDULE OF VALUES

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit to the Architect, within 15 days of establishing the Guaranteed Maximum Price (if the Contractor is a Construction Manager at Risk) or before the first Application for Payment, whichever is applicable, a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

### § 9.3 APPLICATIONS FOR PAYMENT

§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values for completed portions of the Work. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and shall reflect retainage if provided for in the Contract Documents.

§ 9.3.1.1 Contractor agrees that, for purposes of Texas Government Code Section 2251.042, receipt of the Application for Payment by the Architect shall not be construed as receipt of any invoice by the Owner. Contractor further agrees that Owner's receipt of the Certificate for Payment shall be construed as receipt of any invoice by the Owner, for purposes of Texas Government Code section 2251.042. Until Final Completion of the Work, the Owner shall withhold retainage as provided in the Contract Documents, except that Owner shall not pay amounts for which the Architect refuses to certify in Section 9.5 as amended. In any case, the Architect's certification shall not be unreasonably withheld. The retainage shall be paid with the Final Payment. *(Note: if more than 5% is retained, under Texas law, then the retainage must be placed in an interest-bearing account, and the contractor must be paid the interest earned on the retainage upon completion of the Work. Texas Government Code section 2252.032.)*

§ 9.3.1.2 Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.

§ 9.3.1.3 Until Final Completion of the Work, the Owner shall withhold retainage as provided in the Contract Documents, except that Owner shall not pay amounts for which the Architect refuses to certify payment, or the Owner refuses to pay, as provided herein Section 9.5 as amended. The retainage shall be paid with the final Payment.

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work. **CONTRACTOR SHALL INDEMNIFY AND HOLD OWNER HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTERESTS OR ENCUMBRANCES FILED BY THE CONTRACTOR, SUBCONTRACTORS, OR ANYONE CLAIMING BY, THROUGH OR UNDER THE CONTRACTOR OR SUBCONTRACTOR FOR ITEMS COVERED BY PAYMENTS MADE BY THE OWNER TO CONTRACTOR.**

§ 9.3.3.1 Contractor shall provide all required Payment Bonds.

§ 9.3.4 By signing each Application for Payment, the Contractor stipulates and certifies to the following: that the information presented is true, correct, accurate and complete and has been completed in accordance with the Contract Documents; that the Contractor has made the necessary detailed examinations, audits and arithmetic verifications; that the submitted Work has been completed to the extent represented in the Applications for Payment; that the materials and supplies identified in the Applications for payment have been purchased, paid for and received; that the Subcontractors have been paid as identified in the Applications for Payment or that Contractor has been invoiced for same; that he has made the necessary on-site inspections to confirm the accuracy of the Applications for Payment; that there are no known mechanics' or materialmen's liens outstanding at the date of this requisition; all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current application; that except for such bills not paid but so included, there is no known basis for the filing of any mechanics' or materialmen's liens on the Work; that the Payment Application includes only Work self-performed by Contractor or for which Contractor has been invoiced; and that releases from all Subcontractors and materialmen have been obtained in such form as to constitute an effective release of lien under the laws of the State of Texas covering all Work performed and for which payment has been made by the Owner to the Contractor. Contractor understands that documents submitted to Owner become government documents under the laws of the State of Texas. Contractor further understands that falsification of Contractor's Application for Payment may constitute a violation of the penal laws of the State of Texas, including but not limited to, Texas Penal Code sections 32.46, 37.09 and 37.10, and may justify termination of Contractor's Contract with Owner. Incomplete or inaccurate Applications for Payment shall be returned to the Contractor by the Architect for completion and/or correction. Owner shall have no responsibility for payment of same if the application for Payment is incomplete or inaccurate.

§ 9.3.5 This Document, A201-2007, is an Exhibit to the Primary Agreement between the City of Midland and the Contractor, documented by AIA Document A133-2009 as modified, and the terms of A133-2009 as modified will govern over any inconsistencies between that document and A201-2007.

## § 9.4 CERTIFICATES FOR PAYMENT

§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 9.5.1. Architect's written reasons for withholding certification shall be construed as the notice required by Texas Government Code Section 2251.042, et. Seq. except, undisputed amounts owed shall not be unreasonably withheld.

**§ 9.4.2** The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

## **§ 9.5 DECISIONS TO WITHHOLD CERTIFICATION**

**§ 9.5.1** The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

- .1 defective Work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or a separate contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 repeated failure to carry out the Work in accordance with the Contract Documents.

**§ 9.5.2** When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

**§ 9.5.3** If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Architect will reflect such payment on the next Certificate for Payment.

**§ 9.5.4** Notwithstanding any provision contained within this Article, if the Work has not attained Substantial Completion or Final Completion by the required dates, subject to extensions of time allowed under these Conditions, then Architect may withhold any further payment to Contractor to the extent necessary to preserve sufficient funds to complete the construction of the Project and to cover liquidated damages. The Owner shall not be deemed in default by reason of withholding payment as provided for in Sections 9.3.4., 9.4.1, 9.5.1 or this Section.

## **§ 9.6 PROGRESS PAYMENTS**

**§ 9.6.1** After the Architect has issued a Certificate for Payment for undisputed amounts, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect. Owner shall notify Contractor within 21 days if Owner disputes the Architect's Certificate for Payment, pursuant to Texas Government Code section 2251.042 et. Seq., listing the specific reasons for nonpayment. Payments to the Contractor shall not be construed as releasing the Contractor, Contractor's Surety, or any subcontractor from any



obligations under the Contract Documents or Construction Documents or waiving any claims of Owner against Contractor, Contractor's surety, or any subcontractor.

**§ 9.6.2** In compliance with Texas Government Code section 2251.022, the Contractor shall within ten (10) days following receipt of payment from the Owner, pay all bills for labor and materials performed and furnished by others in connection with the Work, and shall, if requested, provide the Owner with evidence of such payment, Contractor's failure to make payments within such time shall constitute a material breach of this Contract. Contractor shall include a provision in each of its subcontracts imposing the same payment obligations on its Subcontractors as are applicable to the Contractor hereunder, and if the Owner so requests, shall provide copies of such Subcontractor payments to the owner. If the Contractor has failed to make payment promptly to the Contractor's Subcontractor or for materials or labor used in the Work for which the Owner has made payment to the Contractor, then the Owner shall be entitled to withhold payment to the Contractor in part or in whole to the extent necessary to protect the Owner.

**§ 9.6.3** The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

**§ 9.6.4** The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. Action on the part of the Owner to require contractor to pay a Subcontractor shall not impose any liability on Owner. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

**§ 9.6.5** Contractor payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

**§ 9.6.6** A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

**§ 9.6.7** Payments received by the contractor for Work properly performed by Subcontractors or materials properly provided by suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor of which payment was made by the Owner.

## **§ 9.7 FAILURE OF PAYMENT**

Pursuant to Texas Government Code Section 2251.051, if the Owner does not pay the Contractor within twenty days after the date established in the Contract Documents the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

**§ 9.7.1** If the Owner is entitled to reimbursement or payment from the Contractor under a pursuant to the Contract Documents, then such payment shall be made promptly upon demand by the Owner. Notwithstanding anything contained in the Contract Documents to the contrary, if the Contractor fails to promptly make any payment due to Owner, or the Owner incurs any costs and expense to cure any default of the Contractor or to correct defective Work, pursuant to the Contract, the Owner shall have an absolute right to offset such amount against the Contract Sum and, in the Owner's sole discretion and without waiving any other remedies, may elect either to:

- .1 deduct an amount equal to that which the Owner is entitled from any payment then or thereafter due to contractor from the Owner, or
- .2 issue a written notice to the Contractor reducing the Contract Sum by an amount equal to that which the Owner is entitled.

## § 9.8 SUBSTANTIAL COMPLETION

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use, all Project systems included in the Work or designated portion thereof have been successfully tested and are fully operational; required local governmental agency inspections and certifications required of the Work to obtain Certificate of Occupancy have been made, approved and posted; designated initial instruction of Owner's personnel in the operation of Project systems have been completed; and all the required finishes set out in the Construction Documents are in place. The only remaining Work shall be minor in nature so that the Owner can occupy the Work or the applicable portion of the Work for all of its intended purposes on that date; and the completion of the Work by the Contractor will not materially interfere with or hamper Owner's normal, intended use. As a further condition of a determination of Substantial Completion, the Contractor shall certify that all remaining Work shall be completed within 30 days.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities clearly assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents. The application for payment to release retainage will not be approved by the Architect until the completed and corrected closeout documents are provided to the Architect by the Contractor. Closeout documents shall be delivered to the Architect under conditions and times set forth in the contract documents and specifications.

§ 9.8.6 Notwithstanding any provision contained within this Article, if the work has not attained Substantial Completion with the contract time, subject to extensions of time allowed under these Conditions, Architect may withhold any further payment to Contractor to the extent necessary to preserve sufficient funds to complete the construction of the Project and to cover liquidated damages assessed against Contractor up to the time of application for Payment and to the time it is reasonably anticipated that Substantial Completion will be achieved.

## § 9.9 PARTIAL OCCUPANCY OR USE

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.3.1.5 and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not

be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

**§ 9.9.2** Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

**§ 9.9.3** Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

## **§ 9.10 FINAL COMPLETION AND FINAL PAYMENT**

**§ 9.10.1** Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**§ 9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

**§ 9.10.3** If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

**§ 9.10.4** The making of final payment shall constitute a waiver of Claims by the  
(Paragraphs deleted)  
Owner, except as set out above.

**§ 9.10.5** Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

## **ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY**

### **§ 10.1 SAFETY PRECAUTIONS AND PROGRAMS**

The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

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## § 10.2 SAFETY OF PERSONS AND PROPERTY

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

§ 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

§ 10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

§ 10.2.7 The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

## § 10.2.8 INJURY OR DAMAGE TO PERSON OR PROPERTY

If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

## § 10.3 HAZARDOUS MATERIALS

§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.

§ 10.3.2 Upon receipt of the Contractor's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract



Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up.

**§ 10.3.3** To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

**§ 10.3.4** The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

**§ 10.3.5** The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

*(Paragraph deleted)*

#### **§ 10.4 EMERGENCIES**

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

### **ARTICLE 11 INSURANCE AND BONDS**

**§ 11.0.1** No Work will be commenced and no equipment or materials can be shipped until all requirements of this Article have been satisfied, satisfactory evidence of insurance has been provided, and all insurance is in full force and effect. Contractor shall notify Owner and Architect in writing of any proposed nonconformity with these requirements, and shall notify Owner and Architect in writing of any insurance changes which occur during the terms required under the Contract Documents. Any deviation from these requirements can only be approved by Owner's City Council. Any non conformity may be grounds for termination or modification of the Contract. To the extent that Contractor is unable to procure the insurance designated herein because the insurance is not reasonably available or is cost-prohibitive, then Contractor shall provide written notice to Owner's City Council. Said lack of insurance may then be grounds for termination or modification of this Agreement.

**§ 11.0.2** Satisfactory evidence of insurance required by this Article shall be provided to Owner and Architect not later than five business days after execution of the Contract by Owner. Satisfactory evidence shall include copies of the required insurance policies, declarations and endorsements themselves. In addition, Contractor shall also provide: 1) a duly-executed Owner's Certificate of Insurance; 2) a duly-executed ACORD Certificate of Insurance, Form 25 (2010/05) or 3) a duly-executed ACORD Certificate of Insurance, Form 27, such form to be modified if necessary to include liability coverage. The Contractor shall furnish Owner all insurance amendments, renewals, notices, cancellations and additional endorsements as they are provided to Contractor.

**§ 11.0.3** All insurance required herein shall be obtained from a company licensed to do business in the State of Texas by the Texas Department of Insurance, and shall be underwritten by a company rated not less than A- VII in A.M.

Best's Key Rating Guide, Property-Casualty, according to the latest posted ratings available on A.M. Best's Web Site, [www.ambest.com](http://www.ambest.com) and that permits waivers of subrogation, or unless carrier is approved in advance by Owner.

§ 11.0.4 All insurance required herein shall name the Owner, its officers, employees, representatives or agents, as an additional insured, except Contractor's Worker's Compensation insurance.

§ 11.0.5 All insurance required herein shall be primary insurance as respects, the Owner, its officers, employees, representatives or agents. All insurance shall be written on an occurrence basis, if available, and shall contain a waiver of subrogation in favor of Owner on all claims arising out of the Project. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, or did not pay the insurance premium directly or indirectly; and whether or not the person or entity had an insurable interest in the property damaged. Aggregate limits on any policy shall be not less than twice the per accident or per occurrence limits of the policy.

§ 11.0.6 Any failure of Contractor to comply with the reporting provision of the policies shall not affect the coverage provided to the Owner, its officers, employees, representatives or agents.

§ 11.0.7 All workers on the Project must be covered by the required insurance policies of the Contractor or a Subcontractor.

§ 11.0.8 Nothing contained in this Article shall limit or waive Contractor's legal or contractual responsibilities to Owner or others.

#### § 11.1 CONTRACTOR'S LIABILITY INSURANCE

§ 11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations and completed operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 Claims under workers' compensation, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed;
- .2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 Claims for damages insured by usual personal injury liability coverage;
- .5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 Claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- .7 Claims for bodily injury or property damage arising out of completed operations; and
- .8 Claims involving contractual liability insurance applicable to the Contractor's obligations under Section 3.18.

§ 11.1.2 The insurance required by Section 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.

#### § 11.1.2.1 Worker's Compensation

#### § 11.1.2.1 Comprehensive General Liability:

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- .1 Products & Completed Operations to be maintained for a period of two years after Final Payment; Contractor shall continue to provide evidence of such coverage to Owner on an annual basis during this period.
- .2 Property Damage Liability Insurance shall provide X, C and U coverage.
- .3 Broad Form Property Damage Coverage shall include Completed Operations.
- .4 Broad Form Contractual Liability Coverage

**§ 11.1.2.2 Contractual Liability:**

- .1 Property Damage shall be included in Comprehensive General Liability Coverage.
- .2 Insurance sufficient to cover Contractor's contractual indemnities.

**§ 11.1.2.3 Personal Injury:**

- .1 With Employment Exclusion deleted; shall be included in Comprehensive General Liability Coverage.

**§ 11.1.2.4 Business Automobile Liability** (including owned, non-owned, hired, or any other vehicles): *(Note: Texas statutory minimum for school districts is \$100,000 per person, \$300,000 per occurrence, \$100,000 property damage).*

**§ 11.1.2.7 All Risk Builder's Risk Insurance.** Contractor shall provide Builder's Risk Insurance in the total amount of the Contract Sum. See Section 11.4. Contractor's indemnity for loss of use and other consequential damages arising out of a builder's risk claim is limited to the delay in completion coverage specified in the GMP Amendment.

**§ 11.1.3** Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness.

**§ 11.1.4** The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

*(Paragraphs deleted)*

**§ 11.1.5 Texas Workers' Compensation Insurance.** A copy of a certificate of insurance, a certificate of authority to self-insure issued by the Texas Department of Insurance (TDI), or a coverage agreement (DWC-81, DWC-82, DWC-83, or DWC-84) showing statutory workers' compensation insurance coverage for the Contractor's employees providing services on a Project is required for the duration of the Project.

**§ 11.1.5.1** Duration of the Project includes the time from the beginning of the Work on the Project until Contractor's work on the Project has been completed and accepted by the Owner.

**§ 11.1.5.2** Persons providing services on the Project ("subcontractor" in Texas Labor Code section 406-096) include all persons or entities performing all or part of the services the Contractor has undertaken to perform on the Project regardless of whether that person has employees. This includes, without limitations, independent contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity that furnishes persons to provide services on the Project.

§ 11.1.5.3 Services include, without limitations, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other services related to the Project. Services do not include activities unrelated to the Project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

§ 11.1.5.4 The Contractor shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code section 401.011(44) for all employees of the Contractor providing services on the Project for the duration of the Project.

§ 11.1.5.5 The Contractor must provide a certificate of coverage to the Owner prior to being awarded the Contract.

§ 11.1.5.6 If the coverage period shown on the Contractor's current certificate of coverage ends during the duration of the Project, the Contractor must, prior to the end of the coverage period, file a new certificate of coverage with the Owner showing that coverage has been extended.

§ 11.1.5.7 The Contractor shall obtain from each person providing services on the Project and provide to the Owner.

- .1 A certificate of coverage, prior to that person beginning work on the Project, so the Owner will have a file certificates of coverage showing coverage for all persons providing services on the Project, and
- .2 No later than seven days after receipt by the Contractor, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the Project.

§ 11.1.5.8 The Contractor shall retain all required certificates of coverage for the duration of the Project and for one year thereafter.

§ 11.1.5.9 The Contractor shall notify the Owner in writing by certified mail or personal delivery, within ten days after the Contractor knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the Project.

§ 11.1.5.10 The Contractor shall post on each Project site a notice, in the text form, and manner prescribed by the TDI informing all persons providing services on the Project that they are required to be covered, and stating how a person may verify coverage and report lack of coverage.

§ 11.1.5.11 The Contractor shall contractually require each person with whom it contracts to provide services on the Project, to:

- .1 Provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory retirements of Texas Labor Code section 401.011(44) for all of its employees providing services on the Project for the duration of the Project.
- .2 Provide to the Contractor, prior to that person beginning work on the Project, a certificate of coverage showing that coverage is being provided for all employees of the person providing services on the Project for the duration of the Project.
- .3 Provide the Contractor, prior to the end of the coverage period, a certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the Project.
- .4 Obtain from each other person with whom it contracts, and provide to the Contractor:
  - .1 A certificate of coverage, prior to the other person beginning work on the Project, and
  - .2 A new certificate of coverage showing extension of coverage, prior the end of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the Project.
- .5 Retain all required certificates of coverage on file for the duration of the Project and for one year thereafter.
- .6 Notify the Owner in writing by certified mail or personal delivery, within ten days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the Project; and



.7 Contractually require each person with whom it contracts to perform as required by items 1-6, with the certificates of coverage to be provided to the person for whom they are providing services.

**§ 11.1.5.12** By signing this Contract or providing or causing to be provided a certificate of coverage, the Contractor is representing to the Owner that all employees of the Contractor who will provide services on the project will be covered by workers' compensation coverage for the duration of the Project, that the coverage will be based on property reporting of classification codes and payroll amounts and that all coverage agreements will be filed with the appropriate insurance carrier or, in the case of a self-insured, with the TDI's Division of Self-Insurance Regulation. Providing false or misleading information may subject the Contractor to administrative penalties, criminal penalties, civil penalties or other civil actions.

**§ 11.1.5.13** The Contractor's failure to comply with any of these provisions is a breach of contract by the Contractor that entitles the Owner to declare the Contract void if the contractors does not remedy the breach within ten days after receipt of notice of breach from the Owner.

**§ 11.1.5.14** The coverage requirement recited above does not apply to sole proprietors, partners, and corporate officers who are excluded from coverage in an insurance policy or certificate of authority to self-insure that is delivered, issued for delivery or renewed on or after January 1, 1996.

### **§ 11.3 PROPERTY INSURANCE**

**§ 11.3.1** Unless otherwise provided, the Contractor shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project. To the extent of any overlap between Owner's property insurance and Contractor's builder's risk insurance, Contractor's builder's risk coverage shall be primary.

**§ 11.3.1.1** Property insurance shall be on an 'all-risk' or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for any Owner loss.

*(Paragraph deleted)*

**§ 11.3.1.3** If the property insurance requires deductibles, the Contractor shall pay costs not covered because of such deductibles.

**§ 11.3.1.4** This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

**§ 11.3.1.5** Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

### **§ 11.3.2 BOILER AND MACHINERY INSURANCE**

The Contractor shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

### § 11.3.3 LOSS OF USE INSURANCE

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused.

§ 11.3.4 If the Owner requests in writing that insurance for risks other than those described herein or other special causes of loss be included in property insurance policy, the Contractor or Architect shall, if possible, include such insurance. If there is an additional cost, Contractor or Architect shall inform Owner and confirm that Owner still requests such insurance.

*(Paragraph deleted)*

§ 11.3.6 Before an exposure to loss may occur, the Contractor shall file with the Owner a copy of each policy that includes insurance coverages required by this Section 11.3. Each policy shall contain all generally applicable conditions, definitions, exclusion and endorsements related to this Project. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Owner.

### § 11.3.7 WAIVERS OF SUBROGATION

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other cause of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Contractor as fiduciary. The Contractor, as appropriate, shall require one another and their consultants, separate contractors described in Article 6 and elsewhere, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise.

§ 11.3.8 A loss insured under property insurance obtained by Contractor shall be adjusted by the Contractor as fiduciary and made payable to the Owner as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor and not subject to claims by the Owner, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

*(Paragraph deleted)*

§ 11.3.10 The Owner as beneficiary shall at its election, have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved in the manner selected by the Owner and Contractor as the method of binding dispute resolution in the Agreement.

### § 11.4 PERFORMANCE BOND AND PAYMENT BOND

§ 11.4.1 The Contractor shall furnish separate payment and performance bonds covering faithful performance of the Contract and payment of obligations arising thereunder as each bond to be a total amount equal to 100% of the Contract Price, or Guaranteed Maximum Price, whichever is applicable. The performance bond shall also include an amount necessary to reimburse Owner its reasonable and necessary attorneys fees (pursuant to Texas Local Government Code section 271.159) and litigation costs incurred in claims arising under the performance bond, and liquidated damages arising under the Contract Documents, in an amount not to exceed five (5) percent of the Cost of the Work. Provided, however, no limitation herein shall limit Contractor's liability under the Contract Documents. (If the Guaranteed Maximum Price is not known at the time that a Construction Manager At Risk contract is awarded, then the sum of the payment and performance bonds must each be in an amount equal to the Project budget. The Construction Manager at Risk shall deliver the bonds not later than the tenth day after the date of Construction Manager At Risk shall deliver the bonds not later than the tenth day after the date the Construction Manager At Risk executes the Contract, unless the Construction Manager At Risk furnished a bid bond or other financial security acceptable to the District to ensure that the Construction Manager will furnish the required payment and performance bonds when the Guaranteed Maximum price is established). All bonds shall be issued by a surety company licensed, listed and authorized to issue bonds in the State of Texas by the Texas Department of Insurance, and shall fully comply with Texas Insurance Code section 3503.001 et seq. and Texas Government Code, Chapter 2253, or their

successors. The surety company shall have a rating of not less than "A VII" according to the latest posted ratings or the A.M. Best Web Site, [www.ambest.com](http://www.ambest.com). The surety company shall provide, if requested, information on bonding capacity and other projects under coverage and shall provide proof to establish adequate financial capacity for this Project. Should the bond amount be in excess of ten percent (10%) of the surety company's capital and surplus, then the surety company issuing the bond shall certify that the surety company has acquired reinsurance, in a form and amount acceptable to the Owner, to reinsure the portion of the risk that exceeds ten percent (10%) of the surety company's capital and surplus with one or more reinsurers who are duly authorized and admitted to do business in Texas and that amount reinsured by a reinsurer does not exceed ten percent (10%) of the reinsurer's capital and surplus. Contractor shall immediately notify the Owner and Architect in writing if there is any change in: the rating; insolvency or receivership in any State; bankruptcy; right to do business in the State; or status of Contractor's sureties at any time until Final Completion.

**§ 11.4.2** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

**§ 11.4.3** The Contractor shall deliver copies of the required bonds to the Owner and Architect not later than ten business days after execution of the GMP Amendment by Owner. All bonds will be reviewed by the Architect for compliance with the Contract Documents. In the event that the Architect has any questions concerning the sufficiency of the bonds, the bonds will be referred to the Owner or the Owner's representative with Architect's recommendation.

**§ 11.4.4** All bonds shall be originals. The Contractor shall require the attorney-in-fact who executes the required Bonds on behalf of the Surety to affix thereto a certified and current copy of the power-of-attorney. The name, address and telephone number of a contact person for the bonding company shall be provided.

**§ 11.4.5** Bonds shall guarantee the faithful performance of all of the covenants, stipulations, and agreements of the Contract. Bond shall be signed by an agent, resident in the State of Texas. If at any time during the continuance of the Contract, the Owner determines that the Contractor is unable to complete the Work in accordance with the Contract Documents, any of the Contractor's bonds become insufficient, the surety becomes insolvent, or the surety's rating drops below the required level, then the Owner shall have the right to require from the Contractor additional and sufficient sureties or other security acceptable to the Owner, which the Contractor shall furnish to the satisfaction of the Owner, within ten (10) days after notice to do so. These contractual remedies are in addition to all remedies available by law. In default thereof, all payment or money due to the Contractor may be withheld until the Contractor provides additional surety or security.

## **ARTICLE 12 UNCOVERING AND CORRECTION OF WORK**

### **§ 12.1 UNCOVERING OF WORK**

**§ 12.1.1** If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

**§ 12.1.2** If a portion of the Work has been covered that the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, such costs and the cost of correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

### **§ 12.2 CORRECTION OF WORK**

#### **§ 12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION**

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

## § 12.2.2 AFTER SUBSTANTIAL COMPLETION

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4.

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

## § 12.3 ACCEPTANCE OF NONCONFORMING WORK

If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## ARTICLE 13 MISCELLANEOUS PROVISIONS

### § 13.1 GOVERNING LAW

The Contract shall be governed by the law of the place where the Project is located, Tarrant County, Texas.

### § 13.2 SUCCESSORS AND ASSIGNS

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

*(Paragraph deleted)*

### § 13.3 WRITTEN NOTICE

Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.



## § 13.4 RIGHTS AND REMEDIES

§ 13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

§ 13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing.

## § 13.5 TESTS AND INSPECTIONS

§ 13.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals which shall be included in the Cost of the Work with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals, provided however, Owner shall bear all costs of inspections services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the Owner. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures.

§ 13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Section 13.5.1, the Owner will provide or contract for such additional testing, inspection or approval. Such costs, except as provided in Section 13.5.3, shall be at the Owner's expense.

§ 13.5.3 If such procedures for testing, inspection or approval under Sections 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.

§ 13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

§ 13.5.5 If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

§ 13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

## § 13.6 INTEREST

Undisputed payments due and unpaid under the Contract Documents shall bear interest from the date payment is due as such rate provided by Texas Government Code section 2251.025. any such payment shall be deemed overdue on the thirty-first day after Owner receives Architect's invoice or Contractor's Certificate for Payment from the Architect.

## § 13.7 TIME LIMITS ON CLAIMS

Provided notice has been provided where required under Article 15.1.2 with respect to Claims arising during performance of the Work, the time for commencement of a cause of action for any dispute arising out of the Project or the Contract shall be governed by applicable Texas law.

## § 13.8 EQUAL OPPORTUNITY IN EMPLOYMENT

§ 13.8.1 The invalidity of any part or provision of the Contract Documents shall not impair or affect in any manner whatsoever the validity, enforceability or effect of the remainder of the Contract Documents.

§ 13.8.2 The Contractor and the Contractor's Subcontract shall not discriminate against any employee or applicant for employment because of race, religion, age, disability, sex, or national origin. The Contractor agrees to post in

conspicuous places, available to employees and applicants, notices setting forth the Contractor's nondiscrimination policies.

**§ 13.8.3** The Contractor and the Contractor's Subcontractor shall, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applications will receive consideration for employment without regard to race, religion, age, disability, sex, or national origin.

**§ 13.9** Notwithstanding anything to the contrary in any of the Contract Documents or in any document forming a part hereof, there shall be no mandatory arbitration for any dispute arising hereunder. Any remaining references in any of the Contract Documents to mediation or arbitration are inadvertent and will not be enforced.

**§ 13.10** Contractor stipulates that Owner is a political subdivision of the State of Texas, and, as such, may enjoy immunities from suit and liability under the Constitution and laws of the State of Texas. By entering into this Agreement, Owner does not waive any of its immunities from suit and/or liability, except as otherwise specifically provided herein and as specifically authorized by law.

**§ 13.11** In any adjudication or claim under this Agreement, reasonable and necessary attorneys' fees may be awarded to the prevailing party, as allowed by Texas Local Government Code section 271.159 or other applicable law.

### **§ 13.12 RECORDS**

**§ 13.12.1** Contractor shall at all times through the date of Final Completion, maintain Job Records, including, but not limited to, invoices, payment records, payroll record, daily reports, diaries, logs, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda, other financial data and job meeting minutes applicable to the Project, in a manner which maintains the integrity of the documents. Job Records must be retained by Contractor for at least twelve (12) years after the date of Final Completion of the Project. Within 10 days of Owner's request, Contractor shall make such Job Records available for inspection, copying and auditing by the Owner, Architect or their respective representatives, at Owner's central office.

**§ 13.12.2** If Contractor is a Construction Manager at Risk, then Contractor shall also maintain, in accordance with the provisions of Section 13.12.1, the following: subcontract files, including proposals of successful and unsuccessful bidders, bid recaps and subcontractor payments; original estimates; estimating work sheets; general ledger entries detail cash and trade discounts received; insurance rebates and dividends; and any other supporting evidence deemed necessary by the Owner to substantiate charges related to the Contract."

**§ 13.12.3** Contractor shall keep a full and detailed financial accounting system and shall exercise such controls as may be necessary for proper financial management under this Contract; the accounting and control system shall be satisfactory to the Owner and shall be subject to the provisions of Section 13.12.1.

**§ 13.12.4** Contractor shall keep all Construction Documents related to the Project, subject to the provisions of Section 13.12.1, provided, however, Contractor shall not destroy said documents until Contractor has confirmed with Owner in writing that Owner has obtained a copy of all as-built drawings.

**§ 13.12.5** In the event that an audit by the Owner reveals any errors/overpayments by the Owner, then the Contractor shall refund to the Owner the full amount of such overpayment within thirty (30) days of such audit findings, or the Owner, at its option, reserves the right to deduct such amounts owed to the Owner from any payments due to the Contractor."

### **§ 13.13 PROPRIETARY INTERESTS AND CONFIDENTIAL INFORMATION**

**§ 13.13.1** Neither Architect nor Contractor shall use the image or likeness of Owner's Project or Owner's official logo or emblem and any other trademark, service mark, or copyrighted or otherwise protected information of Owner, without Owner's prior written consent. Contractor and Architect shall not have any authority to advertise or claim that Owner endorse Architect or Contractor's services, without Owner's prior written consent. ,

**§ 13.13.2** Neither Architect nor Contractor shall disclose any confidential information which comes into the possession of Architect or Contractor at any time during the Project, including but not limited to, the location and

deployment of security devices.

## **ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT**

### **§ 14.1 TERMINATION BY THE CONTRACTOR**

**§ 14.1.1** The Contractor may terminate the Contract if the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, only for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency that requires all Work to be stopped;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on an undisputed sum due on an Certificate for Payment within the time stated in the Contract Documents.

**§ 14.1.2** The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

**§ 14.1.3** If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon ten (10) days' written notice to the Owner and Architect, and Owner's failure to cure the deficiency within such time, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.

**§ 14.1.4** If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon ten (10) additional days' written notice to the Owner and the Architect, and owner's failure to cure the deficiency within such time, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

### **§ 14.2 TERMINATION BY THE OWNER FOR CAUSE**

**§ 14.2.1** The Owner may terminate the Contract if the Contractor

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.
- .5 fails to furnish the Owner, upon request, with assurances satisfactory to the Owner, evidencing the Contractor's ability to complete the Work in compliance with all the requirements of the Contract Documents;
- .6 engages in conduct that would constitute a violation of state or federal criminal law, including but not limited to, the law prohibiting certain gifts to public servants, or engages in conduct that would constitute a violation of the Owner's ethics or conflict of interest policies; or
- .7 fails to proceed continuously and diligently with the construction and completion of the Work; except as permitted under the Contract Documents.

*(Paragraphs deleted)*

**§ 14.2.2** When any of the above reasons exist, the Owner, upon reasonable determination that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate engagement of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and

- construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

**§ 14.2.3** When the Owner terminates the Contract or Contractor's engagement for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished, and any further payments shall be limited to amounts earned for work performed prior to the date of such termination.

**§ 14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, upon application, and this obligation for payment shall survive termination of the Contract.

**§ 14.2.5** The parties hereby agree that: 1) if an order for relief is entered on behalf of the Contractor, pursuant to Chapter 11 of the U.S. Bankruptcy Code; 2) if any other similar order is entered under any debtor relief laws; 3) if Contractor makes an assignment for the benefit of one or more of its creditors; 4) if a receiver is appointed for the benefit of its creditors; or 5) if a receiver is appointed on account of its insolvency, any such event could impair or frustrate Contractor's performance of the Contract Documents. Accordingly, it is agreed that upon occurrence of any such event, Owner shall be entitled to request of Contractor or its successor in interest adequate assurance of future performance in accordance with the terms and conditions of the Contract Documents. Failure to comply with such request within ten (10) days of delivery of the request shall entitle Owner to terminate the Contract and to the accompanying rights set forth in Sections 14.2.1 through 14.2.6. In all events, pending receipt of adequate assurance to proceed with the Work with Owner's own forces or with other Contractors on a time and material or other appropriate basis, the cost of which will be charged against the Contract Sum.

**§ 14.2.6** As required by Texas Government Code Chapter 2253, if a Performance Bond has been furnished and the Contractor is declared by the Owner to be in default under the Contract, then the Surety shall promptly perform the Work, in full accordance with the plans, specifications and Contract Documents. Unless otherwise agreed in writing between the Surety and the Owner, the Surety shall complete the Work by the Surety entering into a Contract acceptable to Owner, with a Contractor acceptable to Owner, and shall obtain new Payment and Performance Bonds as required by law.

### **§ 14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE**

**§ 14.3.1** The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

**§ 14.3.2** The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent, provided that such profit shall not exceed the profit margin of the Project which would have existed if no such delay had occurred.

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

### **§ 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE**

**§ 14.4.1** The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

**§ 14.4.2** Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and



- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

**§ 14.4.3** In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed prior to the notice of termination, and costs incurred by reason of such termination, excluding overhead and profit on the Work not executed.

**§ 14.4.4** Owner shall be entitled to delete or terminate any portion of the Contract bid as an alternate component, at any time at the Owner's convenience and without cause. In the event of such termination, the Contractor shall only be entitled to receive payment for Work executed on the alternate component, if any, prior to the notice of termination.

## **ARTICLE 15 CLAIMS AND DISPUTES**

### **§ 15.1 CLAIMS**

**§ 15.1** No extension of time shall be made to the Contractor because of hindrances or delays from any cause which is the fault of Contractor or Contractor's Subcontractors or under Contractor's control. Claims for extension of time may only be considered because of rain delays, or hindrances or delays which are out of Contractor's control, but only to the extent that Substantial Completion or Final Completion of the Project, as the case may be, is adjusted beyond the original Substantial Completion or Final Completion date. Only claims for extension of time shall be considered because of hindrances or delays out of the Contractor's control, but only to the extent that Substantial Completion or Final Completion of the Project exceeds the date established for the Work. City Council approval shall be required for any extension of time. No damage for such delay shall be paid to Contractor for the first 15 days of delays caused by the Owner, Architect, or those within their control, but Contractor shall be entitled to be paid reasonable additional Cost of Work arising out of such delay beyond 15 days. Contractor shall only be entitled to time extensions per the terms of the Contract Documents.

#### **§ 15.1.1 DEFINITION**

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

#### **§ 15.1.2 NOTICE OF CLAIMS**

Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

Notwithstanding the above, a party's duty to "recognize" an applicable "condition" as falling within this notice provision means that the party reasonably knew or should have known, in the exercise of due diligence, given the differing levels of knowledge, training and experience of the parties, respectively, that the condition is the basis of a claim under this Agreement

#### **§ 15.1.3 CONTINUING CONTRACT PERFORMANCE**

Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents. The Architect will prepare Change Orders and issue Certificates for Payment in accordance with the decisions of the Initial Decision Maker.

#### **§ 15.1.4 CLAIMS FOR ADDITIONAL COST**

If the Contractor wishes to make a Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

#### **§ 15.1.5 CLAIMS FOR ADDITIONAL TIME**

**§ 15.1.5.1** Requests for time extension shall be submitted on a monthly basis and shall specify the time delay, the cause of the delay, and the responsible party for the delay, whether Contractor, Owner, rain day or other. No claims for

damages for delay shall be made by Contractor. Any claim not submitted under the terms of this Section shall be waived. Claims for increase in the Contract Time shall set forth in detail the circumstances that form the basis for the Claim, the date upon which each cause of delay began to affect the progress of the Work, the date upon which each cause of delay ceased to affect the progress of the Work and the number of days' increase in the Contract Time claimed as a consequence of each such cause of delay. The Contractor shall provide such supporting documentation as the Owner may require including, where appropriate, a revised construction schedule indicating all the activities affected by the circumstances forming the basis of the Claim. '

**§ 15.1.5.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction. The Contractor shall not claim additional overhead or fee for weather related delays.

#### **§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES**

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

#### **§ 15.2 ALTERNATIVE DISPUTE RESOLUTION**

**§ 15.2.1** Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and ,except those waived under the terms of the Contract Documents, shall, after written recommendation by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation at the request of either party. Owner and Contractor expressly agree that mediation shall be a condition precedent to the initiation of any litigation. arising out of such Claims.

**§ 15.2.2** . The parties shall endeavor to resolve their Claims by mediation. Requests for mediation shall be filed in writing with the other party to the Contract. Mediation shall be subject to and in accordance with Chapter 154 of the Texas Civil Practice & Remedies Code. Mediation shall be conducted by a mutually-agreed-upon mediator. In the event that the parties are unable to agree on a mediator, then the mediation shall be conducted by the Center for Public Policy Dispute Resolution at the University of Texas School of Law.

**§ 15.2.3** The parties shall share the mediator's fee equally and, if any filing fee is required, shall share said fee equally. Mediation shall be held within Tarrant County, unless another location is mutually agreed on by the parties. Agreements reached in mediation shall be reduced to writing, considered for approval by the Owner's City Council, signed by the parties if approved by the City Council, and, if signed, shall thereafter be enforceable as provided by the laws of the State of Texas.

EXECUTED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

OWNER:

CONTRACTOR:

By:

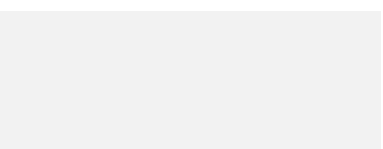
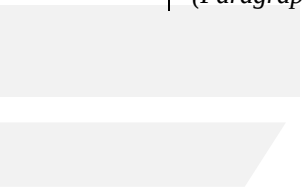
By:

Title:

Title:

Init.

| (Paragraphs deleted)



Init.

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# Additions and Deletions Report for AIA<sup>®</sup> Document A201<sup>™</sup> – 2007

This Additions and Deletions Report, as defined on page 1 of the associated document, reproduces below all text the author has added to the standard form AIA document in order to complete it, as well as any text the author may have added to or deleted from the original AIA text. Added text is shown underlined. Deleted text is indicated with a horizontal line through the original AIA text.

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## PAGE 1

(Name and location or ~~address~~)

address)Midland Court Building- located in Midland, Texas. The project consists of a new multi-level Court for a total project of approximately \_\_\_\_\_ s.f.

...

City of Midland, Texas  
300 N. Loraine  
Midland, Texas 79701

...

Brinkley Sargent Architect  
5000 Quorum Drive, Suite 600  
Dallas, Texas 75254

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~~Arbitration~~  
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§ 1.1.2.1

Should the Contractor find discrepancies, omissions or conflicts within the Contract Documents, or be in doubt or question as to their meaning, the Contractor shall notify in writing the Architect and Owner, and Architect will issue a written addendum to all parties that is consistent with the Owner's Scope of the Work.

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§ 1.2.4 In the event of inconsistencies between portions of the contract documents or within the contract documents; the contract documents shall be interpreted to provide the better quality or greater quantity of Work. Bring all inconsistencies to the Architect's attention, prior to installation, for Architect's interpretation.

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§ 2.1.3 The Contractor stipulates and agrees that the Owner has no duty to discover any design errors or omissions in the Drawings, Plans, Specifications and other Contract Documents, and has no duty to notify Contractor of same. The Contractor has a continuing duty through Final Completion to exercise reasonable diligence to carefully study and compare Drawings and Specifications and promptly to notify the Owner and Architect regarding any conflicts among systems, design errors or omissions of which the Contractor has notice.

§ 2.2.1 Prior to commencement of the Work, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.3 ~~The~~ If requested in writing by Contractor prior to the start of the Work, the Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations which are known to the Owner for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work. Other than any metes and bounds noted in any survey provided, Owner does not guarantee the accuracy of any surveys provided. The Owner does not guarantee that utility lines of other improvements are in the exact locations as shown on plans and surveys. Contractor shall verify with the various utility companies and owners of improvements the location of such utility lines and other improvements. Any identified water, gas or sewer line, telephone, telegraph or electric wire, cable or other utility facility broken, cut or damaged by the Contractor or any of his workmen or subcontractors shall be replaced by the Contractor at his own expense, or by the responsible subcontractor at its own expense, and will not be paid for by the Owner. Repairs shall be made immediately and no other work shall be done until breaks or damages have been repaired and service restored. Any delay caused by the identified cut or break shall be solely attributed to the contractor.

§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction



where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized ~~representative~~ representative and includes the Construction Manager or Construction Manager at Risk, if applicable.

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**§ 3.1.4** The Contractor represents and warrants the following to the Owner (in addition to the other representations and warranties contained in the Contract Document), as an inducement to the Owner to execute this Contract, which representations and warranties shall survive the execution and delivery of the Contract and the Final Completion of the Work:

- .1 that Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete the Work and perform its obligations under the Contract Documents;
- .2 that Contractor it is able to furnish the tools, materials, supplies, equipment and labor required to timely complete the Work and perform its obligations hereunder and has sufficient experience and competence to do so;
- .3 that Contractor is authorized to do business in the State where the Project is located and properly licensed by all necessary governmental, public and quasi-public authorities having jurisdiction over it, the Work, or the site of the Project; and
- .4 that the execution of the Contract and its performance thereof are within Contractor's duly-authorized powers.

...

**§ 3.2.2** The Contractor shall not be entitled to any additional time or compensation for any additional work caused by the Contractor's fault, improper construction, or by Contractor's failure to carefully study and compare the Contract Documents prior to execution of the Work. Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

...

**§ 3.2.4** If the Contractor has knowledge that any of the products or systems specified will perform in a manner that will limit the contractor's ability to satisfactorily perform the Work or to honor his warranty, or will result in a limitation of or interference with the Owner's intended use, then the Contractor shall promptly notify the Architect and Owner in writing, providing substantiation for his position. Any necessary changes, including substitution of materials, shall be accomplished by appropriate Modification. If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall make Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities. Contractor shall not be entitled to



additional compensation for additional Work caused by Contractor's failure to carefully study and compare the Construction Documents prior to execution of the Work.

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§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. ~~If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner required means, methods, techniques, sequences or procedures.~~

...

§ 3.3.4 The Contractor shall bear full responsibility for design and execution of acceptable trenching and shoring procedures, in accordance with Texas Health & Safety Code section 756.021 et seq. To the extent that any portion of the Work requires a trench excavation exceeding five (5) feet in depth, in accordance with Texas Health & Safety Code section 756.023(a), Contractor shall fully comply, and shall require any applicable subcontractor to comply, with:

- .1 The Occupational Safety & Health Administration standards for trench safety in effect for the construction of the Work.
- .2 The special shoring requirements, if any, of the Owner.
- .3 any geotechnical information obtained by Owner for use by the Construction Manager in the design of the trench safety system.
- .4 The trench excavation safety protection shall be a separate pay item and shall be based on linear feet of trench excavated. Special shoring requirements shall also be a separate pay item, and shall be based on the square feet of shoring used. Said cost shall be included within the Contract Sum.

§ 3.3.5 It is understood and agreed that the relationship of contractor to Owner shall be that of an independent contractor. Nothing contained in this Agreement or inferable from this Agreement shall be deemed or construed to: 1) make Contractor the agent, servant or employee of the Owner; or 2) create any partnership, joint venture, or other association between Owner and Contractor. Any direction or instruction by Owner or any of its authorized representatives in respect to the Work shall relate to the results the Owner desires to obtain from the Work, and shall in no way affect Contractor's independent contractor status.

§ 3.3.6 Contractor, its subcontractors and vendors shall bear responsibility for compliance with all federal and state laws, regulations, guidelines, and ordinances pertaining to worker safety and applicable to the Work. Contractor further recognizes that the Owner and Architect do not owe the Contractor any duty to supervise or direct his Work so as to protect the Contractor from the consequences' of his own conduct.

§ 3.3.7 The Contractor shall properly and efficiently coordinate the timing, scheduling and routing of all Work performed by all trades and sub-contractors.

§ 3.3.8 The Contractor shall review Subcontractor safety programs, procedures, and precautions in connection with performance of the Work. However, the Contractor's duties shall not relieve any Subcontractor(s) or any other person or entity (e.g., a Supplier), including any person or entity with who the Contractor does not have a contractual relationship, of their responsibility or liability relative to compliance with all applicable federal, state, and local laws,

rules, regulations, and ordinances which shall include the obligation to provide for the safety of their employees, persons, and property and their requirements to maintain a work environment free of recognized hazards. The foregoing notwithstanding, the requirements of this Paragraph are not intended to impose upon the Contractor any additional obligations that the contractor would not have under any applicable state or federal laws, including, but not limited to any rules, regulations, or statutes pertaining to the Occupational Safety & Health Administration.

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#### **§ 3.4.4 WORKERS' COMPENSATION INSURANCE**

The Contractor shall provide Workers' Compensation Insurance coverage for all employees involved in the performance of this Contract.

##### Workers' Compensation - Certificates of Coverage.

The Contractor shall certify in writing that the Contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the Project, pursuant to the requirements of Texas Labor Code §406.096. The Contractor must provide a certificate of coverage to the District prior to being awarded the Contract. If the coverage period shown on the Contractor's current certificate of coverage ends during the duration of the Project, the Contractor must, prior to the end of the coverage period, file a new certificate of coverage with the District showing that coverage has been extended.

Contractor shall also require that each Subcontractor on the project provide a certificate relating to coverage of the subcontractor's employees to the Contractor, who shall provide the subcontractor's certificate to the District pursuant to the requirements of Texas Labor Code §406.096. The Contractor shall obtain from each person providing services on the Project and provide to the District a certificate of coverage prior to that person beginning work on the Project, so the District will have on file certificates of coverage showing coverage for all persons providing services on the Project; and if the coverage period on the current certificate of coverage ends during the duration of the Projects, the Contract must provide a new certificate of coverage showing an extension of coverage prior to the end of the coverage period. The term subcontractor includes persons providing services on the Project, and includes all persons or entities performing all or part of the services the Contractor has undertaken to perform on the Project, regardless of whether that person has employees. The requirement that a certificate relating to coverage pursuant to the Texas Labor Code §406.096 includes, but is not limited to, independent contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity that furnishes person to provide services on the Project. Services include, but are not limited to, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other services related to the Project. Services do not include activities unrelated to the Project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

Said certificates are required for the duration of the Project, which includes the time from the beginning of the Work on the Project until the Contractor's work on the Project has been completed and acceptable to the District. See 28 T.A.C. §110.110, forms TWCC-81, TWCC-82, TWCC-83, TWCC-84, as they may be updated or modified. The Contractor shall provide coverage based upon proper reporting of classification codes, payroll amounts, and the requirements of this Contract and state law. The Contractor is obligated to meet all legal requirements, regardless of whether or not such requirements are set out in this Contract. By executing this Contract, Contractor is representing that all employees of Contractor and subcontractors and all others who will provide services on this Project will be properly covered by workers' compensation coverage for the entire duration of the Project.

##### Workers' Compensation Insurance

###### Part A: Statutory Limits

###### Part B: Employer's Liability

\$100,000 per accident

\$100,000 disease-each employee

\$500,000 disease-policy limit

Note: Such insurance shall cover employees performing work on any and all projects including but not limited to construction, demolition, and rehabilitation. Contractor or its contractors shall maintain coverages. In the event the respective contractors do not maintain coverage, Contractor shall maintain the coverage on such contractor for each applicable contract.

#### Workers' Compensation – Other Requirements

The Contractor shall post a notice at every project site, in the text, form and manner set out by the Texas Department of Labor that informs all persons providing services under this Contract that they are required to be covered by workers' compensation and stating how a person may verify that such coverage exists and report a lack of coverage.

#### **§ 3.4.5 ASBESTOS OR ASBESTOS CONTAINING MATERIALS: LEAD FREE MATERIAL IN POTABLE WATER SYSTEM; HAZARDOUS MATERIAL CERTIFICATION; EMERGENCIES**

##### Asbestos or Asbestos Containing Materials

Contractor shall submit to Owner's Representative or Engineer a written certification addressed to the Owner that all materials used in the construction of this Project contain less than one tenth of one percent (0.10%) by weight of asbestos and for which it can be demonstrated that, under reasonably foreseeable job site conditions, will not release asbestos fibers in excess of 0.1 fibers per cubic centimeter. The written certification shall further state that, should asbestos fibers be found at this Project in concentrations greater than 0.1 fibers per cubic centimeter, then Contractor will be responsible for determining which materials contain asbestos fibers and shall take all necessary and best practices corrective action to remove those materials from the Project, at no additional cost to the Owner. The written certification shall be dated, shall reference this specific Project and shall be signed by not less than two (2) officers of the Contractor. Final Payment shall not be made until this written certification has been received.

##### Lead-Free Material in Potable Water System

Prior to final payment or payment of retainage, the Contractor and each subcontractor involved with the potable water system shall furnish a written certification that the potable water system is "lead-free." The written certification shall further state that should lead be found in the potable water system built under this Contract, then Contractor shall be responsible for determining which materials contain lead and shall take all necessary corrective action to remove the lead from the Project, at no additional cost to the Owner. The written certification shall be dated, shall reference this specific Project and shall be signed by not less than two (2) officers of the Contractor. Final Payment shall not be made until this written certification has been received.

##### Hazardous Materials Certification

The Contractor shall provide written certification that no materials used in the Work contain lead or asbestos materials in them in excess of amounts allowed by federal, state or local standards, laws, codes, rules and regulations, or the Federal Environmental Protection Agency (EPA) standards and/or the Federal Occupational Safety and Health Administration (OSHA) standards. All standards shall be followed. In case of conflict, the most restrictive standards shall apply. The Contractor shall provide this written certification as part of the submittals required for Final Payment. The written certification shall be dated, shall reference this specific Project and shall be signed by not less than two (2) officers of the Contractor. Final Payment shall not be made until this written certification has been received.

##### Emergencies

In an emergency affecting the safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent damage, injury or loss.

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that Contractor shall perform the Work in a good and workmanlike manner, continuously and diligently in accordance with generally accepted standards of construction practice for construction of projects similar to the Project, except to the extent the Contract Documents expressly specify a higher degree of finish or workmanship, in which case the standard shall be the higher standard. All material shall be installed in a true and straight alignment, level and plumb; patterns shall be uniform; and jointing of materials shall be flush and level, unless otherwise directed in writing by the Architect. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. Notwithstanding anything in the Contract Documents to the contrary, Owner and Contractor expressly agree that the warranties stated herein shall mean the individual warranties associated with each particular Work within the Project, and each such individual warranty shall

run from the Substantial Completion date. Contractor's express warranty is in addition to, and not in lieu of, Owner's other available remedies. All required warranties on equipment, machinery, materials, or components shall be submitted to the Architect on the manufacturer's or supplier's approval forms for delivery to the Owner. The warranties set out in this Section are not exclusive of any other warranties or guarantees set out in other places in the Contract Documents or expressed or implied under applicable law.

**§ 3.5.1** Contractor shall certify that the Project has been constructed in general conformance with the Architect's and Engineer's plans, specifications, and Construction Documents, as modified from time to time pursuant to the terms of the Contract Documents.

**§ 3.5.2** The Contractor agrees to assign to the Owner, at the Time of final Completion of the Work, to be effective no later than the Time of final Completion, any and all manufacturers' and suppliers' warranties relating to materials and labor used in the work and further agrees to perform the Work in such a manner so as to preserve any and all such warranties. All forms will be required to be submitted prior to Final Payment.

**§ 3.5.3** The warranties of Contractor provided in Paragraphs 3.5.1, 3.5.2 shall in no way limit or abridge the warranties of the suppliers of equipment and systems which are to comprise a portion of the Work and all such warranties shall be in form and substance as required by the Contract Documents. Contractor shall take no action or fail to act in any way which results in the termination or expiration of such third party warranties or which otherwise results in prejudice to the rights of Owner under such warranties. Contractor agrees to provide all notices required for the effectiveness of such warranties and shall include provisions in the contracts with the providers and manufacturers of such systems and equipment whereby Owner shall have a direct right, but not a duty, of enforcement of such warranty obligations.

**§ 3.5.4** Contractor shall maintain a complete and accurate schedule of the date(s) of Substantial Completion, the date(s) of Final Completion, and the dates upon which the warranty on each phase or building will expire. Contractor shall provide a copy of such schedules to Owner and Architect. Prior to termination of the warranty period, Contractor shall accompany Owner and Architect on re-inspection of each Work in the project and contractor shall be responsible for correcting any warranty items which are observed or reported during the warranty period. Contractor shall procedure such warranty work without interruption until accepted by Owner and Architect, even though such work should extend beyond the warranty period.

The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect. Owner is an exempt entity under the tax laws of the State of Texas. The Owner represents that this Project is eligible for exemption from the State Sales Tax on tangible personal property and material incorporated in the Project, provided that the Contractor fulfills the requirements of the Limited Sales, Excise and Use Tax Rules and Regulations. For the purpose of establishing exemption, it is understood and agreed that the Contractor may be required to segregate materials and labor costs at the time a Contract is awarded, and will accept a Certificate of Exemption from the Owner. Contractor shall obtain Certificates of Resale from their suppliers shall make the Contractor or Sub-Contractor responsible for absorbing the tax, without compensation from Owner. Contractor shall pay all necessary local, county and state taxes, income tax, compensation tax, social security and withholding payments as required by law. Contractor hereby RELEASES, INDEMNIFIES AND HOLDS HARMLESS Owner from any and all claims and demands made as a result of the failure of Contractor or any Subcontractor to comply with the provisions of any or all such laws and regulations.

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**§ 3.7.4 Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at



the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15. The Contractor shall pay directly all temporary utility charges, temporary tap charges, and temporary water meter charges as established in the GMP Amendment. After consultation with the Owner, the Contractor shall also obtain all permits and approvals, and pay all fees and expenses, if any, associated with national Pollutant Discharge Elimination Systems (NPDES) regulations administered by the Environmental protection Agency (EPA) and local authorities, if applicable, that require completion of documentation and/or acquisition of a "land Disturbing Activities Permit" for the project. Also after consultation with the Owner, the Contractor shall obtain all permits and approvals, and pay all fees and expenses, if any, associated with Storm Water Pollution Prevention and Pollution Control Plan (SWPPP) regulations administered by the Texas Commission on Environmental Quality (TCEQ) and local authorities. Reimbursable expenses shall not include any fines or penalties assessed against the Contractor, Contractor's sub-contractors, the Project, or the Owner, unless SWPPP is installed as directed by the Owner's engineer or consultant.

**§ 3.7.5** If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15. promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

**§ 3.7.6** If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

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**§ 3.12.10** The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and

completeness of the services, certifications and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents. A registered Architect must prepare plans and specifications for all the Work, as governed by the Texas Occupations Code Chapter 1051; and a registered Engineer must prepare plans, specifications and estimates for all Work governed by Texas Occupations Code Chapter 1001. In the event that Contractor retains a licensed design professional under the terms of this Section, Contractor shall require that the licensed design professional carry comprehensive general liability and errors and omissions insurance coverage in the same amounts and forms as required of the Architect on this Project. In the event that the licensed design professional retained by the Contractor will be conducting on-site services or observations, the licensed design professional shall also carry worker's compensation insurance and comprehensive automobile liability in the same amounts and forms as required of the Architect on this Project.

## PAGE 20

### § 3.15 CLEANING - CLEANING PROJECT SITE

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§ 3.15.3 The Contractor shall clean the premises on a daily basis. Cleaning the premises shall mean that the premises and surrounding areas are free from accumulation of waste materials, rubbish, or trash caused by operations under the Contract.

Contractor shall provide on-site containers for the collection of waste materials, debris, rubbish and trash and shall periodically remove waste material, debris, rubbish and trash from the Site and dispose of all such material at a legal disposal area away from the site. The proper disposal of all such materials is the sole responsibility of the Contractor. Contractor shall not allow the on-site containers to overflow.

All cleaning operations shall occur so as to ensure that the contaminants resulting from the cleaning process will not fall on newly coated or newly painted surfaces. At the completion of the Work, the Contractor shall remove waste materials, rubbish, or trash and the Contractor's tools, construction equipment, machinery or other materials from or around or near the Project site.

Any hazardous, dangerous or flammable materials shall be removed from the site immediately. All unpacking materials, all packing case lumber or other packing materials, wrapping or other similar flammable waste shall be collected and removed from the building and premises. Care shall be taken by all workers not to mark, soil, or otherwise deface any finished portion of the Work or any District property. In the event any finished portion of the Work or any District property does become defaced by workers, the Contractor or any of the Subcontractors shall clean and restore such surfaces to their original condition.

After construction is complete, Contractor shall employ skilled workers for final cleaning. Contractor shall require those workers to remove grease, mastic adhesive, dust, dirt, stains, fingerprints, labels and other foreign materials from all sight exposed interior and exterior surfaces; wash and shine glazing and mirrors; polish glossy surfaces to a clear shine; vacuum clean carpeted and similar soft surfaces; clean (damp mop with clean mop and water) resilient and hard surface floors repeating as necessary until no visible residue remains on floors; clean plumbing fixtures to a sanitary condition; clean surfaces of all equipment and remove excess lubrication; clean permanent filters replace disposable filters in ventilating systems if units were operated during construction and clean ducts, blowers, and coils; clean light fixtures; remove waste, foreign matter and debris from roofs, gutters, areas ways and drainage ways; remove waste, debris, and surplus materials from the site; remove stains, spills, and foreign substances from paved areas; and broom clean exterior concrete and paved surfaces and rake clean the grounds.

The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located. Contractor shall ensure that the Work, at all times, is performed in a manner that affords Owner reasonable access, both vehicular and pedestrian, to the site of the Work and all adjacent areas. The Work shall be performed in such a manner that public areas adjacent to the Site of the Work shall be free from all debris, building material and

equipment likely to cause hazardous conditions. Without limitation of any other provision of the Construction Documents, Contractor shall use its reasonable efforts to minimize any interference with the occupancy or beneficial use of any area or building adjacent to the site of the Work or the building, in the event of partial occupancy. The presence of the Owner, Architect or their representatives does not constitute acceptance or approval of the Work.

## PAGE 21

§ 3.18.1 TO THE FULLEST EXTENT PERMITTED BY LAW THE CONTRACTOR SHALL WAIVE AND RELEASE CLAIMS AGAINST AND SHALL INDEMNIFY AND HOLD HARMLESS THE OWNER, ARCHITECT, OWNER'S CITY COUNCIL MEMBERS, ARCHITECT'S CONSULTANTS, OWNER'S CONSULTANTS, AND OFFICER'S AGENTS AND EMPLOYEES OF ANY OF THEM FROM AND AGAINST CLAIMS, DAMAGES, ~~losses and expenses~~, LOSSES, CAUSES OF ACTION, SUITS, JUDGMENTS AND EXPENSES, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES, ARISING OUT OF OR RESULTING FROM PERFORMANCE OF THE WORK, PROVIDED THAT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS ATTRIBUTABLE TO BODILY INJURY, SICKNESS, DISEASE OR DEATH, OR TO INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY (other than (INCLUDING THE WORK ITSELF), BUT ONLY TO THE EXTENT CAUSED ~~by the~~ IN WHOLE OR IN PART BY WILLFUL OR NEGLIGENT ACTS OR OMISSIONS OF THE CONTRACTOR, A SUBCONTRACTOR, ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ~~them~~ THEM, ANYONE THEY CONTROL OR EXERCISE CONTROL OVER, OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE, REGARDLESS OF WHETHER OR NOT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED IN PART BY a party indemnified hereunder. Such ANY WILLFUL OR NEGLIGENT ACTS OR OMISSIONS OF OWNER OR OWNER'S CONSULTANTS OR OTHER INDEMNIFIED PARTIES SUCH OBLIGATION SHALL NOT BE CONSTRUED TO NEGATE, ABRIDGE, OR REDUCE OTHER RIGHTS OR OBLIGATIONS OF INDEMNITY THAT WOULD OTHERWISE EXIST AS TO A PARTY OR PERSON DESCRIBED IN THIS SECTION 3.18. ALL COSTS AND EXPENSES SO INCURRED BY ANY OF THE INDEMNIFIED PARTIES IN THAT EVENT SHALL BE REIMBURSED BY CONTRACTOR TO INDEMNIFIED PARTIES, AND ANY COST AND EXPENSES SO INCURRED BY INDEMNIFIED PARTIES SHALL BEAR INTEREST UNTIL REIMBURSED BY CONTRACTOR, AT THE RATE OF INTEREST PROVIDED TO BE PAID BY THE JUDGMENT UNDER THE LAWS OF THE STATE OF TEXAS.

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3.18.3 THE PROVISIONS OF ARTICLE 3.18 IN ITS ENTIRETY SHALL SURVIVE THE COMPLETION, TERMINATION OR EXPIRATION OF THIS CONTRACT.

...

§ 4.1.3 If the employment of the Architect is ~~terminated~~, terminated before completion of the Work, the Owner shall employ a successor architect as to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect.

§ 4.1.4 Except as expressly provided herein, the Contractor shall not be relieved of Contractor's obligation to perform the Work in strict accordance with the Construction Documents and Contract Documents by the duties, responsibilities or activities of the Architect.

...

§ 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1. The Owner is entitled to reimbursement from the Contractor for amounts paid to the Architect for site visits made necessary by the fault of the Contractor or by defects and deficiencies in the Work unless through their normal course of observations and construction administration obligations.

...



Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with ~~Subcontractors~~Sub-contractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner. However, Owner reserves the right to communicate directly with the Contractor.

#### PAGE 23

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work. Architect and/or Contractor shall promptly notify, orally and in writing, the other party and owner of any fault or defect in the Project or nonconformance with Construction Documents or the Contract Documents they may respectively discover and each, upon discovery of the defect or nonconformance, shall be responsible for notifying the other party and Owner of those corrective actions they respectively take; provided, however, Contractor shall have no duty to notify Owner of discoveries made or actions taken by Architect. Testing or inspections required by this section shall be conducted subject to the requirements of Chapter 271 of the Texas Local Government Code.

#### PAGE 24

§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. The Architect shall be the sole interpreter of the design intent with respect to such matters, but the Architect's authority with respect thereto shall not contravene any other rights of the Owner ascribed to the Owner by other provisions of the Contract.

...

§ 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to any such proposed person or entity or (2) that the Architect requires additional time for review. Failure of the Owner or Architect to reply within the 14-day period shall constitute notice of no reasonable objection. All qualified sub-contractors, shall be procured in accordance with Texas Local Government Code Chapter 271, as applicable. A notice of no reasonable objection shall in no way relieve the Contractor from full responsibility for performance and completion of the Work and its obligations under the Contract Documents. The Contractor shall be full responsible for the performance of its subcontractors, including those recommended or approved by the Owner.

...

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the ~~Work~~Work and was rejected without a reasonable objection, if one was requested, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

...

By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. ~~Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner.~~ Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with ~~Sub-subcontractors.~~ Subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, ~~identify identity~~ to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at a variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

§ 5.3.1 Neither the Owner nor the Architect shall be obligated to pay or to insure the payment of any monies to Subcontractors due to any non-payment to the Contractor or non-payment of Subcontractors by the Contractor. Notwithstanding any provisions contained in the Contract Documents to the contrary, it is hereby acknowledged and agreed that Owner has in no way agreed, expressly or implicitly, nor will Owner agree, to allow any Subcontractor or other material man or workman employed by Contractor the right to obtain a personal judgment or to create a lien against Owner for the amount due from the Contractor. In the event of any termination of the Contract in accordance with Article 14, Subcontractors' remedies shall be limited to Contractor's remedies under this Contract except as required by law. Contractor shall be responsible for any claim of a Subcontractor for Work executed under the Contract except Claims for which Owner has liability under this Contract. Notwithstanding anything to the contrary in this Contract. Subcontractors and their Sub-subcontractors have no direct cause of action against Owner unless the Owner accepts assignment under Article 5.4.1 below.

§ 5.3.2 Contractor shall promptly notify Owner and Architect of any material defaults by any Subcontractor.

## PAGE 25

§ 5.4.1 Each subcontract agreement for a portion of the Work ~~is assigned~~ may be assigned by the Contractor to the Owner, at the option of the Owner, by the Contractor to the Owner, provided that

...

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract. If Owner accepts such assignment, it does not remove any obligation or claim of subcontractors already incurred prior to Owner's acceptance of assignment, upon Contractor.

...

§ 5.4.3 Upon such assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.

§ 5.4.4 Such assignment shall not constitute a waiver by Owner of its rights against Contractor, including, but not limited to, claims for defaults, delays or defects for which a Subcontractor or material vendor may also be liable. Owner shall only be responsible for compensating Subcontractors for Work performed or material furnished from and after the date on which the Owner gives written notice of its acceptance of the subcontract agreement. Owner shall not be responsible for any Work performed or materials furnished by Subcontractors prior to the date of Owner's written notice of acceptance.

## PAGE 26

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a separate contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a Owner's separate contractor's delays, improperly timed activities, and damage to the Work or defective construction. All construction costs and damage resulting from the Contractor's or Owner's separate contractors as the case may be, negligence, lack of oversight, inattention to detail, failure to investigate or failure to follow the Construction Documents or Contract Documents will be borne by the Contractor or Owner's separate contractors, as the case may be.

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§ 8.2.4 If Construction Manager fails to achieve Substantial Completion of the Work within thirty (30) days of the required date of Substantial Completion, as said date may be extended as provided herein, Owner will sustain damages and loss as a result of such failure. The exact amount of such damages will be extremely difficult to ascertain. The Construction Manager has agreed to be liable to the extent of and as limited by this Section.

The Owner shall be entitled to retain or recover from the Contractor, as liquidated damages and not as a penalty, \$2,500 per calendar day, for each calendar day that Substantial Completion is delayed beyond thirty (30) days of the required date of Substantial Completion, as said date may be extended as provided herein, such damages to commence upon thirty (30) days from the required date of Substantial Completion, as said date may be extended herein, and continuing until the calendar day (ending at midnight) that the required completion is achieved. Such liquidated damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work.

Construction Manager shall not be liable for any delay or liquidated damages provided it substantially completion the Project within thirty (30) days from the required date of Substantial Completion, as said date may be extended as provided herein.

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The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents. ~~Documents~~ Documents subject to paragraph 5.2.1 of the A133.

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Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit to the Architect, within 15 days of establishing the Guaranteed Maximum Price (if the Contractor is a Construction Manager at Risk) or before the first Application for Payment, whichever is applicable, a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

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§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of ~~values, if required under Section 9.2,~~ values for completed portions of the Work. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of

requisitions from Subcontractors and material suppliers, and shall reflect retainage if provided for in the Contract Documents.

§ 9.3.1.1 As provided in Section 7.3.9, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders. Contractor agrees that, for purposes of Texas Government Code Section 2251.042, receipt of the Application for Payment by the Architect shall not be construed as receipt of any invoice by the Owner. Contractor further agrees that Owner's receipt of the Certificate for Payment shall be construed as receipt of any invoice by the Owner, for purposes of Texas Government Code section 2251.042. Until Final Completion of the Work, the Owner shall withhold retainage as provided in the Contract Documents, except that Owner shall not pay amounts for which the Architect refuses to certify in Section 9.5 as amended. In any case, the Architect's certification shall not be unreasonably withheld. The retainage shall be paid with the Final Payment. (Note: if more than 5% is retained, under Texas law, then the retainage must be placed in an interest-bearing account, and the contractor must be paid the interest earned on the retainage upon completion of the Work. Texas Government Code section 2252.032.).

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§ 9.3.1.3 Until Final Completion of the Work, the Owner shall withhold retainage as provided in the Contract Documents, except that Owner shall not pay amounts for which the Architect refuses to certify payment, or the Owner refuses to pay, as provided herein Section 9.5 as amended. The retainage shall be paid with the final Payment.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work. CONTRACTOR SHALL INDEMNIFY AND HOLD OWNER HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTERESTS OR ENCUMBRANCES FILED BY THE CONTRACTOR, SUBCONTRACTORS, OR ANYONE CLAIMING BY, THROUGH OR UNDER THE CONTRACTOR OR SUBCONTRACTOR FOR ITEMS COVERED BY PAYMENTS MADE BY THE OWNER TO CONTRACTOR.

§ 9.3.3.1 Contractor shall provide all required Payment Bonds.

§ 9.3.4 By signing each Application for Payment, the Contractor stipulates and certifies to the following: that the information presented is true, correct, accurate and complete and has been completed in accordance with the Contract Documents; that the Contractor has made the necessary detailed examinations, audits and arithmetic verifications; that the submitted Work has been completed to the extent represented in the Applications for Payment; that the materials and supplies identified in the Applications for payment have been purchased, paid for and received; that the Subcontractors have been paid as identified in the Applications for Payment or that Contractor has been invoiced for same; that he has made the necessary on-site inspections to confirm the accuracy of the Applications for Payment; that there are no known mechanics' or materialmen's liens outstanding at the date of this requisition; all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current application; that except for such bills not paid but so included, there is no known basis for the filing of any mechanics' or materialmen's liens on the Work; that the Payment Application includes only Work self-performed by Contractor or for which Contractor has been invoiced; and that releases from all Subcontractors and materialmen have been obtained in such form as to constitute an effective release of lien under the laws of the State of Texas covering all Work performed and for which payment has been made by the Owner to the Contractor. Contractor understands that documents submitted to Owner become government documents under the laws of the State of Texas. Contractor further understands that falsification of Contractor's Application for Payment may constitute a violation of the penal laws of the State of Texas, including but not limited to, Texas Penal Code sections 32.46, 37.09 and 37.10, and may justify termination of Contractor's Contract with Owner. Incomplete or inaccurate Applications for Payment shall be returned to the Contractor by the Architect for completion and/or correction. Owner shall have no responsibility for payment of same if the application for Payment is incomplete or inaccurate.



§ 9.3.5 This Document, A201-2007, is an Exhibit to the Primary Agreement between the City of Midland and the Contractor, documented by AIA Document A133-2009 as modified, and the terms of A133-2009 as modified will govern over any inconsistencies between that document and A201-2007.

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§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 9.5.1. Architect's written reasons for withholding certification shall be construed as the notice required by Texas Government Code Section 2251.042, et. Seq. except, undisputed amounts owed shall not be unreasonably withheld.

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§ 9.5.4 Notwithstanding any provision contained within this Article, if the Work has not attained Substantial Completion or Final Completion by the required dates, subject to extensions of time allowed under these Conditions, then Architect may withhold any further payment to Contractor to the extent necessary to preserve sufficient funds to complete the construction of the Project and to cover liquidated damages. The Owner shall not be deemed in default by reason of withholding payment as provided for in Sections 9.3.4., 9.4.1, 9.5.1 or this Section.

§ 9.6.1 After the Architect has issued a Certificate for ~~Payment~~, Payment for undisputed amounts, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect. Owner shall notify Contractor within 21 days if Owner disputes the Architect's Certificate for Payment, pursuant to Texas Government Code section 2251.042 et. Seq., listing the specific reasons for nonpayment. Payments to the Contractor shall not be construed as releasing the Contractor, Contractor's Surety, or any subcontractor from any obligations under the Contract Documents or Construction Documents or waiving any claims of Owner against Contractor, Contractor's surety, or any subcontractor.

§ 9.6.2 The Contractor shall pay each Subcontractor no later than seven days after receipt of payment from the Owner the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner. In compliance with Texas Government Code section 2251.022, the Contractor shall within ten (10) days following receipt of payment from the Owner, pay all bills for labor and materials performed and furnished by others in connection with the Work, and shall, if requested, provide the Owner with evidence of such payment. Contractor's failure to make payments within such time shall constitute a material breach of this Contract. Contractor shall include a provision in each of its subcontracts imposing the same payment obligations on its Subcontractors as are applicable to the Contractor hereunder, and if the Owner so requests, shall provide copies of such Subcontractor payments to the owner. If the Contractor has failed to make payment promptly to the Contractor's Subcontractor or for materials or labor used in the Work for which the Owner has made payment to the Contractor, then the Owner shall be entitled to withhold payment to the Contractor in part or in whole to the extent necessary to protect the Owner.

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§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. Action on the part of the Owner to require contractor to pay a Subcontractor shall not impose any liability on Owner. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

...

§ 9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor Payments received by the contractor for Work properly performed by Subcontractors and/or materials properly provided by suppliers shall be held by the Contractor for those

Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. ~~Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.~~

#### **§ 9.7 FAILURE OF PAYMENT**

~~If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or Pursuant to Texas Government Code Section 2251.051, if the Owner does not pay the Contractor within seven-twenty days after the date established in the Contract Documents the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.~~

§ 9.7.1 If the Owner is entitled to reimbursement or payment from the Contractor under a pursuant to the Contract Documents, then such payment shall be made promptly upon demand by the Owner. Notwithstanding anything contained in the Contract Documents to the contrary, if the Contractor fails to promptly make any payment due to Owner, or the Owner incurs any costs and expense to cure any default of the Contractor or to correct defective Work, pursuant to the Contract, the Owner shall have an absolute right to offset such amount against the Contract Sum and, in the Owner's sole discretion and without waiving any other remedies, may elect either to:

- .1 deduct an amount equal to that which the Owner is entitled from any payment then or thereafter due to contractor from the Owner, or
- .2 issue a written notice to the Contractor reducing the Contract Sum by an amount equal to that which the Owner is entitled.

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§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use, all Project systems included in the Work or designated portion thereof have been successfully tested and are fully operational; required local governmental agency inspections and certifications required of the Work to obtain Certificate of Occupancy have been made, approved and posted; designated initial instruction of Owner's personnel in the operation of Project systems have been completed; and all the required finishes set out in the Construction Documents are in place. The only remaining Work shall be minor in nature so that the Owner can occupy the Work or the applicable portion of the Work for all of its intended purposes on that date; and the completion of the Work by the Contractor will not materially interfere with or hamper Owner's normal, intended use. As a further condition of a determination of Substantial Completion, the Contractor shall certify that all remaining Work shall be completed within 30 days.

...

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities clearly assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents. The application for payment to release retainage will not be approved by the Architect until the completed and corrected closeout documents are provided to the Architect by the Contractor. Closeout documents shall be delivered to the Architect under conditions and times set forth in the contract documents and specifications.

§ 9.8.6 Notwithstanding any provision contained within this Article, if the work has not attained Substantial Completion with the contract time, subject to extensions of time allowed under these Conditions, Architect may withhold any further payment to Contractor to the extent necessary to preserve sufficient funds to complete the

construction of the Project and to cover liquidated damages assessed against Contractor up to the time of application for Payment and to the time it is reasonably anticipated that Substantial Completion will be achieved.

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**§ 9.10.4** The making of final payment shall constitute a waiver of Claims by the Owner except those arising from  
1 — liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;  
2 — failure of the Work to comply with the requirements of the Contract Documents; or  
3 — terms of special warranties required by the Contract Documents. Owner, except as set out above.

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~~§ 10.3.6~~ If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

...

**§ 11.0.1** No Work will be commenced and no equipment or materials can be shipped until all requirements of this Article have been satisfied, satisfactory evidence of insurance has been provided, and all insurance is in full force and effect. Contractor shall notify Owner and Architect in writing of any proposed nonconformity with these requirements, and shall notify Owner and Architect in writing of any insurance changes which occur during the terms required under the Contract Documents. Any deviation from these requirements can only be approved by Owner's City Council. Any non conformity may be grounds for termination or modification of the Contract. To the extent that Contractor is unable to procure the insurance designated herein because the insurance is not reasonably available or is cost-prohibitive, then Contractor shall provide written notice to Owner's City Council. Said lack of insurance may then be grounds for termination or modification of this Agreement.

**§ 11.0.2** Satisfactory evidence of insurance required by this Article shall be provided to Owner and Architect not later than five business days after execution of the Contract by Owner. Satisfactory evidence shall include copies of the required insurance policies, declarations and endorsements themselves. In addition, Contractor shall also provide: 1) a duly-executed Owner's Certificate of Insurance; 2) a duly-executed ACORD Certificate of Insurance, Form 25 (2010/05) or 3) a duly-executed ACORD Certificate of Insurance, Form 27, such form to be modified if necessary to include liability coverage. The Contractor shall furnish Owner all insurance amendments, renewals, notices, cancellations and additional endorsements as they are provided to Contractor.

**§ 11.0.3** All insurance required herein shall be obtained from a company licensed to do business in the State of Texas by the Texas Department of Insurance, and shall be underwritten by a company rated not less than A- VII in A.M. Best's Key Rating Guide, Property-Casualty, according to the latest posted ratings available on A.M. Best's Web Site, [www.ambest.com](http://www.ambest.com) and that permits waivers of subrogation, or unless carrier is approved in advance by Owner.

**§ 11.0.4** All insurance required herein shall name the Owner, its officers, employees, representatives or agents, as an additional insured, except Contractor's Worker's Compensation insurance.

**§ 11.0.5** All insurance required herein shall be primary insurance as respects, the Owner, its officers, employees, representatives or agents. All insurance shall be written on an occurrence basis, if available, and shall contain a waiver of subrogation in favor of Owner on all claims arising out of the Project. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, or did not pay the insurance premium directly or indirectly; and whether or not the person or entity had an insurable interest in the property damaged. Aggregate limits on any policy shall be not less than twice the per accident or per occurrence limits of the policy.

**§ 11.0.6** Any failure of Contractor to comply with the reporting provision of the policies shall not affect the coverage provided to the Owner, its officers, employees, representatives or agents.



§ 11.0.7 All workers on the Project must be covered by the required insurance policies of the Contractor or a Subcontractor.

§ 11.0.8 Nothing contained in this Article shall limit or waive Contractor's legal or contractual responsibilities to Owner or others.

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§ 11.1.2.1 Worker's Compensation

§ 11.1.2.1 Comprehensive General Liability:

- .1 Products & Completed Operations to be maintained for a period of two years after Final Payment; Contractor shall continue to provide evidence of such coverage to Owner on an annual basis during this period.
- .2 Property Damage Liability Insurance shall provide X, C and U coverage.
- .3 Broad Form Property Damage Coverage shall include Completed Operations.
- .4 Broad Form Contractual Liability Coverage

§ 11.1.2.2 Contractual Liability:

- .1 Property Damage shall be included in Comprehensive General Liability Coverage.
- .2 Insurance sufficient to cover Contractor's contractual indemnities.

§ 11.1.2.3 Personal Injury:

- .1 With Employment Exclusion deleted; shall be included in Comprehensive General Liability Coverage.

§ 11.1.2.4 Business Automobile Liability (including owned, non-owned, hired, or any other vehicles): (Note: Texas statutory minimum for school districts is \$100,000 per person, \$300,000 per occurrence, \$100,000 property damage).

§ 11.1.2.7 All Risk Builder's Risk Insurance. Contractor shall provide Builder's Risk Insurance in the total amount of the Contract Sum. See Section 11.4. Contractor's indemnity for loss of use and other consequential damages arising out of a builder's risk claim is limited to the delay in completion coverage specified in the GMP Amendment.

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~~§ 11.2 OWNER'S LIABILITY INSURANCE~~

~~The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.~~

§ 11.1.5 Texas Workers' Compensation Insurance. A copy of a certificate of insurance, a certificate of authority to self-insure issued by the Texas Department of Insurance (TDI), or a coverage agreement (DWC-81, DWC-82, DWC-83, or DWC-84) showing statutory workers' compensation insurance coverage for the Contractor's employees providing services on a Project is required for the duration of the Project.

§ 11.1.5.1 Duration of the Project includes the time from the beginning of the Work on the Project until Contractor's work on the Project has been completed and accepted by the Owner.

§ 11.1.5.2 Persons providing services on the Project ("subcontractor" in Texas Labor Code section 406-096) include all persons or entities performing all or part of the services the Contractor has undertaken to perform on the Project regardless of whether that person has employees. This includes, without limitations, independent contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity that furnishes persons to provide services on the Project.

§ 11.1.5.3 Services include, without limitations, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other services related to the Project. Services do not include activities unrelated to the Project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

§ 11.1.5.4 The Contractor shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code section 401.011(44) for all employees of the Contractor providing services on the Project for the duration of the Project.

§ 11.1.5.5 The Contractor must provide a certificate of coverage to the Owner prior to being awarded the Contract.

§ 11.1.5.6 If the coverage period shown on the Contractor's current certificate of coverage ends during the duration of the Project, the Contractor must, prior to the end of the coverage period, file a new certificate of coverage with the Owner showing that coverage has been extended.

§ 11.1.5.7 The Contractor shall obtain from each person providing services on the Project and provide to the Owner.

- .1 A certificate of coverage, prior to that person beginning work on the Project, so the Owner will have a file certificates of coverage showing coverage for all persons providing services on the Project, and
- .2 No later than seven days after receipt by the Contractor, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the Project.

§ 11.1.5.8 The Contractor shall retain all required certificates of coverage for the duration of the Project and for one year thereafter.

§ 11.1.5.9 The Contractor shall notify the Owner in writing by certified mail or personal delivery, within ten days after the Contractor knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the Project.

§ 11.1.5.10 The Contractor shall post on each Project site a notice, in the text form, and manner prescribed by the TDI informing all persons providing services on the Project that they are required to be covered, and stating how a person may verify coverage and report lack of coverage.

§ 11.1.5.11 The Contractor shall contractually require each person with whom it contracts to provide services on the Project, to:

- .1 Provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code section 401.011(44) for all of its employees providing services on the Project for the duration of the Project.
- .2 Provide to the Contractor, prior to that person beginning work on the Project, a certificate of coverage showing that coverage is being provided for all employees of the person providing services on the Project for the duration of the Project.
- .3 Provide the Contractor, prior to the end of the coverage period, a certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the Project.
- .4 Obtain from each other person with whom it contracts, and provide to the Contractor:
  - .1 A certificate of coverage, prior to the other person beginning work on the Project, and
  - .2 A new certificate of coverage showing extension of coverage, prior the end of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the Project.
- .5 Retain all required certificates of coverage on file for the duration of the Project and for one year thereafter.
- .6 Notify the Owner in writing by certified mail or personal delivery, within ten days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the Project; and

.7 Contractually require each person with whom it contracts to perform as required by items 1-6, with the certificates of coverage to be provided to the person for whom they are providing services.

§ 11.1.5.12 By signing this Contract or providing or causing to be provided a certificate of coverage, the Contractor is representing to the Owner that all employees of the Contractor who will provide services on the project will be covered by workers' compensation coverage for the duration of the Project, that the coverage will be based on property reporting of classification codes and payroll amounts and that all coverage agreements will be filed with the appropriate insurance carrier or, in the case of a self-insured, with the TDI's Division of Self-Insurance Regulation. Providing false or misleading information may subject the Contractor to administrative penalties, criminal penalties, civil penalties or other civil actions.

§ 11.1.5.13 The Contractor's failure to comply with any of these provisions is a breach of contract by the Contractor that entitles the Owner to declare the Contract void if the contractors does not remedy the breach within ten days after receipt of notice of breach from the Owner.

§ 11.1.5.14 The coverage requirement recited above does not apply to sole proprietors, partners, and corporate officers who are excluded from coverage in an insurance policy or certificate of authority to self-insure that is delivered, issued for delivery or renewed on or after January 1, 1996.

§ 11.3.1 Unless otherwise provided, the ~~Owner-Contractor~~ shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. 9.10. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project. To the extent of any overlap between Owner's property insurance and Contractor's builder's risk insurance, Contractor's builder's risk coverage shall be primary.

§ 11.3.1.1 Property insurance shall be on an "all-risk" 'all-risk' or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for ~~Architect's and Contractor's services and expenses required as a result of such insured any Owner~~ loss.

§ 11.3.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

§ 11.3.1.3 If the property insurance requires deductibles, the ~~Owner-Contractor~~ shall pay costs not covered because of such deductibles.

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The ~~Owner-Contractor~~ shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. ~~The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.~~

**§ 11.3.4** If the ~~Contractor~~ Owner requests in writing that insurance for risks other than those described herein or other special causes of loss be included in ~~the property insurance policy~~, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order. property insurance policy, the Contractor or Architect shall, if possible, include such insurance. If there is an additional cost, Contractor or Architect shall inform Owner and confirm that Owner still requests such insurance.

**§ 11.3.5** ~~If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.~~

**§ 11.3.6** Before an exposure to loss may occur, the ~~Owner~~ Contractor shall file with the ~~Contractor~~ Owner a copy of each policy that includes insurance coverages required by this Section 11.3. Each policy shall contain all generally applicable conditions, definitions, ~~exclusions~~ exclusion and endorsements related to this Project. Each policy shall contain a provision that the policy will not be ~~canceled~~ cancelled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the ~~Contractor~~ Owner.

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The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) ~~the Architect, Architect's consultants,~~ separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other ~~causes~~ cause of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the ~~Owner~~ Contractor as fiduciary. The ~~Owner~~ Contractor, as appropriate, shall require ~~of the Architect, Architect's one another and their consultants,~~ separate contractors described in Article 6, ~~6 and elsewhere,~~ if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. ~~A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.~~

**§ 11.3.8** A loss insured under ~~the Owner's property insurance~~ obtained by Contractor shall be adjusted by the ~~Owner~~ Contractor as fiduciary and made payable to the Owner as fiduciary ~~for the insureds,~~ as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the ~~Contractor,~~ Contractor and not subject to claims by the Owner, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

**§ 11.3.9** ~~If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or as determined in accordance with the method of binding dispute resolution selected in the Agreement between the Owner and Contractor. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.~~

**§ 11.3.10** The Owner as ~~fiduciary shall~~ beneficiary shall at its election, have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved in the manner selected by the Owner and Contractor as the method of binding dispute resolution in the Agreement. ~~If the Owner and Contractor have selected arbitration as the method of binding dispute resolution, the Owner as fiduciary shall make settlement with insurers or, in the case of a dispute over distribution of insurance proceeds, in accordance with the directions of the arbitrators.~~

...

**§ 11.4.1** ~~The Owner shall have the right to require the Contractor to furnish~~ Contractor shall furnish separate payment and performance bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract, each bond to be a total amount equal to 100% of the Contract Price, or Guaranteed Maximum Price, whichever is applicable. The performance bond shall also include an amount necessary to reimburse Owner its reasonable and necessary attorneys fees (pursuant to Texas Local Government Code section 271.159) and litigation costs incurred in claims arising under the performance bond, and liquidated damages arising under the Contract Documents, in an amount not to exceed five (5) percent of the Cost of the Work. Provided, however, no limitation herein shall limit Contractor's liability under the Contract Documents. (If the Guaranteed Maximum Price is not known at the time that a Construction Manager At Risk contract is awarded, then the sum of the payment and performance bonds must each be in an amount equal to the Project budget. The Construction Manager at Risk shall deliver the bonds not later than the tenth day after the date of Construction Manager At Risk shall deliver the bonds not later than the tenth day after the date the Construction Manager At Risk executes the Contract, unless the Construction Manager At Risk furnished a bid bond or other financial security acceptable to the District to ensure that the Construction Manager will furnish the required payment and performance bonds when the Guaranteed Maximum price is established). All bonds shall be issued by a surety company licensed, listed and authorized to issue bonds in the State of Texas by the Texas Department of Insurance, and shall fully comply with Texas Insurance Code section 3503.001 et seq. and Texas Government Code, Chapter 2253, or their successors. The surety company shall have a rating of not less than "A VII" according to the latest posted ratings or the A.M. Best Web Site, [www.ambest.com](http://www.ambest.com). The surety company shall provide, if requested, information on bonding capacity and other projects under coverage and shall provide proof to establish adequate financial capacity for this Project. Should the bond amount be in excess of ten percent (10%) of the surety company's capital and surplus, then the surety company issuing the bond shall certify that the surety company has acquired reinsurance, in a form and amount acceptable to the Owner, to reinsure the portion of the risk that exceeds ten percent (10%) of the surety company's capital and surplus with one or more reinsurers who are duly authorized and admitted to do business in Texas and that amount reinsured by a reinsurer does not exceed ten percent (10%) of the reinsurer's capital and surplus. Contractor shall immediately notify the Owner and Architect in writing if there is any change in: the rating; insolvency or receivership in any State; bankruptcy; right to do business in the State; or status of Contractor's sureties at any time until Final Completion.

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**§ 11.4.3** The Contractor shall deliver copies of the required bonds to the Owner and Architect not later than ten business days after execution of the GMP Amendment by Owner. All bonds will be reviewed by the Architect for compliance with the Contract Documents. In the event that the Architect has any questions concerning the sufficiency of the bonds, the bonds will be referred to the Owner or the Owner's representative with Architect's recommendation.

**§ 11.4.4** All bonds shall be originals. The Contractor shall require the attorney-in-fact who executes the required Bonds on behalf of the Surety to affix thereto a certified and current copy of the power-of-attorney. The name, address and telephone number of a contact person for the bonding company shall be provided.

**§ 11.4.5** Bonds shall guarantee the faithful performance of all of the covenants, stipulations, and agreements of the Contract. Bond shall be signed by an agent, resident in the State of Texas. If at any time during the continuance of the Contract, the Owner determines that the Contractor is unable to complete the Work in accordance with the Contract Documents, any of the Contractor's bonds become insufficient, the surety becomes insolvent, or the surety's rating drops below the required level, then the Owner shall have the right to require from the Contractor additional and sufficient sureties or other security acceptable to the Owner, which the Contractor shall furnish to the satisfaction of



the Owner, within ten (10) days after notice to do so. These contractual remedies are in addition to all remedies available by law. In default thereof, all payment or money due to the Contractor may be withheld until the Contractor provides additional surety or security.

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The Contract shall be governed by the law of the place where the Project is located ~~except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern~~ Section 15.4, located, Tarrant County, Texas.

...

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements and obligations contained in the Contract Documents. ~~Except as provided in Section 13.2.2, neither~~ Neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

~~§ 13.2.2 The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.~~

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§ 13.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals which shall be included in the Cost of the Work with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. ~~and approvals, provided however, Owner shall bear all costs of inspections services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the Owner.~~ The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. ~~The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Contractor.~~

§ 13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Section 13.5.1, ~~the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements~~ Owner will provide or contract for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. ~~approval.~~ Such costs, except as provided in Section 13.5.3, shall be at the Owner's expense.

...

~~Payments~~ Undisputed payments due and unpaid under the Contract Documents shall bear interest from the date payment is due ~~at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located, as such rate provided by Texas Government Code section 2251.025.~~ any such payment shall be deemed overdue on the thirty-first day after Owner receives Architect's invoice or Contractor's Certificate for Payment from the Architect.

...

The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7. Provided notice has been provided where required under Article 15.1.2 with respect to Claims arising during performance of the Work, the time for commencement of a cause of action for any dispute arising out of the Project or the Contract shall be governed by applicable Texas law.

### **§ 13.8 EQUAL OPPORTUNITY IN EMPLOYMENT**

§ 13.8.1 The invalidity of any part or provision of the Contract Documents shall not impair or affect in any manner whatsoever the validity, enforceability or effect of the remainder of the Contract Documents.

§ 13.8.2 The Contractor and the Contractor's Subcontract shall not discriminate against any employee or applicant for employment because of race, religion, age, disability, sex, or national origin. The Contractor agrees to post in conspicuous places, available to employees and applicants, notices setting forth the Contractor's nondiscrimination policies.

§ 13.8.3 The Contractor and the Contractor's Subcontractor shall, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applications will receive consideration for employment without regard to race, religion, age, disability, sex, or national origin.

§ 13.9 Notwithstanding anything to the contrary in any of the Contract Documents or in any document forming a part hereof, there shall be no mandatory arbitration for any dispute arising hereunder. Any remaining references in any of the Contract Documents to mediation or arbitration are inadvertent and will not be enforced.

§ 13.10 Contractor stipulates that Owner is a political subdivision of the State of Texas, and, as such, may enjoy immunities from suit and liability under the Constitution and laws of the State of Texas. By entering into this Agreement, Owner does not waive any of its immunities from suit and/or liability, except as otherwise specifically provided herein and as specifically authorized by law.

§ 13.11 In any adjudication or claim under this Agreement, reasonable and necessary attorneys' fees may be awarded to the prevailing party, as allowed by Texas Local Government Code section 271.159 or other applicable law.

### **§ 13.12 RECORDS**

§ 13.12.1 Contractor shall at all times through the date of Final Completion, maintain Job Records, including, but not limited to, invoices, payment records, payroll record, daily reports, diaries, logs, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda, other financial data and job meeting minutes applicable to the Project, in a manner which maintains the integrity of the documents. Job Records must be retained by Contractor for at least twelve (12) years after the date of Final Completion of the Project. Within 10 days of Owner's request, Contractor shall make such Job Records available for inspection, copying and auditing by the Owner, Architect or their respective representatives, at Owner's central office.

§ 13.12.2 If Contractor is a Construction Manager at Risk, then Contractor shall also maintain, in accordance with the provisions of Section 13.12.1, the following: subcontract files, including proposals of successful and unsuccessful bidders, bid recaps and subcontractor payments; original estimates; estimating work sheets; general ledger entries detail cash and trade discounts received; insurance rebates and dividends; and any other supporting evidence deemed necessary by the Owner to substantiate charges related to the Contract."

§ 13.12.3 Contractor shall keep a full and detailed financial accounting system and shall exercise such controls as may be necessary for proper financial management under this Contract; the accounting and control system shall be satisfactory to the Owner and shall be subject to the provisions of Section 13.12.1.

§ 13.12.4 Contractor shall keep all Construction Documents related to the Project, subject to the provisions of Section 13.12.1, provided, however, Contractor shall not destroy said documents until Contractor has confirmed with Owner in writing that Owner has obtained a copy of all as-built drawings.



§ 13.12.5 In the event that an audit by the Owner reveals any errors/overpayments by the Owner, then the Contractor shall refund to the Owner the full amount of such overpayment within thirty (30) days of such audit findings, or the Owner, at its option, reserves the right to deduct such amounts owed to the Owner from any payments due to the Contractor."

### **§ 13.13 PROPRIETARY INTERESTS AND CONFIDENTIAL INFORMATION**

§ 13.13.1 Neither Architect nor Contractor shall use the image or likeness of Owner's Project or Owner's official logo or emblem and any other trademark, service mark, or copyrighted or otherwise protected information of Owner, without Owner's prior written consent. Contractor and Architect shall not have any authority to advertise or claim that Owner endorse Architect or Contractor's services, without Owner's prior written consent. ,

§ 13.13.2 Neither Architect nor Contractor shall disclose any confidential information which comes into the possession of Architect or Contractor at any time during the Project, including but not limited to, the location and deployment of security devices.

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§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of ~~30-60~~ consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, only for any of the following reasons:

...

- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on ~~a~~an undisputed sum due on an Certificate for Payment within the time stated in the Contract Documents; or
- ~~.4 The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1-Documents.~~

...

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon ~~seven-ten~~ (10) days' written notice to the Owner and Architect, and Owner's failure to cure the deficiency within such time, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon ~~seven-ten~~ (10) additional days' written notice to the Owner and the Architect, and owner's failure to cure the deficiency within such time, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

...

- .5 fails to furnish the Owner, upon request, with assurances satisfactory to the Owner, evidencing the Contractor's ability to complete the Work in compliance with all the requirements of the Contract Documents;
- .6 engages in conduct that would constitute a violation of state or federal criminal law, including but not limited to, the law prohibiting certain gifts to public servants, or engages in conduct that would constitute a violation of the Owner's ethics or conflict of interest policies; or
- .7 fails to proceed continuously and diligently with the construction and completion of the Work; except as permitted under the Contract Documents.

§ 14.2.2 When any of the above reasons exist, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and

after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.2 When any of the above reasons exist, the Owner, upon reasonable determination that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate engagement of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract or Contractor's engagement for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished, finished, and any further payments shall be limited to amounts earned for work performed prior to the date of such termination.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.

§ 14.2.5 The parties hereby agree that: 1) if an order for relief is entered on behalf of the Contractor, pursuant to Chapter 11 of the U.S. Bankruptcy Code; 2) if any other similar order is entered under any debtor relief laws; 3) if Contractor makes an assignment for the benefit of one or more of its creditors; 4) if a receiver is appointed for the benefit of its creditors; or 5) if a receiver is appointed on account of its insolvency, any such event could impair or frustrate Contractor's performance of the Contract Documents. Accordingly, it is agreed that upon occurrence of any such event, Owner shall be entitled to request of Contractor or its successor in interest adequate assurance of future performance in accordance with the terms and conditions of the Contract Documents. Failure to comply with such request within ten (10) days of delivery of the request shall entitle Owner to terminate the Contract and to the accompanying rights set forth in Sections 14.2.1 through 14.2.6. In all events, pending receipt of adequate assurance to proceed with the Work with Owner's own forces or with other Contractors on a time and material or other appropriate basis, the cost of which will be charged against the Contract Sum.

§ 14.2.6 As required by Texas Government Code Chapter 2253, if a Performance Bond has been furnished and the Contractor is declared by the Owner to be in default under the Contract, then the Surety shall promptly perform the Work, in full accordance with the plans, specifications and Contract Documents. Unless otherwise agreed in writing between the Surety and the Owner, the Surety shall complete the Work by the Surety entering into a Contract acceptable to Owner, with a Contractor acceptable to Owner, and shall obtain new Payment and Performance Bonds as required by law.

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§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent, provided that such profit shall not exceed the profit margin of the Project which would have existed if no such delay had occurred.

**§ 14.4.3** In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work ~~executed, executed prior to the notice of termination,~~ and costs incurred by reason of such termination, ~~along with reasonable~~ excluding overhead and profit on the Work not executed.

**§ 14.4.4** Owner shall be entitled to delete or terminate any portion of the Contract bid as an alternate component, at any time at the Owner's convenience and without cause. In the event of such termination, the Contractor shall only be entitled to receive payment for Work executed on the alternate component, if any, prior to the notice of termination.

...

**§ 15.1** No extension of time shall be made to the Contractor because of hindrances or delays from any cause which is the fault of Contractor or Contractor's Subcontractors or under Contractor's control. Claims for extension of time may only be considered because of rain delays, or hindrances or delays which are out of Contractor's control, but only to the extent that Substantial Completion or Final Completion of the Project, as the case may be, is adjusted beyond the original Substantial Completion or Final Completion date. Only claims for extension of time shall be considered because of hindrances or delays out of the Contractor's control, but only to the extent that Substantial Completion or Final Completion of the Project exceeds the date established for the Work. City Council approval shall be required for any extension of time. No damage for such delay shall be paid to Contractor for the first 15 days of delays caused by the Owner, Architect, or those within their control, but Contractor shall be entitled to be paid reasonable additional Cost of Work arising out of such delay beyond 15 days. Contractor shall only be entitled to time extensions per the terms of the Contract Documents.

...

Notwithstanding the above, a party's duty to "recognize" an applicable "condition" as falling within this notice provision means that the party reasonably knew or should have known, in the exercise of due diligence, given the differing levels of knowledge, training and experience of the parties, respectively, that the condition is the basis of a claim under this Agreement

...

**§ 15.1.5.1** If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary. Requests for time extension shall be submitted on a monthly basis and shall specify the time delay, the cause of the delay, and the responsible party for the delay, whether Contractor, Owner, rain day or other. No claims for damages for delay shall be made by Contractor. Any claim not submitted under the terms of this Section shall be waived. Claims for increase in the Contract Time shall set forth in detail the circumstances that form the basis for the Claim, the date upon which each cause of delay began to affect the progress of the Work, the date upon which each cause of delay ceased to affect the progress of the Work and the number of days' increase in the Contract Time claimed as a consequence of each such cause of delay. The Contractor shall provide such supporting documentation as the Owner may require including, where appropriate, a revised construction schedule indicating all the activities affected by the circumstances forming the basis of the Claim.'

**§ 15.1.5.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction. The Contractor shall not claim additional overhead or fee for weather related delays.

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver ~~includes~~ includes:

...

**§ 15.2 INITIAL DECISION/ALTERNATIVE DISPUTE RESOLUTION**

**§ 15.2.1** Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9, and 11.3.10, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner. Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and ,except those waived under the terms of the Contract Documents, shall, after written recommendation by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation at the request of either party. Owner and Contractor expressly agree that mediation shall be a condition precedent to the initiation of any litigation. arising out of such Claims.

**§ 15.2.2** ~~The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim. . The parties shall endeavor to resolve their Claims by mediation. Requests for mediation shall be filed in writing with the other party to the Contract. Mediation shall be subject to and in accordance with Chapter 154 of the Texas Civil Practice & Remedies Code. Mediation shall be conducted by a mutually-agreed-upon mediator. In the event that the parties are unable to agree on a mediator, then the mediation shall be conducted by the Center for Public Policy Dispute Resolution at the University of Texas School of Law.~~

**§ 15.2.3** ~~In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense. The parties shall share the mediator's fee equally and, if any filing fee is required, shall share said fee equally. Mediation shall be held within Tarrant County, unless another location is mutually agreed on by the parties. Agreements reached in mediation shall be reduced to writing, considered for approval by the Owner's City Council, signed by the parties if approved by the City Council, and, if signed, shall thereafter be enforceable as provided by the laws of the State of Texas.~~

EXECUTED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

OWNER: \_\_\_\_\_

CONTRACTOR: \_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

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

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

**§ 15.2.4** ~~If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.~~

**§ 15.2.5** The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

**§ 15.2.6** Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

**§ 15.2.6.1** Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

**§ 15.2.7** In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

**§ 15.2.8** If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

### **§ 15.3 MEDIATION**

**§ 15.3.1** Claims, disputes, or other matters in controversy arising out of or related to the Contract except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6 shall be subject to mediation as a condition precedent to binding dispute resolution.

**§ 15.3.2** The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

**§ 15.3.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

### **§ 15.4 ARBITRATION**

**§ 15.4.1** If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

**§ 15.4.1.1** A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

**§ 15.4.2** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.



~~§ 15.4.3~~ The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

~~§ 15.4.4 CONSOLIDATION OR JOINDER~~

~~§ 15.4.4.1~~ Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

~~§ 15.4.4.2~~ Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

~~§ 15.4.4.3~~ The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Contractor under this Agreement.

## ***Certification of Document's Authenticity***

***AIA® Document D401™ – 2003***

I, Gary Beeman, hereby certify, to the best of my knowledge, information and belief, that I created the attached final document simultaneously with its associated Additions and Deletions Report and this certification at 13:25:53 on 12/30/2013 under Order No. 3033128984\_1 from AIA Contract Documents software and that in preparing the attached final document I made no changes to the original text of AIA® Document A201™ – 2007, General Conditions of the Contract for Construction, as published by the AIA in its software, other than those additions and deletions shown in the associated Additions and Deletions Report.

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*(Signed)*

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*(Title)*

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*(Dated)*



**SELECTION PROCESS**  
**PHASE 2**  
**Exhibit 'A'**  
**FEE & GENERAL CONDITIONS CHECKLIST**

**Midland Court Building**  
Midland, Texas

**FEE& GENERAL CONDITIONS**

The following matrix chart identifies construction related activities anticipated to occur with this project.  
Each activity is marked in the applicable box of the category to which the cost for each item or activity is assigned.

| DESCRIPTION                                      | Included in Fee | Included in Gen. Conditions | Cost of Work | Excluded/ Owner |
|--------------------------------------------------|-----------------|-----------------------------|--------------|-----------------|
| <b>Overhead &amp; Profit</b>                     |                 |                             |              |                 |
| Expenses of Contractor's Principle Office        | x               |                             |              |                 |
| Overhead & General Expenses                      | x               |                             |              |                 |
| Contractor's Capital Expenses                    | x               |                             |              |                 |
| Profit                                           |                 |                             |              |                 |
| <b>Supervision &amp; Administration</b>          |                 |                             |              |                 |
| <b>Supervision</b>                               |                 | x                           |              |                 |
| Superintendent(s) (Full-Time, On-Site)           |                 | x                           |              |                 |
| Quality Control                                  |                 | x                           |              |                 |
| <b>Administration</b>                            |                 | x                           |              |                 |
| Project Executive                                |                 | x                           |              |                 |
| Project Manager & Project Engineer               |                 | x                           |              |                 |
| Estimator                                        |                 | x                           |              |                 |
| Scheduler                                        |                 | x                           |              |                 |
| Project Accountant, Main Office                  |                 | x                           |              |                 |
| Admin. Support Staff                             |                 |                             |              |                 |
| Bid Process – Reproduction, Advertisements, etc. |                 |                             | x            |                 |
| Shop Drawing Reproduction                        |                 |                             | x            |                 |
| Construction Drawing Reproduction                |                 | x                           |              |                 |
| <b>Temporary Facilities</b>                      |                 |                             |              |                 |
| Owner's Office, Furniture                        |                 | x                           |              |                 |
| Architect's Office, Furniture                    |                 | x                           |              |                 |
| GC Office Setup & Rental                         |                 | x                           |              |                 |
| GC Jobsite Office Furniture                      |                 | x                           |              |                 |
| GC Jobsite Fax Machine                           |                 | x                           |              |                 |
| GC Jobsite Copier/Scanner/Printers               |                 | x                           |              |                 |
| GC Office Supplies & Paper                       |                 | x                           |              |                 |
| GC Jobsite Plotter                               |                 | x                           |              |                 |
| GC Jobsite Network Setup                         |                 | x                           |              |                 |
| GC Jobsite Computer & Printer Rentals            |                 | x                           |              |                 |
| GC Jobsite Telephone System, Setup & Conf. Phone |                 | x                           |              |                 |
| GC Jobsite Monthly Telephone Bills               |                 | x                           |              |                 |
| GC Jobsite Personnel Monthly Cell & Pager Bills  |                 | x                           |              |                 |
| GC Site Radios and Safety/Craft Phones           |                 | x                           |              |                 |
| GC Project Sign & Site Signage                   |                 | x                           |              |                 |
| GC Postage & Courier Services                    |                 | x                           |              |                 |
| GC Trucks & Equipment Fueling Costs              |                 | x                           |              |                 |
| GC Travel & Travel Per Diem                      |                 | x                           |              |                 |
| GC Drinking Water & Coffee                       |                 | x                           |              |                 |
| GC Jobsite Trailer Water                         |                 | x                           |              |                 |
| GC Jobsite Trailer Holding Tank                  |                 | x                           |              |                 |
| GC Jobsite Trailer Temporary Electric Service    |                 | x                           |              |                 |
| Tools Rental                                     |                 |                             | x            |                 |

**Exhibit 'A'**  
**FEE & GENERAL CONDITIONS CHECKLIST** (cont'd.)

| DESCRIPTION                            | Included in Fee | Included in Gen. Conditions | Cost of Work | Excluded/ Owner |
|----------------------------------------|-----------------|-----------------------------|--------------|-----------------|
| <b>Miscellaneous</b>                   |                 |                             |              |                 |
| Building & Site Layout                 |                 |                             | x            |                 |
| Partition Layout                       |                 |                             | x            |                 |
| Hoisting – Personnel & Material Hoist  |                 |                             | x            |                 |
| Hoisting – Cranes, Lifts, etc.         |                 |                             | x            |                 |
| Environmental 1 Study                  |                 |                             |              | x               |
| Soils Report                           |                 |                             |              | x               |
| Materials Testing & Inspection         |                 |                             |              | x               |
| Project Survey                         |                 |                             |              | x               |
| Quality Assurance Program              |                 |                             | x            |                 |
| <b>Permits, Bonds &amp; Insurance</b>  |                 |                             |              |                 |
| Building Permits                       |                 |                             | x            |                 |
| Tap & meter Fees                       |                 |                             |              | x               |
| Lane Closure Permits & Police Officers |                 |                             | x            |                 |
| Contractor's License                   | x               |                             |              |                 |
| Payment & Performance Bond             |                 | x                           |              |                 |
| Builder's Risk Insurance               |                 | x                           |              |                 |
| General Liability Insurance            |                 | x                           |              |                 |
| AGC Membership Fees                    |                 |                             | x            |                 |
| Impact Fees                            |                 |                             |              | x               |
| Environmental Fees                     |                 |                             |              | x               |

**SELECTION PROCESS**  
**PHASE 2**  
**Exhibit 'B'**  
**ALLOWABLE GENERAL CONDITION LINE ITEMS**

On-Site Project Management Staff

Safety Coordinator/Assistant(s)  
Project Executive  
Office Engineer(s)  
Project Expeditor(s)  
Assistant Superintendent(s)  
Quality Control/Assurance Coordinator

Scheduler  
Superintendent(s)  
Project Manager(s)  
Project Support Staff  
Cost Engineer

Bonds and Insurance

Builder's Risk Insurance  
General Liability Insurance  
Payment and Performance Bonds  
Other Project Insurance as Required by Contract

Temporary Project Construction and Utilities

Dumpsters  
Project Electricity  
Monthly Telephone Service  
Street Rental and Barricades  
Fencing and Covered Walkways  
Temporary Water Distribution and Meters  
Temporary Electrical Distribution and Meters  
Site Erosion Control (BMP) and Project Entrance(s)

Project Water  
Temporary Toilets  
Temporary Fire Protection  
Telephone System Installation  
Temporary Partitions  
Project Cleanup  
Ceremonies

Field Offices & Office Supplies

Partnering Costs  
Job Photos/Videos  
Project Specific Signage  
Postage/Special Shipping/Courier Service  
Project/As-Built Drawings  
Project Milestone Event(s)\*  
Move-In/Out and Office Setup  
Employee Identification System  
Small Tools and Storage Trailers  
Monthly Office Trailer Rental Costs  
Mobilization and Demobilization (Equipment Only)  
Fields Office Equipment  
Field Office Telephone  
Vehicles  
Safety Equipment/Supplies

First Aid Supplies  
Reproduction / Plotting Services  
Monthly Office Supplies & Paper  
Remote Parking Expenses  
Project Reference Manuals  
Security System/Watchman  
Safety Material and Equipment  
Drinking Water and Accessories  
Office Clean-Up/Janitorial Services  
Project Computers and Software  
Field Office Furniture  
Copier, printers, scanners  
Communications Equipment  
Vehicle Fuel, Maintenance & Insurance  
Advertising

(\*) Groundbreaking, topping-out, dedication, etc.

**CITY OF MIDLAND MUNICIPAL COURT BUILDING  
CONTRACT ADDENDUM**

**ADDITIONAL GENERAL CONDITIONS**

***NOTWITHSTANDING ANY OTHER PROVISION OF THE AGREEMENT, IN THE EVENT OF A CONFLICT BETWEEN THESE ADDITIONAL GENERAL CONDITIONS AND ANY PROVISION OF THE AGREEMENT, THESE ADDITIONAL GENERAL CONDITIONS SHALL SUPERSEDE THE AGREEMENT PROVISION(S) AND GOVERN AND CONTROL SUCH CONFLICT.***

**ARTICLE 1. INSURANCE**

CONTRACTOR shall at all times during the term of this Agreement maintain and keep in full force and effect insurance in the following types and minimum amounts with companies authorized to do business in the State of Texas:

*Commercial General Liability (including Contractual Liability):*

- |                   |                                                            |
|-------------------|------------------------------------------------------------|
| -Personal Injury: | \$1,000,000.00 per person<br>\$1,000,000.00 per occurrence |
| -Property Damage: | 500,000.00 per occurrence                                  |

|                                       |                                                                           |
|---------------------------------------|---------------------------------------------------------------------------|
| <i>Business Automobile Liability:</i> | \$250,000.00 combined single limit<br>Personal Injury and Property Damage |
|---------------------------------------|---------------------------------------------------------------------------|

|                               |                  |
|-------------------------------|------------------|
| <i>Worker's Compensation:</i> | Statutory limits |
|-------------------------------|------------------|

|                              |                                         |
|------------------------------|-----------------------------------------|
| <i>Employers' Liability:</i> | \$500,000.00 per accident or occurrence |
|------------------------------|-----------------------------------------|

The Commercial General Liability insurance shall be on a per project aggregate, including completed operations, and shall be on an occurrence basis.

The Business Automobile Liability insurance provided by CONTRACTOR shall cover any auto for bodily injury and property damage, including owned vehicles, hired and non-owner vehicles, and employee non-ownership, and the amount of such policy shall be a minimum of \$250,000.00 covering any vehicle used for the execution of the work that is the subject of this Agreement.

The Workers' Compensation coverage provided by CONTRACTOR shall inure to the benefit of employees injured during the course and scope of their employment by CONTRACTOR pursuant to this Agreement.

All insurance required pursuant to this Agreement shall provide for a waiver of subrogation in favor of the CITY. All insurance required pursuant to this Agreement, except for

Worker's Compensation insurance, shall name the CITY as an additional insured on a claims occurred basis. CITY shall be provided the notice by CONTRACTOR'S insurance provider not later than thirty (30) days prior to any reduction or termination of such coverage.

CONTRACTOR shall contractually require all contractors, subcontractors, and sub-subcontractors that work on any portion of the work that is the subject of this Agreement to obtain insurance coverage that meets or exceeds the policy requirements and minimum amounts specified herein. All contractors, subcontractors, and sub-subcontractors shall obtain insurance policies that provide blanket waivers of subrogation in favor of the City of Midland and policies that name the City of Midland as an additional insured on a claims occurred basis (except Workers' Compensation coverage).

The parties agree that, prior to the execution of the Agreement, CONTRACTOR shall provide one or more certificates of insurance specifically stating that these requirements have been met and subject to the approval of the CITY. The CITY shall not be required to provide any insurance whatsoever pursuant to this Agreement.

CONTRACTOR certifies that the certificate of insurance provided as required herein complies with the requirements of Senate Bill 425, passed during the 82<sup>nd</sup> regular session of the Texas Legislature, and effective January 1, 2012.

## **ARTICLE 2. ASSIGNMENT**

CONTRACTOR shall not, either directly or indirectly, assign all or any part of this Agreement or any interest, right or privilege herein, without the prior written consent of the CITY. The issue on whether or not to grant consent to an assignment is in the sole discretion of the CITY.

## **ARTICLE 3. RELEASE**

**NOTWITHSTANDING ANY OTHER PROVISIONS, CONTRACTOR HEREBY RELEASES, ACQUITS, RELINQUISHES AND FOREVER DISCHARGES CITY, CITY'S EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS, CLAIMS, DAMAGES, OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH CONTRACTOR HAS OR MIGHT HAVE IN THE FUTURE, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, QUANTUM MERUIT, CLAIMS UNDER THE DUE PROCESS AND TAKINGS CLAUSES OF THE TEXAS AND UNITED STATES CONSTITUTIONS, TORT CLAIMS, OR CITY'S NEGLIGENCE.**

## **ARTICLE 4. GOVERNING LAW & VENUE**

This Agreement shall be governed by the laws of the State of Texas. All performance and payment made pursuant to this Agreement shall be deemed to have occurred in Midland County, Texas. Exclusive venue for any claims, suits or any other action arising from or connected in any way to this Agreement or the performance of this Agreement shall be in Midland County, Texas.

The obligations and undertakings of each of the parties to this Agreement shall be deemed to have occurred in Midland County, Texas. The City does not waive its right to a trial by jury.

#### **ARTICLE 5. INDEPENDENT CONTRACTOR**

It is expressly understood and agreed that CONTRACTOR shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant or employee of the CITY; that CONTRACTOR shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors; that the doctrine of respondeat superior shall not apply as between CITY and CONTRACTOR, its officers, agents, employees, contractors and subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between CITY and CONTRACTOR. No person performing any of the work and services described hereunder by CONTRACTOR shall be considered an officer, agent, servant or employee of the CITY. Further, it is specifically understood and agreed that nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. CONTRACTOR shall be an independent contractor under this Agreement and shall assume all of the rights, obligations and liabilities, applicable to it as such independent contractor hereunder. The CITY does not have the power to direct the order in which the work is done. The CITY shall not have the right to control the means, methods or details of the CONTRACTOR'S work. CONTRACTOR shall assume exclusive responsibility for the work. CONTRACTOR is entirely free to do the work in its own way.

#### **ARTICLE 6. NOTICE OF BREACH; STATUTORY PREREQUISITES**

As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Agreement, CONTRACTOR or his legal representative, shall give the City Manager, or any other reasonable official of the CITY, notice in writing (consisting of one original and seven copies of notice attached to a copy of this Agreement) of such damages, duly verified, within one hundred-twenty (120) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which the CONTRACTOR will settle, the physical and mailing addresses of CONTRACTOR at the time and date the claim was presented and the physical and mailing addresses of CONTRACTOR for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom the CONTRACTOR relies to establish its claim; and a failure to so notify the City Manager within the time and manner provided herein shall exonerate, excuse and except the CITY from any liability whatsoever. The CITY is under no obligation to provide notice to DAILEY & WELLS that CONTRACTOR'S notice is insufficient. CITY reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, CONTRACTOR'S failure to comply with the requirements herein shall perpetually bar CONTRACTOR'S claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless if CITY has actual or constructive notice or knowledge of said claim or alleged damages. CONTRACTOR agrees that the requirements of this entire Agreement are reasonable.

#### **ARTICLE 7. SOVEREIGN IMMUNITY**

By executing this Agreement the CITY is not waiving its right of sovereign immunity. The CITY is retaining its immunity from suit. The CITY is not granting consent to be sued by legislative resolution or action.

THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.

#### **ARTICLE 8. THIRD PARTY BENEFICIARY**

The CITY's approval of this Agreement does not create a third party beneficiary. There is no third party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third party beneficiary or other rights hereunder.

#### **ARTICLE 9. TERMINATION AT WILL**

The CITY may terminate this Agreement at will for no or any reason upon giving at least One Hundred Eighty (180) days' written notice to the CONTRACTOR. The parties to this Agreement understand and agree that it is in the CITY's sole discretion to cancel the Agreement during the term of the Agreement without penalty to the CITY. CONTRACTOR'S has no expectation and has received no guarantees that this Agreement will not be terminated before the end of the Agreement term. The parties have bargained for the flexibility of terminating this Agreement upon tender of the requisite notice at any time during the term of the Agreement. All work and services under the Agreement shall be suspended upon termination of the Agreement becoming effective.

#### **ARTICLE 10. WAIVER OF ATTORNEY FEES**

**BY EXECUTING THIS AGREEMENT, CONTRACTOR AGREES TO WAIVE AND DOES HEREBY KNOWINGLY, CONCLUSIVELY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY CLAIM IT HAS OR MAY HAVE IN THE FUTURE AGAINST THE CITY, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THE AGREEMENT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THE AGREEMENT. CONTRACTOR SPECIFICALLY AGREES THAT IF CONTRACTOR BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS AGREEMENT, THE**



**CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET SEQ., AS AMENDED), OR CHAPTER 271 OF THE TEXAS LOCAL GOVERNMENT CODE, CONTRACTOR AGREES TO ABANDON, WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH CONTRACTOR MIGHT OTHERWISE BE ENTITLED.**

**CONTRACTOR AGREES THAT THIS IS THE VOLUNTARY AND INTENTIONAL RELINQUISHMENT AND ABANDONMENT OF A PRESENTLY EXISTING KNOWN RIGHT. CONTRACTOR ACKNOWLEDGES THAT IT UNDERSTANDS ALL TERMS AND CONDITIONS OF THE AGREEMENT. CONTRACTOR FURTHER ACKNOWLEDGES AND AGREES THAT THERE WAS AND IS NO DISPARITY OF BARGAINING POWER BETWEEN THE CITY AND CONTRACTOR. THIS SECTION SHALL NOT BE CONSTRUED OR INTERPRETED AS A WAIVER OF SOVEREIGN IMMUNITY.**

**CONTRACTOR AND CITY ARE RELYING ON THEIR OWN JUDGMENT. EACH PARTY HAD THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH LEGAL COUNSEL PRIOR TO ITS EXECUTION.**

#### **ARTICLE 11. CONSIDERATION**

The terms of this Agreement are supported by good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties hereto.

#### **ARTICLE 12. FEDERAL WAGE REQUIREMENTS**

If applicable, the Davis-Bacon Act, 29 CFR 5.5, and any related acts or regulations are hereby incorporated by reference and made a part of this Agreement, and all terms and requirements under said laws, by such incorporation, are made terms and requirements of this Agreement, to which the parties to this Agreement have agreed to be bound.

#### **ARTICLE 13. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS**

CONTRACTOR shall at all times during the term of this Agreement comply with applicable federal, state, and local laws regarding CONTRACTOR'S activities pursuant to this Agreement, including but not limited to all applicable sections of the Municipal Code of Midland, Texas, as may be amended, said sections being hereby incorporated by reference and made a part of this Agreement for all legal purposes. Failure to abide by any such law mentioned herein constitutes grounds for the immediate termination of this Agreement.

#### **ARTICLE 14. PROMPT PAY ACT**

The City and CONTRACTOR agree that Texas Government Code, Chapter 2251, Payment for Goods and Services (the "Prompt Pay Act") does not waive governmental immunity.

#### **ARTICLE 15. PAYMENT TERMS**

Payment shall be made in United States currency. All amounts over thirty (30) days past due shall accrue interest from the due date at the rate of one-tenth of one percent (0.1 %) per month (or such lesser rate as is the maximum permissible rate under applicable law). CONTRACTOR agrees to pay all collection costs and enforcement expenses, including reasonable attorney fees, if CONTRACTOR must bring a proceeding to collect any amount owed by CITY or to enforce any rights in any bankruptcy or similar proceeding involving CITY.

# City of Midland

Court Building

Project Budget

January 20, 2014

|                                                       | 10/01/10         | 04/17/12         | 07/15/13         | 01/08/14          | 01/20/14          |          |
|-------------------------------------------------------|------------------|------------------|------------------|-------------------|-------------------|----------|
| <b>Land Acquisition</b>                               | 0                | 750,000          | 750,000          | 380,000           | 380,000           | Note EE  |
| <b>Testing Services</b>                               |                  |                  |                  |                   |                   |          |
| Construction Materials                                | 30,000           | 30,000           | 30,000           | 30,000            | 30,000            | Note L   |
| Environmental Phase 1                                 | 0                | 10,000           | 10,000           | 0                 | 0                 | Note D   |
| Existing Building Abatement and Abatement Engineering | 0                | 0                | 0                | 0                 | 0                 | Note Y   |
| <b>Total</b>                                          | <b>30,000</b>    | <b>40,000</b>    | <b>40,000</b>    | <b>30,000</b>     | <b>30,000</b>     |          |
| <b>Construction</b>                                   |                  |                  |                  |                   |                   |          |
| Court Building                                        | 5,332,500        | 5,333,625        | 5,333,625        | 5,333,625         | 5,333,625         | Note C   |
| Additional Court Area                                 | 0                | 0                | 0                | 1,121,000         | 1,121,000         | Note Z   |
| Sallyport                                             | 0                | 52,271           | 52,271           | 52,271            | 52,271            | Note X   |
| LEED Enhancements                                     | 0                | 0                | 0                | 0                 | 0                 |          |
| I.T. Backbone/Cabling                                 | 0                | 82,968           | 82,968           | 102,000           | 102,000           | Note E   |
| I.T. Video Surveillance                               | 0                | 71,115           | 71,115           | 87,000            | 87,000            | Note F   |
| Site Demolition                                       | 0                | 0                | 0                | 33,000            | 33,000            | Note O   |
| Site Development/Parking                              | 410,000          | 375,000          | 375,000          | 375,000           | 375,000           | Note G   |
| Landscape                                             | 150,000          | 150,000          | 150,000          | 150,000           | 150,000           | Note L   |
| Site Fence (Secure Lot)                               | 0                | 98,000           | 98,000           | 98,000            | 98,000            | Note H   |
| On-Site Water Retention                               | 0                | 0                | 0                | 0                 | 0                 |          |
| Off-Site Utility Development                          | 0                | 0                | 0                | 0                 | 0                 | Note P   |
| Contingency                                           | 152,830          | 554,668          | 554,668          | 662,000           | 662,000           | Note J   |
| <b>Subtotal</b>                                       | <b>6,045,330</b> | <b>6,717,647</b> | <b>6,717,647</b> | <b>8,013,896</b>  | <b>8,013,896</b>  |          |
| Inflation                                             | 480,828          | 0                | 0                | 0                 | 2,251,904         | Note CC  |
| <b>Total Construction Cost</b>                        | <b>6,526,158</b> | <b>6,717,647</b> | <b>6,717,647</b> | <b>8,013,896</b>  | <b>10,265,800</b> | Note B   |
| <b>FF&amp;E</b>                                       |                  |                  |                  |                   |                   |          |
| Furniture                                             | 400,000          | 426,690          | 426,690          | 522,000           | 522,000           | Note K   |
| Audio/Visual Systems                                  | 189,333          | 320,000          | 320,000          | 320,000           | 320,000           | Note N   |
| Security Screening                                    | 0                | 26,000           | 26,000           | 26,000            | 26,000            | Note N   |
| <b>Total</b>                                          | <b>589,333</b>   | <b>772,690</b>   | <b>772,690</b>   | <b>868,000</b>    | <b>868,000</b>    |          |
| <b>City Budgets</b>                                   |                  |                  |                  |                   |                   |          |
| Art Budget                                            | 0                | 0                | 0                | 0                 | 0                 | Note D   |
| Site Demolition                                       | 0                | 137,500          | 137,500          | 0                 | 0                 |          |
| Telephone                                             | 40,000           | 47,410           | 47,410           | 58,000            | 58,000            | Note S   |
| Fiber to Site                                         | 0                | 0                | 0                | 0                 | 0                 | Note BB  |
| Electrical/Gas/Cable Service Fees                     | 0                | 0                | 0                | 0                 | 0                 | Note Q   |
| City Computer/Network Equipment                       | 0                | 0                | 0                | 0                 | 0                 | Note W   |
| Moving Costs                                          | 8,000            | 8,000            | 8,000            | 8,000             | 8,000             | Note Q   |
| Owner Contingency                                     | 0                | 0                | 0                | 0                 | 0                 | Note DD  |
| <b>Total</b>                                          | <b>48,000</b>    | <b>192,910</b>   | <b>192,910</b>   | <b>66,000</b>     | <b>66,000</b>     |          |
| <b>Professional Services</b>                          |                  |                  |                  |                   |                   |          |
| Site Submittal Process                                | 0                | 0                | 0                | 0                 | 0                 | Note R   |
| A/E Services                                          | 548,332          | 537,412          | 537,412          | 537,412           | 537,412           | Note T/L |
| A/E Additional Services Program Increase              | 0                | 0                | 0                | 104,000           | 104,000           | Note AA  |
| A/E Additional Service Inflation                      | 0                | 0                | 0                | 0                 | 180,000           | Note FF  |
| Commissioning                                         | 0                | 0                | 0                | 0                 | 0                 | Note Y   |
| LEED Services                                         | 0                | 0                | 0                | 0                 | 0                 | Note Y   |
| Civil Engineering (On-Site)                           | 0                | 27,000           | 27,000           | 27,000            | 27,000            |          |
| Civil Engineering (Bard St. closure)                  | 0                | 0                | 25,000           | 25,000            | 25,000            |          |
| Phase1 Environmental                                  | 0                | 0                | 0                | 4,000             | 4,000             | Note D   |
| Site Survey/Platting                                  | 7,500            | 11,000           | 11,000           | 11,000            | 11,000            |          |
| Civil Engineering/On-Site /Retention                  | 0                | 0                | 0                | 0                 | 0                 | Note Y   |
| Civil Engineering (Off-Site Utilities)                | 0                | 0                | 0                | 0                 | 0                 | Note Y   |
| Geotechnical Report                                   | 10,000           | 6,800            | 6,800            | 6,800             | 6,800             | Note L   |
| Accessibility Consulting                              | 0                | 3,425            | 3,425            | 3,425             | 3,425             |          |
| Landscape Design                                      | 0                | 17,250           | 17,250           | 17,250            | 17,250            |          |
| Cost Estimating                                       | 0                | 7,750            | 7,750            | 7,750             | 7,750             |          |
| Audio/Visual Consulting                               | 0                | 18,000           | 18,000           | 18,000            | 18,000            | Note N   |
| Acoustical Consulting                                 | ( )              | 9,000            | 9,000            | 9,000             | 9,000             |          |
| FF & E/Interiors                                      | 0                | 54,000           | 54,000           | 54,000            | 54,000            |          |
| IT/Security Systems Consulting                        | 0                | 29,000           | 29,000           | 29,000            | 29,000            |          |
| As Built/CAD Documents                                | 0                | 8,000            | 8,000            | 8,000             | 8,000             |          |
| Reimbursable                                          | 35,000           | 52,000           | 52,000           | 52,000            | 52,000            |          |
| <b>Total</b>                                          | <b>600,832</b>   | <b>780,637</b>   | <b>805,637</b>   | <b>913,637</b>    | <b>1,093,637</b>  |          |
| <b>Total Project Cost</b>                             | <b>7,794,323</b> | <b>9,253,884</b> | <b>9,278,884</b> | <b>10,271,533</b> | <b>12,703,437</b> | Note A   |
| <b>Current Budget</b>                                 |                  |                  |                  | <b>8,769,534</b>  | <b>8,769,534</b>  | Note M   |
| <b>Budget Status</b>                                  |                  |                  |                  | <b>1,501,999</b>  | <b>3,933,903</b>  |          |

## Budget Notes

- Note A: Project Schedule  
11/2013 - Design start  
9/2014 - Construction bid  
10/2014 - Construction start  
9/2015 - Substantial completion  
10/2015 - Occupancy
- Note B: Base pricing to January 2013
- Note C: Court 23,705 s.f. @ \$225/s.f. Oct. 2010 original study.
- Note D: Additional service authorization dated 12/4/13
- Note E: 29,000 s.f. @ \$3.50/s.f.
- Note F: 29,000 s.f. @ \$3.00/s.f.
- Note G: Site preparation/paving 60,000 s.f. @ \$6.25/s.f.
- Note H: 350 l.f. @ \$280/l.f.
- Note J: 9% of construction cost
- Note K: 29,000 s.f. @ \$18
- Note L: Cost taken from Midland Court Study dated 10/2010
- Note M: City cash flow projection 6/11/13 \$8,405,534.  
Court Security Funding \$364,000 (Note N).
- Note N: The following budget items will be provided from Court Security Funding.  
Audio/Visual system: \$320,000  
Metal detectors: 26,000  
AV consultant: 18,000  
Total: \$364,000
- Note O: 65,000 s.f. paving @ \$.50/s.f.
- Note P: Off-site utilities assumed to be adequate
- Note Q: Scope unknown at this time
- Note R: Included in civil engineering fees
- Note S: Assumed relocation of system to site 29,000 s.f. @ \$2/s.f. (New VOIP System @ \$5.80/s.f.)
- Note T: 8% of construction cost of \$6,717,647
- Note W: \$30,000 budget to be funded from other City sources
- Note X: Sallyport 313 s.f. @ \$167/s.f.
- Note Y: Not required
- Note Z: Final program 1/8/14 29,000 s.f. Additional 4,982 s.f. @ \$225/s.f. Base pricing to Jan.2013.
- Note AA: 5,300 s.f. program increase. Per contract, 8% of construction cost beyond \$6,717,647.
- Note BB: Off-site fiber cost by City.
- Note CC: Midland inflation as follows:  
2010 4%  
2011 6%  
2012 8%  
2013 8%  
2014 6%  
Total 36.25%  
Original study estimated 8.15%. Net increase 28.10%
- Note DD: Typically 1% of construction cost.
- Note EE: Final cost provided by city.
- Note FF: Inflation projection per contract, 8% of construction cost beyond \$8,013,896.



# City Council Agenda

Approved for Agenda:  
THudson  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Marv Esterly, Director of Airports

**SUBJECT:** Consider a resolution amending Resolution No. 2012-244 authorizing the City Manager or his designee to execute on behalf of the City of Midland, all contracts and agreements with the State of Texas, represented by the Texas Department of Transportation described as Airpark Hangar Expansion which is an improvement contained in the Airport Capital Improvement Program, and appropriate necessary funds.

---

## **Purpose:**

Consider a resolution amending Resolution No. 2012-244 authorizing the City Manager or his designee to execute on behalf of the City of Midland, all contracts and agreements with the State of Texas, represented by the Texas Department of Transportation, and such other parties as shall be necessary and appropriate for the implementation of the project described as Airpark Hangar Expansion which is an improvement contained in the Airport Capital Improvement Program, and appropriate necessary funds.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

Project Cost Estimates:

Total design and construction project costs currently estimated - \$ 1,245,000

Total sponsor share including, construction and design estimate - \$ 124,500

That the sum of \$120,125.00 is hereby appropriated from the Airport Restricted Asset Sales Fund (509) Unappropriated Fund Balance (5650) to the Airpark Hangar Expansion Project (7085) and;

That the sum of \$4,375.00 is hereby appropriated from the Airport Operating Fund (500) Unappropriated Fund Balance (5650) to the Airpark Hangar Expansion Project (7085).

**Discussion:**

On May 22, 2012, the City Council approved Resolution 2012-140 authorizing an amendment to the Professional Services Agreement with Parkhill, Smith & Cooper, Inc. for the Airport Capital Improvement Program which included the Airpark Hangar Expansion Project. Then on August 14, 2012, the City Council approved Resolution No. 2012-244 authorizing the City Manager or his designee to execute on behalf of the City of Midland, all contracts and agreements with the State of Texas, represented by the Texas Department of Transportation, and such other parties as shall be necessary and appropriate for the implementation of the project described as Airpark Hangar Expansion which is an improvement contained in the Airport Capital Improvement Program.

An amendment to Resolution No. 2012-244 is necessary because of the increase in the total cost estimates for this project. This project will construct 12 T-hangars at Midland Airpark Airport with drainage improvements on the existing hangars.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION AUTHORIZING THE EXECUTION OF AN AMENDMENT TO RESOLUTION NO. 2012-244 AUTHORIZING THE CITY MANAGER TO EXECUTE AND APPROVE ON BEHALF OF THE CITY OF MIDLAND ALL CONTRACTS AND AGREEMENTS WITH THE STATE OF TEXAS, REPRESENTED BY THE TEXAS DEPARTMENT OF TRANSPORTATION AND SUCH OTHER PARTIES AS SHALL BE NECESSARY FOR THE IMPLEMENTATION OF THE PROJECT DESCRIBED AS MIDLAND AIRPARK HANGAR EXPANSION; AND APPROPRIATING FUNDS; SAID AMENDMENT TO INCLUDE CONSTRUCTING 12 T-HANGARS AT THE MIDLAND AIRPARK AIRPORT WITH DRAINAGE IMPROVEMENTS TO THE EXISTING HANGARS THEREBY INCREASING THE TOTAL COST ESTIMATES FOR THIS PROJECT**

**WHEREAS**, the City of Midland received demands for hangars at both Midland International and Midland Airpark Airports; and

**WHEREAS**, the City Council previously authorized the City Manager to execute and approve on behalf of the City of Midland, all contracts and agreements with the State of Texas, represented by the Texas Department of Transportation, and such other parties as shall be necessary in order to offer the Texas Department of Transportation (TxDOT) some relief by providing hangars for TxDot Aircraft in which TxDot would participate in the Midland Airpark Hangar Expansion at a 90/10 cost split; and

**WHEREAS**, certain amendments to Resolution No. 2012-244 are necessary in order to include constructing 12 T-Hangars at Midland Airpark with drainage improvements on the existing hangars thereby increasing the total cost estimates for this project; and

**WHEREAS**, the City Council finds it to be in the public interest to make certain amendments to said Resolution No. 2012-244;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the Mayor and the City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, certain

amendments to Resolution No. 2012-244 to include constructing 12 T-Hangars at Midland Airpark with drainage improvements on the existing hangars thereby increasing the total cost estimates for this project. Said amendments to be on file in the City Secretary's office referenced by the date and number of this resolution.

**SECTION TWO.** That the sum of \$120,125.00 is hereby appropriated from the Airport Restricted Asset Sales Fund (509) Unappropriated Fund Balance (5650) to the Airpark Hangar Expansion Project (7085) and;

**SECTION THREE.** That the sum of \$4,375.00 is hereby appropriated from the Airport Operating Fund (500) Unappropriated Fund Balance (5650) to the Airpark Hangar Expansion Project (7085).

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

\_\_\_\_\_  
Courtney Sharp, City Manager



APPROVED AS TO CONTENT  
AND COMPLETENESS:

---

Marv Esterly, Director of Airports

APPROVED ONLY AS TO FORM:

---

Keith Stretcher, City Attorney



# City Council Agenda

Approved for Agenda:  
THudson  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Marv Esterly, Director of Airports

**SUBJECT:** Consider a resolution authorizing a three-year extension contingent upon an amendment to the Non-Exclusive Commercial Fixed Base Operator Lease Agreement between The City of Midland and Basin Aviation.

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## **Purpose:**

Consider a resolution authorizing a three-year extension contingent upon an amendment to the Non-Exclusive Commercial Fixed Base Operator Lease Agreement between The City of Midland and Basin Aviation.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

Annual Rent: \$135,645.00 + \$.04 per gallon fuel flowage fees

## **Discussion:**

In April 2006, the City Council authorized the execution of a Non-Exclusive Commercial Fixed Base Operator Lease Agreement with Basin Aviation. This Agreement was for a term of eight (8) years and is set to expire at the end of April 2014. The lease contains an option to extend the Agreement for an additional three (3) years. The Department of Airports recommends that the City of Midland exercise this option contingent upon an amendment to the Agreement that will allow the City to construct and lease 12 hangars within the Leased Premises.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION AUTHORIZING THE EXECUTION OF  
AN AMENDMENT TO THE NON-EXCLUSIVE  
COMMERCIAL FIXED BASE OPERATOR LEASE  
AGREEMENT BETWEEN THE CITY OF MIDLAND,  
TEXAS AND BASIN AVIATION, INCORPORATED, AT  
MIDLAND AIRPARK AIRPORT**

**WHEREAS**, the City Council of the City of Midland, Texas, finds it to be in the public interest to authorize an amendment to the Non-Exclusive Commercial Fixed Base Operator Lease Agreement between the City of Midland and Basin Aviation Incorporated for facilities and land at the Midland Airpark Airport;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the City Manager and City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, an amendment, in the form substantially as shown in Exhibit "A", to the Non-Exclusive Commercial Fixed Base Operator Lease Agreement between the City of Midland and Basin Aviation Incorporated, for facilities and land at the Midland Airpark Airport, said amended lease agreement being attached hereto and incorporated herein.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

\_\_\_\_\_  
Courtney Sharp, City Manager

APPROVED AS TO CONTENT  
AND COMPLETENESS:

\_\_\_\_\_  
Marv Esterly, Director of Airports

APPROVED ONLY AS TO FORM:

\_\_\_\_\_  
Keith Stretcher, City Attorney

**AMENDMENT TO THE NON-EXCLUSIVE COMMERCIAL FIXED BASED OPERATOR LEASE AGREEMENT BETWEEN THE CITY OF MIDLAND, TEXAS AND BASIN AVIATION, INC.**

**THIS Amendment amends the Non-Exclusive Commercial Fixed Based Operator Lease Agreement between the City of Midland, Texas, a home rule municipal corporation, hereinafter referred to as “City” or “Lessor”, and Basin Aviation, Inc., hereinafter referred to as “Lessee”, which was made and effective the 12<sup>th</sup> day of April, 2006,**

**RECITALS**

**WHEREAS**, the City owns and operates the Midland Airpark Airport, located in the City of Midland, Texas hereinafter referred to as “Airport”; and

**WHEREAS**, the City of Midland and Basin Aviation, Inc. previously entered into an agreement authorizing the lease of certain City-owned facilities and land at the Airport in order to engage in the business of aeronautics as a fixed base operator, and to provide certain aviation services to the public as hereinafter permitted; and

**WHEREAS**, Basin Aviation, Inc. and the City desire to amend the Agreement as shown below;

**W I T N E S S E T H:**

For and in consideration of the execution of this Agreement and the covenants and conditions of the parties hereto, it is mutually promised, understood and agreed that said lease agreement with Basin Aviation, Inc. is hereby amended, effective on January 29, 2014, by adding the following:

**Article 1. GRANT OF LEASE, Section 1.01. Leased Premises of the Agreement shall be amended to read as follows:**

“1.01 Leased Premises: City agrees to lease to Lessee: (a) certain City-owned buildings and improvements, including certain fixtures, apparatus, and equipment located therein, located at the Airport, and being more particularly described as Hangars 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, A, B, I, N and S; and (b) certain City-owned land being more particularly described as Tracts 1, 2, 3, 4-A, and 4-B as shown on Exhibit “A”, attached hereto and incorporated herein by reference; said buildings and improvements and land hereinafter being referred to collectively as the “Leased Premises.” However, notwithstanding any other provisions, all buildings and improvements, including but not limited to, all fixtures, apparatus, equipment, alterations, and hangars constructed by the City or its agents, contractors, or employees after January 1, 2014, shall NOT be considered part of the Leased Premises. The City shall receive all income from any buildings, improvements and hangars constructed after January 1, 2014. The City shall control the leasing and construction of all improvements and hangars constructed after January 1, 2014.”

**Article 2. TERM, Section 2.01. Lease Term of the Agreement shall be amended to read as follows:**

“2.01 Lease Term: The term of this Lease shall commence on January 29, 2014 (“Commencement Date”), and expire on April 30, 2017, (“Expiration Date”) unless the term is earlier terminated by City pursuant to Section 2.04 or otherwise.”

**Article 2. TERM, Section 2.02. Extended Option Period of the Agreement shall be amended to read as follows:**

“2.02 Extended Option Period: The City after April 30, 2014, reserves the right to operate the Lease on a month-to-month basis upon written notice to Lessee. Said notice shall occur no later than 90 days prior to the expiration of the current term of the Lease Agreement. Lessee may accept or decline the extension within 30 days of the offer to extend. Failure of the Lessee to respond to the offer within 30 days shall be considered a rejection of the offer.”

**Article 3. RENT, Section 3.04. Delivery of Rent of the Agreement shall be amended to read as follows:**

“3.04 Delivery of Rent: All payments required of Lessee by this Agreement shall be delivered by mail, or in person, to the Office of the Director of Airports, Midland International Airport, 9506 LaForce Boulevard, P. O. Box 60305, Midland, Texas 79711, or to such other location as specified in writing by the City from time to time, no later than the date such payment is due, unless such due date falls on a Saturday, Sunday, or City holiday, in which case such rent shall be due on the first City business day following the date such payment is due.”

**Article 6. OBLIGATIONS OF LESSEE WITH REGARD TO CONSTRUCTION OF IMPROVEMENTS, Section 6.06. Ownership of Buildings, Improvements and Fixtures of the Agreement shall be amended to read as follows:**

“6.06 Ownership of Buildings, Improvements and Fixtures: Any and all buildings, improvements (including, but not limited to all aprons, taxiways and roadways), additions, alterations, and fixtures existing on the Leased Premises on or before January 1, 2014 shall be considered part of the real property of the Leased Premises, shall remain on the Leased Premises, and shall not be removed by Lessee or any sublessee without the written consent of City. All improvements, additions, alterations, and fixtures on the Leased Premises shall become the sole property of City upon termination of this Agreement without compensation to Lessee, it being understood and agreed by Lessee that the transfer of title to the City of the buildings and improvements located on the Leased Premises at the end of the Lease Term is additional consideration for this Agreement. Notwithstanding the above, Lessee shall have the right at any time during Lessee’s occupancy of the Leased Premises, or within a reasonable time thereafter, to remove any and all furniture, machinery, equipment, or other trade fixtures, owned or placed by Lessee, in, under, or on the Leased Premises; provided, however, prior to the termination of the Lease Term, Lessee shall repair any damage to any buildings or improvements on the Leased Premises resulting from their removal. Any such personal property items or trade fixtures which are not removed within sixty (60) days after the termination date of this Agreement shall become the property of City as of that date. However, notwithstanding any other provisions, all buildings and improvements, including but not limited to, all fixtures, apparatus, equipment, alterations, and hangars constructed by the City or its agents, contractors, or employees after January 1, 2014, shall NOT be considered part of the Leased Premises. The City shall receive all income from any buildings, improvements and hangars constructed after January 1, 2014. The City shall control the leasing and construction of all improvements and hangars constructed after January 1, 2014. The City shall own the hangars constructed after January 1, 2014 and Lessee shall not have the right to occupy, modify or effect the hangars in any way.”

**Article 6. OBLIGATIONS OF LESSEE WITH REGARD TO  
CONSTRUCTION OF IMPROVEMENTS Section 6.07. Improvements to Pilot  
Lounge of the Agreement shall be amended to read as follows:**

“6.07 Improvements to Pilot Lounge: Deleted.”

**Article 6. OBLIGATIONS OF LESSEE WITH REGARD TO  
CONSTRUCTION OF IMPROVEMENTS, Section 6.08. Engineering Services for  
Runway 7 of the Agreement shall be amended to read as follows:**

“6.08 Engineering Services for Runway 7: Deleted.”

There are no other changes or modifications to the subject Agreement, and all remaining terms and conditions shall continue in full force and effect.

Agreed to this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

CITY:  
CITY OF MIDLAND, TEXAS

\_\_\_\_\_  
Courtney Sharp, City Manager

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

APPROVED AS TO CONTENT  
AND COMPLETENESS:

\_\_\_\_\_  
Marv Esterly, Director of Airports

APPROVED ONLY AS TO FORM:

\_\_\_\_\_  
Keith Stretcher, City Attorney

BASIN AVIATION, INC.

\_\_\_\_\_  
J.L. Davis, President



THE STATE OF TEXAS           §  
                                          §  
COUNTY OF MIDLAND       §

BEFORE ME, the undersigned authority, on this day personally appeared J.L. Davis known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed and delivered the foregoing instrument for the purposes and consideration therein expressed on behalf of Basin Aviation, Inc.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public, State of Texas



# City Council Agenda

Approved for Agenda:  
**CSharp**  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Courtney Sharp, City Manager

**SUBJECT:** Consider a Resolution authorizing payment in the amount of \$53,643.20 to Crosswind Communications, LLC for promotional services

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## **Purpose:**

Consider a Resolution authorizing payment in the amount of \$53,643.20 to Crosswind Communications, LLC for promotional services

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

\$53,643.20 from MDC's promotional budget

## **Discussion:**

The City, MDC and Chamber are partnering on an 8 page spread insert for the March edition of Texas Monthly. This article focuses on the Midland Economy, Diversification of our Economy, Tourism, and Quality of Life. The cost includes 5,000 overprints of the insert which will be used for ongoing promotional activities by the City, CVB and the MDC.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION APPROVING THE MIDLAND  
DEVELOPMENT CORPORATION'S PAYMENT IN THE  
AMOUNT OF \$53,643.20 TO CROSSWIND  
COMMUNICATIONS, LLC FOR PROMOTIONAL  
SERVICES**

**WHEREAS**, Section 504.105 of the Texas Local Government Code authorizes the Midland Development Corporation to make promotional expenditures that advertise or publicize the City of Midland for the purpose of developing new and expanded business enterprises; and

**WHEREAS**, the Midland Development Corporation authorized payment in the amount of \$53,643.20 to Crosswind Communications, LLC for promotional services that advertise or publicize the City of Midland for the purpose of developing new and expanded business enterprises; and

**WHEREAS**, the City Council finds it to be in the public interest to approve said payment to Crosswind Communications, LLC for said services;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF MIDLAND, TEXAS:**

**THAT** the Midland Development Corporation's payment in the amount of \$53,643.20 to Crosswind Communications, LLC for promotional services is hereby approved.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE": \_\_\_\_\_

Council members voting "NAY": \_\_\_\_\_

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

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Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

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Courtney Sharp, City Manager

APPROVED ONLY AS TO FORM:

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Keith Stretcher, City Attorney



CHICAGO  
LOS ANGELES  
MIAMI  
NEW YORK  
TEXAS  
WASHINGTON, D.C.

PO Box 264  
Austin TX 78767  
T: 855-277-7963  
admin@crosswindpr.com

Invoice #: 100-453  
Invoice Date: 12/17/2013  
Bill To: Midland Economic Development Corporation  
109 North Main, 2nd Flr  
Midland, TX 79701

Dates Covered:  
Authorizing Contact:  
Project:

| Description                                       | Fee       |
|---------------------------------------------------|-----------|
| March Issue 8 pg Color (Texas Monthly)            | 38,466.00 |
| Flat Fee Net: Production (Texas Monthly)          | 5,497.50  |
| Flat Fee Net: 100# Stock Paper (Texas Monthly)    | 250.00    |
| Flat Fee Net: 5,000 Overruns (Texas Monthly)      | 1,023.30  |
| Layout, Design, Copy & Illustration (Crosswind)   | 5,656.40  |
| Account Coordinator, 50 hours (Crosswind)         | 2,750.00  |
| Account Director, 50 hours (Crosswind), no charge | 0.00      |

If you wish to pay electronically, our bank information is as follows:

Wells Fargo Bank NA  
Routing # 111900659  
Account # 9688211342

|                    |             |
|--------------------|-------------|
| Total Current Fees | \$53,643.20 |
|--------------------|-------------|

|                                             |                    |
|---------------------------------------------|--------------------|
| <b>Total due (including prior balance):</b> | <b>\$53,643.20</b> |
|---------------------------------------------|--------------------|

**Payment Due Due on receipt**

Please make all checks payable to Crosswind Communications, LLC.  
Please contact Thomas Graham (512) 294-7111 or tgraham@crosswindpr.com with questions.



# City Council Agenda

Approved for Agenda:  
**CSharp**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Pam Simecka, Director of Finance

**SUBJECT:** Amendment to 2013-2014 MDC Adopted Budget

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**Purpose:**

Amend Midland Development Corporation Fiscal Year 2013-2014 budget by \$4,700,000 to balance budget and allow for Economic Development Incentives for Orbital Outfitter's.

**Recommended City Council Action**

☒ Approve      ☐ Deny      ☐ Direction/Informational

**Fiscal Impact:**

Appropriation of \$4,700,000 from Midland Development Corporation Fund (235) Unappropriated Fund Balance (5650)

**Discussion:**

That the official Midland Development Corporation Budget as approved by Resolution ED-0199 is hereby amended by appropriating the sum of \$4,700,000 from the Midland Development Corporation Fund (235) Unappropriated Fund Balance (5650) to the Midland Development Corporation (235) MDC (235) MDC (0235) Economic Development Incentives (3905) budget account. This is to allow expenditures for the Orbital Outfitter's contract.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION APPROVING THE AMENDED FISCAL  
YEAR 2013-2014 BUDGET OF THE MIDLAND  
DEVELOPMENT CORPORATION, A TYPE A  
CORPORATION AS AUTHORIZED BY CHAPTER 504  
OF THE TEXAS LOCAL GOVERNMENT CODE**

**WHEREAS**, the Midland Development Corporation approved an amended budget for the fiscal year 2013-2014; and

**WHEREAS**, Chapter 501 of the Texas Local Government Code requires the City Council to approve the Midland Development Corporation's budget and any amendments thereto;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF MIDLAND, TEXAS:**

**THAT** the Fiscal Year 2013-2014 Midland Development Corporation budget amendment appropriating \$4,700,000.00 from the Midland Development Corporation (235) Unappropriated Fund Balance (5650) to the Midland Development Corporation (235) Midland Development Corporation (235) Midland Development Corporation Operations (0235) Economic Development Incentives (3905) budget account is hereby approved.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

\_\_\_\_\_  
Jerry F. Morales, Mayor



ATTEST:

---

Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

---

Courtney Sharp, City Manager

APPROVED ONLY AS TO FORM:

---

Keith Stretcher, City Attorney



# City Council Agenda

Approved for Agenda:  
**CSharp**  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Courtney Sharp, City Manager

**SUBJECT:** Consider a Resolution authorizing the execution of an economic development agreement between the Midland Development Corporation and Orbital Outfitters, Ltd.; and authorizing payment therefor.

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## Purpose:

Consider a Resolution authorizing the execution of an economic development agreement between the Midland Development Corporation and Orbital Outfitters, Ltd.; and authorizing payment therefor.

## Recommended City Council Action

☒ Approve ☐ Deny ☐ Directional / Informational

## Fiscal Impact:

## Discussion:

The proposed resolution authorizes the Chairman of the MDC to negotiate, approve and execute an economic development agreement with Orbital Outfitters, Ltd. to relocate its Space and Pressure Suit manufacturing and development business to an approximate 2 acre site at Midland International Airport. The agreement states that the MDC will fund the construction of a building on the property by December 31, 2015 for a total cost not to exceed \$2.2 million and agrees to fund the design and construction of an altitude chamber complex comprised of not less than four separate volumes designed to support the testing of space flight suits and flight crew operations for a cost not to exceed \$3.2 million. MDC shall be the owner of the building and the altitude chamber complex. MDC agrees to disburse \$1.2 million for full-time jobs and the relocation of existing machinery and equipment, inventory, raw materials, supplies, computer equipment and other items used in the operation of the Company's business. The Company will also make the altitude chamber complex available for the use by UTPB at no cost for 100 hours per year. MDC

will file a UCC-1 Financing Statement to perfect a lien on the assets described in Exhibit C “Security Agreement.”

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION APPROVING AN ECONOMIC  
DEVELOPMENT AGREEMENT BETWEEN THE  
MIDLAND DEVELOPMENT CORPORATION AND  
ORBITAL OUTFITTERS, LTD., AS AUTHORIZED BY  
CHAPTER 501 OF THE TEXAS LOCAL GOVERNMENT  
CODE**

**WHEREAS**, the Midland Development Corporation authorized the execution of an economic development agreement with Orbital Outfitters, Ltd.; and

**WHEREAS**, the City Council must consider and approve all economic development agreements approved by the Midland Development Corporation before the agreements can become effective; and

**WHEREAS**, the City Council finds it to be in the public interest to approve an economic development agreement between the Midland Development Corporation and Orbital Outfitters, Ltd.;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF MIDLAND, TEXAS:**

**THAT** the economic development agreement between the Midland Development Corporation and Orbital Outfitters, Ltd. is hereby approved and shall be in a form substantially similar to that of Exhibit "A", which is attached hereto and incorporated herein for all purposes.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE": \_\_\_\_\_

Council members voting "NAY": \_\_\_\_\_

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

---

Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

---

Courtney Sharp, City Manager

APPROVED ONLY AS TO FORM:

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Keith Stretcher, City Attorney

## ECONOMIC DEVELOPMENT AGREEMENT

THIS AGREEMENT is entered into by and between the MIDLAND DEVELOPMENT CORPORATION (hereinafter referred to as "MDC"), a Type A corporation pursuant to Chapter 504 of the Texas Local Government Code, as amended, and ORBITAL OUTFITTERS, LTD. (hereinafter referred to as the "Company").

### I. Recitals

- A. The Company will sublease from the MDC certain real property located at Midland International Airport, City and County of Midland, Texas, which is shown on **Exhibit A** attached hereto and incorporated herein (the "Property").
- B. The Company will relocate its space and pressure suits manufacturing and development business (the "Business") to the Property.
- C. The MDC and the Company desire to set forth the terms and conditions upon which incentives will be provided to the Company as consideration for the Company's creation of primary jobs and payroll, and for the Company's capital investment expenditures.
- D. The Company will exercise its commercially reasonable efforts to employ Midland residents and to advertise the availability of job openings in Midland, Texas.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the MDC and the Company hereby agree as follows:

### II. Obligations of the MDC

- A. **MDC Funding.** The MDC agrees to provide the Company funding in the following amounts for the following purposes.
  - 1. **Construction of Building.** The MDC agrees to fund the construction of a building (the "Building") on the Property as necessary for the Company's operations, as determined by the Company in its reasonable discretion. Said building shall be at least 22,000 square feet in area, and at a total cost not to exceed \$2,200,000.00. The MDC acknowledges and agrees that it shall be a condition precedent to the effectiveness of the MDC's rights to enforce this Agreement and the Company's obligations hereunder that the Building be constructed and certified for the Company's occupancy on or before December 31, 2015.
  - 2. **Funds for Altitude Chamber Complex.** The MDC agrees to fund the design and

construction of an altitude chamber complex comprised of not less than four (4) separate volumes designed to support the testing of space flight suits and flight crew operations as described in Section III(C). Said altitude chamber complex, which shall meet the Company's reasonable requirements and may or may not be located within the Building, shall be designed, constructed and delivered to the Property at a total cost not to exceed \$3,200,000.00.

The MDC agrees to advance funds to Company for said altitude chamber complex in accordance with the schedule set forth on **Exhibit B** attached hereto and incorporated herein. The parties acknowledge and agree that the milestones and targets set forth on Exhibit B are approximations and expressions of the parties' present intentions regarding completion of milestones, associated deliverables and planned use of funds, and each of the parties shall cooperate in good faith as reasonably requested by the other to revise Exhibit B from time to time as circumstances warrant in order to more accurately state the parties' agreements with respect to such matters. Notwithstanding any other provision contained herein, the Company shall complete the installation of the cabin chamber not later than 22 months after the execution of this Agreement.

3. **Relocation Costs.** The MDC agrees to pay the Company \$1,200,000.00 for (a) relocating existing machinery and equipment, inventory, raw materials, supplies, computer equipment and other items used in the operation of the Company's Business, including the costs of disassembling, packing and reassembling any such items in Midland, Texas; (b) the down time loss associated with relocating; (c) relocating Company personnel to Midland, Texas; and (d) other working capital needs.

The MDC agrees to disburse such \$1,200,000.00 in accordance with the following schedule:

- a. \$500,000.00 within fifteen (15) days after the approval of this Agreement by the Midland City Council.
  - b. \$500,000.00 within fifteen (15) days after the MDC receives certification from the Company, in accordance with Section VII(B), that the Company has employed not less than two (2) persons who reside in Midland, Texas to oversee the construction of the Building and prepare for the relocation of the Business to the Property.
  - c. \$200,000.00 within fifteen (15) days after the MDC receives certification from the Company, in accordance with Section VII(B)(1), that the Company has commenced relocation of the Business to the Property.
4. **Performance Incentive.** The MDC agrees to pay to the Company \$300,000.00 in



consideration for the Company operating the Business at the Property and using commercially reasonable efforts to create the Annual Salaries and Wages set forth in Section III(A).

The MDC agrees to disburse funds to the Company for the said performance incentive in the amount of \$300,000.00 within fifteen (15) days after the MDC receives certification from the Company, in accordance with Section VII(B)(1), that the Company has commenced relocation of the Business to the Property.

5. **Ownership of Building and Altitude Chamber Complex.** MDC and Company acknowledge that MDC shall be the owner of the Building and the altitude chamber complex at all times during the term of this Agreement.

- B. **Repayment.** The parties agree that the payments provided hereunder shall be subject to the Company's obligations and the recapture provisions set forth in Section III.

### **III. Obligations of the Company**

- A. **Payroll Obligation.** The Company shall create and maintain full-time jobs at the Business on the Property with total Annual Salaries and Wages in accordance with the following schedule:
  1. \$300,000.00 in total Annual Salaries and Wages on or before December 31, 2015;
  2. \$715,000.00 in total Annual Salaries and Wages on or before December 31, 2017;
  3. \$1,200,000.00 in total Annual Salaries and Wages on or before December 31, 2020; and
  4. \$1,200,000.00 in total Annual Salaries and Wages on or before December 31, 2023.
- B. **Capital Investment Obligation.** By December 31, 2018, the Company shall invest a minimum of \$500,000.00 for the purchase of machinery, equipment, fixtures and furniture at the Property, and for the cost of constructing improvements at the Property. This shall include capital investments made out of state and then moved to Midland when the company occupies the Building. The Company shall provide a certification to MDC in accordance with the provision of Section VII(B).
- C. **Altitude Chamber Complex.** The Company shall operate and maintain an altitude chamber complex on the Property under the following terms and conditions.
  1. **Specifications.** The altitude chamber complex shall include an equipment chamber, a two-person suit checkout chamber, and a mockup chamber. Said chambers shall be used to accommodate tests of equipment at various altitude pressures, operation of space suits during ascent and at orbital altitudes and

configurations of various components to be used during ascent or at altitude such as space vehicle cockpits.

Each test chamber shall be capable of being controlled independently or simultaneously. Each chamber shall be designed and built to achieve and maintain an altitude equivalent of 100,000 feet above sea level. Each of the chambers shall be designed to ensure the safety of Company personnel and third-party users.

2. **Use by UTPB.** The Company shall make the altitude chamber complex available for use by the University of Texas of the Permian Basin ("UTPB"), at no cost, for 100 hours per year. If requested by UTPB, the Company shall make the altitude chamber complex available for use by UTPB from time to time as its scheduling of paying customers allows, for up to an additional 100 hours per calendar year, at eighty percent (80%) of the arm's-length cost that the Company charges third parties for usage.
3. **Revenue to MDC.** During the term of this Agreement, the Company shall be obligated to pay to the MDC five percent (5%) of the Company's annual gross revenue generated from third parties paying the Company for the use of the altitude chamber complex. Provided, however, that the annual amount the Company is obligated to pay to the MDC under this Section III(C)(3) shall be reduced by any amount due and owing from UTPB to the Company for UTPB's use of the altitude chamber complex.

D. **Annual Compliance Certifications.** Beginning in January 2015, and continuing every year during the term of this Agreement, each calendar year by January 31 (except as provided in Subparagraph 3 below) the Company shall certify to the MDC, as described in Section VII(B), the following:

1. The total amount of capital investment made at the Business on the Property by the Company as of December 31 of the preceding year for the year then ending. The Company shall describe or list the capital investments or improvements and provide certification as to the purchase price or cost of such investments and improvements until such time as the Company has invested the amount specified in Section III(B) above.
2. The Company's annual gross revenue generated from third parties paying the Company for the use of the altitude chamber complex.

Pursuant to this Section, there will be a total of ten (10) Annual Compliance Certifications due, in years 2015 through 2024, covering (a) capital investment expenditures, and (b) annual gross revenue generated from third parties using the altitude chamber complex.

Provided, however, the Company may certify to the MDC that the Company has met the capital investment obligation of Section III(B) at the actual time of completion.

3. In addition, on or before December 31, 2015, 2017, 2020 and 2023, the Company shall certify to MDC the total Annual Salaries and Wages of jobs at the Business on the Property paid by the Company as of December 31 for such year then ending.

E. **Failure to Meet Payroll Obligations.** If the Company fails to meet the payroll obligations set forth in Section III(A), then the following recapture schedule shall apply:

1. For failure to meet the obligations of III(A)(1), Company shall repay MDC \$500,000.00;
2. For failure to meet the obligations of III(A)(2), Company shall repay MDC \$300,000.00;
3. For failure to meet the obligations of III(A)(3), Company shall repay MDC \$100,000.00; and
4. For failure to meet the obligations of III(A)(4), Company shall repay MDC \$100,000.00.

Any amount(s) repayable to the MDC hereunder shall be repaid, without interest, within (30) days after the MDC gives written notice to the Company that the Company is in default. Notwithstanding anything to the contrary contained anywhere in this Agreement, under no circumstances shall the Company be obligated to repay the MDC an amount in excess of the total dollar amount of the funds actually received by the Company from the MDC under this Agreement.

F. **Cure Period.** In lieu of demanding repayment within thirty (30) days after the MDC gives the Company written notice of its default as set forth in Section III(E), the MDC may, in its sole discretion, elect to allow the Company a period not to exceed one hundred eighty (180) days to cure any such default. Any such election by the MDC to allow the Company to cure such a default shall in no way be construed as, or shall operate as, a waiver of any of the MDC's rights contained herein, including but not limited to the MDC's rights to repayment under this Agreement.

G. **Financial Assurance: Security Agreement.** Upon the execution of this Agreement, the Company shall execute the Security Agreement set forth on **Exhibit C** attached hereto and incorporated herein for all purposes ("Security Agreement"). MDC shall have the right to file a UCC-1 Financing Statement in the States of California and Texas in order to perfect a lien on the assets described in the Security Agreement. Company agrees that the MDC

may, in the event of a default by Company under this Agreement, execute against any of the Company's personal property pursuant to the terms of the Security Agreement.

#### **IV. Term**

Upon execution by all of the parties, this Agreement becomes effective January 28, 2014 (the "Effective Date") and shall terminate on March 1, 2024, or when terminated by mutual agreement of the parties or when terminated as hereinafter provided.

#### **V. Law**

The parties are aware of statutory limitations on the use of funds under the Chapters 501 and 504 of the Texas Local Government Code, and the parties acknowledge that the funds herein granted or guaranteed shall be utilized solely for purposes authorized under that law and by the terms of this Agreement.

#### **VI. Documents**

- A. **Executed Agreement.** Prior to any payment by the MDC, the Company shall deliver to the MDC an executed copy of this Agreement.
- B. **Sublease Agreement.** Contemporaneous with the execution of this Agreement, the Company shall enter into a separate agreement with the MDC for the sublease of the Property. Said sublease is attached hereto and incorporated herein for all purposes as **Exhibit D.**

#### **VII. Special Conditions**

- A. **Jobs and Payments.** The following provisions shall apply:
  - 1. A full-time job is defined as an individual who (a) works a minimum of 1,820 hours per year, including allowance for vacation, sick leave, earned time off, or other Company policies and practices, (b) earns a base hourly wage of at least \$18.00 per hour, and (c) spends a substantial amount of his or her working time performing job duties in the Midland area arising out of the operations of the Midland, Texas facility, and is on the payroll of the Company. "Annual Salaries and Wages" as used in this Agreement shall mean payments made to individuals employed in a full-time job as defined herein. Payments shall include base pay, paid vacation, paid sick leave, or other pay, pursuant to Company policies or practices.
  - 2. Notwithstanding any provision hereof which might be interpreted otherwise, the MDC's total financial commitment to the Company during a fiscal year of the MDC, October 1 to September 30, shall not exceed the amount it is obligated to pay to the Company during that fiscal year.

B. **Certification.** The Company agrees to the following certification requirements:

1. As to the certification required in Section II(A)(3), the Company shall provide a letter from the Company President or other appropriate officer stating that the Company has commenced relocation of the Business to the Property located in Midland, Texas.
2. As to the certifications required in Section III(D), the Company shall provide reasonable evidence or supporting documentation of Salaries and Wages. Notwithstanding the above requirements, the Company may maintain its records in accordance with its record retention policies and shall not be required to create any additional records. Upon a reasonable request, the MDC may review the Company's records of Salaries and Wages but may not copy or retain a copy of said reports. In addition to the above requirements, the Company shall provide to the MDC a supplemental Salary and Wages report as of September 30 each year during the term of this Agreement evidencing the running total or Annual Salaries and Wages of the Company.
3. The Company shall allow the MDC reasonable access to the Property for purposes of determining the Company's compliance with the Salary and Wages certifications given by the Company, provided that such access shall be with representatives of the Company and during normal business hours. The Company acknowledges that the MDC is subject to the Texas Public Information Act.
4. When requested in writing by the MDC to do so, the Company will provide an annual statement in a form acceptable to the Company that, to the Company's knowledge, the Company is in compliance with each applicable term of this Agreement.
5. All certifications required under this Agreement shall be signed by the Company President or other appropriate officer before a notary. E-mail shall not be an acceptable form of certification under this Section of the Agreement.

C. **Covenants.** The Company makes the following covenants to the MDC and agrees that in the event of failure of the Company to comply with such covenants (a non-compliance event), the breach of any one of which shall constitute an event of default should the non-compliance event not be cured within 30 days of notification by the MDC, the MDC may terminate this Agreement at its sole discretion. In the event of such termination, if any consideration has been paid to or on behalf of the Company, and not earned, the Company must reimburse the MDC for such consideration based on the recapture schedule of Section III(E):

1. Upon relocation and thereafter until the term of this agreement is expired, the Company shall be a legal entity duly organized, validly existing and in good standing and is duly authorized to do business in the State of Texas.
2. The execution of this Agreement has been duly authorized by the Company's

board of directors or other governing body, or by an officer of the Company empowered to execute such agreements and bind the Company, and is not in contravention of the provisions of the Company's articles of incorporation or by-laws, or of any agreement or instrument to which the Company is a party or by which it may be bound, the breach of which would have a material, adverse effect on the Company and its operations.

3. There are no bankruptcy proceedings currently pending by or against the Company.

D. **Suspension.** The MDC, under the following circumstances and at its sole discretion, may terminate this Agreement, and the Company must reimburse any of the unearned consideration paid by the MDC pursuant to the recapture schedule of Section III(E):

1. The insolvency of the Company. "Insolvent" shall have the meaning set forth in the federal bankruptcy law.
2. The appointment of a receiver of the Company, or of all or any substantial part of its property, and the failure of such receiver to be discharged within sixty (60) days thereafter.
3. The adjudication of the Company as bankrupt, the filing by the Company of a petition to be adjudged bankrupt, or a petition or answer seeking reorganization or admitting the material allegations of a petition filed against it in any bankruptcy or reorganization proceeding.

E. **Additional Covenants.** If the Company should fail to comply with any of the following provisions, and such failure continues for thirty (30) days following MDC written notice to the Company or a mutually agreed upon Cure Plan that has been agreed that allows more than thirty (30) days to cure and this extended cure period has elapsed, (each, an "event of default"), the MDC may terminate this Agreement. In the event that the Agreement is terminated, the Company shall be required to reimburse the MDC pursuant to the recapture schedule of Section III(E).

1. The Company, or any affiliate of, or successor to the Company, shall continue its full- time business activities on the Property at all times during the period of this Agreement, except for periods of temporary interruption due to force majeure, or for periods not longer than six (6) months due to restructuring, reorganizations or other corporate activities.
2. The Company shall pay before delinquent all ad valorem taxes assessed against personal property owned by Company and owing by it to the taxing authorities having jurisdiction. In addition, the Company will pay before delinquent all employment, income, franchise and all other taxes to all local, state and federal entities. Nothing herein shall be deemed to preclude the Company from contesting any such taxes as provided by applicable law.
3. The Company shall obtain and maintain all necessary rights, licenses, and permits to carry on its business.

4. The Company agrees that, as to all of the programs and activities arising out of this Agreement, it shall comply in all material respects with all Civil Rights Acts and specifically will not discriminate against any person on the basis of race, color, national origin, religion, age, sex or by reason of being disabled.
  5. The Company agrees that it shall comply with Texas Government Code Section 2264.001 *et seq.*, as amended.
- F. **Payments.** Payments to be made to the Company under Section II hereof shall be made upon a written request from the Company and completion of all necessary supporting documentation as provided in Sections III and VII(B). The payment request and documentation should be directed to MDC Executive Director, 109 N. Main St., Midland, Texas 79701.

### VIII. General Terms

- A. **Entire Agreement.** This Agreement embodies the complete agreement of the parties hereto, superseding all oral or written, previous and contemporary agreements between the parties relating to matters in this Agreement; and except as otherwise provided herein, parties
- B. **No Third-Party Beneficiary.** The parties approval of the Agreement does not create a third-party beneficiary. There is no third-party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third-party beneficiary or other rights hereunder.
- C. **Legal Relationships.** The parties are not, and shall not be considered as, joint venturers, partners, or agents of each other; and neither shall have the power to bind nor obligate the other, except as set forth in this Agreement. The parties agree not to represent to anyone that they are agents of one another or have any authority to act on behalf of one another. It is mutually understood and agreed that nothing in this Agreement is intended or shall be construed as in any way creating or establishing any partnership, joint venture, or agency between the MDC and the Company. Further, it is specifically understood and agreed that nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability.
- D. **Terminations.** This Agreement may be terminated by mutual agreement of the parties or, subject to the terms and conditions hereof, by either party, upon the failure of the other party to fulfill an obligation as set forth herein if the default is not cured within thirty (30) days after written notice from the other party.
- E. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument.
- F. **Venue.** The obligations of the parties to this Agreement are deemed to have been performed in Midland County, Texas, and if legal action is necessary to enforce same,

exclusive venue shall be in Midland County, Texas. All payments under this Agreement are deemed to have taken place in Midland County, Texas. The obligations and undertakings of each of the parties to this Agreement shall be deemed to have been performed in Midland County, Texas.

- G. **Legal Construction.** In case one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.
- H. **Law.** This Agreement is subject to all applicable state and federal laws, and the Company agrees that it will comply in all material respects with all such applicable laws, regulations, orders and rules of the State of Texas and other such governmental agencies. This Agreement shall be governed by and construed in accordance with the laws and court decisions of the State of Texas.
- I. **Assignment.** This Agreement shall be binding upon the parties hereto and their successors and assigns. This Agreement may not be assigned by the Company without the prior written consent of the MDC.
- J. **Notices.** All notices to either party required under this Agreement shall be sent by certified U.S. mail, postage prepaid, addressed to such party at the addresses shown below. All notices shall be deemed given on the date so deposited in the mail, unless otherwise provided herein. Either party hereto may change the address below by sending written notice of such change to the other in the manner provided herein.

*If to the MDC:*

MDC Chairman  
c/o City Secretary  
City of Midland  
P.O. Box 1152  
Midland, Texas 79702

*If to the Company:*

Orbital Outfitters, Ltd.  
Attn: Jeff Feige  
225 10<sup>th</sup> St. SE  
Washington, D.C. 20003

*with copy to:*

MDC Executive Director  
Midland Development Corp.  
109 N. Main St.  
Midland, Texas 79701

- K. **Waiver of Attorney Fees.** By executing this Agreement, THE COMPANY AND THE MDC AGREE TO WAIVE AND DO HEREBY WAIVE ANY CLAIM THEY HAVE OR MAY HAVE AGAINST THE OTHER PARTY, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO



THE AGREEMENT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THE AGREEMENT. THE COMPANY AND THE MDC SPECIFICALLY AGREE THAT IF THE COMPANY OR THE MDC BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS AGREEMENT, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET SEQ., AS AMENDED), THE COMPANY AND THE MDC EACH AGREES TO WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH THE COMPANY OR THE MDC MIGHT OTHERWISE BE ENTITLED.

The Company and the MDC agree that this is the intentional relinquishment of a presently existing known right. Each party acknowledges that it understands all terms and conditions of the Agreement.

By execution of the Agreement, the Company hereby represents and warrants to the MDC that the Company has read and understood the Agreement.

This section shall not be construed or interpreted as a waiver of sovereign immunity.

- L. **Amendment.** This Agreement may be amended by written instrument executed by both parties expressly stating the intention to amend this Agreement.
- M. **Payments.** All payments to either party required under this Agreement shall be sent by certified U.S. mail, postage prepaid, addressed to such party at the addresses shown below. All payments shall be deemed given on the date so deposited in the mail, unless otherwise provided herein. Either party hereto may change the address below by sending written notice of such change to the other in the manner provided herein.

*If to the MDC:*

MDC Chairman  
c/o City Secretary  
City of Midland  
P. O. Box 1152  
Midland, Texas 79702

*If to the Company:*

Orbital Outfitters, Ltd.  
Jeff Feige  
225 10<sup>th</sup> St. SE  
Washington, D.C. 20003

- N. **Release.** NOTWITHSTANDING ANY OTHER PROVISION CONTAINED HEREIN, THE COMPANY HEREBY RELEASES, ACQUITS, RELINQUISHES AND FOREVER DISCHARGES THE MDC, THE MDC'S EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS CLAIMS, DAMAGES, OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH THE COMPANY HAS OR MIGHT HAVE, INCLUDING BUT NOT LIMITED TO QUANTUM MERUIT, CLAIMS UNDER THE DUE PROCESS AND TAKINGS CLAUSES OF

**THE TEXAS AND UNITED STATES CONSTITUTIONS, TORT CLAIMS, OR  
THE MDC'S NEGLIGENCE.**

- O. **Sovereign Immunity.** By executing this Agreement the MDC is not waiving its right of sovereign immunity. The MDC is retaining its immunity from suit. The MDC is not granting consent to be sued by legislative resolution or action.
- P. By signing below on behalf of the MDC, the signatory, for and on behalf of the MDC, represents and warrants to the Company that this Agreement has been duly authorized and approved by the Midland City Council.

*[signature pages follow]*

IN WITNESS WHEREOF, the MDC and the Company have executed this Agreement on the \_\_\_\_\_ day of \_\_\_\_\_, 2014.

**MIDLAND DEVELOPMENT  
CORPORATION**

\_\_\_\_\_  
Chairman

ATTEST:

\_\_\_\_\_  
Secretary

**ORBITAL OUTFITTERS, LTD.**

By: \_\_\_\_\_  
Jeff Feige, Chief Executive Officer

THE STATE OF \_\_\_\_\_ §  
COUNTY OF \_\_\_\_\_ §

BEFORE ME, \_\_\_\_\_, a notary public, on this day personally appeared JEFF FEIGE of ORBITAL OUTFITTERS, LTD., known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of said company for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS \_\_\_\_\_ day of \_\_\_\_\_, 2014.

Notary Public, in and for  
the State of \_\_\_\_\_

Proposed Lease Tract to Orbital Outfitters  
Field Notes

For a 1.28 acre tract located in Midland, Texas and being a portion of Lot 1A, Block 13, Midland International Airport Industrial Park as recorded in Cabinet F, Page 187 of the Midland County Plat Records and being more fully described as follows;

Beginning at a nail spike set in a fence line for the west corner of the herein described tract and having a coordinate of  $X = 1,714,363.32$  ft.,  $Y = 10,671,386.25$  ft., a  $\frac{1}{2}$ " iron rod found for the southwest corner of said Lot 1A bears  $S 19^{\circ} 15' 34''$  W a distance of 1,098.23 ft.,

Thence  $N 41^{\circ} 02' 19''$  E along said fence line and the northwest line of the herein described tract at 97.5 ft. pass a fence corner and continue with said fence and the southeast line of "Taxiway S" in all a distance of 267.5 ft. to a set nail spike for the north corner of the herein described tract,

Thence  $S 48^{\circ} 57' 41''$  E along the northeast line of the herein described tract in all a distance of 209.57 ft. to a set railroad spike for the east corner of same and also being the north corner of a proposed 0.66 acre tract,

Thence  $S 41^{\circ} 18' 15''$  W along the southeast line of the herein describe tract and the northwest line of said 0.66 acre tract in all a distance of 267.50 ft. to a set nail spike for the south corner of the herein described tract and also being the west corner of said 0.66 acre tract,

Thence  $N 48^{\circ} 57' 41''$  W along the southwest line of the herein described tract in all a distance of 208.33 ft. to the place of beginning and containing 1.28 acres.  
Bearings, distances and coordinates are based on the Texas State Coordinate System, Central Zone, NAD 83.



*Richard A. Shelton* 1-22-14  
Richard A. Shelton, RPLS 4356  
City of Midland, Texas  
432-685-7295

Exhibit "A"

## EXHIBIT B

### Chamber Milestones

| #  | Milestone                           | Target Month | Amount      | Requirements / Deliverables                                                                                                                                                 | Planned Use of \$                                                                                                                                                                  |
|----|-------------------------------------|--------------|-------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| C1 | Agreement Signed                    | 1            | \$250,000   | <ul style="list-style-type: none"> <li>Agreement between MDC and OO negotiated and signed by both parties</li> <li>Report &amp; Invoice submitted to MDC</li> </ul>         | <ul style="list-style-type: none"> <li>Detailed design of chamber &amp; support system</li> </ul>                                                                                  |
| C2 | Suit Chamber CDR                    | 3            | \$1,000,000 | <ul style="list-style-type: none"> <li>Critical Design Review of suit chamber completed</li> <li>Report &amp; Invoice submitted to MDC</li> </ul>                           | <ul style="list-style-type: none"> <li>Purchase Suit Chamber construction materials &amp; fabricate (remotely)</li> <li>Assemble support system &amp; build glove boxes</li> </ul> |
| C3 | Suit Chamber Fabrication Complete   | 8            | \$1,000,000 | <ul style="list-style-type: none"> <li>Suit chamber fabrication completed and ready for remote testing</li> <li>Report &amp; Invoice submitted to MDC</li> </ul>            | <ul style="list-style-type: none"> <li>Test, ship, outfit Suit Chamber</li> <li>Purchase Cabin Chamber construction materials &amp; fabricate (remotely)</li> </ul>                |
| C4 | Cabin Chamber Fabrication Complete  | 12           | \$500,000   | <ul style="list-style-type: none"> <li>Cabin chamber hardware fabrication completed and ready for offsite testing</li> <li>Report &amp; Invoice submitted to MDC</li> </ul> | <ul style="list-style-type: none"> <li>Test, ship fabricated Cabin chamber hardware</li> <li>Integrate Suite Chamber in Midland facility</li> </ul>                                |
| C5 | Suit Chamber Installation Complete  | 17           | \$250,000   | <ul style="list-style-type: none"> <li>Suit chamber installation completed and functionality available.</li> <li>Report &amp; Invoice submitted to MDC</li> </ul>           | <ul style="list-style-type: none"> <li>Complete Cabin Chamber integration and final on-site system testing.</li> </ul>                                                             |
| C6 | Cabin Chamber Installation Complete | 21           | \$200,000   | <ul style="list-style-type: none"> <li>Cabin chamber installation completed and functionality available.</li> <li>Report &amp; Invoice submitted to MDC</li> </ul>          | <ul style="list-style-type: none"> <li>Chamber operations training</li> </ul>                                                                                                      |

**TOTAL: \$3,200,000**

## SECURITY AGREEMENT

THIS SECURITY AGREEMENT (the "Security Agreement") is by and between Midland Development Corporation (hereinafter referred to as "Secured Party"), and Orbital Outfitters, Ltd. (together with any successors and/or permitted assigns, hereinafter referred to as "Debtor").

WHEREAS, Debtor has entered into the Economic Development Agreement of even date herewith executed between Debtor and Secured Party (the "Economic Development Agreement"); and

WHEREAS, to secure payment and performance of any and all liabilities and obligations of Debtor to the Secured Party (as hereinafter described) pursuant to the Economic Development Agreement, Debtor hereby assigns, transfers, pledges, and grants a security interest in the Collateral (as hereinafter defined) to the Secured Party and Debtor hereby warrants, covenants and agrees that the Secured Party shall have the rights, remedies, and benefits hereinafter set forth.

NOW, THEREFORE, it is agreed as follows:

1. DEFINITIONS: The terms "Secured Party" and "Debtor" as used in this Security Agreement shall include the successors or assigns of these parties. If more than one Debtor executes this Security Agreement, the term "Debtor" shall include each Debtor as well as all of them, and their obligations under this Security Agreement shall be joint and several.
  - A. For purposes of this Security Agreement, the term "Business" shall mean the Business owned and operated by Debtor; the term "Premises" shall include the present and any or all future locations of the Business, whether singular or multiple and wherever located.
  - B. The term "Liabilities" shall include all financial obligations of Debtor to Secured Party, now existing or hereafter arising, whether direct or indirect, assumed or acquired outright, conditionally or as collateral security from another, absolute or conditional, joint or several, secured or unsecured, due or not due, contractual or tortious, liquidated or unliquidated, arising by operation of law or otherwise.
  - C. The term "Collateral" shall mean:
    - (i) **all assets** owned by the Secured Party, together with all present and after acquired property and assets of the Business of every nature and type, real, personal or mixed, tangible and general intangible, in all forms, wherever located, and all proceeds thereof, whether cash or non-cash, including but not limited to insurance proceeds, all equipment, supplies, furniture, fixtures, computers, computer records and software, parts and accessories, including any substitutions, additions thereto and replacements thereof,

Exhibit "C"

leasehold improvements, telephone numbers and yellow page ads, cash, accounts receivable, contract rights, general intangibles, pre-paid expenses, patient clinical and financial records and files, patient lists, and all work in progress;

- (ii) all of Debtor's rights, title, and interest that Debtor has as tenant under any lease (if applicable and to the extent assignable) where Debtor may hereafter be located (or any part thereof) for the practice of the Business (each a "Lease").

2. SECURITY INTEREST: In consideration and as an inducement for Secured Party's extending credit to Debtor for purchasing the Business, Debtor agrees to the following:

- A. Secured Party may file one or more UCC-1 Financing Statements (to be provided and filed by Secured Party's attorney, where and when required for perfection of Secured Party's security interest in the Collateral).
- B. Debtor hereby grants to Secured Party a lien on, and a continuing security interest in the Collateral together with all substitutions, replacements, and proceeds, including all of the foregoing now in existence and all hereafter acquired by Debtor at any time or times regardless of whether simultaneous with or subsequent to the incurring of any of Debtor's Liabilities to Secured Party (the "Security Interest").
- C. The Security Interest created herein shall attach without the execution or delivery to Secured Party of any instruments, documents, assignments, or other agreements of transfer, and in the event that any such instruments, documents, or other agreements of transfer are or will be delivered to Secured Party, the same are and will be in furtherance of and in addition to the security interest created by virtue of this Security Agreement.

3. VALIDATION OF SECURITY INTEREST, U.C.C. FILINGS: At any time, and at reasonable intervals, upon request of Secured Party (or Secured Party's attorney), Debtor will give, execute and deliver any notice, statement, instrument, document, agreement, or other papers that Secured Party may reasonably request in order to create, preserve, perfect, or validate any security interest granted pursuant hereto or to enable Secured Party to exercise and enforce its rights hereunder or with respect to such security interest. The Secured Party acknowledges and agrees that it is the responsibility of the attorney for the Secured Party to file all UCC Financing Statements, where and when required, including renewals.

4. SALE OR TRANSFER OF COLLATERAL AND OTHER ASSETS: Debtor hereby represents and agrees that while there remains any unpaid Liability to Secured Party:

- A. Except for transfer in the ordinary course of business, Debtor will not sell, transfer, convey, or assign any portion of the Collateral consisting of goods exceeding a book value of Ten Thousand Dollars (\$10,000.00) in any fiscal year



without previously notifying Secured Party in writing and obtaining Secured Party's prior written consent, and provided that:

- (i) the funds received from the sale, transfer, assignment or other conveyances of a portion of the Collateral must be used to immediately replace the sold goods with goods of equal or greater value, net of any debt thereon, which such replacement goods shall thereafter become part of the Collateral; or
    - (ii) if such goods are not replaced, then such entire amount received shall be immediately paid to Secured Party and applied to the outstanding Liabilities.
  - B. Subject to the provisions of section 4 (A) above, if more than fifty percent (50%) of Debtor's interest in the Business is sold, then the balance of the Liabilities, at the option of Secured Party, shall become immediately due and payable. The aforementioned sale or transfer restrictions shall not be considered applicable if made to a partnership or corporation of which Debtor is an equal or majority partner or stockholder provided the transferee agrees in writing prior to the transfer to be bound by the terms and conditions hereto; any amount received by Debtor for the sale of any interest in the Business shall be immediately paid to Secured Party and applied to the outstanding Liabilities.
5. JUDICIAL ENCUMBRANCES AND DEFENSE OF TITLE: Debtor shall not, after the effective date of this Security Agreement, allow or create any lien or encumbrance to be attached by law or any judicial process to the Collateral, unless expressly made subordinate to Secured Party's Security Interest; however, Debtor shall be entitled to "cure" any such encumbrance or lien within ten (10) days of receipt of notice of the same from Secured Party. Debtor will defend the title and Secured Party's security interest in and to the Collateral at Debtor's own cost and expense.
- A. Debtor will pay and discharge promptly all taxes, assessments, and governmental charges or levies imposed upon Debtor or Debtor's income or the Collateral, as well as all judgment liens and all claims for labor and materials which, if unpaid, may constitute a lien or charge upon the Collateral, unless and only to the extent that the same shall be appropriately reserved against and be diligently contested in good faith by appropriate proceedings.
  - B. Debtor will give Secured Party full and prompt written notice of any condemnation or forfeiture proceeding, and of any judgment, order, or decree entered against Debtor or the Collateral, in or by any court or governmental authority.
6. MAINTENANCE AND INSURANCE: During the term of this Security Agreement:
- A. Debtor will, at Debtor's cost, maintain the Collateral in good order and repair. Unless the Collateral is specified as a fixture, Debtor will prevent the Collateral or

any part of the Collateral from becoming a fixture. Debtor shall promptly pay all costs, expenses and obligations of every kind and nature incurred in connection with the use, maintenance, servicing, repair or operation of the Collateral. Debtor agrees to operate the Business in compliance with all O.S.H.A. rules and regulations.

- B. Debtor shall insure the Collateral against fire, theft, and such other risks to the extent they are insurable, and Secured Party shall be named as additional insured and loss payee therein (to the extent of the outstanding Liabilities). If any policy should be canceled, Debtor shall immediately replace the canceled policy with another policy having equal coverage on the Collateral. An assignment of such insurance policy or policies or certificate of coverage showing Secured Party as loss payee shall be provided to Secured Party by Debtor on the Closing Date.
  - C. All Collateral related insurance proceeds received by Debtor shall be reinvested in assets of a like kind, net of any debt thereon, and shall become part of the Collateral; any insurance proceeds not so reinvested shall then be paid immediately over to and for the benefit of Secured Party and applied as a reduction in the outstanding Liabilities.
  - D. Debtor shall maintain in full force and effect, insurance as required by the Economic Development Corporation.
7. NOTICE OF RELOCATION AND DISCONTINUANCE: Debtor shall maintain the Collateral, and any replacements thereof, within a ten mile radius from its location at the time of the Signature Date. Debtor agrees to give Secured Party immediate written notification of: (i) any change in the location of the Collateral; (ii) the establishment of any new office or place of Business; and (iii) the discontinuance of any office or place of Business. Upon change of location, Debtor will provide Secured Party with a landlord's or mortgagee's waiver, or both, recognizing Secured Party's superior rights in the Collateral.
8. EVENTS OF DEFAULT, ACCELERATION: Provided Secured Party is not in material default of the Economic Development Agreement and/or any of its exhibits, then the following shall apply:
- A. An event of default ("Event of Default") shall be deemed to have occurred (unless Secured Party specifically waives any of the following provisions in writing):
    - (i) if there is any default in the payment of the Liabilities and such default is not cured within any cure period as provided herein; or
    - (ii) if Debtor shall materially default in the performance of any of the respective obligations, warranties, covenants and indemnifications made herein or in any instrument or document delivered to Secured Party simultaneously herewith, which default is not cured within any cure period therein or herein; or

- (iii) if any warranty, representations or written statements made or furnished to Secured Party by Debtor relating to this Security Agreement proves to have been false or misleading in any material respect when made or furnished; or
- (iv) if any final judgment is docketed against Debtor which has not been satisfied or appealed within Sixty (60) days; or
- (v) if any lien is filed against Debtor relating to the Collateral (unless subordinate to Secured Party's lien or paid or bonded within thirty (30) days); or
- (vi) if a petition in bankruptcy or for relief under any law relating to the relief of Debtor's indebtedness, readjustment of indebtedness, reorganization, composition, or extension shall be filed or any proceeding shall be instituted under any such law by or against Debtor which if instituted against (but not by) Debtor remains undismissed for a period of sixty (60) days; or

Should Secured Party waive, in writing, any of the aforementioned Events of Default, such waiver shall not be continuing.

- B. Debtor agrees to promptly give written notice to Secured Party upon the discovery of an occurrence of an Event of Default or of a third party claim of default (e.g. Debtor's landlord). Except as otherwise provided herein, upon an Event of Default (subject to cure as set forth in this Security Agreement), the Liabilities shall, at the option of Secured Party, without further notice or demand, become immediately due and payable.

9. **NOTICE OF DEFAULT AND RIGHT TO CURE:** Unless elsewhere provided to the contrary, **Debtor shall have ten (10) days after written notice to cure if a default is failure to make payment of any of the Liabilities, and thirty (30) days after written notice to cure if the default is curable and a default other than the failure to make payment.** The right to cure shall expire at the end of the later of the aforementioned 10 day or 30 day cure period provided for in this section or another time provided in any of the itemized Events of Default set forth in this Security Agreement.

10. **RIGHTS AND REMEDIES ON DEFAULT:** Secured Party shall have the rights and remedies with respect to the Collateral of a Secured Party under the State Uniform Commercial Code and any other applicable law that may be in effect from time to time. Without limiting the generality of the foregoing, upon the occurrence of an Event of Default hereunder and failure of Debtor to cure after notice is provided herein, the following shall apply:

- A. Secured Party shall have the right to the appointment of a receiver, by an arbitrator or by process of law, and the right to enter upon the Premises and, without resistance or interference by Debtor, take possession of the Collateral; and/or remove all or any part of the Collateral from the Premises on which any

part thereof may be located for the purpose of affecting sale or other disposition thereof. Secured Party may require Debtor to assemble and make available all or any part of the Collateral at any place and time designated reasonably convenient to Secured Party and Debtor.

- B. Secured Party may sell or cause the Collateral to be sold in the present office area or elsewhere, in one or more sales, at such price and terms as Secured Party may deem best, at public or private sale, without demand of performance or notice of intention to sell or of time or place of sale (except such notice as is required by applicable statute and cannot be waived) and Secured Party or anyone else may be the purchaser of any or all of the Collateral so sold and thereafter hold the same absolutely free from any claim or right of whatsoever kind, including any equity of redemption, of Debtor, any such demand, notice or right and equity being hereby expressly waived and released.
- C. Should Secured Party take possession of the Collateral and use the Collateral to operate the Business on the Premises while seeking another purchaser for the Business, then such use of the Collateral shall not constitute an election by Secured Party to retain the Collateral in satisfaction of the debt.
- D. Upon a determination by a court of competent jurisdiction that the Debtor is in default hereof, Debtor will pay to Secured Party all reasonable expenses actually incurred, including reasonable attorneys' fees incidental to the enforcement of any of the provisions hereof or of any of the Liabilities, or any actual or attempted sale, retaking, enforcement, collection, compromise, or settlement of any of the Collateral or receipt of the proceeds thereof, and for the care of the Collateral and defending or asserting the rights and claims of Secured Party in respect thereof, by litigation or otherwise, including expenses of insurance, and all such expenses shall be liabilities within the terms of this Security Agreement and secured by the Collateral.
- E. If the proceeds of any sale or other lawful disposition of the Collateral are insufficient to pay the expenses, including attorneys' fees, of retaking, holding, preparing it for sale or other disposition and selling it or otherwise disposing of it, and to satisfy all of Debtor's Liabilities to Secured Party, then Debtor agrees to pay any deficiency. Debtor shall be entitled to any surplus if one results after lawful application of such proceeds.
- F. Secured Party may notify any account debtor (of Debtor) of the Security Interest and may direct such account debtor to make all payments on the Collateral to Secured Party. All such payments or other proceeds received by Secured Party shall be applied to the outstanding indebtedness of Debtor.
- G. Secured Party may demand, collect and sue for all proceeds of Collateral (either in Debtor's name or Secured Party's name), with the right to enforce compromise, settle or discharge any proceeds. Debtor appoints Secured Party as Debtor's

attorney-in-fact to endorse Debtor's name on all checks, commercial paper and instruments pertaining to the proceeds.

- H. Secured Party may exercise all and any number of the Secured Party's rights and remedies (and they shall be cumulative and not alternative) which Secured Party may have hereunder and any other paper delivered by Debtor in connection with any of Debtor's liabilities to Secured Party, and the Uniform Commercial Code or any other law, or otherwise, at any time or times, and in whole or in part.
  - I. Secured Party shall be under no liability to anyone for the exercise of any right or for any failure to exercise any thereof, and the exercise or failure shall not affect or discharge any liability or debt of any other person.
  - J. In the event Debtor fails to maintain insurance, pay taxes, assessments, costs and expenses which the Debtor is required to pay under the terms hereof or fails to keep the Collateral free from other security interest, liens or encumbrances or to maintain the Collateral in good order and repair or shall be in default in the performance of any other provisions of this Security Agreement, the Secured Party may make expenditures or take action for any such purposes. The amount so expended, together with interest thereon at the highest rate permitted by Texas Law, shall immediately become due and payable by Debtor to Secured Party and shall be part of the Liabilities secured by the Security Interest herein granted.
11. CASH PROCEEDS OF RECEIVABLES: With respect to receivables (which shall include all Debtor's rights of payment, including, without limitation, rights of payment relating to chattel paper, accounts, contract rights and instruments), Debtor shall, in the absence of default hereunder, at Debtor's own expense take all necessary action promptly to collect Debtor's accounts, contract rights, instruments and chattel paper.
- A. After the occurrence of an Event of Default and subject to Secured Party's rights described in section 13 above, all cash proceeds of receivables (including money and checks or other drafts), shall be promptly deposited, in the form received with any endorsements necessary for collection, in a special deposit account with Secured Party (the "Collateral Collection Account") on which Debtor shall have no right to make withdrawals. At any time, Secured Party shall apply this Account, if any, to the payment of any obligation secured hereby, in the order as Secured Party may choose, or may release all or any part of the Account to Debtor.
  - B. After the occurrence of an Event of Default, Debtor shall pay and deliver all proceeds of the accounts, contract rights, instruments and chattel paper into the Collateral Collection Account immediately upon receipt, in the exact form received, with any endorsement necessary for collection, without co-mingling with any other property.

- C. After the occurrence of an Event of Default, Debtor shall notify Account Debtors that their accounts, contract rights, instruments or chattel paper have been assigned to Secured Party and shall be paid directly to Secured Party. At its option, at any time after default and at Debtor's expense, Secured Party may notify Account Debtors to pay Secured Party directly, and may sue, collect, compromise on terms it considers proper, endorse, sell or otherwise deal with the accounts, contract rights, instruments and chattel paper either in its own name or in that of Debtor. After deduction of any expenses, including attorneys' fees, all proceeds of the collections received by Secured Party shall be applied to the payment of any obligation secured hereby, in the order as Secured Party may choose.
- D. After the occurrence of an Event of Default, with respect to non-receivables, Debtor shall, to the extent required by Secured Party:
- (i) deliver chattel paper and instruments to Secured Party, and to more specifically identify Collateral, give Secured Party assignments or endorsements, as the case may be, in the forms specified by Secured Party, of specific accounts, contract rights, instruments and chattel paper as the accounts arise, the contracts are made or the paper is acquired;
  - (ii) furnish Secured Party with the originals or copies of statements of account or ledger cards and contracts applicable to each account or contract right noting thereon, if Secured Party so requires, Secured Party's assignment and any additional statement required;
  - (iii) inform Secured Party immediately of the claim of an Account Debtor relating to any specific assigned accounts, contract rights, instruments or chattel paper;
  - (iv) make no material change in any specifically assigned account or any account arising out of a contract right assigned to Secured Party and no material change in the terms of any contract;
  - (v) furnish Secured Party with all information received by Debtor relating to the financial condition of the Account Debtor on any specifically assigned account, contract right, instrument or chattel paper;
  - (vi) furnish to Secured Party satisfactory evidence of performance of services; and
  - (vii) tender to Secured Party a list of Account Debtors (showing names, addresses and amounts owing) and such other data concerning Debtor's accounts, contract rights, chattel paper, instruments, collections and other matters as Secured Party may from time to time specify.

12. NON-WAIVER: No failure or delay on the part of Secured Party in exercising any power or right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any power or right hereunder preclude other or further exercise thereof or the

exercise of any other power or right. No waiver shall be enforceable against Secured Party unless in writing, signed by Secured Party, and shall be limited solely to that one event. The rights, remedies, and benefits herein expressly specified are cumulative and not exclusive of any rights, remedies, or benefits which Secured Party may otherwise have.

13. TERMINATION OF SECURITY INTEREST: Upon the payment of the Liabilities in full, this Security Agreement shall automatically terminate and Secured Party shall execute a termination statement at that time. However, the parties' rights, responsibilities, warranties and covenants and indemnifications as described in the attached Economic Development Agreement and its exhibits shall survive termination of this Security Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Security Agreement on the same date the attached Economic Development Agreement was signed and executed.

Orbital Outfitters, Ltd.

by \_\_\_\_\_  
Debtor

**SUBLEASE AGREEMENT  
BETWEEN THE MIDLAND DEVELOPMENT CORPORATION  
AND ORBITAL OUTFITTERS, LTD.**

THIS SUBLEASE AGREEMENT ("Agreement") is made and effective this 28<sup>th</sup> day of January, 2014, by and between the Midland Development Corporation ("MDC"), a Type A corporation existing under the authority of Chapter 504 of the Texas Local Government Code, and Orbital Outfitters, LTD. ("Lessee").

**RECITALS**

WHEREAS, the City of Midland, Texas ("City") owns and operates Midland International Airport (the "Airport") at which Lessee desires to locate its corporate headquarters as well as research and development activities related to its relocate its space and pressure suits manufacturing and development business; and

WHEREAS, the MDC has leased from the City certain land at the Airport, which is further described herein on **Exhibit A**, attached hereto ("Land");

WHEREAS, the MDC shall construct a Building on the Land to be built in accordance with plans and specifications approved by Lessee (the "Building"); and

WHEREAS, the MDC and Lessee desire to set forth the terms and conditions under which Lessee will sublease said Building and Land from the MDC for purposes of said business;

NOW, THEREFORE, for and in consideration of the covenants and conditions herein stated, City and Lessee agree as follows:

**ARTICLE 1. GRANT OF LEASE**

- 1.01 **Leased Premises:** MDC agrees to lease to Lessee, the Building and Land, hereinafter collectively referred to as the "Leased Premises." The parties hereby agree that any adjacent real property the MDC subsequently leases from the City of Midland through an option agreement may be included as part of the Leased Premises upon written approval of such inclusion by both parties. Any such real property included as part of the Leased Premises shall be subject to the terms and conditions of this Agreement. Lessee shall construct on the Land and shall have exclusive use of an altitude chamber complex subject to the terms and conditions of the Economic Development Agreement by and between the MDC and Lessee.
- 1.02 **Easements:** This Agreement shall be subject to such easements, rights-of way, drill sites, or other rights or reservations affecting the Leased Premises which are of record on the date hereof.
- 1.03 **Acceptance of Leased Premises:** Subject to the requirements of Section 6.01, BY EXECUTING THIS AGREEMENT THE LESSEE AGREES AND



ACKNOWLEDGES THE LESSEE UPON DELIVERY OF THE COMPLETED BUILDING TO LESSEE IS THEN TAKING OR LEASING THE LEASED PREMISES "AS IS" WITH ANY AND ALL LATENT AND PATENT DEFECTS AND THAT THERE IS NO WARRANTY, EXPRESS OR IMPLIED BEING MADE BY THE MDC OR CITY THAT THE LEASED PREMISES ARE FIT FOR A PARTICULAR PURPOSE. THE LESSEE ACKNOWLEDGES, BY EXECUTING THIS AGREEMENT, THAT LESSEE IS NOT RELYING UPON ANY REPRESENTATION MADE BY THE MDC OR CITY WITH RESPECT TO THE CONDITION OF THE LEASED PREMISES, BUT IS RELYING UPON LESSEE'S EXAMINATION OF THE PLANS AND SPECIFICATIONS AND WILL RELY UPON EXAMINATION OF THE LEASED PREMISES ONCE COMPLETED. LESSEE ALSO RECOGNIZES BY EXECUTING THIS AGREEMENT, THAT THE LESSEE IS AGREEING TO ACCEPT THE LEASED PREMISES "AS IS," THAT LESSEE AGREES TO MAKE LESSEE'S OWN APPRAISAL OF THE LEASED PREMISES AND TO ACCEPT THE RISK THAT LESSEE MAY BE WRONG. THE MDC GIVES NO ASSURANCES, EXPRESS OR IMPLIED CONCERNING THE VALUE OR CONDITION OF THE LEASED PREMISES SOLD. IN NO EVENT SHALL A LESSEE HAVE A RIGHT TO RECOVER CONSEQUENTIAL DAMAGES. THEREFORE, THE LESSEE WILL TAKE THE LEASED PREMISES UNDER THE EXPRESS UNDERSTANDING THE LEASED PREMISES ARE ACCEPTED "AS IS" AND WITH ALL FAULTS, EXCLUDING EXPRESS OR IMPLIED WARRANTIES. MDC AGREES TO ENFORCE FOR THE BENEFIT OF LESSEE ALL CLAIMS FOR CONSTRUCTION DEFECTS OR FAILURE TO CONSTRUCT THE BUILDING IN ACCORDANCE WITH THE PLANS AND SPECIFICATIONS.

## **ARTICLE 2. TERM OF AGREEMENT**

- 2.01 **Lease Term:** The term of this Agreement shall commence on the date which is the earlier of (a) the date which is thirty (30) days after a Certificate of Occupancy is issued for the Building or (b) the date Lessee takes possession of the Building ("Commencement Date), and terminate on the date which is the last day of the twelfth year after the Commencement Date, ("the Lease Term") unless terminated earlier pursuant to the provisions of this Agreement.
- 2.02 **Extended Term:** Lessee shall have the option to extend the term of this Lease for two (2) additional terms of ten (10) years each by giving written notice to MDC not less than twelve (12) months prior to the end of the then-current term. Upon notice to MDC, MDC and Lessee shall promptly enter into a renewal of the Lease Term under the same terms and conditions as set forth herein, except the Base Rent due hereunder shall be at the "Market Rate". As used herein, Market Rate shall mean the rent currently being charged by lessors to lessees in Midland County, Texas, for space of comparable locate, site, quality and utility taking into consideration all concessions and benefits offered by the lessors.

### **ARTICLE 3. RENT**

- 3.01 **Amount of Base Rent:** Beginning on the Commencement Date and continuing through the Lease Term each year by January 5, Lessee agrees to pay annual rent to the MDC for the Leased Premises in the amount of \$1.00.
- 3.02 **Delivery of Rent:** All payments required of Lessee by this Agreement shall be delivered by mail, or in person, to the Midland Development Corporation, 109 N. Main Street, Midland, Texas 79701, or to such other location as specified in writing by the MDC from time to time, no later than the date such payment is due, unless such due date falls on a Saturday, Sunday, or City holiday, in which case such rent shall be due on the first business day following the date such payment is due.

### **ARTICLE 4. USE OF LEASED PREMISES**

- 4.01 **Permitted Uses:** Lessee shall be permitted to use the Leased Premises for the purpose of conducting for-profit commercial services or activities consisting of any or all of the following operations and no others:
- (a) Location of corporate headquarters and operation of research and development activities related to space flight suits and related activities;
  - (b) Operation of an Altitude Chamber Complex as well as warehouse, freight distribution and storage services for commercial and non-commercial activities;
  - (c) Repair and maintenance service for equipment related to the space industry;
  - (d) Sales of parts and equipment, and supplies related to the space industry;
  - (e) Storage of such equipment and apparatus as may be incidental and/or necessary to Lessee's operations, including motor vehicles operated and/or owned by Lessee; and
  - (f) Such other uses as may be permitted in writing by the MDC.
- 4.02 **Prohibited Uses:** Lessee agrees at all times to comply with the following:
- (a) Lessee shall at no time use, or permit the use of, the Leased Premises in a manner that is contrary to applicable federal, state, or local laws, ordinances, rules, or regulations, which shall include, but not be limited to, applicable Federal Aviation Administration ("FAA") rules and regulations and applicable regulations for the use of the Airport as may from time to time be promulgated by the City;
  - (b) Lessee shall not permit any permanent, unshielded light or illumination source to cause glare as viewed from any street, adjacent properties or operating aircraft;
  - (c) Lessee shall not cause or permit the burial of storage above ground on the Leased Premises of any hazardous waste or materials, as defined by

federal or state law, except in accordance with applicable federal, state, or local laws, ordinances, regulations and rules, as may be adopted or amended from time to time;

- (d) Lessee shall not cause or permit any use or activity on the Leased Premises which would create a hazardous condition for aircraft operating at the Airport;
- (e) Lessee shall not allow the Leased Premises to be used for parking of motor vehicles, motorcycles, or motor driven equipment by anyone other than customers, employees, or contractors of Lessee except as may be authorized by the Director of Airports, with all such parking being limited to areas designated by the Department of Airports for such parking. Lessee shall not be in default for the improper parking of vehicles over which neither Lessee nor any of its subtenants, customers, employees, or contractors have any control; and
- (f) Lessee shall not operate, nor permit the operation of, a car rental business from the Leased Premises, unless the Lessee or the operator of said car rental business has executed a car rental concession or permit agreement with the City; and
- (g) Lessee shall not allow scheduled airline passenger operations to be conducted on the Leased Premises.

4.03 **Compliance with Minimum Standards:** All activities conducted upon the Leased Premises, whether by Lessee or its sublessees, shall be in substantial conformance with the City's Minimum Standards for Aeronautical Activities, as such standards exist or may be duly amended from time to time by the City Council to the extent that such Minimum Standards may apply to Lessee's operations. MDC agrees to provide Lessee with written notice not later than 30 days prior to adoption of substantive changes to the Minimum Standards for Aeronautical Activities which would apply to Lessee's operations.

4.04 **Non-exclusive Uses:** Lessee understands and acknowledged that, as to that part of the Airport not included within the Leased Premises, the allowable uses permitted herein are on a non-exclusive basis with respect to other potential providers of aeronautical services at the Airport.

## **ARTICLE 5. OBLIGATIONS OF LESSEE WITH REGARD TO CONSTRUCTION OF IMPROVEMENTS**

5.01 **Approval of Plans Not Assurance of Design Quality:** The approval by the MDC and the Director of Airports of any plans and specifications applies only to the conformity of such plans to the general architectural and operational plan for the Leased Premises and the Airport. The approval of the MDC and the Director of Airports does not constitute approval of the quality of the architectural or engineering work performed. Neither the MDC, City nor the Director of Airports assumes any liability or responsibility for the architectural or engineering design or

for any defect in any building or improvement constructed from the plans or specifications. Construction of any contemplated improvements shall be in accordance with the plans presented to and approved by the MDC and the Director of Airports. All construction work shall be subject to inspection by a representative employed by the City or an inspector from the Code Enforcement Division of the City, or both, to determine that such work conforms to the plans and specifications approved by the MDC and the City.

- 5.02 **Contractor's Insurance; Bonds:** At any time construction activities are undertaken on the Leased Premises other than the initial construction of the Building, Lessee shall require that its contractor or contractors keep in force insurance issued by a responsible insurance company or companies authorized to conduct business in the State of Texas insuring the improvements during construction under Completed Builder's All Risk Insurance, including fire, extended coverage, vandalism and malicious mischief, in an amount equal to the full insurable value of such construction as the same progresses in order to insure continuity of construction and ultimate completion despite damage or destruction suffered during the course thereof. **ALL INSURANCE SHALL NAME THE MDC AND THE CITY AS ADDITIONAL INSUREDS AND CO-PAYEES AND PROVIDE FOR A WAIVER OF SUBROGATION IN FAVOR OF THE MDC AND THE CITY.** Lessee shall require all contractors performing construction work on the Leased Premises to provide payment and performance bonds issued by a responsible bonding company or companies authorized to conduct business in the State of Texas for the full amount of the cost of the construction to be performed on forms which are in compliance with Tex. Gov't Code Ch. 2253, as amended. The foregoing shall be made a part of any contract between Lessee and its contractor or contractor. In the event Lessee does not complete the construction work itself, it shall comply with the all-risk insurance provisions hereof.
- 5.03 **Compliance with Building Codes and Federal Standards:** All improvements made to the Leased Premises by Lessee shall comply with all applicable City Building Codes and federal standards for construction of airport improvements in effect at the time construction commences as well as all other applicable federal aviation regulations, if any.
- 5.04 **Encumbrance of Leasehold Estate:** Lessee shall at no time encumber or attempt to encumber its leasehold interest in the Leased Premises by deed of trust, mortgage, security agreement or other security interest.
- 5.05 **Ownership of Buildings, Improvements and Fixtures:** Any and all buildings, improvements (including, but not limited to all aprons, taxiways and roadways), additions, alterations, and fixtures existing on the Commencement Date or constructed or placed on any part of the Leased Premises during the Lease Term by City, MDC or Lessee shall be considered part of the real property of the Leased Premises, shall remain on the Leased Premises, and shall not be removed by Lessee or any sublessee without the written consent of the MDC. All improvements,

additions, alterations, and fixtures on the Leased Premises shall become the sole property of MDC and City upon termination of this Agreement without compensation to Lessee, it being understood and agreed by Lessee that the improvements located on the Leased Premises at the end of the Lease Term are additional consideration for this Agreement. Notwithstanding the above, Lessee shall have the right at any time during Lessee's occupancy of the Leased Premises, or within a reasonable time thereafter, to remove any and all furniture, machinery, equipment, and trade tooling, but not fixtures owned or placed by Lessee, in, under, or on the Leased Premises; provided, however, prior to the termination of the Lease Term, Lessee shall repair any damage to any buildings or improvements on the Leased Premises resulting from their removal. Any such personal property items which are not removed within sixty (60) days after the termination date of this Agreement shall become the property of City as of that date.

## **ARTICLE 6. REPAIRS, MAINTENANCE AND RESTORATION**

6.01 **Maintenance by Lessee:** Lessee shall, at Lessee's sole expense, keep the Leased Premises and all improvements of any kind, which may be existing at the commencement of the Lease Term in good repair, condition and appearance. MDC specifically acknowledges its obligations, at its sole expense, to keep in good repair, condition and appearance the foundation, roof, exterior walls and structural portions of the interior walls of the Building located on the Leased Premises. Lessee shall keep mowed and in a sightly condition all landscaping and grass areas within the Lease Premises. MDC shall be the sole judge of the quality of Lessee's maintenance; provided, however, MDC shall not unreasonably withhold acceptance of said repairs or maintenance. Upon written notice by MDC to Lessee, Lessee shall be required to perform such reasonable maintenance under this Section 6.01, as MDC considers necessary. If Lessee does not undertake such maintenance within ten (10) days after receipt of written notice, MDC shall have the right to enter on the Leased Premises and perform the necessary maintenance, the cost of which shall be borne by Lessee. Other items of maintenance for which Lessee shall be solely responsible shall include, but not be limited to, the following:

- (a) Janitorial services, providing janitorial supplies, window washing, rubbish and trash removal;
- (b) Supply and replacement of light bulbs in and on all buildings (except lighting removed for causing obstructions or glare);
- (c) Replacement of cracked or broken glass in all buildings;
- (d) Cleaning of interior stoppages in interior plumbing fixtures and drain lines up to the first manhole or clean out outside of the exterior of the building where the stoppage occurred;
- (e) Replacement of floor covering;
- (f) Maintenance of all doors and door operating systems, including weather stripping and glass replacement;

- (g) Painting, repairing and replacement of interior walls not resulting from structural failure;
- (h) Landscaping and grass cutting services within the Leased Premises, including, but not limited to, repair or replacement of exterior building flood lights and planter lights;
- (i) Repair or replacement of heating, air conditioning, ventilation, electrical, plumbing, or mechanical systems, or their respective components; and
- (j) Maintenance of all aprons, ramps, and roadways that are constructed by Lessee.

Subject to the provisions of Section 5.05, on the last day of the term hereof, or on any earlier termination, Lessee shall surrender the Leased Premises to MDC in the same condition as received, except for fire and casualty, ordinary wear and tear, clean and free of debris.

- 6.02 **Trash and Waste Removal:** Lessee agrees to cause to be removed from the Leased Premises, at its own expense, all waste, garbage and rubbish, and agrees not to deposit same on the Leased Premises except temporarily in waste or garbage containers provided by Lessee at Lessee's expense. Lessee further agrees that Lessee will store all parts, supplies, and other materials on the interior of buildings located on the Leased Premises, provided, however, that any parts or supplies which must be kept outside because of volatility of the supply item or the size of the part will be kept out of view of the public traveling on public rights of way or other surrounding tenants by installation of fencing or other means of screening approved by the MDC and the Director of Airports.

## ARTICLE 7. ACCESS TO AND USE OF AIRPORT

- 7.01 **Access to Airport:** City shall maintain all roads on the Airport giving access to the Leased Premises in good and adequate condition for use by cars and trucks and shall maintain free and uninterrupted access to the Leased Premises over said roads at all times; provided, however, MDC shall not be in default of this Agreement if access is interrupted.
- 7.02 **Right to Use Airport:** Lessee and Lessee's employees, sublessees, and guests shall have the right to use that part of the Airport and its facilities not included within the Leased Premises in common with others authorized to do so. Such use shall be subject to any and all applicable federal, state or local laws, ordinances, statutes, rules, regulations, or orders of any governmental authority, lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.
- 7.03 **Vehicular Operations on the Airfield:** No vehicles of Lessee, its employees, customers or invitees will be allowed to operate on, or cross, the runways and

taxiways and their respective safety areas of the Airport. When necessary, Airport Operations Control Center personnel will provide Lessee escorted access to and from the airfield area.

- 7.04 **Airport Security Rules and Regulations:** Lessee, its directors, officers, employees, and contractors shall comply with all federal and local Airport Security Regulations adopted by the City or the Department of Airports as such rules and regulations exist or may hereafter be amended.
- 7.05 **14 C.F.R. Part 77 Requirements:** Lessee agrees to comply with the notification and review requirements set forth in Part 77 of the Federal Aviation Regulations [14 CFR Part 77] in the event any future structure, antenna or building is planned for the Leased Premises, or in the event of any planned modification of any present or future building, antenna or structure located on the Leased Premises.
- 7.06 **Control of Structures:** Lessee shall not erect nor permit the erection of any structure or object, nor permit the growth of any tree on the Leased Premises which highest point is above a mean sea level elevation established by the FAA and City as a height limitation on such structures or objects. City reserves the right to enter upon the Leased Premises and to remove the offending structure or object and cut the offending tree at Lessee's expense.
- 7.07 **Aerial Approaches:** City reserves the right to take any action it considers necessary to protect the aerial approaches of the Airport against obstruction together with the right to prevent Lessee from erecting or permitting to be erected any building or other structure on or adjacent to the Airport which, in the opinion of the City, would limit the usefulness of the Airport or constitute a hazard to aircraft.
- 7.08 **Right of Over-flight:** There is hereby reserved to the City, for the use and benefit of the public, a right of flight for the passage of aircraft above the surface of the Leased Premises, together with the right to cause in said airspace such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air, using said airspace for landing at, taking off from or operating on the Airport.

## **ARTICLE 8. INSURANCE AND INDEMNITY**

- 8.01 **Lessee's Minimum Insurance Amounts:** Lessee shall obtain and maintain continuously in effect at all times during the Lease Term, at Lessee's sole expense, at least the following minimum insurance with a carrier or carriers licensed to do business in the State of Texas and satisfactory to the MDC:
- (a) Property and Casualty Insurance insuring against loss or damage to Lessee's improvements and any and all property being maintained or repaired by Lessee due to fire, lightning and all other perils included in standard extended coverage policies, and vandalism and malicious

mischievous, all in amounts of not less than one-hundred percent (100%) of replacement value;

- (b) Commercial General Liability Insurance against claims for bodily injury, death, or property damage occurring on, in or about the Leased Premises, or any other portion of the Airport, in at least the amount of \$10,000,000.00 per individual, \$10,000,000.00 per occurrence and \$10,000,000.00 with respect to property, and the statutory limits with respect to worker's compensation.

- 8.02 **Lessee's Coverage Primary:** All insurance herein required shall apply as primary and not in excess of or contributing with other insurance which the Lessee may carry. Insurance provided pursuant to Section 8.01 shall name the MDC and the City as additional insureds or loss payees as the case may be and provide for a waiver of subrogation in favor of the MDC and the City. The commercial general liability policy as provided in Paragraph 8.01 (b) shall provide contractual liability coverage sufficiently broad so as to include the liability assumed by Lessee under this Agreement. The Lessee's insurance policies as required by this Agreement shall apply separately to the MDC and City as if separate policies had been issued to Lessee and MDC and City.
- 8.03 **Contents of General Liability Policy:** Lessee's Commercial General Liability policy shall protect the MDC, the City and Lessee against any and all liability to any person or persons whose property damage or personal injury arises out of or is in connection with the occupation, use, or condition of the Leased Premises or resulting from any injury or damage occurring on or about the roads, driveways or other public areas of the Leased Premises used by Lessees, its trustees, officers, employees, students, invitees, and contractors at the Airport, whether or not such damage or injury is the result of negligence of the Lessee or its officers, employees, representatives, invitees, licensees, contractors, agents, guests, or students.
- 8.04 **Cancellation:** Certificates of Insurance: Lessee's insurance as required by this Agreement shall not be subject to cancellation or material alteration until at least thirty (30) days written notice has been provided to the MDC. Lessee shall furnish to the MDC, annually, Certificates of Insurance showing MDC and City as additional insureds and evidencing that all of the herein-stated requirements have been met.
- 8.05 **MDC's Right to Purchase Insurance:** In the event such insurance as required by Section 8.01, above, shall lapse, the MDC reserves the right to obtain such insurance at Lessee's expense. Upon demand from MDC, Lessee shall reimburse MDC for the full amount of the premium paid on Lessee's behalf.
- 8.06 **Effect of Sublease:** In the event the Leased Premises are subleased by Lessee in accordance with Article 11, Lessee shall be relieved of the insurance obligations set forth herein provided that the sublessee obtains and maintains insurance that fully complies with Article 8.



- 8.07 **Indemnity:** LESSEE WILL INDEMNIFY AND HOLD HARMLESS AND DEFEND MDC AND CITY AND ALL OF MDC'S AND CITY'S OFFICERS, AGENTS AND EMPLOYEES FROM ALL SUITS, ACTIONS, CLAIMS, DAMAGES, PERSONAL INJURIES, LOSSES, PROPERTY DAMAGE AND EXPENSES OF ANY CHARACTER WHATSOEVER, INCLUDING REASONABLE ATTORNEY'S FEES, BROUGHT FOR OR ON ACCOUNT OF ANY INJURIES OR DAMAGES RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS OR PROPERTY, ON ACCOUNT OF ANY NEGLIGENT ACT OF LESSEE, its agents or employees, or any subcontractor, arising out of, or resulting from, Lessee's use of, or activities on, the Leased Premises, and Lessee will be required to pay any judgment with costs which may be obtained against MDC or City or any of MDC's or City's officers, agents or employees, including reasonable attorney's fees.

#### ARTICLE 9. UTILITIES

Lessee shall be solely responsible for the payment of all electric, telephone, water, refuse, natural gas and other public utility services used on the Leased Premises.

#### ARTICLE 10. SIGNS

- 10.01 **Consent Required:** Except with the prior written consent of the Director of Airports, which shall not be unreasonably withheld, Lessee shall not erect, maintain or display any signs or any advertising at, or on, the exterior part of structures on the Leased Premises, or inside any buildings located on the Leased Premises so as to be visible through the window or exterior doors thereof.
- 10.02 **Removal on Termination:** Upon the termination of this Agreement, Lessee shall remove, obliterate or paint out, as the MDC may direct, any and all signs and advertising on the Leased Premises or elsewhere at the Airport, and in connection therewith shall restore the Leased Premises to the same condition as prior to the placement of any such signs or advertising. In the event that there is a failure by Lessee to so remove, obliterate or paint out each and every sign or advertising and so to restore the Leased Premises, the MDC may, at its option, perform the necessary work at the expense of Lessee, and the charge therefor shall be paid by Lessee to the MDC on demand. In certain circumstances, the MDC may elect to allow specific signs to remain as existing at the termination of this Agreement. Such signs shall be identified and agreed upon mutually, in writing, by Lessee and MDC.

#### ARTICLE 11. SUBLEASING

At no time shall Lessee sublease any portion of the Leased Premises or otherwise assign its interests or obligations in this Lease Agreement without the written consent of the MDC. Any such assignment or attempted assignment shall be void.

## ARTICLE 12. TAX LIENS

Lessee shall be solely responsible for the collection and payment of all applicable federal, state, and local taxes, including, but not limited to, sales, use, amusement, or excise tax required to be collected and paid over by Lessee to the appropriate taxing authority. Furthermore, Lessee shall be responsible for the payment of any applicable ad valorem taxes and any taxes on Lessee's personal property located on the Leased Premises. Lessee shall at no time permit the foreclosure of any tax liens to Lessee's leasehold interest in the Leased Premises or the buildings, fixtures, or other improvements located on the Leased Premises. The MDC shall have the right to pay such taxes due after Lessee's refusal to pay such taxes, and upon demand Lessee shall reimburse the MDC for the amount of taxes paid plus any penalties, interests, and attorney's fees incurred, subject to Lessee's right to challenge the validity of such taxes in whole or in part. In the event that Lessee is successful in any challenge regarding the payment of any tax, the MDC shall be subrogated to any recovery obtained by Lessee to the extent of the amount of taxes, interests, penalties, and attorneys fees previously paid by the MDC and not already reimbursed by Lessee.

## ARTICLE 13. DEFAULT AND REMEDIES

13.01 **Default by Lessee:** The following shall be deemed to be events of default by Lessee under this Agreement:

- (a) Lessee shall fail to pay when due any installment of rent or any other payment required pursuant to this Agreement not cured within ten (10) days of written notice by MDC to Lessee of such failure;
- (b) Lessee shall abandon any substantial portion of the Leased Premises;
- (c) Lessee or any guarantor of Lessee's obligations hereunder shall file a petition or be adjudged bankrupt or insolvent under any applicable federal or state bankruptcy or insolvency law or admit that it cannot meet its financial obligations as they become due, or a receiver or trustee shall be appointed for all or substantially all of the assets of Lessee or any guarantor of Lessee's obligations hereunder;
- (d) Lessee or any guarantor of Lessee's obligations hereunder shall make a transfer in fraud of creditors or shall make an assignment for the benefit of creditors;
- (e) Lessee shall do or permit to be done any act which results in a lien being filed against the Leased Premises and not removed or bonded over within thirty (30) days of Lessee being notified in writing of such lien being filed;
- (f) The liquidation, termination, dissolution of Lessee or any guarantor of Lessee's obligations hereunder; or
- (g) Lessee shall be in noncompliance with any other term, provision or covenant of this Agreement, other than those specified in subparts (a)

through (f) above and not cured within thirty (30) days of written notice by MDC to Lessee of such failure.

- 13.02 **Abandonment of Business by Lessee:** Lessee further agrees that the abandonment for a period of thirty (30) days by Lessee of the conduct of its business activities at the Airport shall terminate Lessee's rights under this Agreement. By so terminating this Agreement, MDC does not waive any other claim or rights against Lessee. For the purposes of this paragraph, the term "abandonment" shall mean the failure of Lessee to be open for business on the Leased Premises except in the case of war, strike, fire, other destruction of the Building, catastrophe or causes beyond Lessee's control.
- 13.03 **No Remedy Exclusive:** No remedy herein conferred upon or reserved to the MDC or Lessee is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or hereafter existing under law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the MDC and Lessee to exercise any remedy reserved to it in this section, it shall not be necessary to give any notice, other than such notice as may be herein expressly required.
- 13.04 **No Waiver of Breach:** MDC's failure or delay in declaring the existence of an event of default by Lessee shall not be construed as a waiver thereof, nor shall it be construed so as to waive or to lessen the right of the MDC to insist upon the performance by Lessee of any term, covenant or condition hereof, or to exercise any rights given it on account of any such event of default. A waiver of any particular event of default shall not be deemed to be a waiver of the same, similar of any other subsequent event of default.
- 13.05 **Expeditious Action:** Notwithstanding any provision as to notice in this Agreement herein contained, if in MDC's reasonable judgment the continuance of any event of default by Lessee for the full period of the notice to cure the event of default will jeopardize the operation of the Airport or the rights of the MDC or the other Airport tenants, MDC may, without notice, elect to perform those acts in respect to which Lessee is in default. Lessee shall reimburse MDC for any reasonable and necessary costs incurred by the MDC pursuant to this Section 13.05.

#### **ARTICLE 14. TERMINATION BY LESSEE**

- 14.01 Except for the payment by Lessee to MDC of rents or other amounts past due accrued but not yet due, Lessee shall have the right to terminate this Agreement in its entirety, and all rights and obligations ensuing therefrom immediately upon the occurrence of the following:

- (a) The issuance of any order, rule or regulation of the Federal Aviation Administration, or its successor federal agency, or other competent government authority, federal or state, or the issuance and execution of any judicial process by any court of competent jurisdiction, materially restricting for a period of at least sixty (60) days, the use of the Airport for aeronautical purposes; provided that none of the foregoing is due to any fault of Lessee; or
  - (b) The material restriction of the City's operation of the Airport by action of the federal government, or any department or agency thereof, under its wartime or emergency powers, and the continuance thereof for a period of not less than sixty (60) days; provided, however, that without prejudice to the rights of Lessee to terminate as above provided, the MDC and Lessee may mutually agree to adjust fees and charges; or
  - (c) Material restriction of the operation of the Airport arising from City's failure to maintain and keep in repair the landing area of the Airport.
- 14.02 Lessee terminates this Agreement for any of the reasons set forth in (a) through (c) of Article 14, MDC shall promptly repay Lessee any rent previously paid by Lessee attributable to the period following the date of such termination.

#### ARTICLE 15. MISCELLANEOUS PROVISIONS

- 15.01 **Quiet Enjoyment:** Upon the performance of the covenants and agreements on the part of the Lessee to be performed hereunder, the Lessee shall peaceably have and enjoy the Leased Premises, appurtenances, facilities, licenses and privileges granted in this Agreement.
- 15.02 **Force Majeure:** Neither the MDC nor Lessee shall be deemed in violation of this Agreement if it is prevented from performing any of its obligations hereunder except the obligation to pay rent by reason of strikes, boycotts, labor disputes, embargoes, shortages of materials, act of God, act of superior governmental authority, weather conditions, floods, riots, rebellions, acts of sabotage or any other circumstances for which it is not responsible or which are not in its control.
- 15.03 **Independent Contractor:** It is expressly understood and agreed that Lessee shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant or employee of the MDC; that Lessee shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors; that the doctrine of *respondeat superior* shall not apply as between MDC and Lessee, its officers, agents, employees, contractors and subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between MDC and Lessee. No person performing any of the work and services described hereunder shall be considered an officer, agent, servant or employee of the MDC. Further, it is specifically understood and agreed that

nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. Lessee shall be an independent contractor under this Agreement and shall assume all the rights, obligations and liabilities, applicable to it as such independent contractor hereunder and any provisions in this Agreement which may appear to give MDC the right to direct Lessee as to details of doing the work herein covered or to exercise a measure of control over the work shall be deemed to mean that Lessee shall follow the desires of MDC in the results of the work only. The MDC does not have the power to direct the order in which the work is done. The MDC shall not have the right to control the means, methods or details of the Lessee's work.

- 15.04 **Inspection by MDC:** Upon reasonable prior notice, MDC may enter upon the Leased Premises at any reasonable time for any purpose necessary, incidental to or connected with the performance of MDC's obligations hereunder, or in the exercise of its governmental functions, for fire protection or security purposes, or for inspecting or maintaining the Leased Premises, or doing any and all things MDC is obligated to do, or which may be deemed by MDC necessary or desirable for the proper conduct and operation of the Airport or the protection of MDC's interests.
- 15.05 **On-Site Representatives:** Lessee shall select and appoint a representative or representatives for its operations at the Airport. The representatives shall be qualified and experienced, and vested with the full power and authority to act in the name of the Lessee with respect to the method, manner and conduct of the operation of Lessee to be performed under this Agreement.
- 15.06 **Conformance with Rules and Regulations:** The use of the Airport by Lessee shall be subject to any and all rules, regulations and ordinances which are now in force or which may be hereafter adopted by the City with respect to the operation and use of the Airport, but no such rules, regulations, or ordinances shall increase the payable by Lessee under this Agreement or otherwise materially and adversely affect Lessee's tenure of the Leased Premises under this Lease. Furthermore, this Agreement and Lessee's use of the Airport shall be subject to any and all applicable laws, ordinances, resolutions, statutes, rules, regulations or orders of any federal, state or local governmental authority lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.
- 15.07 **Licenses and Permits:** Lessee hereby agrees that it shall, at its own expense and cost, procure and obtain all lawfully required licenses and permits, certificates and other authorizations required by any governmental authority, in connection with or covering the operations or activities permitted to be performed by it under the provisions of this Agreement.

- 15.08 **Notices:** Notices provided for in this Agreement shall be either hand delivered or sent by certified mail, return receipt requested, postage prepaid, and properly addressed as follows:

If to MDC:                      Executive Director  
Midland Development Corporation  
109 N. Main St.  
Midland, Texas 79701

With Copy To:              City Manager  
P. O. Box 1152  
300 North Loraine  
Midland, Texas 79702

If to Lessee:                Orbital Outfitters, LTD  
Attn: Jeff Feige  
225 10<sup>th</sup> Street S.E.  
Washington, D.C. 20003

The parties may change the representative or address for delivery of notices from time to time by sending written notices to the other party. All notices shall be in writing and effective only upon actual receipt.

- 15.09 **Governing Law and Venue:** This Agreement shall be governed by the laws of the State of Texas. All performance and payment made pursuant to this Agreement shall be deemed to have occurred in Midland County, Texas. Exclusive venue for any claims, suits or any other action arising from or connected in any way to this Agreement or the performance of this Agreement shall be in Midland County, Texas. The obligations and undertakings of each of the parties to this Agreement shall be deemed to have occurred in Midland County, Texas.
- 15.10 **Severability:** If any provision of this Agreement is invalid or unenforceable, this Agreement shall be considered severable as to such provision, and the remainder of this Agreement shall remain valid and binding as though such invalid or unenforceable provisions were not included herein.
- 15.11 **Captions:** Section headings are inserted herein only as a matter of convenience and for reference, and in no way defines, limits or describes the scope or intent to any provision herein.
- 15.12 **Use of Language:** Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular shall be held to include the plural, unless the context otherwise requires.

- 15.13 **Counterparts:** This Agreement may be executed in multiple counterparts, each of which shall be deemed as original, and all of which constitute but one and the same instrument.
- 15.14 **Development of the Airport:** The parties understand and agree future development, changes, alterations, modifications or improvement to the Airport are in the sole discretion of the City, subject only to such notification to Lessee that the Federal Aviation Administration may dictate.
- 15.15 **Subordination to Other Agreements:** This Agreement shall be subordinate to the provisions and requirements of any existing or future agreement between the MDC and the City relative to the Leased Premises, including the lease agreement between the MDC and the City regarding the Leased Premises, which is attached hereto and incorporated herein as Exhibit "B"; and the City and the United States, relative to the development, operation or maintenance of the Airport.
- 15.16 **No Exclusivity on Aeronautical Services:** Nothing herein contained shall be construed to grant or authorize the granting of the exclusive right to provide aeronautical services to the public as prohibited by Section 308(a) of the Federal Aviation Act of 1958, as amended.
- 15.17 **Discrimination Prohibited:** The Lessee, for itself, its trustees, officers, legal representatives, successors-in-interest and assigns, as a part of the consideration hereof, agrees (1) that no person on the grounds of race, color, sex, national origin, veteran status or disability shall be excluded from participation in, denied the benefits of or be otherwise subjected to discrimination in the use of the Leased Premises; (2) that in the construction of any improvements on, over or under the Leased Premises and the furnishing of services thereon, no person on the grounds of race, sex, color, national origin, or disability shall be excluded from participation in, denied the benefits of or otherwise be subjected to discrimination; (3) that the Lessee shall use the Leased Premises and the Airport in compliance with all other requirements imposed by, or pursuant to, Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, office of the Secretary, Part 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said regulations may be amended. In the event of breach of any of the above nondiscrimination covenants, the MDC shall have the right to terminate this Agreement and to re-enter and repossess the Leased Premises and the improvements thereon, and hold the same as if said Agreement were terminated by its own term pursuant to Section 2.01 above.
- 15.18 **Affirmative Action Program:** Lessee assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, to ensure that no person shall on the grounds of race, creed, color, national origin, sex or disability be excluded from participating in any employment activities covered in 14 CFR Part 152, Subpart E. Lessee assures that no person shall be excluded on these grounds

from participating in or receiving the services or benefits of any program or activity covered by this Agreement.

- 15.19 **Entire Agreement:** This Agreement embodies the entire agreement between the MDC and Lessee, and supersedes all prior agreements and understandings, whether written or oral, and all contemporaneous oral agreements and understandings relating to the subject matter hereof. This Agreement shall not be changed, modified, discharged or extended, except by written instrument duly executed by MDC and Lessee. The parties agree that no representations or warranties shall be binding upon either party unless expressed in writing in the aforesaid Agreement.
- 15.20 **Sovereign Immunity:** By executing this Agreement the MDC is not waiving its right of sovereign immunity. The MDC is retaining its immunity from suit. The MDC is not granting consent to be sued by legislative resolution or action.  
**THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.**
- 15.21 **Third-Party Beneficiary:** The MDC's approval of this Agreement does not create a third-party beneficiary. There is no third-party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third-party beneficiary or other rights hereunder.
- 15.22 **Notice of Alleged Breach:** As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Agreement, Lessee or its legal representative, shall give the Chairman of the MDC, or any other reasonable official of the MDC, notice in writing of such damages, duly verified, within one hundred and twenty (120) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which the Lessee will settle, the physical and mailing addresses of Lessee at the time and date the claim was presented and the physical and mailing addresses of Lessee for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom the Lessee relies to establish its claim; and a failure to so notify the MDC within the time and manner provided herein shall exonerate, excuse and except the MDC from any liability whatsoever. The MDC is under no obligation to provide notice to Lessee that Lessee's notice is insufficient. MDC reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, Lessee's failure to comply with the requirements herein shall perpetually bar Lessee's claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless if MDC has



actual or constructive notice or knowledge of said claim or alleged damages. Lessee agrees that the requirements of this entire agreement are reasonable.

15.23 **Release:** LESSEE HEREBY RELEASES, RELINQUISHES, ACQUITS AND FOREVER DISCHARGES MDC, MDC'S EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS, CLAIMS, DAMAGES OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH LESSEE HAS OR MIGHT HAVE IN THE FUTURE, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, QUANTUM MERUIT, DUE PROCESS AND TAKINGS CLAUSES UNDER THE TEXAS AND UNITED STATES CONSTITUTION, TORT CLAIMS OR MDC'S NEGLIGENCE.

15.24 **Waiver of Attorney Fees:** By executing this Agreement, LESSEE AND MDC AGREE TO WAIVE AND DO HEREBY WAIVE ANY CLAIM THEY HAVE OR MAY HAVE AGAINST THE OTHER PARTY, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THE AGREEMENT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THE AGREEMENT. LESSEE AND MDC SPECIFICALLY AGREE THAT IF LESSEE OR MDC BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS AGREEMENT, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET SEQ., AS AMENDED), LESSEE AND MDC EACH AGREES TO WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH LESSEE OR MDC MIGHT OTHERWISE BE ENTITLED.

Lessee and MDC agree that this is the intentional relinquishment of a presently existing known right. Each party acknowledges that it understands all terms and conditions of the Agreement.

By execution of the Agreement, Lessee hereby represents and warrants to the MDC that Lessee has read and understood the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be legally executed in duplicate this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

**MIDLAND DEVELOPMENT CORPORATION**

\_\_\_\_\_, Chairman

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_, Secretary

**ORBITAL OUTFITTERS, LTD.**

By: \_\_\_\_\_  
Jeff Feige, Chief Executive Officer

STATE OF \_\_\_\_\_ §  
COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on this \_\_\_\_\_, day of \_\_\_\_\_, 2014, by Jeff Feige, Chief Executive Officer, on behalf of Orbital Outfitters, Ltd., a corporation.

[SEAL]

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

THE STATE OF TEXAS §  
COUNTY OF MIDLAND §

This instrument was acknowledged before me on this the \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_, by, \_\_\_\_\_, \_\_\_\_\_, of Midland Development Corporation, a Texas nonprofit corporation, on behalf of said corporation.

Notary Public, in and for the State of  
\_\_\_\_\_



# City Council Agenda

Approved for Agenda:  
**CSharp**  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Courtney Sharp, City Manager

**SUBJECT:** Consider a Resolution authorizing the execution of a lease agreement with the City of Midland regarding certain real property located at Midland International Airport and described as an approximate 2 acre tract of land located in Section 8, Lot 1A, Block 3, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas.

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## **Purpose:**

Consider a Resolution authorizing the execution of a lease agreement with the City of Midland regarding certain real property located at Midland International Airport and described as an approximate 2 acre tract of land located in Section 8, Lot 1A, Block 3, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

\$24,000 will be paid annually to the City of Midland by the MDC.

## **Discussion:**

Midland International Airport will lease land to the MDC for use by Orbital Outfitter's for monthly rent of \$2,000.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION APPROVING A SUBLEASE AGREEMENT BETWEEN THE MIDLAND DEVELOPMENT CORPORATION AND ORBITAL OUTFITTERS, LTD. REGARDING CERTAIN REAL PROPERTY LOCATED AT MIDLAND INTERNATIONAL AIRPORT AND DESCRIBED AS A 1.28-ACRE TRACT OF LAND LOCATED IN LOT 1A, BLOCK 13, INDUSTRIAL PARK REGIONAL AIR TERMINAL, UNIT 12, MIDLAND, MIDLAND COUNTY, TEXAS**

**WHEREAS**, the Midland Development Corporation (“MDC”) Board of Directors previously authorized the execution of a sublease agreement with Orbital Outfitters, Ltd. regarding certain real property located at Midland International Airport and described as a 1.28-acre tract of land located in Lot 1A, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas; and

**WHEREAS**, the City Council finds it to be in the public interest to approve said agreement between the MDC and Orbital Outfitters, Ltd.;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**THAT** the sublease agreement between the Midland Development Corporation and Orbital Outfitters, Ltd. is hereby approved and shall be in a form substantially similar to that of Exhibit “A”, which is attached hereto and incorporated herein for all purposes.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting “AYE”:

Council members voting “NAY”:

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

\_\_\_\_\_  
Courtney Sharp, City Manager

APPROVED ONLY AS TO FORM:

\_\_\_\_\_  
Keith Stretcher, City Attorney

**SUBLEASE AGREEMENT  
BETWEEN THE MIDLAND DEVELOPMENT CORPORATION  
AND ORBITAL OUTFITTERS, LTD.**

THIS SUBLEASE AGREEMENT ("Agreement") is made and effective this 28<sup>th</sup> day of January, 2014, by and between the Midland Development Corporation ("MDC"), a Type A corporation existing under the authority of Chapter 504 of the Texas Local Government Code, and Orbital Outfitters, LTD. ("Lessee").

**RECITALS**

WHEREAS, the City of Midland, Texas ("City") owns and operates Midland International Airport (the "Airport") at which Lessee desires to locate its corporate headquarters as well as research and development activities related to its relocate its space and pressure suits manufacturing and development business; and

WHEREAS, the MDC has leased from the City certain land at the Airport, which is further described herein on **Exhibit A**, attached hereto ("Land");

WHEREAS, the MDC shall construct a Building on the Land to be built in accordance with plans and specifications approved by Lessee (the "Building"); and

WHEREAS, the MDC and Lessee desire to set forth the terms and conditions under which Lessee will sublease said Building and Land from the MDC for purposes of said business;

NOW, THEREFORE, for and in consideration of the covenants and conditions herein stated, City and Lessee agree as follows:

**ARTICLE 1. GRANT OF LEASE**

- 1.01 **Leased Premises:** MDC agrees to lease to Lessee, the Building and Land, hereinafter collectively referred to as the "Leased Premises." The parties hereby agree that any adjacent real property the MDC subsequently leases from the City of Midland through an option agreement may be included as part of the Leased Premises upon written approval of such inclusion by both parties. Any such real property included as part of the Leased Premises shall be subject to the terms and conditions of this Agreement. Lessee shall construct on the Land and shall have exclusive use of an altitude chamber complex subject to the terms and conditions of the Economic Development Agreement by and between the MDC and Lessee.
- 1.02 **Easements:** This Agreement shall be subject to such easements, rights-of way, drill sites, or other rights or reservations affecting the Leased Premises which are of record on the date hereof.
- 1.03 **Acceptance of Leased Premises:** Subject to the requirements of Section 6.01, BY EXECUTING THIS AGREEMENT THE LESSEE AGREES AND

ACKNOWLEDGES THE LESSEE UPON DELIVERY OF THE COMPLETED BUILDING TO LESSEE IS THEN TAKING OR LEASING THE LEASED PREMISES "AS IS" WITH ANY AND ALL LATENT AND PATENT DEFECTS AND THAT THERE IS NO WARRANTY, EXPRESS OR IMPLIED BEING MADE BY THE MDC OR CITY THAT THE LEASED PREMISES ARE FIT FOR A PARTICULAR PURPOSE. THE LESSEE ACKNOWLEDGES, BY EXECUTING THIS AGREEMENT, THAT LESSEE IS NOT RELYING UPON ANY REPRESENTATION MADE BY THE MDC OR CITY WITH RESPECT TO THE CONDITION OF THE LEASED PREMISES, BUT IS RELYING UPON LESSEE'S EXAMINATION OF THE PLANS AND SPECIFICATIONS AND WILL RELY UPON EXAMINATION OF THE LEASED PREMISES ONCE COMPLETED. LESSEE ALSO RECOGNIZES BY EXECUTING THIS AGREEMENT, THAT THE LESSEE IS AGREEING TO ACCEPT THE LEASED PREMISES "AS IS," THAT LESSEE AGREES TO MAKE LESSEE'S OWN APPRAISAL OF THE LEASED PREMISES AND TO ACCEPT THE RISK THAT LESSEE MAY BE WRONG. THE MDC GIVES NO ASSURANCES, EXPRESS OR IMPLIED CONCERNING THE VALUE OR CONDITION OF THE LEASED PREMISES SOLD. IN NO EVENT SHALL A LESSEE HAVE A RIGHT TO RECOVER CONSEQUENTIAL DAMAGES. THEREFORE, THE LESSEE WILL TAKE THE LEASED PREMISES UNDER THE EXPRESS UNDERSTANDING THE LEASED PREMISES ARE ACCEPTED "AS IS" AND WITH ALL FAULTS, EXCLUDING EXPRESS OR IMPLIED WARRANTIES. MDC AGREES TO ENFORCE FOR THE BENEFIT OF LESSEE ALL CLAIMS FOR CONSTRUCTION DEFECTS OR FAILURE TO CONSTRUCT THE BUILDING IN ACCORDANCE WITH THE PLANS AND SPECIFICATIONS.

## **ARTICLE 2. TERM OF AGREEMENT**

- 2.01 **Lease Term:** The term of this Agreement shall commence on the date which is the earlier of (a) the date which is thirty (30) days after a Certificate of Occupancy is issued for the Building or (b) the date Lessee takes possession of the Building ("Commencement Date), and terminate on the date which is the last day of the twelfth year after the Commencement Date, ("the Lease Term") unless terminated earlier pursuant to the provisions of this Agreement.
- 2.02 **Extended Term:** Lessee shall have the option to extend the term of this Lease for two (2) additional terms of ten (10) years each by giving written notice to MDC not less than twelve (12) months prior to the end of the then-current term. Upon notice to MDC, MDC and Lessee shall promptly enter into a renewal of the Lease Term under the same terms and conditions as set forth herein, except the Base Rent due hereunder shall be at the "Market Rate". As used herein, Market Rate shall mean the rent currently being charged by lessors to lessees in Midland County, Texas, for space of comparable locate, site, quality and utility taking into consideration all concessions and benefits offered by the lessors.



### ARTICLE 3. RENT

- 3.01 **Amount of Base Rent:** Beginning on the Commencement Date and continuing through the Lease Term each year by January 5, Lessee agrees to pay annual rent to the MDC for the Leased Premises in the amount of \$1.00.
- 3.02 **Delivery of Rent:** All payments required of Lessee by this Agreement shall be delivered by mail, or in person, to the Midland Development Corporation, 109 N. Main Street, Midland, Texas 79701, or to such other location as specified in writing by the MDC from time to time, no later than the date such payment is due, unless such due date falls on a Saturday, Sunday, or City holiday, in which case such rent shall be due on the first business day following the date such payment is due.

### ARTICLE 4. USE OF LEASED PREMISES

- 4.01 **Permitted Uses:** Lessee shall be permitted to use the Leased Premises for the purpose of conducting for-profit commercial services or activities consisting of any or all of the following operations and no others:
- (a) Location of corporate headquarters and operation of research and development activities related to space flight suits and related activities;
  - (b) Operation of an Altitude Chamber Complex as well as warehouse, freight distribution and storage services for commercial and non-commercial activities;
  - (c) Repair and maintenance service for equipment related to the space industry;
  - (d) Sales of parts and equipment, and supplies related to the space industry;
  - (e) Storage of such equipment and apparatus as may be incidental and/or necessary to Lessee's operations, including motor vehicles operated and/or owned by Lessee; and
  - (f) Such other uses as may be permitted in writing by the MDC.
- 4.02 **Prohibited Uses:** Lessee agrees at all times to comply with the following:
- (a) Lessee shall at no time use, or permit the use of, the Leased Premises in a manner that is contrary to applicable federal, state, or local laws, ordinances, rules, or regulations, which shall include, but not be limited to, applicable Federal Aviation Administration ("FAA") rules and regulations and applicable regulations for the use of the Airport as may from time to time be promulgated by the City;
  - (b) Lessee shall not permit any permanent, unshielded light or illumination source to cause glare as viewed from any street, adjacent properties or operating aircraft;
  - (c) Lessee shall not cause or permit the burial of storage above ground on the Leased Premises of any hazardous waste or materials, as defined by

federal or state law, except in accordance with applicable federal, state, or local laws, ordinances, regulations and rules, as may be adopted or amended from time to time;

- (d) Lessee shall not cause or permit any use or activity on the Leased Premises which would create a hazardous condition for aircraft operating at the Airport;
- (e) Lessee shall not allow the Leased Premises to be used for parking of motor vehicles, motorcycles, or motor driven equipment by anyone other than customers, employees, or contractors of Lessee except as may be authorized by the Director of Airports, with all such parking being limited to areas designated by the Department of Airports for such parking. Lessee shall not be in default for the improper parking of vehicles over which neither Lessee nor any of its subtenants, customers, employees, or contractors have any control; and
- (f) Lessee shall not operate, nor permit the operation of, a car rental business from the Leased Premises, unless the Lessee or the operator of said car rental business has executed a car rental concession or permit agreement with the City; and
- (g) Lessee shall not allow scheduled airline passenger operations to be conducted on the Leased Premises.

4.03 **Compliance with Minimum Standards:** All activities conducted upon the Leased Premises, whether by Lessee or its sublessees, shall be in substantial conformance with the City's Minimum Standards for Aeronautical Activities, as such standards exist or may be duly amended from time to time by the City Council to the extent that such Minimum Standards may apply to Lessee's operations. MDC agrees to provide Lessee with written notice not later than 30 days prior to adoption of substantive changes to the Minimum Standards for Aeronautical Activities which would apply to Lessee's operations.

4.04 **Non-exclusive Uses:** Lessee understands and acknowledged that, as to that part of the Airport not included within the Leased Premises, the allowable uses permitted herein are on a non-exclusive basis with respect to other potential providers of aeronautical services at the Airport.

## **ARTICLE 5. OBLIGATIONS OF LESSEE WITH REGARD TO CONSTRUCTION OF IMPROVEMENTS**

5.01 **Approval of Plans Not Assurance of Design Quality:** The approval by the MDC and the Director of Airports of any plans and specifications applies only to the conformity of such plans to the general architectural and operational plan for the Leased Premises and the Airport. The approval of the MDC and the Director of Airports does not constitute approval of the quality of the architectural or engineering work performed. Neither the MDC, City nor the Director of Airports assumes any liability or responsibility for the architectural or engineering design or

for any defect in any building or improvement constructed from the plans or specifications. Construction of any contemplated improvements shall be in accordance with the plans presented to and approved by the MDC and the Director of Airports. All construction work shall be subject to inspection by a representative employed by the City or an inspector from the Code Enforcement Division of the City, or both, to determine that such work conforms to the plans and specifications approved by the MDC and the City.

- 5.02 **Contractor's Insurance; Bonds:** At any time construction activities are undertaken on the Leased Premises other than the initial construction of the Building, Lessee shall require that its contractor or contractors keep in force insurance issued by a responsible insurance company or companies authorized to conduct business in the State of Texas insuring the improvements during construction under Completed Builder's All Risk Insurance, including fire, extended coverage, vandalism and malicious mischief, in an amount equal to the full insurable value of such construction as the same progresses in order to insure continuity of construction and ultimate completion despite damage or destruction suffered during the course thereof. **ALL INSURANCE SHALL NAME THE MDC AND THE CITY AS ADDITIONAL INSUREDS AND CO-PAYEES AND PROVIDE FOR A WAIVER OF SUBROGATION IN FAVOR OF THE MDC AND THE CITY.** Lessee shall require all contractors performing construction work on the Leased Premises to provide payment and performance bonds issued by a responsible bonding company or companies authorized to conduct business in the State of Texas for the full amount of the cost of the construction to be performed on forms which are in compliance with Tex. Gov't Code Ch. 2253, as amended. The foregoing shall be made a part of any contract between Lessee and its contractor or contractor. In the event Lessee does not complete the construction work itself; it shall comply with the all-risk insurance provisions hereof.
- 5.03 **Compliance with Building Codes and Federal Standards:** All improvements made to the Leased Premises by Lessee shall comply with all applicable City Building Codes and federal standards for construction of airport improvements in effect at the time construction commences as well as all other applicable federal aviation regulations, if any.
- 5.04 **Encumbrance of Leasehold Estate:** Lessee shall at no time encumber or attempt to encumber its leasehold interest in the Leased Premises by deed of trust, mortgage, security agreement or other security interest.
- 5.05 **Ownership of Buildings, Improvements and Fixtures:** Any and all buildings, improvements (including, but not limited to all aprons, taxiways and roadways), additions, alterations, and fixtures existing on the Commencement Date or constructed or placed on any part of the Leased Premises during the Lease Term by City, MDC or Lessee shall be considered part of the real property of the Leased Premises, shall remain on the Leased Premises, and shall not be removed by Lessee or any sublessee without the written consent of the MDC. All improvements,

additions, alterations, and fixtures on the Leased Premises shall become the sole property of MDC and City upon termination of this Agreement without compensation to Lessee, it being understood and agreed by Lessee that the improvements located on the Leased Premises at the end of the Lease Term are additional consideration for this Agreement. Notwithstanding the above, Lessee shall have the right at any time during Lessee's occupancy of the Leased Premises, or within a reasonable time thereafter, to remove any and all furniture, machinery, equipment, and trade tooling, but not fixtures owned or placed by Lessee, in, under, or on the Leased Premises; provided, however, prior to the termination of the Lease Term, Lessee shall repair any damage to any buildings or improvements on the Leased Premises resulting from their removal. Any such personal property items which are not removed within sixty (60) days after the termination date of this Agreement shall become the property of City as of that date.

## **ARTICLE 6. REPAIRS, MAINTENANCE AND RESTORATION**

6.01 **Maintenance by Lessee:** Lessee shall, at Lessee's sole expense, keep the Leased Premises and all improvements of any kind, which may be existing at the commencement of the Lease Term in good repair, condition and appearance. MDC specifically acknowledges its obligations, at its sole expense, to keep in good repair, condition and appearance the foundation, roof, exterior walls and structural portions of the interior walls of the Building located on the Leased Premises. Lessee shall keep mowed and in a sightly condition all landscaping and grass areas within the Lease Premises. MDC shall be the sole judge of the quality of Lessee's maintenance; provided, however, MDC shall not unreasonably withhold acceptance of said repairs or maintenance. Upon written notice by MDC to Lessee, Lessee shall be required to perform such reasonable maintenance under this Section 6.01, as MDC considers necessary. If Lessee does not undertake such maintenance within ten (10) days after receipt of written notice, MDC shall have the right to enter on the Leased Premises and perform the necessary maintenance, the cost of which shall be borne by Lessee. Other items of maintenance for which Lessee shall be solely responsible shall include, but not be limited to, the following:

- (a) Janitorial services, providing janitorial supplies, window washing, rubbish and trash removal;
- (b) Supply and replacement of light bulbs in and on all buildings (except lighting removed for causing obstructions or glare);
- (c) Replacement of cracked or broken glass in all buildings;
- (d) Cleaning of interior stoppages in interior plumbing fixtures and drain lines up to the first manhole or clean out outside of the exterior of the building where the stoppage occurred;
- (e) Replacement of floor covering;
- (f) Maintenance of all doors and door operating systems, including weather stripping and glass replacement;

- (g) Painting, repairing and replacement of interior walls not resulting from structural failure;
- (h) Landscaping and grass cutting services within the Leased Premises, including, but not limited to, repair or replacement of exterior building flood lights and planter lights;
- (i) Repair or replacement of heating, air conditioning, ventilation, electrical, plumbing, or mechanical systems, or their respective components; and
- (j) Maintenance of all aprons, ramps, and roadways that are constructed by Lessee.

Subject to the provisions of Section 5.05, on the last day of the term hereof, or on any earlier termination, Lessee shall surrender the Leased Premises to MDC in the same condition as received, except for fire and casualty, ordinary wear and tear, clean and free of debris.

- 6.02 **Trash and Waste Removal:** Lessee agrees to cause to be removed from the Leased Premises, at its own expense, all waste, garbage and rubbish, and agrees not to deposit same on the Leased Premises except temporarily in waste or garbage containers provided by Lessee at Lessee's expense. Lessee further agrees that Lessee will store all parts, supplies, and other materials on the interior of buildings located on the Leased Premises, provided, however, that any parts or supplies which must be kept outside because of volatility of the supply item or the size of the part will be kept out of view of the public traveling on public rights of way or other surrounding tenants by installation of fencing or other means of screening approved by the MDC and the Director of Airports.

## **ARTICLE 7. ACCESS TO AND USE OF AIRPORT**

- 7.01 **Access to Airport:** City shall maintain all roads on the Airport giving access to the Leased Premises in good and adequate condition for use by cars and trucks and shall maintain free and uninterrupted access to the Leased Premises over said roads at all times; provided, however, MDC shall not be in default of this Agreement if access is interrupted.
- 7.02 **Right to Use Airport:** Lessee and Lessee's employees, sublessees, and guests shall have the right to use that part of the Airport and its facilities not included within the Leased Premises in common with others authorized to do so. Such use shall be subject to any and all applicable federal, state or local laws, ordinances, statutes, rules, regulations, or orders of any governmental authority, lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.
- 7.03 **Vehicular Operations on the Airfield:** No vehicles of Lessee, its employees, customers or invitees will be allowed to operate on, or cross, the runways and

taxiways and their respective safety areas of the Airport. When necessary, Airport Operations Control Center personnel will provide Lessee escorted access to and from the airfield area.

- 7.04 **Airport Security Rules and Regulations:** Lessee, its directors, officers, employees, and contractors shall comply with all federal and local Airport Security Regulations adopted by the City or the Department of Airports as such rules and regulations exist or may hereafter be amended.
- 7.05 **14 C.F.R. Part 77 Requirements:** Lessee agrees to comply with the notification and review requirements set forth in Part 77 of the Federal Aviation Regulations [14 CFR Part 77] in the event any future structure, antenna or building is planned for the Leased Premises, or in the event of any planned modification of any present or future building, antenna or structure located on the Leased Premises.
- 7.06 **Control of Structures:** Lessee shall not erect nor permit the erection of any structure or object, nor permit the growth of any tree on the Leased Premises which highest point is above a mean sea level elevation established by the FAA and City as a height limitation on such structures or objects. City reserves the right to enter upon the Leased Premises and to remove the offending structure or object and cut the offending tree at Lessee's expense.
- 7.07 **Aerial Approaches:** City reserves the right to take any action it considers necessary to protect the aerial approaches of the Airport against obstruction together with the right to prevent Lessee from erecting or permitting to be erected any building or other structure on or adjacent to the Airport which, in the opinion of the City, would limit the usefulness of the Airport or constitute a hazard to aircraft.
- 7.08 **Right of Over-flight:** There is hereby reserved to the City, for the use and benefit of the public, a right of flight for the passage of aircraft above the surface of the Leased Premises, together with the right to cause in said airspace such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air, using said airspace for landing at, taking off from or operating on the Airport.

## **ARTICLE 8. INSURANCE AND INDEMNITY**

- 8.01 **Lessee's Minimum Insurance Amounts:** Lessee shall obtain and maintain continuously in effect at all times during the Lease Term, at Lessee's sole expense, at least the following minimum insurance with a carrier or carriers licensed to do business in the State of Texas and satisfactory to the MDC:
- (a) Property and Casualty Insurance insuring against loss or damage to Lessee's improvements and any and all property being maintained or repaired by Lessee due to fire, lightning and all other perils included in standard extended coverage policies, and vandalism and malicious

mischievous, all in amounts of not less than one-hundred percent (100%) of replacement value;

- (b) Commercial General Liability Insurance against claims for bodily injury, death, or property damage occurring on, in or about the Leased Premises, or any other portion of the Airport, in at least the amount of \$10,000,000.00 per individual, \$10,000,000.00 per occurrence and \$10,000,000.00 with respect to property, and the statutory limits with respect to worker's compensation.

- 8.02 **Lessee's Coverage Primary:** All insurance herein required shall apply as primary and not in excess of or contributing with other insurance which the Lessee may carry. Insurance provided pursuant to Section 8.01 shall name the MDC and the City as additional insureds or loss payees as the case may be and provide for a waiver of subrogation in favor of the MDC and the City. The commercial general liability policy as provided in Paragraph 8.01 (b) shall provide contractual liability coverage sufficiently broad so as to include the liability assumed by Lessee under this Agreement. The Lessee's insurance policies as required by this Agreement shall apply separately to the MDC and City as if separate policies had been issued to Lessee and MDC and City.
- 8.03 **Contents of General Liability Policy:** Lessee's Commercial General Liability policy shall protect the MDC, the City and Lessee against any and all liability to any person or persons whose property damage or personal injury arises out of or is in connection with the occupation, use, or condition of the Leased Premises or resulting from any injury or damage occurring on or about the roads, driveways or other public areas of the Leased Premises used by Lessees, its trustees, officers, employees, students, invitees, and contractors at the Airport, whether or not such damage or injury is the result of negligence of the Lessee or its officers, employees, representatives, invitees, licensees, contractors, agents, guests, or students.
- 8.04 **Cancellation:** Certificates of Insurance: Lessee's insurance as required by this Agreement shall not be subject to cancellation or material alteration until at least thirty (30) days written notice has been provided to the MDC. Lessee shall furnish to the MDC, annually, Certificates of Insurance showing MDC and City as additional insureds and evidencing that all of the herein-stated requirements have been met.
- 8.05 **MDC's Right to Purchase Insurance:** In the event such insurance as required by Section 8.01, above, shall lapse, the MDC reserves the right to obtain such insurance at Lessee's expense. Upon demand from MDC, Lessee shall reimburse MDC for the full amount of the premium paid on Lessee's behalf.
- 8.06 **Effect of Sublease:** In the event the Leased Premises are subleased by Lessee in accordance with Article 11, Lessee shall be relieved of the insurance obligations set forth herein provided that the sublessee obtains and maintains insurance that fully complies with Article 8.

- 8.07 **Indemnity:** LESSEE WILL INDEMNIFY AND HOLD HARMLESS AND DEFEND MDC AND CITY AND ALL OF MDC'S AND CITY'S OFFICERS, AGENTS AND EMPLOYEES FROM ALL SUITS, ACTIONS, CLAIMS, DAMAGES, PERSONAL INJURIES, LOSSES, PROPERTY DAMAGE AND EXPENSES OF ANY CHARACTER WHATSOEVER, INCLUDING REASONABLE ATTORNEY'S FEES, BROUGHT FOR OR ON ACCOUNT OF ANY INJURIES OR DAMAGES RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS OR PROPERTY, ON ACCOUNT OF ANY NEGLIGENT ACT OF LESSEE, its agents or employees, or any subcontractor, arising out of, or resulting from, Lessee's use of, or activities on, the Leased Premises, and Lessee will be required to pay any judgment with costs which may be obtained against MDC or City or any of MDC's or City's officers, agents or employees, including reasonable attorney's fees.

#### ARTICLE 9. UTILITIES

Lessee shall be solely responsible for the payment of all electric, telephone, water, refuse, natural gas and other public utility services used on the Leased Premises.

#### ARTICLE 10. SIGNS

- 10.01 **Consent Required:** Except with the prior written consent of the Director of Airports, which shall not be unreasonably withheld, Lessee shall not erect, maintain or display any signs or any advertising at, or on, the exterior part of structures on the Leased Premises, or inside any buildings located on the Leased Premises so as to be visible through the window or exterior doors thereof.
- 10.02 **Removal on Termination:** Upon the termination of this Agreement, Lessee shall remove, obliterate or paint out, as the MDC may direct, any and all signs and advertising on the Leased Premises or elsewhere at the Airport, and in connection therewith shall restore the Leased Premises to the same condition as prior to the placement of any such signs or advertising. In the event that there is a failure by Lessee to so remove, obliterate or paint out each and every sign or advertising and so to restore the Leased Premises, the MDC may, at its option, perform the necessary work at the expense of Lessee, and the charge therefor shall be paid by Lessee to the MDC on demand. In certain circumstances, the MDC may elect to allow specific signs to remain as existing at the termination of this Agreement. Such signs shall be identified and agreed upon mutually, in writing, by Lessee and MDC.

#### ARTICLE 11. SUBLEASING

At no time shall Lessee sublease any portion of the Leased Premises or otherwise assign its interests or obligations in this Lease Agreement without the written consent of the MDC. Any such assignment or attempted assignment shall be void.



## ARTICLE 12. TAX LIENS

Lessee shall be solely responsible for the collection and payment of all applicable federal, state, and local taxes, including, but not limited to, sales, use, amusement, or excise tax required to be collected and paid over by Lessee to the appropriate taxing authority. Furthermore, Lessee shall be responsible for the payment of any applicable ad valorem taxes and any taxes on Lessee's personal property located on the Leased Premises. Lessee shall at no time permit the foreclosure of any tax liens to Lessee's leasehold interest in the Leased Premises or the buildings, fixtures, or other improvements located on the Leased Premises. The MDC shall have the right to pay such taxes due after Lessee's refusal to pay such taxes, and upon demand Lessee shall reimburse the MDC for the amount of taxes paid plus any penalties, interests, and attorney's fees incurred, subject to Lessee's right to challenge the validity of such taxes in whole or in part. In the event that Lessee is successful in any challenge regarding the payment of any tax, the MDC shall be subrogated to any recovery obtained by Lessee to the extent of the amount of taxes, interests, penalties, and attorneys fees previously paid by the MDC and not already reimbursed by Lessee.

## ARTICLE 13. DEFAULT AND REMEDIES

13.01 **Default by Lessee:** The following shall be deemed to be events of default by Lessee under this Agreement:

- (a) Lessee shall fail to pay when due any installment of rent or any other payment required pursuant to this Agreement not cured within ten (10) days of written notice by MDC to Lessee of such failure;
- (b) Lessee shall abandon any substantial portion of the Leased Premises;
- (c) Lessee or any guarantor of Lessee's obligations hereunder shall file a petition or be adjudged bankrupt or insolvent under any applicable federal or state bankruptcy or insolvency law or admit that it cannot meet its financial obligations as they become due, or a receiver or trustee shall be appointed for all or substantially all of the assets of Lessee or any guarantor of Lessee's obligations hereunder;
- (d) Lessee or any guarantor of Lessee's obligations hereunder shall make a transfer in fraud of creditors or shall make an assignment for the benefit of creditors;
- (e) Lessee shall do or permit to be done any act which results in a lien being filed against the Leased Premises and not removed or bonded over within thirty (30) days of Lessee being notified in writing of such lien being filed;
- (f) The liquidation, termination, dissolution of Lessee or any guarantor of Lessee's obligations hereunder; or
- (g) Lessee shall be in noncompliance with any other term, provision or covenant of this Agreement, other than those specified in subparts (a)

through (f) above and not cured within thirty (30) days of written notice by MDC to Lessee of such failure.

- 13.02 **Abandonment of Business by Lessee:** Lessee further agrees that the abandonment for a period of thirty (30) days by Lessee of the conduct of its business activities at the Airport shall terminate Lessee's rights under this Agreement. By so terminating this Agreement, MDC does not waive any other claim or rights against Lessee. For the purposes of this paragraph, the term "abandonment" shall mean the failure of Lessee to be open for business on the Leased Premises except in the case of war, strike, fire, other destruction of the Building, catastrophe or causes beyond Lessee's control.
- 13.03 **No Remedy Exclusive:** No remedy herein conferred upon or reserved to the MDC or Lessee is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or hereafter existing under law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the MDC and Lessee to exercise any remedy reserved to it in this section, it shall not be necessary to give any notice, other than such notice as may be herein expressly required.
- 13.04 **No Waiver of Breach:** MDC's failure or delay in declaring the existence of an event of default by Lessee shall not be construed as a waiver thereof, nor shall it be construed so as to waive or to lessen the right of the MDC to insist upon the performance by Lessee of any term, covenant or condition hereof, or to exercise any rights given it on account of any such event of default. A waiver of any particular event of default shall not be deemed to be a waiver of the same, similar of any other subsequent event of default.
- 13.05 **Expeditious Action:** Notwithstanding any provision as to notice in this Agreement herein contained, if in MDC's reasonable judgment the continuance of any event of default by Lessee for the full period of the notice to cure the event of default will jeopardize the operation of the Airport or the rights of the MDC or the other Airport tenants, MDC may, without notice, elect to perform those acts in respect to which Lessee is in default. Lessee shall reimburse MDC for any reasonable and necessary costs incurred by the MDC pursuant to this Section 13.05.

#### **ARTICLE 14. TERMINATION BY LESSEE**

- 14.01 Except for the payment by Lessee to MDC of rents or other amounts past due accrued but not yet due, Lessee shall have the right to terminate this Agreement in its entirety, and all rights and obligations ensuing therefrom immediately upon the occurrence of the following:

- (a) The issuance of any order, rule or regulation of the Federal Aviation Administration, or its successor federal agency, or other competent government authority, federal or state, or the issuance and execution of any judicial process by any court of competent jurisdiction, materially restricting for a period of at least sixty (60) days, the use of the Airport for aeronautical purposes; provided that none of the foregoing is due to any fault of Lessee; or
  - (b) The material restriction of the City's operation of the Airport by action of the federal government, or any department or agency thereof, under its wartime or emergency powers, and the continuance thereof for a period of not less than sixty (60) days; provided, however, that without prejudice to the rights of Lessee to terminate as above provided, the MDC and Lessee may mutually agree to adjust fees and charges; or
  - (c) Material restriction of the operation of the Airport arising from City's failure to maintain and keep in repair the landing area of the Airport.
- 14.02 Lessee terminates this Agreement for any of the reasons set forth in (a) through (c) of Article 14, MDC shall promptly repay Lessee any rent previously paid by Lessee attributable to the period following the date of such termination.

#### **ARTICLE 15. MISCELLANEOUS PROVISIONS**

- 15.01 **Quiet Enjoyment:** Upon the performance of the covenants and agreements on the part of the Lessee to be performed hereunder, the Lessee shall peaceably have and enjoy the Leased Premises, appurtenances, facilities, licenses and privileges granted in this Agreement.
- 15.02 **Force Majeure:** Neither the MDC nor Lessee shall be deemed in violation of this Agreement if it is prevented from performing any of its obligations hereunder except the obligation to pay rent by reason of strikes, boycotts, labor disputes, embargoes, shortages of materials, act of God, act of superior governmental authority, weather conditions, floods, riots, rebellions, acts of sabotage or any other circumstances for which it is not responsible or which are not in its control.
- 15.03 **Independent Contractor:** It is expressly understood and agreed that Lessee shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant or employee of the MDC; that Lessee shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors; that the doctrine of *respondeat superior* shall not apply as between MDC and Lessee, its officers, agents, employees, contractors and subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between MDC and Lessee. No person performing any of the work and services described hereunder shall be considered an officer, agent, servant or employee of the MDC. Further, it is specifically understood and agreed that

nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. Lessee shall be an independent contractor under this Agreement and shall assume all the rights, obligations and liabilities, applicable to it as such independent contractor hereunder and any provisions in this Agreement which may appear to give MDC the right to direct Lessee as to details of doing the work herein covered or to exercise a measure of control over the work shall be deemed to mean that Lessee shall follow the desires of MDC in the results of the work only. The MDC does not have the power to direct the order in which the work is done. The MDC shall not have the right to control the means, methods or details of the Lessee's work.

- 15.04 **Inspection by MDC:** Upon reasonable prior notice, MDC may enter upon the Leased Premises at any reasonable time for any purpose necessary, incidental to or connected with the performance of MDC's obligations hereunder, or in the exercise of its governmental functions, for fire protection or security purposes, or for inspecting or maintaining the Leased Premises, or doing any and all things MDC is obligated to do, or which may be deemed by MDC necessary or desirable for the proper conduct and operation of the Airport or the protection of MDC's interests.
- 15.05 **On-Site Representatives:** Lessee shall select and appoint a representative or representatives for its operations at the Airport. The representatives shall be qualified and experienced, and vested with the full power and authority to act in the name of the Lessee with respect to the method, manner and conduct of the operation of Lessee to be performed under this Agreement.
- 15.06 **Conformance with Rules and Regulations:** The use of the Airport by Lessee shall be subject to any and all rules, regulations and ordinances which are now in force or which may be hereafter adopted by the City with respect to the operation and use of the Airport, but no such rules, regulations, or ordinances shall increase the payable by Lessee under this Agreement or otherwise materially and adversely affect Lessee's tenure of the Leased Premises under this Lease. Furthermore, this Agreement and Lessee's use of the Airport shall be subject to any and all applicable laws, ordinances, resolutions, statutes, rules, regulations or orders of any federal, state or local governmental authority lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.
- 15.07 **Licenses and Permits:** Lessee hereby agrees that it shall, at its own expense and cost, procure and obtain all lawfully required licenses and permits, certificates and other authorizations required by any governmental authority, in connection with or covering the operations or activities permitted to be performed by it under the provisions of this Agreement.

- 15.08 **Notices:** Notices provided for in this Agreement shall be either hand delivered or sent by certified mail, return receipt requested, postage prepaid, and properly addressed as follows:

If to MDC:                      Executive Director  
Midland Development Corporation  
109 N. Main St.  
Midland, Texas 79701

With Copy To:                City Manager  
P. O. Box 1152  
300 North Loraine  
Midland, Texas 79702

If to Lessee:                  Orbital Outfitters, LTD  
Attn: Jeff Feige  
225 10<sup>th</sup> Street S.E.  
Washington, D.C. 20003

The parties may change the representative or address for delivery of notices from time to time by sending written notices to the other party. All notices shall be in writing and effective only upon actual receipt.

- 15.09 **Governing Law and Venue:** This Agreement shall be governed by the laws of the State of Texas. All performance and payment made pursuant to this Agreement shall be deemed to have occurred in Midland County, Texas. Exclusive venue for any claims, suits or any other action arising from or connected in any way to this Agreement or the performance of this Agreement shall be in Midland County, Texas. The obligations and undertakings of each of the parties to this Agreement shall be deemed to have occurred in Midland County, Texas.
- 15.10 **Severability:** If any provision of this Agreement is invalid or unenforceable, this Agreement shall be considered severable as to such provision, and the remainder of this Agreement shall remain valid and binding as though such invalid or unenforceable provisions were not included herein.
- 15.11 **Captions:** Section headings are inserted herein only as a matter of convenience and for reference, and in no way defines, limits or describes the scope or intent to any provision herein.
- 15.12 **Use of Language:** Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular shall be held to include the plural, unless the context otherwise requires.

- 15.13 **Counterparts:** This Agreement may be executed in multiple counterparts, each of which shall be deemed as original, and all of which constitute but one and the same instrument.
- 15.14 **Development of the Airport:** The parties understand and agree future development, changes, alterations, modifications or improvement to the Airport are in the sole discretion of the City, subject only to such notification to Lessee that the Federal Aviation Administration may dictate.
- 15.15 **Subordination to Other Agreements:** This Agreement shall be subordinate to the provisions and requirements of any existing or future agreement between the MDC and the City relative to the Leased Premises, including the lease agreement between the MDC and the City regarding the Leased Premises, which is attached hereto and incorporated herein as Exhibit "B"; and the City and the United States, relative to the development, operation or maintenance of the Airport.
- 15.16 **No Exclusivity on Aeronautical Services:** Nothing herein contained shall be construed to grant or authorize the granting of the exclusive right to provide aeronautical services to the public as prohibited by Section 308(a) of the Federal Aviation Act of 1958, as amended.
- 15.17 **Discrimination Prohibited:** The Lessee, for itself, its trustees, officers, legal representatives, successors-in-interest and assigns, as a part of the consideration hereof, agrees (1) that no person on the grounds of race, color, sex, national origin, veteran status or disability shall be excluded from participation in, denied the benefits of or be otherwise subjected to discrimination in the use of the Leased Premises; (2) that in the construction of any improvements on, over or under the Leased Premises and the furnishing of services thereon, no person on the grounds of race, sex, color, national origin, or disability shall be excluded from participation in, denied the benefits of or otherwise be subjected to discrimination; (3) that the Lessee shall use the Leased Premises and the Airport in compliance with all other requirements imposed by, or pursuant to, Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, office of the Secretary, Part 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said regulations may be amended. In the event of breach of any of the above nondiscrimination covenants, the MDC shall have the right to terminate this Agreement and to re-enter and repossess the Leased Premises and the improvements thereon, and hold the same as if said Agreement were terminated by its own term pursuant to Section 2.01 above.
- 15.18 **Affirmative Action Program:** Lessee assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, to ensure that no person shall on the grounds of race, creed, color, national origin, sex or disability be excluded from participating in any employment activities covered in 14 CFR Part 152, Subpart E. Lessee assures that no person shall be excluded on these grounds

from participating in or receiving the services or benefits of any program or activity covered by this Agreement.

- 15.19 **Entire Agreement:** This Agreement embodies the entire agreement between the MDC and Lessee, and supersedes all prior agreements and understandings, whether written or oral, and all contemporaneous oral agreements and understandings relating to the subject matter hereof. This Agreement shall not be changed, modified, discharged or extended, except by written instrument duly executed by MDC and Lessee. The parties agree that no representations or warranties shall be binding upon either party unless expressed in writing in the aforesaid Agreement.
- 15.20 **Sovereign Immunity:** By executing this Agreement the MDC is not waiving its right of sovereign immunity. The MDC is retaining its immunity from suit. The MDC is not granting consent to be sued by legislative resolution or action.  
**THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.**
- 15.21 **Third-Party Beneficiary:** The MDC's approval of this Agreement does not create a third-party beneficiary. There is no third-party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third-party beneficiary or other rights hereunder.
- 15.22 **Notice of Alleged Breach:** As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Agreement, Lessee or its legal representative, shall give the Chairman of the MDC, or any other reasonable official of the MDC, notice in writing of such damages, duly verified, within one hundred and twenty (120) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which the Lessee will settle, the physical and mailing addresses of Lessee at the time and date the claim was presented and the physical and mailing addresses of Lessee for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom the Lessee relies to establish its claim; and a failure to so notify the MDC within the time and manner provided herein shall exonerate, excuse and except the MDC from any liability whatsoever. The MDC is under no obligation to provide notice to Lessee that Lessee's notice is insufficient. MDC reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, Lessee's failure to comply with the requirements herein shall perpetually bar Lessee's claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless if MDC has

actual or constructive notice or knowledge of said claim or alleged damages. Lessee agrees that the requirements of this entire agreement are reasonable.

15.23 **Release:** LESSEE HEREBY RELEASES, RELINQUISHES, ACQUITS AND FOREVER DISCHARGES MDC, MDC'S EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS, CLAIMS, DAMAGES OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH LESSEE HAS OR MIGHT HAVE IN THE FUTURE, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, QUANTUM MERUIT, DUE PROCESS AND TAKINGS CLAUSES UNDER THE TEXAS AND UNITED STATES CONSTITUTION, TORT CLAIMS OR MDC'S NEGLIGENCE.

15.24 **Waiver of Attorney Fees:** By executing this Agreement, LESSEE AND MDC AGREE TO WAIVE AND DO HEREBY WAIVE ANY CLAIM THEY HAVE OR MAY HAVE AGAINST THE OTHER PARTY, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THE AGREEMENT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THE AGREEMENT. LESSEE AND MDC SPECIFICALLY AGREE THAT IF LESSEE OR MDC BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS AGREEMENT, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET SEQ., AS AMENDED), LESSEE AND MDC EACH AGREES TO WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH LESSEE OR MDC MIGHT OTHERWISE BE ENTITLED.

Lessee and MDC agree that this is the intentional relinquishment of a presently existing known right. Each party acknowledges that it understands all terms and conditions of the Agreement.

By execution of the Agreement, Lessee hereby represents and warrants to the MDC that Lessee has read and understood the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be legally executed in duplicate this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

**MIDLAND DEVELOPMENT CORPORATION**

\_\_\_\_\_  
\_\_\_\_\_, Chairman



ATTEST:

\_\_\_\_\_  
\_\_\_\_\_, Secretary

**ORBITAL OUTFITTERS, LTD.**

By: \_\_\_\_\_  
Jeff Feige, Chief Executive Officer

STATE OF \_\_\_\_\_ §  
COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on this \_\_\_\_, day of \_\_\_\_\_,  
2014, by Jeff Feige, Chief Executive Officer, on behalf of Orbital Outfitters, Ltd., a corporation.

[SEAL]

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

THE STATE OF TEXAS §  
COUNTY OF MIDLAND §

This instrument was acknowledged before me on this the \_\_\_\_ day of \_\_\_\_\_,  
201\_\_\_\_, by, \_\_\_\_\_, \_\_\_\_\_, of Midland Development  
Corporation, a Texas nonprofit corporation, on behalf of said corporation.

Notary Public, in and for the State of

\_\_\_\_\_

Proposed Lease Tract to Orbital Outfitters  
Field Notes

For a 1.28 acre tract located in Midland, Texas and being a portion of Lot 1A, Block 13, Midland International Airport Industrial Park as recorded in Cabinet F, Page 187 of the Midland County Plat Records and being more fully described as follows;

Beginning at a nail spike set in a fence line for the west corner of the herein described tract and having a coordinate of X= 1,714,363.32 ft., Y= 10,671,386.25 ft., a ½" iron rod found for the southwest corner of said Lot 1A bears S 19° 15' 34" W a distance of 1,098.23 ft.,

Thence N 41° 02' 19" E along said fence line and the northwest line of the herein described tract at 97.5 ft. pass a fence corner and continue with said fence and the southeast line of "Taxiway S" in all a distance of 267.5 ft. to a set nail spike for the north corner of the herein described tract,

Thence S 48° 57' 41" E along the northeast line of the herein described tract in all a distance of 209.57 ft. to a set railroad spike for the east corner of same and also being the north corner of a proposed 0.66 acre tract,

Thence S 41° 18' 15" W along the southeast line of the herein describe tract and the northwest line of said 0.66 acre tract in all a distance of 267.50 ft. to a set nail spike for the south corner of the herein described tract and also being the west corner of said 0.66 acre tract,

Thence N 48° 57' 41" W along the southwest line of the herein described tract in all a distance of 208.33 ft. to the place of beginning and containing 1.28 acres.  
Bearings, distances and coordinates are based on the Texas State Coordinate System, Central Zone, NAD 83.



*Richard A. Shelton* 1-22-14

Richard A. Shelton, RPLS 4356  
City of Midland, Texas  
432-685-7295

Exhibit "A"



# City Council Agenda

Approved for Agenda:  
CSharp  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Courtney Sharp, City Manager

**SUBJECT:** Consider a Resolution authorizing the execution of a sublease agreement with Orbital Outfitters, Ltd. regarding certain real property located at Midland International Airport and described as an approximate 2 acre tract of land located in Section 8, Lot 1A, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas.

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## **Purpose:**

Consider a Resolution authorizing the execution of a sublease agreement with Orbital Outfitters, Ltd. regarding certain real property located at Midland International Airport and described as an approximate 2 acre tract of land located in Section 8, Lot 1A, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

## **Discussion:**

MDC agrees to construct a building in accordance with the plans and specifications approved by Orbital Outfitters and agree to lease to Orbital Outfitters the building and land for 12 years for annual rent of \$1.00.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION AUTHORIZING THE EXECUTION OF A  
LEASE AGREEMENT WITH THE MIDLAND  
DEVELOPMENT CORPORATION REGARDING  
CERTAIN REAL PROPERTY AT MIDLAND  
INTERNATIONAL AIRPORT AND DESCRIBED AS A  
1.28-ACRE TRACT OF LAND LOCATED IN LOT 1A,  
BLOCK 13, INDUSTRIAL PARK REGIONAL AIR  
TERMINAL, UNIT 12, MIDLAND, MIDLAND COUNTY,  
TEXAS**

**WHEREAS**, the City Council finds it to be in the public interest to authorize the execution of a lease agreement with the Midland Development Corporation regarding certain real property at Midland International Airport and described as a 1.28-acre tract of land located in Lot 1A, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas; and

**WHEREAS**, the Director of Airports and City Manager recommend that the City Council approve said lease at Midland International Airport;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF MIDLAND, TEXAS:**

**THAT** the Mayor and City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, said lease agreement with the Midland Development Corporation. Said agreement shall be in a form substantially similar to that of Exhibit "A", which is attached hereto and incorporated herein for all legal purposes.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

---

Jerry F. Morales, Mayor

ATTEST:

---

Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

---

Courtney Sharp, City Manager

APPROVED AS TO CONTENT  
AND COMPLETENESS:

---

Marv Esterly, Director of Airports

APPROVED ONLY AS TO FORM:

---

Keith Stretcher, City Attorney

**LEASE AGREEMENT  
BETWEEN THE CITY OF MIDLAND, TEXAS  
AND THE MIDLAND DEVELOPMENT CORPORATION**

THIS LEASE AGREEMENT ("Agreement") is made this 29<sup>th</sup> day of January, 2014, by and between the City of Midland, Texas ("City"), a home rule municipal corporation, and the Midland Development Corporation ("Lessee"), a Type A corporation existing under the authority of Chapter 504 of the Texas Local Government Code.

**RECITALS**

WHEREAS, the City owns and operates the Midland International Airport, located in the City of Midland, Texas hereinafter referred to as "Airport"; and

WHEREAS, Lessee desires to lease certain City-owned facilities and land at the Airport for economic development purposes and to provide aviation services as hereinafter permitted;

NOW, THEREFORE, for and in consideration of the covenants and conditions herein stated, City and Lessee agree as follows:

**ARTICLE 1. GRANT OF LEASE**

- 1.01 **Leased Premises:** City agrees to lease to Lessee that certain tract of land located in Lot 1A, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas, and being more particularly described on **Exhibit A** attached hereto and incorporated herein (the "Leased Premises").
- 1.02 **Easements:** This Agreement shall be subject to such easements, rights-of way, drill sites, or other rights or reservations affecting the Leased Premises which are of record or are clearly visible as of the date of this Agreement, or which are shown on **Exhibit A**.
- 1.03 **Acceptance of Leased Premises:** Subject to the requirements of Section 6.01, BY EXECUTING THIS AGREEMENT THE LESSEE AGREES AND ACKNOWLEDGES THE LESSEE IS TAKING OR LEASING THE LEASED PREMISES **"AS IS" WITH ANY AND ALL LATENT AND PATENT DEFECTS AND THAT THERE IS NO WARRANTY, EXPRESS OR IMPLIED BEING MADE BY THE CITY THAT THE LEASED PREMISES ARE FIT FOR A PARTICULAR PURPOSE.** THE LESSEE ACKNOWLEDGES, BY EXECUTING THIS AGREEMENT, THAT LESSEE IS NOT RELYING UPON ANY REPRESENTATION MADE BY THE CITY WITH RESPECT TO THE CONDITION OF THE LEASED PREMISES, BUT IS RELYING UPON LESSEE'S EXAMINATION OF THE LEASED PREMISES. LESSEE ALSO RECOGNIZES BY EXECUTING THIS AGREEMENT, THAT THE LESSEE IS AGREEING TO ACCEPT THE LEASED PREMISES **"AS IS"**, THAT LESSEE AGREES TO MAKE LESSEE'S OWN APPRAISAL OF THE LEASED PREMISES AND TO ACCEPT THE RISK THAT LESSEE MAY BE WRONG. THE CITY GIVES NO ASSURANCES, EXPRESS OR IMPLIED CONCERNING THE VALUE OR CONDITION OF THE LEASED PREMISES SOLD. IN NO EVENT SHALL A LESSEE HAVE A RIGHT TO RECOVER CONSEQUENTIAL DAMAGES. THEREFORE, THE LESSEE WILL TAKE THE LEASED PREMISES UNDER THE EXPRESS UNDERSTANDING THE LEASED PREMISES ARE ACCEPTED **"AS IS"** AND WITH ALL FAULTS, EXCLUDING EXPRESS OR IMPLIED WARRANTIES.

## ARTICLE 2. TERM OF AGREEMENT

- 2.01 **Lease Term:** The term of this Agreement shall commence on April 1, 2014 and terminate on March 31, 2049, ("the Lease Term") unless terminated earlier pursuant to the provisions of this Agreement.

## ARTICLE 3. RENT

- 3.01 **Amount of Base Rent:** During the Lease Term, Lessee agrees to pay to City rent for the Leased Premises in the amount of \$2,000.00, hereafter called the "Base Rent". The Base Rent shall be due on the first day of each month.
- 3.02 **Rental Adjustments:** It is agreed and understood that provision must be made herein for an adjustment of rentals every five (5) years. Therefore, as of January 15, 2019, the minimum monthly rent shall be increased only in the same proportion or percentage by which the cost of living has been increased as reflected by the Consumer Price Index for All Items, as maintained by the United States Government's Department of Labor, Bureau of Labor Statistics for the Dallas/Fort Worth SMA. Provided, however, that any such rental increase shall not exceed twenty-five percent (25%) above the prior period's rent. In no event shall the monthly payment due be less than \$2,000.00.
- 3.03 **Delivery of Rent:** All payments required of Lessee by this Agreement shall be delivered by mail, or in person, to the Office of the Director of Airports, Midland International Airport, 9506 LaForce Boulevard, P. O. Box 60305, Midland, Texas 79711, or to such other location as specified in writing by the City from time to time, no later than the date such payment is due, unless such due date falls on a Saturday, Sunday, or City holiday, in which case such rent shall be due on the first City business day following the date such payment is due.
- 3.04 **Delinquent Rent Payments:** All rent and other payments which are past due more than five (5) days shall accrue simple interest at the rate of six percent (6.0%) annually or (b) the maximum percentage rate allowed by law, whichever is less. Notwithstanding anything to the contrary in this Section 3.04, if at the time performance of the provisions set forth in this Section 3.04 becomes due, the interest to be paid in accordance with this Section 3.04 exceeds the limits on the payment of interest established by law, then the amount of interest to be paid shall be reduced to the maximum limit allowed by law; furthermore, if, from any circumstances, City should ever receive as interest an amount that would exceed the highest lawful rate, the amount that would be excessive interest shall be applied to the payment of rent owing pursuant to the provisions of this Lease Agreement and not to the payment of interest.

## ARTICLE 4. USE OF LEASED PREMISES

- 4.01 **Permitted Uses:** Lessee shall be permitted to use the Leased Premises for the purpose of conducting for-profit commercial services or activities consisting of any or all of the following operations and no others:
- (a) Location of corporate headquarters and operation of research and development activities related to space and pressure suits manufacturing and development;



- (b) Operation of warehouse, freight distribution and storage services for commercial and non-commercial activities;
- (c) Repair and maintenance service for aircraft, airframe, power plant, avionics, instruments, and related equipment;
- (d) Sales of aircraft parts and equipment, and pilot supplies;
- (e) Storage of such equipment and apparatus as may be incidental and/or necessary to Lessee's operations, including motor vehicles operated and/or owned by Lessee; and
- (f) Such other uses as may be permitted in writing by the City.

**4.02 Prohibited Uses:** Lessee agrees at all times to comply with the following:

- (a) Lessee shall at no time use, or permit the use of, the Leased Premises in a manner that is contrary to applicable federal, state, or local laws, ordinances, rules, or regulations, which shall include, but not be limited to, applicable Federal Aviation Administration rules and regulations and applicable regulations for the use of the Airport as may from time to time be promulgated by the City;
- (b) Lessee shall not permit any permanent, unshielded light or illumination source to cause glare as viewed from any street, adjacent properties or operating aircraft;
- (c) Lessee shall not cause or permit the burial of storage above ground on the Leased Premises of any hazardous waste or materials, as defined by federal or state law, except in accordance with applicable Federal, State, or local laws, ordinances, regulations and rules, as may be adopted or amended from time to time;
- (d) Lessee shall not cause or permit any use or activity on the Leased Premises which would create a hazardous condition for aircraft operating at the Airport;
- (e) Lessee shall not allow the Leased Premises to be used for parking of motor vehicles, motorcycles, or motor driven equipment by anyone other than customers, employees, or contractors of Lessee except as may be authorized by the Director of Airports, with all such parking being limited to areas designated by the Department of Airports for such parking. Lessee shall not be in default for the improper parking of vehicles over which neither Lessee nor any of its subtenants, customers, employees, or contractors have any control;
- (f) Less shall not operate, nor permit the operation of, a car rental business from the Leased Premises, unless the Lessee or the operator of said car rental business has executed a car rental concession or permit agreement with the City; and
- (g) Lessee shall not allow schedules airline passenger operations to be conducted on the Leased Premises.

**4.03 Compliance with Minimum Standards:** All activities conducted upon the Leased Premises, whether by Lessee or its sublessees, shall be in substantial conformance with the City's Minimum Standards for Aeronautical Activities, as such standards exist or may

be duly amended from time to time by the City Council to the extent that such Minimum Standards may apply to Lessee's operations. City agrees to provide Lessee with written notice not later than 30 days prior to adoption of substantive changes to the Minimum Standards for Aeronautical Activities which would apply to Lessee's operations.

- 4.04 **Non-exclusive Uses:** Lessee understands and acknowledged that, as to that part of the Airport not included within the Leased Premises, the allowable uses permitted herein are on a non-exclusive basis with respect to other potential providers of aeronautical services at the Airport.

#### **ARTICLE 5. OBLIGATIONS OF LESSEE WITH REGARD TO CONSTRUCTION OF IMPROVEMENTS**

- 5.01 **Approval of Plans Not Assurance of Design Quality:** The approval by the City of any plans and specifications applies only to the conformity of such plans to the general architectural and operational plan for the Leased Premises and the Airport. The approval of the City does not constitute approval of the quality of the architectural or engineering work performed. The City assumes no liability or responsibility for the architectural or engineering design or for any defect in any building or improvement constructed from the plans or specifications. Construction of any contemplated improvements shall be in accordance with the plans presented to and approved by the City. All construction work shall be subject to inspection by a representative employed by the City or an inspector from the Code Enforcement Division of the City, or both, to determine that such work conforms to the plans and specifications approved by the City.
- 5.02 **Contractor's Insurance; Bonds:** At any time construction activities are undertaken on the Leased Premises, Lessee shall require that its contractor or contractors keep in force insurance issued by a responsible insurance company or companies authorized to conduct business in the State of Texas insuring the improvements during construction under Completed Builder's All Risk Insurance, including fire, extended coverage, vandalism and malicious mischief, in an amount equal to the full insurable value of such construction as the same progresses in order to insure continuity of construction and ultimate completion despite damage or destruction suffered during the course thereof. **ALL INSURANCE SHALL NAME THE CITY AS ADDITIONAL INSURED AND CO-PAYEE AND PROVIDE FOR A WAIVER OF SUBROGATION IN FAVOR OF THE CITY.** Lessee shall require all contractors performing construction work on the Leased Premises to provide payment and performance bonds issued by a responsible bonding company or companies authorized to conduct business in the State of Texas for the full amount of the cost of the construction to be performed on forms which are in compliance with Tex. Gov't Code Ch. 2253, as amended. The foregoing shall be made a part of any contract between Lessee and its contractor or contractor. In the event Lessee does not complete the construction work itself; it shall comply with the All Risk Insurance provisions hereof.
- 5.03 **Compliance with Building Codes and Federal Standards:** All improvements made to the Leased Premises by Lessee shall comply with all applicable City Building Codes and Federal standards for construction of airport improvements in effect at the time construction commences as well as all other applicable federal aviation regulations, if any.

- 5.04 **Encumbrance of Leasehold Estate:** Lessee shall at no time encumber or attempt to encumber its leasehold interest in the Leased Premises by deed of trust, mortgage, security agreement or other security interest.
- 5.05 **Ownership of Buildings, Improvements and Fixtures:** Any and all buildings, improvements (including, but not limited to all aprons, taxiways and roadways), additions, alterations, and fixtures existing on the Commencement Date or constructed or placed on any part of the Leased Premises during the Lease Term by Lessee shall be considered part of the real property of the Leased Premises, shall remain on the Leased Premises, and shall not be removed by Lessee or any sublessee without the written consent of City. All improvements, additions, alterations, and fixtures on the Leased Premises shall become the sole property of City upon termination of this Agreement without compensation to Lessee, it being understood and agreed by Lessee that the improvements located on the Leased Premises at the end of the Lease Term are additional consideration for this Agreement. Notwithstanding the above, Lessee shall have the right at any time during Lessee's occupancy of the Leased Premises, or within a reasonable time thereafter, to remove any and all furniture, machinery, equipment, but not fixtures owned or placed by Lessee, in, under, or on the Leased Premises; provided, however, prior to the termination of the Lease Term, Lessee shall repair any damage to any buildings or improvements on the Leased Premises resulting from their removal. Any such personal property items which are not removed within sixty (60) days after the termination date of this Agreement shall become the property of City as of that date.

#### **ARTICLE 6. REPAIRS, MAINTENANCE AND RESTORATION**

- 6.01 **Maintenance by City:** City shall, at City's sole discretion and expense, keep in good repair, condition and appearance the taxiways and roadways which have been or may be constructed by City. City may commence required repairs as soon as reasonably practicable after receiving written notice from Lessee thereof. Except as provided in this Section, City shall not be obligated to make repairs, replacements or improvements of any kind upon the Leased Premises, or to any equipment, merchandise, facilities or fixtures therein, all of which shall be Lessee's responsibility. The amount and extent of the repairs to be made by City are in the City's sole discretion.
- 6.02 **Maintenance by Lessee:** Lessee shall, at Lessee's sole expense, keep the Leased Premises and all improvements of any kind, which may be existing at the commencement of the Lease Term, not required herein to be maintained by City, in good repair, condition and appearance. Without limitation of the foregoing sentence, Lessee specifically acknowledges its obligations, at its sole expense, to keep in good repair, condition and appearance the foundation, roof, exterior walls and structural portions of the interior walls of the hangar(s) located on the Leased Premises. Lessee shall keep mowed and in a sightly condition all landscaping and grass areas within the Leased Premises. City shall be the sole judge of the quality of Lessee's maintenance; provided, however, City shall not unreasonably withhold acceptance of said repairs or maintenance. Upon written notice by City to Lessee, Lessee shall be required to perform such reasonable maintenance under this section, as City considers necessary. If Lessee does not undertake such maintenance within ten (10) days after receipt of written notice, City shall have the right to enter on the Leased Premises and perform the necessary maintenance, the cost of which shall be borne by Lessee. Other items of maintenance for which Lessee shall be solely responsible shall include, but not be limited to, the following:

- (a) Janitorial services, providing janitorial supplies, window washing, rubbish and trash removal;
- (b) Supply and replacement of light bulbs in and on all buildings (except lighting removed for causing obstructions or glare);
- (c) Replacement of cracked or broken glass in all buildings;
- (d) Cleaning of interior stoppages in interior plumbing fixtures and drain lines up to the first manhole or clean out outside of the exterior of the building where the stoppage occurred;
- (e) Replacement of floor covering;
- (f) Maintenance of all doors and door operating systems, including weather stripping and glass replacement;
- (g) Painting, repairing and replacement of interior walls not resulting from structural failure;
- (h) Landscaping and grass cutting services within the Leased Premises, including, but not limited to, repair or replacement of exterior building flood lights and planter lights;
- (i) Repair or replacement of heating, air conditioning, ventilation, electrical, plumbing, or mechanical systems, or their respective components; and
- (j) Maintenance of all aprons, ramps, and roadways that are constructed by Lessee.

Subject to the provisions of Section 5.05, on the last day of the term hereof, or on any earlier termination, Lessee shall surrender the Leased Premises to City in the same condition as received, except for fire and casualty, ordinary wear and tear, clean and free of debris.

- 6.03 **Trash and Waste Removal:** Lessee agrees to cause to be removed from the Leased Premises, at its own expense, all waste, garbage and rubbish, and agrees not to deposit same on the Leased Premises except temporarily in waste or garbage containers provided by Lessee at Lessee's expense. Lessee further agrees that Lessee will store all parts, supplies, and other materials on the interior of buildings located on the Leased Premises, provided, however, that any parts or supplies which must be kept outside because of volatility of the supply item or the size of the part will be kept out of view of the public traveling on public rights of way or other surrounding tenants by installation of fencing or other means of screening approved by the Director of Airports.

## **ARTICLE 7. USE OF AIRPORT**

- 7.01 **Right to Use Airport:** Lessee and Lessee's employees, sublessees, and guests shall have the right to use that part of the Airport and its facilities not included within the Leased Premises in common with others authorized to do so. Such use shall be subject to any and all applicable federal, state or local laws, ordinances, statutes, rules, regulations, or orders of any governmental authority, lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.

- 7.02 **Vehicular Operations on the Airfield:** No vehicles of Lessee, its employees, customers or invitees will be allowed to operate on, or cross, the runways and taxiways and their respective safety areas of the Airport. When necessary, Airport Operations Control Center personnel will provide Lessee escorted access to and from the airfield area.
- 7.03 **Airport Security Rules and Regulations:** Lessee, its directors, officers, employees, and contractors shall comply with all federal and local Airport Security Regulations adopted by the City or the Department of Airports as such rules and regulations exist or may hereafter be amended.
- 7.04 **14 C.F.R. Part 77 Requirements:** Lessee agrees to comply with the notification and review requirements set forth in Part 77 of the Federal Aviation Regulations [14 CFR Part 77] in the event any future structure, antenna or building is planned for the Leased Premises, or in the event of any planned modification of any present or future building, antenna or structure located on the Leased Premises.
- 7.05 **Control of Structures:** Lessee shall not erect nor permit the erection of any structure or object, nor permit the growth of any tree on the Leased Premises which highest point is above a mean sea level elevation established by the FAA and City as a height limitation on such structures or objects. City reserves the right to enter upon the Leased Premises and to remove the offending structure or object and cut the offending tree at Lessee's expense.
- 7.06 **Aerial Approaches:** Lessee understands and agrees that the City has the right to take any action it considers necessary to protect the aerial approaches of the Airport against obstruction together with the right to prevent Lessee from erecting or permitting to be erected any building or other structure on or adjacent to the Airport which, in the opinion of the City, would limit the usefulness of the Airport or constitute a hazard to aircraft.
- 7.07 **Right of Over-flight:** There is hereby reserved to the City, for the use and benefit of the public, a right of flight for the passage of aircraft above the surface of the Leased Premises, together with the right to cause in said airspace such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air, using said airspace for landing at, taking off from or operating on the Airport.

## **ARTICLE 8. INSURANCE**

- 8.01 **Lessee's Minimum Insurance Amounts:** Lessee shall obtain and maintain continuously in effect at all times during the Lease Term, at Lessee's sole expense, at least the following minimum insurance with a carrier or carriers licensed to do business in the State of Texas and satisfactory to the City:
- (a) Property and Casualty Insurance insuring against loss or damage to Lessee's or a sublessee's improvements and any and all property being maintained or repaired by Lessee due to fire, lightning and all other perils included in standard extended coverage policies, and vandalism and malicious mischief, all in amounts of not less than one-hundred percent (100%) of replacement value; and

- (b) Commercial General Liability Insurance against claims for bodily injury, death, or property damage occurring on, in or about the Leased Premises, or any other portion of the Airport, in at least the amount of \$10,000,000.00 per individual, \$10,000,000.00 per occurrence and \$10,000,000.00 with respect to property, and the statutory limits with respect to worker's compensation. The Commercial General Liability Insurance shall name the City as an additional insured.
- 8.02 **Lessee's Coverage Primary:** All insurance herein required shall apply as primary and not in excess of or contributing with other insurance which the Lessee may carry. Insurance provided pursuant to Section 8.01 shall name the City as an additional insured or loss payee as the case may be and provide for a waiver of subrogation in favor of the City. The comprehensive general liability policy as provided in Paragraph 8.01(b) shall provide contractual liability coverage sufficiently broad so as to include the liability assumed by Lessee under this Agreement. The Lessee's insurance policies as required by this Agreement shall apply separately to Lessee and City as if separate policies had been issued to Lessee and City.
- 8.03 **Contents of General Liability Policy:** Lessee's Comprehensive General Liability policy shall protect City and Lessee against any and all liability to any person or persons whose property damage or personal injury arises out of or is in connection with the occupation, use, or condition of the Leased Premises or resulting from any injury or damage occurring on or about the roads, driveways or other public areas of the Leased Premises used by Lessees, its trustees, officers, employees, students, invitees, and contractors at the Airport, whether or not such damage or injury is the result of negligence of the Lessee or its officers, employees, representatives, invitees, licensees, contractors, agents, guests, or students.
- 8.04 **Cancellation; Certificates of Insurance:** Lessee's insurance as required by this Agreement shall not be subject to cancellation or material alteration until at least thirty (30) days written notice has been provided to the City. Lessee shall furnish to the City, annually, Certificates of Insurance showing City as an additional insured and evidencing that all of the herein-stated requirements have been met.
- 8.05 **City's Right to Purchase Insurance:** In the event such insurance as required by Section 8.01 above shall lapse, the City reserves the right to obtain such insurance at Lessee's expense. Upon demand from City, Lessee shall reimburse City for the full amount of the premium paid on Lessee's behalf.
- 8.06 **Effect of Sublease:** In the event the Leased Premises are subleased by Lessee in accordance with Article 11, Lessee shall not be relieved of the insurance obligations set forth herein.
- 8.07 **Insurance Modifications:** Lessee's insurance as required by this Article may be modified or amended upon a written request from the Lessee to the City for a modification or amendment and the City Manager providing to the Lessee written approval of such modification or amendment.

## ARTICLE 9. UTILITIES

Lessee shall be solely responsible for the payment of all electric, telephone, water, refuse, natural gas and other public utility services used on the Leased Premises.

## ARTICLE 10. SIGNS

- 10.01 **Consent Required:** Except with the prior written consent of the Director of Airports, Lessee shall not erect, maintain or display any signs or any advertising at, or on, the exterior part of structures on the Leased Premises, or inside any buildings located on the Leased Premises so as to be visible through the window or exterior doors thereof.
- 10.02 **Removal on Termination:** Upon the termination of this Agreement, Lessee shall remove, obliterate or paint out, as the City may direct, any and all signs and advertising on the Leased Premises or elsewhere at the Airport, and in connection therewith shall restore the Leased Premises to the same condition as prior to the placement of any such signs or advertising. In the event that there is a failure by Lessee to so remove, obliterate or paint out each and every sign or advertising and so to restore the Leased Premises, the City may, at its option, perform the necessary work at the expense of Lessee, and the charge therefor shall be paid by Lessee to the City on demand. In certain circumstances, the City may elect to allow specific signs to remain as existing at the termination of this Agreement. Such signs shall be identified and agreed upon mutually, in writing, by Lessee and City, and approved by the City.

## ARTICLE 11. SUBLEASING

At no time shall Lessee sublease any portion of the Leased Premises or otherwise assign its interests or obligations in this Lease Agreement without the written consent of the City. Any such assignment or attempted assignment shall be void. Provided, however, that the parties agree that the Lessee may sublease the Leased Premises to Orbital Outfitters, Ltd.

## ARTICLE 12. TAX LIENS

Lessee shall be solely responsible for the collection and payment of all applicable federal, state, and local taxes, including, but not limited to, sales, use, amusement, or excise tax required to be collected and paid over by Lessee to the appropriate taxing authority. Furthermore, Lessee shall be responsible for the payment of any applicable ad valorem taxes and any taxes on Lessee's personal property located on the Leased Premises. Lessee shall at no time permit the foreclosure of any tax liens to Lessee's leasehold interest in the Leased Premises or the buildings, fixtures, or other improvements located on the Leased Premises. The City shall have the right to pay such taxes due after Lessee's refusal to pay such taxes, and upon demand Lessee shall reimburse the City for the amount of taxes paid plus any penalties, interests, and attorney's fees incurred, subject to Lessee's right to challenge the validity of such taxes in whole or in part. In the event that Lessee is successful in any challenge regarding the payment of any tax, the City shall be subrogated to any recovery obtained by Lessee to the extent of the amount of taxes, interests, penalties, and attorneys fees previously paid by the City and not already reimbursed by Lessee.

## ARTICLE 13. DEFAULT AND REMEDIES

- 13.01 **Default by Lessee:** The following shall be deemed to be events of default by Lessee under this Agreement:
- (a) Lessee shall fail to pay when due any installment of rent or any other payment required pursuant to this Agreement;

- (b) Lessee shall abandon any substantial portion of the Leased Premises;
- (c) Lessee or any guarantor of Lessee's obligations hereunder shall file a petition or be adjudged bankrupt or insolvent under any applicable federal or state bankruptcy or insolvency law or admit that it cannot meet its financial obligations as they become due, or a receiver or trustee shall be appointed for all or substantially all of the assets of Lessee or any guarantor of Lessee's obligations hereunder;
- (d) Lessee or any guarantor of Lessee's obligations hereunder shall make a transfer in fraud of creditors or shall make an assignment for the benefit of creditors;
- (e) Lessee shall do or permit to be done any act which results in a lien being filed against the Leased Premises;
- (f) The liquidation, termination, dissolution of Lessee or any guarantor of Lessee's obligations hereunder; or
- (g) Lessee shall be in noncompliance with any other term, provision or covenant of this Agreement, other than those specified in subparts (a) through (f) above.

13.02 **No Remedy Exclusive:** No remedy herein conferred upon or reserved to the City or Lessee is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or hereafter existing under law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the City and Lessee to exercise any remedy reserved to it in this section, it shall not be necessary to give any notice, other than such notice as may be herein expressly required.

13.03 **No Waiver of Breach:** City's failure or delay in declaring the existence of an event of default by Lessee shall not be construed as a waiver thereof, nor shall it be construed so as to waive or to lessen the right of the City to insist upon the performance by Lessee of any term, covenant or condition hereof, or to exercise any rights given it on account of any such event of default. A waiver of any particular event of default shall not be deemed to be a waiver of the same, similar of any other subsequent event of default.

13.04 **Expeditious Action:** Notwithstanding any provision as to notice in this Agreement herein contained, if in City's reasonable judgment the continuance of any event of default by Lessee for the full period of the notice to cure the event of default will jeopardize the operation of the Airport or the rights of the City or the other Airport tenants, City may, without notice, elect to perform those acts in respect to which Lessee is in default. Lessee shall reimburse City for any reasonable and necessary costs incurred by the City pursuant to this section.

#### **ARTICLE 14. TERMINATION BY LESSEE**

14.01 Except for the payment by Lessee to City of rents or other amounts past due accrued but not yet due, Lessee shall have the right to terminate this Agreement in its entirety,



and all rights and obligations ensuing therefrom immediately upon the occurrence of the following:

- (a) The issuance of any order, rule or regulation of the Federal Aviation Administration, or its successor Federal Agency, or other competent government authority, Federal or State, or the issuance and execution of any judicial process by any court of competent jurisdiction, materially restricting for a period of at least sixty (60) days, the use of the airport for aeronautical purposes; provided that none of the foregoing is due to any fault of Lessee; or
- (b) The material restriction of the City's operation of the Airport by action of the Federal Government, or any department or agency thereof, under its wartime or emergency powers, and the continuance thereof for a period of not less than sixty (60) days; provided, however, that without prejudice to the rights of Lessee to terminate as above provided, the City and Lessee may mutually agree to adjust fees and charges; or
- (c) The material restriction of the operation of the Airport arising from City's failure to maintain and keep in repair the landing area of the Airport; or
- (d) In the event the Lessee subleases the Leased Premises in accordance with Article 11 and the sublease is terminated by the sublessee or the sublessee ceases operations at the Leased Premises.

14.02 If Lessee terminates this Lease for any of the reasons set forth in (a) through (d) of Article 14, City shall promptly repay Lessee any rent previously paid by Lessee attributable to the period following the date of such termination.

#### **ARTICLE 15. MISCELLANEOUS PROVISIONS**

15.01 **Quiet Enjoyment:** Upon the performance of the covenants and agreements on the part of the Lessee to be performed hereunder, the Lessee shall peaceably have and enjoy the Leased Premises, appurtenances, facilities, licenses and privileges granted in this Agreement.

15.02 **Force Majeure:** Neither the City nor Lessee shall be deemed in violation of this Agreement if it is prevented from performing any of its obligations hereunder except the obligation to pay rent by reason of strikes, boycotts, labor disputes, embargoes, shortages of materials, act of God, acts of the public enemy, act of superior governmental authority, weather conditions, floods, riots, rebellions, acts of sabotage or any other circumstances for which it is not responsible or which are not in its control.

15.03 **Independent Contractor:** It is expressly understood and agreed that Lessee shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant or employee of the City; that Lessee shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors; that the doctrine of respondeat superior shall not apply as between City and Lessee, its officers, agents, employees, contractors and subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between City and Lessee. No person performing any of the work and services

described hereunder shall be considered an officer, agent, servant or employee of the City. Further, it is specifically understood and agreed that nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. Lessee shall be an independent contractor under this Agreement and shall assume all the rights, obligations and liabilities, applicable to it as such independent contractor hereunder and any provisions in this Agreement which may appear to give City the right to direct Lessee as to details of doing the work herein covered or to exercise a measure of control over the work shall be deemed to mean that Lessee shall follow the desires of City in the results of the work only. The City does not have the power to direct the order in which the work is done. The City shall not have the right to control the means, methods or details of the Lessee's work.

- 15.04 **Inspection by City:** City may enter upon the Leased Premises at any reasonable time for any purpose necessary, incidental to or connected with the performance of City's obligations hereunder, or in the exercise of its governmental functions, for fire protection or security purposes, or for inspecting or maintaining the Leased Premises, or doing any and all things City is obligated to do, or which may be deemed by City necessary or desirable for the proper conduct and operation of the Airport or the protection of City's interests.
- 15.05 **On-Site Representatives:** Lessee shall select and appoint a representative or representatives for its operations at the Airport. The representatives shall be qualified and experienced, and vested with the full power and authority to act in the name of the Lessee with respect to the method, manner and conduct of the operation of Lessee to be performed under this Agreement. City's on-site representative shall be the City's Director of Airports.
- 15.06 **Conformance with Rules and Regulations:** The use of the Airport by Lessee shall be subject to any and all rules, regulations and ordinances which are now in force or which may be hereafter adopted by the City with respect to the operation and use of the Airport, but no such rules, regulations, or ordinances shall increase the Base Rent or Additional Rent payable by Lessee under this Lease or otherwise materially and adversely affect Lessee's tenure of the Leased Premises under this Lease. Furthermore, this Agreement and Lessee's use of the Airport shall be subject to any and all applicable laws, ordinances, resolutions, statutes, rules, regulations or orders of any Federal, State or local governmental authority lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.
- 15.07 **Licenses and Permits:** Lessee hereby agrees that it shall, at its own expense and cost, procure and obtain all lawfully required licenses and permits, certificates and other authorizations required by any governmental authority, in connection with or covering the operations or activities permitted to be performed by it under the provisions of this Agreement.
- 15.08 **Notices:** Notices provided for in this Agreement shall be either hand delivered or sent by certified mail, return receipt requested, postage prepaid, and properly addressed as follows:

If to City:                      Director of Airports  
                                                 P. O. Box 60305

9506 LaForce Boulevard  
Midland, Texas 79711

With Copy To: City Manager  
P. O. Box 1152  
300 North Loraine  
Midland, Texas 79702

If to Lessee: Executive Director  
Midland Development Corporation  
109 N. Main (2<sup>nd</sup> Floor)  
Midland, Texas 79701

The parties may change the representative or address for delivery of notices from time to time by sending written notices to the other party. All notices shall be in writing and effective only upon actual receipt.

- 15.09 **Governing Law and Venue:** This Agreement shall be governed by the laws of the State of Texas. All performance and payment made pursuant to this Agreement shall be deemed to have occurred in Midland County, Texas. Exclusive venue for any claims, suits or any other action arising from or connected in any way to this Agreement or the performance of this Agreement shall be in Midland County, Texas. The obligations and undertakings of each of the parties to this Agreement shall be deemed to have occurred in Midland County, Texas.
- 15.10 **Severability:** If any provision of this Agreement is invalid or unenforceable, this Agreement shall be considered severable as to such provision, and the remainder of this Agreement shall remain valid and binding as though such invalid or unenforceable provisions were not included herein.
- 15.11 **Captions:** Section headings are inserted herein only as a matter of convenience and for reference, and in no way defines, limits or describes the scope or intent to any provision herein.
- 15.12 **Use of Language:** Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular shall be held to include the plural, unless the context otherwise requires.
- 15.13 **Counterparts:** This Agreement may be executed in multiple counterparts, each of which shall be deemed as original, and all of which constitute but one and the same instrument.
- 15.14 **Maintenance of the Airport:** City agrees to maintain and keep in repair the landing area of the Airport (including, but not limited to, runways, taxiways, landing lights, signals, signs and other conveniences for the takeoff, flying and landing of aircraft) and to maintain the Airport as a commercial airport; provided, however, if City decides to relocate the Airport, City may cancel this Agreement by providing Lessee notice of termination not later than 180 days prior to the date of termination. If City gives notice to Lessee of cancellation of the Agreement because of a planned relocation of the Airport, and the Airport continues to exist and remain in operation at its present location after the effective date of the termination, then this Agreement shall continue as a month-to-month tenancy.

- 15.15 **Development of the Airport:** Future development, changes, alterations, modifications or improvement to the Airport shall be at the sole discretion of the City, subject only to such notification to Lessee that the Federal Aviation Administration may dictate. The City will strive not to hinder the Lessee's operations in carrying out the provisions of this paragraph.
- 15.16 **Subordination to Federal Agreements:** This Agreement shall be subordinate to the provisions and requirements of any existing or future agreement between the City and the United States, relative to the development, operation or maintenance of the Airport.
- 15.17 **No Exclusivity on Aeronautical Services:** Nothing herein contained shall be construed to grant or authorize the granting of the exclusive right to provide aeronautical services to the public as prohibited by Section 308(a) of the Federal Aviation Act of 1958, as amended.
- 15.18 **Discrimination Prohibited:** The Lessee, for itself, its trustees, officers, legal representatives, successors-in-interest and assigns, as a part of the consideration hereof, agrees (1) that no person on the grounds of race, color, sex, national origin, veteran status or disability shall be excluded from participation in, denied the benefits of or be otherwise subjected to discrimination in the use of the Leased Premises; (2) that in the construction of any improvements on, over or under the Leased Premises and the furnishing of services thereon, no person on the grounds of race, sex, color, national origin, or disability shall be excluded from participation in, denied the benefits of or otherwise be subjected to discrimination; (3) that the Lessee shall use the Leased Premises and the Airport in compliance with all other requirements imposed by, or pursuant to, Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, office of the Secretary, Part 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said regulations may be amended. In the event of breach of any of the above nondiscrimination covenants, the City shall have the right to terminate this Agreement and to re-enter and repossess the Leased Premises and the improvements thereon, and hold the same as if said Agreement were terminated by its own term pursuant to Section 2.01, above.
- 15.19 **Affirmative Action Program:** Lessee assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, to ensure that no person shall on the grounds of race, creed, color, national origin, sex or disability be excluded from participating in any employment activities covered in 14 CFR Part 152, Subpart E. Lessee assures that no person shall be excluded on these grounds from participating in or receiving the services or benefits of any program or activity covered by this Agreement.
- 15.20 **Entire Agreement:** This Agreement embodies the entire agreement between the City and Lessee, and supersedes all prior agreements and understandings, whether written or oral, and all contemporaneous oral agreements and understandings relating to the subject matter hereof. This Agreement shall not be changed, modified, discharged or extended, except by written instrument duly executed by City and Lessee. The parties agree that no representations or warranties shall be binding upon either party unless expressed in writing in the aforesaid Agreement.

- 15.21 **Sovereign Immunity:** By executing this Agreement the City is not waiving its right of sovereign immunity. The City is retaining its immunity from suit. The City is not granting consent to be sued by legislative resolution or action.

**THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.**

- 15.22 **Third-Party Beneficiary:** The City's approval of this Agreement does not create a third party beneficiary. There is no third party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third party beneficiary or other rights hereunder.

- 15.23 **Notice of Alleged Breach:** As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Agreement, Lessee or its legal representative, shall give the City Manager, or any other reasonable official of the City, notice in writing (consisting of one original and seven copies of notice attached to a copy of this agreement) of such damages, duly verified, within one hundred and twenty (120) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which the Lessee will settle, the physical and mailing addresses of Lessee at the time and date the claim was presented and the physical and mailing addresses of Lessee for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom the Lessee relies to establish its claim; and a failure to so notify the City Manager within the time and manner provided herein shall exonerate, excuse and except the City from any liability whatsoever. The City is under no obligation to provide notice to Lessee that Lessee's notice is insufficient. City reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, Lessee's failure to comply with the requirements herein shall perpetually bar Lessee's claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless if City has actual or constructive notice or knowledge of said claim or alleged damages. Lessee agrees that the requirements of this entire agreement are reasonable.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be legally executed in duplicate this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

THE CITY OF MIDLAND, TEXAS

MIDLAND DEVELOPMENT CORPORATION

\_\_\_\_\_  
Jerry F. Morales, Mayor

\_\_\_\_\_  
Chairman

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

APPROVED AS TO CONTENT  
AND COMPLETENESS:

\_\_\_\_\_  
Marv Esterly, Director of Airports

ATTEST:

\_\_\_\_\_  
Secretary

Proposed Lease Tract to Orbital Outfitters  
Field Notes

For a 1.28 acre tract located in Midland, Texas and being a portion of Lot 1A, Block 13, Midland International Airport Industrial Park as recorded in Cabinet F, Page 187 of the Midland County Plat Records and being more fully described as follows;

Beginning at a nail spike set in a fence line for the west corner of the herein described tract and having a coordinate of X= 1,714,363.32 ft., Y= 10,671,386.25 ft., a ½" iron rod found for the southwest corner of said Lot 1A bears S 19° 15' 34" W a distance of 1,098.23 ft.,

Thence N 41° 02' 19" E along said fence line and the northwest line of the herein described tract at 97.5 ft. pass a fence corner and continue with said fence and the southeast line of "Taxiway S" in all a distance of 267.5 ft. to a set nail spike for the north corner of the herein described tract,

Thence S 48° 57' 41" E along the northeast line of the herein described tract in all a distance of 209.57 ft. to a set railroad spike for the east corner of same and also being the north corner of a proposed 0.66 acre tract,

Thence S 41° 18' 15" W along the southeast line of the herein describe tract and the northwest line of said 0.66 acre tract in all a distance of 267.50 ft. to a set nail spike for the south corner of the herein described tract and also being the west corner of said 0.66 acre tract,

Thence N 48° 57' 41" W along the southwest line of the herein described tract in all a distance of 208.33 ft. to the place of beginning and containing 1.28 acres.  
Bearings, distances and coordinates are based on the Texas State Coordinate System, Central Zone, NAD 83.



*Richard A. Shelton* 1-22-14

Richard A. Shelton, RPLS 4356  
City of Midland, Texas  
432-685-7295

Exhibit "A"



# City Council Agenda

Approved for Agenda:  
**CSharp**  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Courtney Sharp, City Manager

**SUBJECT:** Consider a Resolution Amending the Protective Covenants applicable to Entrada Enterprise Park located in Midland International Airport Industrial Park, Section 5, Midland, Midland County, Texas, and ordering recordation.

---

## Purpose:

Consider a Resolution Amending the Protective Covenants applicable to Entrada Enterprise Park located in Midland International Airport Industrial Park, Section 5, Midland, Midland County, Texas, and ordering recordation.

## Recommended City Council Action

☒ Approve ☐ Deny ☐ Directional / Informational

## Fiscal Impact:

## Discussion:

The covenants were adopted as deed restrictions for the MDC's sites at the Airport in 2005. The proposed amendment is to allow for the use of new and improved building materials. The original covenants state that the exposed exterior of buildings shall be composed of concrete panels, glass or brick or a combination thereof.

All land owners and the Director of Airports have met and agree to the amendment.

The amendment adds texture-wall panels to the list of approved building materials. Below is a picture of the newly construction Graybar facility in Odessa that is comprised of texture- wall panels.





**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION APPROVING AN AMENDMENT TO THE  
DECLARATION OF PROTECTIVE COVENANTS  
APPLICABLE TO ENTRADA ENTERPRISE PARK  
LOCATED IN MIDLAND INTERNATIONAL AIRPORT  
INDUSTRIAL PARK, SECTION 5, MIDLAND, MIDLAND  
COUNTY, TEXAS; AND ORDERING RECORDATION**

**WHEREAS**, Entrada Enterprise Park located in Midland International Airport Industrial Park, Section 5, Midland, Midland County, Texas, is subject to a Declaration of Protective Covenants, as amended; and

**WHEREAS**, on January 24, 2014, the Midland Development Corporation Board of Directors approved an amendment to said protective covenants; and

**WHEREAS**, the Midland City Council finds it to be in the public interest to approve said amendment to said protective covenants;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the amendment to the Declaration of Protective Covenants of Entrada Enterprise Park, which is attached hereto as Exhibit "A" and incorporated herein, is hereby approved.

**SECTION TWO.** That the City Secretary is hereby authorized and directed to file said amendment for record with the Midland County Clerk.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

---

Amy Turner, City Secretary

RECOMMENDED AND APPROVED:

---

Courtney Sharp, City Manager

APPROVED ONLY AS TO FORM:

---

Keith Stretcher, City Attorney

STATE OF TEXAS           §

COUNTY OF MIDLAND   §

AMENDMENT TO DECLARATION OF PROTECTIVE COVENANTS

The Undersigned, being One Hundred percent (100%) of the votes and owners of the Entrada Enterprise Park Association, a Texas non-profit corporation (the "Association") do hereby make the following amendments to the Declaration of Protective Covenants (the "Declaration") as found in Volume 2942, Page 73 in the Official Public Records of Midland County, Texas.

1. The Declarations are hereby amended as set for below:

Paragraph F.2.a. shall hereinafter read as follows:

2. Building Wall Finish
  - a. All walls exposed to the exterior shall be composed of concrete panel, masonry, texture-wall panels, glass or brick, or a combination thereof.

2. The Declarations are hereby confirmed and ratified as amended herein.

Executed effective January 28, 2014.

**MIDLAND DEVELOPMENT CORPORATION**

By: \_\_\_\_\_,  
\_\_\_\_\_, Chairman

STATE OF TEXAS           §  
COUNTY OF MIDLAND   §

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2014, by \_\_\_\_\_, Chairman of the Midland Development Corporation, a Texas corporation, on behalf of said corporation.

[SEAL]

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

**GILLILAND GROUP PARTNERSHIP**

by: \_\_\_\_\_  
name: \_\_\_\_\_  
title: \_\_\_\_\_

STATE OF TEXAS                    §  
COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on this \_\_\_\_\_, day of \_\_\_\_\_, 2014 by \_\_\_\_\_, Partner(s) on behalf of Gilliland Group Partnership, a partnership.

[SEAL]

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

**NC STURGEON LP**

by: \_\_\_\_\_  
its general partner

by: \_\_\_\_\_  
name: \_\_\_\_\_  
title: \_\_\_\_\_

STATE OF TEXAS                    §  
COUNTY OF MIDLAND §

This instrument was acknowledged before me on this \_\_\_\_\_, day of \_\_\_\_\_, 2014 by \_\_\_\_\_ as \_\_\_\_\_ of \_\_\_\_\_.

[SEAL]

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

**CITY OF MIDLAND, TEXAS**

Witness:

by:

\_\_\_\_\_  
Jerry F. Morales  
Mayor

\_\_\_\_\_  
Amy Turner  
City Secretary



*City of Midland*  
Office Memorandum

**DATE:** 1/28/2014

**TO:** The Honorable Mayor and City Council Members

**FROM:** Amy Turner, City Secretary

**SUBJECT:** Consider a resolution calling a special election on May 10, 2014 to fill the unexpired Council Member At Large term.

---

The proposed resolution calls for a special election to be held on May 10, 2014 to fill the vacancy created by Jerry Morales when he was elected Mayor.

The cost of the election is handled through the master inter-local agreement with Midland County.

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION CALLING A SPECIAL ELECTION FOR ONE CITY COUNCIL MEMBER-AT-LARGE; PROVIDING FOR USE OF ACCESSIBLE VOTING SYSTEMS; ESTABLISHING ELECTION PRECINCTS FOR SAID ELECTION; AND ESTABLISHING POLLING PLACES FOR SAID ELECTION; SAID ELECTION SHALL BE HELD ON MAY 10, 2014, WITH EARLY VOTING TO BEGIN ON APRIL 28, 2014**

**WHEREAS**, the laws of the State of Texas provide that election must be held to fill vacancies on a City Council; and

**WHEREAS**, it is necessary for the City Council to order that an election be held on Saturday, May 10, 2014, and to establish election precincts and voting places for the current election year beginning April 1, 2014;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That an election be, and is, hereby ordered to be held on Saturday, May 10, 2014, during the hours of 7:00 a.m. to 7:00 p.m. for the office of one City Council member representing the City at-Large.

**SECTION TWO.** That the City hereby adopts for use in early and election day voting the iVotronic Direct Recording Electronic (DRE) Voting System as approved by the Secretary of State. Optical scan ballots shall be used for early voting by mail, and the DRE voting system shall be used for early voting by personal appearance; the DRE Voting System and optical scan ballots shall be used in each polling place in the City on election day.

**SECTION THREE.** That in accordance with the provisions of V.A.T.S., Election Code, § 42.061, the Municipal Election precincts for the voting year effective April 1, 2014, through March 31, 2015, are hereby designated as follows:

City Election Precinct No. 1, containing County Voting Precinct No. 211;

City Election Precinct No. 2, containing County Voting Precinct Nos. 308 and 310;

City Election Precinct No. 3, containing County Voting Precinct No. 306;

City Election Precinct No. 4, containing County Voting Precinct No. 305;



City Election Precinct No. 5, containing County Voting Precinct No. 304;  
City Election Precinct No. 6, containing County Voting Precinct No. 309;  
City Election Precinct No. 7, containing County Voting Precinct No. 307;  
City Election Precinct No. 8, containing County Voting Precinct No. 205;  
City Election Precinct No. 9, containing County Voting Precinct No. 212;  
City Election Precinct No. 10, containing County Voting Precinct Nos. 104, 109 and 303;  
City Election Precinct No. 11, containing County Voting Precinct No. 208;  
City Election Precinct No. 12, containing County Voting Precinct No. 105;  
City Election Precinct No. 13, containing County Voting Precinct No. 106;  
City Election Precinct No. 14, containing County Voting Precinct No. 102;  
City Election Precinct No. 15, containing County Voting Precinct No. 103;  
City Election Precinct No. 16, containing County Voting Precinct No. 405;  
City Election Precinct No. 17, containing County Voting Precinct Nos. 107 and 110;  
City Election Precinct No. 18, containing County Voting Precinct No. 407;  
City Election Precinct No. 19, containing County Voting Precinct No. 404;  
City Election Precinct No. 20, containing County Voting Precinct No. 403;  
City Election Precinct No. 21, containing County Voting Precinct No. 206;  
City Election Precinct No. 22, containing County Voting Precinct No. 207;  
City Election Precinct No. 23, containing County Voting Precinct No. 210;  
City Election Precinct No. 24, containing County Voting Precinct No. 204;  
City Election Precinct No. 25, containing County Voting Precinct No. 408;  
City Election Precinct No. 26, containing County Voting Precinct No. 409 and 411;  
City Election Precinct No. 27, containing County Voting Precinct No. 402;  
City Election Precinct No. 28, containing the tracts of land described below:

Beginning at a point in the west R.O.W. line of State Highway 349, said point lying 72 feet west of the east section line of Section 11, Block 39, T-1-S, T&P Ry. Co. Survey, more or less;

Thence northwesterly approximately 5,097 feet along the west R.O.W. line of State Highway 349 to a point for a corner, said point lying in the west R.O.W. of State Highway 349 and on the Martin County-Midland County line;

Thence east along the Martin-Midland County Line approximately 17,250 feet to a point for a corner, said point being 660 feet east of the west section line and 491 feet north of the south section line of Section 9, Block 38, T-1-S, T&P Ry. Co. Survey;

Thence southeasterly approximately 1,151 feet along a line lying 660 feet east of and parallel to the west section lines of Sections 9 and 16, Block 38, T-1-S, T&P Ry. Co. Survey, to a point for a corner; said point being 660 feet east of the west line and 660 feet south of the north line of Section 16, Block 38, T-1-S, T&P Ry. Co. Survey;

Thence southwesterly approximately 5,280 feet along a line lying 660 feet south of and parallel to the north line of Sections 16 and 17, Block 38, T-1-S, T&P Ry. Co. Survey; to a point for a corner; said point being 660 feet east of the west line and 660 feet south of the north line of said Section 17, Block 38, T-1-S, T&P Ry. Co. Survey;

Thence northwesterly 1,320 feet along a line lying 660 feet more or less east of and parallel to the western line of Sections 17 and 8, Block 38, T-1-S, T&P Ry. Co. Survey, to a point for a corner; said point being 660 feet east of the west line and 660 feet north of the south line of Section 8, Block 38, T-1-S, T&P Ry. Co. Survey;

Thence westerly approximately 11,292 feet along a line lying 660 feet, more or less, north of and parallel to the northern line of Section 18, Block 38, T-1-S, T&P Ry. Co. Survey and Sections 11 and 12, Block "X", H. P. Hilliard Survey to the point of beginning:

And a tract of land lying in Martin County described as follows:

Beginning at a point on the City limits line of the City of Midland, said point lying at the intersection of the west R.O.W. line of State Highway 349 and the Midland-Martin County line and located approximately 73 feet west of the east section line and 183 feet south of the north section line of Section 11, Block 39, T-1-S, T&P Ry. Co. Survey;

Thence northwesterly along the west R.O.W. line of State Highway 349 approximately 11,403 feet to a point for a corner, said point being 660 feet north of the south section line and 170.5 feet west of the east section line of Section 26, Block 39, T-1-N, T&P Ry. Co. Survey, said point lying on the west R.O.W. line of State Highway 349;

Thence northeasterly 660 feet north of and parallel to the south section lines of Sections 26 and 25, Block 39, T-1-N, T&P Ry. Co. Survey and Sections 32, 31 and 30, Block 38, T-1-N, T&P Ry. Co. Survey to a point for a corner; said point being 660 feet north of the south line and 660 feet east of the west line of said Section 30, Block 38, T-1-N, T&P Ry. Co. Survey;

Thence southeasterly a distance of approximately 15,909 feet along a line

lying 660 feet east of and parallel to the west section lines of Sections 30 and 35, Block 38, T-1-N, T&P Ry. Co. Survey, and Sections 4 and 9, Block 38, T-1-S, T&P Ry. Co. Survey, to a point for a corner; said point being 660 feet east of the west line of said Section 9, and lying on the Midland-Martin County line:

Thence west along the Midland-Martin County line a distance of approximately 17,250 feet to the point of beginning;

City Election Precinct No. 29, containing County Voting Precinct No. 410.

**SECTION FOUR.** That in accordance with the provisions of V.A.T.S., Election Code §§ 43.004, 271.002 and 271.003, the Municipal Polling Locations for the election to be held on Saturday, May 10, 2014, are hereby designated as follows:

ANNEX COURTROOM 2110 NORTH A

CENTENNIAL LIBRARY 2503 W. LOOP 250 N

COGDELL LEARNING CENTER 211 W FLORIDA

COTTON FLAT BAPTIST CHURCH 6409 S. HWY 349

FAIRMONT PARK CHURCH OF CHRIST 3813 N MIDLAND DRIVE

GOLF COURSE CHURCH OF CHRIST 3500 W GOLF COURSE

GREATER IDEAL BAPTIST CHURCH 301 S TYLER

GREENWOOD BAPTIST CHURCH 10908 FM 307

MANOR PARK 5212 SINCLAIR

MLK, JR COMMUNITY CENTER 2300 BUTTERNUT

PALMER DRUG (PDAP) 1208 W WALL

ST. PAUL'S METHODIST CHURCH 4501 THOMASON

**SECTION FIVE.** That the method of voting shall be by paper ballots which are counted by a centralized optical scanner or by use of the Direct Recording Electronic (DRE) Voting System, as set out in Section Three hereunder. Voting shall be conducted between the hours of 7:00 a.m. and 7:00 p.m. on the date of such election; and election shall be held in accordance with the constitutional laws of the State of Texas and all qualified electors of the City of Midland, Texas, shall be entitled to vote.

**SECTION SIX.** That early voting shall be conducted at the Midland County Election Administrator's office, in the County Annex, 2110 North A Street, in accordance with the provisions of V.A.T.S., Election Code, § 85.002. Early voting shall be by Direct Recording Electronic (DRE) Voting System, and shall be conducted during the regular office hours of 8:00 a.m. to 5:00 p.m. on April 28 through May 2, 2014 and from 7:00 a.m. to 7:00 p.m. during the final two days of early voting on May 5 and May 6, 2014. Application for ballots by mail shall be addressed to Early Voting Clerk, P. O. Box 3434, Midland, TX, 79702.

**SECTION SEVEN.** A candidate's application for a place on the ballot must be filed not later than 5:00 p.m. of the 71<sup>st</sup> day before election day.

**SECTION EIGHT.** An application by a candidate for a place on the ballot may not be filed before the election is ordered.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

---

Courtney Sharp, City Manager

APPROVED AS TO CONTENT AND  
COMPLETENESS:

---

Amy M. Turner, City Secretary

APPROVED ONLY AS TO FORM:

---

Keith Stretcher, City Attorney



**DATE:** January 22, 2014

**TO:** The Honorable Mayor and City Council Members

**FROM:** Keith Stretcher, City Attorney

**SUBJECT:** Agreement with the Midland-Odessa Urban Transit District (MOUSD), the City of Odessa, the City of Midland and McDonald Transit Associates Incorporated (McDonald)

---

The proposed resolution authorizes the execution of an agreement between the MOUSD, the City of Odessa, the City of Midland, and McDonald. MOUSD has selected McDonald to manage and operate a motorbus transit system in the City of Odessa and the City of Midland. The terms of the agreement are outlined below:

1. The term of this proposed agreement is from January 29, 2014 to September 30, 2018, subject to rights of termination;
2. In Article IV, the parties agree that this agreement shall not be interpreted as providing goods and services to the City of Odessa and the City of Midland. This is important because it preserves the governmental immunity for the cities of Odessa and Midland;
3. In Article X, the City of Midland is given the right to review and audit the records of McDonald;
4. In Article XIV, it is clear that the City of Midland has no financial commitment that exceeds the budget approved by the Midland City Council;
5. In Article XVI, McDonald shall maintain liability insurance at its sole expense and the insurance shall name the City of Midland and the City of Odessa as additional insureds;
6. In Article XIX, McDonald releases the City of Midland from all present and future causes of action;
7. In Article XX, McDonald waives its right to recover attorney's fees;

8. In Article XXIII, the City of Midland reserves the right to cancel this agreement with or without cause upon giving all parties at least thirty (30) days written notice;
9. In Article XXIV, McDonald shall act as an independent contractor and not as an employee or agent of the City of Midland;
10. In Article XXV, venue for any lawsuit shall be in Ector County or Midland County, Texas. This is important because McDonald has their principal place of business in Tarrant County, Texas;
11. In Article XXXV, McDonald shall be responsible for all fines and penalties that result from the violation of any applicable laws, ordinances, or governmental rules or regulations.

If you have any questions or if I may be of any assistance do not hesitate to contact me.

Keith Stretcher

KS/lo

**RESOLUTION NO. \_\_\_\_\_**

**RESOLUTION AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH THE MIDLAND-ODESSA URBAN TRANSIT DISTRICT, THE CITY OF ODESSA, THE CITY OF MIDLAND, AND MCDONALD TRANSIT ASSOCIATES, INCORPORATED, RELATED TO THE MANAGEMENT AND OPERATION OF A MOTORBUS SYSTEM IN THE CITY OF ODESSA AND THE CITY OF MIDLAND; AND THE CITY MANAGER AND CITY ATTORNEY ARE AUTHORIZED TO MAKE NON-SUBSTANTIVE MODIFICATIONS TO THE AGREEMENT AS LONG AS THE INTENT IS NOT CHANGED**

**WHEREAS**, the Council finds it to be in the public interest to authorize the execution of an agreement with the Midland-Odessa Urban Transit District, the City of Odessa, the City of Midland and McDonald Transit Associates Incorporated, related to the management and operation of a motorbus system in the City of Odessa and the City of Midland; and

**WHEREAS**, the Council finds it to be in the public interest to authorize the City Manager and the City Attorney to make non-substantive modifications to the agreement as long as the intent is not changed;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the City Manager and the City Attorney are hereby authorized and directed on behalf of the City of Midland, Texas, to execute an agreement with the Midland-Odessa Urban Transit District, the City of Odessa, the City of Midland and McDonald Transit Associates Incorporated. That said Agreement is attached hereto and marked as Exhibit "A", and the City Manager and the City Attorney are hereby authorized to make non-substantive modifications to the agreement as long as the intent is not changed.

On motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, by the following vote:

Council members voting "AYE":



Council members voting “NAY”:

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

\_\_\_\_\_  
Courtney Sharp, City Manager

APPROVED ONLY AS TO FORM:

\_\_\_\_\_  
Keith Stretcher, City Attorney

STATE OF TEXAS           §

COUNTY OF ECTOR       §

**MIDLAND-ODESSA URBAN TRANSIT DISTRICT, THE CITY OF ODESSA, TEXAS,  
AND THE CITY OF MIDLAND, TEXAS, AND  
MCDONALD TRANSIT ASSOCIATES, INC.  
MANAGEMENT CONTRACT FOR TRANSPORTATION SYSTEM**

This Contract and Agreement (“Agreement”) is made and entered into this \_\_\_\_ day of \_\_\_\_, 20\_\_, by and between the Midland-Odessa Urban Transit District, located in Midland and Ector Counties, Texas (hereinafter referred to as the “MOUTD”), the City of Midland, located at 300 N. Loraine, Midland, Texas 79701, the City of Odessa, located at 411 W. 8<sup>th</sup> Street, Odessa, Texas 79761, and McDonald Transit Associates, Inc., located at 3800 Sandshell Drive, Suite 185, Fort Worth, Texas 76137 (hereinafter referred to as “McDonald”), collectively referred to as the “Parties”.

**WITNESSETH**

WHEREAS, the MOUTD has determined that it will require services of a professional management company for the MOUTD-owned transit system which is being operated in its area of jurisdiction; and

WHEREAS, the MOUTD is authorized to enter into a contract for the operation and management of said transportation system; and

WHEREAS, McDonald is engaged in the business of providing advisory and management services for the operation of transit systems and has trained, experienced personnel available for that purpose, and is desirous of providing such advisory and management services for the MOUTD; and

WHEREAS, the MOUTD has made the determination that McDonald is qualified to provide the services referenced herein and the employment of McDonald would serve the best interests and welfare of the public utilizing the transit system operated by the MOUTD;

NOW, THEREFORE, in consideration of the foregoing recitals and covenants and agreements of each of the Parties, the Parties agree as follows:

**ARTICLE I.  
PURPOSE**

The MOUTD does hereby engage McDonald to manage and operate the motorbus transit system conducted in and about the MOUTD jurisdictional area (“System”) as an independent contractor, under the terms and conditions set forth.

## **ARTICLE II. MOUTD PERFORMANCE**

The MOUTD agrees to make available to McDonald all necessary office, garage, and storage facilities, office furniture, equipment, materials, supplies, rolling stock, bus maintenance equipment, automobile transportation and other equipment necessary or appropriate for the operation of the System.

## **ARTICLE III. TERM**

The term of this Agreement shall be for a period beginning January 29, 2014 and ending on September 30, 2018, subject to rights of termination.

## **ARTICLE IV. PERFORMANCE OF SERVICES**

McDonald agrees to furnish a qualified, diligent, expert, and efficient executive who will reside in the Midland/Odessa area and who will be assigned to, and perform the functions of the position of Resident General Manager who will serve as operating officer and be responsible for the day-to-day operation of all departments of the System in an efficient and effective manner.

The selection and appointment of the Resident General Manager, and any such subsequent appointees, shall be the responsibility of McDonald but shall not be made without first obtaining the advice and consent of the MOUTD, the City of Odessa and the City of Midland. In the event of the disability of any person acting in the position of Resident General Manager for a period in excess of one (1) month, McDonald covenants and agrees to secure a qualified individual to fill said position for as long as such disability may continue, or to replace such individual if necessary, all subject to the advice and consent of the MOUTD, the City of Midland and the City of Odessa.

McDonald further covenants and agrees to furnish expert, efficient, and economical management services and consultation in all areas of the public bus transportation industry including, but not limited to, the following:

1. Overall management and policy direction
  - a. Operations; systems and procedures; and research
  - b. Finance and accounting
    - i. Annual budget
    - ii. Quarterly and annual reports
  - c. Safety, accident prevention and insurance
  - d. Schedules, transportation and routing
  - e. Maintenance and purchasing of equipment
  - f. Sales promotion and public relations
  - g. Governmental grant application and administration
  - h. Security
  - i. Schedule preparations
2. Management Continuity
3. Management personnel development and training
4. Compliance with the Federal, State, and local guidelines and requirements, i.e, Section 504 Title VI, EEO, DBE, NTD, etc.
5. Personnel and labor relations including bargaining unit contract negotiations, if any.
6. McDonald's legal advisors will act as legal counsel in all legal affairs, suits, pleas, and litigation pertaining to management of the transit system operated by the MOUTD. Neither the City of Odessa's nor the City of Midland's legal staff will act as legal counsel for McDonald or the MOUTD.

McDonald covenants and agrees that it will maintain at its sole cost and expense, the Texas Corporation, Midland-Odessa Transit Management, Inc. (hereinafter called "MOTM"), which corporation shall serve as employer of all transit employees, excluding the Resident General Manager.

Any contractual obligations entered into or assumed by MOTM and approved by the MOUTD in connection with the operation of the System, shall be binding upon McDonald only for the term of this Agreement as same may be extended and, thereafter, McDonald shall have no further obligation. With regard to liability as between McDonald, the MOUTD, the City of Midland and the City of Odessa, McDonald shall have the same liability and limitations of liability for MOTM as are applicable to McDonald under this Agreement.

**GOODS AND SERVICES** - The Parties agree that this Agreement is not a contract for the providing of goods or services to the City of Odessa and the City of Midland as authorized by Subchapter I, Section 271.151 of the Texas Local Government Code.

## **ARTICLE V. PAYMENT FOR SERVICES**

As compensation for all services and obligations set forth herein, the MOUTD shall pay McDonald a firm, fixed, monthly management fee ("Management Fee") as follows:

|              | Year 1       | Year 2       | Year 3       | Year 4       | Year 5       |
|--------------|--------------|--------------|--------------|--------------|--------------|
| Monthly Fee  | \$13,521.00  | \$14,129.42  | \$14,659.33  | \$15,172.33  | \$15,627.58  |
| Annual Total | \$162,252.00 | \$169,548.00 | \$175,911.96 | \$182,067.96 | \$187,530.96 |

The Management Fee includes all costs and expenses associated with the salary and related costs of the Resident General Manager, in-house legal counsel, corporate staff travel, and overhead. In addition, the Management Fee includes the cost of expert management consultation and advisory assistance in all areas of the public bus transportation industry as may be reasonably required to assist the Resident General Manager.

The MOUTD agrees to provide such funds as may be necessary to meet payroll and all other operating expenses of the System (sometimes referred to as "Operating Expenses"), excluding costs covered by the Management Fee, the cost of the fidelity bond on McDonald officers as described in Article VI, and the costs of non-resident advisory services described in Article IV.

## **ARTICLE VI. FIDELITY BOND**

McDonald, at its sole cost and expense, shall furnish to the MOUTD all necessary fidelity and surety bonds to protect, save whole and harmless, and indemnify the MOUTD, the City of Odessa and the City of Midland, from and against dishonesty, fraud or theft occasioned by any officer or employee of McDonald. Coverage of each such employee shall be in the amount of not less than One Million Dollars (\$1,000,000.00).

The MOUTD-based transit employees, excluding the Resident General Manager, will be covered by a blanket fidelity bond, the premium for which shall be considered as an Operating Expense.

## **ARTICLE VII.**

## **NONDISCRIMINATION**

As a condition of this Agreement, McDonald covenants that McDonald will take all necessary actions to insure that, in connection with any work under this Agreement, McDonald, its associates and subcontractors, will not discriminate in the treatment or employment of any individual or groups of individuals on the grounds of race, color, religion, national origin, age, sex, or physical handicap unrelated to job performance, either directly, indirectly or through contractual or other arrangements. In this regard, McDonald shall keep, retain and safeguard all records relating to this Agreement or work performed hereunder for a minimum period of three (3) years from final Agreement completion, with full access allowed to authorized representatives of the MOUTD, the City of Midland and the City of Odessa, upon request, for purposes of evaluating compliance with this and other provisions of the Agreement.

## **ARTICLE VIII. INTEREST OF PUBLIC OFFICIALS**

McDonald represents that no MOUTD officer, employee, or agent has been compensated in any way with respect to this Agreement and its consideration by the MOUTD. In no event will McDonald pay a fee to or in any other manner compensate any MOUTD officers, employees, or agents in connection with the approval of this Agreement. A breach under this Article shall result in automatic termination under this Agreement by McDonald.

No member, officer, or employee of the MOUTD, the City of Odessa or the City of Midland, during their tenure will have any interest, direct or indirect, in this Agreement or the proceeds thereof.

## **ARTICLE IX. INTEREST OF MEMBER OF CONGRESS AND THE LEGISLATURES OF THE STATE OF TEXAS**

No member of, or delegate to, the Congress of the United States nor the Legislatures of the State of Texas will be admitted to any share or part of this Agreement or to any benefit arising therefrom.

## **ARTICLE X. RIGHT OF REVIEW AND AUDIT**

McDonald will permit the authorized representatives of the United States Department of Transportation, the Comptroller General of the United States, the State of Texas, the MOUTD, the City of Odessa, and the City of Midland to inspect and audit all data and records relating to performance under this Agreement. McDonald agrees to retain such records for a minimum of three (3) years following completion of this Agreement.

## **ARTICLE XI. CONFLICTING INTEREST**

McDonald covenants and agrees that it presently has no interest, and will not acquire any interest, direct or indirect, which conflicts with its efficient, diligent and faithful performance of the terms of this Agreement.

## **ARTICLE XII. COOPERATION**

McDonald, its officers, agents, employees and assignees, covenant and agree to maintain close contact and cooperate with the MOUTD through a MOUTD staff member specifically designated for such purpose and to furnish to said MOUTD staff member regular reports on the operations of the System.

## **ARTICLE XIII. COMPLIANCE**

McDonald acknowledges and agrees that it shall comply with all terms and conditions of the State of Texas and the Federal Transit Administration grant contracts between the United States and the MOUTD, the MOUTD's applications, assurances, and all other applicable laws and regulations which may apply in carrying out the accomplishment of the programs including, but not limited to, Equal Employment Opportunity and Disadvantaged Business Enterprise. McDonald shall also comply with all applicable City ordinances of the City of Midland and the City of Odessa and with the Interlocal Agreement between the City of Midland and the City of Odessa establishing the MOUTD.

## **ARTICLE XIV. BUDGET**

McDonald, its successors and assigns, covenant and agree to prepare, submit, and recommend a proposed annual budget, in the same form and manner as requests for City of Midland and/or City of Odessa departments, for the operation of the System for the same fiscal year under which the MOUTD operates, i.e., the period commencing October 1<sup>st</sup> and ending September 30<sup>th</sup> of each year. Such proposed budget shall be prepared and submitted in accordance with a schedule of presentations and submissions approved by the MOUTD, or its duly authorized representatives. Amended budgets may also be submitted for approval. There shall be no expenditure of funds except as authorized by the annual or amended budget approved by the City of Midland and the City of Odessa. The City of Midland and the City of Odessa shall have no financial commitment that exceeds the budgets adopted by their respective city councils. The budget shall include a budget for the City of Midland, a budget for the City of Odessa, and a general budget for the cost to be allocated between the cities. The MOUTD shall have the right to all revenues arising out of Grants or operation of the System.

## **ARTICLE XV. DECISIONS**

All services to be rendered by McDonald shall be subject to the review by the MOUTD. McDonald shall make recommendations, or MOUTD may request information or recommendations, as to the areas of operation which are deemed appropriate and proper and the decision of the MOUTD shall be binding and final in regards thereto.

## **ARTICLE XVI. INSURANCE**

McDonald shall obtain appropriate forms of insurance coverage naming McDonald and MOTM as primary insured, to be in effect during the term of this Agreement, customarily maintained by the transit industry with respect to similar transit operations including, but not limited to, personal injury and property damage insurance providing single limit coverage in an amount as may be designated by the MOUTD from time to time. All policies providing such coverage by their terms or by specific endorsement shall designate the MOUTD, the City of Midland, and the City of Odessa as additional insureds under the terms thereof. The cost of such insurance or of any primary risk shall be an Operating Expense. Whatever liability, whether tort, contractual or otherwise, including but not limited, employment related matters, or bodily injury or property damage, which exceeds the insurance provided herein, other than liability for intentional personal injury or punitive damages, which may be incurred by third parties in connection with or arising out of the management or operation of the System by McDonald or MOTM and the MOUTD, the cost and expense thereof, including any and all liability of MOTM and/or McDonald, its agents servants, or employees will be a part of the costs and expenses incurred by the MOUTD in the operation of the System and will be reimbursed by the MOUTD to MOTM or McDonald as may be appropriate. McDonald will, however, be liable for any dishonesty, gross negligence, or fraudulent misconduct committed or directed by any officer of McDonald or any subsidiary of McDonald and for any breach of this Agreement on the part of McDonald, MOTM or any such subsidiary. The provisions of this Article are solely for the benefit of the Parties, shall not waive any governmental immunity, and do not grant any rights, contractual or otherwise, to any other person or entity not a party to the contract.

- (a) McDonald, as an Operating Expense, shall at its sole expense provide and maintain public liability insurance in full force and effect at all times during the term of this Agreement and any extensions thereof. Such insurance, at a minimum, must include the following coverage and limits of liability:

| <b><u>Coverage</u></b>                                 | <b><u>Limit of Liability</u></b>                  |
|--------------------------------------------------------|---------------------------------------------------|
| Comprehensive General Liability                        | \$10,000,000 combined single limit per occurrence |
| Comprehensive Automobile Liability and Property Damage | \$2,000,000 combined single limit per occurrence  |

Worker's Compensation Insurance as required by the laws of the State of Texas and Employer's liability insurance in a minimum amount of \$10,000,000.

- (b) All insurance provided for in subsection (a) shall be effective under policies issued by solvent insurance carriers qualified to do business in the State of Texas and having a rating satisfactory to the MOUTD, and shall be written on policy forms satisfactory to the MOUTD, the City of Midland and the City of Odessa, their officials and employees as additional insureds waiving any rights of subrogation against the MOUTD, the City of Midland, the City of Odessa, and their officials and employees.
- (c) The payment of any deductible on such policies shall be the responsibility of McDonald as an Operating Expense.

- (d) There shall be an endorsement that requires issuer to give written notice to the Director of Public Works of the City of Odessa and the City Manager of the City of Midland (hereinafter referred to as "Project Managers") at least thirty (30) days prior to cancellation, non-renewal, or material modification of such policy. McDonald shall furnish Project Managers with copies of said policies or certificates evidencing such coverage and endorsement prior to commencing the work.
- (e) McDonald and MOTM shall maintain workers compensation coverage on all employees working on this project. The workers compensation coverage insurance shall waive all rights of subrogation as to the MOUTD, the City of Midland and the City of Odessa.
- (f) For purposes of insurance, the Cities of Midland and Odessa are considered third party beneficiaries.
- (g) The City of Midland and the City of Odessa, and their officers, agents, and employees shall be named as additional insureds on the Comprehensive General Liability and Comprehensive Auto Liability policies. All policies, Comprehensive General Liability, Comprehensive Auto Liability and Workers Compensation, must contain an endorsement to the effect that the issuer waives any claim or right in the nature of subrogation to recover against the City of Midland and the City of Odessa, their officers, agents or employees regardless of the cause or origin of that claim or right including negligence of the Cities of Midland and Odessa, their agents, officers, or employees, and that the issuer covenants that no insurer shall hold any right of subrogation against the Cities of Midland and Odessa.

#### **ARTICLE XVII. ASSIGNMENT**

This Agreement shall not be assigned or transferred, in whole or in part, by McDonald without the prior written consent of the MOUTD, the City of Odessa, and the City of Midland.

#### **ARTICLE XVIII. INDEMNITY - LIABILITY**

***McDonald and MOTM shall indemnify and hold harmless and defend the MOUTD, the City of Odessa, and the City of Midland, and their officers, agents and employees, against any and all claims, lawsuits, judgments, costs and expenses for personal injury (including death), property damage or other harm for which recovery of damages is sought and suffered by any person or persons, that may arise out of or be occasioned by McDonald's or MOTM's breach of any of the terms or provisions of this Agreement, or by any other negligent act or omission of McDonald or MOTM, its officers, agents, associates, employees or subcontractors, in the performance of this Agreement; except that the indemnity provided for in this Paragraph shall not apply to any liability resulting from the sole negligence of the MOUTD, its officers, agents, employees or separate contractors, and in the event of joint and concurrent negligence of both the McDonald or MOTM and the MOUTD, responsibility and indemnity, if any, shall be apportioned comparatively in accordance with the laws of the State of Texas without, however, waiving any governmental immunity available to the MOUTD, the City of Midland and the City of Odessa under Texas law and without waiving any defense of the Parties under Texas law. The provisions of this Paragraph are solely for the benefit of the Parties hereto and do not create or grant any rights, contractual or otherwise, to any other person or entity.***



**ARTICLE XIX.**  
**INDEMNITY – DEFENSE**

*McDonald and MOTM agree to indemnify, protect and save the MOUTD, the City of Odessa, and the City of Midland, its directors, officers, and employees harmless against any and all cost or expenses of whatever kind or nature, including costs of litigation, attorney fees and reasonable expenses in connection therewith whether or not such loss, injury, or damage shall be valid or groundless, and McDonald and MOTM shall be bound and obligated to assume the defense thereof, including any settlement negotiations, and shall pay, liquidate, discharge and satisfy any and all settlement, judgments, awards or expenses resulting from or arising out of such injuries, death or damages without reimbursement from the MOUTD. It is understood and agreed by McDonald and MOTM that if MOUTD, its officers, agents, employees, are made defendant in any suit or action and McDonald and MOTM fail or neglect to assume the defense thereof, after having been notified so to do by the MOUTD, then the MOUTD may compromise and settle or defend any such suit or action, and McDonald and MOTM shall be bound and obligated to reimburse the MOUTD for the amount expended by it in settling and compromising any such claim, or in the amount expended by the MOUTD in paying any judgment rendered therein, together with all reasonable attorney's fees incurred by the MOUTD by reason of its defense or settlement of such claims.*

***SOVEREIGN IMMUNITY - By executing this Agreement, the MOUTD, the City of Odessa, and the City of Midland are not waiving their rights of sovereign immunity. The MOUTD, the City of Midland and the City of Odessa are retaining their immunity from suit. The MOUTD, the City of Odessa, and the City of Midland are not granting consent to be sued by legislative resolution or action. THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.***

**RELEASE -NOTWITHSTANDING ANY OTHER PROVISIONS, MCDONALD HEREBY RELEASES, ACQUITS, RELINQUISHES AND FOREVER DISCHARGES THE MOUTD, THE CITY OF ODESSA, THE CITY OF MIDLAND, AND THEIR RESPECTIVE EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS, CLAIMS, DAMAGES, OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH MCDONALD HAS OR MIGHT HAVE IN THE FUTURE INCLUDING, BUT NOT LIMITED TO, BREACH OF CONTRACT, QUANTUM MERUIT, CLAIMS UNDER THE DUE PROCESS AND TAKINGS CLAUSES OF THE TEXAS AND UNITED STATES CONSTITUTIONS, TORT CLAIMS OR THE MOUTD'S, THE CITY OF ODESSA'S, OR THE CITY OF MIDLAND'S NEGLIGENCE.**

**NOTICE OF ALLEGED BREACH; STATUTORY PREREQUISITES** - As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Agreement, McDonald or its legal representative, shall give to the MOUTD, to the City Manager of Odessa, Texas, and to the City Manager of Midland, Texas, notice in writing (consisting of one original and seven copies of notice attached to a copy of this Agreement) of such damages, duly verified, within one-hundred-twenty (120) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which McDonald will settle, the physical and mailing addresses of McDonald at the time and date the claim was presented and the physical and mailing addresses of McDonald for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom McDonald relies to establish its claim; and a failure to so notify the MOUTD and the City Managers within the time and manner provided herein shall exonerate, excuse and except the MOUTD, and the City of Odessa, and the City of Midland from any liability whatsoever. The MOUTD, the City of Odessa, and the City of Midland are under no obligation to provide notice to McDonald that McDonald's notice is insufficient. The MOUTD reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, McDonald's failure to comply with the requirements herein shall perpetually bar McDonald's claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless of whether the MOUTD, or the City of Odessa, or the City of Midland has actual or constructive notice or knowledge of said claim or alleged damages. McDonald agrees that the requirements of this entire Agreement are reasonable.

## **ARTICLE XX. ATTORNEY FEES**

**ATTORNEY'S FEES - BY EXECUTING THIS AGREEMENT, MCDONALD AGREES TO WAIVE AND DOES HEREBY KNOWINGLY, CONCLUSIVELY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY CLAIM IT HAS OR MAY HAVE IN THE FUTURE AGAINST EITHER THE MOUTD, THE CITY OF ODESSA OR THE CITY OF MIDLAND, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THE AGREEMENT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THE AGREEMENT. MCDONALD SPECIFICALLY AGREES THAT IF MCDONALD BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS AGREEMENT, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET. SEQ., AS AMENDED), OR CHAPTER 271 OF THE TEXAS LOCAL GOVERNMENT CODE, MCDONALD AGREES TO ABANDON, WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH MCDONALD MIGHT OTHERWISE BE ENTITLED.**

**MCDONALD AGREES THAT THIS IS THE VOLUNTARY AND INTENTIONAL RELINQUISHMENT AND ABANDONMENT OF A PRESENTLY EXISTING KNOWN RIGHT. MCDONALD ACKNOWLEDGES THAT IT UNDERSTANDS ALL TERMS AND CONDITIONS OF THE AGREEMENT. MCDONALD FURTHER ACKNOWLEDGES AND AGREES THAT THERE WAS AND IS NO DISPARITY OF BARGAINING POWER BETWEEN THE MOUTD AND MCDONALD. THIS ARTICLE SHALL NOT BE CONSTRUED OR INTERPRETED AS A WAIVER OF SOVEREIGN IMMUNITY OR GOVERNMENTAL IMMUNITY.**

**MCDONALD AND THE MOUTD ARE RELYING ON THEIR OWN JUDGMENT. EACH PARTY HAD THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH LEGAL COUNSEL PRIOR TO ITS EXECUTION.**

**Insurance - Nothing in the foregoing Article XVIII, Article XIX, or Article XX shall limit or impair the application of any form of insurance coverage that is customarily maintained by the transit industry with respect to similar transit operations including, but not limited to, personal injury and property damage coverage, employment claims, and comprehensive general liability, naming McDonald and MOTM as primary insureds, and naming the City of Midland and the City of Odessa as additional insureds, that is in effect during the term of this Agreement.**

## **ARTICLE XXI. FORCE MAJEURE**

Neither the MOUTD or McDonald shall be required to perform any term, condition, or covenant in this Agreement so long as such performance is delayed or prevented by force majeure, which shall mean acts of God, civil riots, floods and any other cause not reasonably within the control of the MOUTD or McDonald except as herein provided and which, by the exercise of due diligence, the MOUTD or McDonald is unable, wholly, or in part, to prevent or overcome.

## **ARTICLE XXII. OWNERSHIP OF DOCUMENTS**

Upon acceptance or approval by the MOUTD, all reports, information and other data, given to, prepared or assembled by McDonald under this Agreement, and any other related documents or items shall become the sole property of the MOUTD and shall be delivered to the MOUTD, without restriction except as herein provided. McDonald may make copies of any and all documents for its files and shall have the rights to the concepts contained therein. It is understood, however, that McDonald does not intend or represent that such documents are suitable for reuse by the MOUTD or others for any other project and the reuse by the MOUTD for any other project shall require approval of McDonald. All Parties recognize that production of all documents is subject to the Public Information Act.

## **ARTICLE XXIII. TERMINATION**

In connection with all the work outlined or contemplated herein, it is agreed that any of the Parties may cancel or terminate this Agreement with or without cause and without penalty upon at least thirty (30) days written notice to the other Parties, with the provision and understanding that immediately upon receipt of notice of such cancellation from either party to the other, all work and labor being performed under this Agreement shall immediately cease, pending final cancellation at the end of such thirty (30) day period, and further provided that McDonald shall be compensated in accordance with the terms of this Agreement for all work accomplished prior to the receipt of notice of such termination. The Parties have bargained for the flexibility of terminating this Agreement upon the tender of the requisite notice at any time during the term of this Agreement. No Party has received any guarantee that this Agreement will not be terminated prior to September 30, 2018 upon effective written notice. All completed or partially completed studies, reports, drawings, documents, and material prepared under this Article shall then be delivered to the MOUTD which it, its agents or contractors, may use without restraint for the purpose of completing the project. All rights duties, liabilities and obligations accrued prior to such termination shall survive termination. McDonald shall be liable for any additional cost to complete the project as a result of McDonald's termination of this Agreement without cause.

## **ARTICLE XXIV. INDEPENDENT CONTRACTOR**

In performing services under this Agreement, the relationship between the MOUTD, and the City of Odessa, and the City of Midland, and McDonald, and MOTM is that of an independent contractor, and the execution of this Agreement does not change the independent contractor status of McDonald and MOTM. No term or provision of this Agreement or act of McDonald in the performance of this Agreement shall be construed as making McDonald or MOTM, or their employees or contractors, the agent, servant, or employee of the MOUTD. This project is not a joint enterprise and no action by any party to this Agreement shall cause this project to be considered a joint enterprise.

It is expressly understood and agreed that McDonald and MOTM shall perform all work and services described herein as independent contractors and not as officers, agents, servants or employees of the City of Midland, the City of Odessa, or the MOUTD; that McDonald and MOTM shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and McDonald and MOTM shall be solely responsible for the acts and omissions of their officers, agents, employees, contractors and subcontractors; that the doctrine of respondeat superior shall not apply as between the MOUTD, the City of Midland, the City of Odessa, and McDonald or MOTM, their officers, agents, employees, contractors or subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between the MOUTD, the City of Midland, the City of Odessa, and McDonald or MOTM. No person performing any of the work and services described hereunder by McDonald or MOTM shall be considered an officer, agent, servant, or employee of the City of Midland, the City of Odessa, or the MOUTD. Further, it is specifically understood and agreed that nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. McDonald and MOTM shall be independent contractors under this Agreement and shall assume all of the rights, obligations and liabilities, applicable to them as such independent contractors hereunder. The City of Midland, the City of Odessa, and the MOUTD do not have the power to direct the order in which the work is done. The City of Midland, the City of Odessa, and the MOUTD shall not have the right to control the means, methods or details of McDonald's or MOTM's work. McDonald and MOTM shall assume exclusive responsibility for the work. McDonald and MOTM are entirely free to do the work in their own way.

#### **ARTICLE XXV. VENUE**

The obligations of the Parties to this Agreement are performable in Ector and Midland Counties, Texas and, if legal action is necessary to enforce same, exclusive venue shall lie in Ector or Midland County, Texas. The obligations and undertakings of each of the Parties to this Agreement shall be deemed to have occurred in Midland County or Ector County, Texas. All performance and payments made pursuant to this Agreement shall be deemed to have occurred in Midland County or Ector County, Texas.

#### **ARTICLE XXVI. GOVERNING LAW**

This Agreement shall be governed by and construed in accordance with the laws and court decisions of the State of Texas.

#### **ARTICLE XXVII. LEGAL CONSTRUCTION**

In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof and this Agreement shall be considered as if such invalid, illegal, or unenforceable provision had never been contained in this Agreement. This Agreement constitutes the only agreement of the Parties hereto and supersedes any prior understanding or oral or written agreements between the Parties regarding the subject of this Agreement.

This Agreement is not intended to be a third party beneficiary contract and confers no rights on anyone other than the MOUTD, the City of Odessa, the City of Midland, and McDonald. Nothing herein will constitute any imposition or acceptance of any personal obligation or liability not otherwise imposed by law or by an individual associated with the City of Odessa, the City of Midland, MOUTD or McDonald. This Agreement is subject to a financial assistance contract between the project sponsor (MOUTD) and the United States Department of Transportation.

#### **ARTICLE XXVIII. COUNTERPARTS**

This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument.

#### **ARTICLE XXIX. CAPTIONS**

The captions to the various clauses of this Agreement are for informational purposes only and shall not alter the substance of the terms and conditions of this Agreement.

#### **ARTICLE XXX. NOTICE**

Notice to McDonald means notice in writing addressed to the President of McDonald Transit Associates, 3800 Sandshell Drive, Suite 185, Fort Worth, Texas 76137

Notice to the MOUTD means notice in writing addressed to the Director of Public Works, City of Odessa, P.O. Box 4398, Odessa, Texas, 79760, and the Office of City Manager, City of Midland, P.O. Box 1152, Midland, Texas 79702.

Notice to the City of Odessa means notice in writing addressed to the City Manager, City of Odessa, P.O. Box 4398, Odessa, Texas, 79760.

Notice to the City of Midland means notice in writing addressed to the Mayor, City of Midland, P.O. Box 1152, Midland, Texas 79702.

#### **ARTICLE XXXI COVENANTS**

McDonald makes the following covenants to the MOUTD and agrees that, in the event of failure of McDonald to comply with such covenants, the breach of any one of which shall constitute an event of default, the MOUTD may terminate this Agreement at its sole discretion; and in the event of such termination, if any consideration has been paid to or on behalf of McDonald, and not earned, McDonald must reimburse the MOUTD for such consideration.

- (a) McDonald is a legal entity duly organized and existing in good standing and is duly authorized to do business in the State of Texas.
- (b) The execution of this Agreement has been duly authorized by its board of directors or an officer of McDonald empowered to execute such agreements and bind McDonald, and is not in contravention of any law, rule or regulations or of the provisions of McDonald's articles of incorporation or by-laws, or of any agreement or instrument to which McDonald is a party or by which it may be bound.

- (c) No material litigation or governmental proceeding is pending, or, to the knowledge of any McDonald's officers, threatened against or affecting McDonald.
- (d) No certificate or statement delivered by McDonald to the MOUTD in connection herewith, or in connection with any transaction contemplated hereby, contains any untrue statement or fails to state any fact necessary to keep the statements contained therein from being misleading.
- (e) There are no bankruptcy proceedings or other proceedings currently or contemplated by McDonald.

## **ARTICLE XXXII. SUSPENSION**

The MOUTD, under the following circumstances, at its sole discretion, may suspend its obligation under this Agreement, or may terminate this Agreement and recapture any of the unearned consideration paid by the MOUTD:

- (a) McDonald becomes insolvent. "Insolvent" is defined to mean McDonald either has ceased to pay its debts in the ordinary course of business or cannot pay its debts as they become due, or it is insolvent within the meaning of federal bankruptcy law.
- (b) The appointment of a receiver of McDonald, or of all or any substantial part of its property, and the failure of such receiver to be discharged within sixty (60) days thereafter.
- (c) The adjudication of McDonald as bankrupt.
- (d) The filing of McDonald of a petition to be adjudged as a bankrupt, or a petition or answer seeking reorganization or admitting the material allegation of a petition filed against it in any bankruptcy or reorganization proceedings.
- (e) McDonald fails to obtain and maintain all necessary rights, licenses, permits, and authorities to carry on its business.

## **ARTICLE XXXIII. REPORTS**

McDonald shall submit monthly reports to the City of Midland and the City of Odessa, not later than the fifteenth (15<sup>th</sup>) day of the next month. The form and content of such reports shall be mutually approved by the Parties.

## **ARTICLE XXXIV. STANDARD OF OPERATION AND MAINTENANCE OF FACILITIES**

McDonald shall operate or cause the System to be operated in an efficient and economical manner in accordance with (i) sound business principles, (ii) accepted good management practices for the operation of similar type and size transit system, and (iii) all applicable regulatory requirements. McDonald agrees to use reasonable diligence and care to continually hold itself ready, willing and able to render its services as provided in this Agreement. The real and personal property comprising the System shall be used exclusively for the operation of the System during the term of this Agreement, unless otherwise agreed to by both the City of Midland and the City of Odessa.

McDonald shall provide preventative maintenance on all transit vehicles as specified by the Transit Manager. Preventative maintenance shall include tires, fluid changes and other services recognized by the vehicle manufacturer to be preventative.

McDonald shall provide transit signage and shelter installation.

#### **ARTICLE XXXV. FINES, PENALTIES AND INDEMNITY**

In the event that fines, penalties, or civil liabilities are assessed against or imposed upon the Parties, or their officers, agents and/or employees, as a result of McDonald's or MOTM's negligence or intentional act of omission, arising out of McDonald's or MOTM's violation of any permits or in violation of any other applicable laws, ordinances, governmental rules, or regulation, and such negligence or intentional act or omission causing such fine, penalty, or civil liability is established by agreement between the Parties or by any other means pursuant to the terms thereof, as the negligence or intentional act or omission of McDonald or MOTM, such fines, penalties, or civil liabilities shall be paid as follows: McDonald shall pay the initial \$25,000 of such fines, penalties or civil liability out of McDonald's Management Fee. Any fines, penalties, or civil liabilities in excess of the initial \$25,000 shall be the sole responsibility of McDonald.

#### **ARTICLE XXXVII. ENTIRE AGREEMENT**

THIS Agreement embodies the complete agreement of the Parties hereto, superseding all prior oral or written agreements between the Parties relating to matters in this Agreement, and except as otherwise provided herein, cannot be modified without written agreement of the Parties.

**[THIS SPACE INTENTIONALLY LEFT BLANK]**

IN WITNESS WHEREOF, the Parties hereto have executed this contract and agreement on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, as of the date and year aforesaid.

MIDLAND-ODESSA URBAN TRANSIT DISTRICT

By: \_\_\_\_\_

President

CITY OF ODESSA

Attest:

\_\_\_\_\_  
Norma Grimaldo, City Secretary

By: \_\_\_\_\_  
Richard Morton, City Manager

APPROVED ONLY AS TO FORM:

By: \_\_\_\_\_  
Larry Long, City Attorney

CITY OF MIDLAND

Attest:

\_\_\_\_\_  
Amy Turner, City Secretary

By: \_\_\_\_\_  
Courtney Sharp, City Manager

APPROVED ONLY AS TO FORM:

By: \_\_\_\_\_  
Keith Stretcher, City Attorney

MCDONALD TRANSIT ASSOCIATES, INC.

By: \_\_\_\_\_  
President



(MIDLAND-ODESSA URBAN TRANSIT DISTRICT)

STATE OF TEXAS §

COUNTY OF ECTOR §

BEFORE ME, the undersigned authority, on this day personally appeared \_\_\_\_\_, President of the Midland-Odessa Urban Transit District, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of the said Midland-Odessa Urban Transit District, and that he executed the same as the act of said Midland-Odessa Urban Transit District, for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL of office this \_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Notary Public in and for the State of Texas

(CITY OF ODESSA)

STATE OF TEXAS §

COUNTY OF ECTOR §

BEFORE ME, the undersigned authority, on this day personally appeared **Richard Morton**, City Manager of the City of Odessa, Texas, a municipal corporation of Ector County, Texas, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of the said City of Odessa, a municipal corporation, and that he executed the same as the act of said City of Odessa for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL of office this the \_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Notary Public in and for the State of Texas

(CITY OF MIDLAND)

STATE OF TEXAS §

COUNTY OF MIDLAND §

**BEFORE ME**, the undersigned authority, on this day personally appeared **Courtney Sharp**, City Manager of the City of Midland, Texas, a municipal corporation of Midland County, Texas, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of the said City of Midland, a municipal corporation, and that he executed the same as the act of said City of Midland for the purposes and consideration therein expressed and in the capacity therein stated.

**GIVEN UNDER MY HAND AND SEAL** of office this the \_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Notary Public in and for the State of Texas

(MCDONALD TRANSIT ASSOCIATES, INC.)

STATE OF TEXAS §

COUNTY OF TARRANT §

**BEFORE ME**, the undersigned authority, on this day personally appeared \_\_\_\_\_, President of McDonald Transit Associates, Inc., known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of the said McDonald Transit Associates, Inc., and that he executed the same as the act of said McDonald Transit Associates, Inc., for the purposes and consideration therein expressed and in the capacity therein stated.

**GIVEN UNDER MY HAND AND SEAL** of office this \_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Notary Public in and for the State of Texas



# City Council Agenda

Approved for Agenda:  
rpatrick  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Sylvester Cantu, Community Development Manager

**SUBJECT:** Presentation of schedule for Fiscal 2014/2015 Community Development Block Grant (CDBG) Program Funding Cycle.

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## **Purpose:**

Presentation of schedule for Fiscal 2014/2015 Community Development Block Grant (CDBG) Program Funding Cycle

## **Recommended City Council Action**

☐ Approve ☐ Deny ☒ Directional / Informational

## **Fiscal Impact:**

There are direct administrative costs of the Community Development Division and other staff involved in support of general program administration and/or specific project implementation, and the cost of the independent audit.

## **Discussion:**

At this time we have not received notice from the U.S. Department of Housing and Urban Development (HUD) as to the amount to be allocated to the City for the 2014/2015 CDBG program. Our current grant amount is \$743,626. I expect a slight reduction from that amount. Nonetheless, it is necessary to proceed with a schedule in order to complete the various steps in the upcoming application process. I have prepared the attached schedule. Please mark your calendars for the scheduled public hearings.

**SCHEDULE for 2014 CDBG APPLICATION CYCLE  
and 2014/2015 ACTION PLAN**

| <b>DESCRIPTION OF EVENT</b>                                                                                                              | <b>DATE</b>                                         |
|------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------|
| Inform Public of Schedule.                                                                                                               | January 30, 2014                                    |
| Application <b>Training</b> to Prospective Applicants.                                                                                   | As needed                                           |
| <b>Community Meeting(s)</b> . Meeting Starts at 7:00 pm.                                                                                 | Date and location to be determined                  |
| <b>Project Application and Proposals Deadline.</b>                                                                                       | <b>March 31, 2014</b>                               |
| <b>Community Development Week</b>                                                                                                        | April 21 – April 26<br>2014                         |
| <b>Public Hearing #1</b> (City Hall) – Discuss Housing and Community Development Needs. Review Past Performance. Present CDBG Proposals. | <b>April 22, 2014</b><br><b>7:00 p.m.</b>           |
| <b>CDBG Committee Meeting.</b> Develops recommendation on fund distribution                                                              | To be determined                                    |
| <b>Public Hearing #2</b> (City Hall) – Review Draft Action Plan and Projects Selected on a Preliminary Basis.                            | <b>May 20, 2014</b><br><b>Time to be determined</b> |
| Publish <b>Draft Plan</b> for a <b>30-Day</b> Review and Comment Period                                                                  | To be determined                                    |
| <b>Final Approval</b> (City Hall) – Council Approves 2014/15 Action Plan.                                                                | <b>July 8, 2014</b>                                 |
| <b>Submit</b> Action Plan to HUD.                                                                                                        | By August 15, 2014                                  |
| Conduct Environmental Reviews and Provide Training to New Subrecipients.                                                                 | As needed                                           |
| Receive Grant Agreement from HUD and Begin Projects that are Authorized by Individual Contracts.                                         | October 1, 2014                                     |



# City Council Agenda

Approved for Agenda:  
**RPatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Consider an ordinance on second reading on a request by Real Property Resources for a zone change from FD, Future Development District and PD, Planned District for a Housing Development to Amended Planned District for a Housing Development on a 46.722-acre tract out of Section 37, 38 and 48, Block 40, T-1-S, T&P RR Company Survey, Midland County, Texas (Generally located on the south extension of Avalon Drive, approximately 700 feet south of Hall of Fame Boulevard) District 4.

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## Purpose:

Consider an ordinance on second reading on a request by Real Property Resources for a zone change from FD, Future Development District and PD, Planned District for a Housing Development to Amended Planned District for a Housing Development

## Recommended City Council Action

☒ Approve

☐ Deny

☐ Direction/Informational

## Fiscal Impact:

There is no cost to the City to process this application.

## Discussion:

This is a request to rezone a 46-acre parcel from FD District and Planned District for a Housing Development to Amended Planned District to accommodate a development in Legends Park. A Planned District is needed to describe the character of a screening fence along Avalon Drive to screen the back of residential lots that face this arterial street. The fence will match the existing fence that was previously constructed. The City Council voted to approve this request at the November 26<sup>th</sup>, 2013 meeting, and no opposition has been received. It is now appropriate to consider this request on second and final reading.

**ORDINANCE NO.**

**AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING A 40.498-ACRE TRACT OF LAND OUT OF SECTIONS 37, 38 AND 48, BLOCK 40, T-1-S, T&P RR CO. SURVEY, A 5.954-ACRE TRACT OF LAND OUT OF SECTION 37, BLOCK 40, T-1-S, T&P RR CO. SURVEY, AND A 0.270-ACRE TRACT OF LAND OUT OF SECTION 37, BLOCK 40, T-1-S, T&P RR CO. SURVEY, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED FD, FUTURE DEVELOPMENT DISTRICT, IN PART, AND PD, PLANNED DISTRICT FOR A HOUSING DEVELOPMENT, IN PART, TO BE USED AS AN AMENDED PLANNED DISTRICT FOR A HOUSING DEVELOPMENT (GENERALLY LOCATED ON THE EAST SIDE OF THE SOUTH EXTENSION OF AVALON DRIVE, APPROXIMATELY 700 FEET SOUTH OF HALL OF FAME BOULEVARD); PROVIDING FOR SUCH USE TO BE SUBJECT TO CERTAIN SPECIAL CONDITIONS AND RESTRICTIONS AS SET OUT HEREIN; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION**

**WHEREAS**, the City Planning and Zoning Commission and the Governing Body of the City of Midland, in compliance with the City Charter and the State law with reference to the creation of “Planned Districts” under the zoning ordinance regulations and zoning map, have given the requisite notices by United States mail, publication and otherwise; and after a full and fair hearing to all of the property owners generally and particularly to those interested persons situated in the affected area and in the vicinity thereof, the Governing Body finds that the public health, safety and general welfare will be best served by the creation of an Amended Planned District for a Housing Development, set out hereinafter and subject to the conditions and restrictions set out hereinafter;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Chapter 1, Title XI, of the City Code of Midland, Texas, and the official zoning map of the City of Midland, Texas, are hereby amended insofar as the

hereinafter described property is concerned, which is presently zoned FD, Future Development District, in part, and PD, Planned District for a Housing Development, in part, and it shall be used as an Amended Planned District for a Housing Development, subject to the special conditions and restrictions hereinafter set out, said property being described as follows:

A 40.498-acre tract of land out of Sections 37, 38 and 48, Block 40, T-1-S, T&P RR Co. Survey, a 5.954-acre tract of land out of Section 37, Block 40, T-1-S, T&P RR Co. Survey, and a 0.270-acre tract of land out of Section 37, Block 40, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas. Said tracts being more specifically described by metes and bounds in Exhibits “B”, “C”, and “D”, which are attached hereto and incorporated herein.

**SECTION TWO.** That said property shall be subject to the following special conditions and restrictions:

1. That the use and development of this property shall conform to the regulations of the 1F-3, One-Family Dwelling District, except as otherwise stated below.
2. That the screening fence illustrated on Exhibit “A”, which is attached hereto and incorporated herein, shall be constructed between the rear of any residential lot and an abutting public right-of-way and located in a common area set forth on the associated subdivision plat.
3. That a Certificate of Occupancy shall not be issued for any structure on a residential lot where the rear of the lot abuts a public right-of-way until the fence described herein is fully constructed.

**SECTION THREE.** That the definitions given in the zoning regulations contained in the City Code of the City of Midland, Texas, shall be applicable to such of those terms as are used herein.

**SECTION FOUR.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION FIVE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not

affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION SIX.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$2,000.00).

**SECTION SEVEN.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_ day of \_\_\_\_\_, A.D., 2013; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_ day of \_\_\_\_\_, A.D., 2013, at a regular meeting of the City Council:

Council members voting "AYE":

Council members voting "NAY":

PASSED AND APPROVED THIS \_\_\_\_ day of \_\_\_\_\_, A.D., 2013.



---

W. Wesley Perry, Mayor

ATTEST:

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Amy M. Turner, City Secretary

APPROVED AS TO CONTENT  
AND COMPLETENESS:

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Robert Patrick, Assistant to the City Manager

APPROVED AS TO FORM:

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Keith Stretcher, City Attorney



## Stanford Surveying Company

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### TRACT 1

METES AND BOUNDS DESCRIPTION of a 40.498 Acre Tract of Land being 40.135 acres out of a 40.498 Acre Tract of Land, as recorded in Instrument No. 2013-5263, Official Public Records, Midland County, Texas, and a 0.363 Acre Tract of Land described as Exhibit B as recorded in Instrument No. 2013-8477, Official Public Records, Midland County, Texas, located in Section 37, Section 38, and Section 48, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas.

BEGINNING at (N=10689414.20 & E=1728297.74) a 1/2" iron rod and plastic cap marked "RPLS 4413" found in the west line of Section 37, the east line of Section 38, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, the east line of a 634.887 acre tract of land as recorded in Volume 3131, Page 210, Official Public Records, Midland County, Texas, the southwest corner of a 108.712 acre tract of land as recorded in Instrument No. 2012-3638, Official Public Records, Midland County, Texas, for the northwest corner of a 40.498 acre tract of land as recorded in Instrument No. 2013-5263, Official Public Records, Midland County, Texas, and the northwest corner of this tract from which a 1/2" iron rod and plastic cap marked "RPLS 4413" found for the northwest corner of the 108.712 acre tract of land bears N 14°25'48" W a distance of 2417.76 feet;

THENCE, along the north boundary line of the 40.498 acre tract of land and the south boundary line of the 108.712 acre tract of land, S 84°27'35" E a distance of 2349.72 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" found in the north ROW line of a 40 foot wide pipeline easement as recorded in Volume 42, Page 289, Midland County Deed Records, the northeast corner of the 40.498 acre tract of land, the most southerly corner of the 108.712 acre tract of land and the northeast corner of this tract;

THENCE, along the east boundary line of the 40.498 acre tract of land, S 30°42'19" E a distance of 20.00 feet to a point in the center of said pipeline easement for the southeast corner of the 40.498 acre tract of land and the southeast corner of this tract, from which a City of Midland Control Point marked "43/93" bears S 12°53'34" E a distance of 9436.9 feet;

THENCE, along the south boundary line of the 40.498 acre tract of land and the centerline of said pipeline easement, S 59°17'41" W at a distance of 35.46 feet cross the south line of said Section 37 and the north line of said Section 48, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, continuing for a total distance of 2499.30 feet to a 3/4" galvanized iron pipe and plastic cap marked "RPLS 4413" set in the west line of said Section 48, the east line of Section 47, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, and the east line of the 634.887 acre tract of land for the southwest corner of this tract, from which a 1" black iron pipe found for the southwest corner of said Section 48 and the southeast corner of said Section 47 bears S 14°16'09" E a distance of 4659.26 feet;

THENCE, along the west line of said Section 48, the east line of said Section 47, the east boundary line of the 634.887 acre tract of land and the west boundary line of the 40.498 acre tract of land, N 14°16'09" W a distance of 156.99 feet to a point of curve to the right in the west line of said Section 48, the east line of said Section 47, the east boundary line of the 634.887 acre tract of land, the west boundary line of the 40.498 acre tract of land, the most southerly corner of a 0.363 acre tract of land described as Exhibit A as recorded in Instrument No. 2013-8477, Official Public Records, Midland County, Texas, and a corner of this tract;



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THENCE, along the east boundary line of the 0.363 acre tract of land described as Exhibit A, with a curve to the right having a radius of 1500.00 feet, delta angle of  $17^{\circ}58'42''$  and an arc length of 470.67 feet (chord bearing  $N 05^{\circ}16'48'' W$  a distance of 468.74 feet), to a point for a corner of the 0.363 acre tract of land described as Exhibit A and a corner of this tract;

THENCE, along the east boundary line of the 0.363 acre tract of land described as Exhibit A,  $N 03^{\circ}42'33'' E$  at a distance of 59.38 feet pass the north line of said Section 48 and the south line of said Section 38, for the northeast corner of the 0.363 acre tract of land described as Exhibit A and the southwest corner of a 0.363 acre tract of land described as Exhibit B, as recorded in Instrument No. 2013-8477, Official Public Records, Midland County, Texas, from which a 1" black iron pipe found for the southeast corner of said Section 38 bears  $N 75^{\circ}19'36'' E$  a distance of 91.64 feet and a 1" black iron pipe found for the northwest corner of said Section 48 bears  $S 75^{\circ}19'36'' W$  a distance of 91.57 feet, continuing for a total distance of 114.29 feet to a point of curve to the left for a corner of the 0.363 acre tract of land described as Exhibit B and a corner of this tract;

THENCE, along the west boundary line of the 0.363 acre tract described as Exhibit B, with a curve to the left having a radius of 1500.00 feet, delta angle of  $18^{\circ}08'21''$  and an arc length of 474.88 feet, (chord bearing  $N 05^{\circ}21'37'' W$  a distance of 472.90 feet), to a point in the west line of said Section 37, the east line of said Section 38, the east line of the 634.887 acre tract of land for the most northerly corner of the 0.363 acre tract of land described as Exhibit B and a corner of this tract;

THENCE, along the west line of said Section 37, the east line of said Section 38, the east line of the 634.887 acre tract of land and the west boundary line of the 40.498 acre tract of land,  $N 14^{\circ}25'48'' W$  a distance of 326.76 feet to the POINT OF BEGINNING.

Bearing, Distances and Coordinates are based upon the Texas State Plane Coordinate System NAD 83 Central Zone and are relative to the City of Midland GPS Control Monuments as provided by the City of Midland. Acreages shown are surface values.

This document was prepared under 22 TAC 663.21, and is not to be used to convey or establish interest in real property except those rights and interest implied or established by the creation or reconfiguration of the boundary of the political subdivision for which it was prepared.

AUG 30 2013  
CITY OF MIDLAND  
PLANNING DIVISION OFFICE





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### TRACT 2

METES AND BOUNDS DESCRIPTION of a 5.954 Acre Tract of Land out of a 108.712 acre tract of land, as described in Instrument No. 2012-3638, Official Public Records, Midland County, Texas, located in Section 37, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas.

BEGINNING at (N=10689284.36' & E=1730799.85') a 1/2" iron rod and plastic cap marked "RPLS 4413" found in the north ROW line of a 40 foot wide pipeline easement as recorded in Volume 42, Page 289, Midland County Deed Records, for the southwest corner of Legends Park, Section 3, an addition to the City of Midland, being a subdivision of 20.226 acres of land in Section 37, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, as recorded in Cabinet I, Page 106, Plat Records, Midland County, Texas, the southeast corner of a 108.712 acre tract of land, as described in Instrument No. 2012-3638, Official Public Records, Midland County, Texas, located in Section 37, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, and for the southeast corner of this tract, from which a City of Midland Control Point marked "43/93" bears S 11°50'25" E a distance of 9515.67 feet;

THENCE, along the north ROW line of said 40 foot wide pipeline easement and the south line of the 108.712 acre tract of land, S 59°17'41" W a distance of 190.00 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" found in the north ROW line of said 40 foot wide pipeline easement, the most southerly corner of the 108.712 acre tract of land, the northeast corner of a 40.498 acre tract of land, as described in Instrument No. 2013-5263, Official Public Records, Midland County, Texas, and the southwest corner of this tract;

THENCE, along the north line of the 40.498 acre tract of land and the south line of the 108.712 acre tract of land, N 84°27'35" W a distance of 652.04 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" set in the north line of the 40.498 acre tract of land and the south line of the 108.712 acre tract of land for the southwest corner of this tract;

THENCE N 73°05'13" E a distance of 201.82 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" set for a corner of this tract;

THENCE N 25°41'24" E a distance of 350.98 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" set for a corner of this tract;

THENCE N 76°41'19" E a distance of 12.59 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" set at a point of curve to the left and for a corner of this tract;

THENCE with a curve to the left having a radius of 245.00 feet, delta angle of 35°04'30" and an arc length of 149.98 feet, (chord bearing N 68°40'51" W 147.65 feet) to a 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 4, an addition to the City of Midland, being a subdivision of 18.183 acres of land in Section 37, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, as recorded in Cabinet I, Page 129, Plat Records, Midland County, Texas, and for a corner of this tract;





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THENCE, along the boundary line of Legends Park, Section 4, N 00°33'50" W a distance of 60.14 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 4, and a corner of this tract;

THENCE, along the boundary line of Legends Park, Section 4, N 48°03'12" W a distance of 18.81 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 4, and for the northwest corner of this tract, from which a City of Midland Control Point marked "191/158" bears N 35°56'47" W a distance of 4913.50 feet;

THENCE, along the boundary line of Legends Park, Section 4, N 45°49'51" E a distance of 173.99 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" found in the west boundary line of Legends Park, Section 3, the east boundary line of the 108.712 acre tract of land, for a corner of Legends Park, Section 4, and the northeast corner of this tract;

THENCE, along the west boundary line of Legends Park, Section 3, and the east boundary line of the 108.712 acre tract of land, S 43°25'06" E a distance of 76.48 feet to a found 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 3, and the 108.712 acre tract of land for a corner of this tract;

THENCE, along the west boundary line of Legends Park, Section 3, and the east boundary line of the 108.712 acre tract of land, S 62°06'40" E a distance of 387.62 feet to a found 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 3, and the 108.712 acre tract of land for a corner of this tract;

THENCE, along the west boundary line of Legends Park, Section 3, and the east boundary line of the 108.712 acre tract of land, S 23°52'17" E a distance of 15.71 feet to a found 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 3, and the 108.712 acre tract of land for a corner of this tract;

THENCE, along the west boundary line of Legends Park, Section 3, and the east boundary line of the 108.712 acre tract of land, S 14°22'07" W at a distance of 172.32 feet pass a 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 3, and the 108.712 acre tract of land, continuing for a total distance of 341.24 feet to a point for a corner of this tract;

THENCE S 86°39'26" E at a distance of 141.68 feet pass a 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 3, and the 108.712 acre tract of land, continuing for a total distance of 165.64 feet to the POINT OF BEGINNING.

Bearing, Distances and Coordinates are based upon the Texas State Plane Coordinate System NAD 83 Central Zone and are relative to the City of Midland GPS Control Monuments as provided by the City of Midland. Acreages shown are surface values.



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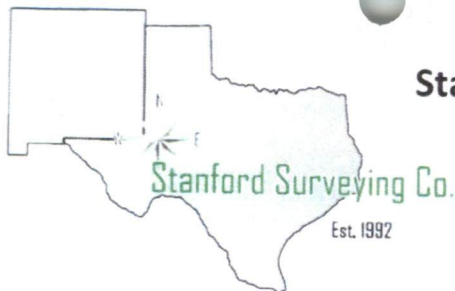
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This document was prepared under 22 TAC 663.21, and is not to be used to convey or establish interest in real property except those rights and interest implied or established by the creation or reconfiguration of the boundary of the political subdivision for which it was prepared.

*Michael L. Stanford*







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### TRACT 3

METES AND BOUNDS DESCRIPTION of a 0.270 Acre Tract of Land out of a 108.712 acre tract of land, as described in Instrument No. 2012-3638, Official Public Records, Midland County, Texas, located in Section 37, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas.

BEGINNING at (N=10689457.65 & E=1730676.42) a ½" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 3, an addition to the City of Midland, being a subdivision of 20.226 acres of land in Section 37, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, as recorded in Cabinet I, Page 106, Plat Records, Midland County, Texas, a corner of a 108.712 acre tract of land, as described in Instrument No. 2012-3638, Official Public Records, Midland County, Texas, located in Section 37, Block 40, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, and for the most northerly corner of this tract;

THENCE, along the west boundary line of Legends Park, Section 3 and the east boundary line of the 108.712 acre tract of land, S 30°04'06" E a distance of 198.63 feet to a ½" iron rod and plastic cap marked "RPLS 4413" found for a corner of Legends Park, Section 3, and a corner of the 108.712 acre tract of land and for the most southeast corner of this tract;

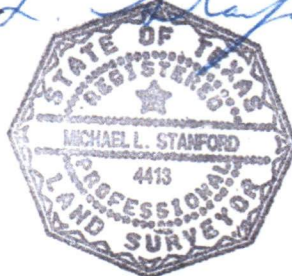
THENCE N 86°39'26" W a distance of 141.68 feet to a point for the southwest corner of this tract;

THENCE N 14°22'07" E a distance of 168.92 feet to the POINT OF BEGINNING.

Bearing, Distances and Coordinates are based upon the Texas State Plane Coordinate System NAD 83 Central Zone and are relative to the City of Midland GPS Control Monuments as provided by the City of Midland. Acreages shown are surface values.

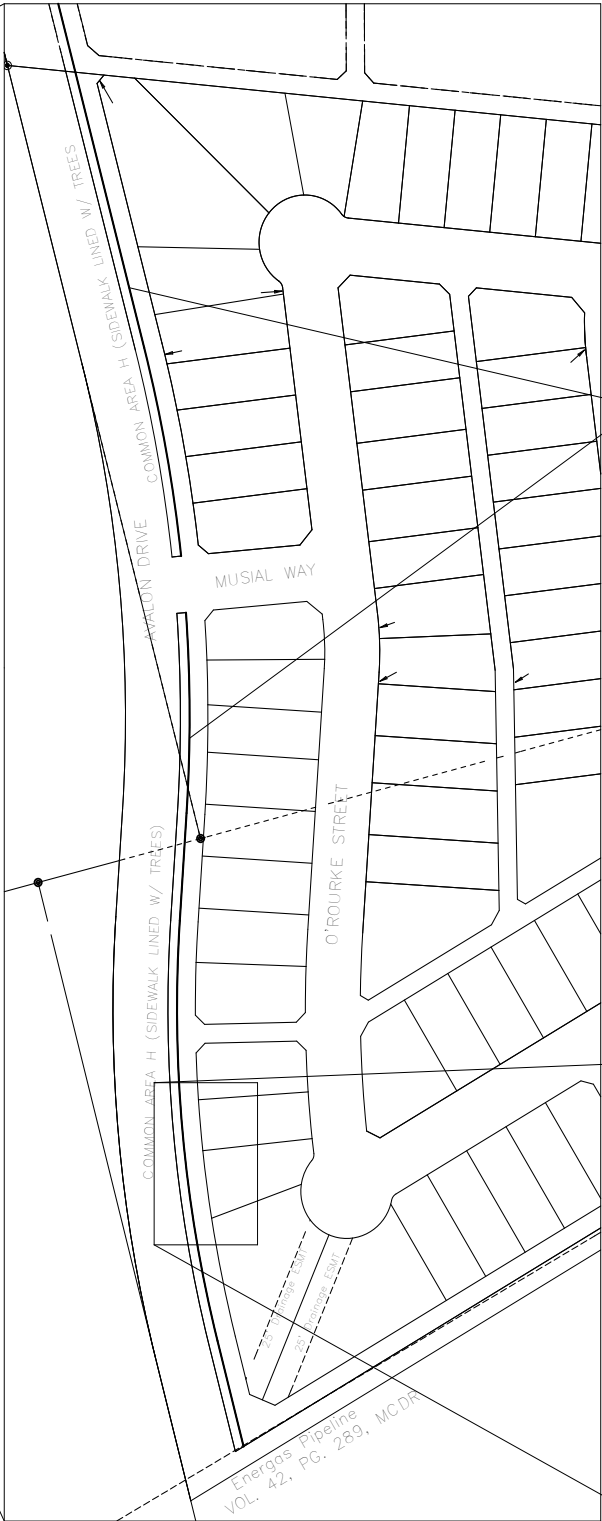
This document was prepared under 22 TAC 663.21, and is not to be used to convey or establish interest in real property except those rights and interest implied or established by the creation or reconfiguration of the boundary of the political subdivision for which it was prepared.

*Michael L. Stanford*

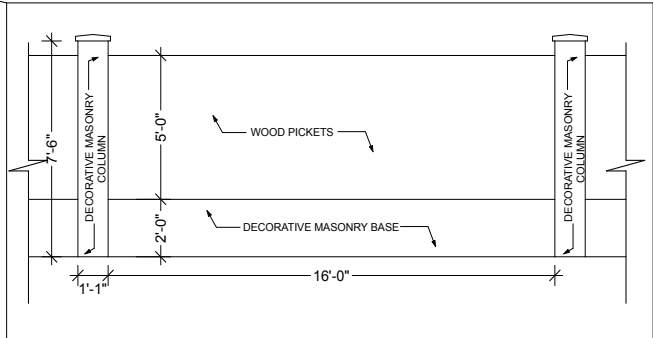




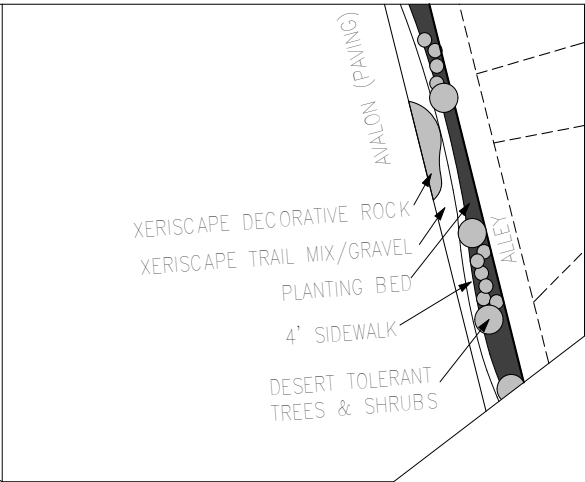
AVALON COMMON AREA



FENCE ELEVATION FOR  
AVALON COMMON AREA H



AVALON COMMON AREA DETAIL



BETTENBOUGH  
HOMES

PLAN: LEGENDS PARK SECTION 8

ADDRESS:

CUSTOMER: BETTENBOUGH HOMES

D1

COMMON AREA  
DETAIL



# PLANNING AND ZONING COMMISSION

November 4, 2013

**CASE:** Z-13-041.

**REQUEST:** Hold a public hearing and consider a request for a zone change from FD, Future Development District and PD, Planned District for a Housing Development to a PD, Planned District for a Housing Development.

**APPLICANT/OWNER:** Real Property Resources, Inc.

**REPRESENTATIVE:** Keith Smith.

**LEGAL DESCRIPTION:** A 46.722-acre tract out of Sections 37, 38 and 48, Block 40, T-1-S, T&P RR Company Survey, Midland County, Texas.

**LOCATION:** Generally located at the south extension of Avalon Drive, approximately 700 feet south of Hall of Fame Boulevard.

## DETAILS OF REQUEST:

1. This is a request to rezone land that will be located within a plat to be called Legends Park, Section 8. The majority of this land is zoned FD District (40.498 acres). A portion is already zoned Planned District for a Housing Development (5.954 acres), as is a smaller tract (0.27 acres). The purpose of this application is to consolidate all of these parcels under the same zoning ordinance, which matches the preliminary plat. The Commission must first recommend approval of this request before it can consider the associated preliminary plat.

## SURROUNDING ZONING AND LAND USE:

2. This property is bounded on the south and west by the City limit. It is bounded on the north and east sides by the Legends Park neighborhood.

## ANALYSIS:

3. The plat associated with this proposed development has lots backing toward Avalon Drive, an arterial street. This is a condition the Subdivision Code prohibits unless the plat includes a decorative fence to screen the rear of the lots from view from Avalon Drive. The fence must be constructed within a common area created on the plat, and be owned and maintained by a Home Owners

Association. The applicant has submitted the attached Exhibit A to ensure the character of the screening fence. It illustrates a six-foot solid wood fence with masonry pilasters on 16-foot centers. This fence will be the same design as previously constructed along Legends Park. There will also be desert landscaping installed between the curb line and the screening fence. Since it will match the existing fences used for a similar screening requirement, we find this fence to be satisfactory.

**STAFF RECOMMENDATION:**

Staff recommends approval of this request for zone change from FD, Future Development District and PD, Planned District for a Housing Development to PD, Planned District for a Housing Development, subject to the following conditions:

- A. That this property shall be subject to the regulations of the 1F-3, One-Family Dwelling District, except as otherwise stated below.
- B. That the screening fence illustrated on Exhibit A shall be constructed between the rear of any residential lot and an abutting public right-of-way, within a common area to be established on the associated plat.
- C. No Certificate of Occupancy shall be issued to any structure on a residential lot where the rear of the lot abuts a public right-of-way until the fence described in Section B above is fully constructed.

---

Jim Compton, Planning Division Manager

**Attachments:**

Application  
Maps  
Exhibit A

Case Number: 2-13041

# CITY OF MIDLAND

## Planning Division

### APPLICATION TO CHANGE ZONING CLASSIFICATION

Real Property Resources Inc 806-797-9494 Kelly.OwBetenbaugh.com  
 Applicant Name (Phone/e-mail)

6305 82<sup>nd</sup> St Lubbock Tx 79424  
 Address Zip Code

See Above  
 Property Owner Name (Phone/e-mail)

Address Zip Code

Keith Smith 432-230-4221 Keith.S@betenbaugh.com  
 Representative Name (Phone/e-mail)

Same as Above  
 Address Zip Code

Street address and Legal Description of property (complete Lot, Block, and Subdivision Name or if unplatted, attach a Metes and Bounds description with surveyor's seal). Each district must be described separately. 40.498 Acre Tract of Land in Sections  
37, 38 + 48 BIK 40, T-1-S, T+P RR Co Survey  
Midland County Tx

PRESENT ZONE: FD REQUESTED ZONE: PDSF  
 (List by tracts if more than one district is requested)

Reason for Zone Change Request: To develop Single Family Homes

Present Use of Property: VACANT LAND

Proposed Use of Property: Single Family Homes

How will zone change affect the public health, safety and welfare? NA

Describe how conditions affecting the property have changed since present zoning designation:  
Still VACANT LAND - Surrounding Property has been developed  
to Single Family

Is a Specific Use Permit with Term for alcoholic beverages sales needed? Yes ☒ No



**APPLICATION FEES:**

- Single, standard zone change: **\$400**. Multiple, standard zone change: add **\$100** per additional district.
- Single PD, Planned District zone change: **\$550**. Multiple PD proposal: add **\$100** per district.
- If a Traffic Impact Analysis is required, a fee of up to \$500.00 will be assessed.

**SITE PLAN SUBMITTALS** (if applicable):

16 copies (FOLDED) of the PD site plan: \_\_\_\_\_

Site Plan in digital format .pdf and .jpg: \_\_\_\_\_

**SIGNATURE** (by property owner only - authorized agent must sign affidavit below)

Property Owner (signature):  Date: 8/27/13

---

**If an Agent is authorized by the property owner to file and execute the application on behalf of the property owner, the Agent must complete the affidavit below.**

STATE of TEXAS  
COUNTY OF MIDLAND

Before me, the undersigned authority, on this day personally appeared

\_\_\_\_\_ who, being by me duly sworn, upon oath says: That (s)he is authorized by \_\_\_\_\_, the owner of the above described property, to fully represent him/her in this application and that (s)he had the legal right, power and authority to sign said owner's name hereto as his/her attorney in fact.

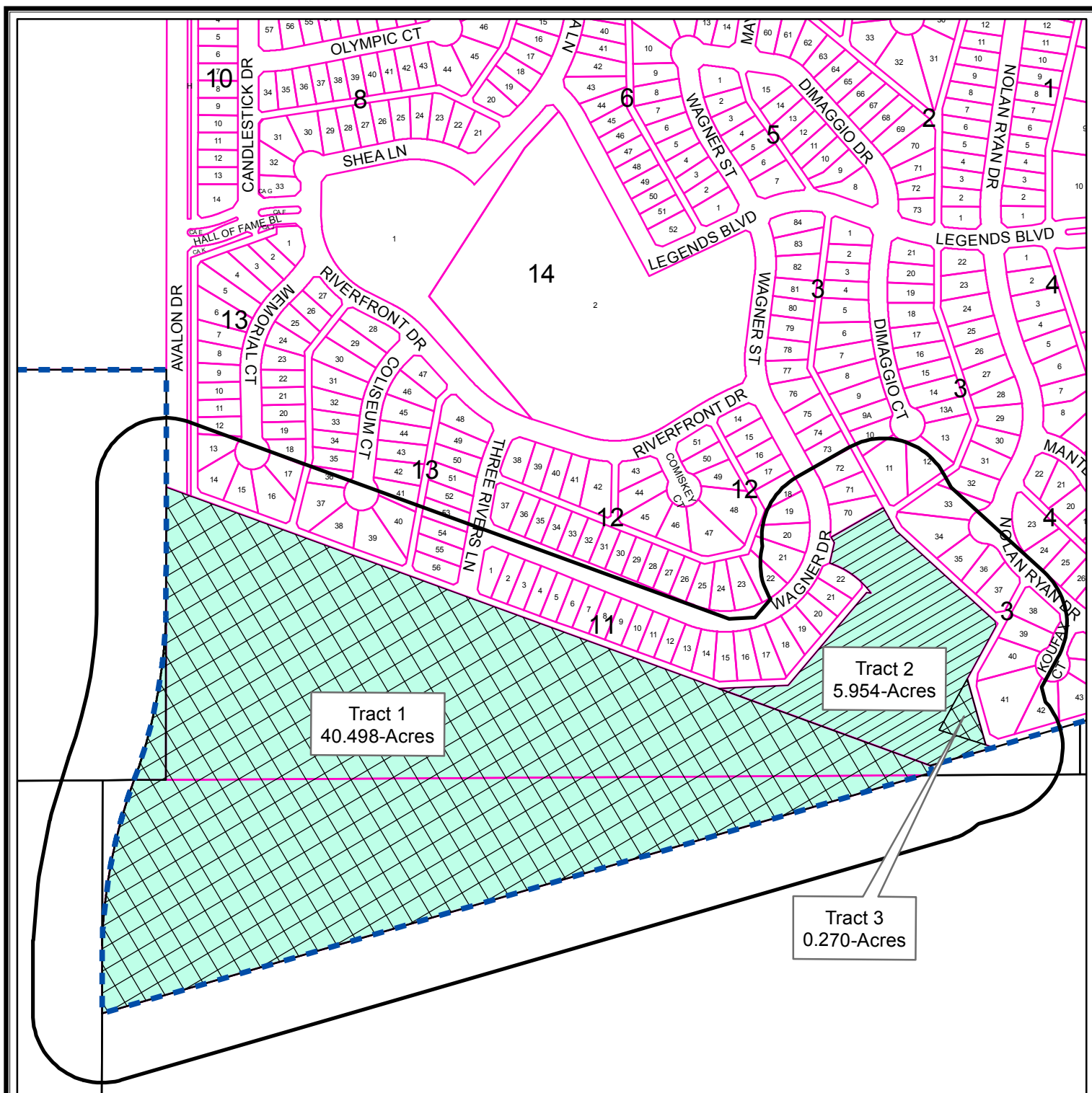
\_\_\_\_\_  
Authorized Agent (signature)

Subscribed and sworn to before me, this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_, to certify which witness my hand and seal of office.

\_\_\_\_\_  
NOTARY PUBLIC, MIDLAND COUNTY, TEXAS

|                            |                    |
|----------------------------|--------------------|
| <b>FOR OFFICE USE ONLY</b> |                    |
| Rec'd By: <u>TJS</u>       | Date: <u>8/30</u>  |
| Assigned: <u>JC</u>        |                    |
| For: <u>P+Z</u>            | On: <u>11/4/13</u> |

**\*\*Application will not be considered for scheduling until reviewed by a planner.\*\***



## PROPERTY OWNER NOTIFICATION MAP

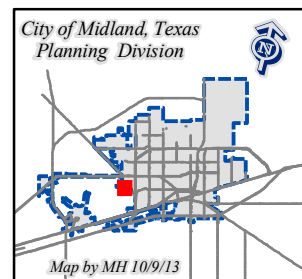
Consider a request for a zone change from FD, Future Development District, to PD, Planned District for a Housing Development on a 40.498-acre tract of land (Tract 1) out of Sections 37, 38 and 48; from PD, Planned District for a Housing Development, to an Amended Planned District on a 5.954-acre tract of land (Tract 2) and from PD, Planned District for a Housing Development, to an Amended Planned District on a 0.270-acre tract of land (Tract 3) all out of Section 37, both out of Block 40, T-1-S, T & P RR Co. Survey, City and County of Midland, Texas.

**Z - 13 - 041**

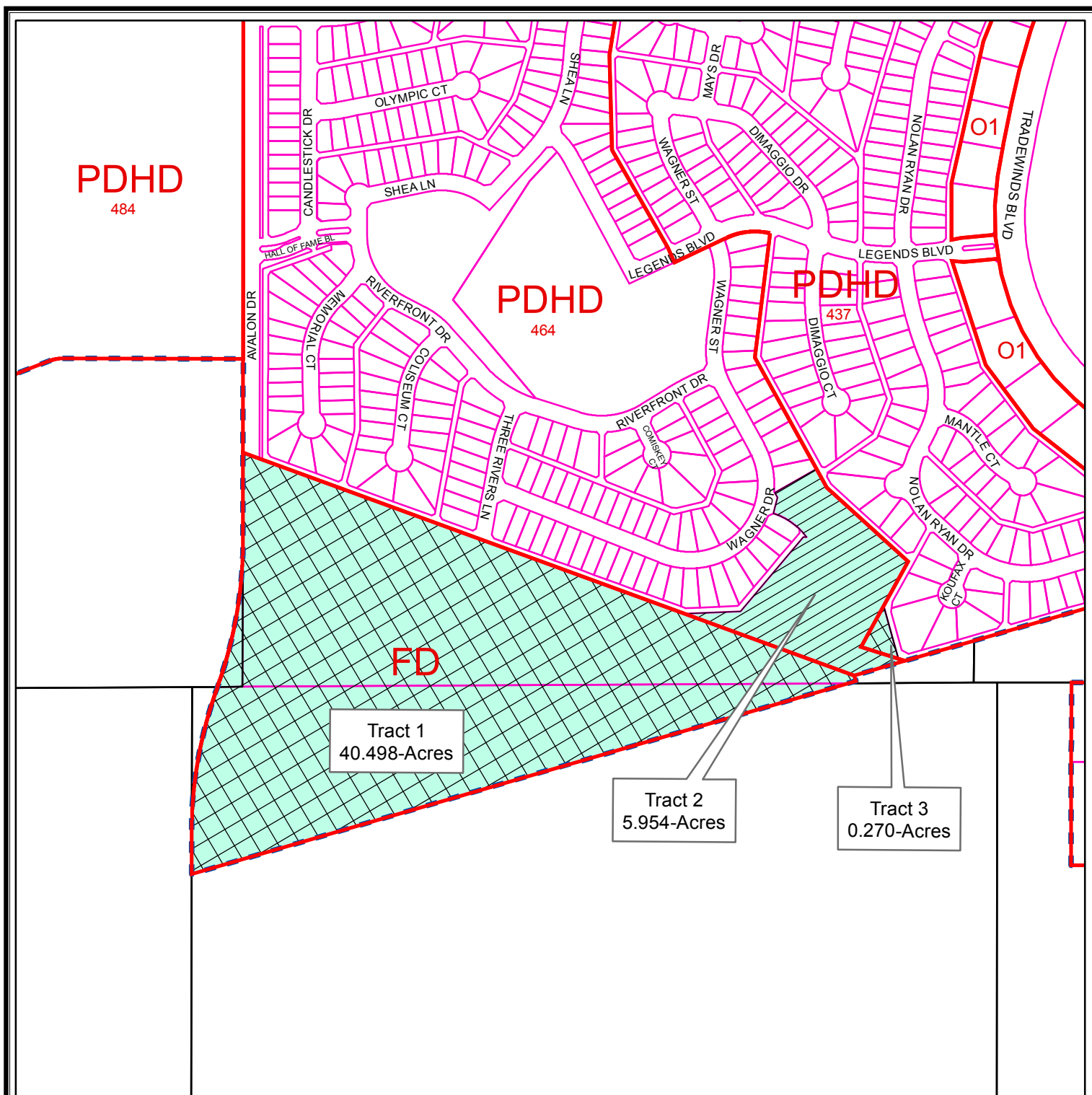
**Scale: 1" = 450'**

### LEGEND

- CITY LIMITS
- COUNTY PARCEL
- CITY PARCEL
- PRIVATE BLDGS
- ACCESSORY BLDGS



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## ZONING MAP

Consider a request for a zone change from FD, Future Development District, to PD, Planned District for a Housing Development on a 40.498-acre tract of land (Tract 1) out of Sections 37, 38 and 48; from PD, Planned District for a Housing Development, to an Amended Planned District on a 5.954-acre tract of land (Tract 2) and from PD, Planned District for a Housing Development, to an Amended Planned District for a Housing Development on a 0.270-acre tract of land (Tract 3) all out of Section 37, both out of Block 40, T-1-S, T & P RR Co. Survey, City and County of Midland, Texas.

Z - 13 - 041

### LEGEND

Scale: 1" = 500'

|                                                                                           |                          |                                                                 |                      |
|-------------------------------------------------------------------------------------------|--------------------------|-----------------------------------------------------------------|----------------------|
| <span style="border: 2px solid red; padding: 2px;"> </span>                               | ZONING                   | <span style="border: 1px solid magenta; padding: 2px;"> </span> | CITY PARCELS         |
| <span style="border-bottom: 2px dashed blue; width: 20px; display: inline-block;"></span> | CITY LIMITS              | <span style="border: 1px solid black; padding: 2px;"> </span>   | COUNTY PARCELS       |
| <b>ZONING DISTRICTS:</b>                                                                  |                          |                                                                 |                      |
| FD                                                                                        | FUTURE DEVELOPMENT       | BP                                                              | BUSINESS PARK        |
| PD                                                                                        | PLANNED DISTRICT         | P                                                               | PARKING              |
| AE                                                                                        | AGRICULTURE ESTATE       | 01, 02                                                          | OFFICE               |
| CE                                                                                        | COUNTRY ESTATE           | NS                                                              | NEIGHBORHOOD SERVICE |
| IF1, IF2, IF3                                                                             | ONE-FAMILY DWELLING      | LR1, LR2, LR3                                                   | LOCAL RETAIL         |
| MH                                                                                        | MOBILE HOME DWELLING     | C1, C2, C3                                                      | COMMERCIAL           |
| TH                                                                                        | TOWNHOUSE DWELLING       | IP, IP1, IP2, IP3                                               | INDUSTRIAL PARK      |
| 2F                                                                                        | TWO-FAMILY DWELLING      | LI                                                              | LIGHT INDUSTRY       |
| MF1, MF2                                                                                  | MULTIPLE FAMILY DWELLING | HI                                                              | HEAVY INDUSTRY       |

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# City Council Agenda

Approved for Agenda:  
**RPatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Consider an ordinance on second reading on a request by Stanley Beard/ Corky Allen for a zone change from AE, Agriculture-Estate District to a PD, Planned District for Housing Development on a 21.85-acre tract of land out of Section 11, Block "X", H.P. Hilliard Survey, City and County of Midland, Texas. (Generally located on the west side of N. State Hwy 349, west of Pueblo) - District 1.

---

**Purpose:** Consider an ordinance on second reading on a request by Stanley Beard/ Corky Allen for a zone change from AE, Agriculture-Estate District, to a PD, Planned District for Housing Development.

## Recommended City Council Action

☒ Approve

☐ Deny

☐ Direction/Informational

## Fiscal Impact:

There is no cost to the City to process this request.

## Discussion:

Mr. Beard, the owner, is requesting a zone change on his property from AE, Agriculture-Estate District, to PD, Planned District for Housing Development. The applicant proposes to reduce the front yard setback from 20 feet to 5 feet. Staff has no objections provided that front-entry garages are prohibited. The site will have 86 lots developed along with three common areas that will be used for drainage detention basins and for a decorative screening fence, due to a lot backing condition. The developer has requested that the ordinance be amended to allow 5,000 SF lot instead of 5,500 SF. All other requirements will remain the same. Staff has no objection to this change.

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING A 21.85-ACRE TRACT OF LAND OUT OF SECTION 11, BLOCK “X”, H.P. HILLIARD SURVEY, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED AE, AGRICULTURE ESTATE DISTRICT, TO BE USED AS A PD, PLANNED DISTRICT FOR A HOUSING DEVELOPMENT (GENERALLY LOCATED ON THE WEST SIDE OF NORTH STATE HIGHWAY 349, WEST OF PUEBLO); CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION**

**WHEREAS**, the City Planning and Zoning Commission and the Governing Body of the City of Midland, in compliance with the City Charter and the State law with reference to the creation of “Planned Districts” under the zoning ordinance regulations and zoning map, have given the requisite notices by United States mail, publication and otherwise; and after a full and fair hearing to all of the property owners generally and particularly to those interested persons situated in the affected area and in the vicinity thereof, the Governing Body finds that the public health, safety and general welfare will be best served by the creation of a PD, Planned District for a Housing Development, set out hereinafter and subject to the conditions and restrictions set out hereinafter;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Chapter 1, Title XI, of the City Code of Midland, Texas, and the official zoning map of the City of Midland, Texas, are hereby amended insofar as the hereinafter described property is concerned, which is presently zoned AE, Agriculture Estate District, and it shall be used as a PD, Planned District for a Housing Development, said property being described as follows:

A 21.85-acre tract of land out of Section 11, Block “X”, H.P. Hilliard Survey, City and County of Midland, Texas, said tract being more specifically described by metes and bounds in Exhibit “B”, which is attached hereto and incorporated herein.



**SECTION TWO.** That said property shall be subject to the following special conditions and restrictions:

1. That this planned district shall conform to the conditions of the 1F-3, One-Family Dwelling District, except as otherwise stated below.
2. That Texas Department of Transportation approval shall be obtained for any state highway controlled access frontage.
3. That a decorative masonry fence shall be constructed along State Highway 349 as shown on Exhibit "A", which is attached hereto and incorporated herein. Said fence shall be constructed of split face concrete masonry units or decorative masonry. A Certificate of Occupancy shall not be issued to any lot adjacent to said fence until construction of said fence is completed.
4. That any residence constructed on a lot within this planned district shall have not less than 2,300 square feet of occupiable space, excluding the garage and/or carport. The Building Official shall ensure compliance with this condition and shall not issue a Certificate of Occupancy for any residence that does not comply with this condition.

**SECTION THREE.** That the definitions given in the zoning regulations contained in the City Code of the City of Midland, Texas, shall be applicable to such of those terms as are used herein.

**SECTION FOUR.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION FIVE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION SIX.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland,

Texas, which provides for a fine not exceeding two thousand dollars (\$2,000.00).

**SECTION SEVEN.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting “AYE”:

Council members voting “NAY”:

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting “AYE”:

Council members voting “NAY”:

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

APPROVED AS TO CONTENT  
AND COMPLETENESS:

---

Robert Patrick, Assistant to the City Manager

APPROVED ONLY AS TO FORM:

---

Keith Stretcher, City Attorney

SITE PLAN  
THE PINES AT MIRA VISTA  
BEING 21.85 ACRES OUT OF SECTION 11  
BLOCK X, H.P. HILLIARD SURVEY,  
CITY AND COUNTY OF MIDLAND, TEXAS

LEGEND  
X 1/2" Iron pipe found  
O 1/2" Iron rod found  
O 1/2" Iron rod set

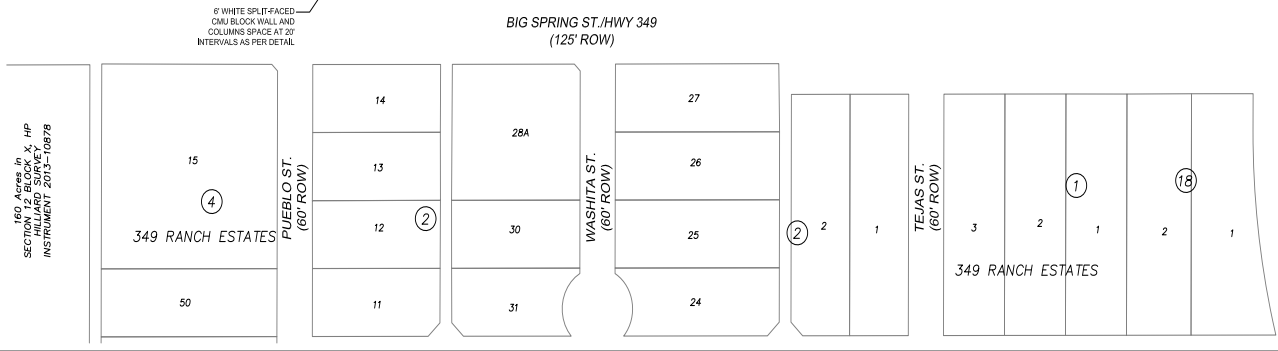
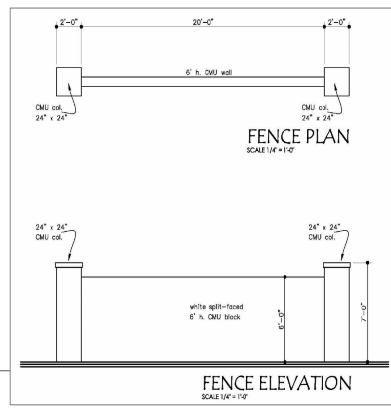
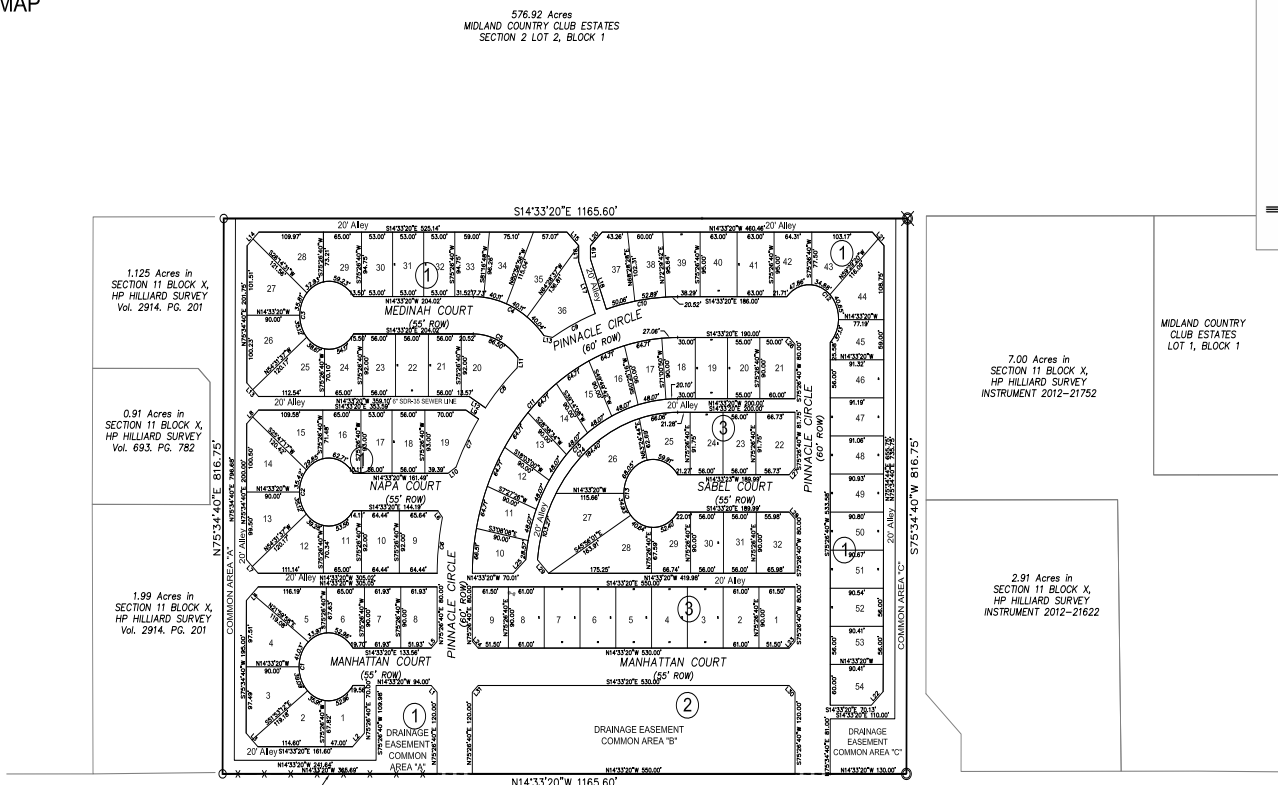
GRAPHIC SCALE  
100 0 100 200  
(IN FEET)  
1 INCH = 100 FT.



GENERAL LOCATION MAP

| Parcel Line Table |        |                  |
|-------------------|--------|------------------|
| Line #            | Length | Direction        |
| L1                | 14.14  | N30° 26' 39.63"E |
| L2                | 28.26  | S59° 33' 20.37"E |
| L3                | 28.25  | S30° 30' 39.63"W |
| L4                | 28.32  | N59° 29' 20.37"W |
| L5                | 14.14  | S59° 33' 20.37"E |
| L6                | 12.49  | N36° 48' 42.81"E |
| L7                | 28.25  | N30° 30' 39.63"E |
| L8                | 28.32  | S59° 29' 20.37"E |
| L9                | 25.22  | S16° 31' 38.51"W |
| L10               | 16.60  | N48° 27' 26.22"W |
| L11               | 14.76  | S80° 29' 39.51"W |
| L12               | 32.35  | N16° 31' 38.51"E |
| L13               | 28.25  | N30° 30' 39.63"E |
| L14               | 14.76  | N4° 09' 17.31"W  |
| L15               | 28.32  | S59° 29' 20.37"E |
| L16               | 28.26  | S30° 26' 39.63"W |
| L17               | 23.11  | S75° 26' 39.63"W |
| L18               | 81.73  | S55° 18' 59.88"W |
| L19               | 78.70  | S55° 18' 59.88"W |
| L20               | 19.56  | S75° 26' 39.63"W |
| L21               | 28.28  | N59° 33' 20.37"W |
| L22               | 28.32  | S59° 29' 20.37"E |
| L23               | 14.14  | N59° 33' 20.37"W |
| L24               | 14.14  | N30° 26' 39.63"E |
| L25               | 29.00  | S58° 05' 42.69"E |
| L26               | 14.14  | S30° 26' 39.63"W |
| L27               | 14.14  | N59° 33' 20.37"W |
| L28               | 14.14  | S30° 26' 39.63"W |
| L29               | 27.49  | N32° 01' 35.64"E |
| L30               | 14.14  | S30° 26' 39.63"W |
| L31               | 14.14  | S59° 33' 20.37"E |

| Curve Table |        |        |        |               |
|-------------|--------|--------|--------|---------------|
| Curve #     | Length | Radius | Delta  | Chord Length  |
| C1          | 255.92 | 50.00  | 293.27 | N75° 26' 40"E |
| C2          | 255.92 | 50.00  | 293.27 | S75° 26' 40"W |
| C3          | 255.92 | 50.00  | 293.27 | S75° 26' 40"W |
| C4          | 137.99 | 155.00 | 51.01  | N10° 56' 57"E |
| C5          | 66.50  | 100.00 | 49.56  | S10° 13' 29"W |
| C6          | 82.88  | 410.00 | 11.58  | N81° 41' 23"E |
| C7          | 80.82  | 410.00 | 11.27  | N78° 01' 37"W |
| C8          | 80.05  | 410.00 | 11.19  | N61° 59' 48"W |
| C9          | 80.91  | 410.00 | 11.31  | N40° 15' 35"W |
| C10         | 123.47 | 410.00 | 17.25  | S23° 10' 58"E |
| C11         | 546.53 | 350.00 | 89.47  | S59° 17' 22"E |
| C12         | 160.53 | 50.00  | 183.95 | S27° 40' 21"W |
| C13         | 255.93 | 50.00  | 293.27 | S75° 26' 37"W |
| C14         | 353.73 | 240.00 | 84.45  | S56° 46' 46"E |
| C15         | 385.15 | 260.00 | 84.87  | N56° 59' 35"W |



OWNER:  
STANLEY BEARD  
500 W. Texas Ave. Ste. 705  
MIDLAND, TEXAS 79701  
432-685-7100

DEVELOPER:  
CORKY ALLEN  
5400 N. Big Spring St.  
MIDLAND, TEXAS 79705  
432-934-6971

THE PINES AT MIRA VISTA

SCALE: 1" = 100'  
DATE: NOVEMBER 2012  
DRAWN BY: JAW/GPH APPROVED BY: [Signature]  
FILE NAME: [Blank]  
PROJECT NUMBER: 11-ME007

SITE PLAN

## CHARLES P. RUTHERFORD SURVEYING

CHARLES P. RUTHERFORD  
REGISTERED PROFESSIONAL LAND SURVEYOR  
LICENSED STATE LAND SURVEYOR  
PROFESSIONAL LAND SURVEYOR, NEW MEXICO

November 14, 2013  
Field Notes for Rezoning  
Mira Vista North  
21.85 acres

All of that certain tract or parcel of land situated in the H. P. Hilliard Survey, Section 11, Block X, A-642, Midland County, Texas and being all of a called 6.88 acre tract as described in deed recorded in Volume 671, Page 261, Deed Records of Midland County, Texas and all of a called 15.0 acre tract as described in deed recorded in Volume 774, Page 123, Deed Records of Midland County, Texas and being more particularly described as follows:

Beginnig at a  $\frac{1}{2}$  inch iron rod found at the Northeast corner of this tract, the Northeast corner of the said called 15.0 acres and the Southeast corner of a called 0.68 acre tract as described in deed to Patriot Resources, Inc., recorded in Volume 2680, Page 168, Official Public Records of Midland County, Texas.

Thence S  $75^{\circ}34'40''$  W along the North line of this tract, same being the North line of the said called 15.0 acres and said South line of the called 0.68 acre tract, 816.75 feet to a  $\frac{1}{2}$  inch iron pipe found at the Northwest corner of this tract, the Northwest corner of the said called 15.0 acres and the Southwest corner of the said called 0.68 acre on the East line of the Midland Country Club as described in deed recorded in Volume 122, Page 153, Midland County Deed Records.

Thence S  $14^{\circ}33'20''$  E along the West line of this tract and the said East line of the Midland Country Club, 1,165.60 feet to a  $\frac{1}{2}$  inch iron rod set, with yellow plastic cap, stamped "RPLS 1977", at the Southwest corner of this tract, the Southwest corner of the said called 6.88 acres and being the Northwest corner of a called 1.125 acre tract as described in deed recorded in Volume 2914, Page 201, Official Public Records of Midland County, Texas.

Thence N  $75^{\circ}34'40''$  E along the South line of this tract, the North line of the said called 1.125 acres, the North line of a called 0.91 acre tract as described in deed to James L. Prince, recorded in Volume 693, Page 782, Deed Records of Midland County, Texas and the North line of a called 1.99 acre tract as described in deed to Amy Wettstein recorded in Volume 2914, Page 201, Official Public Records of Midland County, Texas, 816.75 feet to a  $\frac{1}{2}$  inch iron rod set, with yellow plastic cap stamped "RPLS 1977", on the West right-of-way line of State Highway No. 349 at the Southeast corner of this tract, same being the Southeast corner of the said called 6.88 acres.

Thence N  $14^{\circ}33'20''$  W along the said West right-of-way of State Highway No. 349 and the East line of this tract, 1,165.60 feet to the place of beginning and containing 21.85 acres of land.



CASE NO. P-13-059 20.7



## CHARLES P. RUTHERFORD SURVEYING

CHARLES P. RUTHERFORD  
REGISTERED PROFESSIONAL LAND SURVEYOR  
LICENSED STATE LAND SURVEYOR  
PROFESSIONAL LAND SURVEYOR, NEW MEXICO

October 17, 2013  
Field Notes for Rezoning  
Mira Vista North  
21.85 acres

All of that certain tract or parcel of land situated in the H. P. Hilliard Survey, Section 11, Block X, A-642, Midland County, Texas and being all of a called 6.88 acre tract as described in deed recorded in Volume 671, Page 261, Deed Records of Midland County, Texas and all of a called 15.0 acre tract as described in deed recorded in Volume 774, Page 123, Deed Records of Midland County, Texas and being more particularly described as follows:

Beginning at a ½ inch iron rod set, with yellow plastic cap stamped "RPLS 1977", on the West right-of-way line of State Highway No. 349 at the Southeast corner of this tract, same being the Southeast corner of the said called 6.88 acres and the Northeast corner of a called 1.99 acre tract as described in deed to Amy Wettstein recorded in Volume 2914, Page 201, Official Public Records of Midland County, Texas.

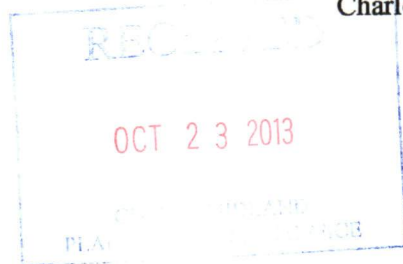
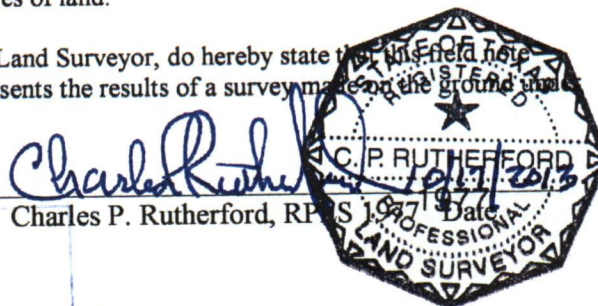
Thence N 14°33'20" W along the said West right-of-way of State Highway No. 349 and the East line of this tract, 1,165.60 feet to a ½ inch iron rod found at the Northeast corner of this tract, the Northeast corner of the said called 15.0 acres and the Southeast corner of a called 0.68 acre tract as described in deed to Patriot Resources, Inc., recorded in Volume 2680, Page 168, Official Public Records of Midland County, Texas.

Thence S 75°34'40" W along the North line of this tract, same being the North line of the said called 15.0 acres and said South line of the called 0.68 acre tract, 816.75 feet to a ½ inch iron pip found at the Northwest corner of this tract, the Northwest corner of the said called 15.0 acres and the Southwest corner of the said called 0.68 acre on the East line of the Midland Country Club as described in deed recorded in Volume 122, Page 153, Midland County Deed Records.

Thence S 14°33'20" E along the West line of this tract and the said East line of the Midland Country Club, 1,165.60 feet to a ½ inch iron rod set, with yellow plastic cap, stamped "RPLS 1977", at the Southwest corner of this tract, the Southwest corner of the said called 6.88 acres and being the Northwest corner of a called 1.125 acre tract as described in deed recorded in Volume 2914, Page 201, Official Public Records of Midland County, Texas.

Thence N 75°34'40" E along the South line of this tract, the North line of the said called 1.125 acres, the North line of a called 0.91 acre tract as described in deed to James L. Prince, recorded in Volume 693, Page 782, Deed Records of Midland County, Texas and the North line of the said called 1.99 acres, 816.75 feet to the place of beginning and containing 21.85 acres of land.

I, Charles P. Rutherford, Registered Professional Land Surveyor, do hereby state that this field note description and its accompany plat correctly represents the results of a survey made on the ground under my supervision and direction.



CASE NO Z-13050

# PLANNING AND ZONING COMMISSION

December 16, 2013

**CASE:** Z-13-050, Corky Allen.

**REQUEST:** Hold a public hearing and consider a request for a zone change from AE, Agriculture-Estate District, to Planned District for a Housing Development.

**APPLICANT/OWNER:** Corky Allen.

**REPRESENTATIVE:** John Newton, PC.

**LEGAL DESCRIPTION:** On a 21.85-acre tract of land out of Section 11, Block "X", H.P. Hilliard Survey, City and County of Midland, Texas.

**LOCATION:** Generally located on the west side of N. State Hwy 349, west of Pueblo.

**CURRENT ZONING:** AE, Agriculture-Estate District.

**ASSOCIATED CASES:** P-13-059, The Pines at Mira Vista.

## DETAILS OF REQUEST:

1. The subject property is located on the west side of N. State Highway 349 and west of Pueblo. Mr. Allen, the owner, is requesting a zone change on his property from AE, Agriculture-Estate District, to a Planned District for Housing Development, with the underlining zoning of 1F-3, One-Family Dwelling District with a five feet front setback line and Lot depth greater than 90'.

## SURROUNDING ZONING AND LAND USE:

2. The property is on the west side of N. State Highway 349 and on the north is an AE, Agriculture-Estate District. To the west and south is a PDRC, Planned District for Recreation Center District. Finally, to the east, is an LR2, Local Retail District.



**ANALYSIS:**

3. We find that the zone change from AE, Agriculture-Estate District, to a Planned District Housing Development (with an underlining zoning of 1F-3, One-Family Dwelling District with five foot front setback line is reasonable. The reason for the smaller front setback line is to allow larger homes on a smaller lot. There are Planned Districts north and west of the proposed site.

**SITE PLAN:**

4. The site plan, Exhibit A, provides the layout and information about the site. The site will have 54 lots developed along with three common areas that will be used for drainage detention basins and for a decorative screening fence, due to a lot backing condition. The proposed screening fence illustration can be found on Exhibit A. The applicant is requesting a five foot front yard setbacks.

**TECHINICAL ISSUES:**

5. Big Springs Road needs to be named State Highway 349 on the final site plan per City Policy.

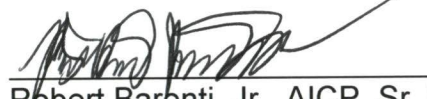
**STAFF RECOMMENDATION:**

Staff recommends approval of this request for a zone change from AE, Agriculture-Estate District to Planned District for Housing Development, subject to the following conditions:

- A. This Planned district shall be subject to the regulations of the 1F-3, One-Family Dwelling District, except as otherwise stated below.
- B. That TxDot access approval is granted for any State Highway controlled access frontage.
- C. That a decorative masonry fence shall be constructed along State Highway 349, as shown on Exhibit A. Said fence shall be a minimum height of six feet in height, and shall be constructed of split faced CMU or decorative masonry column. No Certificate of Occupancy shall be issued to any lot adjacent to this fence until the fence is completed.



  
\_\_\_\_\_  
Jim Compton  
Planning Division Manager  
Department of Development Services

  
\_\_\_\_\_  
Robert Baronti, Jr., AICP, Sr. Planner  
Department of Development Services

**Attachments:**

Application  
Maps  
Exhibit A

Case Number: 213-030

**CITY OF MIDLAND**  
**Planning Division**

**APPLICATION TO CHANGE ZONING CLASSIFICATION**

|                            |                   |
|----------------------------|-------------------|
| Corky Allen                | (432) 934-6971    |
| <b>Applicant Name</b>      | <b>Contact #s</b> |
| 5400 N. Big Spring St.     | 79705             |
| <b>Address</b>             | <b>Zip Code</b>   |
| Stanley Beard              | (432) 934-6971    |
| <b>Property Owner Name</b> | <b>Contact #s</b> |
| 500 W. Texas Ave. Ste. 705 | 79701             |
| <b>Address</b>             | <b>Zip Code</b>   |
| John M. Newton             | (432) 438-7784    |
| <b>Representative Name</b> | <b>Contact #s</b> |
| 4908 N. MIDKIFF RD.        | 79705             |
| <b>Address</b>             | <b>Zip Code</b>   |

Street address and Legal Description of property (complete Lot, Block, and Subdivision, or if unplatted, attach a Metes and Bounds description with surveyor's seal). Describe by tracts if more than one zoning district is requested:

See attached. REQUESTING 21.85 ACRES TO BE ZONED PD Conforming to TH and 5' front setback line.

PRESENT ZONE: AE

REQUESTED ZONE: PD TH HD  
(List by tracts if more than one district is requested)

Reason for Zone Change or PD Amendment: To conform to development

Present Use of Property: Pasture with single residence

Proposed Use of Property: Residential

How will zone change affect the public health, safety and welfare? \_\_\_\_\_

Describe how conditions affecting the property have changed since present zoning designation: \_\_\_\_\_

Is a Specific Use Permit with Term for alcoholic beverages sales needed? \_\_\_\_\_ Yes ☒ No

\*this request is conditional upon approval at the PD AND  
The actual development of same. Otherwise, the  
Zoning shall remain as is.

**APPLICATION FEES:**

- Single, standard zone change: **\$400**. Multiple, standard zone change: add **\$100** per district.
  - Single PD, Planned District zone change: **\$550**. Multiple PD proposal: add **\$100** per district.
- 80% of fee will be refunded if no P&Z public hearing is called; if no City Council public hearing is called, then 30% of fee will be refunded.
- If a Traffic Impact Analysis is required, a fee of up to \$500.00 will be assessed.

**SITE PLAN SUBMITTALS (if applicable):**

16 copies of the PD site plan:

Site Plan on a CD in .pdf and .jpg format:

N/A  
N/A

**SIGNATURE** (by property owner only - authorized agent must sign affidavit below)

\* **Property Owner** (signature):

Date: 10/18/13

STANLEY S. BEARD, INDIVIDUALLY AND AS SOLE PROPRIETOR, Double B Land & Cattle Co

If an Agent is authorized by the property owner to file and execute the application on behalf of the property owner, the Agent must complete the affidavit below.

STATE of TEXAS

COUNTY OF MIDLAND

Before me, the undersigned authority, on this day personally appeared

\_\_\_\_\_ who, being by me duly sworn, upon oath says: That (s)he is  
authorized by \_\_\_\_\_, the owner of the above described property, to fully  
represent him/her in this application and that (s)he had the legal right, power and authority to sign said  
owner's name hereto as his/her attorney in fact.

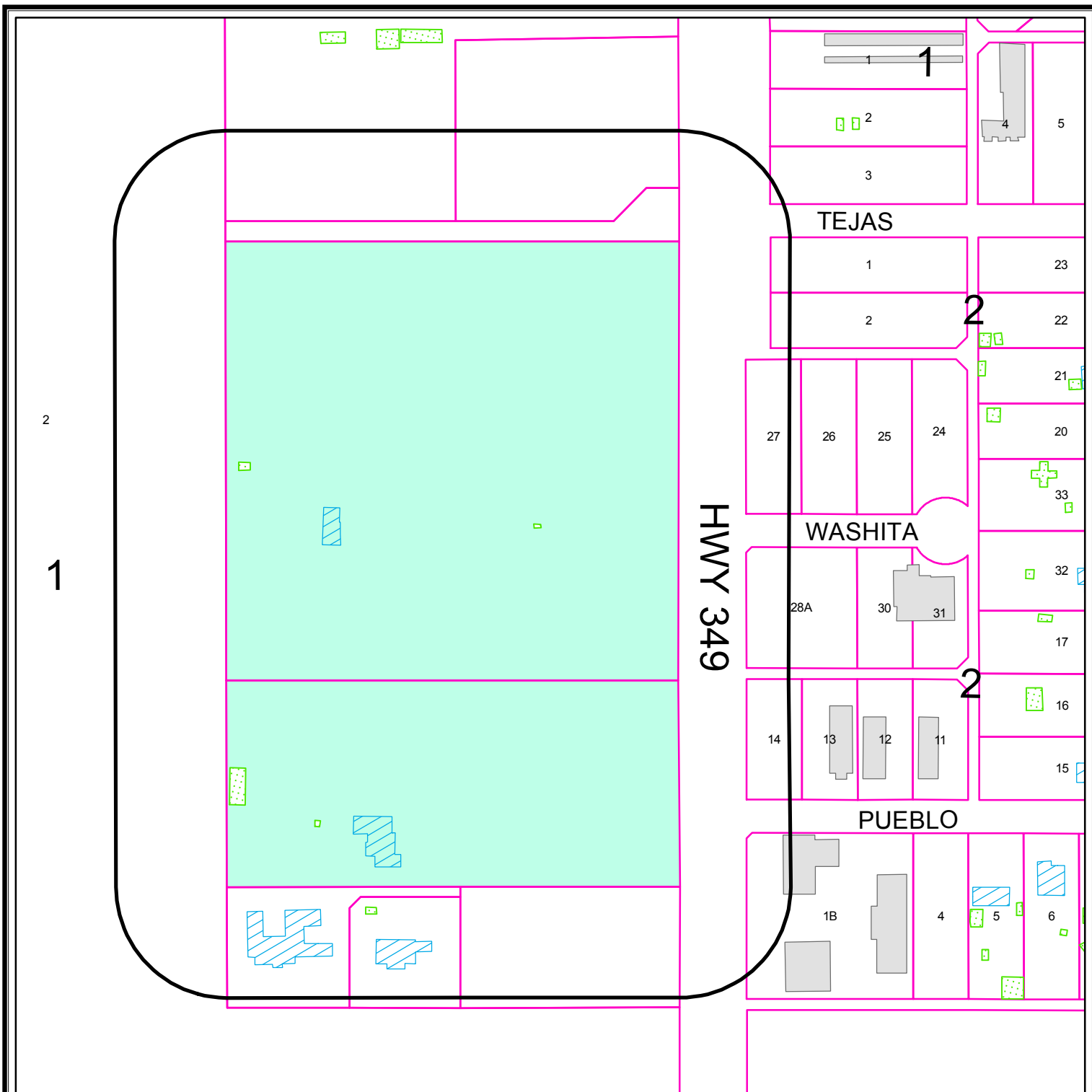
\_\_\_\_\_  
Authorized Agent (signature)

Subscribed and sworn to before me, this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, to certify which  
witness my hand and seal of office.

\_\_\_\_\_  
NOTARY PUBLIC, MIDLAND COUNTY, TEXAS

| FOR OFFICE USE ONLY |                |
|---------------------|----------------|
| Rec'd By: BB        | Date: 10/23/13 |
| Assigned: BB        |                |
| For: P&Z            | On: 12/16/13   |

**\*\*Application will not be considered for scheduling until reviewed by a planner.\*\***



## PROPERTY OWNER NOTIFICATION MAP

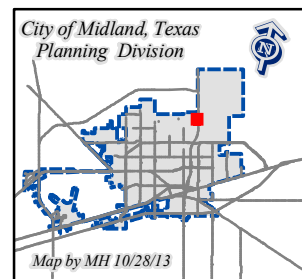
**Z - 13 - 050**

**Scale: 1" = 250'**

Consider a request for a zone change from AE, Agriculture Estate District to PD, Planned District for a Housing Development on a 21.85-acre tract of land out of Section 11, Block "X", H. P. Hilliard Survey, City and County of Midland, Texas.

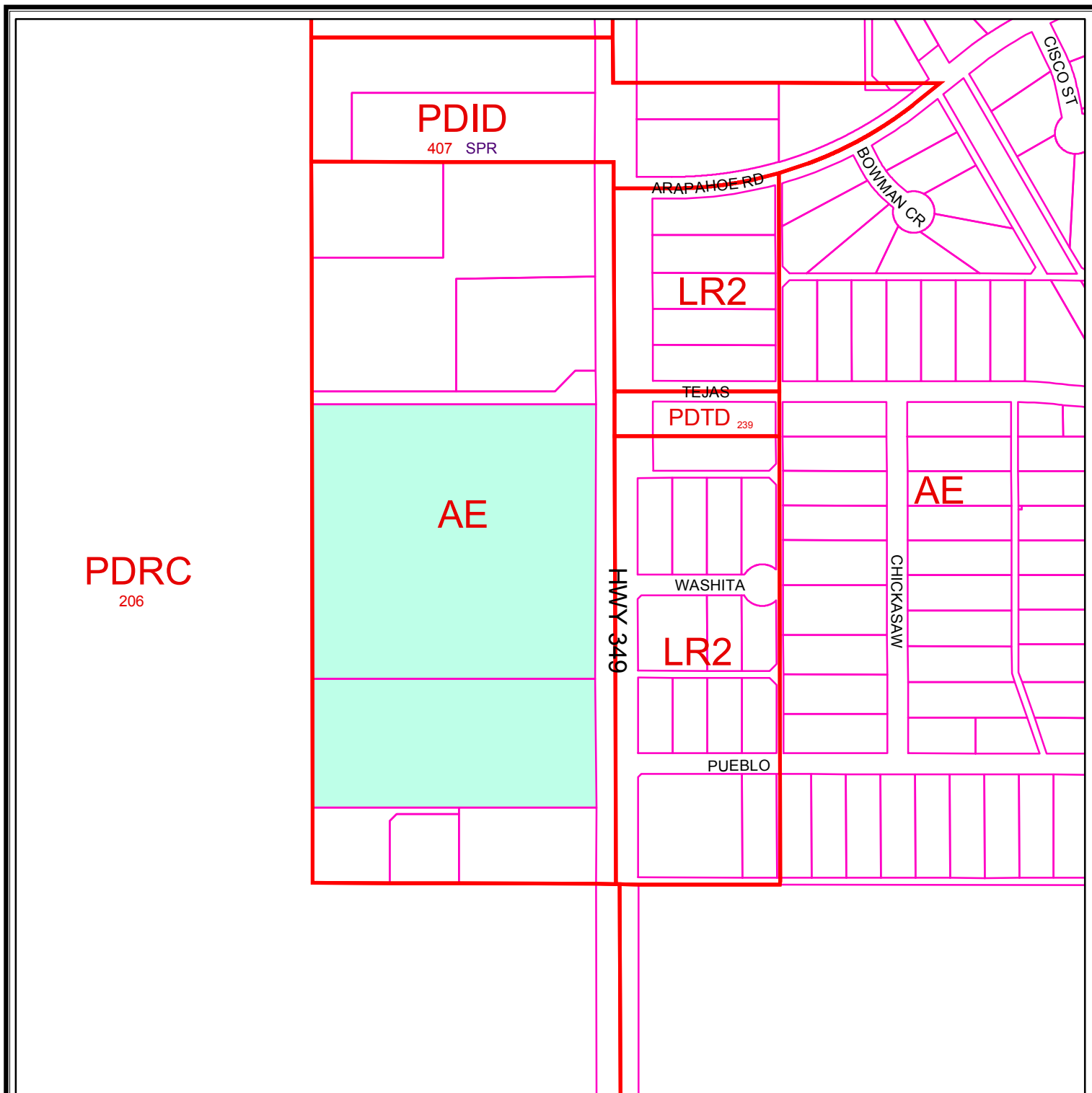
### LEGEND

- CITY LIMITS
- 200 FT. LEGAL NOTICE LIMIT
- PARCEL
- PUBLIC BLDGS
- PRIVATE BLDGS
- ACCESSORY BLDGS



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 THIS DATA IS NOT DESIGNED TO BE USED AS A PRIMARY TOOL IN PERMITTING, CIZING, OR OTHER DECISION  
 SOLELY ON THE INFORMATION CONTAINED HEREIN





## ZONING MAP

**Z - 13 - 050**

**Scale: 1" = 400'**

Consider a request for a zone change from AE, Agriculture Estate District to PD, Planned District for a Housing Development on a 21.85-acre tract of land out of Section 11, Block "X", H. P. Hilliard Survey, City and County of Midland, Texas.

## LEGEND

ZONING  PARCELS

### ZONING DISTRICTS:

|               |                          |                   |                      |
|---------------|--------------------------|-------------------|----------------------|
| FD            | FUTURE DEVELOPMENT       | BP                | BUSINESS PARK        |
| PD            | PLANNED DISTRICT         | P                 | PARKING              |
| AE            | AGRICULTURE ESTATE       | 01, 02            | OFFICE               |
| CE            | COUNTRY ESTATE           | NS                | NEIGHBORHOOD SERVICE |
| 1F1, 1F2, 1F3 | ONE-FAMILY DWELLING      | LR1, LR2, LR3     | LOCAL RETAIL         |
| MH            | MOBILE HOME DWELLING     | C1, C2, C3        | COMMERCIAL           |
| TH            | TOWNHOUSE DWELLING       | IP, IP1, IP2, IP3 | INDUSTRIAL PARK      |
| 2F            | TWO-FAMILY DWELLING      | LI                | LIGHT INDUSTRY       |
| MF1, MF2      | MULTIPLE FAMILY DWELLING | HI                | HEAVY INDUSTRY       |

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# City Council Agenda

Approved for Agenda:  
**RPatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Consider an ordinance on second reading on a request by Pulman, Cappuccio, Pullen, Benson, & Jones, LLP for a zone change from O-1, Office District to PD, Planned District for an Office District, on Lots 2 and 3, Block 1, The Vineyard Addition, Section 3, City and County of Midland, Texas. (Generally located on the west side of Holiday Hill Road, approximately 800 feet north of Sherwood Drive). District-1

---

## **Purpose:**

Consider an ordinance on second reading on a request by Pulman, Cappuccio, Pullen, Benson, & Jones, LLP for a zone change from O-1, Office District to PD, Planned District for an Office Center (Generally located on the west side of Holiday Hill Road, approximately 800 feet north of Sherwood Drive)

## **Recommended City Council Action**

☒ Approve

☐ Deny

☐ Direction/Informational

## **Fiscal Impact:**

There is no cost to the City to process this request.

## **Discussion:**

The applicant desires to rezone Lots 2 and 3 from O-1, Office District to PD, Planned District for an Office Center, subject to the O-2, Office District standards except for the maximum building height. The O-2 District allows buildings up to seven stories, or 80 feet, in height. This request is to limit a 3.77-acre portion to a maximum height of sixty feet, and the remainder to 45 feet. The purpose is to provide protection to the homes in Green Tree. On December 17, 2013, City Council approved this request. It is now appropriate to consider this ordinance on second and final reading

**ORDINANCE NO.**

**AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING LOTS 2 AND 3, BLOCK 1, THE VINEYARD ADDITION, SECTION 3, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED O-1, OFFICE DISTRICT, TO BE USED AS A PD, PLANNED DISTRICT FOR AN OFFICE CENTER (GENERALLY LOCATED ON THE WEST SIDE OF HOLIDAY HILL ROAD, APPROXIMATELY 800 FEET NORTH OF SHERWOOD DRIVE); PROVIDING FOR SUCH USE TO BE SUBJECT TO CERTAIN SPECIAL CONDITIONS AND RESTRICTIONS AS SET OUT HEREIN; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION**

**WHEREAS**, the City Planning and Zoning Commission and the Governing Body of the City of Midland, in compliance with the City Charter and the State law with reference to the creation of “Planned Districts” under the zoning ordinance regulations and zoning map, have given the requisite notices by United States mail, publication and otherwise; and after a full and fair hearing to all of the property owners generally and particularly to those interested persons situated in the affected area and in the vicinity thereof, the Governing Body finds that the public health, safety and general welfare will be best served by the creation of a Planned District for an Office Center, set out hereinafter and subject to the conditions and restrictions set out hereinafter;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Chapter 1, Title XI, of the City Code of Midland, Texas, and the official zoning map of the City of Midland, Texas, are hereby amended insofar as the hereinafter described property is concerned, which is presently zoned O-1, Office District, and it shall be used as a Planned District for an Office Center, subject to the special conditions and restrictions hereinafter set out, said property being described as follows:

Lots 2 and 3, Block 1, The Vineyard Addition, Section 3, City and County of Midland, Texas.

**SECTION TWO.** That said property shall be subject to the following special conditions and restrictions:

1. That this property shall conform to the regulations of the O-1, Office District, except as stated below.
2. That the property described in Exhibits “A”, which is attached hereto and incorporated herein, shall have a maximum building height of 60 feet.
3. That the remainder of the two lots shall have a maximum building height of 45 feet.

**SECTION THREE.** That the definitions given in the zoning regulations contained in the City Code of the City of Midland, Texas, shall be applicable to such of those terms as are used herein.

**SECTION FOUR.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION FIVE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION SIX.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$2,000.00).

**SECTION SEVEN.** The City Secretary is hereby authorized and directed to publish



the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting "AYE":

Council members voting "NAY":

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

APPROVED AS TO CONTENT  
AND COMPLETENESS:

---

Robert Patrick, Assistant to the City Manager

APPROVED ONLY AS TO FORM:

---

Keith Stretcher, City Attorney

# ***Northstar Land Surveying, Inc.***

***9033 Aero St. Suite 105***

***San Antonio, Texas 78217***

***(210) 826-6228***

## **FIELD NOTES FOR ZONING EXHIBIT**

A 3.7736 ACRE TRACT OF LAND OUT OF LOT 2, THE VINEYARD ADDITION, SECTION 3, CITY AND COUNTY OF MIDLAND, TEXAS, AS RECORDED IN CABINET I, PAGE 144, PLAT RECORDS OF MIDLAND COUNTY, TEXAS AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

**BEGINNING:** At a found ½ inch iron rod on the west line of Lot 1, The Vineyard Addition as recorded in Cabinet I, Page 83, Plat Records of Midland County, Texas, the most easterly northeast corner of Lot 4 of the above referenced The Vineyard Addition, Section 3, the most southerly southeast corner of the above referenced Lot 2, the southeast corner of the herein described tract;

**THENCE:** South 75 degrees 36 minutes 27 seconds West, 250.01 feet coincident with the north line of the above referenced Lot 4, to a found 1/2 inch iron rod, a corner of Lot 4, the southwest corner of Lot 2;

**THENCE:** North 14 degrees 23 minutes 33 seconds West, 573.52 feet coincident with the east line of Lot 4 to the northwest corner of the herein described tract;

**THENCE:** North 75 degrees 35 minutes 20 seconds East, 220.64 feet to the beginning of a curve to the right;

**THENCE:** 169.18 feet coincident with the curve to the right, concave to the south, having a radius of 172.51 feet, a central angle of 56 degrees 11 minutes 27 seconds, and a chord bearing and length of South 76 degrees 18 minutes 57 seconds East, 162.48 feet to the end of this curve;

**THENCE:** South 48 degrees 13 minutes 13 seconds East, 37.15 feet to the beginning of a non-tangent curve to the left;

**THENCE:** 325.59 feet with the curve to the left, concave to the east, having a radius of 368.64 feet, a central angle of 50 degrees 36 minutes 10 seconds, and a chord bearing and length of South 10 degrees 54 minutes 32 seconds West, 315.11 feet to a found ½ inch iron rod, the end of this curve;

Continued . . .

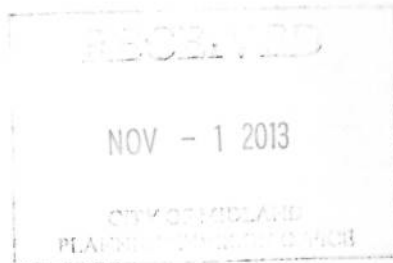
**THENCE:** South 14 degrees 23 minutes 33 seconds East, 181.36 feet to the **POINT OF BEGINNING**, containing 3.7736 acres.

This legal description is for zoning purposes only and is not to be used for any other transactions.

*Thomas C. Haber*

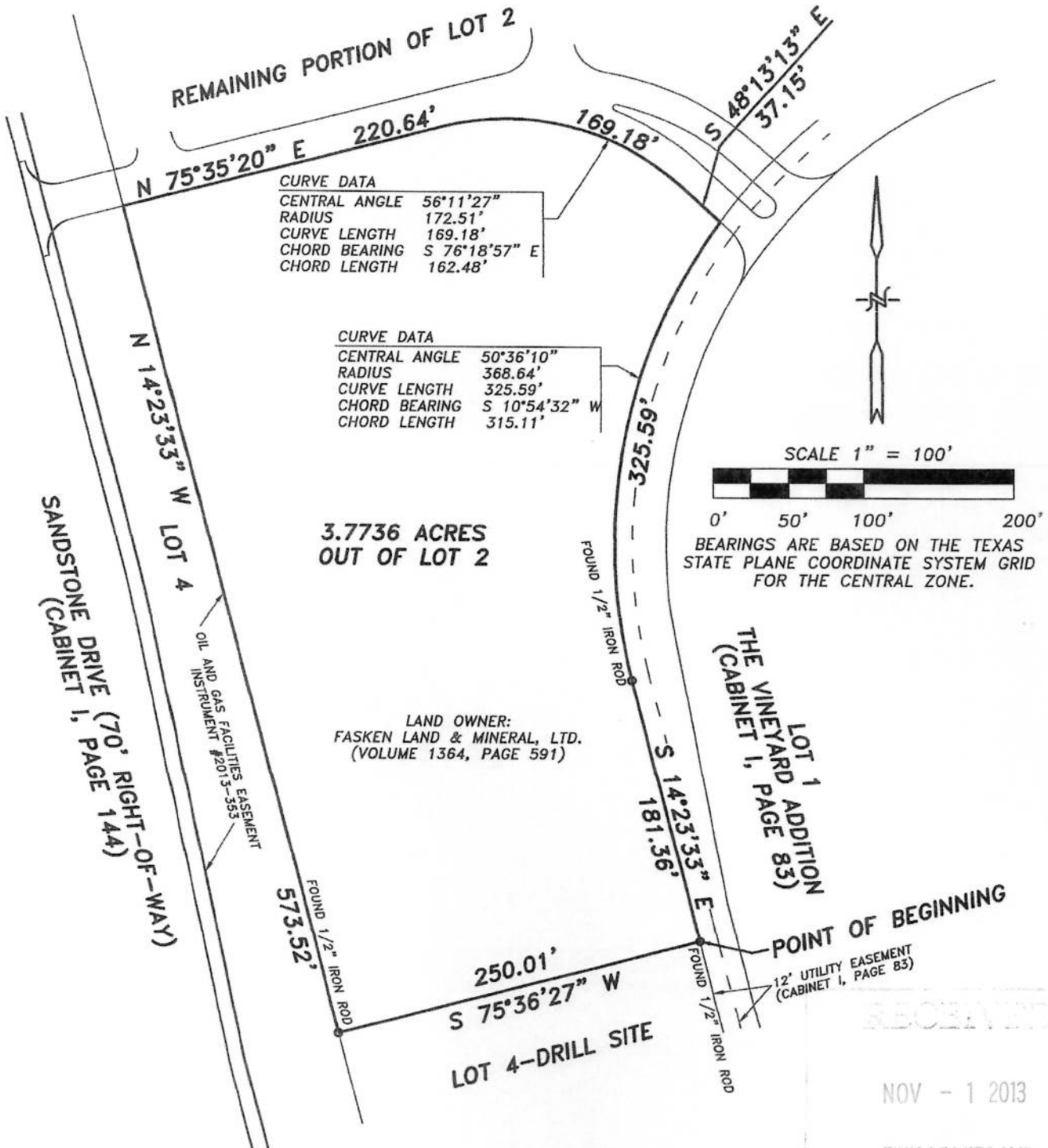
Thomas C. Haberer  
Registered Professional Land Surveyor #4350

October 30, 2013  
Job Number 5-13-0021 (Rezoning)



CASE NO. 2-13-052

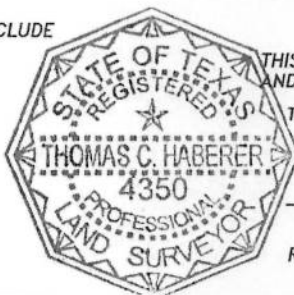
# THE VINEYARD ADDITION ZONING EXHIBIT



THE PROFESSIONAL SERVICES PROVIDED HERewith INCLUDE  
THE PREPARATION OF A FIELD NOTE DESCRIPTION.



**NORTHSTAR LAND  
SURVEYING, INC.**  
9033 AERO ST., SUITE 105  
SAN ANTONIO, TEXAS 78217  
(210) 826-6228



THIS LEGAL DESCRIPTION IS FOR ZONING PURPOSES ONLY  
AND IS NOT TO BE USED FOR ANY OTHER TRANSACTIONS.

THIS 30th DAY OF OCTOBER 2013 A.D.

*Thomas C. Haberer*

THOMAS C. HABERER  
REGISTERED PROFESSIONAL LAND SURVEYOR #4350

JOB NO. 5-13-0021 (REZONING)

NOV - 1 2013

CITY OF MIDLAND  
PLANNING DIVISION

CASE NO. Z-13-052

# PLANNING AND ZONING COMMISSION

December 16, 2013

**CASE:** Z-13-052.

**REQUEST:** Hold a public hearing and consider a request for a zone change from O-1, Office District to PD, Planned District Office Center.

**APPLICANT:** Pullen, Cappuccio, Pullen, Benson, & Jones, LLP.

**OWNER:** Vineyard Reserve, LLC.

**REPRESENTATIVE:** Buck Benson.

**LEGAL DESCRIPTION:** Lot 2 and 3, Block 1, the Vineyard Addition, Section 3; City and County of Midland, Texas.

**LOCATION:** Generally located on the west side of Holiday Hill Road, approximately 800 feet north of Sherwood Drive.

**CURRENT ZONING:** O-1, Office District.

## DETAILS OF REQUEST:

1. The applicant desires to rezone Lots 2 and 3 from O-1, Office District to PD, Office Center, subject to the O-2, Office District standards except for the maximum building height. The O-2 District allows buildings up to seven stories, or 80 feet, in height. This request is to limit a 3.77-acre portion to sixty feet in height, and the remainder to 45 feet.

## SURROUNDING ZONING AND LAND USE:

2. The land to the north of the property is zoned FD, Future Development and PD, Housing Development. The land to the east across Holiday Hill Road is zoned PD, Housing Development and PD-Recreation Center. The land to the south across Sherwood Drive is zoned 1F3, One-Family Dwelling, PD, Planned District for a Housing Development, and LR-2, Local Retail District. There is one TH, Townhouse District to the east of Holiday Hill Rd.

**STAFF RECOMMENDATION:**

3. Staff recommends approval of this request for a zone change from O-1, Office District. This proposed PD, Office Center would be subject to the regulations of the O-2, Office District, except for the building height. All of the proposed uses of the O-1 Office District are also allowed in the O-2, District, but the applicant proposes a height reduction to protect adjacent residential neighborhoods. Staff believes there are sufficient building design and administrative review process in place to ensure that the new building will complement the existing development in this area.



Robert Baronti, AICP  
Senior Planner  
Department of Development Services



Jim Compton  
Planning Division Manager  
Department of Development Services

**Attachments:**

Application  
Maps  
Meets and Bounds Description



Case Number: 2-13-052

**CITY OF MIDLAND**  
**Planning Division**

**APPLICATION TO CHANGE ZONING CLASSIFICATION**

Pulman, Cappuccio, Pullen, Benson & Jones, LLP (210) 892-0510

|                                                          |                       |
|----------------------------------------------------------|-----------------------|
| <b>Applicant Name</b>                                    | <b>(Phone/e-mail)</b> |
| 2161 NW Military Hwy, Suite 400 San Antonio, Texas 78213 |                       |
| <b>Address</b>                                           | <b>Zip Code</b>       |

Vineyard Reserve, LLC

|                                             |                       |
|---------------------------------------------|-----------------------|
| <b>Property Owner Name</b>                  | <b>(Phone/e-mail)</b> |
| 6101 Holiday Hill Road Midland, Texas 79707 |                       |
| <b>Address</b>                              | <b>Zip Code</b>       |

Buck Benson (210) 892-0510 bbenson@pulmanlaw.com

|                                                          |                       |
|----------------------------------------------------------|-----------------------|
| <b>Representative Name</b>                               | <b>(Phone/e-mail)</b> |
| 2161 NW Military Hwy, Suite 400 San Antonio, Texas 78213 |                       |
| <b>Address</b>                                           | <b>Zip Code</b>       |

Street address and Legal Description of property (complete Lot, Block, and Subdivision Name or if unplatted, attach a Metes and Bounds description with surveyor's seal). Each district must be described separately. 3.7736 acres of Lot 2, The Vineyard Addition, Section 3 (see attached field notes)

PRESENT ZONE: 0-1 REQUESTED ZONE: PD  
(List by tracts if more than one district is requested)

Reason for Zone Change Request: To allow for construction of building not to exceed 60 feet in height.

Present Use of Property: Undeveloped.

Proposed Use of Property: Office building.

How will zone change affect the public health, safety and welfare? This request does not adversely affect the health, safety & welfare of the general public.

Describe how conditions affecting the property have changed since present zoning designation: There is more demand for office space in the market and it will be more efficient to build a 3 story building.

Is a Specific Use Permit with Term for alcoholic beverages sales needed? Yes ☒ No



**APPLICATION FEES:**

- Single, standard zone change: **\$400**. Multiple, standard zone change: add **\$100** per additional district.
- Single PD, Planned District zone change: **\$550**. Multiple PD proposal: add **\$100** per district.
- If a Traffic Impact Analysis is required, a fee of up to \$500.00 will be assessed.

**SITE PLAN SUBMITTALS** (if applicable):

16 copies (FOLDED) of the PD site plan: \_\_\_\_\_

Site Plan in digital format .pdf and .jpg: \_\_\_\_\_

**SIGNATURE** (by property owner only - authorized agent must sign affidavit below)

Property Owner (signature): \_\_\_\_\_ Date: 10/30/13

**If an Agent is authorized by the property owner to file and execute the application on behalf of the property owner, the Agent must complete the affidavit below.**

STATE of TEXAS

COUNTY OF ~~MIDLAND~~ BEXAR

Before me, the undersigned authority, on this day personally appeared  
Buck Benson who, being by me duly sworn, upon oath says: That (s)he is  
authorized by Vineyard Reserve, LLC, the owner of the above described property, to fully  
represent him/her in this application and that (s)he had the legal right, power and authority to sign said  
owner's name hereto as his/her attorney in fact.

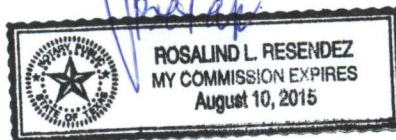
Buck Benson

Authorized Agent (signature)

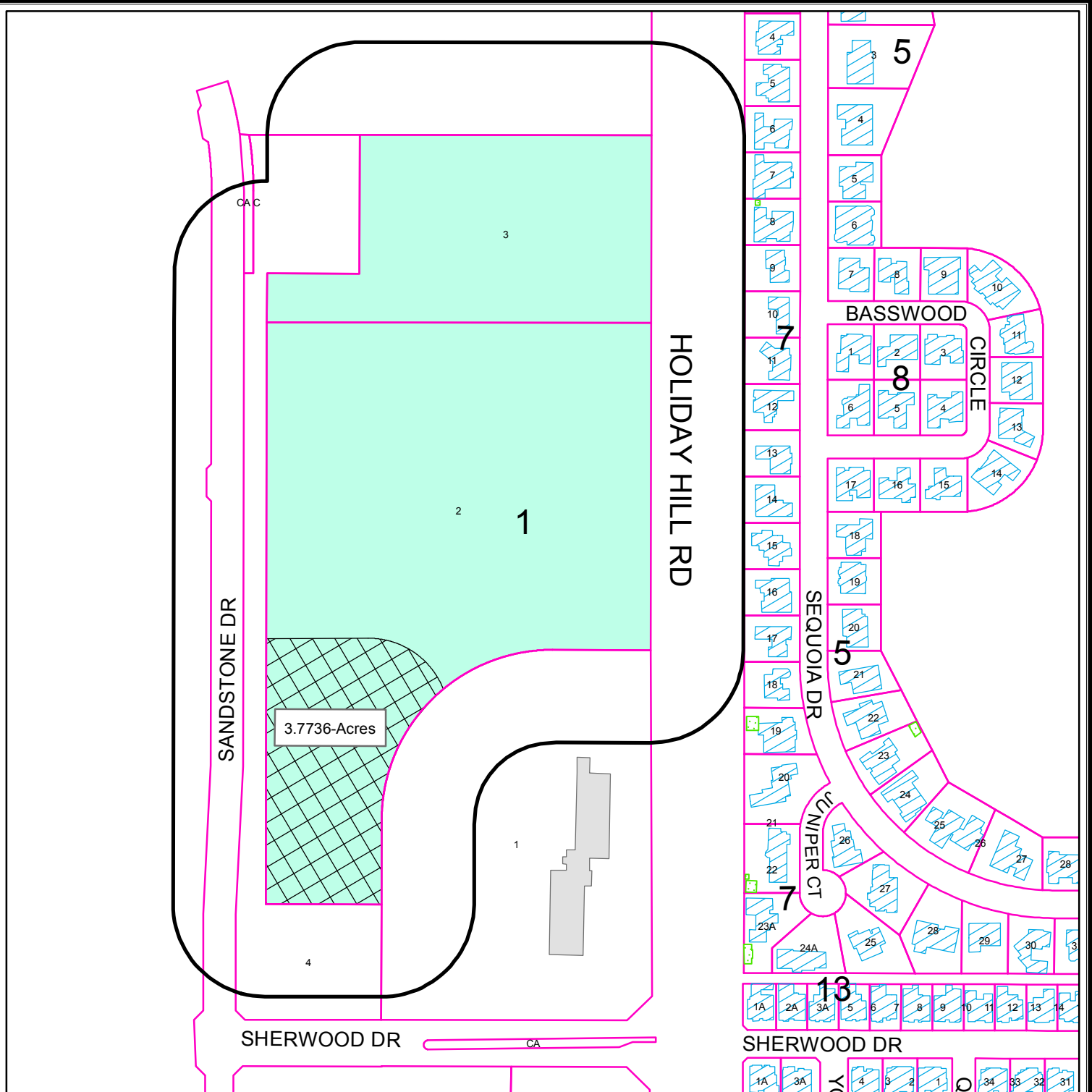
Subscribed and sworn to before me, this 30th day of October, 20 13, to certify which  
witness my hand and seal of office.

NOTARY PUBLIC, MIDLAND COUNTY, TEXAS

|                     |                      |
|---------------------|----------------------|
| FOR OFFICE USE ONLY |                      |
| Rec'd By: <u>FC</u> | Date: <u>11-7-13</u> |
| Assigned: <u>BB</u> |                      |
| For: <u>P+Z</u>     | On: _____            |



**\*\*Application will not be considered for scheduling until reviewed by a planner.\*\***



# PROPERTY OWNER NOTIFICATION MAP

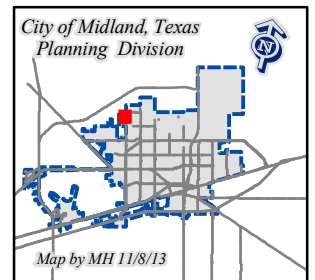
**Z - 13 - 052**

**Scale: 1" = 300'**

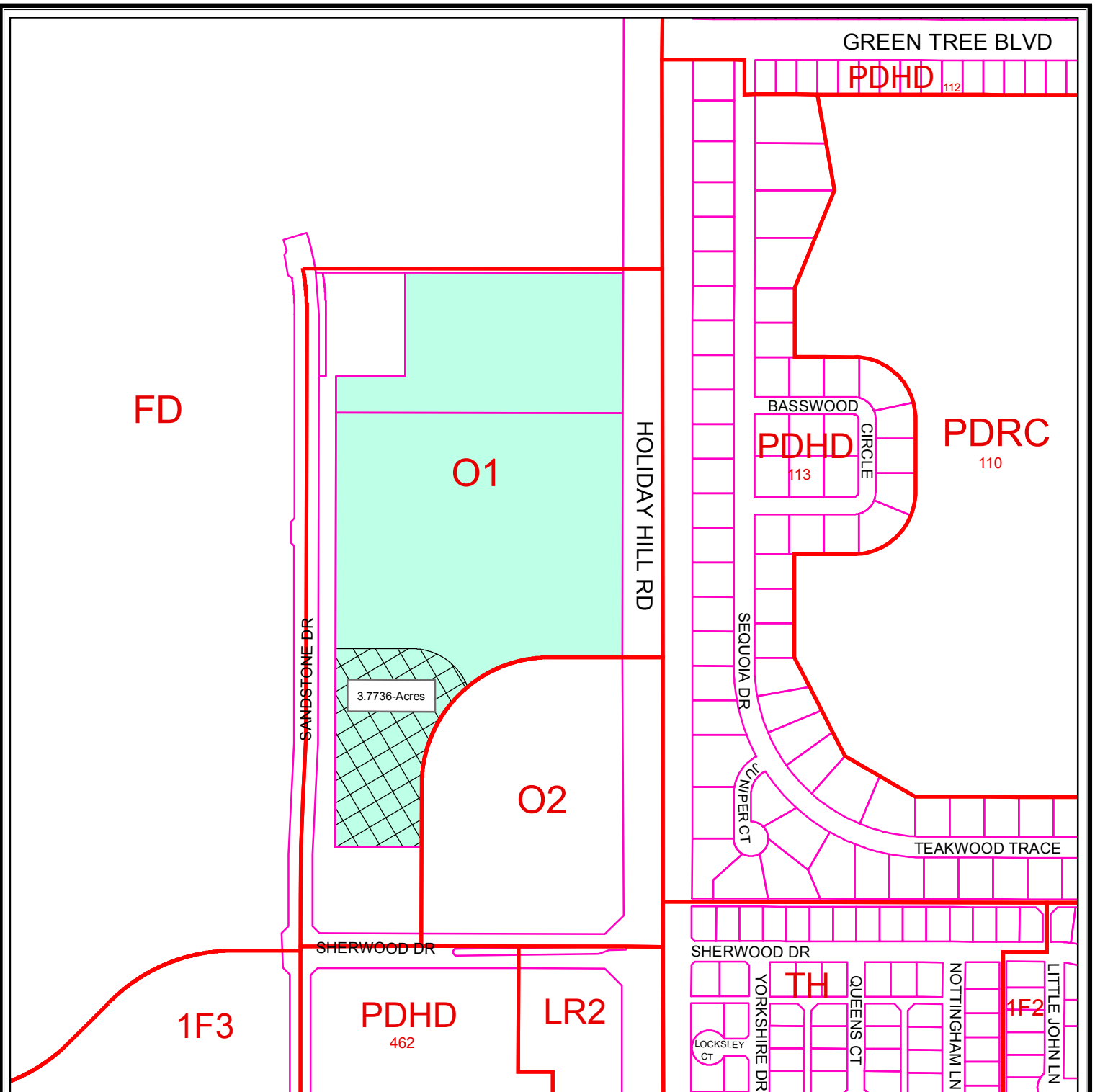
Consider a request for a zone change from O-1, Office District to PD, Planned District for a Office Center on Lots 2 and 3, Block 1, The Vineyard Addition, Section 3; City and County of Midland, Texas.

## LEGEND

- CITY LIMITS
- 200 FT. LEGAL NOTICE LIMIT
- PARCEL
- PUBLIC BLDGS
- PRIVATE BLDGS
- ACCESSORY BLDGS



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## ZONING MAP

**Z - 13 - 052**

**Scale: 1" = 400'**

Consider a request for a zone change from O-1, Office District to PD, Planned District for a Office Center on Lots 2 and 3, Block 1, The Vineyard Addition, Section 3; City and County of Midland, Texas.

## LEGEND

ZONING       PARCELS

### ZONING DISTRICTS:

|               |                          |                   |                      |
|---------------|--------------------------|-------------------|----------------------|
| FD            | FUTURE DEVELOPMENT       | BP                | BUSINESS PARK        |
| PD            | PLANNED DISTRICT         | P                 | PARKING              |
| AE            | AGRICULTURE ESTATE       | O1, O2            | OFFICE               |
| CE            | COUNTRY ESTATE           | NS                | NEIGHBORHOOD SERVICE |
| 1F1, 1F2, 1F3 | ONE-FAMILY DWELLING      | LR1, LR2, LR3     | LOCAL RETAIL         |
| MH            | MOBILE HOME DWELLING     | C1, C2, C3        | COMMERCIAL           |
| TH            | TOWNHOUSE DWELLING       | IP, IP1, IP2, IP3 | INDUSTRIAL PARK      |
| 2F            | TWO-FAMILY DWELLING      | LI                | LIGHT INDUSTRY       |
| MF1, MF2      | MULTIPLE FAMILY DWELLING | HI                | HEAVY INDUSTRY       |

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# City Council Agenda

Approved for Agenda:  
**RPatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Consider an ordinance on second reading on a request by Jeff Benson for a zone change from PD, Planned District for Shopping Center, to an Amended Planned District, on Lot 1A, Block 2, Gateway Plaza, Section 3, City and County of Midland, Texas. (Generally located near the southeast corner of the intersection of Liberty Drive and Starboard Drive.) – District 4.

---

## **Purpose:**

Consider an ordinance on second reading on a request by Jeff Benson for a zone change from PD, Planned District for Shopping Center, to an Amended Planned District.

## **Recommended City Council Action**

☒ Approve

☐ Deny

☐ Direction/Informational

## **Fiscal Impact:**

No City funds are required to process this request.

## **Discussion:**

The applicant's property, Cinergy Cinemas, is located on the southeast corner of the intersection of Liberty Drive and Starboard Drive, and north of Business I-20. A zone change from PD, Planned District for Shopping Center, to an Amended Planned District, is required to adopt a new site plan and elevation drawings allowing a 2,358 square foot storage building. Following a favorable recommendation from the Planning and Zoning Commission, City Council approved this request on first reading on January 14, 2014. It is now appropriate to consider this ordinance on second and final reading.

**ORDINANCE NO.**

**AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING LOT 1A, BLOCK 2, GATEWAY PLAZA, SECTION 3, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED PD, PLANNED DISTRICT FOR A SHOPPING CENTER, TO BE USED AS AN AMENDED PLANNED DISTRICT (GENERALLY LOCATED ON THE SOUTHEAST CORNER OF THE INTERSECTION OF LIBERTY DRIVE AND STARBOARD DRIVE); PROVIDING FOR SUCH USE TO BE SUBJECT TO CERTAIN SPECIAL CONDITIONS AND RESTRICTIONS AS SET OUT HEREIN; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION**

**WHEREAS**, the City Planning and Zoning Commission and the Governing Body of the City of Midland, in compliance with the City Charter and the State law with reference to the creation of “Planned Districts” under the zoning ordinance regulations and zoning map, have given the requisite notices by United States mail, publication and otherwise; and after a full and fair hearing to all of the property owners generally and particularly to those interested persons situated in the affected area and in the vicinity thereof, the Governing Body finds that the public health, safety and general welfare will be best served by the creation of an Amended Planned District, set out hereinafter and subject to the conditions and restrictions set out hereinafter;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Chapter 1, Title XI, of the City Code of Midland, Texas, and the official zoning map of the City of Midland, Texas, are hereby amended insofar as the hereinafter described property is concerned, which is presently zoned PD, Planned District for a Shopping Center, and it shall be used as an Amended Planned District, subject to the special conditions and restrictions hereinafter set out, said property being described as follows:

Lot 1A, Block 2, Gateway Plaza, Section 3, City and County of Midland, Texas.

**SECTION TWO.** That said property shall be subject to the following special conditions and restrictions:

1. That the development of this property, including the addition of the storage building, shall conform to Exhibits “A-1” and “A-2”, which are attached hereto and incorporated herein.
2. That Exhibit “A-1” hereto shall replace and supersede Exhibit “A” to City of Midland Ordinance No. 8892. The elevation of the storage building shall conform to the conditions shown on Exhibit “A-2” hereto.
3. That the maximum square footage of the storage building shall not exceed 2,360 square feet.
4. That all other conditions of City of Midland Ordinance No. 8892, which are not amended by this ordinance, shall remain in full force and effect.

**SECTION THREE.** That the definitions given in the zoning regulations contained in the City Code of the City of Midland, Texas, shall be applicable to such of those terms as are used herein.

**SECTION FOUR.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION FIVE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION SIX.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$2,000.00).

**SECTION SEVEN.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting “AYE”:

Council members voting “NAY”:

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting “AYE”:

Council members voting “NAY”:

PASSED AND APPROVED THIS \_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

APPROVED AS TO CONTENT  
AND COMPLETENESS:

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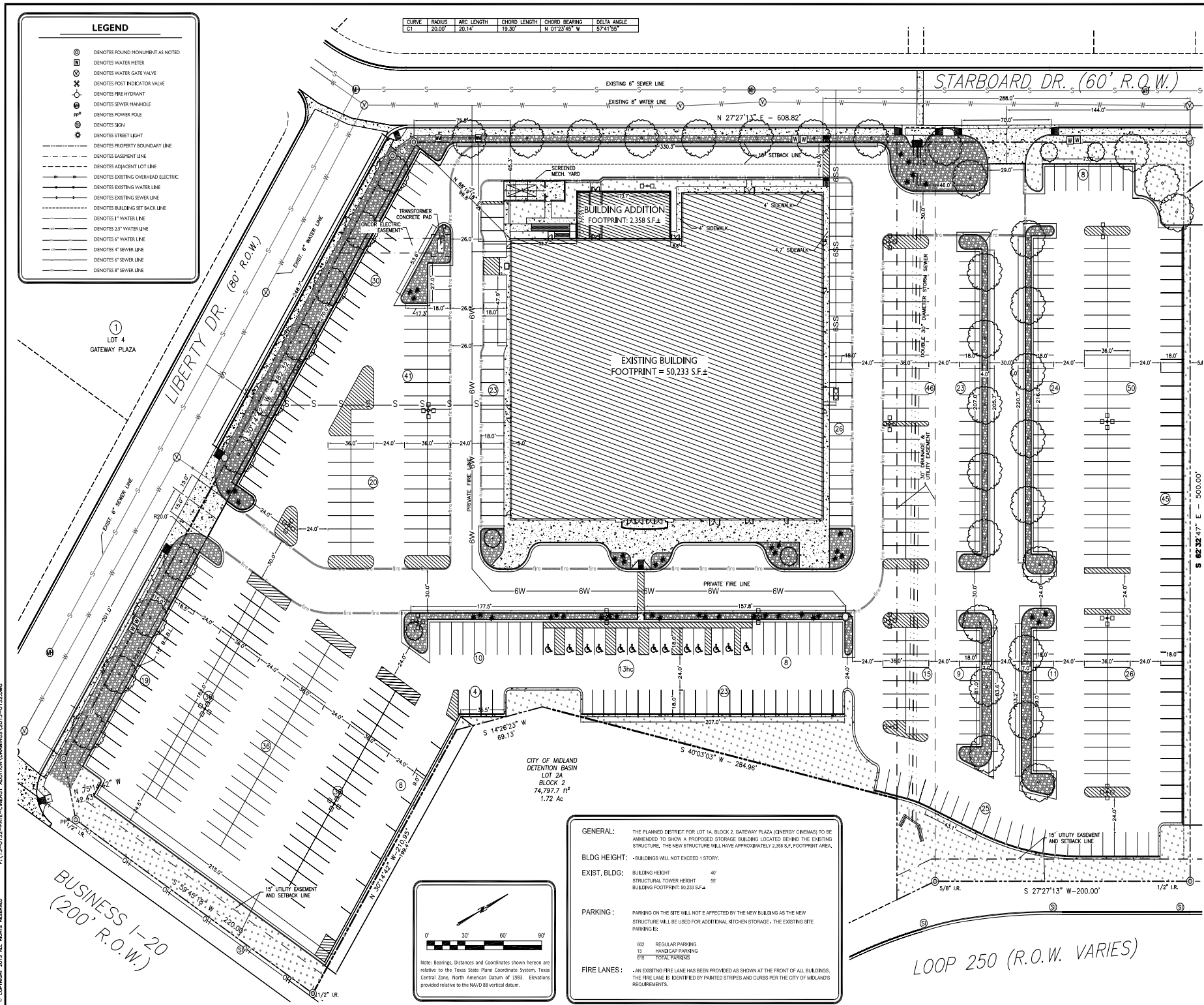
Robert Patrick, Assistant to the City Manager

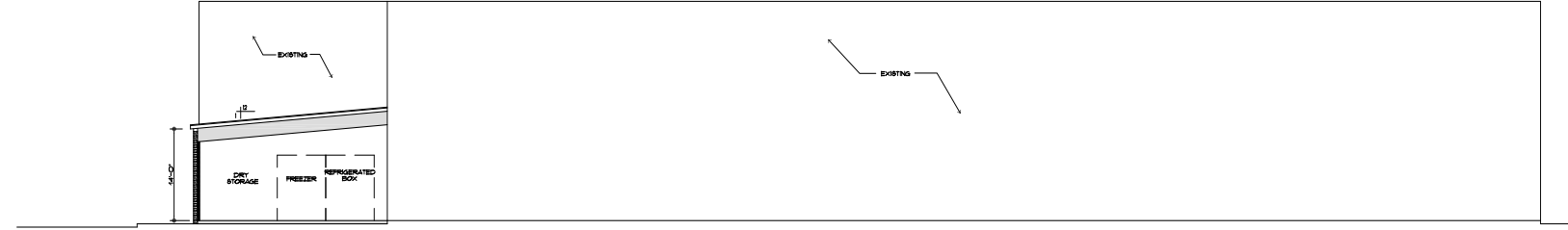
APPROVED ONLY AS TO FORM:

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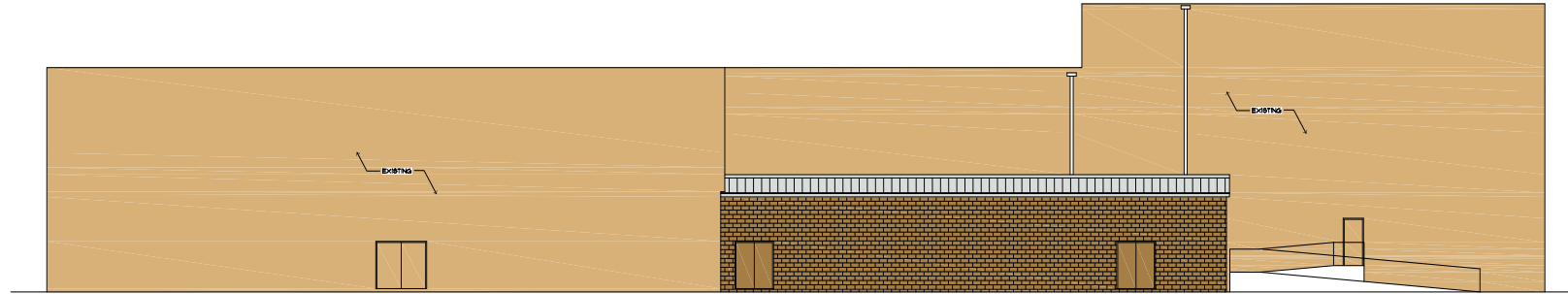
Keith Stretcher, City Attorney



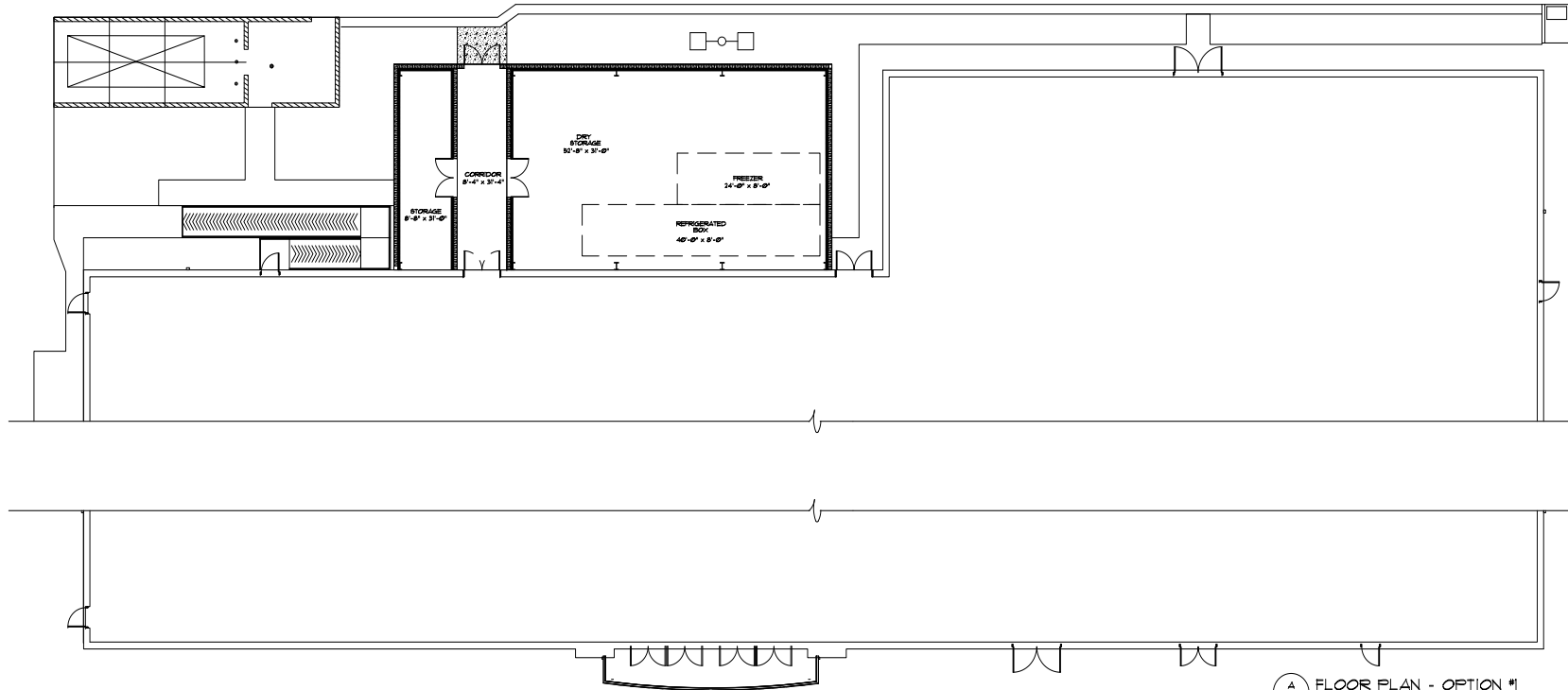




**C SECTION**  
SD2 1/8" = 1'-0"



**B REAR ELEVATION - OPTION #1**  
SD2 1/8" = 1'-0"



**A FLOOR PLAN - OPTION #1**  
SD2 1/8" = 1'-0"

**SQ. FT. CALCULATIONS:**

|             |              |
|-------------|--------------|
| DRY STORAGE | 1700 SQ. FT. |
| STORAGE     | 247 SQ. FT.  |
| CORRIDOR    | 167 SQ. FT.  |
| TOTAL       | 2114 SQ. FT. |

FOR REVIEW ONLY -  
NOT FOR REGULATORY  
APPROVAL, PERMITTING,  
OR CONSTRUCTION.

**PIA PATE & ASSOCIATES**  
ARCHITECTS - PLANNERS, INC.  
4100 W. ILLINOIS, SUITE 102  
MIDLAND, TEXAS 79703 (432) 697-0037

ADDITION FOR:  
**CINERGY CINEMAS - MIDLAND**

DATE ISSUED  
09/3/2023

SHEET NUMBER

**SD2**

OF SHEETS  
JOB NO. 1342

# PLANNING AND ZONING COMMISSION

December 16, 2013

**CASE:** Z-13-053, Jeff Benson.

**REQUEST:** Hold a public hearing and consider a request for a zone change from PD, Planned District for Shopping Center, to an Amended Planned District.

**APPLICANT/OWNER:** Jeff Benson.

**REPRESENTATIVE:** Maverick Engineering.

**LEGAL DESCRIPTION:** Lot 1A, Block 2, Gateway Plaza, Section 3, City and County of Midland, Texas.

**LOCATION:** Generally located near the southeast corner of the intersection of Liberty Drive and Starboard Drive.

**CURRENT ZONING:** PD, Planned District for Shopping Center.

## DETAILS OF REQUEST:

1. This property, the Cinergy Cinemas movie theater, is located between I-20 and Starboard Drive, and on the east side of Liberty Drive. Currently, the property is zoned PD, Planned District for Shopping Center, with an underlining zoning of LR-2, Local Retail District. The applicant wishes to add an approximately 2,358 square foot storage building on the north side of the property adjacent to Starboard Drive, and in order to do so, must amend the Planned District.

## SURROUNDING ZONING AND LAND USE:

2. Cinergy Cinemas is located on the southeast corner of Liberty and Starboard Drives, both classified as residential streets, and north of I-20. The zoning to the west is an LR-3, Local Retail District. To the north is an LR-2, Local Retail District, and a PD, Planned District for Shopping Center. An LR-3 District is adjacent on the east. Finally, to the south is a strip zoned IP-3, Industrial Park District, but the land south of I-20 is outside the City limits. Most of the surrounding property is currently vacant.



**ANALYSIS:**

3. The lot was initially replatted in February 2012 as Gateway Plaza, Section 3. The property at that time was zoned LR-3, Local Retail District. However, to accommodate for a greater height for the movie theater and family entertainment complex, a zone change to a PD, Planned District for Shopping Center, was approved also in February 2012. The Planned District was associated with a site plan and elevations. Any future changes to the site plan require an amendment to the Planned District. Thus, in this proposal, the addition of the storage building requires a zone change that adopts an amended site plan.

**SITE PLAN:**

4. The site plan, Exhibit A, provides the layout and information about the site. As shown, the current footprint of the theater is approximately 50,233 square feet. The addition to the building is shown on the northern portion of the lot. The addition complies with the LR-2 District setbacks. The parking requirement is a minimum of 574 spaces. Existing parking includes a total of 615 parking spaces, exceeding the minimum requirement. The addition will neither affect any existing parking spaces nor necessitate additional parking spaces as the addition is to be used for storage.

Exhibit B shows the side and rear view the storage building addition. The height of the new addition is 14 feet, which is less than the maximum height requirement. The building will be constructed of painted split face CMU, with the color to match the existing building, and the roof will be a pre-finished grey roof.

Because the Planned District was already established during the initial zoning, and the proposed amendment is minor, we find the zone change from PD, Planned District for Shopping Center, to an Amended Planned District to be reasonable.

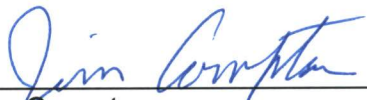
**STAFF RECOMMENDATION:**

**Staff recommends approval of the zone change from PD, Planned District for a Shopping Center, to an Amended Planned District, subject to the following conditions:**

- A. That the development of this site, including the addition of the storage building, shall conform to Exhibits A-1 and A-2:
  - a. That the attached Exhibit A-1 shall replace Exhibit A in Ordinance 8982, and that the elevation of the storage building shall conform to the conditions shown in Exhibit A-2.

**B. That the maximum square footage of the storage building shall not exceed 2,360 square feet.**

**C. That all remaining conditions in Ordinance 8982 are retained.**

  
\_\_\_\_\_  
Jim Compton  
Planning Division Manager  
Department of Development Services

  
\_\_\_\_\_  
Madhuri Kulkarni, City Planner  
Department of Development Services

**Attachments:**

Application  
Maps  
Exhibits A-1 and A-2

Case Number: 2-13-053

**CITY OF MIDLAND**  
**Planning Division**

**APPLICATION TO AMEND A PLANNED DISTRICT**

Applicant: Jeff Benson  
Address: 11311 N. Central Expressway Suite 336 214-750-6607  
Street Address Dallas TX 75243  
City State Zip Code

Property Owner: Jeff Benson  
Address: 11311 N. Central Expressway Suite 336 214-750-6607  
Street Address Dallas TX 75243  
City State Zip Code

Street address and Legal Description of Planned District (complete Lot, Block, and Subdivision Name description below, or, if not in a recorded plat, attach a sealed Metes and Bounds Description:

Lot 1A, Blk 2, Gateway Plaza, Section 3  
Current PD Classification: PDSC

Requested PD Classification: PDSC - Amendment  
(List by tracts if more than one zoning district is requested)

Reason for amendment request: Add a Storage Building

Describe how conditions affecting the property have changed since it was designated its present zone: N/A

Will a Specific Use Permit with Term for alcoholic beverage sales be needed? Yes X No



**FEES:**  
 Single, Planned District amendment: \$550 <sup>RPD</sup> Multiple, PD proposal: add \$75 per district.

**SUBMITTALS:**  
 16 copies of the PD site plan (FOLDED): ✓ RPD  
 Site Plan in digital format .pdf and .jpg: ⓧ will E-mail

**SIGNATURE** (by property owner only - authorized agent must sign affidavit below)

Property Owner (signature): \_\_\_\_\_ Date: \_\_\_\_\_

**If an agent is authorized by the property owner to file and execute the application on behalf of the property owner, the agent must complete the affidavit below.**

STATE of TEXAS  
 COUNTY OF MIDLAND

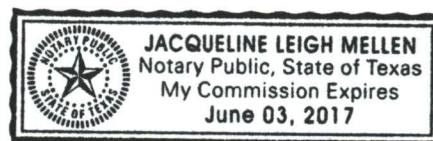
Before me, the undersigned authority, on this day personally appeared ANDREW MELLEN who, being by me duly sworn, upon oath says: That (s)he is authorized by CINERGY CINEMAS, the owner of the above described property, to fully represent him/her in this application and that (s)he had the legal right, power and authority to sign said owner's name hereto as his/her attorney in fact.

Andrew L. Mellen  
 Authorized Agent (signature)

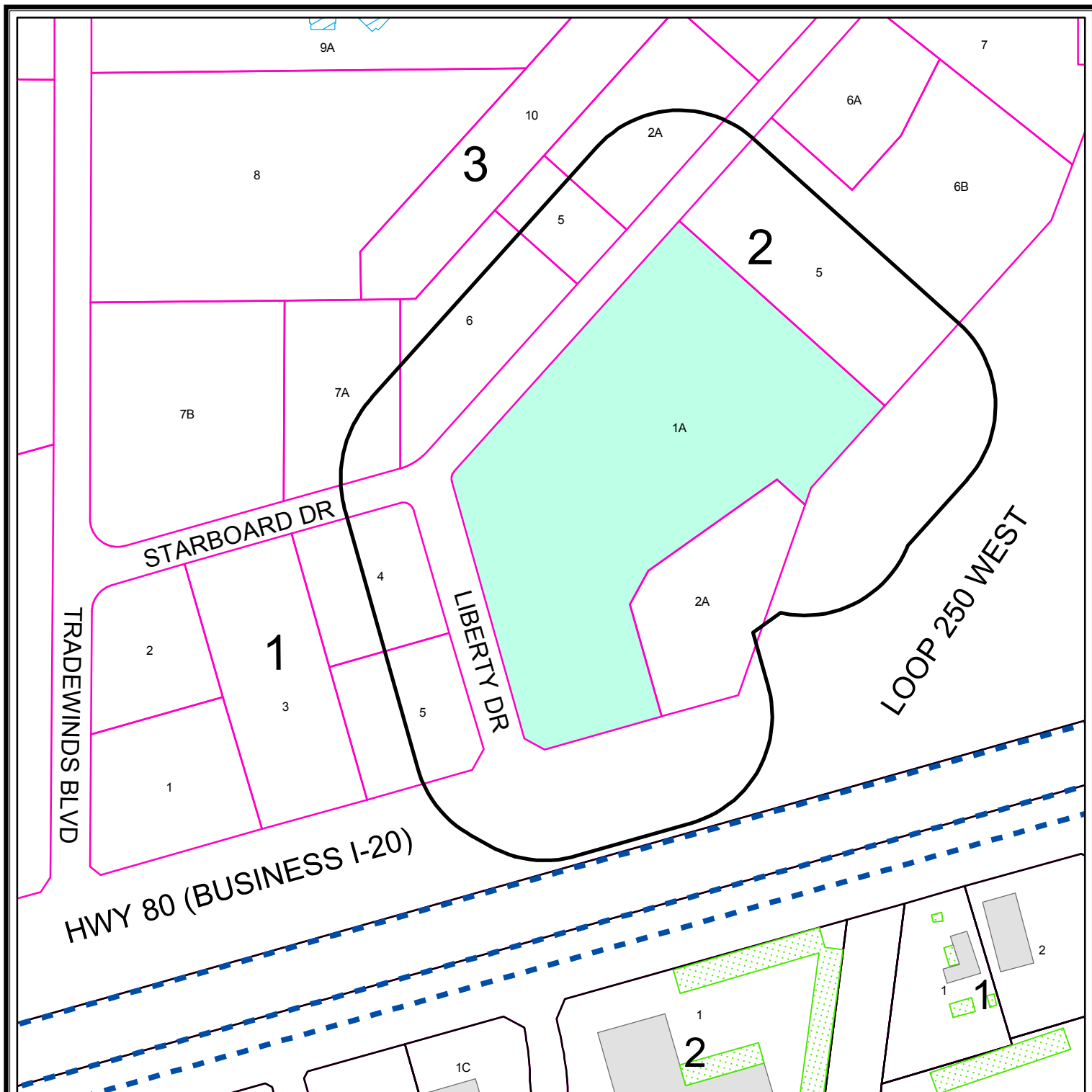
Subscribed and sworn to before me, this 1 day of NOVEMBER, 20 13, to certify which witness my hand and seal of office.

Jacqueline Leigh Mellen  
 NOTARY PUBLIC, MIDLAND COUNTY, TEXAS

**FOR OFFICE USE ONLY**  
 Rec'd By: RPB Date: 1-1-13  
 Assigned: MK  
 For: P+2 On: 12/16/13



**\*\*Application will not be considered for scheduling until reviewed by a planner. \*\***



## PROPERTY OWNER NOTIFICATION MAP

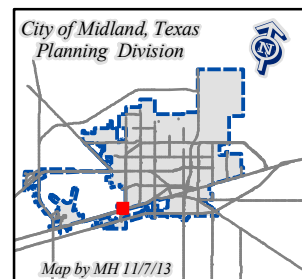
**Z - 13 - 053**

**Scale: 1" = 250'**

Consider a request for a zone change from PD, Planned District for a Shopping Center, to an Amended Planned District on Lot 1A, Block 2, Gateway Plaza, Section 3, City and County of Midland, Texas.

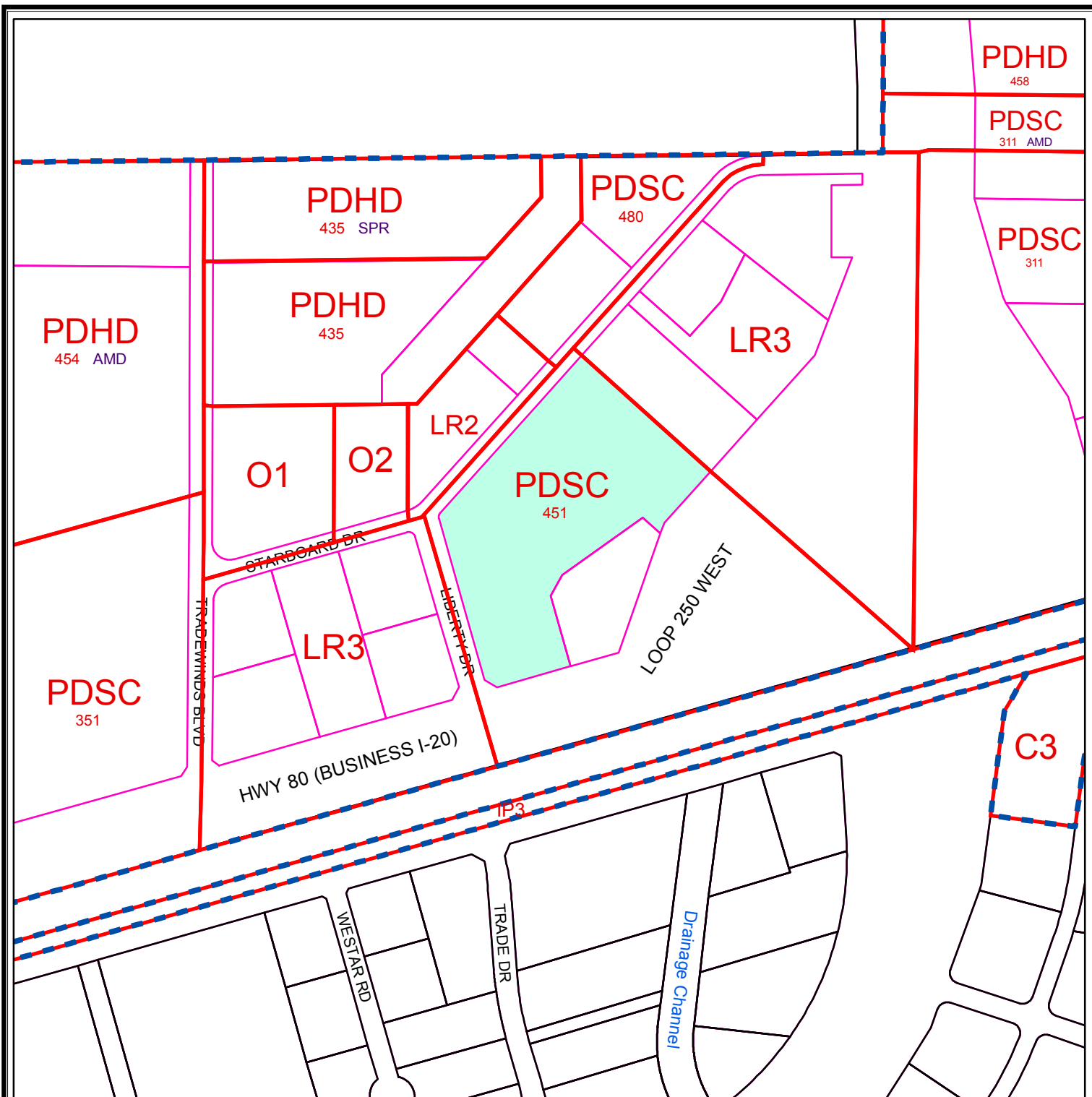
### LEGEND

- CITY LIMITS
- 200 FT. LEGAL NOTICE LIMIT
- CITY PARCEL
- COUNTY PARCEL
- PUBLIC BLDGS
- PRIVATE BLDGS
- ACCESSORY BLDGS



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## ZONING MAP

Z - 13 - 053

Scale: 1" = 400'

Consider a request for a zone change from PD, Planned District for a Shopping Center, to an Amended Planned District on Lot 1A, Block 2, Gateway Plaza, Section 3, City and County of Midland, Texas.

## LEGEND

- |                                                                                                       |                                                                                                                 |
|-------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| <span style="border: 2px solid red; display: inline-block; width: 20px; height: 10px;"></span> ZONING | <span style="border: 2px solid magenta; display: inline-block; width: 20px; height: 10px;"></span> CITY PARCELS |
| <span style="border-top: 2px dashed blue; display: inline-block; width: 20px;"></span> CITY LIMITS    | <span style="border: 2px solid black; display: inline-block; width: 20px; height: 10px;"></span> COUNTY PARCELS |

### ZONING DISTRICTS:

|               |                          |                   |                      |
|---------------|--------------------------|-------------------|----------------------|
| FD            | FUTURE DEVELOPMENT       | BP                | BUSINESS PARK        |
| PD            | PLANNED DISTRICT         | P                 | PARKING              |
| AE            | AGRICULTURE ESTATE       | O1, O2            | OFFICE               |
| CE            | COUNTRY ESTATE           | NS                | NEIGHBORHOOD SERVICE |
| 1F1, 1F2, 1F3 | ONE-FAMILY DWELLING      | LR1, LR2, LR3     | LOCAL RETAIL         |
| MH            | MOBILE HOME DWELLING     | C1, C2, C3        | COMMERCIAL           |
| TH            | TOWNHOUSE DWELLING       | IP, IP1, IP2, IP3 | INDUSTRIAL PARK      |
| 2F            | TWO-FAMILY DWELLING      | LI                | LIGHT INDUSTRY       |
| MF1, MF2      | MULTIPLE FAMILY DWELLING | HI                | HEAVY INDUSTRY       |

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# City Council Agenda

Approved for Agenda:  
**RPatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Acting Planning Division Manager

**SUBJECT:** Consider an ordinance on second reading on a request by Kevin Leary/Borgata Partners, LLC, for the vacation of a 0.126-acre portion of the right-of-way of Holiday Hill Road adjacent to Lot 1, Block 2, Grandridge Park Addition, Section 1, City and County of Midland, Texas. (Generally located on the west side of the intersection of Holiday Hill Road and N. Loop 250 West.) – District 1.

---

## **Purpose:**

Consider an ordinance on second reading on a request by Kevin Leary/Borgata Partners, LLC, for the vacation of a 0.126-acre portion of the right-of-way of Holiday Hill Road adjacent to Lot 1, Block 2, Grandridge Park Addition, Section 1, City and County of Midland, Texas.

## **Recommended City Council Action**

☒ Approve

☐ Deny

☐ Direction/Informational

## **Fiscal Impact:**

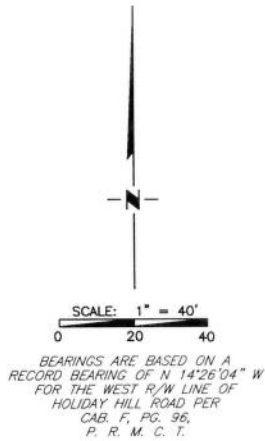
No City funds are required to process this request.

## **Discussion:**

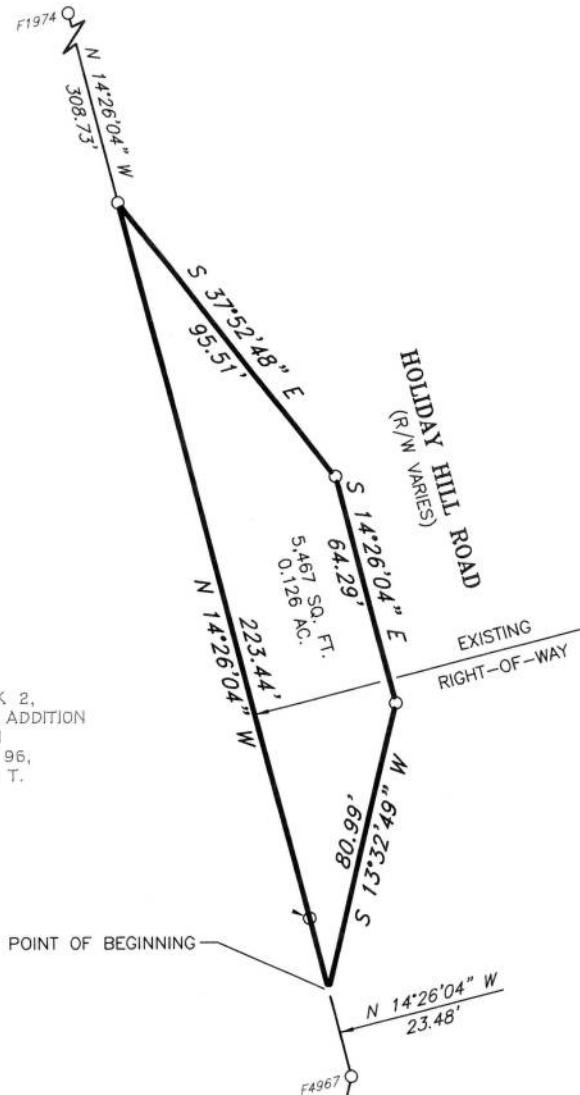
This property is located on the northwest corner of N. Loop 250 West and Holiday Hill Road. The applicant has requested to vacate a 0.126-acre portion of right-of-way on Holiday Hill Road to allow for a drive-through lane and additional parking at this proposed retail center. All of the franchised utility companies and the Texas Department of Transportation were contacted, and have no objection. A general public utility easement has been retained for an existing fiber cable and a gas main. According to the Midland Central Appraisal District, the appraised land value, for taxation purposes, of the 0.126-acre right-of-way is \$16,470. Due to the necessary utility easement, staff

has reduced the value by half to \$8,235. City Council has approved this ordinance on first reading on January 14, 2014, and no changes have been made since that date.

**"EXHIBIT"**  
**PROPOSED HOLIDAY HILL ROAD**  
**RIGHT-OF-WAY VACATION**



LOT 1, BLOCK 2,  
 GRANDRIDGE PARK ADDITION  
 SECTION 1  
 CAB. F, PG. 96,  
 P. R. M. C. T.



**LEGEND**

- F4967** Found 1/2" rebar w/cap marked "RPLS 4967"
- F1974** Found 1/2" rebar w/cap marked "RPLS 1974"
- P. R. M. C. T.** Plat Records of Midland Co., TX.

TX FIRM #10193838

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| NO.       | REVISION   | DATE |
|-----------|------------|------|
| JOB NO.:  | LS130184   |      |
| DWG. NO.: | 130184-1V2 |      |

PROSPERITY CONSULTANTS, LLC



2251 Double Creek Drive, Suite 602, Round Rock, Texas 78664

o (512) 992-2087 f (512) 251-2518

|                     |
|---------------------|
| SCALE: 1" = 40'     |
| DATE: 11/26/13      |
| SURVEYED BY: KW/LWB |
| DRAWN BY: LWB       |
| APPROVED BY: LWB    |
| SHEET : 1 OF 2      |

**EXHIBIT A**

CASE NO. V-13-23.3

**"EXHIBIT"**  
**PROPOSED HOLIDAY HILL ROAD**  
**RIGHT-OF-WAY VACATION**

DESCRIPTION

PROPOSED HOLIDAY HILL ROAD RIGHT-OF-WAY VACATION

A tract of land being a portion of the existing Holiday Hill Road right-of-way adjoining Lot 1 in Block 2 of the Grandridge Park Addition, Section 1, an addition to the City of Midland, Midland County, Texas according to the map or plat thereof filed for record in Cabinet F at Page 96 of the Plat Records of Midland County, Texas. Said tract of land being more particularly described by metes and bounds as follows:

Commencing, for a tie, at a 1/2" rebar with a cap marked "RPLS 4967" found for a corner of the aforementioned Lot 1 at the intersection of the West right-of-way line of Holiday Hill Road and the Northwest right-of-way line of N. Loop 250;

Thence N 14°26'04" W, along the common boundary line of the aforementioned Lot 1 and the aforementioned West right-of-way line, 23.48 feet to the Point of Beginning of the tract of land herein described;

Thence N 14°26'04" W, continuing along the aforementioned common boundary line, 223.44 feet to a point for a corner, from which a 1/2" rebar with a cap marked "RPLS 1974" found for a corner of Lot 1 bears N 14°26'04" W 308.73 feet;

Thence S 37°52'48" E, 95.51 feet to a point for a corner;

Thence S 14°26'04" E, 64.29 feet to a point for a corner;

Thence S 13°32'49" W, 80.99 feet to the Point of Beginning.

Said tract of land containing 5,467 square feet or 0.126 acre, more or less.



TX FIRM #10193838

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|           |            |      |
|-----------|------------|------|
| NO.       | REVISION   | DATE |
| JOB NO.:  | LS130184   |      |
| DWG. NO.: | 130184-2V2 |      |

PROSPERITY CONSULTANTS, LLC



2251 Double Creek Drive, Suite 602, Round Rock, Texas 78664

© (512) 992-2087 f (512) 251-2518

|                     |
|---------------------|
| SCALE: 1" = 40'     |
| DATE: 11/26/13      |
| SURVEYED BY: KW/LWB |
| DRAWN BY: LWB       |
| APPROVED BY: LWB    |
| SHEET : 2 OF 2      |

**EXHIBIT B**

CASE NO. V-13-C 23.4



Office of the City Manager

January 2, 2014

Midland City Council  
City of Midland, Texas

**RE: Request for vacation of a 0.126-acre portion of Holiday Hill Road right-of-way adjacent to Lot 1, Block 2, Grandridge Park Addition, Section 1, City and County of Midland, Texas**

Dear Members of the City Council:

The above-referenced property has been appraised in accordance with Chapter 272 of the Texas Local Government Code. The fair market value of the property is \$8,235.00. The property can be vacated and recorded in the Midland County Clerk's office when the City of Midland has received this amount from the adjoining property owner(s).

Very truly yours,

Courtney Sharp  
City Manager

**Exhibit "C"**

L:\Ordinances\Planning\Vacate & Abandon\2014\Holiday Hill Road, Blk 2, Grandridge Park Addition - Appraisal Letter.wpd

Case Number: V-13-017

**CITY OF MIDLAND**  
**Planning Division**

**APPLICATION TO VACATE RIGHT-OF-WAY**

- I. Application is hereby made to the City Council to vacate the following public right-of-way or easement:  
5,632 S.E. of Holiday Hill Rd. right-of-way at the Northwest corner of the intersection of Holiday Hill and Loop 250
- II. Reason for Request: The owner of Lot 1, Block 2, Grandridge Park (the adjacent tract) needs this tract to allow for a drive-through lane at the proposed Borgata Retail Center
- III. Reasons, in applicant's opinion, why the requested vacation will not adversely affect the public welfare or will contribute to it in a positive way:  
The tract is located at an unused portion of Holiday Hill Right-of-Way, and will allow better traffic patterns on the shopping center site.

**IV. REQUIRED ITEMS:**

1. Applicant(s) Information:

Name: Kevin Leary, Borgata Partners, LLC

Address: 619 W. Texas Ave. Phone: \_\_\_\_\_

Midland Tex. 79701

City State Zip Code

2. Sealed metes and bounds description of property to be vacated (included on the map) and total square feet of vacation. Include ownership, legal-and deed information for adjacent property owners.

3. Application Fee: \$300.00

Required items attached? Date Received: 1. 10-29-13 2. 10-29-13 3. 10-29-13  
BB BB BB

*The City of Midland will take no action on this request, until items 1-3 are received.*

- V. Clearance is needed from the following utility companies: City of Midland / Atmos Energy  
Caprock Energy / Oncor Electric / AT&T / Suddenlink Cable TV Co. / Grande Communications

The City will route the request to these companies, but it is the applicant's responsibility to ensure clearance has been obtained and to work out any issues that may arise.



## VI. Policies:

1. If the vacation request involves only a portion of a section right-of-way, such that approval would not affect the public's ability to travel along said right-of-way, then the request will be scheduled for consideration by the City Council. No public hearing will be needed.
2. If the vacation request involves an entire section of right-of-way, such that approval would cause the public to lose all rights to use it, then the following procedures apply:
  - a. Nearby land owners who have a reasonable expectation to use said right-of-way, as determined by the Transportation Division, must first agree to the proposed vacation. It is the applicant's responsibility to obtain a letter of concurrence signed by the affected landowners.
  - b. If all letters are received indicating that the affected landowners agree to the request, then a public hearing before the City Council will be scheduled. The Transportation Division will mail public notice of the hearing to landowners within 400 feet of the affected right-of-way.
  - c. If a request is approved, the right-of-way shall be divided into two equal parts, with each half becoming the property of the respective abutting owner. If the applicant desires to own the entire width, he or she must negotiate with the opposite landowner.

Signature of applicant: \_\_\_\_\_

Date: 10-28-13

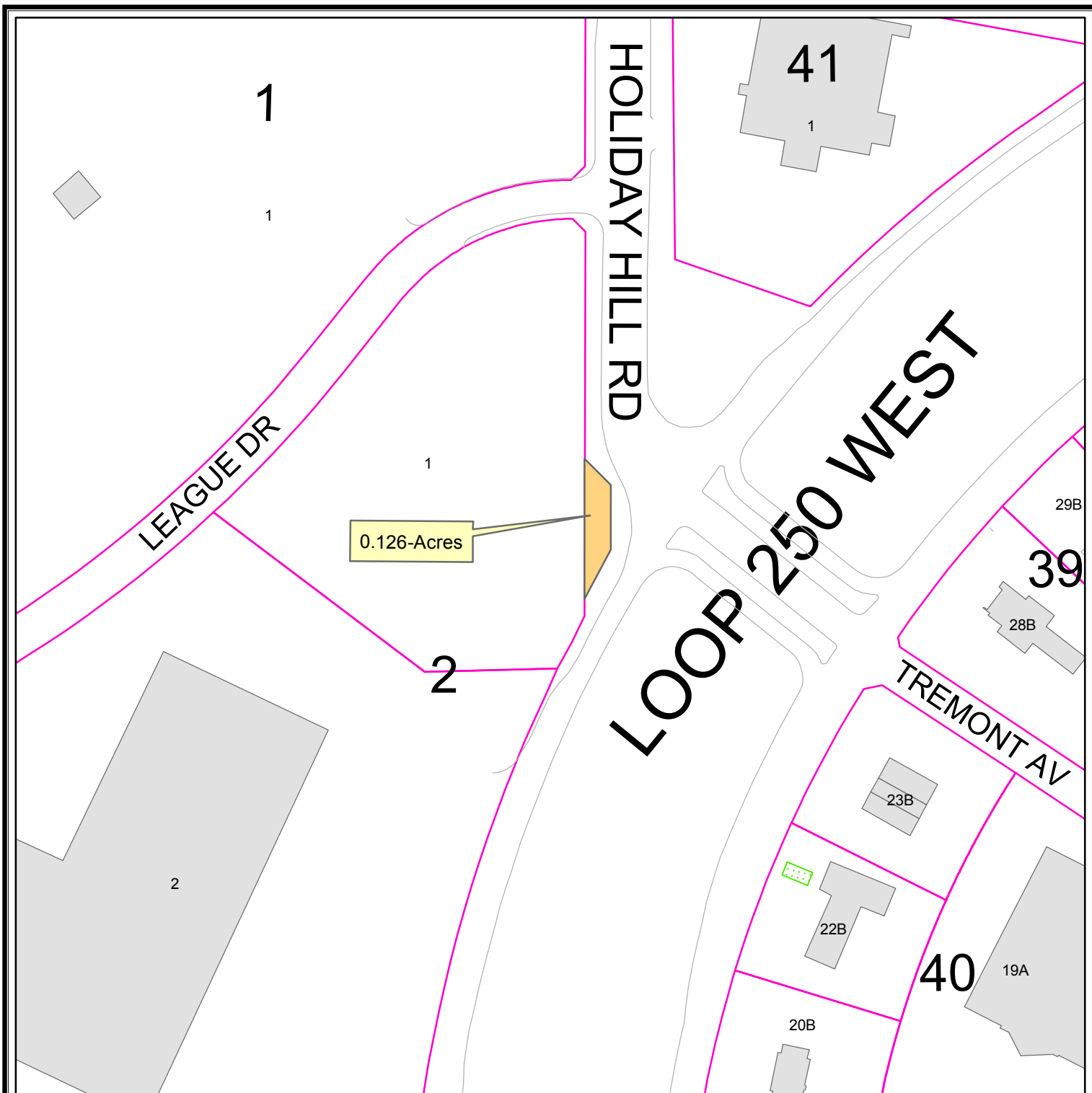
Signature of Other Affected Property Owners: \_\_\_\_\_  
\_\_\_\_\_, \_\_\_\_\_  
\_\_\_\_\_, \_\_\_\_\_  
\_\_\_\_\_, \_\_\_\_\_

Date: \_\_\_\_\_

**\*\*Application will not be considered for scheduling until all required items are reviewed by City Staff.\*\***

| FOR OFFICE USE ONLY  |                       |
|----------------------|-----------------------|
| Rec'd. By: <u>BB</u> | Date: <u>10-29-13</u> |
| Assigned: <u>M/K</u> |                       |
| For: <u>CC</u>       | On: <u>1/14/14</u>    |





# LOCATION MAP

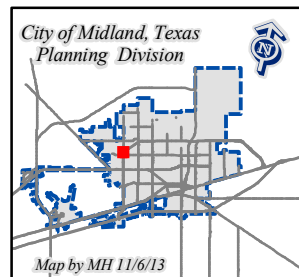
V - 13 - 017

Scale: 1" = 200'

Consider a request for the vacation of a 0.126-acre portion of the right-of-way of Holiday Hill Road adjacent to Lot 1, Block 2, Grandridge Park Addition, Section 1, City and County of Midland, Texas.

## LEGEND

- CITY LIMITS
- PARCEL
- PUBLIC BLDGS
- ACCESSORY BLDGS



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# City Council Agenda

Approved for Agenda:  
J. Nichols  
City Manager's Office

**MEETING DATE:** January 14, 2014

**TO:** City Council / City Manager

**FROM:** Holly McGrath Rosas, Interim Director of Utilities

**SUBJECT:** Consider Amending Ordinance 9214, Title III, "Departments", Chapter 1, "Water Department" Section 2 "Rates", Subsection (A) "Customers Inside of City Limits", of the City Code of Midland, Texas and Ordering Publication.

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## Purpose:

Consider amending Ordinance 9214, Title III, "Departments", Chapter 1, "Water Department" Section 2 "Rates", Subsection (A) "Customers Inside of City Limits", of the City Code of Midland, Texas and Ordering Publication.

## Recommended City Council Action

☒ Approve ☐ Deny ☐ Directional / Informational

## Fiscal Impact:

Increasing Water and Sewer Rates will increase the revenues to the Water Sewer Fund and provide necessary funding for the continued operation of the water and sewer utilities.

## Discussion:

City staff has identified a few discrepancies in the current Ordinance 9214 and for additional clarification the City Staff recommends amending the Ordinance to provide a more detailed explanation.

Staff is recommending an automatic 5% rate escalation for water and sewer effective October 1 of 2014 and October 1 2015, 4.5% October 1 2016, 2.5% October 1 2017 continuing each year after until council sees fit.

Additionally, staff is recommending amending the Ordinance to define winter average for residential as an average of December, January and February water usage, the highest number is dropped and the two lower months are averaged to determine each customer's flow base sewer rate for each year. Commercial user's sewer rate will be based on actual usage.

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE AMENDING TITLE III, “DEPARTMENTS”, CHAPTER 1, “WATER DEPARTMENT”, SECTION 2, “RATES,” OF THE CITY CODE OF MIDLAND, TEXAS, SO AS TO CHANGE THE RATES CHARGED FOR WATER AND SEWER SERVICES; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; AND ORDERING PUBLICATION; AND THE CITY MANAGER SHALL NOTIFY ALL CUSTOMERS OUTSIDE THE CITY LIMITS AS REQUIRED BY STATE LAW; AND RESCINDING ORDINANCE NUMBER 9214 ON THE DATE THIS ORDINANCE BECOMES EFFECTIVE**

**WHEREAS**, the City Council of the City of Midland, Texas, finds it to be in the public interest to revise and change the rates or charges for water and sewer services provided by the City of Midland;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Title III, “Departments,” Chapter One, “Water Department” Section 2, “Rates,” of the City Code of Midland, Texas, shall be amended to hereafter read as follows:

**3-1-2 RATES:**

**(A) *Customers Inside of City Limits:***

1. *Water Rates:* The monthly water rates or charges for services furnished by the City’s waterworks system shall be as follows:
  - (a) Except for sub-section (b) below, for all customers other than apartments, the following charges shall apply:
    - i. The minimum charge shall be \$17.50 for the first 2,000 gallons or less;
    - ii. \$4.95 per 1,000 gallons for all water usage exceeding 2,000 gallons up to 10,000 gallons;
    - iii. \$6.50 per 1,000 gallons for all water usage exceeding 10,000 gallons up to 25,000 gallons;

- iv. \$8.75 per 1,000 gallons for all water usage exceeding 25,000 gallons up to 50,000 gallons;
  - v. \$43.75 per 1,000 gallons for all water usage exceeding 50,000 gallons.
- (b) For all non-residential customers other than apartments, with non-irrigation demands for January and February exceeding 10,000 gallons per month (as determined by the City Manager or his designee), and who are also identified on Attachment “A,” the following charges shall apply:
- i. The minimum charge shall be \$17.50 for the first 2,000 gallons or less;
  - ii. \$4.95 per 1,000 gallons for all water usage exceeding 2,000 gallons up to 10,000 gallons;
  - iii. \$6.50 per 1,000 gallons for all water usage exceeding 10,000 gallons up to 25,000 gallons;
  - iv. \$8.75 per 1,000 gallons for all water usage exceeding 25,000 gallons.
  - v. The City Manager may amend Attachment “A” as he finds necessary.
  - vi. All non-residential customers other than apartments who use water furnished by the City’s waterworks system for outside landscape irrigation purposes shall have installed, by the City, a separate water meter with separate water lines used exclusively for irrigation purposes.
    - a. Said water meter must be installed by the City, at the customer’s expense.
    - b. The City shall own said water meter.
    - c. It is the customer’s responsibility to install any necessary water lines, fittings and appurtenances thereto necessary to connect to customer’s outside landscape irrigation system, at customer’s expense, according to City’s specifications.
    - d. All non-residential customers, other than apartments, operating prior to the effective date of this ordinance shall have until May 1, 2018, to meet the requirements of this ordinance.

- e. The penalty for violation of this section shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding five hundred dollars (\$500.00).
- (c) All water and sewer rates will increase by 5.0% on October 1, 2014, 5.0% on October 1, 2015 and 4.5% on October 1, 2016 and 2.5% on October 1, 2017 and every October 1 thereafter unless otherwise modified by the City Council.
- (d) For apartments, the minimum charge shall be \$14.25 per unit for the first 2,000 gallons or less per unit such that the minimum charge for an apartment complex of 100 units would be \$1,425.00 for the first 200,000 gallons or less of water used. Apartment units shall be calculated pursuant to Subsection (B) of this Section.
- 2. *Sewer Rates:* The monthly rates or charges for services to users of the City's sewer system shall be as follows:
  - (a) Residential (Winter Average)

December, January, and February will be the Residential Winter Average months. Delete the highest month out and average the other two months. This amount will become the monthly charge for the next year.

    - (1) \$17.65 per month minimum, plus
    - (2) \$0.71 per 1,000 gallons for water usage greater than 2,000 gallons.
  - (b) Commercial (Actual Water Consumption)
    - (1) \$17.65 per month minimum, plus
    - (2) \$0.71 per 1,000 gallons for water usage greater than 2,000 gallons.
- (B) *Customers outside of City limits:* All customers, except for those qualifying for industrial rates, who obtain water or sewer service outside the City limits shall pay 1.5 times the rates charged to customers inside the City limits.

**SECTION TWO.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that

covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION THREE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION FOUR.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by law as an alternative method of publication.

**SECTION FIVE.** The City Manager shall notify all customers outside the City limits of the rate changes as required by state law.

**SECTION SIX.** That this ordinance shall be effective on March 1, 2014.

**SECTION SEVEN.** That Ordinance No. 9214 is hereby rescinded.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular

meeting of the City Council:

Council members voting “AYE”:

Council members voting “NAY”:

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

APPROVED AS TO CONTENT  
AND COMPLETENESS:

\_\_\_\_\_  
Holly McGrath, Assistant Director of Utilities

\_\_\_\_\_  
Pam Simecka, Director of Finance

APPROVED ONLY AS TO FORM:

\_\_\_\_\_  
Keith Stretcher, City Attorney





# City Council Agenda

Approved for Agenda:  
**RPatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Hold a public hearing at 10:30 a.m. and consider an ordinance on an Appeal on a request by Real Property Resources/Lone Star trails for a zone change from AE, Agriculture-Estate District to Planned district for a Housing Development and O-1, Office District on a 302.19-acre tract of land and 15.83-acre tract of land all out of Section 12, Block 39, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas. (Generally located on the east side of State Highway 349, approximately 840 feet north of Arapahoe Road – District 3.)

---

## **Purpose:**

Hold a public hearing at 10:30 - a.m. and consider an ordinance on Appeal on a request by Real Property Resources/Lone Star Trails for a zone change from AE, Agriculture-Estate District to Planned District for a Housing Development for 302-acres, with the underling zoning of 1F-3, One-Family Dwelling District and 15.83-acres to O-1, Office District, all out of Section 12, Block 39, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas

## **Recommended City Council Action**

☐ Approve

☐ Deny

☒ Direction/Informational

## **Fiscal Impact:**

There is no cost to the City for processing this application.

## **Discussion:**

This is a request to rezone approximately 316 acres located on the east side of N. Big Spring Street, north of Loop 250. Fifteen acres adjacent to Big Spring Street are proposed to be rezoned to an O-1, Office District. This proposal appears adequate, but it was not discussed at the earlier Planning and Zoning Commission meeting. The majority of the land is proposed to be rezoned to PD, Planned District for a Housing Development. The Planning and Zoning Commission considered this request on January 6, 2013. A motion to approved failed by a 3-3 vote. No public opposition was expressed. There is also an associated preliminary plat, but it could not be considered without support of the zone change.

Within the residential area, 952 residential lots are planned. However, no alley dedications are proposed, as required by the Subdivision Code. Such plats require approval by the City Council. The original submittal contained almost 1,000 lots, and all lots were only 50 feet wide. Based on staff comments for a neighborhood with more balanced lot sizes, the applicant agreed to divide the plat into three regions. In the first area, the average lot width is 70.4 feet, in the second area the average width is 62.5 feet, and in the third they average 54.0 feet in width. These changes result in fewer lots and a lower density. The attached Exhibit A includes the requested changes. A unique characteristic of this proposal is that this proposed Planned District has no underlying zoning district. This was necessary due to the manner in which the application was submitted. Rather than providing a minimum lot width for each region, an average lot width for each region was provided. Most lots in each region exceed the minimum lot width of the 1F-3 District (50 feet) and several exceed the minimum width of the 1F-2 District (65 feet). However, not all lots in a particular region met these criteria. Therefore, we are recommending that lot sizes meet the dimensions shown on Exhibit A, which is an exact copy of the associated preliminary plat.

The Planning and Zoning Commission's discussion centered on two major issues. The first dealt with the four existing oil wells and their proximity to planned residences. However, the applicant has worked with Pioneer Resources, and has increased the minimum spacing from the non-permitted wells from 135 feet to 250 feet, which would, of course, still require a variance approval by the City Council.

The second and more significant discussion was the lack of alley dedications. Acceptance of such plats requires approval of a variance from the Subdivision Code. The City Council has approved plats without alleys on a 104 acre parcel on the far west side of town (D. R. Horton), and of 160 acres south of the subject property (Permian Homes). Even so, the Planning and Zoning Commission struggled with a decision, as noted by its vote. The applicant states they can sell homes for less money if alleys are not required. This has been an important matter given the strong demand for affordable housing. As a tradeoff, the applicant has reduced the density with somewhat larger lots. If a neighborhood of this size is determined to be adequate without alleys, we would recommend that the City Council approve this request. Should the zoning be approved, the City Council would see the associated preliminary plat at a later meeting.

Attachments: **Maps, P & Z Reports, Site Plan (Exhibit A), Site Plan In-depth (Exhibit B)**

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING A 302.19-ACRE TRACT OF LAND WHICH IS PRESENTLY ZONED AE, AGRICULTURE ESTATE DISTRICT, TO BE USED AS A PD, PLANNED DISTRICT FOR A HOUSING DEVELOPMENT; BY PERMITTING A 15.83-ACRE TRACT OF LAND WHICH IS PRESENTLY ZONED AE, AGRICULTURE ESTATE DISTRICT, TO BE USED AS AN O-1, OFFICE DISTRICT; SAID TRACTS BEING OUT OF SECTION 12, BLOCK 39, T-1-S, T&P RR CO. SURVEY, CITY AND COUNTY OF MIDLAND, TEXAS (GENERALLY LOCATED ON THE EAST SIDE OF STATE HIGHWAY 349, APPROXIMATELY 840 FEET NORTH OF ARAPAHOE ROAD); CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION**

**WHEREAS**, the City Planning and Zoning Commission and the Governing Body of the City of Midland, in compliance with the City Charter and the State law with reference to the creation of Districts under the zoning ordinance regulations and zoning map, have given the requisite notices by United States mail, publication and otherwise; and after a full and fair hearing to all of the property owners generally and particularly to those interested persons situated in the affected area and in the vicinity thereof, the Governing Body finds that the public health, safety and general welfare will be best served by the creation of a PD, Planned District for a Housing Development, and an O-1, Office District, as set out hereinafter;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Chapter 1, Title XI, of the City Code of Midland, Texas, and the official zoning map of the City of Midland, Texas, are hereby amended insofar as the hereinafter described property is concerned, which is presently zoned AE, Agriculture Estate District, and it shall be used as a PD, Planned District for a Housing Development, said property being described as follows:

A 302.19-acre tract of land out of Section 12, Block 39, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas, said tract being more specifically described by metes and bounds in Exhibit “B”, which is attached hereto and incorporated herein.

**Special Conditions and Restrictions:**

1. That this planned district shall be developed only with single-family detached residences and permitted accessory structures.
2. That the minimum front yard setback shall be 20 feet. However, the standard reduction to 15 feet shall apply to cul-de-sacs, except that an overhead door to a garage must either be setback 20 feet, or the door must be perpendicular to the front lot line.
3. That the minimum side yard setback shall be five feet except that corner lots shall observe a 10-foot side yard setback.
4. That the minimum rear yard setback shall be 10 feet for one story homes, and 20 feet for two-story homes.
5. That the minimum front yard width shall be 20 feet.
6. That the minimum lot area shall be 5,500 square feet.
7. That the maximum building height shall be 38 feet.
8. That a minimum of two off-street parking spaces shall be provided for each lot.
9. That permitted signs shall conform to the Sign Code as it relates to single-family residential zoning districts.
10. That fence heights shall conform to the regulations for single-family residential zoning districts.
11. That all lot dimensions shall conform to the site plan, which is attached hereto and incorporated herein as Exhibit “A”. Exhibit “A” is an approved copy of the preliminary plat.
12. That Texas Department of Transportation access approval must be obtained for any state highway controlled access frontage.
13. That home occupations shall be allowed.

**SECTION TWO.** That Chapter 1, Title XI, of the City Code of Midland, Texas, and the official zoning map of the City of Midland, Texas, are hereby amended insofar as the hereinafter described property is concerned, which is presently zoned AE, Agriculture Estate District, and it shall be used as an O-1, Office District, said property being described as follows:

A 15.83-acre tract of land out of Section 12, Block 39, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas, said tract being more specifically described by metes and bounds in Exhibit "C", which is attached hereto and incorporated herein.

**SECTION THREE.** That the definitions given in the zoning regulations contained in the City Code of the City of Midland, Texas, shall be applicable to such of those terms as are used herein.

**SECTION FOUR.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION FIVE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION SIX.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$2,000.00).

**SECTION SEVEN.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting “NAY”:

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting “AYE”:

Council members voting “NAY”:

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

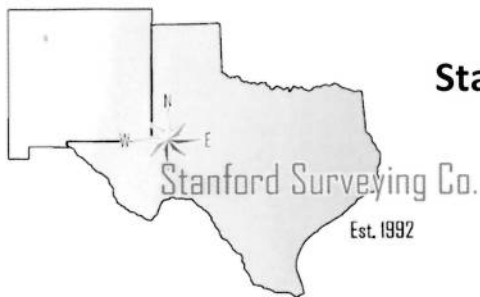
APPROVED AS TO CONTENT  
AND COMPLETENESS:

\_\_\_\_\_  
Robert Patrick, Assistant to the City Manager

APPROVED ONLY AS TO FORM:

\_\_\_\_\_  
Keith Stretcher, City Attorney





## Stanford Surveying Company

P.O. Box 8490  
Midland, TX 79708  
Office 432-699-5708  
Fax 432-699-5510

[www.stanfordsurveying.com](http://www.stanfordsurveying.com)

PD

Metes and Bounds Description for a 302.19 Acre Tract of Land being 101.74 acres out of a 107.02 Acre Tract of land as recorded in Instrument No. 2013-27670, Official Public Records, Midland County, Texas, and 200.45 acres out of a 211.00 Acre Tract of Land as recorded in Instrument No. 2013-9994, Official Public Records, Midland County, Texas, located in Section 12, Block 39, T-1-S, Midland County, Texas.

BEGINNING at (N=10726228.11' & E=1757239.82') a 1/2" iron rod and plastic cap marked "RPLS 4413" found in the east boundary line of said Section 12 and the west boundary line of Section 7, Block 38, T-1-S, T. & P. RR. Co. Survey, Midland County, Texas, for the northeast corner of the 107.02 acre tract and the northeast corner of this tract;

THENCE, along the east boundary line of said Section 12 and the west boundary line of said Section 7, S 14°20'25" E a distance of 2668.20 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" found for the southeast corner of the 211.00 acre tract, the northeast corner of a 22.82 Acre Tract of Land as described in Volume 869, Pages 567, 571, 575, 577 and 579, Midland County, Deed Records, Midland County, Texas, and the southeast corner of this tract, from which a City of Midland Control Point marked "E89-7600" bears S 17°37'12" E a distance of 10437.38 feet;

THENCE, along the north boundary line of the 22.82 acre tract and the south boundary line of the 211.00 acre tract, S 75°36'58" W a distance of 532.14 feet to a copperweld rod marked "TESSCO" found for a corner of this tract;

THENCE, along the north boundary line of the 22.82 acre tract and the south boundary line of the 211.00 acre tract, S 76°40'54" W a distance of 4036.86 feet to a 1/2" iron rod and plastic cap marked "RPLS 4413" found for a corner of this tract;

THENCE, along the north boundary line of the 22.82 acre tract and the south boundary line of the 211.00 acre tract, S 75°36'58" W a distance of 334.78 feet to a point for the southwest corner of this tract;

THENCE N 14°23'02" W a distance of 288.62 feet to a point for a corner of this tract;

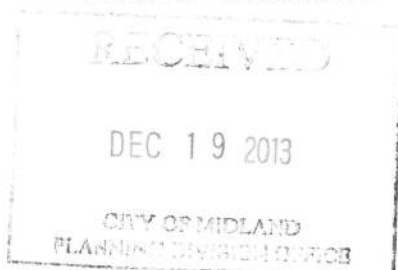
THENCE S 76°24'46" W a distance of 147.33 feet to a point for a corner of this tract;

THENCE N 15°03'32" W a distance of 312.28 feet to a point for a corner of this tract;

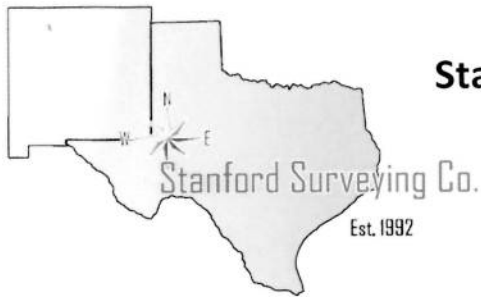
THENCE N 74°40'29" E a distance of 44.89 feet to a point for a corner of this tract;

THENCE N 14°34'43" W a distance of 1984.67 feet to a point in the north boundary line of the 107.02 acre tract and for the northwest corner of this tract, from which a 1/2" iron rod and plastic cap marked "RPLS 4413" found in the east Right-of-Way line of State Highway 349 and the northwest corner of the 107.02 acre tract bears S 75°33'40" W a distance of 260.00 feet;

THENCE, along the north line of the 107.02 acre tract, N 75°33'40" E a distance of 5017.98 feet to the POINT OF BEGINNING.







## Stanford Surveying Company

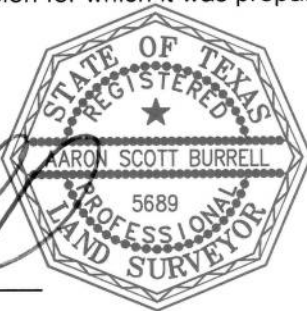
P.O. Box 8490  
Midland, TX 79708  
Office 432-699-5708  
Fax 432-699-5510

[www.stanfordsurveying.com](http://www.stanfordsurveying.com)

Bearing, Distances and Coordinates are based upon the Texas State Plane Coordinate System NAD 83 Central Zone and are relative to the City of Midland GPS Control Monuments as provided by the City of Midland. Acreages shown are surface values.

This document was prepared under 22 TAC 663.21, and is not to be used to convey or establish interest in real property except those rights and interest implied or established by the creation or reconfiguration of the boundary of the political subdivision for which it was prepared.

See attached Exhibit.



Aaron S. Burrell, RPLS No. 5689  
December 18, 2013

SHERIDAN BAR M RANCH LLC  
24 SMITH RD STE 601  
MIDLAND, TX 79705

BLOCK 39, T-1-S,  
T. & P. RR. CO. SURVEY

12

7

BLOCK 39, T-1-S,  
T. & P. RR. CO. SURVEY

OCCIDENTAL PERMIAN, LTD  
5 GREENWAY PLAZA, SUITE 110  
HOUSTON, TX 77046

STATE HIGHWAY 349 125' ROW - VOL. 105/P.G. 293 M.C.D.R.

302.19 ACRE  
TRACT OF LAND

22.82 ACRE TRACT  
VOL. 869 / PG. 567, 571, 575, 577, & 579  
M.C.D.R.

BLOCK 11

BLOCK 12

18

302.19 ACRES OF LAND LOCATED IN  
SECTION 12, BLOCK 39, T-1-S,  
T. & P. RR. CO. SURVEY, MIDLAND COUNTY, TEXAS

600 0 600 1200 1800 Feet

STANFORD SURVEYING COMPANY  
P.O. BOX 8490  
MIDLAND, TEXAS 79708-8490  
432-699-5708

EXHIBIT

DRAWN BY Justin Robertson

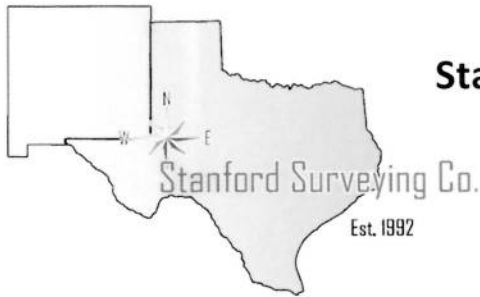
DATE 12-18-2013

SCALE 1" = 600'

© 2013 ALL RIGHTS RESERVED  
FILE NAME LST EXHIBIT - 302.19AC.

D B FITE PROPERTIES, INC.  
9857 HORN ROAD  
SACRAMENTO, CA 95827

BLOCK 38, T-1-S,  
T. & P. RR. CO. SURVEY



## Stanford Surveying Company

P.O. Box 8490  
Midland, TX 79708  
Office 432-699-5708  
Fax 432-699-5510  
[www.stanfordsurveying.com](http://www.stanfordsurveying.com)

4 C-1, District

Metes and Bounds Description for a 15.83 Acre Tract of Land being 5.27 acres out of a 107.02 Acre Tract of land as described in Instrument No. 2013-27670 and 10.56 acres out of a 211.00 Acre Tract of Land as described in Instrument No. 2013-9994, Official Public Records, Midland County, Texas, located in Section 12, Block 39, T-1-S, Midland County, Texas.

BEGINNING at (N=10722407.30' & E=1752779.99') a copperweld rod found in the east Right-of-Way of State Highway 349, for the northwest corner of a 22.82 Acre Tract of Land as described in Volume 869, Page 567, Deed Records, Midland County, Texas, the southwest corner of the 211.00 acre tract and the southwest corner of this tract, from which a City of Midland Control Point, NGS Bench Mark N 1126, bears S 13°11'29" E a distance of 4903.47 feet;

THENCE, along the east Right-of-Way line of State Highway 349 and the west boundary line of the 211.00 acre tract, N 14°34'43" W a distance of 2588.09 feet a 1/2" iron rod and plastic cap marked "RPLS 4413" found for the northwest corner of the 211.00 acre tract and the northwest corner of this tract;

THENCE, along the north boundary line of the 211.00 acre tract, N 75°33'40" E a distance of 260.00 feet to a point for the northeast corner of this tract;

THENCE S 14°34'43" E a distance of 1984.67 feet to a point for a corner of this tract;

THENCE S 74°40'29" W a distance of 44.89 feet to a point for a corner of this tract;

THENCE S 15°03'32" E a distance of 312.28 feet to a point for a corner of this tract;

THENCE N 76°24'46" E a distance of 147.33 feet to a point for a corner of this tract;

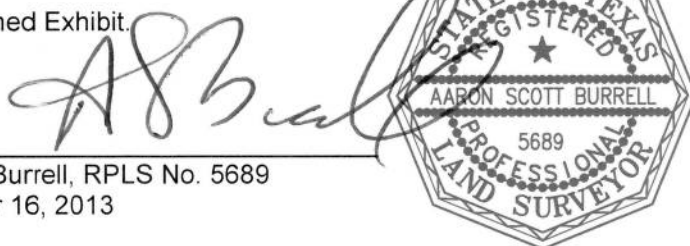
THENCE S 14°23'02" E a distance of 288.62 feet to a point in the north boundary line of the 22.82 acre tract, in the south boundary line of the 211.00 acre tract and for the southeast corner of this tract;

THENCE, along the north boundary line of the 22.82 acre tract and the south boundary line of the 211.00 acre tract, S 75°36'58" W a distance of 364.06 feet to the POINT OF BEGINNING.

Bearing, Distances and Coordinates are based upon the Texas State Plane Coordinate System NAD 83 Central Zone and are relative to the City of Midland GPS Control Monuments as provided by the City of Midland. Acreages shown are surface values.

This document was prepared under 22 TAC 663.21, and is not to be used to convey or establish interest in real property except those rights and interest implied or established by the creation or reconfiguration of the boundary of the political subdivision for which it was prepared.

See attached Exhibit.



Aaron S. Burrell, RPLS No. 5689  
December 16, 2013

12  
BLOCK 39, T-1-S,  
T. & P. RR. CO. SURVEY

SHEVANDOH BAR M RANCH LLC  
24 SMITH RD, STE. 601  
MIDLAND, TX 79705

REGION 1  
66.57 ACRE  
TRACT OF LAND

REGION 2  
57.08 ACRE  
TRACT OF LAND

REGION 3  
178.54 ACRE  
TRACT OF LAND

REGION 4  
15.83 ACRE TRACT OF LAND

BLOCK 39, T-1-S,  
T. & P. RR. CO. SURVEY

OCCIDENTAL PERMAN, LTD  
5 GREENWAY PLAZA, SUITE 110  
HOUSTON, TX 77046

STATE HIGHWAY 349 125' ROW - VOL. 105/PG. 293 M.C.D.R.

BLOCK 38, T-1-S,  
T. & P. RR. CO. SURVEY

D B FITTE PROPERTIES, INC.  
9857 HORN ROAD  
SACRAMENTO, CA 95827

22.82 ACRE TRACT  
VOL. 869 / PG. 567, 571, 575, 577, & 579  
M.C.D.R.

18

12  
BLOCK X

EXHIBIT

318.02 ACRES OF LAND LOCATED IN  
SECTION 12, BLOCK 39, T-1-S,  
T. & P. RR. CO. SURVEY, MIDLAND COUNTY, TEXAS

STANFORD SURVEYING COMPANY  
P.O. BOX 8490  
MIDLAND, TEXAS 79708-8490  
432-699-5708

DRAWN BY Justin Robertson DATE 12-16-2013

SCALE 1" = 600' FILE NAME LST EXHIBIT

1800 Feet

1200

600

0

00

# PLANNING AND ZONING COMMISSION

January 6, 2014

**CASE:** Z-13-054, Real Property Resources/Lone Star Trails

**REQUEST:** Hold a public hearing and consider a request for a zone change from AE, Agriculture-Estate District, to Planned District for a Housing Development and O-1, Office District

**APPLICANT/OWNER:** Real Property Resources, Inc.

**REPRESENTATIVE:** Keith Smith.

**LEGAL DESCRIPTION:** On a 302.19-acre tract of land and 15.83-acre tract of land all out of Section 12, Block 39, T-1-S, T & P RR Co. Survey, City and County of Midland, Texas.

**LOCATION:** Generally located on the east side of State Hwy 349, approximately 840 feet north of Arapahoe Road.

**CURRENT ZONING:** AE, Agriculture-Estate District.

**ASSOCIATED CASES:** P-13-074, Lone Star Trails

## DETAILS OF REQUEST:

1. The subject property is located on the east side of State Highway 349, approximately 840 feet north of Arapahoe Road. Real Property Resources, the owner, is requesting a zone change on the property from AE, Agriculture-Estate District, to a Planned District for Housing Development for 302-acres, with the underlining zoning of 1F-3, One-Family Dwelling District and 15.83-acres to O-1, Office District (See Exhibit A).

## SURROUNDING ZONING AND LAND USE:

2. The property is on the east side of N. State Highway 349 and on the north, west, and east are AE, Agriculture-Estate Districts. To the and south is a PD, Planned District for Housing Development and PD, Planned District for an Industrial District.



The reason for the smaller front setback line is to allow larger homes on a smaller lot. We find that the zone change from AE, Agriculture-Estate District, to a Planned District Housing Development (with an underlining zoning of 1F-3, One-Family Dwelling District is reasonable.

**SITE PLAN:**

3. The site plan, Exhibit A, provides the layout and information about the site. The site will have 952 lots developed along with three common parks of 6.5-acres, 2.8 acres, and .85-acres. Both Lone Star and Buffalo Gap will have medians with hike and bike trails (See Exhibit B). 15.83-acres located on the west side of the proposed plat is proposed for O-1, Office Development.

**STAFF RECOMMENDATION:**

**Staff recommends approval of this request for a zone change from AE, Agriculture-Estate District to O-1, Office District. We also recommend approval of the PD, Planned District for Housing District subject to the following conditions:**

- A. This Planned district shall be developed with single-family detached residences.
- B. The minimum front yard setback shall be 20 feet. However, the standard reduction to 15 feet shall apply to cul-de-sacs, except that an overhead door to a garage must either be setback 20 feet, or the door must be perpendicular to the front line.
- C. The minimum side yard setback shall be five feet except that corner lots shall observe a 10-foot side yard setback.
- D. The minimum rear yard setback shall be 10 feet for one story homes, and 20 feet for two-story homes.
- E. The minimum front yard width shall be 45 feet.
- F. The minimum lot area shall be 5,500 square feet.
- G. The maximum building height shall be 38 feet.
- H. A minimum of two off-street parking spaces shall be provided for each lot.
- I. Permitted signs shall conform to the Sign Code as it relates to single-family residential zoning districts.

- J. Fence heights shall conform to the regulations for single-family residential zoning districts.**
- K. All lot sizes shall conform to the site plan Exhibit A, which will be an approved copy of the preliminary plat.**
- L. That TxDot access approval is granted for any State Highway controlled access frontage.**



Jim Compton  
Planning Division Manager  
Department of Development Services



Robert Baronti, Jr., AICP, Sr. Planner  
Department of Development Services

**Attachments:**

Application  
Maps  
Exhibit A  
Exhibit B

Case Number: 2-13-004

**CITY OF MIDLAND**  
**Planning Division**

**APPLICATION TO CHANGE ZONING CLASSIFICATION**

Real Property Resources Inc  
Applicant Name (Phone/e-mail)  
6305 82nd St Lubbock Tx 79424  
Address Zip Code

See Above  
Property Owner Name (Phone/e-mail)  
5603 Champions Dr  
Address Zip Code 432-230-4221

Keith Smith Keiths@betenbaugh.com  
Representative Name (Phone/e-mail)  
5603 Champions Dr Midland Tx 79706  
Address Zip Code

Street address and Legal Description of property (complete Lot, Block, and Subdivision Name or if unplatted, attach a Metes and Bounds description with surveyor's seal). Each district must be described separately. A 318.02 Acres Tract of LAND in Section 12 block 39, T-1-S, T&P RR Co Survey midland County TX

PRESENT ZONE: FD AE REQUESTED ZONE: ~~FD FERA~~ O-1  
(List by tracts if more than one district is requested)

Reason for Zone Change Request: We are building a Residential Community with Commercial Frontage on Hwy 349.

Present Use of Property: VACANT LAND

Proposed Use of Property: Residential Community with commercial frontage on Hwy 349.

How will zone change affect the public health, safety and welfare? It will improve the Communities Ability to secure quality Affordable housing.

Describe how conditions affecting the property have changed since present zoning designation: The conditions of the property has not changed but the population And housing needs have dramatically increased in our Area.

Is a Specific Use Permit with Term for alcoholic beverages sales needed? Yes ☒ No



**APPLICATION FEES:**

- Single, standard zone change: **\$400**. Multiple, standard zone change: add **\$100** per additional district.
- Single PD, Planned District zone change: **\$550**. Multiple PD proposal: add **\$100** per district.
- If a Traffic Impact Analysis is required, a fee of up to \$500.00 will be assessed.

**SITE PLAN SUBMITTALS** (if applicable):

16 copies (FOLDED) of the PD site plan: \_\_\_\_\_

Site Plan in digital format .pdf and .jpg: \_\_\_\_\_

**SIGNATURE** (by property owner only - authorized agent must sign affidavit below)

Property Owner (signature): [Signature] Date: 11/11/13

---

**If an Agent is authorized by the property owner to file and execute the application on behalf of the property owner, the Agent must complete the affidavit below.**

STATE of TEXAS  
COUNTY OF MIDLAND

Before me, the undersigned authority, on this day personally appeared \_\_\_\_\_ who, being by me duly sworn, upon oath says: That (s)he is authorized by \_\_\_\_\_, the owner of the above described property, to fully represent him/her in this application and that (s)he had the legal right, power and authority to sign said owner's name hereto as his/her attorney in fact.

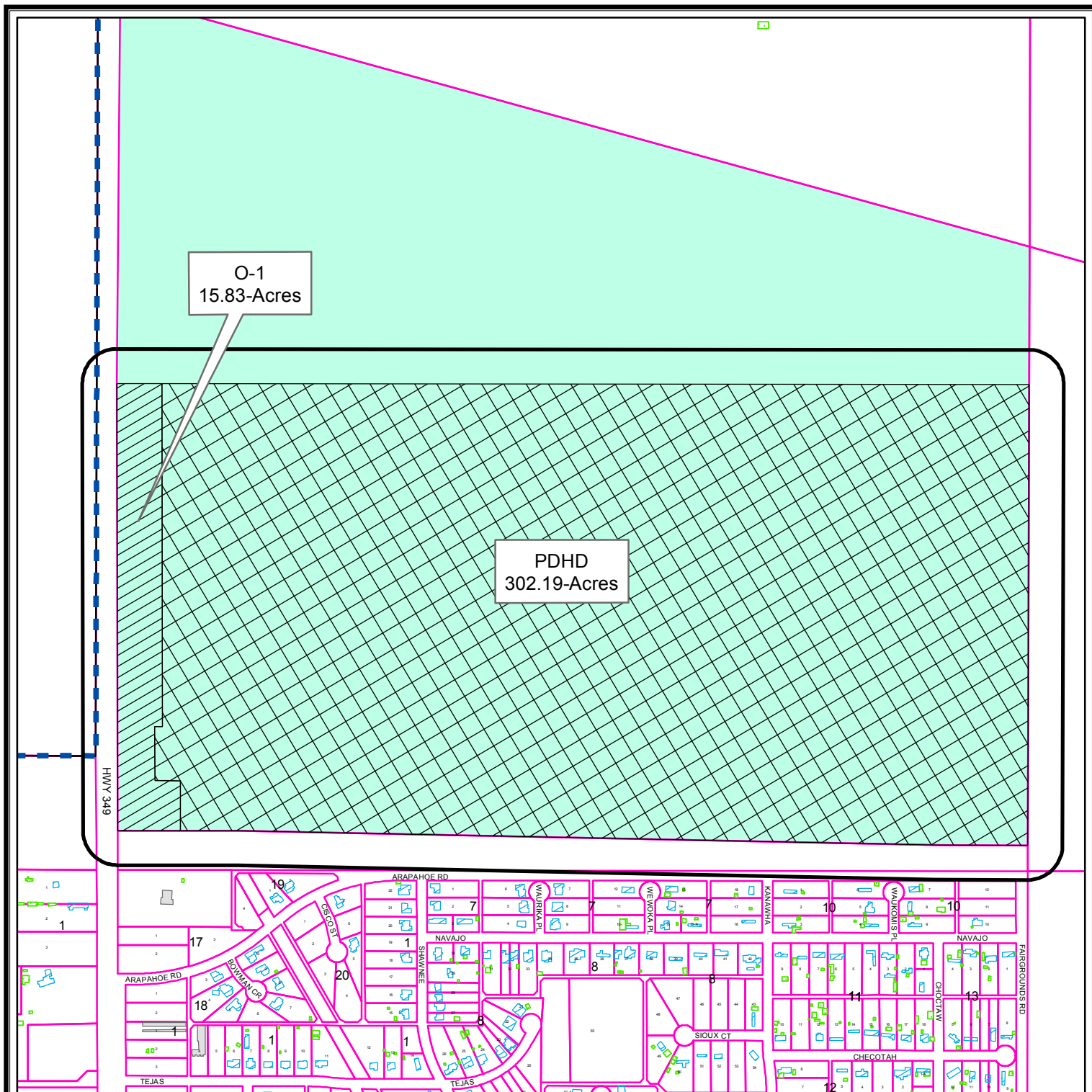
\_\_\_\_\_  
Authorized Agent (signature)

Subscribed and sworn to before me, this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, to certify which witness my hand and seal of office.

\_\_\_\_\_  
NOTARY PUBLIC, MIDLAND COUNTY, TEXAS

|                            |                       |
|----------------------------|-----------------------|
| <b>FOR OFFICE USE ONLY</b> |                       |
| Rec'd By: <u>BB</u>        | Date: <u>11/13/13</u> |
| Assigned: <u>BB</u>        |                       |
| For: <u>P+2</u>            | On: <u>1/6/14</u>     |

**\*\*Application will not be considered for scheduling until reviewed by a planner.\*\***



## PROPERTY OWNER NOTIFICATION MAP

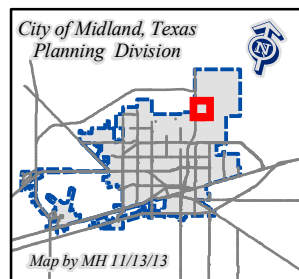
**Z - 13 - 054**

**Scale: 1" = 800'**

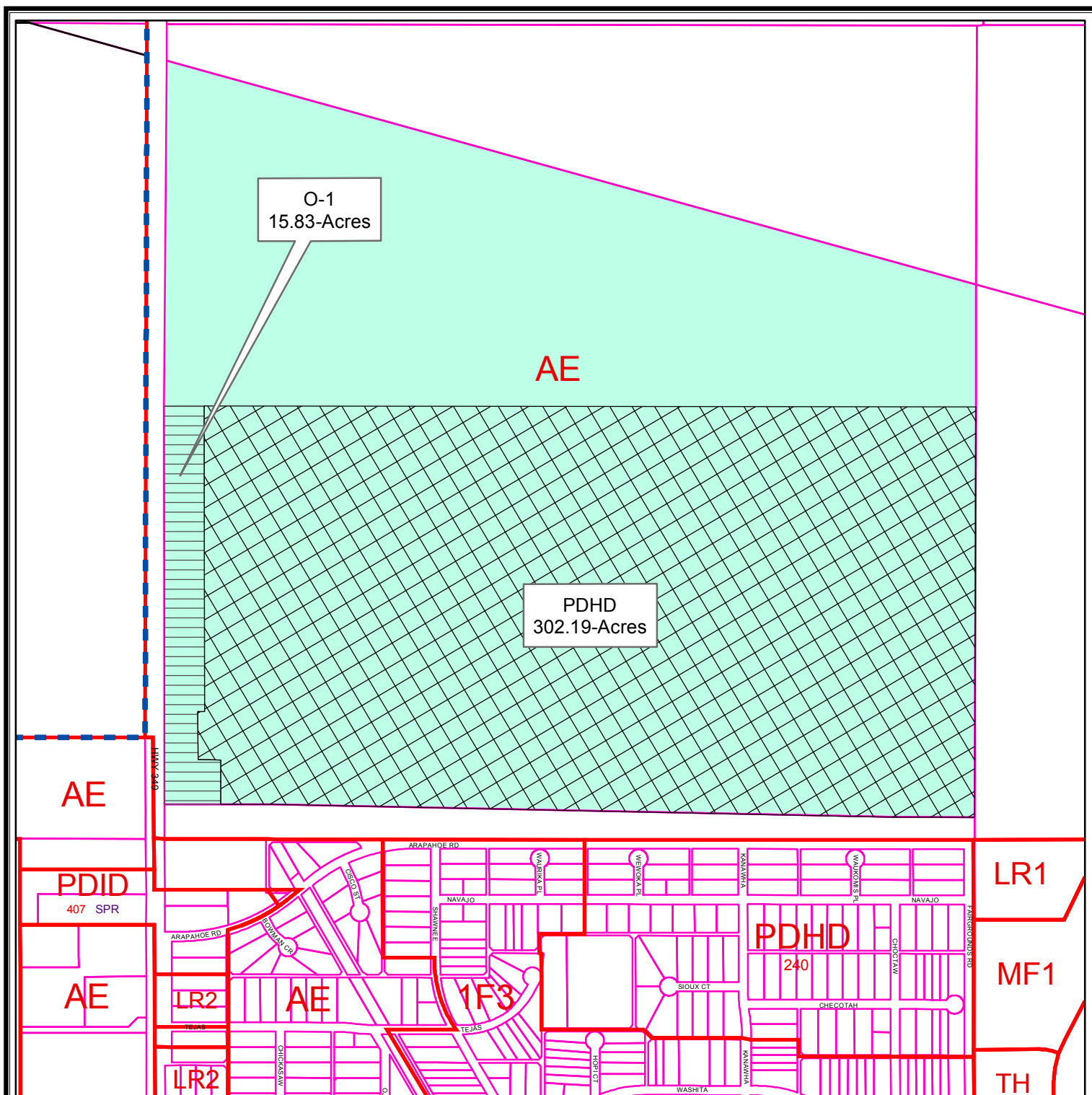
Consider a request for a zone change from AE, Agriculture Estate District to PD, Planned District for a Housing Development on a 302.19-acre tract of land and to O-1, Office District on a 15.83-acre tract of land all out of Section 12, Block 39, T-1-S, T & P RR Co. Survey, City and County of Midland, Texas.

### LEGEND

- CITY LIMITS
- 200 FT. LEGAL NOTICE LIMIT
- CITY PARCEL
- COUNTY PARCEL
- PUBLIC BLDGS
- PRIVATE BLDGS
- ACCESSORY BLDGS



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 THE CITY OF MIDLAND SHALL NOT BE RESPONSIBLE FOR ANY DECISIONS BASED UPON THE USE OF THIS DATA. WHILE THIS DATA IS MADE AVAILABLE TO THE PUBLIC, IT WAS CREATED FOR INTERNAL USE BY THE CITY OF MIDLAND WHICH MAKES NO CLAIM AS TO ITS ACCURACY OR COMPLETENESS. THIS DATA IS NOT DESIGNED TO BE USED AS A PRIMARY TOOL IN PERMITTING, GRANTING, OR OTHER DECISION, SOLELY ON THE INFORMATION CONTAINED HEREIN.



# ZONING MAP

Z - 13 - 054

Scale: 1" = 900'

Consider a request for a zone change from AE, Agriculture Estate District to PD, Planned District for a Housing Development on a 302.19-acre tract of land and to O-1, Office District on a 15.83-acre tract of land all out of Section 12, Block 39, T-1-S, T & P RR Co. Survey, City and County of Midland, Texas.

## LEGEND

- ZONING
- CITY LIMITS
- CITY PARCELS
- COUNTY PARCELS

### ZONING DISTRICTS:

|               |                          |                   |                      |
|---------------|--------------------------|-------------------|----------------------|
| FD            | FUTURE DEVELOPMENT       | BP                | BUSINESS PARK        |
| PD            | PLANNED DISTRICT         | P                 | PARKING              |
| AE            | AGRICULTURE ESTATE       | O1, O2            | OFFICE               |
| CE            | COUNTRY ESTATE           | NS                | NEIGHBORHOOD SERVICE |
| 1F1, 1F2, 1F3 | ONE-FAMILY DWELLING      | LR1, LR2, LR3     | LOCAL RETAIL         |
| MH            | MOBILE HOME DWELLING     | C1, C2, C3        | COMMERCIAL           |
| TH            | TOWNHOUSE DWELLING       | IP, IP1, IP2, IP3 | INDUSTRIAL PARK      |
| 2F            | TWO-FAMILY DWELLING      | LI                | LIGHT INDUSTRY       |
| MF1, MF2      | MULTIPLE FAMILY DWELLING | HI                | HEAVY INDUSTRY       |

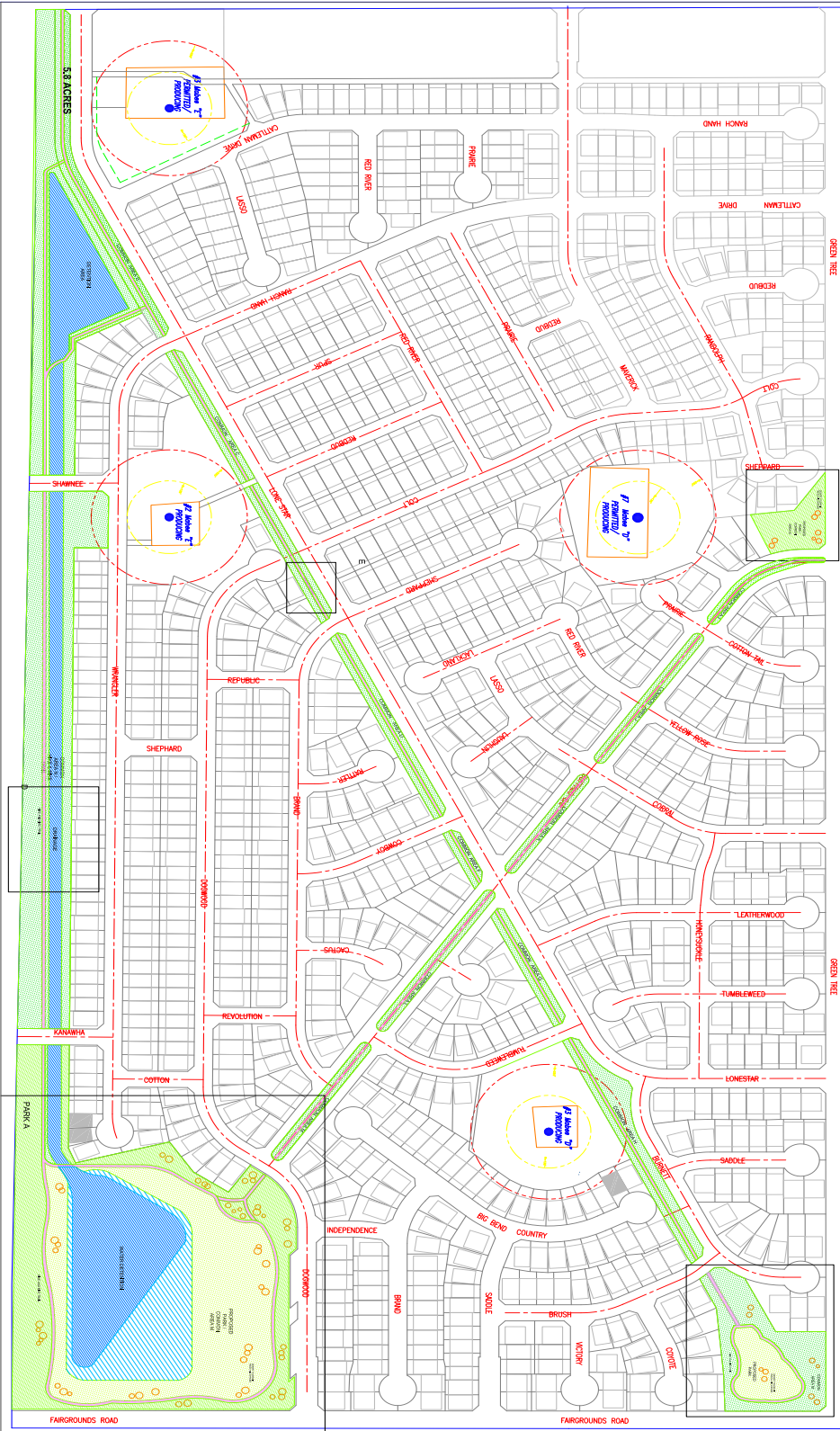
© THE CITY OF MIDLAND 2013; THE CITY OF MIDLAND SHALL NOT BE RESPONSIBLE FOR ANY DECISIONS BASED UPON THE USE OF THIS DATA. WHILE THIS DATA IS MADE AVAILABLE TO THE PUBLIC, IT WAS CREATED FOR INTERNAL USE BY THE CITY OF MIDLAND WHICH MAKES NO CLAIM AS TO ITS ACCURACY OR COMPLETENESS. THIS DATA IS NOT DESIGNED TO BE USED AS A PRIMARY TOOL IN PERMITTING, CITING, OR OTHER DECISIONS BASED SOLELY ON THE INFORMATION CONTAINED HEREIN.





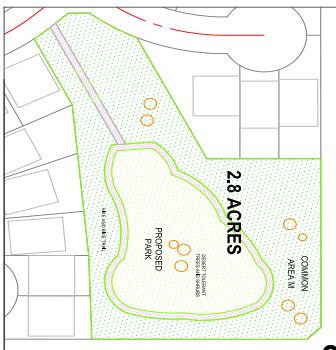
PARK C

GREEN TREE



PARK B

## PARK B



25.20

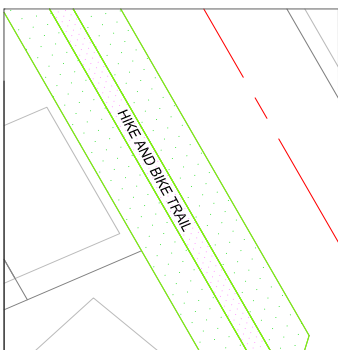
6.08 ACRES - COMMON AREA B-H  
2.39 ACRES - COMMON AREA I-J

TOTAL: 952 LOTS

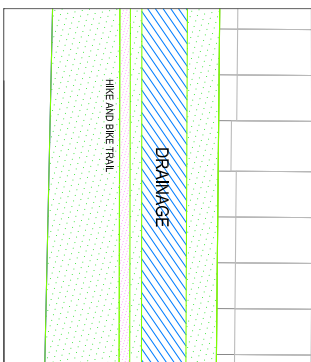
## PARK C



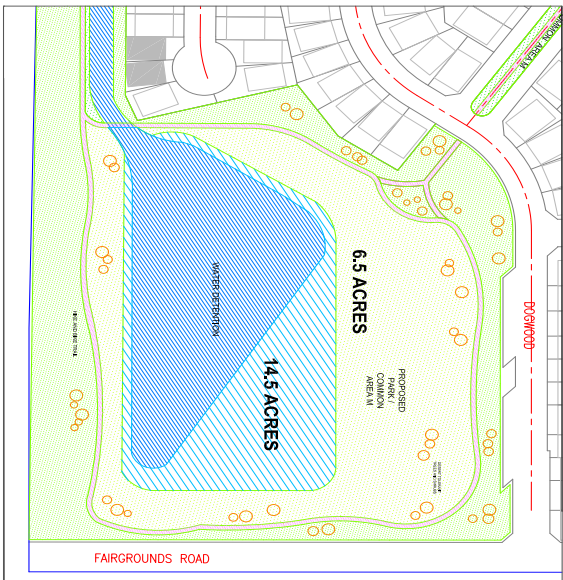
E: MEDIAN WITH HIKE AND BIKE TRAIL



D: SOUTH DRAINAGE



## PARK A



## PRELIMINARY PLAN LONE STAR TRAILS

AN ADDITION TO THE CITY OF MIDLAND,  
MIDLAND COUNTY, TEXAS

**AM** CIVIL ENGINEERING  
LAND SURVEYING  
AND ENGINEERING, LLC  
2807 74th Street, Suite 8  
Lubbock, TX 79423  
Phone: 806-771-4878  
Fax: 806-771-7825  
Toll Free: 800-874-1877  
Accuracy: Efficiency • Integrity



# City Council Agenda

Approved for Agenda:  
**RPatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Hold a public hearing at approximately 10:33 a.m. and consider an ordinance on a request by Ed Hernandez for a zone change from MH, Manufactured Home Dwelling District, and from LR-2, Local Retail District, to PD, Planned District for a Shopping Center, on Lots 1-12, Block 40, Belmont Addition, City and County of Midland, Texas. (Generally located on the southeast corner of the intersection of Rankin Hwy and W. Gist Avenue.) District – 2.

---

## Purpose:

Hold a public hearing at approximately 10:33 a.m. and consider an ordinance on a request by Ed Hernandez for a zone change from MH, Manufactured Home Dwelling District, and from LR-2, Local Retail District, to PD, Planned District for a Shopping Center.

## Recommended City Council Action

☒ Approve      ☐ Deny      ☐ Direction/Informational

## Fiscal Impact:

No City funds are required to process this request.

## Discussion:

The applicant wishes to develop a retail strip, including a Melrose clothing store, on this currently vacant property located on the east side of Rankin Highway, between Gist and Stokes Avenues. The request is to rezone this property to a PD, Planned District for Shopping Center, with the underlining zoning of LR-2, Local Retail District. As shown in Exhibit A, five buildings are proposed. The setbacks and height meet the LR-2 District requirements. Access to the property will be from a driveway off Stokes Avenue and a

driveway off Gist Avenue. Two dumpsters are shown on the northeastern corner of the property, and will be enclosed and screened with brick. A total of 97 parking spaces are required and provided. A six-foot tall decorative masonry fence, composed of brick, will be constructed along the northeastern and eastern perimeter of the property as a buffer between this retail development and the adjacent MH District. As shown in the elevations in Exhibit B, the building height will be 22'7", and will be composed of glass, ceramic tile, and EIFS. In addition to the rezoning, the north/south alley in between the lots is in the process of being vacated and also must be replatted. The Planning and Zoning Commission voted for approval at the January 6, 2014 meeting, and staff concurs.

**Attachments:**

January 6, 2014P&Z Staff Report  
Exhibits A and B  
Proposed Ordinance

**ORDINANCE NO.**

**AN ORDINANCE CHANGING THE ZONING CLASSIFICATION BY AMENDING CHAPTER ONE, TITLE XI, OF THE CITY CODE OF MIDLAND, TEXAS, BY PERMITTING LOTS 1-12, BLOCK 40, BELMONT ADDITION, CITY AND COUNTY OF MIDLAND, TEXAS, WHICH IS PRESENTLY ZONED MH, MANUFACTURED HOME DWELLING DISTRICT, IN PART, AND LR-2, LOCAL RETAIL DISTRICT, IN PART, TO BE USED AS A PD, PLANNED DISTRICT FOR A SHOPPING CENTER (GENERALLY LOCATED ON THE SOUTHEAST CORNER OF THE INTERSECTION OF RANKIN HIGHWAY AND WEST GIST AVENUE); PROVIDING FOR SUCH USE TO BE SUBJECT TO CERTAIN SPECIAL CONDITIONS AND RESTRICTIONS AS SET OUT HEREIN; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); AND ORDERING PUBLICATION**

**WHEREAS**, the City Planning and Zoning Commission and the Governing Body of the City of Midland, in compliance with the City Charter and the State law with reference to the creation of “Planned Districts” under the zoning ordinance regulations and zoning map, have given the requisite notices by United States mail, publication and otherwise; and after a full and fair hearing to all of the property owners generally and particularly to those interested persons situated in the affected area and in the vicinity thereof, the Governing Body finds that the public health, safety and general welfare will be best served by the creation of a Planned District for a Shopping Center, set out hereinafter and subject to the conditions and restrictions set out hereinafter;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Chapter 1, Title XI, of the City Code of Midland, Texas, and the official zoning map of the City of Midland, Texas, are hereby amended insofar as the hereinafter described property is concerned, which is presently zoned MH, Manufactured Home Dwelling District, in part, and LR-2, Local Retail District, in part, and it shall be used as a Planned District for a Shopping Center, subject to the special conditions and restrictions

hereinafter set out, said property being described as follows:

Lots 1-12, Block 40, Belmont Addition, City and County of Midland, Texas.

**SECTION TWO.** That said property shall be subject to the following special conditions and restrictions:

1. That the use and development of this property shall conform to the regulations of the LR-2, Local Retail District, except as stated below.
2. That the development shall conform to the conditions shown on Exhibits “A” “B”, which are attached hereto and incorporated herein.
3. That a minimum of 97 parking spaces shall be provided; however, the arrangement and locations of the parking spaces shown on Exhibit “A” shall be considered illustrative.
4. That a minimum six-foot-tall solid brick screening fence shall be constructed at the location shown on Exhibit “A”.
5. That the development shall meet all requirements of the Fire Department, Code Administration Division and Transportation Division.
6. That signage shall be in compliance with the Revised Outdoor Sign Regulations of the Midland City Code.
7. That landscaping shall be considered illustrative, and shall be in compliance with the Landscape Regulations of the Midland City Code.
8. That the dumpster locations shall be considered illustrative and shall be determined by the Solid Waste Department. Dumpster screening shall conform to the Site Plan Review Standards of the Midland City Code.

**SECTION THREE.** That the definitions given in the zoning regulations contained in the City Code of the City of Midland, Texas, shall be applicable to such of those terms as are used herein.

**SECTION FOUR.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION FIVE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not



affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION SIX.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$2,000.00).

**SECTION SEVEN.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting "AYE":

Council members voting "NAY":

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

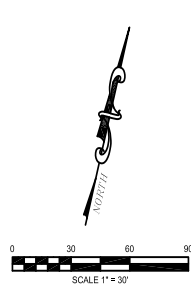
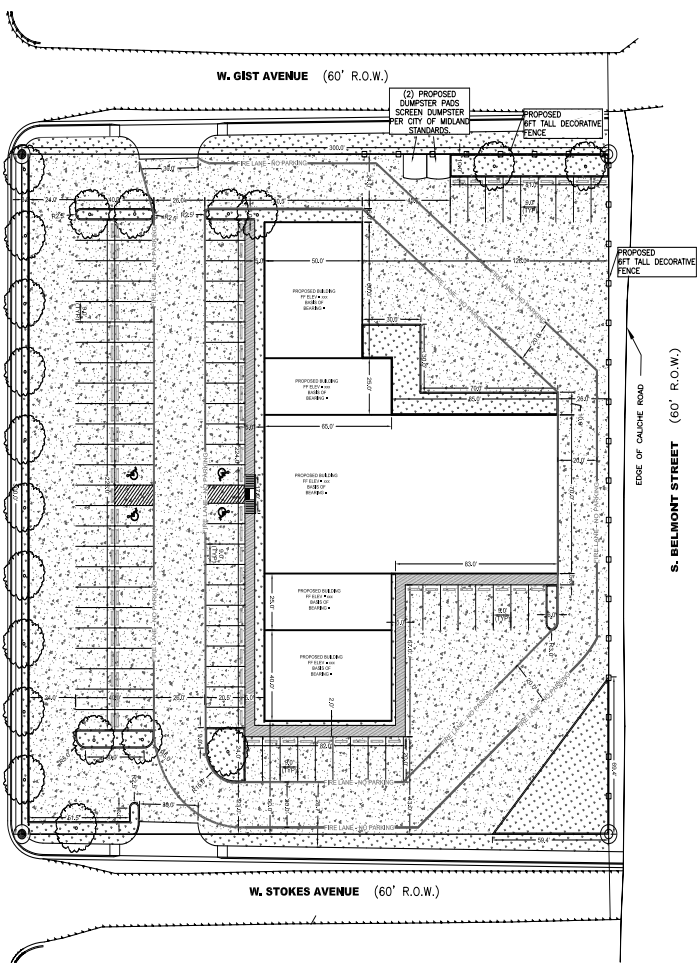
APPROVED AS TO CONTENT  
AND COMPLETENESS:

\_\_\_\_\_  
Robert Patrick, Assistant to the City Manager

APPROVED ONLY AS TO FORM:

\_\_\_\_\_  
Keith Stretcher, City Attorney

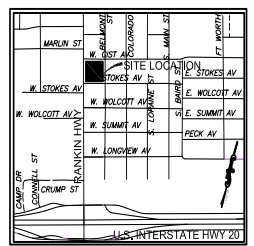
S. RANKIN HIGHWAY (VARIABLE R.O.W.)



THESE PLANS ARE SUBJECT TO REVIEW & APPROVAL BY JURISDICTIONAL ENTITIES

**811**

Know what's below.  
Call before you dig.



### INGRESS & EGRESS

- INGRESS & EGRESS BY DOUBLE DRIVEWAY ALONG W. STOKES AVENUE & W. GIST AVENUE.

### SCREENING FENCE

A 6' TALL DECORATIVE BRICK FENCE IS CURRENTLY PROPOSED ALONG THE NORTH & EAST PROPERTY LINE. TYPICAL SCREENING WILL BE PROVIDED AROUND THE DUMPSTER LOCATIONS PER CITY OF MIDLAND STANDARDS.

### DRAINAGE

AN ONSITE DETENTION BASIN WILL BE DESIGNED WITH AN OUTLET STRUCTURE WHICH DOES NOT INCREASE THE PRE-DEVELOPMENT FLOW RATE FOR THE ENTIRE PROJECT SITE.

### LANDSCAPE

- PER CITY OF MIDLAND ORDINANCE, MINIMUM LANDSCAPE AREA = 10% OF LOT AREA.
- LANDSCAPING TO BE TURF GRASS.
- PROPOSED AREA: 90,000 S.F.
- BUILDING FOOTPRINT: 19,350 S.F.
- REQUIRED LANDSCAPE AREA: 7,065 S.F.
- PROVIDED LANDSCAPE AREA: 7,326 S.F.

### TRASH ENCLOSURES

TRASH DUMPSTERS TO BE PLACED AS SHOWN. ENCLOSURES TO BE BUILT OF BRICK, AND WILL MATCH DESIGN OF SCREENING WALL. DUMPSTER DISPOSAL TO BE SERVICED BY OTHERS.

### BUILDING SETBACKS

MINIMUM BUILDING SETBACK DISTANCES OF 15 FEET FROM PROPERTY LINES WILL BE OBSERVED.

### PARKING SPACES

- REQUIRED
- PER THE CITY OF MIDLAND'S PARKING REQUIREMENTS: "1 SPACE FOR EACH 200 S.F. OF FLOOR AREA" 19350 S.F. OF FLOOR AREA @ 1 SPACE per 200 S.F. = 97 REQUIRED SPACES
- PROVIDED
- 93 REGULAR PARKING
  - 4 HANDICAP PARKING
  - 97 TOTAL PARKING

### TREE REQUIREMENTS

- 1 TREE FOR EVERY 15 PARKING SPACES
- 1 TREE PER 30 LINEAR FEET OF STREET FRONTAGE
- 97 PARKING SPACES: 07 TREES
- 1200' STREET FRONTAGE: 40 TREES
- TOTAL REQUIRED: 47 TREES
- TOTAL SHOWN: 20 TREES
- HALF OF THE REQUIRED TREES TO BE DONATED TO PARKS & RECREATION FUND.

### BUILDING HEIGHTS

REFER TO ARCHITECT'S BUILDING ELEVATION PLAN.

### FIRE PROTECTION

THE 20' WIDE MINIMUM FIRE LANE HAS BEEN PROVIDED AT THE FRONT OF ALL BUILDINGS. THE FIRE LANE WILL BE IDENTIFIED BY PAINTED STRIPES, CURBS, AND PERMANENT SIGNAGE PER THE CITY OF MIDLAND REQUIREMENTS AND IN ACCORDANCE WITH THE IFC, 2009. FIRE HYDRANT WILL BE PROVIDED AT CORNER OF RANKIN AND W. STOKES.

### SIDEWALKS

- 5' SIDEWALK TO BE PLACED IN THE INTERIOR OF THE PROPERTY AS SHOWN.

### SITE UTILITIES

A PUBLIC SEWER MAIN EXISTS NORTH OF GIST AVE. MUNICIPAL WATER SERVICE WILL BE ROUTED FROM BELMONT STREET.

### BENCHMARK

COORDINATES, BEARINGS, DISTANCES AND AREAS SHOWN HEREON ARE LAMBERT GRID AND CONFORM TO THE "TEXAS COORDINATE SYSTEM", TEXAS CENTRAL ZONE, NORTH AMERICAN DATUM 1983.

### NOTICE TO CONTRACTOR

1. ALL DIMENSIONS SHOWN ARE TO FACE OF CURB UNLESS NOTED OTHERWISE.
2. ALL PROPOSED SIDEWALKS ARE TO BE 5.0' UNLESS NOTED OTHERWISE.

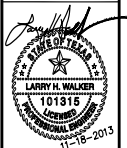
### SITE INFORMATION

TOTAL LAND AREA: 90,000 S.F. (2.06 AC)  
CURRENT ZONING: LR-20 MH  
TOTAL PARKING PROVIDED: 97  
HANDICAP PARKING PROVIDED: 4  
HANDICAP PARKING REQUIRED: 4  
LANDSCAPE PERCENTAGE: 0.10%

### STANDARD ACCESSIBILITY REQUIREMENTS

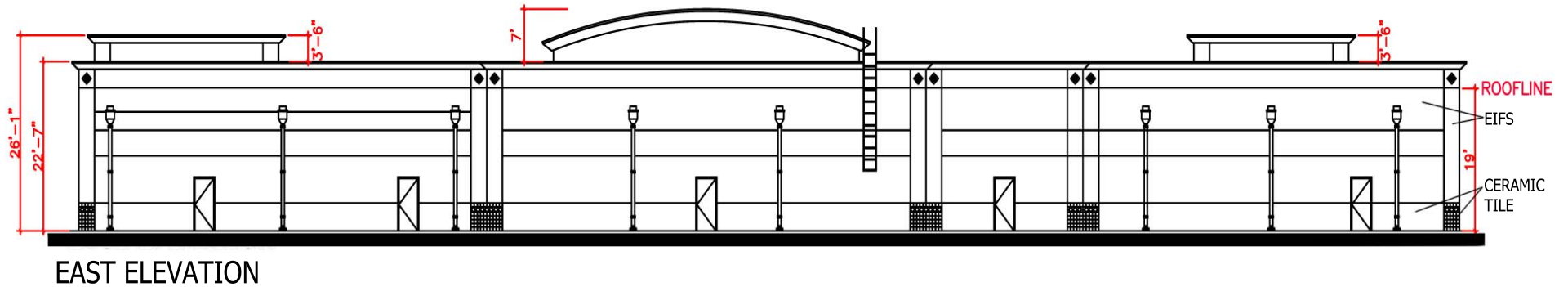
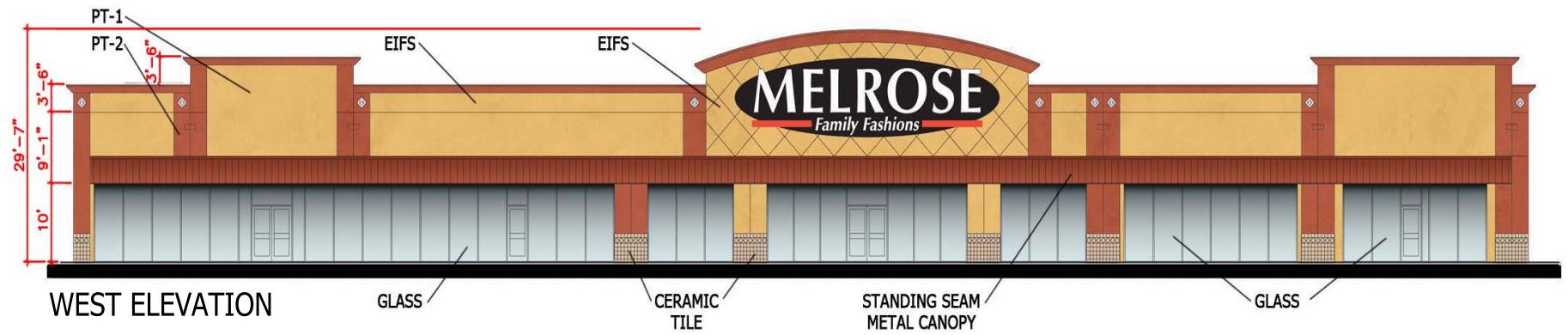
- PARKING:**
- ① ACCESSIBLE PARKING SPACES SHALL BE A MIN. 9' WIDE WITH A MAXIMUM SLOPE OF 2% (IN ALL DIRECTIONS)
  - ① EACH ACCESSIBLE PARKING SPACE SHALL HAVE A VERTICALLY MOUNTED (OR SUPERIMPOSED) SIGN SHOWING THE SYMBOL OF ACCESSIBILITY. AT LEAST ONE SPACE MUST HAVE AN ADDITIONAL SIGN "VAN ACCESSIBLE" MOUNTED BELOW THE SYMBOL OF ACCESSIBILITY. SIGN SHALL BE LOCATED 5' MIN. ABOVE THE ADJACENT PAVED SURFACE TO BOTTOM OF TEXT.
  - ① ALL ACCESSIBLES SERVING H.C. PARKING SPACES SHALL BE 6' WIDE MINIMUM AND 9' WIDE MINIMUM FOR VAN DESIGNATED SPACES. ALL BUILDINGS SHALL CONTAIN AT LEAST ONE VAN ACCESSIBLE SPACE.
  - ① **CURB RAMP:**
  - ① RAMPS EXCEEDING 6" IN RISE (EXCLUDING CURB RAMPS) SHALL HAVE HANDRAILS ON EACH SIDE AT BETWEEN 34" AND 38", AND EXTEND 12" BEYOND THE TOP AND BOTTOM OF RAMP. HANDRAIL SHALL NOT OBSTRUCT THE CLEAR AREA REQUIRED FOR TOP AND BOTTOM LANDINGS SERVING THE RAMPS.
  - ① RAMPS SHALL CONTAIN A TRUNCATED DOME SURFACE ARRANGED SO THAT WATER WILL NOT ACCUMULATE. COLOR OF RAMP FURNISH MATERIALS (INCLUDING CONCRETE) SHALL HAVE A LIGHT AND REFLECTIVE VALUE AND MUST CONTRAST SIGNIFICANTLY TO DETACHMENT FROM ADJACENT SURFACES (OR PAINT STRIPE).
  - ① BOTTOM LANDINGS FOR RAMPS SERVING REQUIRED EXITS SHALL BE 5'-0" LONG X 5'-0" WIDE MINIMUM.
  - ① RAMPS SHALL NOT EXCEED A 1:12 SLOPE.
  - ① **SIDEWALKS AND ACCESSIBLE ROUTES:**
  - ① SIDEWALKS MUST BE AT LEAST 36" WIDE. SIDEWALK CROSS SLOPE SHALL NOT EXCEED 1:50 (2%).
  - ① LONGITUDINAL SLOPE OF ANY SIDEWALK (ACCESSIBLE ROUTE) SHALL NOT EXCEED 1:50 (2%).

**SITE PLAN**  
**BELMONT ADDITION**  
**SOUTH RANKIN HIGHWAY**  
**MIDLAND, TEXAS**

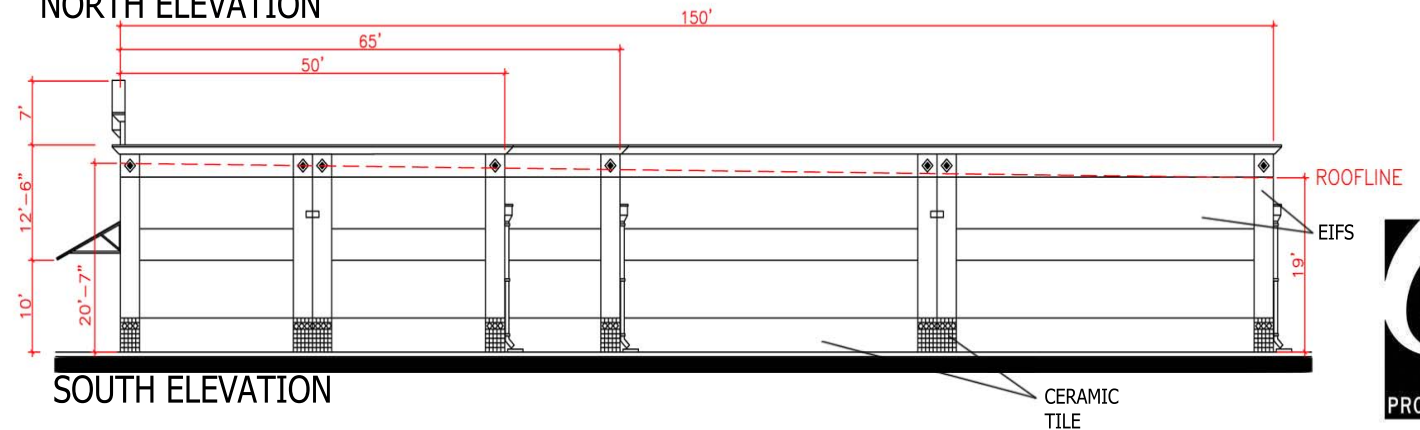
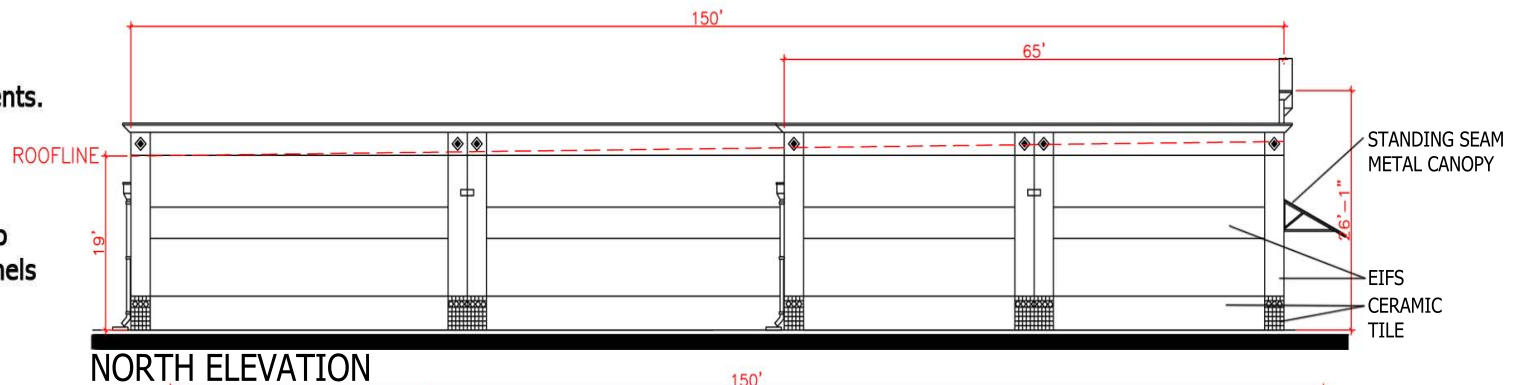


PROJECT NUMBER: 2013-0131

SHEET C1.0 OF 1



NOTE: Tilt wall concrete shell building with retail finish-out and site improvements. Roofing shall be Carlisle "Sure-Weld" single-ply 60 mil mechanically fastened roofing system or approved equal. Substrate shall be Carlisle "HP-H" polyiso (minimum R-21) rigid roof insulation panels or approved equal.



PT-1 SW6375 HONEYCOMB  
PT-2 SW0008 CAJUN RED

# PLANNING AND ZONING COMMISSION

January 6, 2014

**CASE:** Z-13-055, Ed Hernandez.

**REQUEST:** Hold a public hearing and consider a request for a zone change from MH, Manufactured Home Dwelling District, and from LR-2, Local Retail District, to PD, Planned District for a Shopping Center.

**APPLICANT:** Ed Hernandez.

**OWNER:** NBY Rankin Hwy Midland, LLC.

**REPRESENTATIVE:** West Company of Midland, Inc.

**LEGAL DESCRIPTION:** Lots 1-12, Block 40, Belmont Addition, City and County of Midland, Texas.

**LOCATION:** Generally located on the southeast corner of the intersection of Rankin Hwy and W. Gist Avenue.

**CURRENT ZONING:** MH, Manufactured Home Dwelling District, and LR-2, Local Retail District.

**ASSOCIATED CASES:** P-13-042, Belmont Addition, Section 18, and V-13-020, NBY Rankin Hwy, Midland, LLC.

## DETAILS OF REQUEST:

1. This property, zoned both MH, Manufactured Home Dwelling District, and LR-2, Local Retail District, is located on the east side of Rankin Highway, west of Belmont Street, south of Gist Avenue, and north of Stokes Avenue. The property is currently vacant. The applicant wishes to develop a retail strip, including a Melrose clothing store, and has thus applied for this zone change to a PD, Planned District for Shopping Center, with the underlining zoning of LR-2, Local Retail District.

## SURROUNDING ZONING AND LAND USE:

2. The property is located on the east side of Rankin Highway, west of Belmont Street, to the south of Gist Avenue, and to the north of Stokes Avenue. To the north is an LR-2, Local Retail District and an MH, Manufactured Home Dwelling District. To the east is a continuation of the Manufactured Home Dwelling District with several homes. A vacant PD, Planned District for Shopping Center, abuts the south. Across Rankin Highway to the west is a PD, Planned District for Shopping Center, which was recently rezoned to be used for a used car sales business, and an LR-2, Local Retail District, with a Dollar General store.



**ANALYSIS:**

3. This property is in the process of being replatted from the current 12 lot configuration to one lot. Additionally, the 20-foot alley is in the process of being vacated for the development. According to the Midland Master Plan 2025, retail uses are recommended to be generally located along major thoroughfares for high visibility (such as Rankin Highway). The Master Plan also recommends that the City protect optimal locations for retail and that a property should not develop as residential when it has characteristics of a retail location. Thus, this shopping center meets the guidelines of the Comprehensive Plan, and we find the zone change to be reasonable.

**SITE PLAN:**

The site plan, Exhibit A, provides the layout and information about the site. As shown, five buildings are proposed. The setbacks for the buildings follow the LR-2 District requirements. There will be a total of two means of ingress and egress to the property: a driveway off Stokes Avenue and a driveway off Gist Avenue. The interior roadway will include a fire lane in accordance with the Fire Department. A six-foot tall decorative masonry fence, specifically composed of brick, will be provided along the northeastern and eastern perimeter of the property to act as a buffer between this retail development and the adjacent Manufactured Home Dwelling District. Two dumpsters are provided on the northeastern corner of the property. The dumpsters will be enclosed and screened with brick, which will match the design of the screening wall. Dumpster locations will be considered illustrative. Landscaping will also be provided according to the City Code – landscaping shown on the plan will be considered illustrative. For parking, using the retail ratio of one space for every 200 square feet of floor area, a total of 97 parking spaces are required and provided. Parking shown on the plan will be considered illustrative.

Exhibit B depicts the elevation of the proposed building, which will be composed of glass, ceramic tile, and primarily of EIFS. The building height will be 22'-7"; 26'-1" to the first level parapet, and 29'-7" to the Melrose parapet.

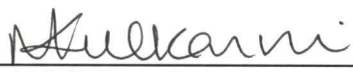
**STAFF RECOMMENDATION:**

**Staff recommends approval of the zone change from MH, Manufactured Home Dwelling District, and LR-2, Local Retail District, to PD, Planned District for a Shopping Center, subject to the following conditions:**

- A. That the use and development of this property shall conform to the regulations of the LR-2, Local Retail District, except as stated below.
- B. That the proposed development shall conform to the conditions shown on Exhibits A and B.
- C. That a minimum of 97 parking spaces shall be provided; however, the arrangement and locations of the parking spaces shown on Exhibit A shall be considered illustrative.

- D. That a minimum six-foot tall solid brick screening fence shall be constructed at the location shown in Exhibit A.
- E. That the proposed development meets all requirements of the Fire Division, Code Administration Division, and Transportation Division.
- F. That signage shall be in compliance with the "Revised Outdoor Sign Regulations" of the Midland City Code.
- G. That landscaping shall be considered illustrative, and shall be in compliance with the "Landscape Regulations" of the Midland City Code.
- H. That the dumpster locations shall be considered illustrative and shall be determined by the Solid Waste Division. Dumpster screening shall conform to the "Site Plan Review Standards" of the Midland City Code.

  
\_\_\_\_\_  
Jim Compton  
Acting Planning Division Manager  
Department of Development Services

  
\_\_\_\_\_  
Madhuri Kulkarni, City Planner  
Department of Development Services

**Attachments:**

Application  
Maps  
Exhibits A and B

Case Number: 2-B-655

**CITY OF MIDLAND**  
**Planning Division**

**APPLICATION TO CHANGE ZONING CLASSIFICATION**

|                                              |                                     |
|----------------------------------------------|-------------------------------------|
| Ed Hernandez                                 | (210) 424-8061                      |
| <b>Applicant Name</b>                        | <b>(Phone/e-mail)</b>               |
| 4629 Marco Drive, San Antonio, TX            | 78218                               |
| Address                                      | Zip Code                            |
| NBY Rankin Hwy Midland, LLC                  | (210) 424-8061                      |
| <b>Property Owner Name</b>                   | <b>(Phone/e-mail)</b>               |
| 4629 Marco Drive, San Antonio, TX            | 78218                               |
| Address                                      | Zip Code                            |
| West Company of Midland, Inc.                | (432) 682-0588/jawtry@team-west.com |
| <b>Representative Name</b>                   | <b>(Phone/e-mail)</b>               |
| 110 W. Louisiana Ave., Ste. 110, Midland, TX | 79701                               |
| Address                                      | Zip Code                            |

Street address and Legal Description of property (complete Lot, Block, and Subdivision Name or if unplatted, attach a Metes and Bounds description with surveyor's seal). Each district must be described separately. Being a replat of Lots 1-12, Block 40, Belmont Addition, City and County of Midland, Texas.

PRESENT ZONE: LR2 & MH REQUESTED ZONE: PDSC  
(List by tracts if more than one district is requested)

Reason for Zone Change Request: To vacate alley and combine all lots for a retail development.

Present Use of Property: none

Proposed Use of Property: retail development

How will zone change affect the public health, safety and welfare? public health, safety and welfare will not be affected, due to necessary measures taken for privacy and noise control.

Describe how conditions affecting the property have changed since present zoning designation: the property will change from residential to commercial retail

Is a Specific Use Permit with Term for alcoholic beverages sales needed? ☐ Yes ☒ No



**APPLICATION FEES:**

- Single, standard zone change: **\$400**. Multiple, standard zone change: add **\$100** per additional district.
- Single PD, Planned District zone change: **\$550**. Multiple PD proposal: add **\$100** per district.
- If a Traffic Impact Analysis is required, a fee of up to \$500.00 will be assessed.

**SITE PLAN SUBMITTALS** (if applicable):

16 copies (FOLDED) of the PD site plan:

Site Plan in digital format .pdf and .jpg:

|                                     |
|-------------------------------------|
| <input checked="" type="checkbox"/> |
| <input checked="" type="checkbox"/> |

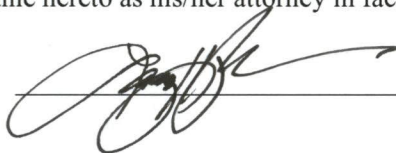
**SIGNATURE** (by property owner only - authorized agent must sign affidavit below)

Property Owner (signature): \_\_\_\_\_ Date: \_\_\_\_\_

**If an Agent is authorized by the property owner to file and execute the application on behalf of the property owner, the Agent must complete the affidavit below.**

STATE of TEXAS  
COUNTY OF MIDLAND

Before me, the undersigned authority, on this day personally appeared  
Larry H. Walker who, being by me duly sworn, upon oath says: That (s)he is  
authorized by NBY Rankin Hwy Midland, the owner of the above described property, to fully  
represent him/her in this application and that (s)he had the legal right, power and authority to sign said  
owner's name hereto as his/her attorney in fact.



Authorized Agent (signature)

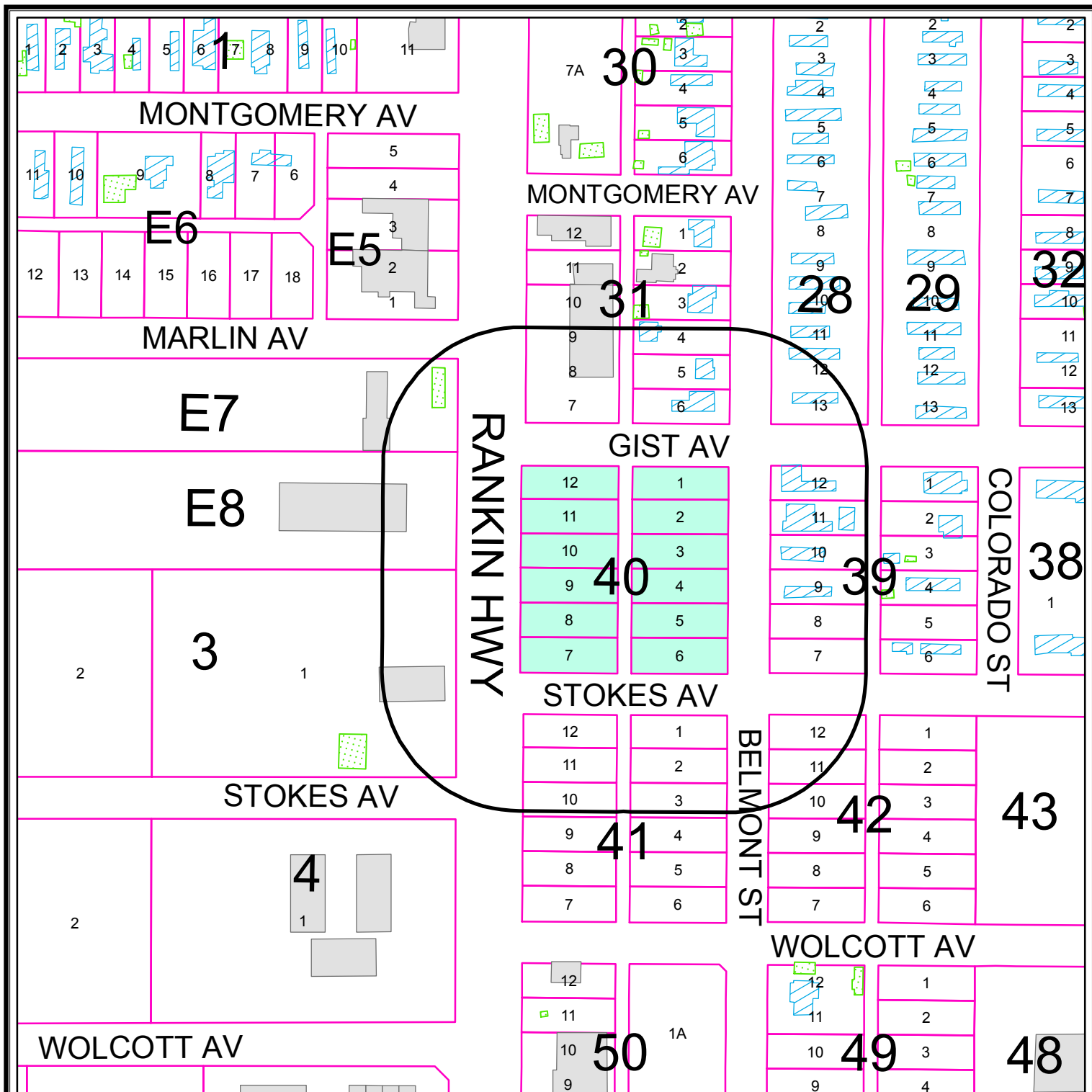
Subscribed and sworn to before me, this 26<sup>th</sup> day of November, 20 13, to certify which  
witness my hand and seal of office.

NOTARY PUBLIC, MIDLAND COUNTY, TEXAS

|                            |                      |
|----------------------------|----------------------|
| <b>FOR OFFICE USE ONLY</b> |                      |
| Rec'd By: <u>RS</u>        | Date: <u>12/4/13</u> |
| Assigned: <u>MK</u>        |                      |
| For: <u>P&amp;Z</u>        | On: <u>1/6/14</u>    |



**\*\*Application will not be considered for scheduling until reviewed by a planner.\*\***



## PROPERTY OWNER NOTIFICATION MAP

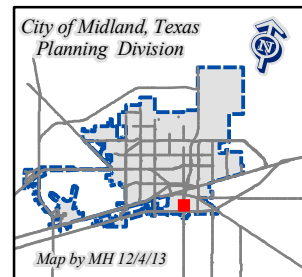
**Z - 13 - 055**

**Scale: 1" = 200'**

Consider a request for a zone change from MH, Manufacture Home District on Lots 1 – 6 and from LR-2, Local Retail District on Lots 7 – 12, to PD, Planned District for a Shopping Center, all out of Block 40, Belmont Addition, City and County of Midland, Texas.

### LEGEND

- CITY LIMITS
- 200 FT. LEGAL NOTICE LIMIT
- PARCEL
- PUBLIC BLDGS
- PRIVATE BLDGS
- ACCESSORY BLDGS



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# City Council Agenda

Approved for Agenda:  
**rpatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Hold a public hearing at approximately 10:36 a.m. and consider an annexation of the property (Tract 1), being a 37.09-acre tract of land out of Sections 7 and 8, Block 40, T-2-S, T & P RR Co. Survey, Midland County, Texas. (Generally located on the northeast corner of the intersection of FM 1788 and Loop 40)

---

**Purpose:** Hold a public hearing at approximately 10:36 a.m. and consider an annexation of the property (Tract 1), being a 37.09-acre tract of land out of Sections 7 and 8, Block 40, T-2-S, T & P RR Co. Survey, Midland County, Texas. (Generally located on the northeast corner of the intersection of FM 1788 and Loop 40)

## Recommended City Council Action

☒ Approve

☐ Deny

☐ Direction/Informational

## Fiscal Impact:

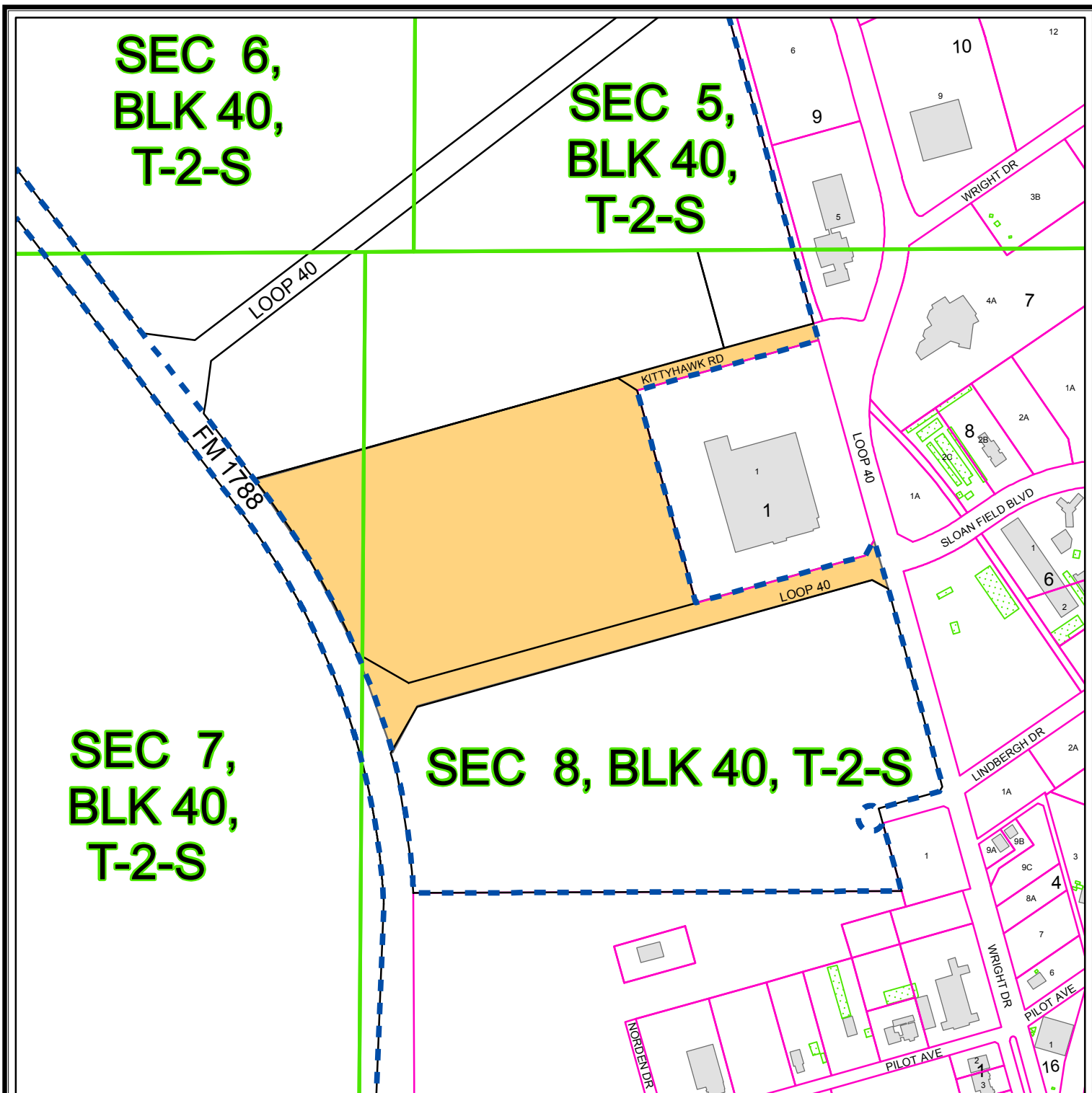
There is no cost to the City to hold a public hearing on the proposed annexation.

## Discussion:

The owners of these properties have requested annexation into the City of Midland. On June 25, 2013, the City Council voted to have staff begin the annexation of the property (Tract 1), being a 37.09-acre tract of land out of Sections 7 and 8, Block 40, T-2-S, T & P RR. Co. Survey, Midland County, Texas. This is the next step in the annexation process to hold a public hearing. The second public hearing is scheduled for January 29<sup>th</sup> at a Special Council Meeting. Both of these public hearing have been averted and no letters of opposition have been received.

## Attachments:

Map, Service Plan



## PROPOSED ANNEXATION MAP

M - 13 - 013

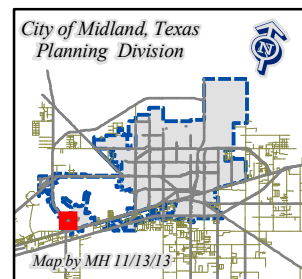
Scale: 1" = 550'

### TRACT 1

Consider a request for the annexation of a 37.09-acre tract of land out of Sections 7 and 8, Block 40, T-2-S, T & P RR Co. Survey, Midland County, Texas.

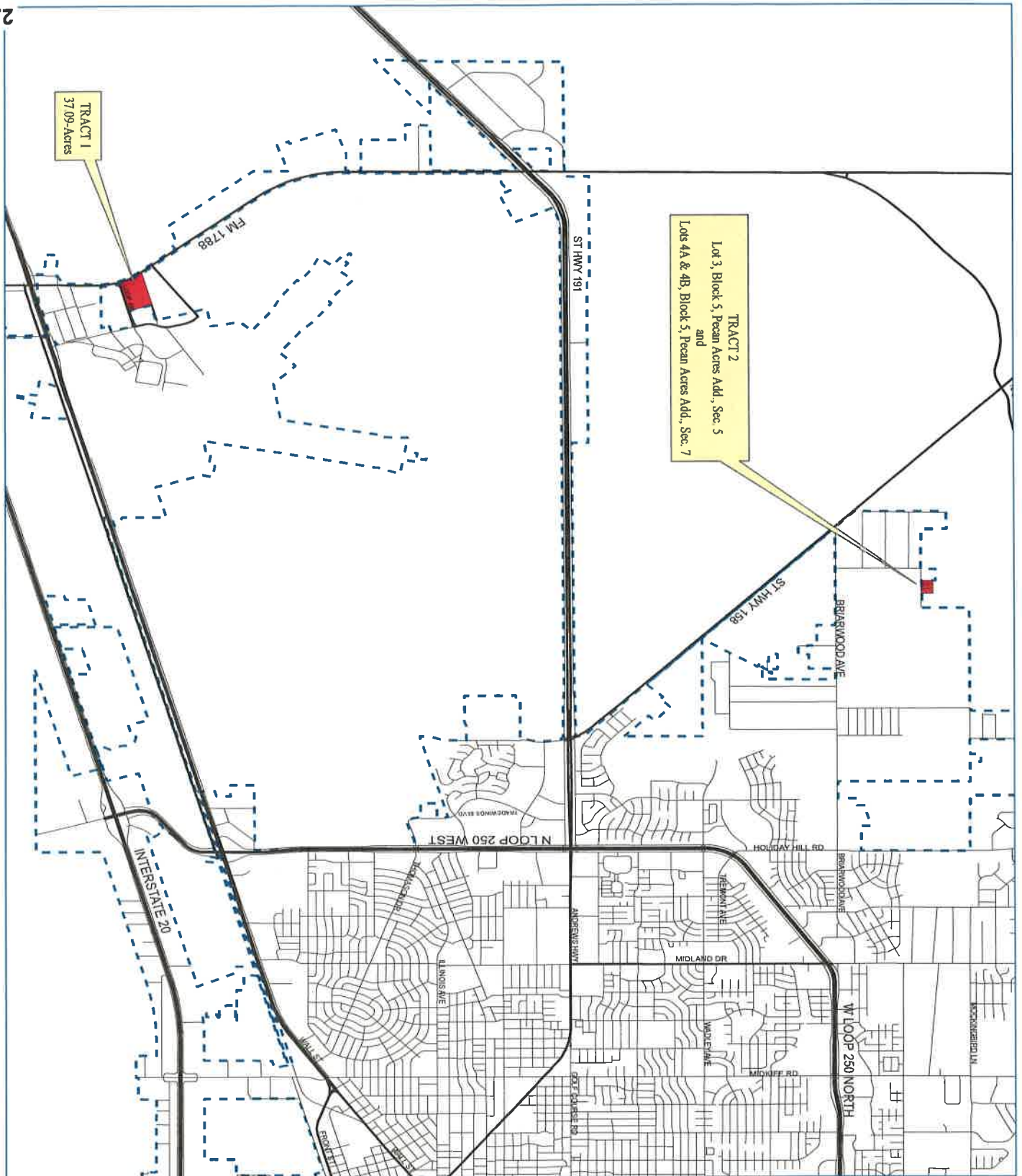
### LEGEND

- ANNEXATION BOUNDARY
- CITY LIMITS
- SURVEY SECTION
- COUNTY PARCEL
- CITY PARCEL
- PUBLIC BLDGS
- ACCESSORY BLDGS



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# *Proposed Annexation*

January, 2014

**LEGEND**

- Streets
- City Limits
- Annexation Tract



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## **EXHIBIT**

### **SERVICE PLAN FOR AREA**

#### **North Younger Properties, LTD**

**Being a 37.09-acre tract of land out of Sections 7 and 8, Block 40, T-2-S, T&P RR. Co. Survey, Midland County, Texas. (Generally located on the northeast corner of the intersection of FM 1788 and Loop 40)**

#### **Engineering Services**

**Existing Services:** None

- A. **Type of service to be provided:** Maintenance of streets, drainage, and right-of-way. Engineering services, traffic studies and controls will be provided as warranted.
- B. **Service to be provided within 60 days:** None.
- C. **Capital improvements to begin within 2 1/2 years:** Water line extension; street improvements; drainage improvements in accordance with City of Midland's development policies.

#### **Utilities**

**Existing Services:** None

- A. **Type of service to be provided:** Water provision and waste water collection.
- B. **Service to be provided within 60 days:** None
- C. **Capital Improvements to begin within 2 ½ Years:** Water and waste water improvements in accordance with City of Midland's development policies.

#### **Solid Waste**

**Existing Services:** None

- A. **Type of service to be provided:** Solid waste collection.
- B. **Service to be provided within 60 days:** Solid waste collection
- C. **Capital Improvements to begin within 2 ½ Years:** No improvements anticipated.

**Police**

**Existing Services:** None

- A. **Type of service to be provided:** Emergency and routine call response, traffic enforcement.
- B. **Service to be provided within 60 days:** Same as A above.
- C. **Capital Improvements to begin within 2 ½ Years:** No improvements anticipated.

**Fire**

**Existing Services:** Provided through agreement with Midland County

- A. **Type of service to be provided:** Emergency service for fire protection for persons and property; Ambulance service.
- B. **Service to be provided within 60 days:** Same as A above.
- C. **Capital Improvements to begin within 2 ½ Years:** No improvements anticipated.

**Community Services**

**Existing Services:** Health and Senior Services throughout Midland County

- A. **Type of service to be provided:** Parks Service, Health, Senior Services, and Animal Control.
- B. **Service to be provided within 60 Days:** All of the services described in A, above.
- C. **Capital Improvements to begin within 2 ½ years:** No improvements anticipated.





# City Council Agenda

Approved for Agenda:  
**rpatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Hold a public hearing at approximately 10:39 a.m. and consider an annexation of the property (Tract 2), being Lot 3, Block 5, Pecan Acres Addition, Section 5 and of Lots 4A & 4B, Block 5, Pecan Acres Addition, Section 7, Midland County, Texas. (Generally located on the north side of Trenton Drive, approximately 550 feet east of Trobaugh Boulevard)

---

**Purpose:** Hold a public hearing at approximately 10:39 a.m. and consider an annexation of the property (Tract 2), being Lot 3, Block 5, Pecan Acres Addition, Section 5 and of Lots 4A & 4B, Block 5, Pecan Acres Addition, Section 7, Midland County, Texas. (Generally located on the north side of Trenton Drive, approximately 550 feet east of Trobaugh Boulevard)

## Recommended City Council Action

☒ Approve

☐ Deny

☐ Direction/Informational

## Fiscal Impact:

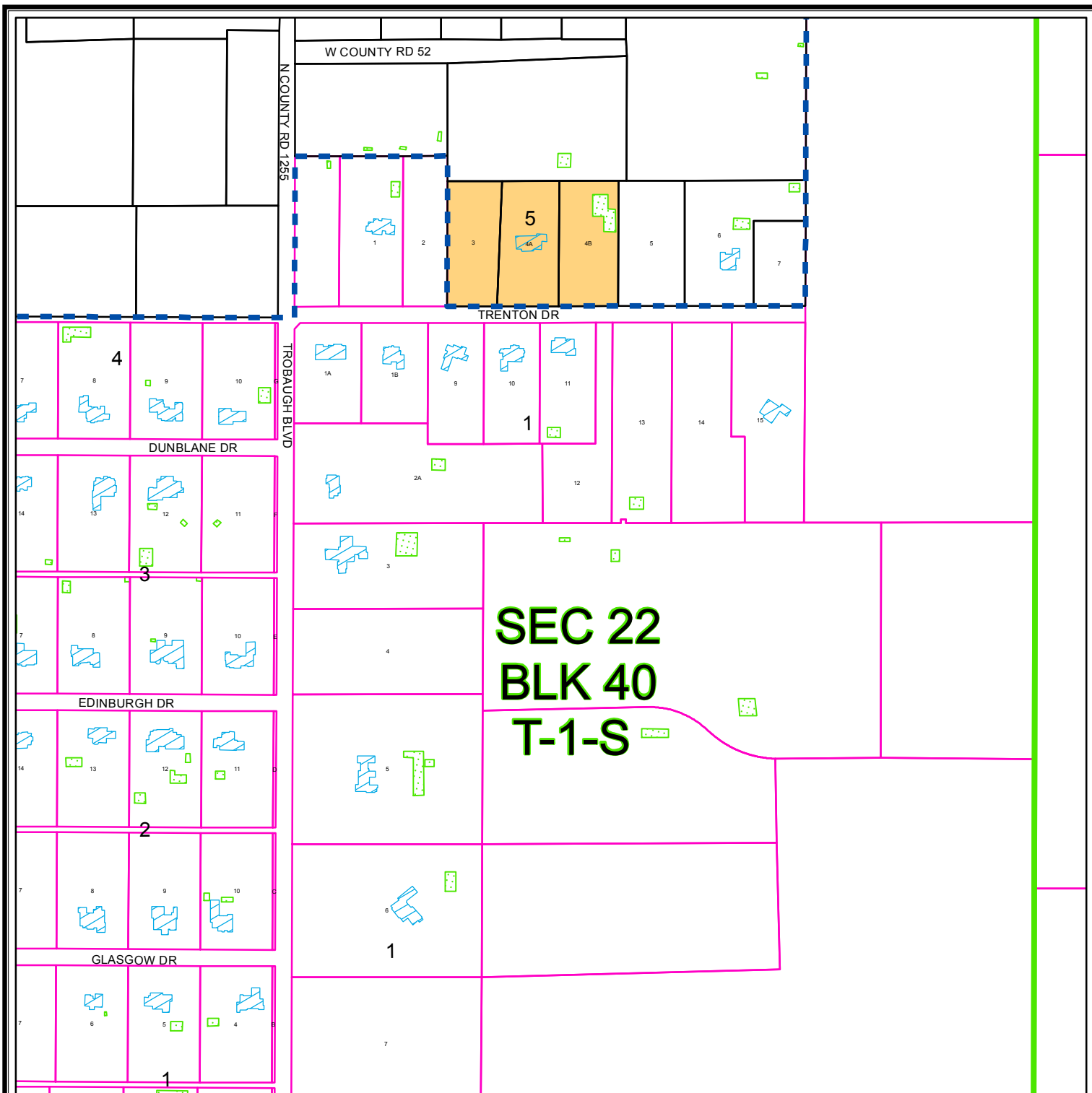
There is no cost to the City to hold a public hearing on the proposed annexation.

## Discussion:

The owners of these properties have requested annexation into the City of Midland. On November 26, 2013, the City Council voted to have staff begin the annexation of these lots. This is the next step in the annexation process to hold a first public hearing. The second public hearing is scheduled for January 29<sup>th</sup> at a Special Council meeting. Both of these public hearing have been advertised and no letters of opposition have been received.

## Attachments:

Map, Service Plan



## PROPOSED ANNEXATION MAP

**M - 13 - 021**

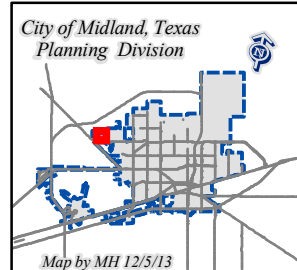
**Scale: 1" = 500'**

### TRACT 2

Consider a request for the annexation of Lot 3, Block 5, Pecan Acres Addition, Section 5 and of Lots 4A & 4B, Block 5, Pecan Acres Addition, Section 7, Midland County, Texas.

### LEGEND

- ANNEXATION BOUNDARY
- CITY LIMITS
- SURVEY SECTION
- CITY PARCEL
- COUNTY PARCEL
- PUBLIC BLDGS
- PRIVATE BLDGS



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*January, 2014*

 Streets  
 City Limits  
 Annexation Tract



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## **EXHIBIT**

### **SERVICE PLAN FOR AREA**

#### **Blackwood/Baily Annexation**

**Being Lot 3, Block 5, Pecan Acres Addition, Section 5 and of Lots 4A & 4B, Block 5, Pecan Acres Addition, Section 5, and of Lots 4A & 4B, Block 5, Pecan Acres Addition, Section 7, Midland County, Texas. (Generally located on the north side of Trenton Drive, approximately 550 feet east of Trobaugh Boulevard.)**

#### **Engineering Services**

**Existing Services:** None

- A. **Type of service to be provided:** Maintenance of streets, drainage, and right-of-way. Engineering services, traffic studies and controls will be provided as warranted.
- B. **Service to be provided within 60 days:** None.
- C. **Capital improvements to begin within 2 1/2 years:** Water line extension; street improvements; drainage improvements in accordance with City of Midland's development policies.

#### **Utilities**

**Existing Services:** None

- A. **Type of service to be provided:** Water provision and waste water collection.
- B. **Service to be provided within 60 days:** None
- C. **Capital Improvements to begin within 2 ½ Years:** Water and waste water improvements in accordance with City of Midland's development policies.

#### **Solid Waste**

**Existing Services:** None

- A. **Type of service to be provided:** Solid waste collection.
- B. **Service to be provided within 60 days:** Solid waste collection
- C. **Capital Improvements to begin within 2 ½ Years:** No improvements anticipated.

### **Police**

**Existing Services:** None

- A. **Type of service to be provided:** Emergency and routine call response, traffic enforcement.
- B. **Service to be provided within 60 days:** Same as A above.
- C. **Capital Improvements to begin within 2 ½ Years:** No improvements anticipated.

### **Fire**

**Existing Services:** Provided through agreement with Midland County

- A. **Type of service to be provided:** Emergency service for fire protection for persons and property; Ambulance service.
- B. **Service to be provided within 60 days:** Same as A above.
- C. **Capital Improvements to begin within 2 ½ Years:** No improvements anticipated.

### **Community Services**

**Existing Services:** Health and Senior Services throughout Midland County

- A. **Type of service to be provided:** Parks Service, Health, Senior Services, and Animal Control.
- B. **Service to be provided within 60 Days:** All of the services described in A, above.
- C. **Capital Improvements to begin within 2 ½ years:** No improvements anticipated.



# City Council Agenda

Approved for Agenda:  
**rpatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Ron Jenkins, Oil & Gas Coordinator

**SUBJECT:** Hold a public hearing at approximately 10:42 a.m. regarding a proposed oil and gas permit to Callon Petroleum Operating Company (Operator), *for a Permit to Drill an Oil & Gas Well within the City Limits*, (Pecan Acres 23 #7) located 660 feet from the south line and 1,911 feet from the east line located in Section 23, Block 40, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas. (Generally located on the west side of Golden Gate Drive, approximately 660 feet north of Briarwood Avenue-District 4.) This is a public hearing only. No further action will be taken.

---

## **Purpose:**

At approximately 10:42 a.m. hold a public hearing on a request from Callon Petroleum Operating Company (Operator), *for a Permit to Drill an Oil & Gas Well within the City Limits*, (Pecan Acres 23 #7) located 660 feet from the south line and 1,911 feet from the east line located in Section 23, Block 40, T-1-S, T&P RR Co. Survey, City and County of Midland, Texas. This is an opportunity for the Council to receive public comment. Council may consider this permit following a 30-day public comment period and at a regularly scheduled meeting. No letters of objection received.

## **Recommended City Council Action**

☐ Approve

☐ Deny

☒ Direction/Informational

## **Fiscal Impact:**

There is no cost to the City to process this application.

## **Discussion:**

The Oil and Gas Advisory Committee has reviewed this well site in detail and recommends approval of the application noting the correction to add a missing attachment of the casing and cementing plan and correct the lease line description in two exhibits. Callon Petroleum is requesting a landscaping/irrigation variance of 18 months. Callon Petroleum Operating Company has addressed the recommendations and updated the application.

Attachments: Application; Location map; Exhibit - Drill site map, Exhibit – Flow Line Location.



NOV 26 2013



## APPLICATION FOR OIL AND GAS PERMIT

(Pursuant to Midland City Ordinance No. 8769)

## I. General Information

|                                                                                           |                                                                                                                 |                                                                        |
|-------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------|
| Date<br><b>11/15/2013</b>                                                                 | Operator Name (must match W-1)<br><b>Callon Petroleum Operating Company</b>                                     | Operator Address<br><b>P.O. Box 1287<br/>Natchez, MS 39121</b>         |
| Representative Name<br><b>Jimmy Baggett</b>                                               | Representative Address (within Midland City Limits)<br><b>4305 N. Garfield, Suite 235<br/>Midland, TX 79705</b> | Rep. Tele. <b>(432) 686-1828</b><br><br>Rep. Fax <b>(432) 686-2764</b> |
| Fee: \$4,000.00 Rec'd Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> |                                                                                                                 |                                                                        |

Permit Compliance Contact (Choose 1):

Option A:

24/7 Answering Services - No. 1 (tele

No. 2 (Tele.):

Option B: **Jimmy Baggett 4305 N. Garfield, Suite 235 Midland, TX 79705**

Company Compliance Representative (Name, Address, Local Telephone) (ATTACH STATEMENT AS EXHIBIT A):

Emergency Contact Representative (Name, Address, 24-Hour Tele. No.):

**Jimmy Baggett (432) 202-7210****4305 N. Garfield, Suite 235 Midland, TX 79705**Other Permitted Wells in City (ATTACH EXHIBIT B [see § J(26)]). **Thirteen: See Exhibit B**

## II. Mineral Ownership

Name(s) and Address(es) of Mineral Estate Lessors (under applicable lease): **See Attached List**

1.

2.

3.

ATTACHED AS EXHIBIT C is (a Title Opinion by **Mike Canon**, a licensed Texas Attorney/Title Commitment by Abstract Company/a Take-off from \_\_\_\_\_, a Certified Petroleum Landman/an opinion letter from \_\_\_\_\_,a licensed Texas Attorney) indicating that |Operator| has a legal right to develop the mineral estate that is the subject of this Application. [See § J(5)]. **Attached**

## III. Surface Ownership &amp; Use

General Description of Current Surface Use (within 860 feet of proposed surface location):

**Future Development (zoned FD): No building allowed except those for customary agricultural uses.  
Temporary designation for newly annexed land.**

ATTACHED AS EXHIBIT D is (a Title Opinion by \_\_\_\_\_, A licensed Texas Attorney/a Take-off from \_\_\_\_\_, a Certified Petroleum Landman/ Current Tax Roll from Midland Central Appraisal District), which

lists the name(s) and address(es) of all surface owners within 860 feet of the surface well location. [See § J(7)]. **Attached**ATTACHED AS EXHIBIT E is a (map/p lat/satellite/aerial photo) depicting all Residences, commercial structures, public buildings, all publicly dedicated Streets and alleys, Rights of Way, and permanent accessory structures surrounding the proposed Drill Site. The (map/p lat/satellite/aerial photo) includes two circles, as required by the Ordinance - on depicting a 500 foot radius and one depicting an 860 foot radius from the proposed well's surface location. [See § J(10)]. **Attached**ATTACHED AS EXHIBIT F is a copy of the notification letter(s) sent to 100 percent of the surface owners, Certified Mail, Return Receipt Requested. [See § J(36)]. **Attached**



#### IV. Well & Operations Information

Proposed Well Name: **Pecan Acres 23 #7**

Proposed Hole Size, Casing Program and Cementing Program (attach Exhibit as Necessary) [See § J(11) and § L(4)]:

**Attached**

Legal Description of Proposed Well Site: **660' FSL, 1911' FEL of Section 23, Block 40, T1S, T&P RR Co. Survey, Midland County, Texas (Abstract 252)**

ATTACHED AS EXHIBIT G is the Location Site Plan [See § J(9)]. **Attached**

ATTACHED AS EXHIBIT H is the Map with the proposed transportation route(s) and road(s) for equipment, chemicals, or refuse products used or produced in the proposed oil and gas operations. [See § J(12)]. **Attached**

ATTACHED AS EXHIBIT I is a copy of the approved Texas Railroad Commission permit to drill (Form W-1), together with all attachments (also file copy of W-1 with City Secretary before commencement of drilling operations). [See § J(16) and (20)]. **Attached**

ATTACHED AS EXHIBIT J is a copy of the required TCEQ report as to depth of usable quality ground water. [See § **Attached**

ATTACHED AS EXHIBIT K (if applicable) is the list of alternative locations developed in consultation with the Oil & Gas Advisory Committee. [See § J(27)]. **Attached**

ATTACHED AS EXHIBIT L is the Fencing and Irrigation Plan. [See § J(30)]. **Attached variance request**

ATTACHED AS EXHIBIT M is the Road Repair Agreement and Letter of Credit/Certificate of Deposit/Surety Bond in the amount of at least \$25,000. Option (if applicable): Applicant would further state that no City-owned streets or alleys will be used by the Operator in connection with its oil and gas operations and as a result, requests a waiver from the Council of this requirement. Option B (if applicable): Because Applicant has three Road Repair Agreements in effect that have been approved by the Council, Applicant requests that the Council consolidate all agreements into one and is filing the necessary \$75,000 letter of credit/certificate of deposit/surety bond in conjunction with this request. [See § J(31)]. **Attached**

ATTACHED AS EXHIBIT N is the Concept Plan depicting the proposed Operations Site (which includes tanks, roads, power lines, and pipeline routes). [See § J(32)]. **Attached**

Description of Public Utilities required during (1) drilling and (2) operations:

(1) Drilling: **No public utilities will be needed during drilling operations.**

(2) Operations: **See Exhibit N and N-3**

Description of water source to be used during Drilling: **Water will be pulled from water wells existing on adjacent property and hauled if necessary.**

Description of all electric lines to production facilities (reference exhibits as necessary) [See § L(10)]: **See Exhibits G & N attached.**

Plan detailing construction, location, and closure of pits used for Drilling and Completion operations (attach exhibit if necessary) [See § J(35)]: **See Exhibit O - Pits will be deep buried in accordance with City of Midland requirements.**

#### V. Additional Required Exhibits

ATTACHED AS EXHIBIT P is the Letter of Credit/Certificate of Deposit in accordance with Subsection (K)(2). [See § J(18)]. **Attached**

ATTACHED AS EXHIBIT Q are Tax certificates from Midland Central Appraisal District to be submitted indicating that all taxes on personal and real property, including minerals, owned by Applicant are current. [See § J(29)]. **Attached**

ATTACHED AS EXHIBIT R is the required Insurance Certificate. [See § J(19) and § K(3)]. **Attached**

ATTACHED AS EXHIBIT S (if applicable) is the Drainage Plan approved by the City Engineer relating to Applicant's proposed operations. [See § J(21)]. **Attached**

ATTACHED AS EXHIBIT T is Applicant's Emergency Action Response Plan. [See § J(22)]. **See Exhibit T and Attachment T-1**

ATTACHED AS EXHIBIT U is Applicant's Hazardous Materials Management Plan, a copy of which has been submitted and is on file with the Midland Fire Department. [See § J(23)]. **Attached**



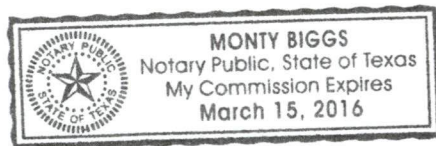
Callon Petroleum Operating Company

By: Jimmy Baggett  
Jimmy Baggett  
Operations Manager

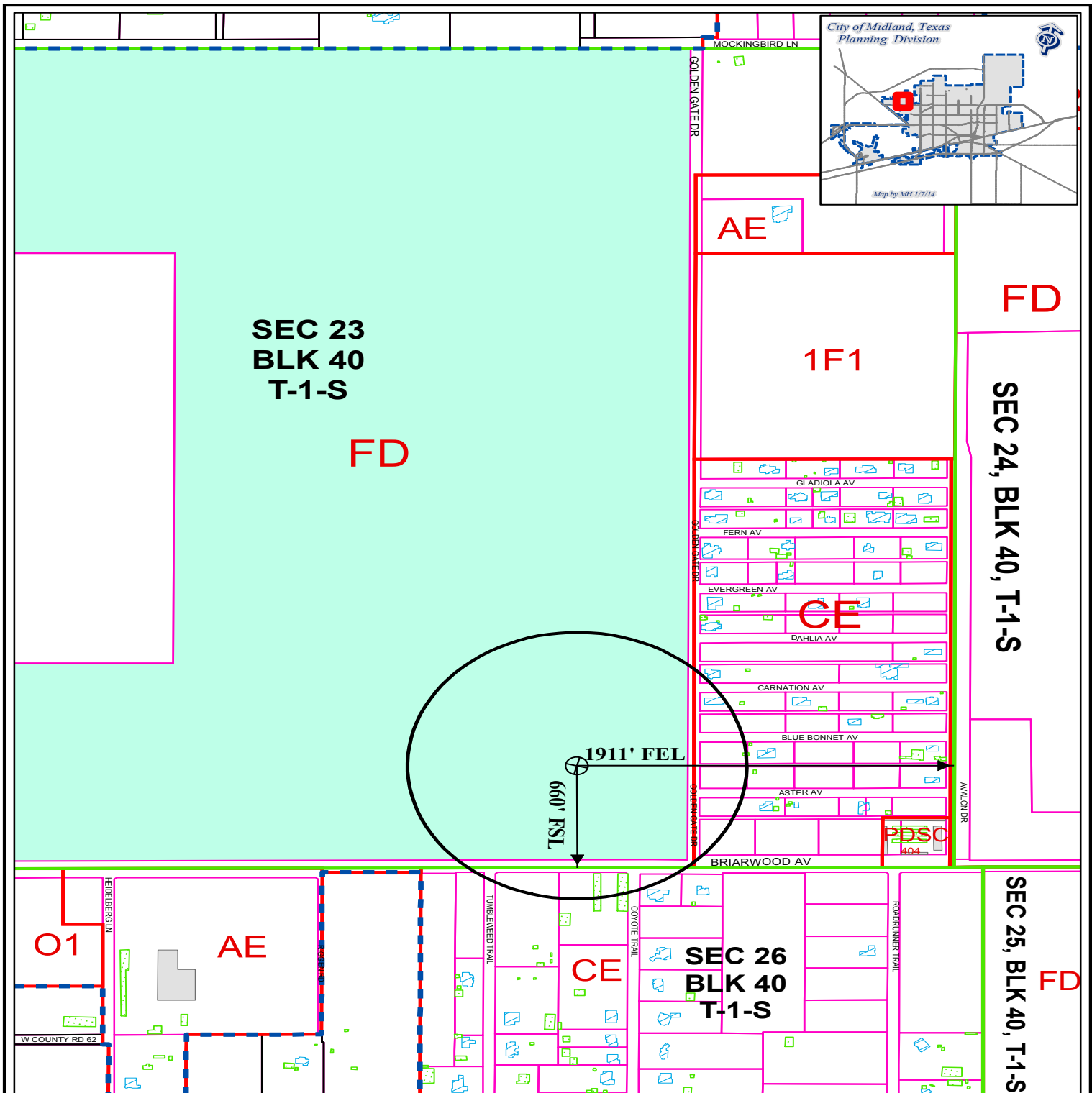
STATE OF TEXAS

COUNTY OF MIDLAND

This instrument was acknowledged before me on the 25<sup>th</sup> day of Nov., 2013 by Jimmy Baggett, Operations Manager for Callon Petroleum Operating Company, who personally appeared before me, and states that he has read the above application and attached exhibits and the statements therein are true and correct to the best of his knowledge.



[Signature]  
Notary Public – State of Texas



## LOCATION AND ZONING MAP

**O - 13 - 023**

**Scale: 1" = 700'**

Consider a request for a Permit to drill an Oil and Gas Well within the City Limits located 660' FSL and 1911' FEL, Section 23, Block 40, T-1-S, T & P RR Co. Survey, Midland County, Texas.

**Pecan Acres 23 #7**

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## LEGEND

|  |                |  |                 |  |                |
|--|----------------|--|-----------------|--|----------------|
|  | CITY PARCELS   |  | PUBLIC BLDGS    |  | CITY LIMITS    |
|  | COUNTY PARCELS |  | PRIVATE BLDGS   |  | 860 FT. BUFFER |
|  | ZONING         |  | ACCESSORY BLDGS |  | SURVEY SEC.    |

### ZONING DISTRICTS:

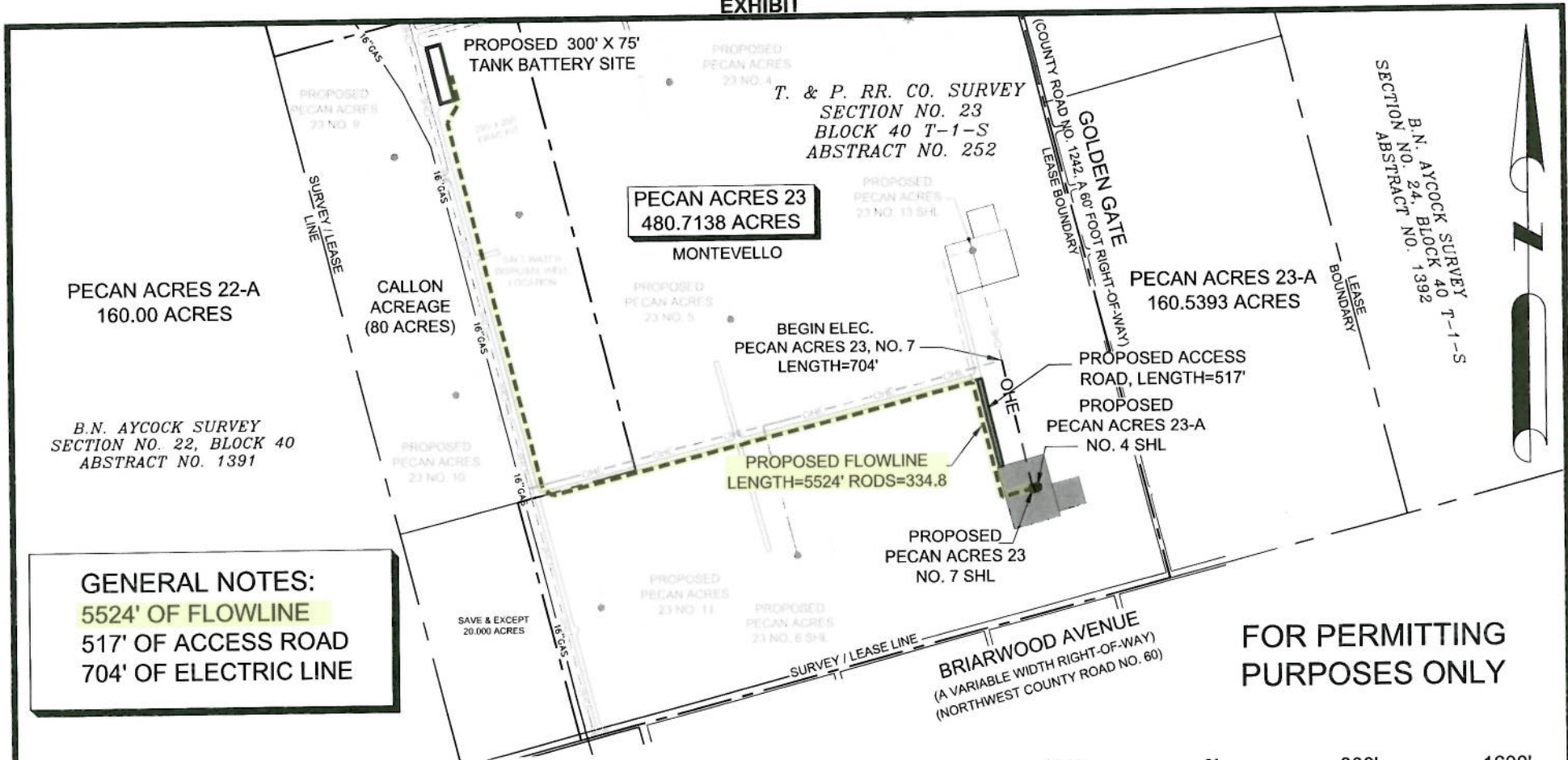
|               |                          |                   |                      |
|---------------|--------------------------|-------------------|----------------------|
| FD            | FUTURE DEVELOPMENT       | BP                | BUSINESS PARK        |
| PD            | PLANNED DISTRICT         | P                 | PARKING              |
| AE            | AGRICULTURE ESTATE       | O1, O2            | OFFICE               |
| 1F1, 1F2, 1F3 | ONE-FAMILY DWELLING      | NS                | NEIGHBORHOOD SERVICE |
| MH            | MOBILE HOME DWELLING     | LR1, LR2, LR3     | LOCAL RETAIL         |
| TH            | TOWNHOUSE DWELLING       | C1, C2, C3        | COMMERCIAL           |
| 2F            | TWO-FAMILY DWELLING      | IP, JP1, IP2, IP3 | INDUSTRIAL PARK      |
| MF1, MF2      | MULTIPLE FAMILY DWELLING | LI                | LIGHT INDUSTRY       |
|               |                          | HI                | HEAVY INDUSTRY       |



## 29.6



# EXHIBIT



- LEGEND**
- OHE— = PROPOSED ADDITIONAL OVERHEAD ELECTRIC LINES
  - = PROPOSED FLOWLINES
  - ===== = PROPOSED ADDITIONAL ACCESS ROADS
  - = PROPOSED WELL LOCATION

I HEREBY STATE THAT THIS PLAT SHOWS THE PROPOSED LOCATIONS AS SHOWN.

JAN - 7 2014

JAMES CURTIS YARGER  
REGISTERED PROFESSIONAL LAND SURVEYOR  
STATE OF TEXAS #5854



**Callon Petroleum Operating Company**

EXHIBIT SHOWING  
PROPOSED

**PECAN ACRES 23 NO. 7**

and

**PECAN ACRES 23-A NO. 4**

PROPOSED FLOWLINE, ACCESS ROAD AND ELECTRIC LINE  
LOCATIONS

CITY OF MIDLAND, MIDLAND COUNTY, TEXAS

|                |                |                                                     |      |
|----------------|----------------|-----------------------------------------------------|------|
| DRAWN BY: GG   | DATE: 04-30-12 | DWG. NO.                                            | REV. |
| CHECKED BY: CY | DATE: 04-30-12 | 1109036 PECAN ACRES 23 NO. 7 AND 23-A NO. 4 EXHIBIT | 1    |
| SCALE: 1"=800' | APP.:          | PAGE 1 OF 1                                         |      |

|                     |          |     |                           |     |
|---------------------|----------|-----|---------------------------|-----|
| 1                   | 05-03-12 | GG  | UPDATE PLAT PER RIVISIONS | CY  |
| REV.                | DATE     | BY: | DESCRIPTION               | CHK |
| PROJECT NO. 1109036 |          |     |                           |     |



403 West Loop 820, Suite 160  
Fort Worth, Texas 76108  
(817) 367-6900 ~ Fax (817) 367-1973

**FLOW LINE LOCATION**

**PECAN ACRES 23 #7**

**0-13-023**



# City Council Agenda

Approved for Agenda:  
rpatrick  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Steve Thorpe, Building Official

**SUBJECT:** Consider an ordinance adopting the 2012 International Building Code, with amendments; as the building code of the City of Midland.

---

## **Purpose:**

Consider an ordinance adopting the 2012 International Building Code, with amendments; as the building code of the City of Midland.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

None

## **Discussion:**

The proposed code and amendments have been on file in the office of the City Secretary since December 5, 2013. No comments regarding the adoption of this code and amendments have been received. This exceeds the minimum thirty (30) day public review and comment period required prior to City Council taking action to adopt the new code.

The 2012 edition of the International Building Code and the proposed amendments regulate the design, construction and inspection of building construction except one and two family dwellings within the city. The currently adopted code is the 2009 edition. The model codes are published in three-year cycles. Therefore this code is the most current available.

An effective date of April 1, 2014 is proposed. This will provide adequate time for notification to architects, engineers, designers, contractors and suppliers of any new requirements.



**ORDINANCE NO.**

**AN ORDINANCE AMENDING TITLE IV, "BUILDING REGULATIONS", CHAPTER 1, "BUILDING CODE", OF THE CITY CODE OF THE CITY OF MIDLAND, TEXAS, AND ADOPTING THE 2012 INTERNATIONAL BUILDING CODE AS THE BUILDING CODE OF THE CITY OF MIDLAND, TEXAS, FOR THE PURPOSE OF REGULATING THE CONSTRUCTION, ALTERATION, REPAIR, EQUIPMENT, USE AND OCCUPANCY, LOCATION, MAINTENANCE, REMOVAL AND DEMOLITION OF BUILDINGS AND STRUCTURES OR ANY APPURTENANCE CONNECTED OR ATTACHED TO SUCH BUILDING OR STRUCTURE; PROVIDING FOR THE INSPECTION OF SAID BUILDINGS OR STRUCTURES, PROVIDING FOR THE ISSUANCE OF PERMITS FOR THE CONSTRUCTION, ALTERATION, REPAIR, EQUIPMENT, USE AND OCCUPANCY, REMOVAL AND DEMOLITION OF SAID BUILDINGS OR STRUCTURES AND COLLECTION OF INSPECTION FEES THEREFOR; ESTABLISHING MINIMUM FLOOR ELEVATIONS FOR CERTAIN STRUCTURES; REQUIRING CASH DEPOSITS TO INSURE SITE CLEARANCE AFTER REMOVAL OR DEMOLITION OF STRUCTURES; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM FINE OR PENALTY OF TWO THOUSAND (\$2000.00) DOLLARS; AND ESTABLISHING AN EFFECTIVE DATE OF APRIL 1, 2014; AND ORDERING PUBLICATION**

**WHEREAS**, by Ordinance No. 8805, adopted July 13, 2010, the City Council adopted the 2009 Edition of the International Building Code as the Building Code of the City of Midland; and

**WHEREAS**, several changes and amendments to the International Building Code have been approved by the International Code Council, Inc., and incorporated into the 2012 International Building Code; and

**WHEREAS**, the Council has heretofore on November 26, 2013, approved the 2012 International Building Code as a public record in order that same be filed as a public record in the office of the City Secretary; and

**WHEREAS**, the Council finds it to be in the public interest to update the building regulations of the City to be more in line with currently accepted building practice;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE  
CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Title IV, "Building Regulations", Chapter 1, "Building Code", of the City Code of the City of Midland, Texas, is hereby amended to hereafter read as follows:

**4-1-1. Purpose.**

The purpose of this Chapter is to provide minimum standards, provisions and requirements for safe construction, alteration, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings, or structures within the City. All such buildings and structures hereafter constructed, altered, repaired, equipped, used and occupied, removed or demolished within the corporate limits of the City shall conform to the requirements of this Chapter and to the specifications, rules and regulations herein contained. (Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

**4-1-2. Code adopted.**

The specifications, rules and regulations entitled 2012 International Building Code together with appendices A,B,C and G as promulgated and published by the International Code Council, Inc, are hereby adopted as the Building Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.

**4-1-3. Changes and additions to adopted building code.**

Notwithstanding any provisions of this Chapter or said adopted Building Code to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following sections and provisions thereof shall hereafter read as follows, to wit:

101.1 Title. These regulations shall be known as the Building Code of the City of Midland, hereinafter referred to as "this code."

101.4.4 Property Maintenance. Delete Section 101.4.4 in its entirety.

103.2 Appointment. Delete 103.2 as written and substitute following:

103.2 Appointment. The Building Official, Assistant Building Official, Inspectors and other personnel shall be appointed in accordance with the personnel policies of the City and shall be subject to all personnel rules and regulations of the City of Midland.

105.1.1 Annual Permit. Delete 105.1.1 as written and substitute following:

105.1.1 Fence Permit Required. A building permit shall be obtained prior to the erection or construction of any fence or wall to be located within the front yard or the side yard adjacent to a street (public or private) of any lot or tract, as such yard is required by Title XI, Chapter 1, Zoning, of the Midland City Code.



105.1.2 Annual Permit Records. Delete 105.1.2 in its entirety.

105.2 Work exempt from permit. Delete the following numbers from the exemptions:

105.2 Delete no. 1, 2, and 6.

105.8 Add a new Section 105.8 as follows:

105.8 Contractor's Responsibilities:

(a) It shall be the duty of every contractor or builder, who is engaged in the construction, erection, alteration or repair of buildings or structures, residential or commercial, subject to the provisions of this Code, to give good and sufficient bond in the sum of ten thousand dollars (\$10,000.00) to be approved by the City Attorney, conditioned to conform to the Building Regulations of this Section, and other ordinances and laws of the City of Midland in reference to buildings and related construction and site requirements. The bond herein required shall include the bonds required for early clearance procedures as required by Section 9 of this Title and Chapter and with the sidewalk, driveway and curb bond required by this Code with no increase in amounts.

(b) No building permit shall be issued by the Building Official unless and until a bond as herein provided has been tendered to and approved by the Building Official by the person or firm requesting such permit.

(c) Nothing in this Code shall prevent a homeowner from maintaining, altering or adding to his home within his own property boundaries provided such work is done by himself for the exclusive benefit of his family. Such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees.

105.8.1 Add a new Section 105.8.1 as follows:

105.8.1 Construction Site Debris. It shall be the responsibility of each permit holder to make provisions for containment of building materials, construction debris, and all other trash and debris generated within the property boundaries. The particular method, which may include but is not limited to refuse containers, roll-offs, fenced areas or other types of wire enclosures, shall be specified by the applicant prior to obtaining a building permit. The applicant may specify City of Midland container service if available, provided it is a container assigned for use at the particular job site. Said container may only be used for materials for which it is suitable, as determined by the City Sanitation Division or as specified by Title 8, Chapter 6 of the Midland City Code. Blowing trash, paper, building material packaging, and other construction site related debris, allowed to collect or accumulate outside the property boundaries for which a permit has been issued, in other than an approved container, shall constitute a violation of this section of the City of Midland Code. Such violations shall be subject to enforcement provisions as provided for in the Building Code, including stop work order, revocation of permit and fine.

109.2 Schedule of Permit Fees. Add to the end of section the following, "See Fee Schedule Ordinance 8818. "

109.6 Refunds. Delete section 109.6 as written and substitute the following: Refunds shall be in accordance with Fee Schedule Ordinance 8818.

113.4 Add a new Section 113.4 as follows:

113.4 Terms of Office. Members of the Board shall serve four (4) year terms beginning and ending on September 30, of the appropriate years. The terms of office of the Board members shall be staggered so that no more than 1/3 of the Board is appointed or replaced in any 12-month period. The City Council may from time to time appoint members for terms of lesser duration than four (4) years when necessary in order to comply with the terms of this Code Section or to fill the remainder of an unexpired term. A member may be removed from office by the City Council for any reason. If a Board member is absent for more than 25% of the duly called meetings in any period of 12 consecutive months or absent for more than two (2) duly called meetings in any period of 12 consecutive months, whichever is greater, for any reason other than a medical reason which prevents the member's attendance, that member shall be disqualified and automatically removed from serving as a Board member. The term "duly called meetings" includes all meetings of the Board and all meetings of subcommittees of the Board on which the member serves.

1101.2 DESIGN. Amend Section 1101.2 Design to read as follows:

1101.2 DESIGN. Buildings and facilities shall be designed and constructed to be accessible in accordance with the Texas Accessibility Standards, pursuant to Article 9102, Texas Civil Statutes, as promulgated by the Texas Department of Licensing and Regulation.

3308.1.2 Add new Section 3308.1.2 as follows:

3308.1.2. Insurance Required. The person or persons in Section 3308.1 desiring to use streets or public property for the storage or handling of equipment shall provide the City with an owner's, landlord's, and tenant's liability policy of insurance naming the City as the named insured, with limits of not less than five hundred thousand dollars (\$500,000.00) bodily injury and one hundred thousand dollars (\$100,000.00) property damage, protecting the City from liability that is or may be imposed on it as owner of such street, sidewalk, or other public property under the laws of this State on account of or in any way arising out of any such use of such public streets, sidewalks or other public property, such insurance policy to remain in force and effect until such time as the use of such public property by such persons has ceased.

3308.1.3 Add new Section 3308.1.3 as follows:

3308.1.3 Street/Sidewalk Permit. Building permits shall not include permission to occupy any part of the public street, sidewalks or alleys with building materials or equipment without first obtaining a permit for the use of public streets, sidewalks or alleys from the Building Official before operations have commenced. The fee for said permit shall be per the Fee Schedule Ordinance 8818. The permit for street, sidewalk or alley occupancy shall be only for the duration of construction or such lesser time

as the Building Official may determine.

3308.1.4 Add new Section 3308.1.4 as follows:

3308.1.4 Waiver. Up to one-third ( 1/3) of the width of the street right of way adjacent to the property on which the building being erected and for which a permit has been issued may be occupied in connection with the building construction provided that the free flow of traffic is not significantly impeded. If the street in front of the property adjoining such building is to be used for similarly limited storage, a due waiver of claim against the applicable governing authority for damages on account of such use, issued by the owner of such property, must be filed with the Building Official before such use shall be allowed.

3308.1.5 Add new Section 3308.1.5 as follows:

3308.1.5 Street Repair - Special Permit Requirements

(a) When any application is made pursuant to the provisions of Section 105 of this Code for a permit for the construction, enlargement or alteration of any building or structure, the owner, authorized agent or contractor applying for such permit shall, as a condition to the granting of such permit, pay to the City the fee specified in subsection (b) hereof to cover the unusual wear and tear to public streets, alleys and/or sidewalks growing out of the construction activities performed by said applicant or anyone in any way under his or its supervision and direction, including the use, movement, parking, loading and/or placement of cranes and other heavy construction equipment and vehicles or trailers laden with construction materials.

(b) The fee specified in subsection (a) above shall be per the Fee Schedule Ordinance.

(c) In addition to the above, any damaged or deteriorated concrete, curb, gutter and paved sidewalk areas abutting the property of the construction site and associated with the project will be replaced or put in new condition by the applicant prior to issuance of final approval of the project by the Building Official.

(d) All proceeds from the special fee set out in subsection (b) above shall be credited to the Street Improvement Fund.

#### **4-1-4. Site Requirements.**

The following site requirements shall be satisfied or committed prior to a building permit being issued for any new construction or substantial addition to the development or redevelopment of a new parcel of land.

(A) Sidewalk construction and permits therefor required:

1. Sidewalks required. Sidewalks shall be constructed within all street rights of way adjacent to all tracts or lots at the time of their INITIAL DEVELOPMENT to the full length of the property line of the lot or tract involved. Sidewalks shall be constructed within all street rights of way adjacent to all lots or tracts, which were initially developed without sidewalks

when SUBSEQUENT DEVELOPMENT exceeds 25% of the existing floor area and also exceeds one thousand (1,000) square feet in floor area. On properties situated at the corner of intersections, sidewalks are required both on the front and side along the full length of the tract or lot involved on which development is being made and such sidewalks shall be connected to the street pavement, if existing, at all street intersections. Sidewalks will be located and constructed as specified in Section 9-4-1 of the City Code. No such sidewalks shall be constructed until a permit approved by the Director of Development Services of the City has been secured, as provided for in Title IX, "Public Ways and Property", Chapter 4, "Sidewalks, Driveways and Curbs", of the Midland City Code. If sidewalks, in good condition, exist adjacent to the developed property, newly constructed sidewalks must provide connections thereto.

The Building Official of the City shall not issue any final electrical or gas clearance or certificate of occupancy and completion until all sidewalks required to be constructed have been finally completed and approved by the Director of Development Services of the City, except pursuant to Section 4-1-9 of the Midland City Code.

2. Exception. Where either side of a street, between two (2) intersecting streets, is seventy-five percent (75%) or more developed and has no existing sidewalks, then no sidewalks shall be required in the remaining undeveloped portion. This exception shall also apply to cul-de-sacs which are seventy-five percent (75%) or more developed and have no existing sidewalks.

(B) Parking and loading areas:

1. Barriers required along streets and alleys. Where an off-street parking, loading or vehicle storage area is to be paved or modifications to such area are to be made adjacent to a public street or alley, the paved area shall not project into the public right of way unless a curb, multiple wheel stops, or other effective barrier(s) shall be erected to prevent parked or stored vehicles from encroaching into said right of way, except in one and two family developments. However, if existing conditions would make such a restriction unreasonably difficult to satisfy, the City Manager may issue a permit for an encroachment into the right of way of a street when he determines that the following conditions will be met:

(a) The encroachment will not create a traffic hazard and adequate space for pedestrian traffic will be maintained.

(b) Barriers as specified above are provided to prevent encroachment beyond the line authorized by the permit.

(c) The permit conditions of Section 10-1-10(A)5.(a)(1) are met.

Parking provided by encroachment into a public right-of-way shall not be considered off-street parking in determining satisfaction of any requirement for such parking.

2. Access to alleys. Where required or non-required parking spaces and loading spaces are permitted which depend upon an alley for access, the abutting property shall have a permanent opening of not more than twenty-five (25) feet (25) per separately owned parcel. All additional access shall be granted by joint alley use agreement authorized by the City Manager. Such agreement shall provide for a fee to the per the Fee Schedule Ordinance 8818 and shall be revocable by the City Manager upon his determination that the access must be revoked or impaired to accommodate some other public purpose. Such agreement shall be effective for one year from the date of issuance and shall automatically renew from year to year upon payment of the prescribed fee, as said fee may be amended from time to time, unless said agreement is earlier revoked as provided for herein above.

3. Parking, Loading Areas, and Traffic Patterns. A building permit shall be required for any new parking area or change in the arrangement of an existing parking area. Where any structure is to be built or improved, the permit may be considered part of the building permit for the structure. In applying for such permit, the applicant shall provide a site plan showing the location and arrangement of the parking areas, to include parking areas, aisles, driveways and abutting street paving, with locations of nearby median openings and street intersections. A permit shall not be given by the Building Official for the construction of any building or parking area where said building or parking area is to be changed and such change will affect or change the traffic pattern entering and exiting the property where such building or parking area is located, unless and until the Director of Development Services reviews such traffic patterns and makes appropriate recommendations as to the proper control of such traffic to provide safe entry to and exit from the abutting rights of way and to provide that the traffic capacity of the abutting rights of way is retained. The recommendations of the Director of Development Services shall be in accordance with all City Ordinances and City engineering specifications concerning traffic control and the use of the public rights of way, and such recommendations shall include the location, size and construction of entryways and exit ways along the rights of way abutting such property. All such recommendations of the Director of Development Services shall be conditions of the permit issued by the Building Official.

(C) Creation of a building site:

1. No permit for the construction of a building or buildings upon any tract or parcel of land shall be issued until a building site, building tract or building lot has been created by complying with one of the following conditions:

(a) The lot or tract is represented as a separate lot or tract on a plat of record, properly approved by the Planning and Zoning Commission and filed in the Plat Records of Midland County, Texas.

(b) The site, plot or tract is all or part of a site plan officially approved by the Planning and Zoning Commission or City Council, which site plan provides all utility and drainage easements, alleys, street and other public improvements necessary to meet the normal requirements for platting including the designation of building areas and access provisions, and such easements, alleys and streets have been required

and properly dedicated and the necessary public improvements provided.

(D) Refuse collection: Where dedicated alleys are not conveniently located for refuse service to a lot or tract, a building permit shall not be issued for such lot or tract until a plan for locations of refuse collection within the property and a guarantee of access to such locations has been submitted by the permit applicant or property owner and found satisfactory by the Utilities Director or his designated representative. Except upon specific permission of the Utilities Director, locations adjacent to public streets shall not be acceptable.

(E) Site plan review: In the event that Section 11-2-5(B) of this Code shall be applicable to the proposed development of a lot, no building permit shall be issued until approval of the site plan required by said Section 11-2-5(B) is obtained. (Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-5. Exceptions.**

Notwithstanding the provisions of Section 4-1-4, if it is shown to the satisfaction of the City Council that any of the requirements of said Section 4-1-4, if complied with, would work a hardship on the developer and that the requirement would not be in the best interest and general welfare of the public, the said City Council may make exception to, or grant variances from such requirements. Provided further that the Planning and Zoning Commission, in its review of subdivision plats, shall have the authority to waive the requirements for sidewalk construction adjacent to one or both sides of cul-de-sac or short loop streets only, in areas zoned for one-family or two-family dwellings. (Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-6. Minimum floor elevation.**

The finished first floor elevation of any residential building or structure hereafter constructed in the City shall be not less than twelve inches (12") above the grade established by the City for the top of the street curb at its lowest point abutting the lot or tract on which such building or structure is constructed. However, if a driveway, walkway or any other facility for ingress or egress is constructed on a lot or tract, for which the standard curb must be removed or lowered, the finished first floor elevation must be at least twelve inches (12") above the highest point of the top of the curb adjacent to the constructed driveway, walkway, ingress or egress. The condition that results in the highest floor elevation will govern the final first floor elevation. (Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-7. Minimum mobile home anchoring standards, flood prone areas.**

The following requirements shall be applicable to mobile homes placed within any special flood hazard area, as is shown on the current Department of Housing and Urban Development Flood Hazard Boundary Map for Midland, Texas, a copy of which is on file in the office of the City Secretary, and these requirements shall be in addition to any other requirements found in the adopted International Building Code:

(A) Over-the-top ties shall be provided at each of the four (4) corners of the mobile home, with two (2) additional ties per side at intermediate locations and mobile homes less than fifty feet (50') long requiring one (1) additional tie per side.

(B) Frame ties shall be provided at each corner of the mobile home with five (5) additional ties per side at intermediate points and mobile homes less than fifty feet (50') long requiring four (4) additional ties per side.

(C) All components of the anchoring system shall be capable of carrying a force of four thousand eight hundred (4,800) pounds.

(Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-8. Early clearance procedure.**

(A) Upon application from a contractor or appropriate party, the Building Official shall issue an early clearance permit for the connection of gas and electric utility service to a new residential structure and gas and electric utility connection and occupancy of a new commercial structure prior to the issuance of the certificate of occupancy and completion if the following conditions are met:

1. All facilities necessary for the connection of and distribution of utility service must be completed in conformity with the applicable Codes.

2. The applicant for such early clearance permit shall have on file with the Building Official a bond in the amount of ten thousand dollars (\$10,000) for all structures in a form approved by the City Attorney and collectable in the event the contractor either allows a residential structure to be occupied prior to the issuance of a certificate of occupancy and completion or fails to obtain a certificate of occupancy and completion for a commercial structure in a timely manner. Such bond shall be combined with the general contractor's bond required by Section 105.8 of the Building Code as amended by Section 4-1-3 of this Title and Chapter with no increase in amounts.

(B) In the event an applicant for an early clearance permit receives the same and shall subsequently violate its terms, or if one otherwise violates the requirements regarding obtaining a certificate of occupancy and completion, that applicant shall not be allowed any further building permits or early clearance permits until the permitted structure is brought into full Code compliance and issued a certificate of occupancy and completion.

(C) An early clearance permit shall be issued for one hundred eighty (180) days for commercial units and for ninety (90) days for residential units. Commercial unit permits may be renewed by the City Manager once for ninety (90) days upon showing of extenuating circumstances. On the expiration of the early clearance permit, the Building Official shall inspect the structure for its eligibility for issuance of a certificate of occupancy and completion. Should the building fail to qualify for a certificate of occupancy and completion, it must be vacated immediately.

(D) For purposes of this Section, the term "occupy" or "occupied" shall mean any use by or possession of a structure affected by this Section, including the mere use for storage of furniture, by any person other than the builder. This term shall also include any use by the builder other than for construction and building purposes.

(E) **Manufactured Home Skirting Deposit:** For any location and installation of a manufactured home as a fixed dwelling, where compliance with the use regulations



pertaining to such location in an "MH", Manufactured Home Dwelling District, is required, the owner of said manufactured home may make application to the Building Official for a certificate of completion of the installation prior to the installation of a continuous skirt with vents as required, provided the location and installation of said manufactured home according to all other applicable provisions of the Zoning Code and all construction codes has been completed, and provided further, the owner posts a deposit per the Fee Schedule Ordinance 8818. A forfeiture of the deposit shall occur in the event that a continuous skirt with vents has not been installed as required prior to the expiration of a period of thirty (30) days from the date of issuance of a certificate of completion. If prior to the expiration of said thirty (30) day period, the owner requests an inspection of the completed installation of a continuous skirt with vents and upon inspection the Building Official or his representative determines that the requirement for said skirt has been satisfied, the owner shall be entitled to a full refund of the deposit. However, in the event that the deposit is forfeited, the owner of the manufactured home is in no way released from the requirement of having continuous skirting installed. Any occupancy of a manufactured home which does not have the required continuous skirt with vents after the expiration of the thirty (30) day period shall constitute a violation of this Code.

(Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-9. Street improvement fee.**

(A) In addition to the building permit fees required by the City Building Code, and the City Residential Code, a separate street improvement fee shall be paid to the in accordance with the Fee Schedule Ordinance 8818. This fee applies to all new construction, additions, alterations and remodels. All proceeds from the street improvement fee shall be deposited in one budget account. The account shall be designated as the "Street Repair Improvement and New Street and Sidewalk Installation Fund." The fee is assessed at the time a building permit is issued by the City.

The purpose of the fund is to cover a portion of the unusual wear and tear to public streets, alleys and/or sidewalks growing out of construction activity and to cover a portion of the construction costs of unpaved public streets, (including curb and gutters), alleys and/or sidewalks.

This section is adopted under Section 395.081 of the Texas Local Government Code. The City of Midland will benefit from allowing the landowner to connect to the capital improvements while promoting the health, safety, and public welfare and providing for efficient and well-planned urban growth and development. All repairs or construction improvements adjoin or are within 11 miles of the developed property. The 11 miles is the specified distance required by Section 395.081.

(B) Any person wishing to appeal the payment of this fee may do so. Any person may appeal to the City Manager, or his designee, prior to paying the fee or after paying the fee. If a person wishes to appeal after payment of the fee, the person shall appeal to the City Manager, or his designee, in writing within ten calendar days of paying the fee. The City Manager, or his designee, shall provide a full and meaningful review process. The City Manager, or his designee, shall provide a fair opportunity for people to challenge the accuracy and legal validity of their fee obligation. The City Manager, or his designee, shall also provide a clear and certain remedy for any erroneous or unlawful fee collection to ensure that the opportunity to contest the fee

is a meaningful one. Options that the City Manager, or his designee, shall consider in providing a clear and certain remedy are a refund of any excess fee paid, as well as other factors such as ensuring that a person may continue the operation of his or her business. Any person may appeal to the City Manager, or his designee, if the person believes that he or she cannot afford the fees. The person may seek an exemption from all or part of the fee. The City shall not file criminal charges against any person if the street improvement fee is not paid. The City shall not file criminal charges against a person in an attempt to collect the Street Improvement fee.

The City Manager, or his designee, shall make his decision within ten days of receiving the appeal in writing. The City Manager, or his designee, shall ensure that a person has all rights under Section 395.081 of the Texas Local Government Code. A person shall incur no financial hardship by exercising his or her right to appeal.

(C) The purpose of this fee is to regulate the application and granting of building permits for members of the public that request such permits, and needed streets, alleys, and sidewalks to serve the community. Said fees shall not be demanded from the public by financial penalties, loss of livelihood, or damage to a business. Individuals who pay the fee will benefit in no less a way from the completion of public streets, alleys, and sidewalks, than any other member of the public. The expense of maintaining and installing public streets, alleys, and sidewalks, greatly outweighs whatever secondary revenue is collected through the generation of this permit fee.

(D) The City Council members of the CDBG Committee may prepare a schedule of unpaved public streets, alleys, and sidewalks for review by the City Council in January and June of each year. The Council may review said schedule and authorize and direct the installation and/or rehabilitation of paved public streets, alleys, or sidewalks on selected public property that meets the criteria of subsection (a) above. (Ord. No. 8393, §§ 2--6, 4-11-2006; Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8666, §§ 3--6, 9-9-2008)

**SECTION TWO.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION THREE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more

sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION FOUR.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$2000.00).

**SECTION FIVE.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

**SECTION SIX.** This ordinance shall become effective April 1, 2014.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting "AYE":

Council members voting "NAY":

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

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Jerry F. Morales, Mayor

ATTEST:

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Amy M. Turner, City Secretary

APPROVED AS TO CONTENT AND  
COMPLETENESS:

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Steven Thorpe, Building Official

APPROVED ONLY AS TO FORM:

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Keith Stretcher, City Attorney

# **Building Code Amendments**

## **Chapter 1 BUILDING CODE\***

### **4-1-1. Purpose.**

The purpose of this Chapter is to provide minimum standards, provisions and requirements for safe construction, alteration, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings, or structures within the City. All such buildings and structures hereafter constructed, altered, repaired, equipped, used and occupied, removed or demolished within the corporate limits of the City shall conform to the requirements of this Chapter and to the specifications, rules and regulations herein contained.

(Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

### **4-1-2. Code adopted.**

**The specifications, rules and regulations entitled 2012 International Building Code together with appendices A,B,C and G as promulgated and published by the International Code Council, Inc, are hereby adopted as the Building Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.**

### **4-1-3. Changes and additions to adopted building code.**

Notwithstanding any provisions of this Chapter or said adopted Building Code to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following sections and provisions thereof shall hereafter read as follows, to wit:

*101.1 Title.* These regulations shall be known as the Building Code of the City of Midland, hereinafter referred to as "this code."

**101.4.4 Property Maintenance.** Delete Section **101.4.4** in its entirety.

*103.2 Appointment.* Delete 103.2 as written and substitute following:

103.2 Appointment. The Building Official, Assistant Building Official, Inspectors and other personnel shall be appointed in accordance with the personnel policies of the City and shall be subject to all personnel rules and regulations of the City of Midland.

*105.1.1 Annual Permit.* Delete 105.1.1 as written and substitute following:

*105.1.1 Fence Permit Required.* A building permit shall be obtained prior to the erection or construction of any fence or wall to be located within the front yard or the side yard adjacent to a street (public or private) of any lot or tract, as such yard is required by Title XI, Chapter 1, Zoning, of the Midland City Code.

*105.1.2 Annual Permit Records.* Delete 105.1.2 in its entirety.

*105.2 Work Exempt from Permit.* Delete the following numbers from the exemptions:

105.2 Delete no. 1, 2, and 6.

*105.8* Add a new Section 105.8 as follows:

*105.8 Contractor's Responsibilities:*

(a) It shall be the duty of every contractor or builder, who is engaged in the construction, erection, alteration or repair of buildings or structures, residential or commercial, subject to the provisions of this Code, to give good and sufficient bond in the sum of ten thousand dollars (\$10,000.00) to be approved by the City Attorney, conditioned to conform to the Building Regulations of this Section, and other ordinances and laws of the City of Midland in reference to buildings and related construction and site requirements. The bond herein required shall include the bonds required for early clearance procedures as required by Section 9 of this Title and Chapter and with the sidewalk, driveway and curb bond required by this Code with no increase in amounts.

(b) No building permit shall be issued by the Building Official unless and until a bond as herein provided has been tendered to and approved by the Building Official by the person or firm requesting such permit.

(c) Nothing in this Code shall prevent a homeowner from maintaining, altering or adding to his home within his own property boundaries provided such work is done by himself for the exclusive benefit of his family. Such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees therefore.

*105.8.1* Add a new Section 105.8.1 as follows:

*105.8.1 Construction Site Debris.* It shall be the responsibility of each permit holder to make provisions for containment of building materials, construction debris, and all other trash and debris generated within the property boundaries. The particular method, which may include but is not limited to refuse containers, roll-offs, fenced areas or other types of wire enclosures, shall be specified by the applicant prior to obtaining a building permit. The applicant may specify City of Midland container service if available, provided it is a container assigned for use

at the particular job site. Said container may only be used for materials for which it is suitable, as determined by the City Sanitation Division or as specified by Title 8, Chapter 6 of the Midland City Code. Blowing trash, paper, building material packaging, and other construction site related debris, allowed to collect or accumulate outside the property boundaries for which a permit has been issued, in other than an approved container, shall constitute a violation of this section of the City of Midland Code. Such violations shall be subject to enforcement provisions as provided for in the Building Code, including stop work order, revocation of permit and fine.

*109.2 Schedule of Permit Fees.* : add to the end of section the following, "See Fee Schedule Ordinance 8818. "

*109.6 Refunds.* Delete section 109.6 as written and substitute the following: Refunds shall be in accordance with Fee Schedule Ordinance 8818.

*113.4* Add a new Section-113.4 as follows:-

*113.4 Terms of Office.* Members of the Board shall serve four (4) year terms beginning and ending on September 30, of the appropriate years. The terms of office of the Board members shall be staggered so that no more than 1/3 of the Board is appointed or replaced in any 12-month period. The City Council may from time to time appoint members for terms of lesser duration than four (4) years when necessary in order to comply with the terms of this Code Section or to fill the remainder of an unexpired term. A member may be removed from office by the City Council for any reason. If a Board member is absent for more than 25% of the duly called meetings in any period of 12 consecutive months or absent for more than two (2) duly called meetings in any period of 12 consecutive months, whichever is greater, for any reason other than a medical reason which prevents the member's attendance, that member shall be disqualified and automatically removed from serving as a Board member. The term "duly called meetings" includes all meetings of the Board and all meetings of subcommittees of the Board on which the member serves.

*1101.2 Design.* Amend Section 1101.2 Design to read as follows:

*1101.2 Design.* Buildings and facilities shall be designed and constructed to be accessible in accordance with the Texas Accessibility Standards, pursuant to Article 9102, Texas Civil Statutes, as promulgated by the Texas Department of Licensing and Regulation.

*3308.1.2* Add new Section 3308.1.2 as follows:

*3308.1.2. Insurance Required.* The person or persons in Section 3308.1 desiring to use streets or public property for the storage or handling of equipment shall provide the City with an owner's, landlord's, and tenant's liability policy of insurance naming the City as the named insured, with limits of not less than five

hundred thousand dollars (\$500,000.00) bodily injury and one hundred thousand dollars (\$100,000.00) property damage, protecting the City from liability that is or may be imposed on it as owner of such street, sidewalk, or other public property under the laws of this State on account of or in any way arising out of any such use of such public streets, sidewalks or other public property, such insurance policy to remain in force and effect until such time as the use of such public property by such persons has ceased.

**3308.1.3** Add new Section 3308.1.3 as follows:

**3308.1.3 Street/Sidewalk Permit.** Building permits shall not include permission to occupy any part of the public street, sidewalks or alleys with building materials or equipment without first obtaining a permit for the use of public streets, sidewalks or alleys from the Building Official before operations have commenced. The fee for said permit shall be per the Fee Schedule Ordinance 8818. The permit for street, sidewalk or alley occupancy shall be only for the duration of construction or such lesser time as the Building Official may determine.

**3308.1.4** Add new Section 3308.1.4 as follows:

**3308.1.4 Waiver.** Up to one-third ( 1/3) of the width of the street right of way adjacent to the property on which the building being erected and for which a permit has been issued may be occupied in connection with the building construction provided that the free flow of traffic is not significantly impeded. If the street in front of the property adjoining such building is to be used for similarly limited storage, a due waiver of claim against the applicable governing authority for damages on account of such use, issued by the owner of such property, must be filed with the Building Official before such use shall be allowed.

**3308.1.5** Add new Section 3308.1.5 as follows:

**3308.1.5 Street Repair - Special Permit Requirements**

(a) When any application is made pursuant to the provisions of Section 105 of this Code for a permit for the construction, enlargement or alteration of any building or structure, the owner, authorized agent or contractor applying for such permit shall, as a condition to the granting of such permit, pay to the City the fee specified in subsection (b) hereof to cover the unusual wear and tear to public streets, alleys and/or sidewalks growing out of the construction activities performed by said applicant or anyone in any way under his or its supervision and direction, including the use, movement, parking, loading and/or placement of cranes and other heavy construction equipment and vehicles or trailers laden with construction materials.

(b) The fee specified in subsection (a) above shall be per the Fee Schedule Ordinance.

(c) In addition to the above, any damaged or deteriorated concrete, curb, gutter and paved sidewalk areas abutting the property of the construction site and associated with the project will be replaced or put in new condition by the



applicant prior to issuance of final approval of the project by the Building Official.

(d) All proceeds from the special fee set out in subsection (b) above shall be credited to the Street Improvement Fund.

#### **4-1-4. Site requirements.**

The following site requirements shall be satisfied or committed prior to a building permit being issued for any new construction or substantial addition to the development or redevelopment of a new parcel of land.

(A) *Sidewalk construction and permits therefor required:*

1. *Sidewalks required.* Sidewalks shall be constructed within all street rights of way adjacent to all tracts or lots at the time of their INITIAL DEVELOPMENT to the full length of the property line of the lot or tract involved. Sidewalks shall be constructed within all street rights of way adjacent to all lots or tracts, which were initially developed without sidewalks when SUBSEQUENT DEVELOPMENT exceeds 25% of the existing floor area and also exceeds one thousand (1,000) square feet in floor area. On properties situated at the corner of intersections, sidewalks are required both on the front and side along the full length of the tract or lot involved on which development is being made and such sidewalks shall be connected to the street pavement, if existing, at all street intersections. Sidewalks will be located and constructed as specified in Section 9-4-1 of the City Code. No such sidewalks shall be constructed until a permit approved by the Director of Development Services of the City has been secured, as provided for in Title IX, "Public Ways and Property", Chapter 4, "Sidewalks, Driveways and Curbs", of the Midland City Code. If sidewalks, in good condition, exist adjacent to the developed property, newly constructed sidewalks must provide connections thereto.

The Building Official of the City shall not issue any final electrical or gas clearance or certificate of occupancy and completion until all sidewalks required to be constructed have been finally completed and approved by the Director of Development Services of the City, except pursuant to Section 4-1-9 of the Midland City Code.

2. *Exception.* Where either side of a street, between two (2) intersecting streets, is seventy-five percent (75%) or more developed and has no existing sidewalks, then no sidewalks shall be required in the remaining undeveloped portion. This exception shall also apply to cul-de-sacs which are seventy-five percent (75%) or more developed and have no existing sidewalks.

(B) *Parking and loading areas:*

1. *Barriers required along streets and alleys.* Where an off-street parking, loading or vehicle storage area is to be paved or modifications to such area are to be made adjacent to a public street or alley, the paved area shall not project into the public right of way unless a curb, multiple wheel stops, or other effective barrier(s) shall be erected to prevent parked or stored vehicles from encroaching into said right of way, except in one and two family developments. However, if existing conditions would make such a restriction unreasonably difficult to satisfy, the City Manager may issue a permit for an encroachment into the right of way of a street when he determines that the following conditions will be met:

(a) The encroachment will not create a traffic hazard and adequate space for pedestrian traffic will be maintained.

(b) Barriers as specified above are provided to prevent encroachment beyond the line authorized by the permit.

(c) The permit conditions of Section 10-1-10(A)5.(a)(1) are met.

Parking provided by encroachment into a public right-of-way shall not be considered off-street parking in determining satisfaction of any requirement for such parking.

2. *Access to alleys.* Where required or non-required parking spaces and loading spaces are permitted which depend upon an alley for access, the abutting property shall have a permanent opening of not more than twenty-five (25) feet (25) per separately owned parcel. All additional access shall be granted by joint alley use agreement authorized by the City Manager. Such agreement shall provide for a fee to the per the Fee Schedule Ordinance 8818 and shall be revocable by the City Manager upon his determination that the access must be revoked or impaired to accommodate some other public purpose. Such agreement shall be effective for one year from the date of issuance and shall automatically renew from year to year upon payment of the prescribed fee, as said fee may be amended from time to time, unless said agreement is earlier revoked as provided for herein above.

3. *Parking, Loading Areas, and Traffic Patterns.* A building permit shall be required for any new parking area or change in the arrangement of an existing parking area. Where any structure is to be built or improved, the permit may be considered part of the building permit for the structure. In applying for such permit, the applicant shall provide a site plan showing the location and arrangement of the parking areas, to include parking areas, aisles, driveways and abutting street paving, with locations of nearby median openings and street intersections. A permit shall not be given by the Building Official for the construction of any building or parking area where said building or parking area is to be changed and such change will affect or change the traffic pattern entering and exiting the property where such building or parking area is located, unless and until the Director of Development Services reviews such traffic patterns and makes appropriate recommendations as to the proper control of such traffic to provide safe entry to and exit from the abutting rights of way and to provide that the traffic capacity of the abutting rights of way is retained. The recommendations of the Director of Development Services shall be in accordance with all City Ordinances and City engineering specifications concerning traffic control and the use of the public rights of way, and such recommendations shall include the location, size and construction of entryways and exit ways along the rights of way abutting such property. All such recommendations of the Director of Development Services shall be conditions of the permit issued by the Building Official.

(C) *Creation of a building site:*

1. No permit for the construction of a building or buildings upon any tract or parcel of land shall be issued until a building site, building tract or building lot has been created by complying with one of the following conditions:

(a) The lot or tract is represented as a separate lot or tract on a plat of record, properly approved by the Planning and Zoning Commission and filed in the Plat Records of Midland County, Texas.

(b) The site, plot or tract is all or part of a site plan officially approved by the Planning and Zoning Commission or City Council, which site plan provides all utility and drainage easements, alleys, street and other public improvements necessary to meet the normal

requirements for platting including the designation of building areas and access provisions, and such easements, alleys and streets have been required and properly dedicated and the necessary public improvements provided.

(D) *Refuse collection*: Where dedicated alleys are not conveniently located for refuse service to a lot or tract, a building permit shall not be issued for such lot or tract until a plan for locations of refuse collection within the property and a guarantee of access to such locations has been submitted by the permit applicant or property owner and found satisfactory by the Utilities Director or his designated representative. Except upon specific permission of the Utilities Director, locations adjacent to public streets shall not be acceptable.

(E) *Site plan review*: In the event that Section 11-2-5(B) of this Code shall be applicable to the proposed development of a lot, no building permit shall be issued until approval of the site plan required by said Section 11-2-5(B)8 is obtained.

(Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-5. Exceptions.**

Notwithstanding the provisions of Section 4-1-4, if it is shown to the satisfaction of the City Council that any of the requirements of said Section 4-1-4, if complied with, would work a hardship on the developer and that the requirement would not be in the best interest and general welfare of the public, the said City Council may make exception to, or grant variances from such requirements. Provided further that the Planning and Zoning Commission, in its review of subdivision plats, shall have the authority to waive the requirements for sidewalk construction adjacent to one or both sides of cul-de-sac or short loop streets only, in areas zoned for one-family or two-family dwellings.

(Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-6. Minimum floor elevation.**

The finished first floor elevation of any residential building or structure hereafter constructed in the City shall be not less than twelve inches (12") above the grade established by the City for the top of the street curb at its lowest point abutting the lot or tract on which such building or structure is constructed. However, if a driveway, walkway or any other facility for ingress or egress is constructed on a lot or tract, for which the standard curb must be removed or lowered, the finished first floor elevation must be at least twelve inches (12") above the highest point of the top of the curb adjacent to the constructed driveway, walkway, ingress or egress. The condition that results in the highest floor elevation will govern the final first floor elevation.

(Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-7. Minimum mobile home anchoring standards, floodprone areas.**

The following requirements shall be applicable to mobile homes placed within any special flood hazard area, as is shown on the current Department of Housing and Urban Development Flood Hazard Boundary Map for Midland, Texas, a copy of which is on file in the office of the City Secretary, and these requirements shall be in addition to any other requirements found in the adopted International Building Code:

- (A) Over-the-top ties shall be provided at each of the four (4) corners of the mobile home, with two (2) additional ties per side at intermediate locations and mobile homes less than fifty feet (50') long requiring one (1) additional tie per side.
- (B) Frame ties shall be provided at each corner of the mobile home with five (5) additional ties per side at intermediate points and mobile homes less than fifty feet (50') long requiring four (4) additional ties per side.
- (C) All components of the anchoring system shall be capable of carrying a force of four thousand eight hundred (4,800) pounds.
- (Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-8. Early clearance procedure.**

(A) Upon application from a contractor or appropriate party, the Building Official shall issue an early clearance permit for the connection of gas and electric utility service to a new residential structure and gas and electric utility connection and occupancy of a new commercial structure prior to the issuance of the certificate of occupancy and completion if the following conditions are met:

1. All facilities necessary for the connection of and distribution of utility service must be completed in conformity with the applicable Codes.
2. The applicant for such early clearance permit shall have on file with the Building Official a bond in the amount of ten thousand dollars (\$10,000) for all structures in a form approved by the City Attorney and collectable in the event the contractor either allows a residential structure to be occupied prior to the issuance of a certificate of occupancy and completion or fails to obtain a certificate of occupancy and completion for a commercial structure in a timely manner. Such bond shall be combined with the general contractor's bond required by Section 105.8 of the Building Code as amended by Section 4-1-3 of this Title and Chapter with no increase in amounts.

(B) In the event an applicant for an early clearance permit receives the same and shall subsequently violate its terms, or if one otherwise violates the requirements regarding obtaining a certificate of occupancy and completion, that applicant shall not be allowed any further building permits or early clearance permits until the permitted structure is brought into full Code compliance and issued a certificate of occupancy and completion.

(C) An early clearance permit shall be issued for one hundred eighty (180) days for commercial units and for ninety (90) days for residential units. Commercial unit permits may be renewed by the City Manager once for ninety (90) days upon showing of extenuating circumstances. On the expiration of the early clearance permit, the Building Official shall inspect the structure for its eligibility for issuance of a certificate of occupancy and completion. Should the building fail to qualify for a certificate of occupancy and completion, it must be vacated immediately.

(D) For purposes of this Section, the term "occupy" or "occupied" shall mean any use by or possession of a structure affected by this Section, including the mere use for storage of furniture, by any person other than the builder. This term shall also include any use by the builder other than for construction and building purposes.

(E) Manufactured Home Skirting Deposit: For any location and installation of a manufactured home as a fixed dwelling, where compliance with the use regulations pertaining to such location in an "MH", Manufactured Home Dwelling District, is required, the owner of said manufactured home may make application to the Building

Official for a certificate of completion of the installation prior to the installation of a continuous skirt with vents as required, provided the location and installation of said manufactured home according to all other applicable provisions of the Zoning Code and all construction codes has been completed, and provided further, the owner posts a deposit per the Fee Schedule Ordinance 8818. A forfeiture of the deposit shall occur in the event that a continuous skirt with vents has not been installed as required prior to the expiration of a period of thirty (30) days from the date of issuance of a certificate of completion. If prior to the expiration of said thirty (30) day period, the owner requests an inspection of the completed installation of a continuous skirt with vents and upon inspection the Building Official or his representative determines that the requirement for said skirt has been satisfied, the owner shall be entitled to a full refund of the deposit. However, in the event that the deposit is forfeited, the owner of the manufactured home is in no way released from the requirement of having continuous skirting installed. Any occupancy of a manufactured home which does not have the required continuous skirt with vents after the expiration of the thirty (30) day period shall constitute a violation of this Code.

(Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8667, § 1, 9-9-2008)

#### **4-1-9. Street improvement fee.**

(A) In addition to the building permit fees required by the City Building Code, and the City Residential Code, a separate street improvement fee shall be paid to the in accordance with the Fee Schedule Ordinance 8818. This fee applies to all new construction, additions, alterations and remodels. All proceeds from the street improvement fee shall be deposited in one budget account. The account shall be designated as the "Street Repair Improvement and New Street and Sidewalk Installation Fund." The fee is assessed at the time a building permit is issued by the City.

The purpose of the fund is to cover a portion of the unusual wear and tear to public streets, alleys and/or sidewalks growing out of construction activity and to cover a portion of the construction costs of unpaved public streets, (including curb and gutters), alleys and/or sidewalks.

This section is adopted under Section 395.081 of the Texas Local Government Code. The City of Midland will benefit from allowing the landowner to connect to the capital improvements while promoting the health, safety, and public welfare and providing for efficient and well-planned urban growth and development. All repairs or construction improvements adjoin or are within 11 miles of the developed property. The 11 miles is the specified distance required by Section 395.081.

(B) Any person wishing to appeal the payment of this fee may do so. Any person may appeal to the City Manager, or his designee, prior to paying the fee or after paying the fee. If a person wishes to appeal after payment of the fee, the person shall appeal to the City Manager, or his designee, in writing within ten calendar days of paying the fee. The City Manager, or his designee, shall provide a full and meaningful review process. The City Manager, or his designee, shall provide a fair opportunity for people to challenge the accuracy and legal validity of their fee obligation. The City Manager, or his designee, shall also provide a clear and certain remedy for any erroneous or unlawful fee collection to ensure that the opportunity to contest the fee is a meaningful one. Options that the City Manager, or his designee, shall consider in providing a clear and certain remedy are a

refund of any excess fee paid, as well as other factors such as ensuring that a person may continue the operation of his or her business. Any person may appeal to the City Manager, or his designee, if the person believes that he or she cannot afford the fees. The person may seek an exemption from all or part of the fee. The City shall not file criminal charges against any person if the street improvement fee is not paid. The City shall not file criminal charges against a person in an attempt to collect the Street Improvement fee. The City Manager, or his designee, shall make his decision within ten days of receiving the appeal in writing. The City Manager, or his designee, shall ensure that a person has all rights under Section 395.081 of the Texas Local Government Code. A person shall incur no financial hardship by exercising his or her right to appeal.

(C) The purpose of this fee is to regulate the application and granting of building permits for members of the public that request such permits, and needed streets, alleys, and sidewalks to serve the community. Said fees shall not be demanded from the public by financial penalties, loss of livelihood, or damage to a business. Individuals who pay the fee will benefit in no less a way from the completion of public streets, alleys, and sidewalks, than any other member of the public. The expense of maintaining and installing public streets, alleys, and sidewalks, greatly outweighs whatever secondary revenue is collected through the generation of this permit fee.

(D) The City Council members of the CDBG Committee **may** prepare a schedule of unpaved public streets, alleys, and sidewalks for review by the City Council in January and June of each year. The Council may review said schedule and authorize and direct the installation and/or rehabilitation of paved public streets, alleys, or sidewalks on selected public property that meets the criteria of subsection (a) above.

(Ord. No. 8393, §§ 2--6, 4-11-2006; Ord. No. 8609, § 1, 2-12-2008; Ord. No. 8666, §§ 3--6, 9-9-2008)



# City Council Agenda

Approved for Agenda:  
rpatrick  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Steve Thorpe, Building Official

**SUBJECT:** Consider an ordinance adopting the 2012 International Plumbing Code, with amendments; as the plumbing code of the City of Midland.

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## **Purpose:**

Consider an ordinance adopting the 2012 International Plumbing Code, with amendments; as the plumbing code of the City of Midland.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

none

## **Discussion:**

The proposed code and amendments have been on file in the office of the City Secretary since November 27, 2013. No comments regarding the adoption of this code and amendments have been received. This exceeds the minimum thirty (30) day public review and comment period required prior to City Council taking action to adopt the new code.

The 2012 edition of the International Plumbing Code and the proposed amendments regulate the design, construction and inspection of plumbing systems except in one and two family dwellings within the city. The currently adopted code is the 2009 edition. The model codes are published in three-year cycles. Therefore this code is the most current available.

An effective date of April 1, 2014 is proposed. This will provide adequate time for notification to architects, engineers, designers, contractors and suppliers of any new requirements.





**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE AMENDING TITLE IV, "BUILDING REGULATIONS", CHAPTER 3, "PLUMBING CODE", OF THE CITY CODE OF THE CITY OF MIDLAND, TEXAS, AND ADOPTING THE 2012 INTERNATIONAL PLUMBING CODE AS THE PLUMBING CODE OF THE CITY OF MIDLAND FOR THE PURPOSE OF REGULATING THE INSTALLATION, ALTERATION, AND MAINTENANCE OF ALL PIPING AND PLUMBING WITHIN THE CORPORATE LIMITS OF THE CITY OF MIDLAND; PROVIDING FOR THE INSPECTION OF SAID PIPING AND PLUMBING; PROVIDING FOR THE ISSUANCE OF PERMITS FOR THE INSTALLATION OF SAID PIPING AND THE COLLECTION OF INSPECTION FEES THEREFOR; PROVIDING FOR THE BONDING OF PERSONS ENGAGED IN THE BUSINESS OF INSTALLING, REPAIRING AND MAINTAINING SAID PIPING OR PLUMBING; PROVIDING FOR APPEALS; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2000.00); ESTABLISHING AN EFFECTIVE DATE OF APRIL 1, 2014; AND ORDERING PUBLICATION**

**WHEREAS**, by Ordinance No. 8827, adopted August 10, 2010, the City Council adopted the 2009 Edition of the International Plumbing Code as the Plumbing Code of the City of Midland; and

**WHEREAS**, several changes and amendments have been made to the International Plumbing Code of 2012 and are incorporated into the 2012 International Plumbing Code; and

**WHEREAS**, the Council has heretofore on November 26, 2013 approved the 2012 International Plumbing Code as a public record in order that same be filed as a public record in the office of the City Secretary; and

**WHEREAS**, the City Council of the City of Midland finds it to be in the public interest to update the Plumbing Code regulations of the City of Midland to be in line with currently accepted practices;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Title IV, "Building Regulations", Chapter 3, "Plumbing Code", of the City Code of the City of Midland, Texas, is hereby amended to hereafter read as follows:

**4-3-1. Purpose.**

The purpose of this Chapter is to provide minimum standards provisions and requirements for safe installation of plumbing and piping in the City. All such plumbing and piping hereafter installed, replaced, maintained or repaired within the corporate limits of the City shall conform to the requirements of this Chapter and to the specifications, rules and regulations herein.

**4-3-2. Code adopted.**

The specifications, rules and regulations entitled " 2012 International Plumbing Code, together with appendices B, C, D, E and F, as promulgated and published by the International Code Council, Inc, are hereby adopted as the Plumbing Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.

**4-3-3. Changes and additions to adopted plumbing code.**

Notwithstanding any revisions of this Chapter or said adopted "Plumbing Code" to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following sections and provisions thereof shall hereafter read as follows:

101.1 Title. Amend Section 101.1 to read as follows:

101.1 Title. These regulations shall be known as the International Plumbing Code of the City of Midland hereinafter referred to as "this code."

106.1.1 Irrigators and home owners. Add new Section 106.1.1 to read as follows:

106.1.1. Irrigators and Home Owners.

(A) Notwithstanding any provisions of this Code to the contrary, any "licensed irrigator" or "licensed installer", as defined in Tex. Water Code § 34.001, shall be allowed to make connections to private or public raw or potable water supply or water supply systems. However, any such person desiring to make such connection shall be subject to the same regulations, requirements and penalties imposed by this Code upon master plumbers doing like work, and any work shall conform to the specifications, rules and regulations contained herein. Any such connection shall be considered to be "plumbing" as defined in Section 202 herein.

(B) Nothing in this Code shall prevent a homeowner from extending, replacing, altering or repairing a plumbing system within his own property boundaries providing such work is done by himself and is used exclusively by him or his family. Such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be

construed as exempting any such property owner from obtaining a permit and paying the required fees.

106.2 Add new exemption 3 to read as follows:

106.2 Exempt Work.

3. Repair of routine under slab water leaks may be made without obtaining a permit or an inspection.

106.4.1 Add new Section 106.4.1 to read as follows:

106.4.1 Bond Required. Before any person shall engage in the business of plumbing in the City, he shall first obtain the required State license and deposit with the City a good and sufficient bond in the sum of Ten Thousand Dollars (\$10,000.00) to be approved by the City Attorney, or provide proof of insurance in the amount of \$300,000.00 in accordance with Sec. 15(b) of the State of Texas Plumbing License Law. Said bond shall be conditioned that the person engaged in the plumbing business will faithfully observe all the laws pertaining to plumbing, drain laying, blasting and excavating; further, that the City shall be indemnified and saved harmless from all claims arising from accidents and damage of any character whatsoever caused by the negligence of such person engaged in the plumbing business, or by their agents or employees and that such person will maintain in a safe condition for a period of one (1) year all ditches and excavations which may be opened in the performance of any plumbing work, and further that all dirt and other material excavated will be replaced in a good condition with similar materials. Where such excavation is made in an unpaved street, or any street paved with chert or macadam the word "street" as herein used, shall apply to sidewalks, curbs, gutters and street paving.

106.6.2 Fee Schedule. Amend Section 106.6.2 to read as follows: The fees for all plumbing work shall be as indicated in the Fee Schedule Ordinance 8818.

106.6.3 Fee Refunds. Delete Section 106.6.3 in its entirety and insert the following:

106.6.3 Refunds shall be in accordance with Fee Schedule Ordinance 8818.

108.4 Violation Penalties. Delete Section 108.4 in its entirety.

108.5 Stop Work Orders. Amend Section 108.5 to read as follows:

108.5 Stop Work Orders. Upon notice from the code official, work on any plumbing system that is being done contrary to the provisions of this code or in a dangerous or unsafe manner shall immediately cease. Such notice shall be in writing and shall be given to the owner of the property, or to the owner's agent, or to the person doing the work. The notice shall state the conditions under which work is authorized to resume. Where an emergency exists, the code official shall not be required to give a written notice prior to stopping the work. Any person who shall continue any work in or about the structure after having been served with a stop work order, except such work as that person is

directed to perform to remove a violation or unsafe condition, shall be liable to a fine in accordance with Section Four of this Ordinance [Ord. No. 8369].

#### 109 Means of Appeal.

109.1 Application for appeal. Amend to read as follows:

109.1 Application for appeal. Any person shall have the right to appeal a decision of the code official to the board of appeals, per the International Building Code section 113.

Delete sections 109.2- 109.7

305.4.1 Sewer Depth. Amend Section 305.4.1 to read as follows:

305.4.1 Sewer Depth. Building sewers shall be a minimum of twelve inches (12") below grade.

312.2 Drainage and Vent Water Test. Amend Section 312.2 to read as follows:

312.2 Drainage and Vent Water Test. A water test shall be applied to the drainage system either in its entirety or in sections. If applied to the entire section, all openings in the piping shall be tightly closed, except the highest opening, and the system shall be filled with water to point of overflow. If the system is tested in sections, each opening shall be tightly plugged except the highest openings of the section under test, and each section shall be filled with water, but no section shall be tested with less than a three foot (3') head of water. In testing successive sections, at least the upper three feet (3') of the next proceeding section shall be tested so that no joint or pipe in the building, except the uppermost three feet (3') of the system, shall have been submitted to a test of less than a three foot (3') head of water. The water shall be kept in the system, or in the portion under test, for at least fifteen (15) minutes before inspection starts. The system shall then be tight at all points.

312.6 Gravity Sewer Tests. Amend Section 312.6 to read as follows:

312.6 Gravity Sewer Tests. Gravity sewer tests shall consist of plugging the end of the building sewer at the point of connection with the public sewer, filling the building sewer with water, testing with not less than three feet (3') head of water and maintaining such pressure for fifteen (15) minutes.

605.3. Water Service Pipe. Add new Section 605.3. Exception to read as follows:

605.3. Exception. Fire Suppression Laterals. Fire suppression laterals shall be ductile iron water pipe, conforming with ANSI/AWWA C151/A21.51-96.

Table 605.3 Water Service Pipe. Add the following footnotes to Table 605.3.

Footnote 1. Copper or copper-alloy tubing shall be minimum Type "L" for underground water supply systems.

Footnote 2. Plastic water pipe used for water service shall terminate thirty-six inches (36") from the water meter. The water service pipe shall be connected to the

water meter with not less than thirty six inches (36") of minimum Type "L" copper.

Table 605.4 Water Distribution Pipe. Add the following footnote to Table 605.4.

Footnote 1. Copper or copper-alloy tubing shall be minimum Type "L" when used under slabs.

608.1.1 Backflow Ordinance. Add new Section 608.1.1 to read as follows:

608.1.1 Backflow Ordinance. All potable water supply systems shall conform to Title VIII, Chapter 9, of the Midland City Code (Ordinance No. 7605) for purposes of cross connection and backflow prevention.

Table 608.1 Application of Backflow Preventers. Add the following footnote to Table 608.1

Footnote 1. The potable water supply to lawn irrigation systems shall be protected against backflow by one of the following testable devices: pressure vacuum breaker, double check valve, reduced pressure principal backflow preventer (RPZ).

904.1 Roof Extension. Amend Section 904.1 to read as follows:

904.1 Roof Extension. All open vent pipes that extend through a roof shall be terminated at least twelve inches (12") above the roof, except that where a roof is to be used for any purpose other than weather protection, the vent extensions shall be run at least seven feet (7') above the roof. 1003.1.1 Sewer Sampling Outlet. In any occupancy required to have a grease interceptor or separator, a sewer sampling outlet shall be provided at an accessible point downstream from the building and any additional traps, interceptors, or separators required for the pretreatment. A clean out, which meets the location requirements above, may serve as a sampling outlet.

1003.1.1 Sewer Sampling Outlet. Add new Section 1003.1.1 to read as follows:

1003.1.1 Sewer Sampling Outlet. In any occupancy required to have a grease interceptor or separator, a sewer sampling outlet shall be provided at an accessible point downstream from the building and any additional traps, interceptors, or separators required for the pretreatment. A clean out, which meets the location requirements above, may serve as a sampling outlet.

1003.10.1 Midland Health Department. Add new Section 1003.10.1 to read as follows:

1003.10.1 Midland Health Department. Interceptors shall be maintained in accordance with City of Midland Health Department regulations.

#### **4-3-4. Appeals.**

Whenever the owner of a building or structure or its duly authorized agent, or the applicant for a plumbing permit is aggrieved by any order or decision of the Plumbing Inspector or the Building Official made in connection with their administration of this Chapter, he may appeal such decision or order to the Board of Appeals (provided for in the Building Code of the City),

and said Board shall proceed to hear and decide any such appeals in the same manner as it now hears appeals from decisions made under said Building Code, and said Board of Appeals shall have the same power and authority over appeals from the Plumbing Code and the same rules and regulations shall apply as are fully set out in said Building Code. (Ord. No. 8369, § 1, 1-10-2006)

**SECTION TWO.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict. However, if there is any conflict between this ordinance and Ordinance No. 8818, then in that event Ordinance No. 8818 shall control and take precedence over this ordinance.

**SECTION THREE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION FOUR.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$2000.00).

**SECTION FIVE.** This ordinance shall become effective April 1, 2014.

**SECTION SIX.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_,

by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting "AYE":

Council members voting "NAY":

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

APPROVED AS TO CONTENT AND  
COMPLETENESS:

\_\_\_\_\_  
Steve Thorpe, Building Official

APPROVED ONLY AS TO FORM

\_\_\_\_\_  
Keith Stretcher, City Attorney

## Plumbing Code Amendments

### **4-3-2. Code adopted.**

The specifications, rules and regulations entitled " **2012** International Plumbing Code, together with appendices B, C, D, E **and** F, as promulgated and published by the International Code Council, Inc, are hereby adopted as the Plumbing Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.

### **4-3-3. Changes and additions to adopted plumbing code.**

Notwithstanding any revisions of this Chapter or said adopted "Plumbing Code" to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following sections and provisions thereof shall hereafter read as follows:

*101.1 Title.* Amend Section 101.1 to read as follows:

*101.1 Title.* These regulations shall be known as the International Plumbing Code of the City of Midland hereinafter referred to as "this code."

*106.1.1 Irrigators and home owners.* Add new Section 106.1.1 to read as follows:

*106.1.1. Irrigators and Home Owners.*

(A) Notwithstanding any provisions of this Code to the contrary, any "licensed irrigator" or "licensed installer", as defined in Tex. Water Code § 34.001, shall be allowed to make connections to private or public raw or potable water supply or water supply systems. However, any such person desiring to make such connection shall be subject to the same regulations, requirements and penalties imposed by this Code upon master plumbers doing like work, and any work shall conform to the specifications, rules and regulations contained herein. Any such connection shall be considered to be "plumbing" as defined in Section 202 herein.

(B) Nothing in this Code shall prevent a homeowner from extending, replacing, altering or repairing a plumbing system within his own property boundaries providing such work is done by himself and is used exclusively by him or his family. Such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees therefor.

*106.2* Add new exemption 3 to read as follows:



## *106.2 Exempt Work.*

3. Repair of routine under slab water leaks may be made without obtaining a permit or an inspection.

### *106.4.1 Add new Section 106.4.1 to read as follows:*

*106.4.1 Bond Required.* Before any person shall engage in the business of plumbing in the City, he shall first obtain the required State license and deposit with the City a good and sufficient bond in the sum of Ten Thousand Dollars (\$10,000.00) to be approved by the City Attorney, or provide proof of insurance in the amount of \$300,000.00 in accordance with Sec. 15(b) of the State of Texas Plumbing License Law. Said bond shall be conditioned that the person engaged in the plumbing business will faithfully observe all the laws pertaining to plumbing, drain laying, blasting and excavating; further, that the City shall be indemnified and saved harmless from all claims arising from accidents and damage of any character whatsoever caused by the negligence of such person engaged in the plumbing business, or by their agents or employees and that such person will maintain in a safe condition for a period of one (1) year all ditches and excavations which may be opened in the performance of any plumbing work, and further that all dirt and other material excavated will be replaced in a good condition with similar materials. Where such excavation is made in an unpaved street, or any street paved with chert or macadam the word "street" as herein used, shall apply to sidewalks, curbs, gutters and street paving.

*106.6.2 Fee Schedule.* Amend Section 106.6.2 to read as follows: The fees for all plumbing work shall be as indicated in the Fee Schedule Ordinance 8818

*106.6.3 Fee Refunds.* Delete Section 106.6.3 in its entirety and insert the following:  
106.6.3 Refunds shall be in accordance with Fee Schedule Ordinance 8818.

*108.4 Violation Penalties.* Delete Section 108.4 in its entirety.

*108.5 Stop Work Orders.* Amend Section 108.5 to read as follows:

*108.5 Stop Work Orders.* Upon notice from the code official, work on any plumbing system that is being done contrary to the provisions of this code or in a dangerous or unsafe manner shall immediately cease. Such notice shall be in writing and shall be given to the owner of the property, or to the owner's agent, or to the person doing the work. The notice shall state the conditions under which work is authorized to resume. Where an emergency exists, the code official shall not be required to give a written notice prior to stopping the work. Any person who shall continue any work in or about the structure after having been served with a stop work order, except such work as that person is directed to perform to remove a violation or unsafe condition, shall be liable to a fine in accordance with Section Four of this Ordinance [Ord. No. 8369].

*109.1 Application for appeal.* Amend to read as follows:

109.1 Application for appeal. Any person shall have the right to appeal a decision of the code official to the board of appeals, per the International Building Code section 113.

Delete sections 109.2- 109.7

*305.4.1 Sewer Depth.* Amend Section 305.4.1 to read as follows:

*305.4.1 Sewer Depth.* Building sewers shall be a minimum of twelve inches (12") below grade.

*312.2 Drainage and Vent Water Test.* Amend Section 312.2 to read as follows:

*312.2 Drainage and Vent Water Test.* A water test shall be applied to the drainage system either in its entirety or in sections. If applied to the entire section, all openings in the piping shall be tightly closed, except the highest opening, and the system shall be filled with water to point of overflow. If the system is tested in sections, each opening shall be tightly plugged except the highest openings of the section under test, and each section shall be filled with water, but no section shall be tested with less than a three foot (3') head of water. In testing successive sections, at least the upper three feet (3') of the next proceeding section shall be tested so that no joint or pipe in the building, except the uppermost three feet (3') of the system, shall have been submitted to a test of less than a three foot (3') head of water. The water shall be kept in the system, or in the portion under test, for at least fifteen (15) minutes before inspection starts. The system shall then be tight at all points.

*312.6 Gravity Sewer Tests.* Amend Section 312.6 to read as follows:

*312.6 Gravity Sewer Tests.* Gravity sewer tests shall consist of plugging the end of the building sewer at the point of connection with the public sewer, filling the building sewer with water, testing with not less than three feet (3') head of water and maintaining such pressure for fifteen (15) minutes.

*605.3. Water Service Pipe.* Add new Section 605.3. Exception to read as follows:

*605.3. Exception. Fire Suppression Laterals.* Fire suppression laterals shall be ductile iron water pipe, conforming with ANSI/AWWA C151/A21.51-96.

*Table 605.3 Water Service Pipe.* Add the following footnotes to Table 605.3.

*Footnote 1.* Copper or copper-alloy tubing shall be minimum Type "L" for underground water supply systems.

*Footnote 2.* Plastic water pipe used for water service shall terminate thirty-six inches (36") from the water meter. The water service pipe shall be connected to the water meter with not less than thirty six inches (36") of minimum Type "L" copper.

*Table 605.4 Water Distribution Pipe.* Add the following footnote to Table 605.4.

*Footnote 1.* Copper or copper-alloy tubing shall be minimum Type "L" when used under slabs.

**608.1.1 Backflow Ordinance.** Add new Section 608.1.1 to read as follows:

**608.1.1 Backflow Ordinance.** All potable water supply systems shall conform to Title VIII, Chapter 9, of the Midland City Code (Ordinance No. 7605) for purposes of cross connection and backflow prevention.

**Table 608.1 Application of Backflow Preventers.** Add the following footnote to Table 608.1

*Footnote 1.* The potable water supply to lawn irrigation systems shall be protected against backflow by one of the following testable devices: pressure vacuum breaker, double check valve, reduced pressure principal backflow preventer (RPZ).

**904.1 Roof Extension.** Amend Section 904.1 to read as follows:

**904.1 Roof Extension.** All open vent pipes that extend through a roof shall be terminated at least twelve inches (12") above the roof, except that where a roof is to be used for any purpose other than weather protection, the vent extensions shall be run at least seven feet (7') above the roof.

**1003.1.1 Sewer Sampling Outlet.** Add new Section 1003.1.1 to read as follows:

**1003.1.1 Sewer Sampling Outlet.** In any occupancy required to have a grease interceptor or separator, a sewer sampling outlet shall be provided at an accessible point downstream from the building and any additional traps, interceptors, or separators required for the pretreatment. A clean out, which meets the location requirements above, may serve as a sampling outlet.

**1003.10.1 Midland Health Department.** Add new Section 1003.10.1 to read as follows:

**1003.10.1 Midland Health Department.** Interceptors shall be maintained in accordance with City of Midland Health Department regulations.

#### **4-3-4. Appeals.**

Whenever the owner of a building or structure or its duly authorized agent, or the applicant for a plumbing permit is aggrieved by any order or decision of the Plumbing Inspector or the Building Official made in connection with their administration of this Chapter, he may appeal such decision or order to the Board of Appeals (provided for in the Building Code of the City), and said Board shall proceed to hear and decide any such appeals in the same manner as it now hears appeals from decisions made under said Building Code, and said Board of Appeals shall have the same power and authority over appeals from the Plumbing Code and the same rules and regulations shall apply as are fully set out in said Building Code.

(Ord. No. 8369, § 1, 1-10-2006)



# City Council Agenda

Approved for Agenda:  
rpatrick  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Steve Thorpe, Building Official

**SUBJECT:** Consider an ordinance adopting the 2012 International Fuel Gas Code, with amendments; as the gas code of the City of Midland.

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## **Purpose:**

Consider an ordinance adopting the 2012 International Fuel Gas Code, with amendments; as the gas code of the City of Midland.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

none

## **Discussion:**

The proposed code and amendments have been on file in the office of the City Secretary since November 27, 2013. No comments regarding the adoption of this code and amendments have been received. This exceeds the minimum thirty (30) day public review and comment period required prior to City Council taking action to adopt the new code.

The 2012 edition of the International Fuel Gas Code and the proposed amendments regulate the design, construction and inspection of fuel gas systems except in one and two family dwellings within the city. The currently adopted code is the 2009 edition. The model codes are published in three-year cycles. Therefore this code is the most current available.

An effective date of April 1, 2014 is proposed. This will provide adequate time for notification to architects, engineers, designers, contractors and suppliers of any new requirements.



**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE AMENDING TITLE IV, "BUILDING REGULATIONS", CHAPTER 4, "GAS CODE", OF THE CITY CODE OF THE CITY OF MIDLAND, TEXAS, AND ADOPTING THE 2012 INTERNATIONAL FUEL GAS CODE AS THE GAS CODE OF THE CITY OF MIDLAND; PROVIDING MINIMUM STANDARDS, PROVISIONS AND REQUIREMENTS FOR GAS PIPING AND APPLIANCES; PROVIDING FOR THE ISSUANCE OF PERMITS FOR THE INSTALLATION OF SAID PIPING AND APPLIANCES AND THE COLLECTION OF INSPECTION FEES THEREFOR; PROVIDING FOR BONDING OF PERSONS ENGAGED IN THE BUSINESS OF INSTALLING, REPAIRING AND MAINTAINING SAID PIPING AND APPLIANCES; REGULATING USE OF EXISTING PIPING AND APPLIANCES; PROVIDING FOR CERTIFICATES OF APPROVAL FOR PIPING WORK; PROVIDING FOR APPEALS; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2,000.00); ESTABLISHING AN EFFECTIVE DATE OF APRIL 1, 2014; AND ORDERING PUBLICATION**

**WHEREAS**, by Ordinance No. 8826, adopted August 10, 2010, the City Council adopted the 2009 Edition of the International Fuel Gas Code as the Gas Code of the City of Midland; and

**WHEREAS**, several changes and amendments to the International Fuel Gas Code have been approved by the International Code Council, and incorporated into the 2009 International Fuel Gas Code; and

**WHEREAS**, the Council has heretofore on November 26, 2013, approved the 2012 International Fuel Gas Code, as a public record in order that same be filed as a public record in the office of the City Secretary; and

**WHEREAS**, the City Council of the City of Midland finds it to be in the public interest to update the Gas Code regulations of the City of Midland to be more in line with currently accepted practices;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS;**

**SECTION ONE.** That Title IV, "Building Regulations", Chapter 4, "Gas Code", of the City Code of the City of Midland, Texas, is hereby amended to hereafter read as follows:

**4-4-1. Purpose.**

The purpose of this Chapter is to provide safe installation of consumer's gas piping and safe gas installation of consumer appliances. All such gas piping and gas appliances installed, replaced, maintained or repaired within the corporate limits of the City shall conform to the requirements of this Chapter and to the specifications, rules and regulations herein.

**4-4-2. Code adopted.**

The specifications, rules and regulations entitled 2012 International Fuel Gas Code together with appendices A,B,C and D as promulgated and published by the International Code Council, Inc, are hereby adopted as the Gas Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.

**4-4-3. Changes and additions to adopted gas code.**

Notwithstanding any revisions in this chapter or said adopted "Gas Code" to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following Sections and provisions thereof shall hereafter read as follows to wit:

101.1 Title. Amend Section 101.1 to read as follows:

101.1 Title. These regulations shall be known as the Gas Code of the City of Midland, hereinafter referred to as "this code".

106.1.1 Bond and License. Add new Section 106.1.1 as follows:

106.1.1 Bond and License.

(a) No person shall engage in or work at the installation, extension or alteration of consumer's gas piping or gas appliances until he has executed and delivered to the Building Official a good and sufficient bond in favor of the City in the penal sum of ten thousand dollars (\$10,000.00) with corporate surety, conditioned for the faithful performance of all such work, entered upon or contracted for, in strict accordance and compliance with the provisions of this Chapter. The bond herein required shall be for a period of not less than twelve (12) months and shall be on forms provided by the City Building Official. This bond, in form and substance as herein required, shall be given by such person to cover all such work as shall be done during the term of the bond. In lieu of said bond, the City shall accept proof of insurance in the amount of \$300,000.00 in accordance with Sec. 15.(b) of the State of Texas Plumbing License Law.

(b) Upon approval of said bond, the person desiring to do such work shall be a master plumber properly licensed by the Texas State Board of Plumbing Examiners, or in the case of liquefied petroleum gas piping installations, such person shall be licensed by the Railroad Commission of Texas.



(c) Nothing in this Code shall prevent a homeowner from installing or repairing his own appliances or installing, extending, replacing, altering or repairing gas piping within his own property boundaries providing such work is done by himself and is used exclusively by him or his family. A homeowner shall not be required to obtain a bond or a license; however, such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees.

106.6.2 Fee Schedule. Amend Section 106.6.2 to read as follows: The fees for all gas systems work shall be as indicated in the Fee Schedule Ordinance 8818

106.6.3 Fee Refunds. Delete 106.6.3 as written and substitute the following:  
Refunds- Refunds shall be in accordance with Fee Schedule Ordinance 8818

108.4 Violation Penalties. Delete Section 108.4 in its entirety.

108.5 Stop Work Orders. Amend Section 108.5 to read as follows:

108.5 Stop Work Orders. Upon notice from the code official that work is being done contrary to the provisions of this code or in a dangerous or unsafe manner, such work shall immediately cease. Such notice shall be in writing and shall be given to the owner of the property, or to the owner's agent, or to the person doing the work. The notice shall state the conditions under which work is authorized to resume. Where an emergency exists, the code official shall not be required to give a written notice prior to stopping the work. Any person who shall continue any work on the system after having been served with a stop work order, except such work as that person is directed to perform to remove a violation or unsafe condition, shall be liable to a fine in accordance with Section Four of this ordinance [Ord. No. 8371].

109.1 Application for appeal. Amend to read as follows:

109.1 Application for appeal. Any person shall have the right to appeal a decision of the code official to the board of appeals, per the International Building Code section 113.

Delete sections 109.2- 109.7

309.2 Connections. Amend Section 309.2 to read as follows:

309.2 Connections. All electrical connections between gas appliances and the building wiring shall conform to the National Electrical Code and to Title IV, Chapter 2, of the Midland City Code.

403.6 Plastic pipe, tubing, and fittings. Amend Section 403.6 to read as follows:

403.6. Plastic pipe, tubing, and fittings. Plastic pipe, tubing, and fittings shall be used outside underground only, and shall conform with ASTM D 2513. Pipe shall be marked "gas" and ASTM D 2513. Plastic pipe may be connected at the end of the thirty-six inch (36") metallic pipe service line and extended to within thirty-six inches (36") of the building where it shall be connected to metallic pipe and riser. The manufacturer's recommendations for the joining of plastic pipe shall be observed. See Section 404.8 for requirements of protection against corrosion.

406.4 Test pressure measurement. Amend Section 406.4 to read as follows:

406.4 Test pressure measurement. Test pressure shall be measured with an ouncegauge, manometer or with a mercury gauge designed and calibrated to read, recorder indicate a pressure loss due to leakage during the pressure test period. The source of pressure shall be isolated before the pressure tests are made.

406.4.1 Test pressure. Amend Section 406.4.1 to read as follows:

406.4.1 Test Pressure. Low pressure (not in excess of 0.5 psi (3.5kPa) gas piping shall withstand a pressure of not less than 1 1/2 times the proposed maximum working pressure, but not less than 5.88 psi (40.5kPa), ninety (90) ounces, or twelve inches(12") of mercury for a period of not less than ten (10) minutes without showing anydrop in pressure. Higher pressure piping (2 psi gas) shall withstand a pressure of atleast 10 psi (68.8kPa) or twenty inches (20") of mercury for a period of not less than ten (10) minutes without showing any drop in pressure.

409.1.4 Service Line Shutoff Valve. Add new Section 409.1.4 to read as follows:

409.1.4 Service Line Shutoff Valve. An approved shutoff valve shall be installed above ground outside on the service line at the building entrance on all new gas line installations and on all replaced gas lines.  
(Ord. No. 8371, § 1, 1-10-2006)

#### **4-4-4. Use of existing piping and appliances.**

Notwithstanding any provision in this Chapter to the contrary, consumer's piping or appliances installed prior to the adoption of this Chapter or piping or appliances installed to supply other than natural gas may be converted to natural gas, if the Inspector finds, upon inspection and proper tests, that such piping or appliances will render reasonably satisfactory gas service to the consumer and will not in any way endanger life or property; otherwise, such piping shall be altered or replaced in whole or in part, to conform with the requirements of this Chapter.

#### **4-4-5. Non-liability of city.**

This Chapter shall not be construed as imposing on the City any liability or responsibility for damages to any person injured by any defect thereof, nor shall the City or any official or employee thereof, be held as assuming any such liability or responsibility by reason of the inspection authorized hereunder or the certificate of approval issued by the Inspector. By approving the Ordinance the City is not waiving its right of sovereign immunity. The City is retaining its immunity. THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.

#### **4-4-6. Appeals.**

Whenever the owner of a building or structure or his duly authorized agent, or the applicant for any permit required by this Chapter, is aggrieved by any order or decision of the Gas Inspector or the Building Official made in connection with their administration of this Chapter, he may appeal such decision or order to the Board of Appeals (provided for in the Building Code of the City) and said Board shall proceed to hear and decide any such appeals in the same manner as it now hears appeals from decisions made under said Building Code,

and said Board of Appeals shall have the same power and authority over appeals from the Gas Code and the same rules and regulations shall apply as are fully set out in the Building Code.(Ord. No. 8371, § 1, 1-10-2006)

**SECTION TWO.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION THREE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION FOUR.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$2000.00).

**SECTION FIVE.** This ordinance shall become effective April 1, 2014.

**SECTION SIX.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting "AYE":

Council members voting "NAY":

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary

APPROVED AS TO FORM:

\_\_\_\_\_  
Steve Thorpe, Building Official

APPROVED ONLY AS TO FORM:

\_\_\_\_\_  
Keith Stretcher, City Attorney

## **Chapter 4 Gas Code**

### **4-4-2. Code adopted.**

**The specifications, rules and regulations entitled 2012 International Fuel Gas Code together with appendices A,B,C and D as promulgated and published by the International Code Council, Inc, are hereby adopted as the Gas Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.**

### **4-4-3. Changes and additions to adopted gas code.**

Notwithstanding any revisions in this chapter or said adopted "Gas Code" to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following Sections and provisions thereof shall hereafter read as follows to wit:

*101.1 Title.* Amend Section 101.1 to read as follows:

*101.1 Title.* These regulations shall be known as the Gas Code of the City of Midland, hereinafter referred to as "this code".

*106.1.1 Bond and License.* Add new Section 106.1.1 as follows:

*106.1.1 Bond and License.*

(a) No person shall engage in or work at the installation, extension or alteration of consumer's gas piping or gas appliances until he has executed and delivered to the Building Official a good and sufficient bond in favor of the City in the penal sum of ten thousand dollars (\$10,000.00) with corporate surety, conditioned for the faithful performance of all such work, entered upon or contracted for, in strict accordance and compliance with the provisions of this Chapter. The bond herein required shall be for a period of not less than twelve (12) months and shall be on forms provided by the City Building Official. This bond, in form and substance as herein required, shall be given by such person to cover all such work as shall be done during the term of the bond. In lieu of said bond, the City shall accept proof of insurance in the amount of \$300,000.00 in accordance with Sec. 15.(b) of the State of Texas Plumbing License Law.

(b) Upon approval of said bond, the person desiring to do such work shall be a master plumber properly licensed by the Texas State Board of Plumbing Examiners, or in the case of liquefied petroleum gas piping installations, such person shall be licensed by the Railroad Commission of Texas.

(c) Nothing in this Code shall prevent a homeowner from installing or repairing his own appliances or installing, extending, replacing, altering or repairing gas piping within his own property boundaries providing such work is done by himself and is used exclusively by him or his family. A homeowner shall not be required to obtain a bond or a license; however, such privilege does not convey

the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees therefor.

*106.6.2 Fee Schedule.* Amend Section 106.6.2 to read as follows: The fees for all gas systems work shall be as indicated in the Fee Schedule Ordinance 8818

*106.6.3-Fee Refunds.* Delete 106.6.3 as written and substitute the following:  
Refunds- Refunds shall be in accordance with Fee Schedule Ordinance 8818

*108.4 Violation Penalties.* Delete Section 108.4 in its entirety.

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*108.5 Stop Work Orders.* Upon notice from the code official that work is being done contrary to the provisions of this code or in a dangerous or unsafe manner, such work shall immediately cease. Such notice shall be in writing and shall be given to the owner of the property, or to the owner's agent, or to the person doing the work. The notice shall state the conditions under which work is authorized to resume. Where an emergency exists, the code official shall not be required to give a written notice prior to stopping the work. Any person who shall continue any work on the system after having been served with a stop work order, except such work as that person is directed to perform to remove a violation or unsafe condition, shall be liable to a fine in accordance with Section Four of this ordinance [Ord. No. 8371].

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109.1 Application for appeal. Any person shall have the right to appeal a decision of the code official to the board of appeals, per the International Building Code section 113.

Delete sections 109.2- 109.7

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*309.2 Connections.* All electrical connections between gas appliances and the building wiring shall conform to the National Electrical Code and to Title IV, Chapter 2, of the Midland City Code.

*403.6 Plastic pipe, tubing, and fittings.* Amend Section 403.6 to read as follows:

*403.6. Plastic pipe, tubing, and fittings.* Plastic pipe, tubing, and fittings shall be used outside underground only, and shall conform with ASTM D 2513. Pipe shall be marked "gas" and ASTM D 2513. Plastic pipe may be connected at the end of the thirty-six inch (36") metallic pipe service line and extended to within thirty-six inches (36") of the building where it shall be connected to metallic pipe and riser. The manufacturer's recommendations for the joining of plastic pipe shall be observed. See Section 404.8 for requirements of protection against corrosion.

*406.4 Test pressure measurement.* Amend Section 406.4 to read as follows:

*406.4 Test pressure measurement.* Test pressure shall be measured with an ounce gauge, manometer or with a mercury gauge designed and calibrated to read, record or indicate a pressure loss due to leakage during the pressure test period. The source of pressure shall be isolated before the pressure tests are made.

*406.4.1 Test pressure.* Amend Section 406.4.1 to read as follows:

*406.4.1 Test Pressure.* Low pressure (not in excess of 0.5 psi (3.5kPa) gas piping shall withstand a pressure of not less than 1 1/2 times the proposed maximum working pressure, but not less than 5.88 psi (40.5kPa), ninety (90) ounces, or twelve inches (12") of mercury for a period of not less than ten (10) minutes without showing any drop in pressure. Higher pressure piping (2 psi gas) shall withstand a pressure of at least 10 psi (68.8kPa) or twenty inches (20") of mercury for a period of not less than ten (10) minutes without showing any drop in pressure.

*409.1.4 Service Line Shutoff Valve.* Add new Section 409.1.4 to read as follows:

*409.1.4 Service Line Shutoff Valve.* An approved shutoff valve shall be installed above ground outside on the service line at the building entrance on all new gas line installations and on all replaced gas lines.  
(Ord. No. 8371, § 1, 1-10-2006)

#### **4-4-6. Appeals.**

Whenever the owner of a building or structure or his duly authorized agent, or the applicant for any permit required by this Chapter, is aggrieved by any order or decision of the Gas Inspector or the Building Official made in connection with their administration of this Chapter, he may appeal such decision or order to the Board of Appeals (provided for in the Building Code of the City) and said Board shall proceed to hear and decide any such appeals in the same manner as it now hears appeals from decisions made under said Building Code, and said Board of Appeals shall have the same power and authority over appeals from the Gas Code and the same rules and regulations shall apply as are fully set out in the Building Code.

(Ord. No. 8371, § 1, 1-10-2006)



# City Council Agenda

Approved for Agenda:  
rpatrick  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Steve Thorpe, Building Official

**SUBJECT:** Consider an ordinance adopting the 2012 International Mechanical Code, with amendments; as the mechanical code of the City of Midland.

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## **Purpose:**

Consider an ordinance adopting the 2012 International Mechanical Code, with amendments; as the mechanical code of the City of Midland.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

none

## **Discussion:**

The proposed code and amendments have been on file in the office of the City Secretary since November 27, 2013. No comments regarding the adoption of this code and amendments have been received. This exceeds the minimum thirty (30) day public review and comment period required prior to City Council taking action to adopt the new code.

The 2012 edition of the International Mechanical Code and the proposed amendments regulate the design, construction and inspection of mechanical systems except in one and two family dwellings within the city. The currently adopted code is the 2009 edition. The model codes are published in three-year cycles. Therefore this code is the most current available.

An effective date of April 1, 2014 is proposed. This will provide adequate time for notification to architects, engineers, designers, contractors and suppliers of any new requirements.





**ORDINANCE NO.**

**AN ORDINANCE AMENDING TITLE IV, "BUILDING REGULATIONS", CHAPTER 10, "MECHANICAL CODE", OF THE CITY CODE OF MIDLAND, TEXAS, AND ADOPTING THE 2012 INTERNATIONAL MECHANICAL CODE AS THE MECHANICAL CODE OF THE CITY OF MIDLAND FOR THE PURPOSE OF PROVIDING MINIMUM STANDARDS, PROVISIONS AND REQUIREMENTS FOR SAFE INSTALLATION AND MAINTENANCE OF MECHANICAL SYSTEMS WITHIN THE CORPORATE LIMITS OF THE CITY OF MIDLAND, TEXAS; PROVIDING FOR THE INSPECTION OF SAID MECHANICAL SYSTEMS; PROVIDING FOR THE ISSUANCE OF PERMITS FOR THE INSTALLATION OF SAID MECHANICAL SYSTEMS AND THE COLLECTION OF INSPECTION FEES THEREFOR; PROVIDING FOR APPEALS; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM PENALTY OR FINE OF TWO THOUSAND DOLLARS (\$2000.00); ESTABLISHING AN EFFECTIVE DATE OF APRIL 1, 2014; AND ORDERING PUBLICATION**

**WHEREAS**, by Ordinance No. 8806, adopted July 13, 2010, the City Council adopted the 2009 Edition of the International Mechanical Code as the Mechanical Code for the City of Midland; and

**WHEREAS**, several changes and amendments to the International Mechanical Code have been approved by the International Code Council, Inc., and incorporated into the 2012 International Mechanical Code; and

**WHEREAS**, the Council has heretofore on November 26, 2013, approved the 2012 International Mechanical Code as a public record in order that same be filed as a public record in the office of the City Secretary; and

**WHEREAS**, the City Council finds it to be in the public interest to update the Mechanical Code so as to incorporate new techniques and materials;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Title IV, "Building Regulations", Chapter 10, "Mechanical

Code", of the City Code of Midland, Texas, is hereby amended to hereafter read as follows:

**4-10-1. Purpose.**

The purpose of this Chapter is to provide minimum standards, revisions and requirements for safe installation of mechanical systems within the City. All such mechanical systems hereafter installed, replaced, maintained or repaired within the corporate limits of the City shall conform to the requirements of this Chapter and to the specifications, rules and regulations herein.

**4-10-2. Code adopted.**

The specifications, rules and regulations entitled 2012 International Mechanical Code together with appendix A, as promulgated and published by the International Code Council, Inc, are hereby adopted as the Mechanical Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.

**4-10-3. Changes and additions to adopted mechanical code.**

Notwithstanding any provisions of this Chapter or said adopted "Mechanical Code" to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following sections and provisions thereof shall hereafter read as follows:

101.1 Title. Amend Section 101.1 to read as follows:

101.1 Title. These regulations shall be known as the Mechanical Code of the City of Midland, hereinafter referred to as "this code".

106.1.1 Homeowners Permit. Add new Section 106.1.1 to read as follows:

106.1.1 Homeowners Permit. Nothing in this Code shall prevent a homeowner from extending, replacing, altering or repairing mechanical equipment within his own property boundaries providing such work is done by himself and is used exclusively by him or his family. A homeowner shall not be required to obtain a bond or a license; however, such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees.

106.5.2 Fee Schedule. Amend Section 106.5.2 to read as follows: The fees for all gas systems work shall be as indicated in the Fee Schedule Ordinance 8818.

108.4 Violation Penalties. Delete Section 108.4 in its entirety.

108.5 Stop Work Orders. Amend Section 108.5 to read as follows:

108.5 Stop Work Orders. Upon notice from the code official that mechanical work is being done contrary to the provisions of this code or in a dangerous manner, such work shall immediately cease. Such notice shall be in writing and shall be given to the owner of the property, or to the owner's agent, or to the person doing the work. The notice shall state the conditions under which work is authorized to resume. Where an emergency exists, the code official shall not be required to give a written notice prior to stopping the work. Any person who shall continue any work on the system after having been served with a stop work order,

except such work as that person is directed to perform to remove a violation or unsafe condition, shall be liable to a fine in accordance with Section Four of this ordinance [Ord. No. 8370].

109.1 Application for appeal. Amend to read as follows:

109.1 Application for appeal. Any person shall have the right to appeal a decision of the code official to the board of appeals, per the International Building Code section 113.

Delete sections 109.2- 109.7

#### **4-10-4. Appeals.**

Whenever the owner of a building or structure, or its duly authorized agent or the applicant for a mechanical permit is aggrieved by any order or decision of the Mechanical Inspector or the Mechanical Official made in connection with his administration of this Chapter, he may appeal such decision or order to the Board of Appeals (provided for in the Building Code of the City), and said Board shall proceed to hear and decide any such appeals in the same manner as it now hears appeals from decisions made under said Building Code. Said Board of Appeals shall have the same power and authority over appeals from the Mechanical Code and the same rules and regulations shall apply as are full set out in said Building Code. (Ord. No. 8370, § 1, 1-10-2006)

#### **4-10-5. Non-liability of city.**

This Chapter shall not be construed as imposing upon the City any liability or responsibility for damages to any person injured by any defect thereof, nor shall the City or any official or employee thereof, be held as assuming any such liability or responsibility by reason of the inspection authorized hereunder or the certificate of approval issued by the Inspector. By approving this ordinance the City is not waiving its right of sovereign immunity. The City is retaining its immunity. THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.

**SECTION TWO.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION THREE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more

sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION FOUR.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars (\$ 2,000.00).

**SECTION FIVE.** This ordinance shall become effective April 1, 2014.

**SECTION SIX.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting "AYE":

Council members voting "NAY":

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

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Amy M. Turner, City Secretary

APPROVED AS TO CONTENT AND  
COMPLETENESS:

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Steve Thorpe, Building Official

APPROVED ONLY AS TO FORM:

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Keith Stretcher, City Attorney

## **Mechanical Code Amendments**

### **4-10-2. Code adopted.**

**The specifications, rules and regulations entitled 2012 International Mechanical Code together with appendix A, as promulgated and published by the International Code Council, Inc, are hereby adopted as the Mechanical Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.**

### **4-10-3. Changes and additions to adopted mechanical code.**

Notwithstanding any provisions of this Chapter or said adopted "Mechanical Code" to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following sections and provisions thereof shall hereafter read as follows:

*101.1 Title.* Amend Section 101.1 to read as follows:

*101.1 Title.* These regulations shall be known as the Mechanical Code of the City of Midland, hereinafter referred to as "this code".

*106.1.1 Homeowners Permit.* Add new Section 106.1.1 to read as follows:

*106.1.1 Homeowners Permit.* Nothing in this Code shall prevent a homeowner from extending, replacing, altering or repairing mechanical equipment within his own property boundaries providing such work is done by himself and is used exclusively by him or his family. A homeowner shall not be required to obtain a bond or a license; however, such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees therefor.

*106.5.2 Fee Schedule.* Amend Section 106.5.2 to read as follows: The fees for all gas systems work shall be as indicated in the Fee Schedule Ordinance 8818

*106.5.3 Fee Refunds.* . Delete 106.5.3 as written and substitute the following:  
Refunds- Refunds shall be in accordance with Fee Schedule Ordinance 8818.

*108.4 Violation Penalties.* Delete Section 108.4 in its entirety.

*108.5 Stop Work Orders.* Amend Section 108.5 to read as follows:

**108.5 Stop Work Orders.** Upon notice from the code official that mechanical work is being done contrary to the provisions of this code or in a dangerous manner, such work shall immediately cease. Such notice shall be in writing and shall be given to the owner of the property, or to the owner's agent, or to the person doing the work. The notice shall state the conditions under which work is authorized to resume. Where an emergency exists, the code official shall not be required to give a written notice prior to stopping the work. Any person who shall continue any work on the system after having been served with a stop work order, except such work as that person is directed to perform to remove a violation or unsafe condition, shall be liable to a fine in accordance with Section Four of this ordinance [Ord. No. 8370].

**109.1 Application for appeal.** Amend to read as follows:

109.1 Application for appeal. Any person shall have the right to appeal a decision of the code official to the board of appeals, per the International Building Code section 113.

Delete sections 109.2- 109.7

#### **4-10-4. Appeals.**

Whenever the owner of a building or structure, or its duly authorized agent or the applicant for a mechanical permit is aggrieved by any order or decision of the Mechanical Inspector or the Mechanical Official made in connection with his administration of this Chapter, he may appeal such decision or order to the Board of Appeals (provided for in the Building Code of the City), and said Board shall proceed to hear and decide any such appeals in the same manner as it now hears appeals from decisions made under said Building Code. Said Board of Appeals shall have the same power and authority over appeals from the Mechanical Code and the same rules and regulations shall apply as are full set out in said Building Code.

(Ord. No. 8370, § 1, 1-10-2006)





# City Council Agenda

Approved for Agenda:  
rpatrick  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Steve Thorpe, Building Official

**SUBJECT:** Consider an ordinance adopting the 2012 International Residential Code, with amendments; as the residential code of the City of Midland.

---

## **Purpose:**

Consider an ordinance adopting the 2012 International Residential Code, with amendments; as the residential code of the City of Midland.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

none

## **Discussion:**

The proposed code and amendments have been on file in the office of the City Secretary since November 27, 2013. No comments regarding the adoption of this code and amendments have been received. This exceeds the minimum thirty (30) day public review and comment period required prior to City Council taking action to adopt the new code.

The 2012 edition of the International Residential Code and the proposed amendments regulate the design, construction and inspection of building construction and plumbing, mechanical, fuel gas and electrical systems in one and two family dwellings within the city. The currently adopted code is the 2009 edition. The model codes are published in three-year cycles. Therefore this code is the most current available.

An effective date of April 1, 2014 is proposed. This will provide adequate time for notification to architects, engineers, designers, contractors and suppliers of any new requirements.



**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE AMENDING TITLE IV, "BUILDING REGULATIONS", CHAPTER 11, "RESIDENTIAL CODE", OF THE CITY CODE OF THE CITY OF MIDLAND, TEXAS, AND ADOPTING THE 2012 EDITION OF THE INTERNATIONAL RESIDENTIAL CODE, AS THE RESIDENTIAL BUILDING CODE FOR THE CITY OF MIDLAND, TEXAS, FOR THE PURPOSE OF REGULATING AND CONTROLLING THE DESIGN, CONSTRUCTION, QUALITY OF MATERIALS, ERECTION, INSTALLATION, ALTERATION, REPAIR, LOCATION, RELOCATION, REPLACEMENT, ADDITION TO, USE OR MAINTENANCE OF ONE-AND TWO-FAMILY DWELLINGS AND TOWNHOUSES IN THE CITY OF MIDLAND, TEXAS, PROVIDING FOR THE ISSUANCE OF PERMITS, THE REVIEW OF PLANS, THE INSPECTION OF FOOTINGS AND FOUNDATIONS AND FRAMING, THE COLLECTION OF INSPECTION FEES THEREFOR; CONTAINING A CUMULATIVE CLAUSE; CONTAINING A SAVINGS AND SEVERABILITY CLAUSE; PROVIDING FOR A MAXIMUM FINE OR PENALTY OF TWO THOUSAND DOLLARS (\$2,000.00); ORDERING PUBLICATION; AND ESTABLISHING AN EFFECTIVE DATE OF APRIL 1, 2014**

**WHEREAS**, by Senate Bill 365 of the 77th Regular Session (2001), the Texas Legislature adopted the International Residential Code as the municipal residential building code for the State of Texas; and

**WHEREAS**, by Ordinance No. 8841, adopted September 28, 2010, the City Council adopted the 2003 Edition of the International Residential Code as the Residential Code for the City of Midland; and

**WHEREAS**, the Council has heretofore on November 26, 2013, approved the 2012 International Residential Code as a public record in order that same be filed as a public record in the office of the City Secretary; and

**WHEREAS**, the Council finds it to be in the public interest to update the residential building regulations of the City to be more in line with currently accepted building practice;

**NOW , THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That Title IV, “Building Regulations” Chapter 11, “Residential Code”, of the City Code of the City of Midland, Texas, is hereby amended to read as follows:

**4-11-1. Purpose.**

The purpose of this Chapter is for regulating and controlling the design, construction, quality of materials, erection, installation, alteration, repair, location, relocation, replacement, addition to, use or maintenance of one-and two-family dwellings and townhouses within the City. All such buildings and structures hereafter constructed, altered, repaired, located, relocated, or added to shall conform to the requirements of this Chapter and to the specifications, rules and regulations herein contained.

**4-11-2. Code adopted.**

The specifications, rules and regulations entitled 2012 International Residential Code together with appendices A,B,C, D, E, J, N, P and Q, as promulgated and published by the International Code Council, Inc, are hereby adopted as the Residential Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.

**4-11-3. Changes and additions to adopted residential code.**

Notwithstanding any provisions of this Chapter or said adopted Residential Code to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following sections and provisions thereof shall hereafter read as follows, to wit:

R101.1 Title. Amend Section R101.1 to read as follows:

R101.1 Title. These provisions shall be known as the Residential Code for One-and Two-Family Dwellings of the City of Midland, and shall be cited as such and will be referred to herein as "this code".

R103.2 Appointment. Amend Section 103.2 to read as follows:

R103.2. Appointment. The Building Official, Assistant Building Official, Inspectors and other personnel shall be appointed in accordance with the personnel policies of the City and shall be subject to all personnel rules and regulations of the City of Midland.

R105.2 Work Exempt From Permit. Amend Section 105.2 to read as follows:

R105.2. Work Exempt From Permit. Delete the following:

Building: No.'s 1, 2, 3, 4, 5.

Add the following:

#11. Tree forts or other play structures supported partially or entirely by a tree.

R105.8 Contractor’s Responsibilities. Amend Section 105.8 to read as follows:

R105.8 Contractor’s Responsibilities:

(a) It shall be the duty of every contractor or builder, who is engaged in the construction, erection, alteration or repair of residential buildings or structures, subject to the provisions of this Code, to give good and sufficient bond in the sum of ten thousand dollars (\$10,000.00) to be approved by the City Attorney, conditioned to conform to the Building Regulations of this Section, and other ordinances and laws of the City of Midland in reference to buildings and related construction and site requirements. The bond herein required shall include the bonds required for early clearance procedures as required by Section 9 of this Title and Chapter and with the sidewalk, driveway and curb bond required by this Code with no increase in amounts.

(b) No building permit shall be issued by the Building Official unless and until a bond as herein provided has been tendered to and approved by the Building Official by the person or firm requesting such permit.

(c) Nothing in this Code shall prevent a homeowner from maintaining, altering or adding to his home within his own property boundaries provided such work is done by himself for the exclusive benefit of his family. Such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees.

R108.2 Schedule of Permit Fees. Amend Section 108.2 to read as follows: The fees for all gas systems work shall be as indicated in the Fee Schedule Ordinance 8818.

R112.1 General- Delete section R112.1 and replace with the following: Application for appeal. A person shall have the right to appeal a decision of the code official to the board of appeals, per International Building Code section 113. An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of this code do not fully apply, or an equally good or better form of construction is proposed. The application shall be filed on a form obtained from the code official within 20 days after the notice was served.

Delete sections R112.2- 112.4 in their entirety.

TABLE R301.2 (1) Climatic and Geographic Design Criteria. Amend TABLE R301.2 (1) to read as follows:

|                                          |                                    |
|------------------------------------------|------------------------------------|
| <b>Ground Snow Load</b>                  | 3.5 PSF                            |
| Basic Wind Speed                         | 90 MPH                             |
| <b><u>Topographic effects</u></b>        | <b><u>No</u></b>                   |
| Seismic Design Category                  | A                                  |
| Weathering                               | Moderate                           |
| Frost Line Depth                         | 12 inches                          |
| Termite                                  | Moderate to Heavy                  |
| Decay <b>(DELETE)</b>                    | Slight to Moderate <b>(DELETE)</b> |
| <b><u>Winter Design Temp</u></b>         | <b><u>21 degrees F</u></b>         |
| <b>Ice Barrier Underlayment Required</b> | <b>No</b>                          |
| Flood Hazards                            | Adoption Date NFIP 09/27/91        |
|                                          | Current FIRM 09/15/05              |
| <b>Air Freezing Index</b>                | <b>1500 or less</b>                |
| <b>Mean annual Temp</b>                  | <b>65 F</b>                        |

Delete section R313 Automatic Fire Sprinkler systems in its entirety.

Delete Chapter 11- Energy Efficiency in its entirety. Title 4 Chapter 12 Energy Code shall be the Energy Code for the city.

G2417.4 (406.4) Test Pressure Measurement. Amend Section G2417.4 to read as follows:

G2417.4 (406.4) Test Pressure Measurement. Test pressure shall be measured with an ounce gauge, manometer or with a mercury gauge designed and calibrated to read, record or indicate a pressure loss due to leakage during the test period. The source of pressure shall be isolated before the pressure tests are made.

G2417.4.1 (406.4.1) Test Pressure. Amend Section G2417.4.1(406.4.1) to read as follows:

G2417.4.1 (406.4.1) Test Pressure. Low pressure (not in excess of 0.5 psi) gas piping shall withstand a pressure of not less than 1 1/2 times the proposed maximum working pressure, but not less than 5.88 psi, ninety (90) ounces, or twelve inches (12") of mercury for a period of not less than ten (10) minutes without showing any drop in pressure. Higher pressure piping (2-psi gas) shall withstand a pressure of at least 10 psi or twenty inches (20") of mercury for a period of not less than ten (10) minutes without showing any drop in pressure.

G2420.1.4 (409.1.4) Service Line Shutoff Valve. Add new Section G2420.1.4(409.1.4) to read as follows:

G2420.1.4 (409.1.4) Service Line Shutoff Valve. An approved shutoff valve shall be installed above ground outside on the service line at the building entrance on all new gas line installations and on all replaced gas lines.

P2503.4 Building Sewer Testing. Amend Section P2503.4 to read as follows:

P2503.4 Building Sewer Testing. Building sewer tests shall consist of plugging the end of the building sewer at the point of connection with the public sewer, filling the building sewer with water, testing with not less than three feet (3') head of water and maintaining such pressure for fifteen (15) minutes.

P2902.1.1 Backflow Ordinance. Add new Section 2902.1.1 to read as follows:

P2902.1.1 Backflow Ordinance. All potable water supply systems shall conform to Title VIII, Chapter 9, of the Midland City Code (Ordinance No. 7605) for purposes of cross connection and backflow prevention.

TableP2905.4 Water Service, Pipe. Add the following footnotes to Table P 2905.4

Footnote 1. Copper or copper-alloy tubing shall be minimum Type "L" for underground water supply systems.

Footnote 2. Plastic water pipe used for water service shall terminate thirty-six inches (36") from the water meter. The water service pipe shall be connected to the water meter with not less than thirty-six inches (36") of minimum Type "L" copper.

P2905.20 Underground Joints. Add a new Section P2905.20 to read as follows:

P2904.20 Underground Joints. For purposes of repair only, joints in polybutylene (PB) plastic pipe or tubing underground or under a concrete floor slab shall be installed using heat fusion, in accordance with the manufacturer's installation instructions. Joints in copper pipe or tubing installed in a concrete floor slab or under a concrete floor slab on grade shall be installed using wrought-copper fittings and brazed joints.

P3103.1 Roof Extension. Amend Section P3103.1 to read as follows:

P3103.1 Roof Extension. All open vent pipes that extend through a roof shall be terminated at least twelve inches (12") above the roof, except that where a roof is to be used for any purpose other than weather protection, the vent extensions shall be run at least seven feet (7') above the roof.

#### **4-11-4. Appeals.**

Whenever the owner of a building or structure or its duly authorized agent, or the applicant for a building permit is aggrieved by any order or decision of the Building Official made in connection with their administration of this Chapter, he may appeal such decision or order to the Board of Appeals (provided for in the Building code of the City), and said Board shall proceed to hear and decide any such appeals in the same manner as it now hears appeals from decisions made under said Building Code, and said Board of Appeals shall have the same power and authority over appeals from the Residential Code and the same rules and regulations shall apply as are fully set out in said Building Code.

**SECTION TWO.** The provisions of this ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

**SECTION THREE.** If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this ordinance. The Council of the City of Midland hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

**SECTION FOUR.** The penalty for violation of this ordinance shall be in accordance with the general penalty provisions contained in Section 1-3-1 of the City Code of Midland, Texas, which provides for a fine not exceeding two thousand dollars(\$2000.00).

**SECTION FIVE.** This ordinance shall become effective April 1, 2014.

**SECTION SIX.** The City Secretary is hereby authorized and directed to publish the descriptive caption of this ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

The above and foregoing ordinance was duly proposed, read in full and adopted on first reading, the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014; and passed to second reading on motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

The above and foregoing ordinance was read in full and finally adopted by the following vote upon motion of Council member \_\_\_\_\_, seconded by Council member \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014, at a regular meeting of the City Council:

Council members voting "AYE":

Council members voting "NAY":

PASSED AND APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, A.D., 2014.

\_\_\_\_\_  
Jerry F. Morales, Mayor

ATTEST:

\_\_\_\_\_  
Amy M. Turner, City Secretary



APPROVED AS TO CONTENT AND  
COMPLETENESS:

---

Steve Thorpe, Building Official

APPROVED ONLY AS TO FORM:

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Keith Stretcher, City Attorney

## **Residential Code Amendments**

### **4-11-2. Code adopted.**

**The specifications, rules and regulations entitled 2012 International Residential Code together with appendices A,B,C, D, E, J, N, P and Q, as promulgated and published by the International Code Council, Inc, are hereby adopted as the Residential Code as fully as if copied at length in this Chapter and are hereby incorporated herein by reference and made a part of this Chapter.**

### **4-11-3. Changes and additions to adopted residential code.**

Notwithstanding any provisions of this Chapter or said adopted Residential Code to the contrary, the latter is adopted with certain changes, additions and deletions thereto so that the following sections and provisions thereof shall hereafter read as follows, to wit:

*R101.1 Title.* Amend Section R101.1 to read as follows:

*R101.1 Title.* These provisions shall be known as the Residential Code for One-and Two-Family Dwellings of the City of Midland, and shall be cited as such and will be referred to herein as "this code".

*R103.2 Appointment.* Amend Section 103.2 to read as follows:

*R103.2. Appointment.* The Building Official, Assistant Building Official, Inspectors and other personnel shall be appointed in accordance with the personnel policies of the City and shall be subject to all personnel rules and regulations of the City of Midland.

*R105.2 Work Exempt From Permit.* Amend Section 105.2 to read as follows:

*R105.2. Work Exempt From Permit.* Delete the following:

Building: No.'s 1, 2, 3, 4, 5.

Add the following:

**#11.** Tree forts or other play structures supported partially or entirely by a tree.

*R105.8 Contractor's Responsibilities.* Amend Section 105.8 to read as follows:

*R105.8 Contractor's Responsibilities:*

(a) It shall be the duty of every contractor or builder, who is engaged in the construction, erection, alteration or repair of residential buildings or structures, subject to the provisions of this Code, to give good and sufficient bond in the sum of ten thousand dollars (\$10,000.00) to be

approved by the City Attorney, conditioned to conform to the Building Regulations of this Section, and other ordinances and laws of the City of Midland in reference to buildings and related construction and site requirements. The bond herein required shall include the bonds required for early clearance procedures as required by Section 9 of this Title and Chapter and with the sidewalk, driveway and curb bond required by this Code with no increase in amounts.

(b) No building permit shall be issued by the Building Official unless and until a bond as herein provided has been tendered to and approved by the Building Official by the person or firm requesting such permit.

(c) Nothing in this Code shall prevent a homeowner from maintaining, altering or adding to his home within his own property boundaries provided such work is done by himself for the exclusive benefit of his family. Such privilege does not convey the right to violate any of the provisions of this Code, nor is it to be construed as exempting any such property owner from obtaining a permit and paying the required fees therefore.

*R108.2 Schedule of Permit Fees.* Amend Section 108.2 to read as follows: The fees for all gas systems work shall be as indicated in the Fee Schedule Ordinance 8818.

*R108.5 Refunds.* Delete 108.5 as written and substitute the following:

Refunds- Refunds shall be in accordance with Fee Schedule Ordinance 8818

*R112.1 General-* **Delete section R112.1 and replace with the following: Application for appeal. A person shall have the right to appeal a decision of the code official to the board of appeals, per International Building Code section 113. An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of this code do not fully apply, or an equally good or better form of construction is proposed. The application shall be filed on a form obtained from the code official within 20 days after the notice was served.**

**Delete sections R112.2- 112.4 in their entirety**

*Table R301.2(1) Climatic and Geographic Design Criteria.* Amend Table R301.2(1) to read as follows:

TABLE INSET:

|                            |           |
|----------------------------|-----------|
| <b>Ground Snow Load</b>    | 3.5 PSF   |
| Basic Wind Speed           | 90 MPH    |
| <b>Topographic effects</b> | <b>No</b> |
| Seismic Design Category    | A         |
| Weathering                 | Moderate  |

|                                                                      |                                    |
|----------------------------------------------------------------------|------------------------------------|
| Frost Line Depth                                                     | 12 inches                          |
| Termite                                                              | Moderate to Heavy                  |
| Decay <b>(DELETE)</b>                                                | Slight to Moderate <b>(DELETE)</b> |
| Winter Design Temp _____<br><b>Ice Barrier Underlayment Required</b> | 21 degrees F _____<br><b>No</b>    |
| Flood Hazards                                                        | Adoption Date NFIP 09/27/91        |
|                                                                      | Current FIRM 09/15/05              |
| <b>Air Freezing Index</b>                                            | <b>1500 or less</b>                |
| <b>Mean annual Temp</b>                                              | <b>65 F</b>                        |

**Delete section R313 Automatic Fire Sprinkler systems in its entirety.**

**Delete Chapter 11- Energy Efficiency in its entirety. Title 4 Chapter 12 Energy Code shall be the Energy Code for the city.**

*G2417.4 (406.4) Test Pressure Measurement.* Amend Section G2417.4 to read as follows:

*G2417.4 (406.4) Test Pressure Measurement.* Test pressure shall be measured with an ounce gauge, manometer or with a mercury gauge designed and calibrated to read, record or indicate a pressure loss due to leakage during the test period. The source of pressure shall be isolated before the pressure tests are made.

*G2417.4.1 (406.4.1) Test Pressure.* Amend Section G2417.4.1(406.4.1) to read as follows:

*G2417.4.1 (406.4.1) Test Pressure.* Low pressure (not in excess of 0.5 psi) gas piping shall withstand a pressure of not less than 1 1/2 times the proposed maximum working pressure, but not less than 5.88 psi, ninety (90) ounces, or twelve inches (12") of mercury for a period of not less than ten (10) minutes without showing any drop in pressure. Higher pressure piping (2-psi gas) shall withstand a pressure of at least 10 psi or twenty inches (20") of mercury for a period of not less than ten (10) minutes without showing any drop in pressure.

*G2420.1.4 (409.1.4) Service Line Shutoff Valve.* Add new Section G2420.1.4(409.1.4) to read as follows:

*G2420.1.4 (409.1.4) Service Line Shutoff Valve.* An approved shutoff valve shall be installed above ground outside on the service line at the building entrance on all new gas line installations and on all replaced gas lines.

*P2503.4 Building Sewer Testing.* Amend Section P2503.4 to read as follows:

*P2503.4 Building Sewer Testing.* Building sewer tests shall consist of plugging the end of the building sewer at the point of connection with the public sewer, filling the building sewer with water, testing with not less than three feet (3') head of water and maintaining such pressure for fifteen (15) minutes.

*P2902.1.1 Backflow Ordinance.* Add new Section 2902.1.1 to read as follows:

*P2902.1.1 Backflow Ordinance.* All potable water supply systems shall conform to Title VIII, Chapter 9, of the Midland City Code (Ordinance No. 7605) for purposes of cross connection and backflow prevention.

*Table P2905.4 Water Service, Pipe.* Add the following footnotes to Table P 2905.4

*Footnote 1.* Copper or copper-alloy tubing shall be minimum Type "L" for underground water supply systems.

*Footnote 2.* Plastic water pipe used for water service shall terminate thirty-six inches (36") from the water meter. The water service pipe shall be connected to the water meter with not less than thirty-six inches (36") of minimum Type "L" copper.

*P2905.20 Underground Joints.* Add a new Section P2905.20 to read as follows:

*P2904.20 Underground Joints.* For purposes of repair only, joints in polybutylene (PB) plastic pipe or tubing underground or under a concrete floor slab shall be installed using heat fusion, in accordance with the manufacturer's installation instructions. Joints in copper pipe or tubing installed in a concrete floor slab or under a concrete floor slab on grade shall be installed using wrought-copper fittings and brazed joints.

*P3103.1 Roof Extension.* Amend Section P3103.1 to read as follows:

*P3103.1 Roof Extension.* All open vent pipes that extend through a roof shall be terminated at least twelve inches (12") above the roof, except that where a roof is to be used for any purpose other than weather protection, the vent extensions shall be run at least seven feet (7') above the roof.

#### **4-11-4. Appeals.**

Whenever the owner of a building or structure or its duly authorized agent, or the applicant for a building permit is aggrieved by any order or decision of the Building Official made in connection with their administration of this Chapter, he may appeal such decision or order to the Board of Appeals (provided for in the Building code of the City), and said Board shall proceed to hear and decide any such appeals in the same manner as it now hears appeals from decisions made under said Building Code, and said Board of Appeals shall have the same power and authority over appeals from the Residential Code and the same rules and regulations shall apply as are fully set out in said Building Code.



# City Council Agenda

Approved for Agenda:  
sreyes  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Pam Simecka, Finance Director

**SUBJECT:** Sale of City of Midland Certificates of Obligations, Series 2014

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## Purpose:

Consider all matters incident and related to the issuance and sale of "City of Midland, Texas, Tax and Limited Pledge Revenue Certificates of Obligation, Series 2014," including the adoption of an ordinance authorizing the issuance of such certificates of obligation.

## Recommended City Council Action

☒ Approve ☐ Deny ☐ Directional / Informational

## Fiscal Impact:

The sale of 2014 Certificate of Obligation not to exceed \$29 million to fund proposed projects, levy ad valorem taxes to pay debt service and approve agreements associated with issue.

## Discussion:

Required notices have been posted at City Hall and published as required.

Fitch Ratings has assigned a top ranking of "AAA" rating to this \$29 million issue, the 2014 refunding issue and all previous outstanding issues of the City of Midland.

Standard & Poor has affirmed the City's bond rating at AA+. Their next to the highest ranking.

Attachment 1 is a schedule of events leading to the issuance of the Certificates.

Attachment 2 is a detail listing of uses of the Certificates.

Attachment 3 is the rating information from Fitch and Standard and Poor's.



ORDINANCE NO. \_\_\_\_

AN ORDINANCE authorizing the issuance of "CITY OF MIDLAND, TEXAS, TAX AND LIMITED PLEDGE REVENUE CERTIFICATES OF OBLIGATION, SERIES 2014"; levying an ad valorem tax upon all taxable property within the City and providing for a limited pledge of the net revenues of the City's Waterworks and Sewer System for the payment of said Certificates; prescribing the terms and details of such Certificates and resolving other matters incident and related to the issuance, sale, security, payment and delivery of said Certificates, including the approval of a Paying Agent/Registrar Agreement and the approval and distribution of an Official Statement pertaining thereto; and providing an effective date.

WHEREAS, notice of the City Council's intention to issue certificates of obligation in the maximum principal amount of \$29,000,000 for the purpose of paying contractual obligations to be incurred for the construction, improvement, and acquisition of public works and equipment, to wit: (i) acquiring and installing a voice and data communication system for public services, including police and fire departments, (ii) improving, constructing and equipping firefighting facilities, (iii) improving, constructing and equipping park and recreational facilities, (iv) improving and equipping the City's information technology system, (v) constructing and improving streets, including drainage, landscaping, curbs, gutters, sidewalks, signage and traffic signalization incidental thereto and the acquisition of land and rights-of-way therefor, and (vi) paying professional services rendered in relation to such projects and the financing thereof, has been duly published in the [*Midland Reporter-Telegram*,] a newspaper of general circulation in the City of Midland, Texas (the "City") on [\_\_\_\_\_, 20\_\_] and [\_\_\_\_\_, 20\_\_], the date of the first publication of such notice being not less than thirty-one (31) days prior to the tentative date stated therein for the passage of the ordinance authorizing the issuance of such certificates; and

WHEREAS, the [*Midland Reporter-Telegram*] is a newspaper which devotes not less than twenty-five percent (25%) of its total column lineage to items of general interest, is published not less frequently than once each week, entered as second-class (periodical class) postal matter in the county where it is published, and has been published regularly and continuously for not less than twelve (12) months prior to the date of the publication of said "NOTICE OF INTENTION TO ISSUE CITY OF MIDLAND, TEXAS, CERTIFICATES OF OBLIGATION";

WHEREAS, no petition protesting the issuance of the certificates of obligation described in the aforesaid notice, signed by at least 5% of the qualified electors of the City, has been filed with or presented to the City Secretary on or prior to the date of the passage of this Ordinance; and

WHEREAS, the Council hereby finds and determines that \$\_\_\_\_\_ in principal amount of the certificates of obligation described in such notice should be issued and sold at this time; now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND:

SECTION 1: Authorization-Designation-Principal Amount-Purpose. Certificates of obligation of the City shall be and are hereby authorized to be issued in the aggregate principal amount of \$\_\_\_\_\_ to be designated and bear the title "CITY OF MIDLAND, TEXAS, TAX



AND LIMITED PLEDGE REVENUE CERTIFICATES OF OBLIGATION, SERIES 2014” (the “Certificates”), for the purpose of paying contractual obligations to be incurred for the construction, improvement, and acquisition of public works and equipment, to wit: (i) acquiring and installing a voice and data communication system for public services, including police and fire departments, (ii) improving, constructing and equipping fire fighting facilities, (iii) improving, constructing and equipping park and recreational facilities, (iv) improving and equipping the City’s information technology system, (v) constructing and improving streets, including drainage, landscaping, curbs, gutters, sidewalks, signage and traffic signalization incidental thereto and the acquisition of land and rights-of-way therefor, and (vi) paying professional services rendered in relation to such projects and the financing thereof; pursuant to authority conferred by and in conformity with the Constitution and laws of the State of Texas, including Texas Local Government Code, Subchapter C of Chapter 271, as amended.

**SECTION 2: Fully Registered Obligations- Authorized Denominations- Stated Maturities- Date.** The Certificates are issuable in fully registered form only; shall be dated January 15, 2014 (the “Certificate Date”) and shall be in denominations of \$5,000 or any integral multiple thereof (within a Stated Maturity), and the Certificates shall become due and payable on March 1 in each of the years and in principal amounts (the “Stated Maturities”) and bear interest at the per annum rate(s) in accordance with the following schedule:

| <u>Year of<br/>Stated Maturity</u> | <u>Principal<br/>Amount</u> | <u>Interest<br/>Rates</u> |
|------------------------------------|-----------------------------|---------------------------|
| 2015                               | \$ ,000                     |                           |
| 2016                               | ,000                        |                           |
| 2017                               | ,000                        |                           |
| 2018                               | ,000                        |                           |
| 2019                               | ,000                        |                           |
| 2020                               | ,000                        |                           |
| 2021                               | ,000                        |                           |
| 2022                               | ,000                        |                           |
| 2023                               | ,000                        |                           |
| 2024                               | ,000                        |                           |
| 2025                               | ,000                        |                           |
| 2026                               | ,000                        |                           |
| 2027                               | ,000                        |                           |
| 2028                               | ,000                        |                           |
| 2029                               | ,000                        |                           |
| 2030                               | ,000                        |                           |
| 2031                               | ,000                        |                           |
| 2032                               | ,000                        |                           |
| 2033                               | ,000                        |                           |
| 2034                               | ,000                        |                           |

The Certificates shall bear interest on the unpaid principal amounts thereof from the Certificate Date at the per annum rate(s) shown in the above schedule, and such interest shall be calculated on the basis of a 360-day year consisting of twelve 30-day months. Interest on the unpaid principal amounts of the Certificates shall be payable on September 1 and March 1 in each year, commencing March 1, 2015.

**SECTION 3: Terms of Payment-Paying Agent/Registrar.** The principal of, premium, if any, and the interest on the Certificates, due and payable by reason of maturity, redemption, or

otherwise, shall be payable only to the registered owners or holders of the Certificates (the "Holders") appearing on the registration and transfer books (the "Security Register") maintained by the Paying Agent/Registrar. Such payments shall be in any coin or currency of the United States of America, which at the time of payment is legal tender for the payment of public and private debts, and shall be without exchange or collection charges to the Holders.

The selection and appointment of The Bank of New York Mellon Trust Company, N.A., Dallas, Texas, to serve as Paying Agent/Registrar for the Certificates is hereby approved and confirmed. Books and records relating to the registration, payment, transfer and exchange of the Certificates (the "Security Register") shall at all times be kept and maintained on behalf of the City by the Paying Agent/Registrar, as provided herein and in accordance with the terms and provisions of a "Paying Agent/Registrar Agreement," substantially in the form attached hereto as Exhibit A, and such reasonable rules and regulations as the Paying Agent/Registrar and the City may prescribe. The Mayor and City Secretary are hereby authorized to execute and deliver such Agreement in connection with the delivery of the Certificates. The City covenants to maintain and provide a Paying Agent/Registrar at all times until the Certificates are paid and discharged, and any successor Paying Agent/Registrar shall be a bank, trust company, financial institution or other entity qualified and authorized to serve in such capacity and perform the duties and services of Paying Agent/Registrar. Upon any change in the Paying Agent/Registrar for the Certificates, the City agrees to promptly cause a written notice of the change to be sent to each Holder by United States Mail, first class postage prepaid, and such notice shall also give the address of the new Paying Agent/Registrar.

Principal of and premium, if any, on the Certificates shall be payable at the Stated Maturities or the redemption thereof only upon presentation and surrender of the Certificates to the Paying Agent/Registrar at its designated offices, initially in East Syracuse, New York, or, with respect to a successor paying agent/registrar, at the designated office of such successor (the "Designated Payment/Transfer Office"). Interest on the Certificates shall be paid by the Paying Agent/Registrar to the Holders whose names appear in the Security Register at the close of business on the Record Date (the fifteenth (15<sup>th</sup>) day of the month next preceding each interest payment date) and payment of such interest shall be (i) by check sent United States mail, first-class postage prepaid, to the address of the Holder recorded in the Security Register or (ii) by such other method, acceptable to the Paying Agent/Registrar, requested by, and at the risk and expense of, the Holder. If the date for the payment of the principal of or interest on the Certificates shall be a Saturday, Sunday, a legal holiday, or a day when banking institutions in the city where the Designated Payment/Transfer Office of the Paying Agent/Registrar is located are authorized by law or executive order to be closed, then the date for such payment shall be the next succeeding day which is not such a Saturday, Sunday, legal holiday, or day when banking institutions are authorized to be closed; and payment on such date shall have the same force and effect as if made on the original date payment was due.

In the event of a nonpayment of interest on a scheduled payment date, and for thirty (30) days thereafter, a new record date for such interest payment (a "Special Record Date") will be established by the Paying Agent/Registrar, if and when funds for the payment of such interest have been received from the City. Notice of the Special Record Date and of the scheduled payment date of the past due interest (which shall be fifteen (15) days after the Special Record Date) shall be sent at least five (5) business days prior to the Special Record Date by United States Mail, first class postage prepaid, to the address of each Holder appearing on the Security Register at the close of business on the last business day next preceding the date of mailing of such notice.

#### SECTION 4: Redemption.

(a) Optional Redemption. The Certificates having Stated Maturities on and after March 1, 2024 shall be subject to redemption prior to maturity, at the option of the City, in whole or in part in principal amounts of \$5,000 or any integral multiple thereof (and if within a Stated Maturity by lot by the Paying Agent/Registrar), on March 1, 2023, or on any date thereafter, at the redemption price of par plus accrued interest to the date of redemption.

(b) Exercise of Redemption Option. At least forty-five (45) days prior to an optional redemption date for the Certificates (unless a shorter notification period shall be satisfactory to the Paying Agent/Registrar), the City shall notify the Paying Agent/Registrar of the decision to redeem Certificates, the principal amount of each Stated Maturity to be redeemed, and the date of redemption therefor. The decision of the City to exercise the right to redeem Certificates shall be entered in the minutes of the governing body of the City.

(c) Selection of Certificates for Redemption. If less than all Outstanding Certificates of the same Stated Maturity are to be redeemed on a redemption date, the Paying Agent/Registrar shall treat such Certificates as representing the number of Certificates Outstanding which is obtained by dividing the principal amount of such Certificates by \$5,000 and shall select the Certificates, or principal amount thereof, to be redeemed within such Stated Maturity by lot.

(d) Notice of Redemption. Not less than thirty (30) days prior to a redemption date for the Certificates, a notice of redemption shall be sent by United States mail, first-class postage prepaid, in the name of the City and at the City's expense, to each Holder of a Certificate to be redeemed in whole or in part at the address of the Holder appearing on the Security Register at the close of business on the business day next preceding the date of mailing such notice, and any notice of redemption so mailed shall be conclusively presumed to have been duly given irrespective of whether or not received by the Holder.

All notices of redemption shall (i) specify the date of redemption for the Certificates, (ii) identify the Certificates to be redeemed and, in the case of a portion of the principal amount to be redeemed, the principal amount thereof to be redeemed, (iii) state the redemption price, (iv) state that the Certificates, or the portion of the principal amount thereof to be redeemed, shall become due and payable on the redemption date specified, and the interest thereon, or on the portion of the principal amount thereof to be redeemed, shall cease to accrue from and after the redemption date, and (v) specify that payment of the redemption price for the Certificates, or the principal amount thereof to be redeemed, shall be made at the Designated Payment/Transfer Office of the Paying Agent/Registrar only upon presentation and surrender thereof by the Holder. If a Certificate is subject by its terms to prior redemption and has been called for redemption and notice of redemption thereof has been duly given as hereinabove provided, such Certificate (or the principal amount thereof to be redeemed) shall become due and payable and interest thereon shall cease to accrue from and after the redemption date therefor; provided moneys sufficient for the payment of such Certificate (or of the principal amount thereof to be redeemed) at the then applicable redemption price are held for the purpose of such payment by the Paying Agent/Registrar.

(e) Conditional Notice of Redemption. With respect to any optional redemption of the Certificates, unless moneys sufficient to pay the principal of and premium, if any, and interest on the Certificates to be redeemed shall have been received by the Paying Agent/Registrar prior to the giving of such notice of redemption, such notice may state that said redemption is conditional upon the receipt of such moneys by the Paying Agent/Registrar on or

prior to the date fixed for such redemption, or upon the satisfaction of any prerequisites set forth in such notice of redemption; and, if sufficient moneys are not received, such notice shall be of no force and effect, the City shall not redeem such Certificates and the Paying Agent/Registrar shall give notice, in the manner in which the notice of redemption was given, to the effect that the Certificates have not been redeemed.

SECTION 5: Registration- Transfer- Exchange of Certificates- Predecessor Certificates. The Paying Agent/Registrar shall obtain, record, and maintain in the Security Register the name and address of each and every Holder of the Certificates issued under and pursuant to the provisions of this Ordinance, or if appropriate, the nominee thereof. Any Certificate may, in accordance with its terms and the terms hereof, be transferred or exchanged for Certificates of other authorized denominations by the Holder, in person or by his duly authorized agent, upon surrender of such Certificate to the Paying Agent/Registrar for cancellation, accompanied by a written instrument of transfer or request for exchange duly executed by the Holder or by his duly authorized agent, in form satisfactory to the Paying Agent/Registrar.

Upon the surrender of any Certificate for transfer at the Designated Payment/Transfer Office of the Paying Agent/Registrar, the Paying Agent/Registrar shall register and deliver, in the name of the designated transferee or transferees, one or more new Certificates of authorized denominations and having the same Stated Maturity and of a like aggregate principal amount as the Certificate or Certificates surrendered for transfer.

At the option of the Holder, Certificates may be exchanged for other Certificates of authorized denominations and having the same Stated Maturity, bearing the same rate of interest and of like aggregate principal amount as the Certificates surrendered for exchange, upon surrender of the Certificates to be exchanged at the Designated Payment/Transfer Office of the Paying Agent/Registrar. Whenever any Certificates are surrendered for exchange, the Paying Agent/Registrar shall register and deliver new Certificates to the Holder requesting the exchange.

All Certificates issued in any transfer or exchange of Certificates shall be delivered to the Holders at the Designated Payment/Transfer Office of the Paying Agent/Registrar or sent by United States mail, first-class postage prepaid, to the Holders, and, upon the registration and delivery thereof, the same shall be the valid obligations of the City, evidencing the same obligation to pay and entitled to the same benefits under this Ordinance, as the Certificates surrendered in such transfer or exchange.

All transfers or exchanges of Certificates pursuant to this Section shall be made without expense or service charge to the Holder, except as otherwise herein provided, and except that the Paying Agent/Registrar shall require payment by the Holder requesting such transfer or exchange of any tax or other governmental charges required to be paid with respect to such transfer or exchange.

Certificates canceled by reason of an exchange or transfer pursuant to the provisions of this Ordinance are hereby defined to be "Predecessor Certificates," evidencing all or a portion, as the case may be, of the same obligation to pay evidenced by the new Certificate or Certificates registered and delivered in the exchange or transfer. Additionally, the term "Predecessor Certificates" shall include any mutilated, lost, destroyed, or stolen Certificate for which a replacement Certificate has been issued, registered, and delivered in lieu thereof pursuant to the provisions of Section 28 hereof, and such new replacement Certificate shall be deemed to evidence the same obligation as the mutilated, lost, destroyed, or stolen Certificate.

Neither the City nor the Paying Agent/Registrar shall be required to issue or transfer to an assignee of a Holder any Certificate called for redemption, in whole or in part, within 45 days of the date fixed for the redemption of such Certificate; provided, however, such limitation on transferability shall not be applicable to an exchange by the Holder of the unredeemed balance of a Certificate called for redemption in part.

SECTION 6: Book-Entry-Only Transfers and Transactions. Notwithstanding the provisions contained in this Ordinance relating to the payment, and transfer/exchange of the Certificates, the City hereby approves and authorizes the use of "Book-Entry-Only" securities clearance, settlement and transfer system provided by The Depository Trust Company ("DTC"), a limited purpose trust company organized under the laws of the State of New York, in accordance with the requirements and procedures identified in the current DTC Operational Arrangements memorandum, as amended, the Blanket Issuer Letter of Representations, by and between the City and DTC, and the Letter of Representation from the Paying Agent/Registrar to DTC (collectively, the "Depository Agreement") relating to the Certificates.

Pursuant to the Depository Agreement and the rules of DTC the Certificates shall be deposited with DTC who shall hold said Certificates for its participants (the "DTC Participants"). While the Certificates are held by DTC under the applicable Depository Agreement, the Holder of the Certificates on the Security Register for all purposes, including payment and notices, shall be Cede & Co., as nominee of DTC, notwithstanding the ownership of each actual purchaser or owner of each Certificate (the "Beneficial Owners") being recorded in the records of DTC and DTC Participants.

In the event DTC determines to discontinue serving as securities depository for the Certificates or otherwise ceases to provide book-entry clearance and settlement of securities transactions in general, the City covenants and agrees with the Holders of the Certificates to cause Certificates to be printed in definitive form and provide for the appropriate Certificates to be issued and delivered to DTC Participants and Beneficial Owners, as the case may be. Thereafter, the Certificates in definitive form shall be assigned, transferred and exchanged on the appropriate Security Register maintained by the Paying Agent/Registrar and payment of such Certificates shall be made in accordance with the provisions hereof other than this Section.

SECTION 7: Execution - Registration. The Certificates shall be executed on behalf of the City by the Mayor under its seal reproduced or impressed thereon and countersigned by the City Secretary. The signatures of said officers on the Certificates may be manual or facsimile. Certificates bearing the manual or facsimile signatures of individuals who are or were the proper officers of the City on the Certificate Date shall be deemed to be duly executed on behalf of the City, notwithstanding that one or more of the individuals executing such Certificates shall cease to be such officers at the time of delivery of the Certificates to the initial purchaser(s) and with respect to Certificates delivered in subsequent exchanges and transfers, all as authorized and provided in the Texas Government Code, Chapter 1201, as amended.

No definitive Certificate shall be entitled to any right or benefit under this Ordinance, or be valid or obligatory for any purpose, unless there appears on such Certificate a certificate of registration substantially in the form provided in Section 9(d), manually executed by an authorized officer, employee or representative of the Paying Agent/Registrar, and such manually executed certificate upon any Certificate shall be conclusive evidence, and the only evidence, that such Certificate has been duly certified, registered and delivered.

No Initial Certificate (as defined below) shall be entitled to any right or benefit under this Ordinance or be valid or obligatory for any purpose unless there appears on such Initial

Certificate a certificate of registration substantially in the form provided in Section 9(c), manually executed by the Comptroller of Public Accounts of the State of Texas, or a duly authorized agent.

SECTION 8: Initial Certificate. The Certificates herein authorized shall be initially issued as a single fully-registered certificate in the principal amount of \$\_\_\_\_\_ with principal installments to become due and payable as provided in Section 2 and numbered T-1 (the "Initial Certificate") and shall be registered in the name of the initial purchaser or the designee thereof. The Initial Certificate shall be submitted to the Office of the Attorney General of the State of Texas for approval; certified and registered by the Office of the Comptroller of Public Accounts of the State of Texas; and, delivered to the initial purchaser. Any time after the delivery of the Initial Certificate, the Paying Agent/Registrar, pursuant to written instructions from the initial purchaser, or the designee thereof, shall cancel the Initial Certificate and exchange it for definitive Certificates of authorized denominations, Stated Maturities, principal amounts and bearing applicable interest rates for transfer and delivery to the Holders named at the addresses identified for such purpose; all pursuant to and in accordance with such written instructions from the initial purchaser, or the designee thereof, and such other information and documentation as the Paying Agent/Registrar may reasonably require.

SECTION 9: Forms.

(a) Forms Generally. The Certificates, the Registration Certificate of the Comptroller of Public Accounts of the State of Texas, the Registration Certificate of Paying Agent/Registrar, and the form of Assignment to appear on each of the Certificates, shall be substantially in the forms set forth in this Section with such appropriate insertions, omissions, substitutions, and other variations as are permitted or required by this Ordinance and may have such letters, numbers, or other marks of identification (including identifying numbers and letters of the Committee on Uniform Securities Identification Procedures of the American Bankers Association) and such legends and endorsements (including insurance legends in the event the Certificates, or any maturities thereof, are purchased with insurance) and any reproduction of an opinion of counsel thereon as may, consistently herewith, be established by the City or determined by the officers executing such Certificates as evidenced by their execution. Any portion of the text of any Certificates may be set forth on the reverse thereof, with an appropriate reference thereto on the face of the Certificate.

The definitive Certificates and the Initial Certificates shall be printed, lithographed, engraved, typewritten, photocopied, or produced in any other similar manner, all as determined by the officers executing such Certificates as evidenced by their execution.

(b) Form of Definitive Certificate.

REGISTERED  
NO. \_\_\_\_\_

REGISTERED  
\$ \_\_\_\_\_

UNITED STATES OF AMERICA  
STATE OF TEXAS  
CITY OF MIDLAND, TEXAS  
TAX AND LIMITED PLEDGE REVENUE  
CERTIFICATE OF OBLIGATION  
SERIES 2014

Certificate Date: January 15, 2014      Interest Rate: \_\_\_\_\_ %      Stated Maturity: \_\_\_\_\_      CUSIP NO: \_\_\_\_\_

Registered Owner:

Principal Amount:

The City of Midland (hereinafter referred to as the "City"), a body corporate and municipal corporation in the Counties of Midland and Martin, State of Texas, for value received, acknowledges itself indebted to and hereby promises to pay to the Registered Owner named above, or the registered assigns thereof, the Principal Amount stated above, on the Stated Maturity date specified above (or so much thereof as shall not have been paid upon prior redemption) and to pay interest (computed on the basis of a 360-day year consisting of twelve 30-day months) on the unpaid Principal Amount hereof from the Certificate Date at the per annum rate of interest specified above; such interest being payable on March 1 and September 1 of each year, commencing March 1, 2015. Principal of this Certificate is payable at its Stated Maturity or date of redemption to the registered owner hereof, upon presentation and surrender, at the Designated Payment/Transfer Office of the Paying Agent/Registrar executing the registration certificate appearing hereon, or its successor. Interest is payable to the registered owner of this Certificate (or one or more Predecessor Certificates, as defined in the Ordinance hereinafter referenced) whose name appears on the "Security Register" maintained by the Paying Agent/Registrar at the close of business on the "Record Date", which is the fifteenth (15<sup>th</sup>) day of the month next preceding each interest payment date, and interest shall be paid by the Paying Agent/Registrar by check sent United States mail, first-class postage prepaid, to the address of the registered owner recorded in the Security Register on the Record Date or by such other method, acceptable to the Paying Agent/Registrar, requested by, and at the risk and expense of, the registered owner. If the date for the payment of the principal of or interest on the Certificates shall be a Saturday, Sunday, a legal holiday, or a day when banking institutions in the city where the Paying Agent/Registrar is located are authorized by law or executive order to be closed, then the date for such payment shall be the next succeeding day which is not such a Saturday, Sunday, legal holiday, or day when banking institutions are authorized to be closed; and payment on such date shall have the same force and effect as if made on the original date payment was due. All payments of principal of, premium, if any, and interest on this Certificate shall be without exchange or collection charges to the registered owner hereof and in any coin or currency of the United States of America, which at the time of payment is legal tender for the payment of public and private debts.

This Certificate is one of the series specified in its title issued in the aggregate principal amount of \$ \_\_\_\_\_ (the "Certificates") for the purpose of paying contractual obligations to be incurred for the construction, improvement, and acquisition of public works and equipment, to wit: (i) acquiring and installing a voice and data communication system for public services, including police and fire departments, (ii) improving, constructing and equipping firefighting facilities, (iii) improving, constructing and equipping park and recreational facilities, (iv) improving and equipping the City's information technology system, (v) constructing and improving streets, including drainage, landscaping, curbs, gutters, sidewalks, signage and traffic signalization incidental thereto and the acquisition of land and rights-of-way therefor, and (vi) paying professional services rendered in relation to such projects and the financing thereof, under and in strict conformity with the Constitution and laws of the State of Texas, particularly Texas Local Government Code, Subchapter C of Chapter 271, as amended, and pursuant to an Ordinance adopted by the governing body of the City (herein referred to as the "Ordinance").

The Certificates maturing on and after March 1, 2024, may be redeemed prior to their Stated Maturities, at the option of the City, in whole or in part in principal amounts of \$5,000 or any integral multiple thereof (and if within a Stated Maturity by lot by the Paying Agent/Registrar), on March 1, 2023, or on any date thereafter.

The redemption price shall be par, together with accrued interest to the date of redemption and thirty (30) days prior written notice shall be sent by United States Mail, first class postage prepaid, to the registered owners of the Certificates to be redeemed. All redemptions are subject to the terms and provisions relating thereto contained in the Ordinance. If this Certificate (or any portion of the principal sum hereof) shall have been duly called for redemption and notice of such redemption duly given, then upon such redemption date this Certificate (or the portion of the principal sum hereof to be redeemed) shall become due and payable, and interest thereon shall cease to accrue from and after the redemption date therefor, provided moneys for the payment of the redemption price and the interest on the principal amount to be redeemed to the date of redemption are held for the purpose of such payment by the Paying Agent/Registrar.

In the event a portion of the principal amount of a Certificate is to be redeemed and the registered owner is someone other than Cede & Co., payment of the redemption price of such principal amount shall be made to the registered owner only upon presentation and surrender of such Certificate to the Paying Agent/Registrar at its Designated Payment/Transfer Office, and a new Certificate or Certificates of like maturity and interest rate in any authorized denominations provided by the Ordinance for the then unredeemed balance of the principal sum thereof will be issued to the registered owner without charge. If a Certificate is selected for redemption, in whole or in part, the City and the Paying Agent/Registrar shall not be required to transfer such Certificate to an assignee of the registered owner within forty-five (45) days of the redemption date; provided, however, such limitation on transferability shall not be applicable to an exchange by the registered owner of the unredeemed balance of a Certificate redeemed in part.

With respect to any optional redemption of the Certificates, unless moneys sufficient to pay the principal of and premium, if any, and interest on the Certificates to be redeemed shall have been received by the Paying Agent/Registrar prior to the giving of such notice of redemption, such notice may state that said redemption is conditional upon the receipt of such moneys by the Paying Agent/Registrar on or prior to the date fixed for such redemption, or upon the satisfaction of any prerequisites set forth in such notice of redemption; and, if sufficient moneys are not received, such notice shall be of no force and effect, the City shall not redeem such Certificates and the Paying Agent/Registrar shall give notice, in the manner in which the notice of redemption was given, to the effect that the Certificates have not been redeemed.

The Certificates are payable from the proceeds of an ad valorem tax levied, within the limitations prescribed by law, upon all taxable property in the City and are additionally payable from and secured by a lien on and limited pledge of the Net Revenues (as defined in the Ordinance) of the City's Waterworks and Sewer System (the "System"), such lien and pledge being limited to an amount not in excess of \$2,500 and being junior and subordinate to the lien on and pledge of the Net Revenues of the System securing the payment of "Prior Lien Obligations" (as defined in the Ordinance) now outstanding and hereafter issued by the City. In the Ordinance, the City reserves and retains the right to issue Prior Lien Obligations while the Certificates are outstanding without limitation as to principal amount but subject to any terms, conditions or restrictions as may be applicable thereto under law or otherwise and additional certificates equally and ratably secured with the Certificates by a parity lien on and pledge of the Net Revenues of the System.



Reference is hereby made to the Ordinance, a copy of which is on file in the Designated Payment/Transfer Office of the Paying Agent/Registrar, and to all the provisions of which the Registered Owner hereof by the acceptance hereof hereby assents, for definitions of terms; the description of and the nature and extent of the tax levied for the payment of the Certificates; the properties constituting the System; the Net Revenues pledged to the payment of the principal of and interest on the Certificates; the nature and extent and manner of enforcement of the limited pledge; the terms and conditions relating to the transfer of this Certificate; the conditions upon which the Ordinance may be amended or supplemented with or without the consent of the registered owners of the Certificates; the rights, duties, and obligations of the City and the Paying Agent/Registrar; the terms and provisions upon which the tax levy and the liens, pledges, charges and covenants made therein may be discharged at or prior to the maturity of this Certificate, and this Certificate deemed to be no longer Outstanding thereunder; and for the other terms and provisions contained therein. Capitalized terms used herein have the meanings assigned in the Ordinance.

This Certificate, subject to certain limitations contained in the Ordinance, may be transferred on the Security Register only upon its presentation and surrender at the Designated Payment/Transfer Office of the Paying Agent/Registrar, with the Assignment hereon duly endorsed by, or accompanied by a written instrument of transfer in form satisfactory to the Paying Agent/Registrar duly executed by, the Registered Owner hereof, or his or her duly authorized agent. When a transfer on the Security Register occurs, one or more fully registered Certificates of authorized denominations and of the same aggregate principal amount will be issued by the Paying Agent/Registrar to the designated transferee or transferees.

The City and the Paying Agent/Registrar, and any agent of either, may treat the Registered Owner hereof whose name appears on the Security Register (i) on the Record Date as the owner entitled to payment of interest hereon, (ii) on the date of surrender of this Certificate as the owner entitled to payment of principal hereof at its Stated Maturity or its date of redemption, in whole or in part, and (iii) on any other date as the owner for all other purposes, and neither the City nor the Paying Agent/Registrar, or any agent of either, shall be affected by notice to the contrary. In the event of nonpayment of interest on a scheduled payment date and for thirty (30) days thereafter, a new record date for such interest payment (a "Special Record Date") will be established by the Paying Agent/Registrar, if and when funds for the payment of such interest have been received from the City. Notice of the Special Record Date and of the scheduled payment date of the past due interest (which shall be fifteen (15) days after the Special Record Date) shall be sent at least five (5) business days prior to the Special Record Date by United States Mail, first class postage prepaid, to the address of each registered owner appearing on the Security Register at the close of business on the last business day next preceding the date of mailing of such notice.

It is hereby certified, recited, represented, and covenanted that the City is a body corporate and political subdivision duly organized and legally existing under and by virtue of the Constitution and laws of the State of Texas; that the issuance of the Certificates is duly authorized by law; that all acts, conditions and things required to exist and be done precedent to and in the issuance of the Certificates to render the same lawful and valid obligations of the City have been properly done, have happened and have been performed in regular and due time, form and manner as required by the Constitution and laws of the State of Texas, and the Ordinance; that the Certificates do not exceed any constitutional or statutory limitation; and that due provision has been made for the payment of the principal of and interest on the Certificates by the levy of a tax and a pledge of the Net Revenues of the System as aforesated. In case any provision in this Certificate or any application thereof shall be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions and

applications shall not in any way be affected or impaired thereby. The terms and provisions of this Certificate and the Ordinance shall be construed in accordance with and shall be governed by the laws of the State of Texas.

IN WITNESS WHEREOF, the City Council of the City has caused this Certificate to be duly executed under the official seal of the City as of the Certificate Date.

CITY OF MIDLAND, TEXAS

\_\_\_\_\_  
Mayor

COUNTERSIGNED:

\_\_\_\_\_  
City Secretary

(SEAL)

**(c)** Form of Registration Certificate of Comptroller of Public Accounts to Appear on Initial Certificates only.

REGISTRATION CERTIFICATE OF  
COMPTROLLER OF PUBLIC ACCOUNTS

|                           |   |                    |
|---------------------------|---|--------------------|
| OFFICE OF THE COMPTROLLER | § |                    |
| OF PUBLIC ACCOUNTS        | § |                    |
|                           | § | REGISTER NO. _____ |
| THE STATE OF TEXAS        | § |                    |

I HEREBY CERTIFY that this Certificate has been examined, certified as to validity and approved by the Attorney General of the State of Texas, and duly registered by the Comptroller of Public Accounts of the State of Texas.

WITNESS my signature and seal of office this \_\_\_\_\_.

\_\_\_\_\_  
Comptroller of Public Accounts  
of the State of Texas

(SEAL)

**(d)** Form of Certificate of Paying Agent/Registrar to appear on definitive Certificates only.

REGISTRATION CERTIFICATE OF PAYING AGENT/REGISTRAR

This Certificate has been duly issued and registered under the provisions of the within-mentioned Ordinance; the certificate or certificates of the above entitled and designated series originally delivered having been approved by the Attorney General of the State of Texas and registered by the Comptroller of Public Accounts, as shown by the records of the Paying Agent/Registrar.

The designated offices of the Paying Agent/Registrar in East Syracuse, New York, is the Designated Payment/Transfer Office of the Certificate.

THE BANK OF NEW YORK MELLON  
TRUST COMPANY, N.A., Dallas, Texas  
as Paying Agent/Registrar

Registration Date:

\_\_\_\_\_

By: \_\_\_\_\_  
Authorized Signature

(e) Form of Assignment.

ASSIGNMENT

FOR VALUE RECEIVED the undersigned hereby sells, assigns, and transfers unto  
(Print or typewrite name, address, and zip code of transferee:) \_\_\_\_\_

\_\_\_\_\_

(Social Security or other identifying number: \_\_\_\_\_) the within Certificate and all rights thereunder, and hereby irrevocably constitutes and appoints attorney to transfer the within Certificate on the books kept for registration thereof, with full power of substitution in the premises.

DATED: \_\_\_\_\_

Signature Guaranteed:

\_\_\_\_\_

NOTICE: The signature on this assignment must correspond with the name of the registered owner as it appears on the face of the within Certificate in every particular.

(f) The Initial Certificate(s) shall be in the form set forth in paragraph (b) of this Section, except that the form of the fully registered Initial Certificate shall be modified as follows:

The Heading and the first paragraph shall be amended as follows:

REGISTERED  
NO. T-1

REGISTERED  
\$ \_\_\_\_\_

UNITED STATES OF AMERICA  
STATE OF TEXAS  
CITY OF MIDLAND, TEXAS  
TAX AND LIMITED PLEDGE REVENUE  
CERTIFICATE OF OBLIGATION  
SERIES 2014

Certificate Date: January 15, 2014

Registered Owner:

Principal Amount: \_\_\_\_\_ DOLLARS

The City of Midland (hereinafter referred to as the "City"), a body corporate and municipal corporation in the Counties of Midland and Martin, State of Texas, for value received, acknowledges itself indebted to and hereby promises to pay to the Registered Owner named above, or the registered assigns thereof, on March 1 in each of the years and in principal amounts and bearing interest at per annum rates in accordance with the following schedule:

| <u>Year of<br/>Stated Maturity</u> | <u>Principal<br/>Amount</u> | <u>Interest<br/>Rates</u> |
|------------------------------------|-----------------------------|---------------------------|
|------------------------------------|-----------------------------|---------------------------|

(Information to be inserted from schedule in Section 2 of the Ordinance)

(or so much thereof as shall not have been paid upon prior redemption) and to pay interest (computed on the basis of a 360-day year consisting of twelve 30-day months) on the unpaid Principal Amount hereof from the Certificate Date at the per annum rate of interest specified above; such interest being payable on March 1 and September 1 of each year, commencing March 1, 2015. Principal of this Certificate is payable at its Stated Maturity or redemption to the Registered Owner hereof, by The Bank of New York Mellon Trust Company, N.A., Dallas, Texas (the "Paying Agent/Registrar"), upon presentation and surrender, at its designated offices initially in East Syracuse, New York, or, with respect to a successor paying agent/registrar, at the designated office of such successor (the "Designated Payment/Transfer Office"). Interest is payable to the Registered Owner of this Certificate (or one or more Predecessor Certificates, as defined in the Ordinance hereinafter referenced) whose name appears on the "Security Register" maintained by the Paying Agent/Registrar at the close of business on the "Record Date", which is the fifteenth (15<sup>th</sup>) day of the month next preceding each interest payment date, and interest shall be paid by the Paying Agent/Registrar by check sent United States mail, first-class postage prepaid, to the address of the Registered Owner recorded in the Security Register on the Record Date or by such other method, acceptable to the Paying Agent/Registrar, requested by, and at the risk and expense of, the Registered Owner. If the date for the payment of the principal of or interest on the Certificates shall be a Saturday, Sunday, a legal holiday, or a day when banking institutions in the city where the Paying Agent/Registrar is located are authorized by law or executive order to be closed, then the date for such payment shall be the next succeeding day which is not such a Saturday, Sunday, legal holiday, or day when banking institutions are authorized to be closed; and payment on such date shall have the same force and effect as if made on the original date payment was due. All payments of principal of, premium, if any, and interest on this Certificate shall be without exchange or collection charges to the Registered Owner hereof and in any coin or currency of the United States of America, which at the time of payment is legal tender for the payment of public and private debts.

SECTION 10: Definitions. For purposes of this Ordinance and for clarity with respect to the issuance of the Certificates herein authorized, and the levy of taxes and appropriation of Net Revenues for the Certificates, the following definitions are provided:

(a) The term “*Additional Certificates*” shall mean combination tax and revenue certificates of obligation hereafter issued under and pursuant to the provisions of the Act, or similar law hereafter enacted and payable from ad valorem taxes and additionally payable from and secured by a parity lien on and pledge of the Net Revenues of the System of equal rank and dignity with the lien and pledge securing the payment of the Certificates.

(b) The term “*Certificates*” shall mean \$ \_\_\_\_\_ “CITY OF MIDLAND, TEXAS, TAX AND LIMITED PLEDGE REVENUE CERTIFICATES OF OBLIGATION, SERIES 2014” authorized by this Ordinance.

(c) The term “*Certificate Fund*” shall mean the special Fund created and established under the provisions of Section 11 of this Ordinance.

(d) The term “*Collection Date*” shall mean, when reference is being made to the levy and collection of annual ad valorem taxes, the date annual ad valorem taxes levied each year by the City become delinquent.

(e) The term “*Fiscal Year*” shall mean the annual financial accounting period used with respect to the operations of the System now ending on September 30th of each year; provided, however, the City Council may change, by ordinance duly passed, such annual financial accounting period to end on another date if such change is found and determined to be necessary for budgetary or other fiscal purposes.

(f) The term “*Government Securities*” shall mean (a) direct, noncallable obligations of the United States of America, including obligations the principal of and interest on which are unconditionally guaranteed by the United States of America, (b) noncallable obligations of an agency or instrumentality of the United States, including obligations unconditionally guaranteed or insured by the agency or instrumentality and on the date of their acquisition or purchase by the City are rated as to investment quality by a nationally recognized investment rating firm not less than AAA or its equivalent, (c) noncallable obligations of a state or an agency or a county, municipality, or other political subdivision of a state that have been refunded and on the date of their acquisition or purchase by the City are rated as to investment quality by a nationally recognized investment rating firm not less than AAA or its equivalent and (d) any other then authorized securities or obligations that may be used to defease obligations such as the Certificates under the then applicable laws of the State of Texas.

(g) The term “*Gross Revenues*” shall mean all income, revenues, and receipts of every nature derived from or received by virtue of the operation of the System, including interest income and earnings received from the investment of moneys in any special funds created for the payment and security of the Prior Lien Obligations and other obligations payable in whole or in part from and secured by a lien on and pledge of the Net Revenues.

(h) The term “*Net Revenues*” shall mean the Gross Revenues of the System, with respect to any period, after deducting the System’s Operating and Maintenance Expenses during such period.

(i) The term “*Operating and Maintenance Expenses*” shall mean all current expenses of maintenance and operation thereof, including all salaries, labor, materials, repairs

and extensions necessary to render efficient service, provided, however, that only such expenses for repairs and extensions as in the judgment of the City Council, reasonably and fairly exercised, are necessary to keep the System in operation and render adequate service to the City and the inhabitants thereof, or such as might be necessary to meet some physical accident or condition which would otherwise impair any obligations payable from the Net Revenues of the System, shall be deducted in determining "Net Revenues." Contractual payments for the purchase of water or the treatment of sewage shall be a maintenance and operating expense of the System to the extent provided in the contract incurred therefor and as may be authorized by statute. Depreciation shall never be considered as an expense of operation and maintenance.

(j) The term "*Outstanding*" when used in this Ordinance with respect to Certificates means, as of the date of determination, all Certificates theretofore issued and delivered under this Ordinance, except:

(i) those Certificates canceled by the Paying Agent/Registrar or delivered to the Paying Agent/Registrar for cancellation;

(ii) those Certificates deemed to be duly paid by the City in accordance with the provisions of Section 24 hereof; and

(iii) those Certificates that have been mutilated, destroyed, lost, or stolen and replacement Certificates have been registered and delivered in lieu thereof as provided in Section 28 hereof.

(k) The term "*Prior Lien Obligations*" shall mean all bonds or other similar obligations that are payable in whole or in part from and secured by a lien on and pledge of the Net Revenues of the System which is prior and superior in claim, rank and dignity to the lien on and pledge of the Net Revenues securing the payment of the Certificates, including:

(i) "City of Midland, Texas Combination Tax and Revenue Refunding Bonds, Series 2007," dated January 15, 2007; and

(l) The term "*System*" shall mean the City's existing Waterworks and Sewer System, including, but not limited to, all properties (real, personal or mixed and tangible or intangible) owned, operated, maintained, and vested in the City for the supply, treatment and distribution of treated water for domestic, commercial, industrial and other uses, and the collection and treatment of water carried wastes, together with all future additions, extensions, replacements and improvements to the System.

SECTION 11: Certificate Fund. For the purpose of paying the interest on and to provide a sinking fund for the payment and retirement of the Certificates, there shall be and is hereby created a special Fund to be designated "SPECIAL 2014 CITY OF MIDLAND, TEXAS, TAX AND LIMITED PLEDGE REVENUE CERTIFICATE OF OBLIGATION FUND", and all moneys deposited to the credit of such Certificate Fund shall be kept and maintained at the City's depository bank, and moneys deposited in said Certificate Fund shall be used for no other purpose. Proper officers of the City are hereby authorized and directed to cause to be transferred to the Paying Agent/Registrar for the Certificates, from funds on deposit in the Certificate Fund, amounts sufficient to fully pay and discharge promptly each installment of interest and principal of the Certificates as the same accrues or matures or comes due by reason of redemption prior to maturity; such transfers of funds to be made in such manner as will cause immediately available funds to be deposited with the Paying Agent/Registrar for the

Certificates at the close of business on the last business day next preceding each interest and/or principal payment date for the Certificates.

Pending the transfer of funds to the Paying Agent/Registrar, money in the Certificate Fund may, at the option of the City, be invested in obligations identified in, and in accordance with the provisions of the "Public Funds Investment Act," Texas Government Code, Chapter 2256, as amended, relating to the investment of "bond proceeds"; provided that all such investments shall be made in such a manner that the money required to be expended from said Certificate Fund will be available at the proper time or times. All interest and income derived from deposits and investments in the Certificate Fund shall be credited to, and any losses debited to, the said Certificate Fund. All such investments shall be sold promptly when necessary to prevent any default in connection with the Certificates.

**SECTION 12: Tax Levy.** To provide for the payment of the "Debt Service Requirements" on the Certificates being (i) the interest on said Certificates and (ii) a sinking fund for their redemption at maturity or a sinking fund of 2% (whichever amount shall be the greater), there shall be and there is hereby levied, within the limitations prescribed by law, for the current year and each succeeding year thereafter while said Certificates or any interest thereon shall remain Outstanding, a sufficient tax on each one hundred dollars' valuation of taxable property in said City, adequate to pay such Debt Service Requirements, full allowance being made for delinquencies and costs of collection; said tax shall be assessed and collected each year and applied to the payment of the Debt Service Requirements, and the same shall not be diverted to any other purpose. The taxes so levied and collected shall be deposited into the Certificate Fund. This governing body hereby declares its purpose and intent to provide and levy a tax legally and fully sufficient to pay the said Debt Service Requirements, it having been determined that the existing and available taxing authority of the City for such purpose is adequate to permit a legally sufficient tax in consideration of all other outstanding indebtedness.

The amount of taxes to be provided annually for the payment of the principal of and interest on the Certificates shall be determined and accomplished in the following manner:

**(a)** Prior to the date the City Council establishes the annual tax rate and passes an ordinance levying ad valorem taxes each year, the City Council shall determine:

(i) The amount on deposit in the Certificate Fund after (a) deducting the total amount of Debt Service Requirements to become due on Certificates prior to the Collection Date for the ad valorem taxes to be levied and (b) adding to that amount the amount of Net Revenues of the System appropriated and allocated to pay such Debt Service Requirements prior to the Collection Date for the ad valorem taxes to be levied.

(ii) The amount of Net Revenues and other lawfully available revenues, if any, that are appropriated and to be set aside for the payment of the Debt Service Requirements on the Certificates between the Collection Date for the taxes then to be levied and the Collection Date for the taxes to be levied during the next succeeding calendar year.

(iii) The amount of Debt Service Requirements to become due and payable on the Certificates between the Collection Date for the taxes then to be levied and the Collection Date for the taxes to be levied during the next succeeding calendar year.

**(b)** The amount of taxes to be levied annually each year to pay the Debt Service Requirements on the Certificates shall be the amount established in paragraph (iii) above less

the sum total of the amounts established in paragraphs (i) and (ii), after taking into consideration delinquencies and costs of collecting such annual taxes.

SECTION 13: Limited Pledge of Net Revenues. The City hereby covenants and agrees that subject to the prior lien on and pledge of the Net Revenues to the payment and security of the Prior Lien Obligations, the Net Revenues of the System, in an amount not to exceed \$2,500, are hereby irrevocably pledged, equally and ratably, to the payment of the principal of and interest on the Certificates. This limited pledge of \$2,500 of the Net Revenues made for the payment of the Certificates shall constitute a lien on the Net Revenues until such time as the City shall pay all of such \$2,500 in Net Revenues, after which time the pledge shall cease, all in accordance with the terms and provisions of this Ordinance; this limited pledge shall be junior and subordinate to the lien on and pledge of Net Revenues of the System securing the payment of "Prior Lien Obligations" (as defined in the Ordinance) now outstanding and hereafter issued by the City; and, this limited pledge shall be valid and binding without further action by the City.

SECTION 14: System Fund. The City hereby covenants and agrees that all Gross Revenues (excluding earnings from the investment of money held in any special funds or accounts created for the payment and security of Prior Lien Obligations) shall be deposited from day to day as collected into a "City of Midland Waterworks and Sewer System Fund" (hereinafter called "System Fund") which Fund shall be kept and maintained at an official depository bank of the City. All moneys deposited in the System Fund shall be pledged and appropriated to the extent required for the following purposes and in the order of priority shown, to wit:

- First: To the payment of all necessary and reasonable Operating and Maintenance Expenses of the System as defined herein or required by statute to be a first charge on and claim against the Gross Revenues;
- Second: To the payment of the amounts required to be deposited in the special Funds created and established for the payment, security and benefit of Prior Lien Obligations in accordance with the terms and provisions of the ordinances authorizing the issuance of Prior Lien Obligations; and
- Third: To the payment of the amounts required to be deposited in the special funds and accounts created and established for the payment of the Certificates and Additional Certificates.

Any Net Revenues remaining in the System Fund after satisfying the foregoing payments, or making adequate and sufficient provision for the payment thereof, may be appropriated and used for any other City purpose now or hereafter permitted by law.

SECTION 15: Deposits to Certificate Fund. The City hereby covenants and agrees to cause to be deposited in the Certificate Fund from the pledged Net Revenues in the System Fund, an amount not to exceed \$2,500.

The City covenants and agrees that the amount of pledged Net Revenues (\$2,500), together with ad valorem taxes levied, collected, and deposited in the Certificate Fund for and on behalf of the Certificates, will be an amount equal to one hundred percent (100%) of the amount required to fully pay the interest and principal due and payable on the Certificates. In addition, any surplus proceeds from the sale of the Certificates not expended for authorized purposes shall be deposited in the Certificate Fund, and such amounts so deposited shall



reduce the sums otherwise required to be deposited in said Fund from ad valorem taxes and the Net Revenues.

SECTION 16: Security of Funds. All moneys on deposit in the Funds for which this Ordinance makes provision (except any portion thereof as may be at any time properly invested) shall be secured in the manner and to the fullest extent required by the laws of Texas for the security of public funds, and moneys on deposit in such Funds shall be used only for the purposes permitted by this Ordinance.

SECTION 17: Maintenance of System - Insurance. While the Certificates remain Outstanding, the City covenants and agrees to maintain and operate the System with all possible efficiency and to maintain casualty and other insurance on the properties of the System and its operations of a kind and in such amounts customarily carried by municipal corporations in the State of Texas engaged in a similar type business; and that it will faithfully and punctually perform all duties with reference to the System required by the Constitution and laws of the State of Texas.

SECTION 18: Rates and Charges. The City hereby covenants and agrees that rates and charges for services provided by the System will be established and maintained, on the basis of all available information and experience and with due allowance for contingencies, that are reasonably expected to provide Gross Revenues to pay:

- (a) Operating and Maintenance Expenses of the System;
- (b) the interest on and principal of Prior Lien Obligations and the amounts required to be deposited into any special Funds created and established for the payment and security of the Prior Lien Obligations;
- (c) the amounts required to be deposited in the special Funds or Accounts (the Certificate Fund) created for the payment of the Certificates and Additional Certificates;
- (d) any other legally incurred indebtedness payable from the revenues of the System and/or secured by a lien on the System or the revenues thereof.

SECTION 19: Records and Accounts - Annual Audit. The City further covenants and agrees that while any Certificates remain Outstanding, it will keep and maintain accurate and complete records and accounts pertaining to the ownership, operation and maintenance of the System. The Holders of the Certificates or any duly authorized agent or agents of such Holders shall have the right to inspect the System and all properties comprising the same. The City further agrees that following the close of each Fiscal Year, it will cause an audit of such books and accounts to be made by an independent firm of Certified Public Accountants. Copies of each annual audit shall be furnished to the Executive Director of the Municipal Advisory Council of Texas at his or her office in Austin, Texas and are available at the City's website, currently [www.ci.midland.tx.us](http://www.ci.midland.tx.us).

SECTION 20: Remedies in Event of Default. In addition to all the rights and remedies provided by the laws of the State of Texas, the City covenants and agrees particularly that in the event the City (a) defaults in the payments to be made to the Certificate Fund, or (b) defaults in the observance or performance of any other of the covenants, conditions or obligations set forth in this Ordinance, any Holder shall be entitled to a writ of mandamus issued by a court of proper jurisdiction compelling and requiring the governing body of the City and other officers of the City to observe and perform any covenant, condition or obligation prescribed in this Ordinance.

No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power, or shall be construed to be a waiver of any such default or acquiescence therein, and every such right and power may be exercised from time to time and as often as may be deemed expedient. The specific remedies herein provided shall be cumulative of all other existing remedies and the specification of such remedies shall not be deemed to be exclusive.

SECTION 21: Special Covenants. The City hereby further covenants as follows:

(a) It has the lawful power to pledge the Net Revenues of the System supporting this issue of Certificates and has lawfully exercised said powers under the Constitution and laws of the State of Texas, including said power existing Texas Government Code, Chapter 1502, as amended, and Texas Local Government Code, Subchapter C of Section 271, as amended.

(b) Other than for the payment of the outstanding Prior Lien Obligations and the Certificates, the Net Revenues of the System are not in any manner pledged to the payment of any debt or obligation of the City or of the System.

(c) While any Certificates remain Outstanding, the City will not sell, lease, or encumber the System or any substantial part thereof; provided that this covenant shall not be construed to prohibit the sale of such machinery, or other properties or equipment which has become obsolete or otherwise unsuited to the efficient operation of the System.

(d) To the extent that it legally may, while any of the Certificates are Outstanding, no franchise shall be granted for the installation or operation of any competing waterworks and sanitary sewer systems other than those owned by the City, and the operation of any such systems by anyone other than the City shall be prohibited.

SECTION 22: Issuance of Prior Lien Obligations and Additional Certificates. The City hereby expressly reserves the right to issue Prior Lien Obligations, without limitation as to principal amount but subject to any terms, conditions or restrictions applicable under law or otherwise, and, also reserves the right to issue Additional Certificates which, together with the Certificates, shall be secured by a parity lien on and pledge of the Net Revenues of the System.

SECTION 23: Subordinate to Prior Lien Obligations, Covenants and Agreements. It is the intention of this governing body and accordingly hereby recognized and stipulated that the provisions, agreements and covenants contained herein bearing upon the management and operations of the System and the administering and application of revenues derived from the operation thereof, shall to the extent possible be harmonized with like provisions, agreements and covenants contained in ordinances authorizing the issuance of Prior Lien Obligations, and to the extent of any irreconcilable conflict between the provisions contained herein and in ordinances authorizing the issuance of Prior Lien Obligations, the provisions, agreements and covenants contained therein shall prevail to the extent of such conflict and be applicable to this Ordinance but in all respects subject to the priority of rights and benefits, if any, conferred thereby to the holders or owners of the Prior Lien Obligations. Notwithstanding the above, any change or modification affecting the application of revenues derived from the operation of the System shall not impair the obligation of contract with respect to the pledge of revenues herein made for the payment and security of the Certificates.

SECTION 24: Satisfaction of Obligations of City. If the City shall pay or cause to be paid, or there shall otherwise be paid to the Holders, the principal of, premium, if any, and interest on the Certificates, at the times and in the manner stipulated in this Ordinance; then the

pledge of taxes levied and the lien on and limited pledge of the Net Revenues of the System (to the extent such limited pledge of Net Revenues shall not have been discharged or terminated by prior payment of principal of or interest on the Certificates) under this Ordinance and all covenants, agreements, and other obligations of the City to the Holders shall cease, terminate, and be discharged and satisfied.

Certificates shall be deemed to have been paid within the meaning and with the effect expressed above in this Section when (i) money sufficient to pay in full such Certificates or the principal amount(s) thereof at maturity or (if notice of redemption has been duly given or waived or if irrevocable arrangements therefor acceptable to the Paying Agent/Registrar have been made) the redemption date thereof, together with all interest due thereon, shall have been irrevocably deposited with and held in trust by the Paying Agent/Registrar, or an authorized escrow agent, or (ii) Government Securities (as defined in Section 10(f) above) shall have been irrevocably deposited in trust with the Paying Agent/Registrar, or an authorized escrow agent, which Government Securities have been certified by an independent accounting firm to mature as to principal and interest in such amounts and at such times as will insure the availability, without reinvestment, of sufficient money, together with any moneys deposited therewith, if any, to pay when due the principal of and interest on such Certificates, or the principal amount(s) thereof, on and prior to the Stated Maturity thereof or (if notice of redemption has been duly given or waived or if irrevocable arrangements therefor acceptable to the Paying Agent/Registrar have been made) the redemption date thereof. The City reserves the right, subject to satisfying the requirements of (i) and (ii) above, to substitute other Government Securities for the Government Securities originally deposited, to reinvest the uninvested moneys on deposit for such defeasance and to withdraw for the benefit of the City moneys in excess of the amount required for such defeasance. The City covenants that no deposit of moneys or Government Securities will be made under this Section and no use made of any such deposit which would cause the Certificates to be treated as "arbitrage bonds" within the meaning of Section 148 of the Internal Revenue Code of 1986, as amended, or regulations adopted pursuant thereto.

The City reserves the option, to be exercised at the time of the defeasance of the Certificates, to call for redemption, at an earlier date, those Certificates which have been defeased to their maturity date, if the City: (i) in the proceedings providing for the firm banking and financial arrangements, expressly reserves the right to call the Certificates for redemption; (ii) gives notice of the reservation of that right to the owners of the Certificates immediately following the making of the firm banking and financial arrangements; and (iii) directs that notice of the reservation be included in any redemption notices that it authorizes.

Any moneys so deposited with the Paying Agent/Registrar and all income from Government Securities held in trust by the Paying Agent/Registrar, or an authorized escrow agent, pursuant to this Section which is not required for the payment of the Certificates, or any principal amount(s) thereof, or interest thereon with respect to which such moneys have been so deposited shall be remitted to the City or deposited as directed by the City. Furthermore, any money held by the Paying Agent/Registrar for the payment of the principal of and interest on the Certificates and remaining unclaimed for a period of three (3) years after the maturity, or applicable redemption date, of the Certificates such moneys were deposited and are held in trust to pay shall upon the request of the City be remitted to the City against a written receipt therefor. Notwithstanding the above and foregoing, any remittance of funds from the Paying Agent/Registrar to the City shall be subject to any applicable unclaimed property laws of the State of Texas.

SECTION 25: Ordinance a Contract - Amendments. This Ordinance shall constitute a contract with the Holders from time to time, be binding on the City, and shall not be amended or repealed by the City so long as any Certificate remains Outstanding except as permitted in this Section. The City, may, without the consent of or notice to any Holders of the Certificates, from time to time and at any time, amend this Ordinance in any manner not detrimental to the interests of the Holders of the Certificates, including the curing of any ambiguity, inconsistency, or formal defect or omission herein. In addition, the City may, with the written consent of Holders of the Certificates holding a majority in aggregate principal amount of the Certificates then Outstanding affected thereby, amend, add to, or rescind any of the provisions of this Ordinance; provided that, without the consent of all Holders of Outstanding Certificates, no such amendment, addition, or rescission shall (1) extend the time or times of payment of the principal of, premium, if any, and interest on the Certificates, reduce the principal amount thereof, the redemption price, or the rate of interest thereon, or in any other way modify the terms of payment of the principal of, premium, if any, or interest on the Certificates, (2) give any preference to any Certificate over any other Certificate, or (3) reduce the aggregate principal amount of Certificates required to be held by Holders for consent to any such amendment, addition, or rescission.

SECTION 26: Notices to Holders - Waivers. Wherever this Ordinance provides for notice to Holders of any event, such notice shall be sufficiently given (unless otherwise herein expressly provided) if in writing and sent by United States Mail, first class postage prepaid, to the address of each Holder appearing in the Security Register at the close of business on the business day next preceding the mailing of such notice.

In any case where notice to Holders is given by mail, neither the failure to mail such notice to any particular Holders, nor any defect in any notice so mailed, shall affect the sufficiency of such notice with respect to all other Certificates. Where this Ordinance provides for notice in any manner, such notice may be waived in writing by the Holder entitled to receive such notice, either before or after the event with respect to which such notice is given, and such waiver shall be the equivalent of such notice. Waivers of notice by Holders shall be filed with the Paying Agent/Registrar, but such filing shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

SECTION 27: Cancellation. All Certificates surrendered for payment, redemption, transfer, or exchange, if surrendered to the Paying Agent/Registrar, shall be promptly canceled by it and, if surrendered to the City, shall be delivered to the Paying Agent/Registrar and, if not already canceled, shall be promptly canceled by the Paying Agent/Registrar. The City may at any time deliver to the Paying Agent/Registrar for cancellation any Certificates previously certified or registered and delivered which the City may have acquired in any manner whatsoever, and all Certificates so delivered shall be promptly canceled by the Paying Agent/Registrar. All canceled Certificates held by the Paying Agent/Registrar shall be returned to the City.

SECTION 28: Mutilated, Destroyed, Lost and Stolen Certificates. In case any Certificate shall be mutilated, or destroyed, lost or stolen, the Paying Agent/Registrar may execute and deliver a replacement Certificate of like form and tenor, and in the same denomination and bearing a number not contemporaneously outstanding, in exchange and substitution for such mutilated Certificate, or in lieu of and in substitution for such destroyed, lost or stolen Certificate, only upon the approval of the City and after (i) the filing by the Holder thereof with the Paying Agent/Registrar of evidence satisfactory to the Paying Agent/Registrar of the destruction, loss or theft of such Certificate, and of the authenticity of the ownership thereof and (ii) the furnishing to the Paying Agent/Registrar of indemnification in an amount satisfactory to hold the City and the

Paying Agent/Registrar harmless. All expenses and charges associated with such indemnity and with the preparation, execution and delivery of a replacement Certificate shall be borne by the Holder of the Certificate mutilated, or destroyed, lost or stolen.

Every replacement Certificate issued pursuant to this Section shall be a valid and binding obligation, and shall be entitled to all the benefits of this Ordinance equally and ratably with all other Outstanding Certificates; notwithstanding the enforceability of payment by anyone of the destroyed, lost or stolen Certificates.

The provisions of this Section are exclusive and shall preclude (to the extent lawful) all other rights and remedies with respect to the replacement and payment of mutilated, destroyed, lost, or stolen Certificates.

#### SECTION 29: Covenants to Maintain Tax-Exempt Status.

**(a)** Definitions. When used in this Section, the following terms have the following meanings:

*“Closing Date”* means the date on which the Certificates are first authenticated and delivered to the initial purchasers against payment therefor.

*“Code”* means the Internal Revenue Code of 1986, as amended by all legislation, if any, effective on or before the Closing Date.

*“Computation Date”* has the meaning set forth in Section 1.148-1(b) of the Regulations.

*“Gross Proceeds”* means any proceeds as defined in Section 1.148-1(b) of the Regulations, and any replacement proceeds as defined in Section 1.148-1(c) of the Regulations, of the Certificates.

*“Investment”* has the meaning set forth in Section 1.148-1(b) of the Regulations.

*“Nonpurpose Investment”* means any investment property, as defined in Section 148(b) of the Code, in which Gross Proceeds of the Certificates are invested and which is not acquired to carry out the governmental purposes of the Certificates.

*“Rebate Amount”* has the meaning set forth in Section 1.148-1(b) of the Regulations.

*“Regulations”* means any proposed, temporary, or final Income Tax Regulations issued pursuant to Sections 103 and 141 through 150 of the Code, and 103 of the Internal Revenue Code of 1954, which are applicable to the Certificates. Any reference to any specific Regulation shall also mean, as appropriate, any proposed, temporary or final Income Tax Regulation designed to supplement, amend or replace the specific Regulation referenced.

*“Yield”* of (1) any Investment has the meaning set forth in Section 1.148-5 of the Regulations and (2) the Certificates has the meaning set forth in Section 1.148-4 of the Regulations.

**(b)** Not to Cause Interest to Become Taxable. The City shall not use, permit the use of, or omit to use Gross Proceeds or any other amounts (or any property the acquisition, construction or improvement of which is to be financed directly or indirectly with Gross Proceeds) in a manner which if made or omitted, respectively, would cause the interest on any Certificate to become includable in the gross income, as defined in Section 61 of the Code, of

the Holder thereof for federal income tax purposes. Without limiting the generality of the foregoing, unless and until the City receives a written opinion of counsel nationally recognized in the field of municipal bond law to the effect that failure to comply with such covenant will not adversely affect the exemption from federal income tax of the interest on any Certificate, the City shall comply with each of the specific covenants in this Section.

(c) No Private Use or Private Payments. Except as permitted by Section 141 of the Code and the Regulations and rulings thereunder, the City shall at all times prior to the last Stated Maturity of Certificates:

(i) exclusively own, operate, and possess all property the acquisition, construction, or improvement of which is to be financed or refinanced directly or indirectly with Gross Proceeds of the Certificates, and not use or permit the use of such Gross Proceeds (including all contractual arrangements with terms different than those applicable to the general public) or any property acquired, constructed, or improved with such Gross Proceeds in any activity carried on by any person or entity (including the United States or any agency, department, and instrumentality thereof) other than a state or local government, unless such use is solely as a member of the general public; and

(ii) not directly or indirectly impose or accept any charge or other payment by any person or entity who is treated as using Gross Proceeds of the Certificates or any property the acquisition, construction, or improvement of which is to be financed or refinanced directly or indirectly with such Gross Proceeds, other than taxes of general application within the City or interest earned on investments acquired with such Gross Proceeds pending application for their intended purposes.

(d) No Private Loan. Except to the extent permitted by Section 141 of the Code and the Regulations and rulings thereunder, the City shall not use Gross Proceeds of the Certificates to make or finance loans to any person or entity other than a state or local government. For purposes of the foregoing covenant, such Gross Proceeds are considered to be "loaned" to a person or entity if: (1) property acquired, constructed or improved with such Gross Proceeds is sold or leased to such person or entity in a transaction which creates a debt for federal income tax purposes; (2) capacity in or service from such property is committed to such person or entity under a take-or-pay, output, or similar contract or arrangement; or (3) indirect benefits, or burdens and benefits of ownership, of such Gross Proceeds or any property acquired, constructed, or improved with such Gross Proceeds are otherwise transferred in a transaction which is the economic equivalent of a loan.

(e) Not to Invest at Higher Yield. Except to the extent permitted by Section 148 of the Code and the Regulations and rulings thereunder, the City shall not at any time prior to the final Stated Maturity of the Certificates directly or indirectly invest Gross Proceeds in any Investment (or use Gross Proceeds to replace money so invested), if as a result of such investment the Yield from the Closing Date of all Investments acquired with Gross Proceeds (or with money replaced thereby), whether then held or previously disposed of, exceeds the Yield of the Certificates.

(f) Not Federally Guaranteed. Except to the extent permitted by Section 149(b) of the Code and the Regulations and rulings thereunder, the City shall not take or omit to take any action which would cause the Certificates to be federally guaranteed within the meaning of Section 149(b) of the Code and the Regulations and rulings thereunder.

(g) Information Report. The City shall timely file the information required by Section 149(e) of the Code with the Secretary of the Treasury on Form 8038-G or such other form and in such place as the Secretary may prescribe.

(h) Rebate of Arbitrage Profits. Except to the extent otherwise provided in Section 148(f) of the Code and the Regulations and rulings thereunder:

(i) The City shall account for all Gross Proceeds (including all receipts, expenditures and investments thereof) on its books of account separately and apart from all other funds (and receipts, expenditures and investments thereof) and shall retain all records of accounting for at least six years after the day on which the last outstanding Certificate is discharged. However, to the extent permitted by law, the City may commingle Gross Proceeds of the Certificates with other money of the City, provided that the City separately accounts for each receipt and expenditure of Gross Proceeds and the obligations acquired therewith.

(ii) Not less frequently than each Computation Date, the City shall calculate the Rebate Amount in accordance with rules set forth in Section 148(f) of the Code and the Regulations and rulings thereunder. The City shall maintain such calculations with its official transcript of proceedings relating to the issuance of the Certificates until six years after the final Computation Date.

(iii) As additional consideration for the purchase of the Certificates by the Purchasers and the loan of the money represented thereby and in order to induce such purchase by measures designed to insure the excludability of the interest thereon from the gross income of the owners thereof for federal income tax purposes, the City shall pay to the United States out of the Certificate Fund or its general fund, as permitted by applicable Texas statute, regulation or opinion of the Attorney General of the State of Texas, the amount that when added to the future value of previous rebate payments made for the Certificates equals (i) in the case of a Final Computation Date as defined in Section 1.148-3(e)(2) of the Regulations, one hundred percent (100%) of the Rebate Amount on such date; and (ii) in the case of any other Computation Date, ninety percent (90%) of the Rebate Amount on such date. In all cases, the rebate payments shall be made at the times, in the installments, to the place and in the manner as is or may be required by Section 148(f) of the Code and the Regulations and rulings thereunder, and shall be accompanied by Form 8038-T or such other forms and information as is or may be required by Section 148(f) of the Code and the Regulations and rulings thereunder.

(iv) The City shall exercise reasonable diligence to assure that no errors are made in the calculations and payments required by paragraphs (2) and (3), and if an error is made, to discover and promptly correct such error within a reasonable amount of time thereafter (and in all events within one hundred eighty (180) days after discovery of the error), including payment to the United States of any additional Rebate Amount owed to it, interest thereon, and any penalty imposed under Section 1.148-3(h) of the Regulations.

(i) Not to Divert Arbitrage Profits. Except to the extent permitted by Section 148 of the Code and the Regulations and rulings thereunder, the City shall not, at any time prior to the earlier of the Stated Maturity or final payment of the Certificates, enter into any transaction that reduces the amount required to be paid to the United States pursuant to Subsection (h) of this Section because such transaction results in a smaller profit or a larger loss than would have

resulted if the transaction had been at arm's length and had the Yield of the Certificates not been relevant to either party.

(j) Elections. The City hereby directs and authorizes the Mayor, City Manager and Director of Finance, either or any combination of them, to make elections permitted or required pursuant to the provisions of the Code or the Regulations, as they deem necessary or appropriate in connection with the Certificates, in the Certificate as to Tax Exemption or similar or other appropriate certificate, form or document.

SECTION 30: Sale of the Certificates – Execution of Purchase Contract – Approval of Official Statement. The Certificates authorized by this Ordinance have been and are hereby sold to Wells Fargo Bank, National Association, Raymond James & Associates, Inc. and RBC Capital Markets, LLC (herein collectively referred to as the "Purchasers") in accordance with the Purchase Contract dated January 28, 2014 (the "Purchase Contract"), attached hereto as Exhibit B and incorporated herein by reference as a part of this Ordinance for all purposes. The Mayor is hereby authorized and directed to execute the Purchase Contract for and on behalf of the City and as the act and deed of this City Council, and in regard to the approval and execution of the Purchase Contract, the City Council hereby finds, determines and declares that the representations, warranties and agreements of the City contained therein are true and correct in all material respects and shall be honored and performed by the City. The Initial Certificate shall be registered as provided in the Purchase Contract.

Furthermore, the Preliminary Official Statement prepared in connection with the public offering and sale of the Certificates is hereby ratified, confirmed and approved in all respects. The final Official Statement dated January 28, 2014 reflecting the terms of the sale of the Certificates, together with all addenda, supplements and amendments thereto issued on behalf of the City, is hereby approved as to form and content, and the City Council hereby finds that the information and data contained in said Official Statement pertaining to the City and its financial affairs is true and correct in all material respects and no material facts have been omitted which are necessary to make the statements contained in the Official Statement, in light of the circumstances under which they were made, not misleading. The use of such Official Statement in the reoffering of the Certificates by the Purchasers is hereby approved and authorized.

SECTION 31: Proceeds of Sale. The par amount of the Certificates (\$\_\_\_\_\_) shall be deposited in a construction fund maintained at a City depository bank and the net premium amount of \$\_\_\_\_\_ will be applied as follows: \$\_\_\_\_\_ will be used to pay underwriter's discount, \$\_\_\_\_\_ will be used to pay costs of issuance, \$\_\_\_\_\_ will be deposited to the Certificate Fund and \$\_\_\_\_\_ will be deposited in the construction fund. Pending expenditure for authorized projects and purposes, such proceeds of sale may be invested in authorized investments pursuant to the Public Funds Investment Act, Texas Government Code Chapter 2256, as amended, and, any investment earnings realized may be expended for such authorized projects and purposes or deposited in the Certificate Fund as shall be determined by the City Council. All surplus proceeds of sale of the Certificates, including investment earnings, remaining after completion of all authorized projects or purposes shall be deposited to the credit of the Certificate Fund.

SECTION 32: Control and Custody of Certificates. The Mayor of the City shall be and is hereby authorized to take and have charge of all necessary orders and records pending investigation by the Attorney General of the State of Texas, including the printing of the Certificates, and shall take and have charge and control of the Initial Certificates pending the



approval thereof by the Attorney General, the registration thereof by the Comptroller of Public Accounts and the delivery thereof to the Purchasers.

Furthermore, the Mayor, City Secretary, City Manager, and Director of Finance, any one or more of said officials, are hereby authorized and directed to furnish and execute such documents and certifications relating to the City and the issuance of the Certificates, including a certification as to facts, estimates, circumstances and reasonable expectations pertaining to the use and expenditure and investment of the proceeds of the Certificates as may be necessary for the approval of the Attorney General, registration by the Comptroller of Public Accounts and delivery of the Certificates to the purchasers thereof and, together with the City's financial advisor, bond counsel and the Paying Agent/Registrar, make the necessary arrangements for the delivery of the Initial Certificates to the initial purchaser(s) and the exchange thereof for definitive Certificates.

### SECTION 33: Continuing Disclosure Undertaking.

**(a)** Definitions. As used in this Section, the following terms have the meanings ascribed to such terms below:

"MSRB" means the Municipal Securities Rulemaking Board.

"Rule" means SEC Rule 15c2-12, as amended from time to time.

"SEC" means the United States Securities and Exchange Commission.

**(b)** Annual Reports.

The City shall provide annually to the MSRB (1) within six months after the end of each fiscal year, beginning in or after 2014, financial information and operating data with respect to the City of the general type described in Exhibit C hereto, and (2) if not provided as part of such financial information and operating data, audited financial statements of the City, when and if available. Any financial statements so provided shall be prepared in accordance with the accounting principles described in Exhibit C hereto, or such other accounting principles as the City may be required to employ from time to time pursuant to state law or regulation, and audited, if the City commissions an audit of such statements and the audit is completed within the period during which they must be provided.

If the City changes its fiscal year, it will notify the MSRB of the change (and of the date of the new fiscal year end) prior to the next date by which the City otherwise would be required to provide financial information and operating data pursuant to this Section.

The financial information and operating data to be provided pursuant to this Section may be set forth in full in one or more documents or may be included by specific reference to any document available to the public on the MSRB's Internet Web site or filed with the SEC.

**(c)** Notices of Certain Events.

The City shall provide notice of any of the following events with respect to the Certificates to the MSRB in a timely manner and not more than ten (10) business days after occurrence of the event:

1. Principal and interest payment delinquencies;

2. Non-payment related defaults, if material;
3. Unscheduled draws on debt service reserves reflecting financial difficulties;
4. Unscheduled draws on credit enhancements reflecting financial difficulties;
5. Substitution of credit or liquidity providers, or their failure to perform;
6. Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB), or other material notices or determinations with respect to the tax status of the Certificates, or other material events affecting the tax status of the Certificates;
7. Modifications to rights of holders of the Certificates, if material;
8. Certificate calls, if material, and tender offers;
9. Defeasances;
10. Release, substitution, or sale of property securing repayment of the Certificates, if material;
11. Rating changes;
12. Bankruptcy, insolvency, receivership, or similar event of the City, which shall occur as described below;
13. The consummation of a merger, consolidation, or acquisition involving the City or the sale of all or substantially all of its assets, other than in the ordinary course of business, the entry into of a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and
14. Appointment of a successor or additional trustee or the change of name of a trustee, if material.

For these purposes, any event described in item 12 of the immediately preceding paragraph is considered to occur when any of the following occur: the appointment of a receiver, fiscal agent, or similar officer for the City in a proceeding under the United States Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the City, or if such jurisdiction has been assumed by leaving the existing governing body and officials or officers in possession but subject to the supervision and orders of a court or governmental authority, or the entry of an order confirming a plan of reorganization, arrangement, or liquidation by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the City.

The City shall notify the MSRB, in a timely manner, of any failure by the City to provide financial information or operating data in accordance with subsection (b) of this Section by the time required by such Section.

**(d) Filings with the MSRB.**

All financial information, operating data, financial statements, notices and other documents provided to the MSRB in accordance with this Section shall be provided in an electronic format prescribed by the MSRB and shall be accompanied by identifying information as prescribed by the MSRB.

(e) Limitations, Disclaimers, and Amendments.

The City shall be obligated to observe and perform the covenants specified in this Section for so long as, but only for so long as, the City remains an “obligated person” with respect to the Certificates within the meaning of the Rule, except that the City in any event will give the notice required by subsection (c) of this Section of any Certificate calls and defeasance that cause the City to be no longer such an “obligated person.”

The provisions of this Section are for the sole benefit of the Holders and beneficial owners of the Certificates; and, nothing in this Section, express or implied, shall give any benefit or any legal or equitable right, remedy, or claim hereunder to any other person. The City undertakes to provide only the financial information, operating data, financial statements, and notices which it has expressly agreed to provide pursuant to this Section. Except as expressly provided within this Section, the City does not undertake to provide any other information, whether or not it may be relevant or material to a complete presentation of the City’s financial results, condition, or prospects; nor does the City undertake to update any information provided in accordance with this Section or otherwise. Furthermore, the City does not make any representation or warranty concerning such information or its usefulness to a decision to invest in or sell Certificates at any future date.

UNDER NO CIRCUMSTANCES SHALL THE CITY BE LIABLE TO THE HOLDER OR BENEFICIAL OWNER OF ANY CERTIFICATE OR ANY OTHER PERSON, IN CONTRACT OR TORT, FOR DAMAGES RESULTING IN WHOLE OR IN PART FROM ANY BREACH BY THE CITY, WHETHER NEGLIGENT OR WITHOUT FAULT ON ITS PART, OF ANY COVENANT SPECIFIED IN THIS SECTION, BUT EVERY RIGHT AND REMEDY OF ANY SUCH PERSON, IN CONTRACT OR TORT, FOR OR ON ACCOUNT OF ANY SUCH BREACH SHALL BE LIMITED TO AN ACTION FOR MANDAMUS OR SPECIFIC PERFORMANCE.

No default by the City in observing or performing its obligations under this Section shall constitute a breach of or default under this Ordinance for purposes of any other provision of this Ordinance.

Nothing in this Section is intended or shall act to disclaim, waive, or otherwise limit the duties of the City under federal and state securities laws.

Notwithstanding anything herein to the contrary, the provisions of this Section may be amended by the City from time to time to adapt to changed circumstances resulting from a change in legal requirements, a change in law, or a change in the identity, nature, status, or type of operations of the City, but only if (1) the provisions of this Section, as so amended, would have permitted an underwriter to purchase or sell Certificates in the primary offering of the Certificates in compliance with the Rule, taking into account any amendments or interpretations of the Rule to the date of such amendment, as well as such changed circumstances, and (2) either (a) the Holders of a majority in aggregate principal amount (or any greater amount required by any other provision of this Ordinance that authorizes such an amendment) of the Outstanding Certificates consent to such amendment or (b) a person that is unaffiliated with the City (such as nationally recognized bond counsel) determines that such amendment will not materially impair the interests of the Holders and beneficial owners of the Certificates. The provisions of this Section may also be amended from time to time or repealed by the City if the SEC amends or repeals the applicable provisions of the Rule or a court of final jurisdiction determines that such provisions are invalid, but only if and to the extent that reservation of the City’s right to do so would not prevent underwriters of the initial public offering of the Certificates from lawfully purchasing or selling Certificates in such offering. If the City so

amends the provisions of this Section, it shall include with any amended financial information or operating data next provided pursuant to subsection (b) of this Section an explanation, in narrative form, of the reasons for the amendment and of the impact of any change in the type of financial information or operating data so provided.

SECTION 34: Bond Counsel's Opinion. The Purchaser's obligation to accept delivery of the Certificates is subject to being furnished a final opinion of Fulbright & Jaworski LLP, Dallas, Texas approving the Certificates as to their validity, said opinion to be dated and delivered as of the date of delivery and payment for the Certificates.

SECTION 35: CUSIP Numbers. CUSIP numbers may be printed or typed on the definitive Certificates. It is expressly provided, however, that the presence or absence of CUSIP numbers on the definitive Certificates shall be of no significance or effect as regards the legality thereof and neither the City nor attorneys approving said Certificates as to legality are to be held responsible for CUSIP numbers incorrectly printed or typed on the definitive Certificates.

SECTION 36: Benefits of Ordinance. Nothing in this Ordinance, expressed or implied, is intended or shall be construed to confer upon any person other than the City, the Paying Agent/Registrar and the Holders, any right, remedy, or claim, legal or equitable, under or by reason of this Ordinance or any provision hereof, this Ordinance and all its provisions being intended to be and being for the sole and exclusive benefit of the City, the Paying Agent/Registrar and the Holders.

SECTION 37: Inconsistent Provisions. All ordinances, orders or resolutions, or parts thereof, which are in conflict or inconsistent with any provision of this Ordinance are hereby repealed to the extent of such conflict and the provisions of this Ordinance shall be and remain controlling as to the matters contained herein.

SECTION 38: Governing Law. This Ordinance shall be construed and enforced in accordance with the laws of the State of Texas and the United States of America.

SECTION 39: Severability. If any provision of this Ordinance or the application thereof to any circumstance shall be held to be invalid, the remainder of this Ordinance and the application thereof to other circumstances shall nevertheless be valid, and the City Council hereby declares that this Ordinance would have been enacted without such invalid provision.

SECTION 40: Effect of Headings. The Section headings herein are for convenience only and shall not affect the construction hereof.

SECTION 41: Construction of Terms. If appropriate in the context of this Ordinance, words of the singular number shall be considered to include the plural, words of the plural number shall be considered to include the singular, and words of the masculine, feminine or neuter gender shall be considered to include the other genders.

SECTION 42: Incorporation of Findings and Determinations. The findings and determinations of the City Council contained in the preamble hereof are hereby incorporated by reference and made a part of this Ordinance for all purposes as if the same were restated in full in this Section.

SECTION 43: Public Meeting. It is officially found, determined, and declared that the meeting at which this Ordinance is adopted was open to the public and public notice of the time,

place, and subject matter of the public business to be considered at such meeting, including this Ordinance, was given, all as required by Chapter 551, Texas Government Code, as amended.

SECTION 44: Effective Date. In accordance with the provisions of Section 1201.028, Texas Government Code, as amended, this Ordinance shall take effect and be in full force immediately from and after its date of adoption shown below.

*[Remainder of page intentionally left blank]*

PASSED AND APPROVED this the 28<sup>th</sup> day of January, 2014.

CITY OF MIDLAND, TEXAS

---

W. Wesley Perry, Mayor

ATTEST:

---

Amy M. Turner, City Secretary

(City Seal)

APPROVED AS TO FORM:

---

Keith Stretcher, City Attorney

## EXHIBIT A

### Paying Agent/Registrar Agreement

EXHIBIT B

Purchase Agreement



## EXHIBIT C

### Description of Annual Financial Information

The following information is referred to in Section 33 of this Ordinance.

#### Annual Financial Statements and Operating Data

The financial information and operating data with respect to the City to be provided annually in accordance with such Section are as specified (and included in the Appendix or under the headings of the Official Statement referred to) below:

1. The financial statements of the City appended to the Official Statement as Appendix B, but for the most recently concluded fiscal year.
2. The information included under Tables numbered 1 through 6 and Tables 8 through 15 of the Official Statement.

#### Accounting Principles

The accounting principles referred to in such Section with respect to the City are the accounting principles described in the notes to the financial statements referred to in paragraph 1 above.

# City of Midland

## Preliminary Schedule of Events Certificates of Obligation, Series 2014 and General Obligation Refunding Bonds, Series 2014

| November |    |    |    |    |    |    | December |    |    |    |    |    |    | January |    |    |    |    |    |    | February |    |    |    |    |    |    |
|----------|----|----|----|----|----|----|----------|----|----|----|----|----|----|---------|----|----|----|----|----|----|----------|----|----|----|----|----|----|
| S        | M  | T  | W  | T  | F  | S  | S        | M  | T  | W  | T  | F  | S  | S       | M  | T  | W  | T  | F  | S  | S        | M  | T  | W  | T  | F  | S  |
|          |    |    |    |    | 1  | 2  | 1        | 2  | 3  | 4  | 5  | 6  | 7  |         |    |    | 1  | 2  | 3  | 4  |          |    |    |    |    |    | 1  |
| 3        | 4  | 5  | 6  | 7  | 8  | 9  | 8        | 9  | 10 | 11 | 12 | 13 | 14 | 5       | 6  | 7  | 8  | 9  | 10 | 11 | 2        | 3  | 4  | 5  | 6  | 7  | 8  |
| 10       | 11 | 12 | 13 | 14 | 15 | 16 | 15       | 16 | 17 | 18 | 19 | 20 | 21 | 12      | 13 | 14 | 15 | 16 | 17 | 18 | 9        | 10 | 11 | 12 | 13 | 14 | 15 |
| 17       | 18 | 19 | 20 | 21 | 22 | 23 | 22       | 23 | 24 | 25 | 26 | 27 | 28 | 19      | 20 | 21 | 22 | 23 | 24 | 25 | 16       | 17 | 18 | 19 | 20 | 21 | 22 |
| 24       | 25 | 26 | 27 | 28 | 29 | 30 | 29       | 30 | 31 |    |    |    |    | 26      | 27 | 28 | 29 | 30 | 31 |    | 23       | 24 | 25 | 26 | 27 | 28 |    |
|          |    |    |    |    |    |    |          |    |    |    |    |    |    |         |    |    |    |    |    |    |          |    |    |    |    |    |    |

### Date

### Event

Thursday, November 7, 2013

Review issuance with Finance and Audit Committee

Thursday, November 14, 2013

Direction from City Council on proceeding with Certificate of Obligation Issue and prospective Refunding issue

Tuesday, November 26, 2013

City Council act on Resolution to publish Notice of Intention to issue Certificates of Obligation

Monday, December 2, 2013

Initiate preparation of Preliminary Official Statement

Saturday, December 28, 2013

Last date for 1<sup>st</sup> publication of Notice of Intention to issue Certificates of Obligation (1<sup>st</sup> publication must precede January 28, 2014 date for authorization by at least **31** days). 2<sup>nd</sup> publication must occur on same day of following week.

Monday, December 30, 2013

Submit Preliminary Official Statement and information to rating agencies

Monday, January 6, 2014 -  
Friday, January 10, 2014

Discussions with rating agencies

Thursday, January 16, 2014

Receive ratings

Friday, January 17, 2014

Distribute Preliminary Official Statement

Friday, January 24, 2014

Final assessment and determination of whether to proceed with pricing of Refunding issue

Monday, January 27, 2014

Pricing of issues by underwriters, overseen by First Southwest Company

Tuesday, January 28, 2014

### City Council:

Sale of Certificate of Obligation issue and Refunding bond issue (if interest rates/savings at acceptable levels); Ordinances Authorizing Issuance.

Thursday, February 27, 2014

Closing and delivery of Certificates of Obligation and Refunding bonds, receipt of Certificates of Obligation proceeds by City

**DETAIL PROJECT LISTING FOR CERTIFICATES OF OBLIGATIONS, SERIES 2014**

Date: January 28, 2014

|                                                                | Communication<br>Systems<br>Fund | Park<br>Improvements<br>Fund | Fire Fighting<br>Facilities<br>Fund | Streets &<br>Drainage<br>Fund | Golf Course<br>Improvements<br>Fund | Information<br>Technology<br>Fund | Total                |
|----------------------------------------------------------------|----------------------------------|------------------------------|-------------------------------------|-------------------------------|-------------------------------------|-----------------------------------|----------------------|
| <b>C.I.S.D. - Communications - Radios</b>                      | 6,430,000.00                     |                              |                                     |                               |                                     |                                   | 6,430,000.00         |
| <b>Fire Facilities</b>                                         |                                  |                              |                                     |                               |                                     |                                   |                      |
| Fire Station 6                                                 |                                  |                              | 4,476,441.00                        |                               |                                     |                                   | 4,476,441.00         |
| <b>Community Services</b>                                      |                                  |                              |                                     |                               |                                     |                                   |                      |
| Renovation of Doug Russell Pool                                |                                  | 2,000,000.00                 |                                     |                               |                                     |                                   | 2,000,000.00         |
| Renovation of Dennis the Menace Park (Phase 1 and 2)           |                                  | 900,000.00                   |                                     |                               |                                     |                                   | 900,000.00           |
| Dog Park #2 - Beal Park                                        |                                  | 125,000.00                   |                                     |                               |                                     |                                   | 125,000.00           |
| MLK Community Center Upgrade                                   |                                  | 175,000.00                   |                                     |                               |                                     |                                   | 175,000.00           |
| <b>Golf Course</b>                                             |                                  |                              |                                     |                               |                                     |                                   |                      |
| Hogan Park Golf Course Upgrades                                |                                  |                              |                                     |                               | 2,000,000.00                        |                                   | 2,000,000.00         |
| <b>Engineering Services:</b>                                   |                                  |                              |                                     |                               |                                     |                                   |                      |
| Wolcott (Belmont - Baird)                                      |                                  |                              |                                     | \$195,000                     |                                     |                                   | 195,000.00           |
| Belmont (Gist - Wolcott)                                       |                                  |                              |                                     | \$105,000                     |                                     |                                   | 105,000.00           |
| Colorado (Gist - Stokes)                                       |                                  |                              |                                     | \$52,000                      |                                     |                                   | 52,000.00            |
| Stokes (Rankin Hwy - Baird)                                    |                                  |                              |                                     | \$301,000                     |                                     |                                   | 301,000.00           |
| Hicks (Terrell - Lamesa) & Taylor (Mineola - Lamesa)           |                                  |                              |                                     | \$720,000                     |                                     |                                   | 720,000.00           |
| Montgomery (Rankin Hwy - Goode)                                |                                  |                              |                                     | \$471,000                     |                                     |                                   | 471,000.00           |
| Frances Ave (Rankin Hwy - Main)                                |                                  |                              |                                     | \$263,000                     |                                     |                                   | 263,000.00           |
| Rita Road & Cory Circle (East Midland off Elkins Rd)           |                                  |                              |                                     | \$188,000                     |                                     |                                   | 188,000.00           |
| Rhode Island, New Jersey & N St.                               |                                  |                              |                                     | \$600,000                     |                                     |                                   | 600,000.00           |
| City Wide ADA Ramps Phase I                                    |                                  |                              |                                     | \$125,000                     |                                     |                                   | 125,000.00           |
| Fairgrounds Road (Pecan - Loop 250) R/W,Design, & Construction |                                  |                              |                                     | \$4,000,000                   |                                     |                                   | 4,000,000.00         |
| MockingBird (Garfield St - A St) R/W,Design, & Construction    |                                  |                              |                                     | \$500,000                     |                                     |                                   | 500,000.00           |
| Developer Participation                                        |                                  |                              |                                     | \$225,000                     |                                     |                                   | 225,000.00           |
| <b>C.I.S.D. - Technology</b>                                   |                                  |                              |                                     |                               |                                     |                                   |                      |
| Backup/Storage                                                 |                                  |                              |                                     |                               |                                     | 100,000.00                        | 100,000.00           |
| PCs                                                            |                                  |                              |                                     |                               |                                     | 260,000.00                        | 260,000.00           |
| Terminal Server                                                |                                  |                              |                                     |                               |                                     | 120,000.00                        | 120,000.00           |
| Switches                                                       |                                  |                              |                                     |                               |                                     | 60,000.00                         | 60,000.00            |
| Servers                                                        |                                  |                              |                                     |                               |                                     | 150,000.00                        | 150,000.00           |
| Printers/Scanners                                              |                                  |                              |                                     |                               |                                     | 70,000.00                         | 70,000.00            |
| ATMS Wireless                                                  |                                  |                              |                                     |                               |                                     | 250,000.00                        | 250,000.00           |
| Fiber Optics                                                   |                                  |                              |                                     |                               |                                     | 400,000.00                        | 400,000.00           |
| WiFi in City Bldgs                                             |                                  |                              |                                     |                               |                                     | 40,000.00                         | 40,000.00            |
| Disaster Recovery Site                                         |                                  |                              |                                     |                               |                                     | 500,000.00                        | 500,000.00           |
| Towers at Remote Sites                                         |                                  |                              |                                     |                               |                                     | 50,000.00                         | 50,000.00            |
| Telephone System                                               |                                  |                              |                                     |                               |                                     | 2,000,000.00                      | 2,000,000.00         |
| <b>Total by Area</b>                                           | <b>6,430,000.00</b>              | <b>3,200,000.00</b>          | <b>4,476,441.00</b>                 | <b>7,745,000.00</b>           | <b>2,000,000.00</b>                 | <b>4,000,000.00</b>               | <b>27,851,441.00</b> |



## Research

### Summary:

## Midland, Texas; General Obligation

17-Jan-2014

### Current Ratings

| Credit Profile                                                                                   |            |          |
|--------------------------------------------------------------------------------------------------|------------|----------|
| <b>US\$29.0 mil tax and ltd pledge rev certs of oblig ser 2014 dtd 01/15/2014 due 03/01/2034</b> |            |          |
| Long Term Rating                                                                                 | AA+/Stable | New      |
| <b>US\$3.895 mil GO rfdg bnds ser 2014 dtd 01/15/2014 due 03/01/2020</b>                         |            |          |
| Long Term Rating                                                                                 | AA+/Stable | New      |
| <b>Midland GO</b>                                                                                |            |          |
| Long Term Rating                                                                                 | AA+/Stable | Affirmed |

## Rationale

Standard & Poor's Ratings Services assigned its 'AA+' long-term rating to **Midland**, Texas' series 2014 combination tax and limited pledge revenue certificates of obligation and general obligation (GO) refunding bonds. At the same time, Standard & Poor's affirmed its 'AA+' long-term rating and underlying rating (SPUR) on the city's GO debt outstanding. The outlook is stable.

The bonds are secured by the city's pledge to levy ad valorem tax. The certificates are secured by the city's continuing and direct annual ad valorem tax levied by the city, with additional security provided by a limited pledge of net revenue of the city's waterworks and sewer system, not to exceed \$2,500.

The ratings reflect our assessment of the following factors for the city:

- ⌵ Adequate to strong economy that remains anchored by a prominent, but cyclical, oil and gas production sector;
- ⌵ Very strong budgetary flexibility, with fiscal 2012 audited reserves at 59.6% of general fund expenditures;
- ⌵ Strong budgetary performance in fiscal 2012;
- ⌵ Very strong liquidity providing very strong cash levels to cover both debt service and expenditures;
- ⌵ Strong management with good financial policies; and
- ⌵ Strong debt and contingent liabilities, with low overall net debt as a percentage of market value.

### Adequate to strong economy

We consider Midland's economy to be adequate to strong. Midland centers on the Permian Basin oil region, which is home to more than 20% of the nation's oil reserves, and regularly supplies more than 60% of all oil and gas produced in Texas. During the past several years, the city has worked to diversify the employment base, and the leading employers are found in the education, oil and gas, and medical fields. In addition, the city serves as a regional trade, service, and medical center for West Texas. Service sector growth, particularly in retail and distribution-related positions, has further diversified the economy. Traditionally, county unemployment has tracked below the state and national levels and was

3.5% for 2012. The city has projected per capita effective buying income of 105.7% of the U.S. Per capita market value for the city is \$70,811 for fiscal 2014. Assessed value (AV) has increased by a cumulative 36% since fiscal 2010 to reach approximately \$8.84 billion for fiscal 2014.

### **Very strong budget flexibility**

In our opinion, the city's budgetary flexibility remains very strong, with reserves above 50% of expenditures for the past three years and no plans to significantly spend them down. The city anticipates reserves for fiscal 2013 will be approximately \$10 million more than fiscal 2012 levels, and will also include several planned expenditures primarily for capital outlay purposes. For audited fiscal 2012, reserves were \$49.1 million, or 59.6% of expenditures.

### **Strong budgetary performance**

The city's budgetary performance has been strong overall, in our view, with a surplus of 12.3% for the general fund and a surplus of about 11.6% for total governmental funds in fiscal 2012. For fiscal 2013, the city is estimating a slight increase of about \$343,000 after transfers into the general fund. For total governmental funds, the city is estimating a deficit of roughly \$3.7 million for fiscal 2013. The fiscal 2014 budget is balanced. Taxes account for the majority of the city's general fund. Sales taxes increased between fiscal 2010 and fiscal 2012, and partial collections for fiscal 2013 indicate this trend will continue. Property tax collections remain very healthy, with current collections averaging above 98% each year. We expect sales taxes will remain at least level, and with property taxes remaining healthy, the city will be in a good position to maintain its strong performance.

### **Very strong liquidity**

Supporting the city's finances is liquidity we consider very strong, with total government available cash as a percent of total governmental fund expenditures and as a percent of debt service both above 90%. We believe the city has strong access to external liquidity. The city has issued bonds, mainly GO bonds and revenue bonds, frequently during the past 10 years.

### **Strong management conditions**

We view the city's management conditions as strong, with "good" financial practices. Among the highlights of the city's management techniques is the city finance department's monthly monitoring and reporting of the current fund budget to ensure compliance and to allow corrective actions to be taken to ensure a balanced budget. The city's finance department also forecasts revenues and expenditures by looking at historical trends and revenue growth projections. Also, the city provides monthly updates on the budget and quarterly reports on investment holdings to the city council. Although the city does have a formal three-year long-term financial plan, the plan only takes into account general growth assumptions. Midland also has a five-year rolling capital plan, with the majority of the projects funded through the budget. The city's investment policy is conservative, and quarterly reports are provided to the council. The city maintains a formal fund balance policy of maintaining a 25% general fund reserve, and, although that policy is not set in statute, in recent years the city's reserves have exceeded the stated policy. The city does not have a formal debt policy but informally seeks to keep tax-supported debt below 8% of total AV.

### **Strong debt and contingent liability profile**

In our opinion, the city's debt and contingent liability profile is strong, with total governmental fund debt service as a percentage of total governmental fund expenditures at 4.5%, and with net direct debt as a percentage of total governmental fund revenue at 60.8%. In addition, overall net debt equals just 2.8% of market value. The city has no plans to issue additional debt within the next two years.

The city provides pension benefits through a nontraditional, joint contributory, hybrid-defined benefit plan: the Texas Municipal Retirement Plan. It has contributed 100% of the annual required contribution (ARC) in each of the past three years. The combined ARC pension costs and other postemployment benefit pay-as you-go costs for fiscal 2012 were about 12% of expenditures, and the city does not anticipate these costs will increase substantially in the near term. The city's pension liability is 87.8% funded. The city provides pension benefits, through a single-employer defined benefit

plan, for all of its fire fighters not covered by the Texas Municipal Retirement System. As of Jan. 1, 2012, the city's unfunded actuarial accrued liability totaled \$101.2 million, with a funded ratio of 72.2%, for the Fireman's Relief and Retirement Fund.

### Strong institutional framework

We consider the Institutional Framework score for Texas cities as strong. See [Institutional Framework score for Texas](#).

## Outlook

The stable outlook reflects our view of the city's consistent financial performance, which is supported by strong management. We do not expect to revise the ratings during the next two years because we believe the city will maintain strong reserves as the Midland regional economy continues to grow.

## Related Criteria And Research

### Related Criteria

USPF Criteria: [Local Government GO Ratings Methodology And Assumptions](#), Sept. 12, 2013

### Related Research

⌵ [S&P Public Finance Local GO Criteria: How We Adjust Data For Analytic Consistency](#), Sept. 12, 2013

⌵ [Institutional Framework Overview: Texas Local Governments](#)

| Ratings Detail (As Of 17-Jan-2014)          |                  |          |
|---------------------------------------------|------------------|----------|
| + Midland GO                                |                  |          |
| Unenhanced Rating                           | AA+(SPUR)/Stable | Affirmed |
| Many issues are enhanced by bond insurance. |                  |          |

Complete ratings information is available to subscribers of RatingsDirect at [www.globalcreditportal.com](http://www.globalcreditportal.com). All ratings affected by this rating action can be found on Standard & Poor's public Web site at [www.standardandpoors.com](http://www.standardandpoors.com). Use the Ratings search box located in the left column.

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## **Fitch Rates Midland, TX's GO Bonds and COs 'AAA'; Outlook Stable** Ratings

Endorsement Policy

16 Jan 2014 4:31 PM (EST)

Fitch Ratings-Austin-16 January 2014: Fitch Ratings assigns an initial 'AAA' rating to Midland, Texas' (the city) following obligations:

- \$29 million tax and limited pledge revenue certificates of obligation (COs), series 2014;
- \$3.9 million general obligation (GO) refunding bonds, series 2014

The GO bonds and COs will be sold via negotiation on January 27. Proceeds of the COs will be used for general purpose improvements, including public safety facilities, information technology, equipment, parks and recreation projects, and street improvements. The GO bonds will be used to refund the series 2003 and 2005 COs for debt service savings.

In addition Fitch assigns an 'AAA' rating on the following GO bonds and COs currently outstanding (pre-refunding):

- \$28.9 million tax and limited pledge revenue COs, series 2012;
- \$2.3 million GO refunding bonds, series 2009;
- \$8.5 million tax and limited pledge revenue COs, series, 2009;
- \$1.7 million combination tax and revenue refunding bonds, series 2007;
- \$49.7 million tax and limited pledge revenue COs, series 2007; --\$4.6 million GO refunding bonds, series 2006A;
- \$20 million GO refunding bonds, series 2006B;
- \$2.7 million tax and limited pledge revenue COs, series 2005;
- \$2.1 million tax and limited pledge revenue COs, series 2003.

The Rating Outlook is Stable.

### **SECURITY**

The GO bonds and COs are payable from a direct annual ad valorem tax levied, limited to \$2.00 per \$100 taxable assessed valuation (TAV), against all taxable property within the city. The COs are further secured by a limited pledge of net revenues of the city's water and sewer system.

### **KEY RATING DRIVERS**

**FAVORABLE ECONOMIC METRICS:** The city serves as the commercial hub and corporate headquarters for Permian Basin energy activity. As such, the city's unemployment levels have been consistently low and wealth levels are high. Government, education and medical top employers lend some stability to the local economy.

**PRUDENT FISCAL MANAGEMENT:** The city's prudent fiscal practices and conservative budgeting are evidenced in its stable financial history despite its inherent vulnerability tied to the energy sector.

**LONG TREND OF SOLID RESERVES:** The city has built up solid general fund balance reserves and consistently has maintained levels well above its formal policy for at least the last ten fiscal years.

**SALES TAX GROWTH:** The city's sales tax receipts have jumped most dramatically in the last three years resulting from rapid population growth. Although sales taxes comprise a large percent of the city's revenue base, the city strategically sets aside a certain portion to spend on capital outlays or to add to fund balance. Additionally, Fitch notes its solid reserve levels temper risk to sales tax volatility.

**MODEST OVERALL DEBT LEVELS:** The city's overall debt burden is moderately low, with a manageable capital plan that is partly funded on a pay-go basis. Principal amortization is average.



**DIVERSE TAX BASE:** As the regional hub of the Permian Basin, the city's tax base is diverse despite the economic dependence on the oil and gas sector. The top ten taxpayers account for less than 5% of TAV.

#### RATING SENSITIVITIES

**WEAKENED FINANCIAL PROFILE:** The rating is sensitive to shifts in fundamental credit characteristics, including the city's strong reserves which help to mitigate exposure to oil and gas price fluctuations and the inherent cyclicity of sales tax revenues. The Stable Outlook reflects Fitch's expectation that such shifts are unlikely.

#### CREDIT PROFILE

The city is the county seat for Midland County (GO bonds rated 'AAA' by Fitch). It is located in the Permian Basin region, about 300 miles west of Dallas. The Permian Basin is one of the United States largest mineral reservoirs with exploration and drilling for additional reserves continuing. The city's 2014 estimated population of 124,804 accounts for nearly 90% of the county's total population.

#### STABLE FINANCIAL OPERATIONS WITH STRONG RESERVE LEVELS

Fitch considers the city's financial profile a significant credit strength. Financial performance has been consistently positive, with the general fund reporting annual surpluses and increasing reserves in four of the last five fiscal years. The general fund reported net operating surplus of \$10.1 million in fiscal 2012, which followed another \$10.5 million surplus in fiscal 2011. Even in years of contracting or stagnant revenue, management promptly has responded with budgetary measures to yield stable operating performance.

For fiscal 2013, management expects to close the year with balanced results even after an \$8 million non-recurring capital outlay. The projected ending fund balance of \$58.8 million represents 56% of recurring expenditures during fiscal 2013. The fiscal 2014 adopted budget is structurally balanced. Sales tax receipts for the first quarter of 2014 are outpacing the budget.

#### SALES TAX REVENUE GROWTH

As increased oil and gas drilling activity has bumped up the city's population and attracted additional retailers, the city's sales tax receipts have jumped most dramatically in the last three years. Although sales tax revenues are comprising a larger percent of the city's resource base, the council is developing a strategic plan to use sales tax funds in excess of a certain amount (one-third of general fund revenues) for non-recurring uses, one time capital improvements, or to enhance fund balance reserves in order to maintain a minimum of 30% in reserves, slightly above the 25% formal fund balance policy level. Fitch notes the city's conservative budgeting practices and consistently high reserve levels temper credit concerns over volatility in sales tax performance.

#### ENERGY-BASED ECONOMY WITH A DIVERSE TAX BASE

The city is located in the heart of the Permian Basin reservoir serving as the commercial hub in one of the country's largest oil and gas reservoirs whose exploration and drilling has fueled strong economic activity. The city covers approximately 66 square miles of the vast Permian Basin and its property valuation is much more diverse than the county's with the top ten taxpayers comprising less than 5%, compared to 16% for the county.

Although the economic activity realized by the oil and gas sector is significant to the city, real oil, gas and other mineral values comprise less than 1% of the fiscal 2014 tax base, with residential accounting for 60% and industrial and commercial valuations at 18%. Lending stability to the local economy, five of the top ten employers are Midland Independent School District, Midland Memorial Hospital, Midland College, the city, and the county.

The October 2013 unemployment rate of 3.0% reflects several years of solid employment base growth. Wealth levels as measured by median household income and per capita personal income are high. The cost of living is growing and a higher level of demand than supply for housing has resulted in higher than average property appreciation.

#### MODEST OVERALL DEBT

The overall debt burden remains moderately low at \$2,229 per capita and 2.8% to market value, with manageable capital needs. Principal amortization is about average. The city plans to cash fund about \$11.5 million in projects over fiscal years 2014 and 2015 then plans to return to market for another bond sale in 2016 to fund the fiscals 2016 and 2017 CIP. Fitch

expects the city's debt profile will remain stable despite the growth related capital pressures given the city's historically conservative pay-go practices and debt policy.

Pension benefits for all employees except fire fighters are provided through the Texas Municipal Retirement System, a statewide agent multiple employer plan. The city's funding position in this plan is a healthy 83% as of Dec. 2011. Pension benefits for fire fighters are provided through a single-employer defined benefit plan. The city's 65% funded position (at Fitch's adjusted 7% rate of return) as of the latest valuation date (Jan. 2012) in this plan is considered weak due to an open 41-year amortization period. Other post-employment benefits (OPEB) are funded on a pay-go basis, but benefits are not so generous. On a combined basis, the city's carrying costs, including debt service as well as contributions for pension and OPEB paygo expense approximate an affordable 16% of governmental spending.

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In addition to the sources of information identified in Fitch's Tax-Supported Rating Criteria, this action was additionally informed by information from Creditscope, Texas Municipal Advisory Council, and IHS Global Insight.

Applicable Criteria and Related Research:

--'Tax-Supported Rating Criteria' (Aug. 14, 2012);  
--'U.S. Local Government Tax-Supported Rating Criteria' (Aug. 14, 2012);  
--'2014 Outlook: North American Oil & Gas' (Dec. 12, 2013).

**Applicable Criteria and Related Research:**

Tax-Supported Rating Criteria  
U.S. Local Government Tax-Supported Rating Criteria  
2014 Outlook: North American Oil & Gas (Strong Oil Prices Continue to Support Energy Complex)

**Additional Disclosure**

Solicitation Status

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FOR WHICH THE LEAD ANALYST IS BASED IN AN EU-REGISTERED ENTITY CAN BE FOUND ON THE ENTITY SUMMARY PAGE FOR THIS ISSUER ON THE FITCH WEBSITE.

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# City Council Agenda

Approved for Agenda:  
sreyes  
City Manager's Office

**MEETING DATE:** 1/28/2014

**TO:** City Council / City Manager

**FROM:** Pam Simecka, Finance Director

**SUBJECT:** Sale of City of Midland General Obligation Refunding Bonds, Series 2014

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## **Purpose:**

Refunding or refinancing of the Series 2003 and 2005 certificate of obligation issues in order to realize future debt service savings.

## **Recommended City Council Action**

☒ Approve ☐ Deny ☐ Directional / Informational

## **Fiscal Impact:**

The combined principal amount of the two issues, subject to refinancing, is \$4.42 million. Based upon market conditions at the present time, projected annual savings would be approximately \$40,000 per year for fiscal years 2015 through 2020, totaling approximately \$240,000. Total present value savings, as a percent of the \$4.42 million principal balance to be refunded is currently projected at approximately 5.2%.

## **Discussion:**

Required notices have been posted at City Hall and published as required.

Fitch Ratings has assigned a top ranking of "AAA" rating to this refunding issuance.

Standard and Poor's has affirmed the City's bond rating at AA+. Their next to the highest ranking.

Attachment 1 is the recommendation and worksheet from the Financial Advisor

Attachment 2 is the rating information from Fitch and Standard and Poor.

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE authorizing the issuance of "City of Midland, Texas, General Obligation Refunding Bonds, Series 2014"; specifying the terms and features of said bonds; levying a continuing direct annual ad valorem tax for the payment of said bonds; providing for the redemption of certain outstanding obligations of the City; and resolving other matters incident and related to the issuance, sale, payment, and delivery of said bonds, including the approval and execution of a Paying Agent/Registrar Agreement and the approval and distribution of an Official Statement; and providing an effective date.

WHEREAS, the City Council of the City of Midland, Texas (the "City") has heretofore issued, sold, and delivered, and there is currently outstanding obligations totaling in original principal amount \$4,420,000.00 of the following issues or series (hereinafter collectively referred to as the "Refunded Obligations"), to wit:

(1) "City of Midland, Texas, Tax and Limited Pledge Revenue Certificates of Obligation, Series 2003, dated February 15, 2003 maturing on March 1 in each of the years 2014 through 2018, inclusive, and aggregating in principal amount of \$2,055,000 (the "Series 2003 Certificates");

(2) "City of Midland, Texas, Tax and Limited Pledge Revenue Certificates of Obligation, Series 2005, dated February 15, 2005 maturing on March 1 in each of the years 2015 through 2020, inclusive, and aggregating in principal amount of \$2,365,000 (the "Series 2005 Certificates");

WHEREAS, pursuant to the provisions of Texas Government Code, Chapter 1207, as amended ("Chapter 1207"), the City Council is authorized to issue refunding bonds and deposit the proceeds of sale directly with any place of payment for the Refunded Obligations, or other authorized depository, and such deposit, when made in accordance with said statute, shall constitute the making of firm banking and financial arrangements for the discharge and final payment of the Refunded Obligations; and

WHEREAS, the City Council hereby finds and determines that the Refunded Obligations should be refunded at this time, and such refunding will result in the City saving approximately \$303,557.50 in debt service payments on such indebtedness and further provide net present value savings of approximately \$289,950.22; now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDLAND:

SECTION 1: Authorization – Designation-Principal Amount-Purpose. General obligation bonds of the City shall be and are hereby authorized to be issued in the aggregate principal amount of \$3,800,000 to be designated and bear the title "CITY OF MIDLAND, TEXAS, GENERAL OBLIGATION REFUNDING BONDS, SERIES 2014" (hereinafter referred to as the "Bonds"), for the purpose of providing funds for the discharge and final payment of certain outstanding obligations of the City (identified in the preamble hereof and referred to as the "Refunded Obligations") and to pay costs of issuance, in accordance with the Constitution and laws of the State of Texas, including Chapter 1207.

SECTION 2: Fully Registered Obligations-Bond Date - Authorized Denominations-Stated Maturities-Interest Rates. The Bonds shall be issued as fully registered obligations only,

shall be dated January 15, 2014 (the "Bond Date"), shall be in denominations of \$5,000 or any integral multiple (within a Stated Maturity) thereof, and shall become due and payable on March 1 in each of the years and in the principal amounts (the "Stated Maturities") and bear interest at the rate(s) per annum in accordance with the following schedule:

| <u>Year of<br/>Stated Maturity</u> | <u>Principal<br/>Amount</u> | <u>Interest<br/>Rate(s)</u> |
|------------------------------------|-----------------------------|-----------------------------|
| 2015                               | 720,000                     | 2.00%                       |
| 2016                               | 745,000                     | 3.00%                       |
| 2017                               | 775,000                     | 3.00%                       |
| 2018                               | 805,000                     | 4.00%                       |
| 2019                               | 370,000                     | 4.00%                       |
| 2020                               | 385,000                     | 4.00%                       |

The Bonds shall bear interest on the unpaid principal amounts from the date of initial delivery of the Bonds at the rate(s) per annum shown above in this Section (calculated on the basis of a 360-day year of twelve 30-day months). Interest on the Bonds shall be payable on March 1 and September 1 in each year, commencing September 1, 2014, until maturity.

SECTION 3: Terms of Payment-Paying Agent/Registrar. The principal of, premium, if any, and the interest on the Bonds, due and payable by reason of maturity or otherwise, shall be payable only to the registered owners or holders of the Bonds (hereinafter called the "Holders") appearing on the registration and transfer books maintained by the Paying Agent/Registrar and the payment thereof shall be in any coin or currency of the United States of America which at the time of payment is legal tender for the payment of public and private debts, and shall be without exchange or collection charges to the Holders.

The selection and appointment of The Bank of New York Mellon Trust Company, N.A., Dallas, Texas to serve as Paying Agent/Registrar for the Bonds is hereby approved and confirmed. Books and records relating to the registration, payment, transfer and exchange of the Bonds (the "Security Register") shall at all times be kept and maintained on behalf of the City by the Paying Agent/Registrar, as provided herein and in accordance with the terms and provisions of a "Paying Agent/Registrar Agreement", substantially in the form attached hereto as **Exhibit A**, and such reasonable rules and regulations as the Paying Agent/Registrar and the City may prescribe. The Mayor and City Secretary are authorized to execute and deliver such Paying Agent/Registrar Agreement in connection with the delivery of the Bonds. The City covenants to maintain and provide a Paying Agent/Registrar at all times until the Bonds are paid and discharged, and any successor Paying Agent/Registrar shall be a commercial bank, trust company, financial institution or other entity qualified and authorized to serve in such capacity and perform the duties and services of Paying Agent/Registrar. Upon any change in the Paying Agent/Registrar for the Bonds, the City agrees to promptly cause a written notice thereof to be sent to each Holder by United States Mail, first class postage prepaid, which notice shall also give the address of the new Paying Agent/Registrar.

Principal of and premium, if any, on the Bonds shall be payable at the Stated Maturities or on a redemption date, only upon presentation and surrender of the Bonds to the Paying Agent/Registrar at its designated offices, initially in East Syracuse, New York or, with respect to a successor Paying Agent/Registrar, at the designated offices of such successor (the "Designated Payment/Transfer Office"). Interest on the Bonds shall be paid to the Holders whose names appear in the Security Register at the close of business on the Record Date (the 15<sup>th</sup> day of the month next preceding each interest payment date) and shall be paid by the Paying Agent/Registrar (i) by check sent United States Mail, first class postage prepaid, to the

address of the Holder recorded in the Security Register or (ii) by such other method, acceptable to the Paying Agent/Registrar, requested by, and at the risk and expense of, the Holder. If the date for the payment of the principal of or interest on the Bonds shall be a Saturday, Sunday, a legal holiday, or a day when banking institutions in the city where the Designated Payment/Transfer Office of the Paying Agent/Registrar is located are authorized by law or executive order to close, then the date for such payment shall be the next succeeding day which is not such a Saturday, Sunday, legal holiday, or day when banking institutions are authorized to close; and payment on such date shall have the same force and effect as if made on the original date payment was due.

In the event of a nonpayment of interest on a scheduled payment date, and for thirty (30) days thereafter, a new record date for such interest payment (a "Special Record Date") will be established by the Paying Agent/Registrar, if and when funds for the payment of such interest have been received from the City. Notice of the Special Record Date and of the scheduled payment date of the past due interest (which shall be 15 days after the Special Record Date) shall be sent at least five (5) business days prior to the Special Record Date by United States Mail, first class postage prepaid, to the address of each Holder appearing on the Security Register at the close of business on the last business day next preceding the date of mailing of such notice.

SECTION 4: Redemption. The Bonds are not subject to redemption prior to maturity.

SECTION 5: Registration - Transfer - Exchange of Bonds-Predecessor Bonds. The Paying Agent/Registrar shall obtain, record, and maintain in the Security Register the name and address of each Holder of the Bonds issued under and pursuant to the provisions of this Ordinance, or if appropriate, the nominee thereof. Any Bond may be transferred or exchanged for Bonds of other authorized denominations by the Holder, in person or by his duly authorized agent, upon surrender of such Bond to the Paying Agent/Registrar at the Designated Payment/Transfer Office for cancellation, accompanied by a written instrument of transfer or request for exchange duly executed by the Holder or by his duly authorized agent, in form satisfactory to the Paying Agent/Registrar.

Upon surrender of any Bond (other than the Initial Bond(s) referenced in Section 8 hereof) for transfer at the Designated Payment/Transfer Office of the Paying Agent/Registrar, the Paying Agent/Registrar shall register and deliver, in the name of the designated transferee or transferees, one or more new Bonds of authorized denominations and having the same Stated Maturity and of a like aggregate principal amount as the Bond or Bonds surrendered for transfer.

At the option of the Holder, Bonds (other than the Initial Bond(s) referenced in Section 8 hereof) may be exchanged for other Bonds of authorized denominations and having the same Stated Maturity, bearing the same rate of interest and of like aggregate principal amount as the Bonds surrendered for exchange, upon surrender of the Bonds to be exchanged at the Designated Payment/Transfer Office of the Paying Agent/Registrar. Whenever any Bonds are surrendered for exchange, the Paying Agent/Registrar shall register and deliver new Bonds to the Holder requesting the exchange.

All Bonds issued in any transfer or exchange of Bonds shall be delivered to the Holders at the Designated Payment/Transfer Office of the Paying Agent/Registrar or sent by United States Mail, first class, postage prepaid to the Holders, and, upon the registration and delivery thereof, the same shall be the valid obligations of the City, evidencing the same obligation to pay, and entitled to the same benefits under this Ordinance, as the Bonds surrendered in such transfer or exchange.

All transfers or exchanges of Bonds pursuant to this Section shall be made without expense or service charge to the Holder, except as otherwise herein provided, and except that the Paying Agent/Registrar shall require payment by the Holder requesting such transfer or exchange of any tax or other governmental charges required to be paid with respect to such transfer or exchange.

Bonds cancelled by reason of an exchange or transfer pursuant to the provisions hereof are hereby defined to be "Predecessor Bonds," evidencing all or a portion, as the case may be, of the same obligation to pay evidenced by the new Bond or Bonds registered and delivered in the exchange or transfer therefor. Additionally, the term "Predecessor Bonds" shall include any mutilated, lost, destroyed, or stolen Bond for which a replacement Bond has been issued, registered, and delivered in lieu thereof pursuant to the provisions of Section 11 hereof and such new replacement Bond shall be deemed to evidence the same obligation as the mutilated, lost, destroyed, or stolen Bond.

SECTION 6: Book-Entry-Only Transfers and Transactions. Notwithstanding the provisions contained in Sections 3, 4 and 5 hereof relating to the payment, and transfer/exchange of the Bonds, the City hereby approves and authorizes the use of "Book-Entry-Only" securities clearance, settlement and transfer system provided by The Depository Trust Company, a limited purpose trust company organized under the laws of the State of New York ("DTC"), in accordance with the operational arrangements referenced in the Blanket Issuer Letter of Representations, by and between the City and DTC (the "Depository Agreement").

Pursuant to the Depository Agreement and the rules of DTC, the Bonds shall be deposited with DTC who shall hold said Bonds for its participants (the "DTC Participants"). While the Bonds are held by DTC under the Depository Agreement, the Holder of the Bonds on the Security Register for all purposes, including payment and notices, shall be Cede & Co., as nominee of DTC, notwithstanding the ownership of each actual purchaser or owner of each Bond (the "Beneficial Owners") being recorded in the records of DTC and DTC Participants.

In the event DTC determines to discontinue serving as securities depository for the Bonds or otherwise ceases to provide book-entry clearance and settlement of securities transactions in general or the City determines that DTC is incapable of properly discharging its duties as securities depository for the Bonds, the City covenants and agrees with the Holders of the Bonds to cause Bonds to be printed in definitive form and provide for the Bond certificates to be issued and delivered to DTC Participants and Beneficial Owners, as the case may be. Thereafter, the Bonds in definitive form shall be assigned, transferred and exchanged on the Security Register maintained by the Paying Agent/Registrar and payment of such Bonds shall be made in accordance with the provisions of Sections 3, 4 and 5 hereof.

SECTION 7: Execution - Registration. The Bonds shall be executed on behalf of the City by the Mayor or Mayor Pro Tem under its seal reproduced or impressed thereon and countersigned by the City Secretary. The signature of said officers on the Bonds may be manual or facsimile. Bonds bearing the manual or facsimile signatures of individuals who are or were the proper officers of the City on the Bond Date shall be deemed to be duly executed on behalf of the City, notwithstanding that one or more of the individuals shall cease to hold such offices at the time of delivery of the Bonds to the initial purchaser(s) and with respect to Bonds delivered in subsequent exchanges and transfers, all as authorized and provided in Texas Government Code, Chapter 1201, as amended.

No Bond shall be entitled to any right or benefit under this Ordinance, or be valid or obligatory for any purpose, unless there appears on such Bond either a certificate of registration



substantially in the form provided in Section 9(c), manually executed by the Comptroller of Public Accounts of the State of Texas, or his duly authorized agent, or a certificate of registration substantially in the form provided in Section 9(d), manually executed by an authorized officer, employee or representative of the Paying Agent/Registrar, and either such certificate duly signed upon any Bond shall be conclusive evidence, and the only evidence, that such Bond has been duly certified, registered, and delivered.

SECTION 8: Initial Bond(s). The Bonds herein authorized shall be initially issued either (i) as a single fully registered bond in the aggregate principal amount stated in Section 1 hereof with principal installments to become due and payable as provided in Section 2 hereof and numbered T-1, or (ii) as multiple fully registered bonds, being one bond for each year of maturity in the applicable principal amount and denomination and to be numbered consecutively from T-1 and upward (hereinafter called the "Initial Bond(s)") and, in either case, the Initial Bond(s) shall be registered in the name of the initial purchaser(s) or the designee thereof. The Initial Bond(s) shall be the Bond(s) submitted to the Office of the Attorney General of the State of Texas for approval, certified and registered by the Office of the Comptroller of Public Accounts of the State of Texas and delivered to the initial purchaser(s). Any time after the delivery of the Initial Bond(s), the Paying Agent/Registrar, pursuant to written instructions from the initial purchaser(s), or the designee thereof, shall cancel the Initial Bond(s) delivered hereunder and exchange therefor definitive Bonds of authorized denominations, Stated Maturities, principal amounts and bearing applicable interest rates for transfer and delivery to the Holders named at the addresses identified therefor; all pursuant to and in accordance with such written instructions from the initial purchaser(s), or the designee thereof, and such other information and documentation as the Paying Agent/Registrar may reasonably require.

SECTION 9: Forms.

(a) Forms Generally. The Bonds, the Registration Certificate of the Comptroller of Public Accounts of the State of Texas, the Registration Certificate of Paying Agent/Registrar, and the form of Assignment to be printed on each of the Bonds, shall be substantially in the forms set forth in this Section with such appropriate insertions, omissions, substitutions, and other variations as are permitted or required by this Ordinance and may have such letters, numbers, or other marks of identification (including identifying numbers and letters of the Committee on Uniform Securities Identification Procedures of the American Bankers Association) and such legends and endorsements (including insurance legends in the event the Bonds, or any maturities thereof, are purchased with insurance and any reproduction of an opinion of counsel) thereon as may, consistently herewith, be established by the City or determined by the officers executing such Bonds as evidenced by their execution. Any portion of the text of any Bonds may be set forth on the reverse thereof, with an appropriate reference thereto on the face of the Bond.

The definitive Bonds and the Initial Bond(s) shall be printed, lithographed, engraved, typewritten, photocopied or otherwise reproduced in any other similar manner, all as determined by the officers executing such Bonds as evidenced by their execution thereof.

(b) Form of Definitive Bond.

REGISTERED  
NO. \_\_\_\_\_

REGISTERED  
\$ \_\_\_\_\_

UNITED STATES OF AMERICA  
STATE OF TEXAS  
CITY OF MIDLAND, TEXAS  
GENERAL OBLIGATION REFUNDING BOND  
SERIES 2014

|                  |                |                 |           |
|------------------|----------------|-----------------|-----------|
| Bond Date:       | Interest Rate: | Stated Maturity | CUSIP NO: |
| January 15, 2014 | _____ %        | March 1, _____  | _____     |

Registered Owner:

Principal Amount:

The City of Midland (hereinafter referred to as the "City"), a body corporate and municipal corporation in the Counties of Midland and Martin, State of Texas, for value received, acknowledges itself indebted to and hereby promises to pay to the registered owner named above, or the registered assigns thereof (the "Registered Owner"), on the Stated Maturity date specified above the Principal Amount hereinabove stated (without right to prior redemption) and to pay interest on the unpaid principal amount hereof from the interest payment date next preceding the "Registration Date" of this Bond appearing below (unless this Bond bears a "Registration Date" as of an interest payment date, in which case it shall bear interest from such date, or unless the "Registration Date" of this Bond is prior to the initial interest payment date in which case it shall bear interest from the date of initial delivery of the Bonds) at the per annum rate of interest specified above computed on the basis of a 360-day year of twelve 30-day months; such interest being payable on March 1 and September 1 in each year, commencing September 1, 2014, until maturity. Principal of this Bond shall be payable at its Stated Maturity to the Registered Owner hereof upon presentation and surrender at the designated offices of the Paying Agent/Registrar executing the registration certificate appearing hereon, initially in East Syracuse, New York, or, with respect to a successor Paying Agent/Registrar, at the designated offices of such successor (the "Designated Payment/Transfer Office"). Interest is payable to the registered owner of this Bond (or one or more Predecessor Bonds, as defined in the Ordinance hereinafter referenced) whose name appears on the "Security Register" maintained by the Paying Agent/Registrar at the close of business on the "Record Date", which is the 15<sup>th</sup> day of the month next preceding each interest payment date, and interest shall be paid by the Paying Agent/Registrar by check sent United States Mail, first class postage prepaid, to the address of the registered owner recorded in the Security Register or by such other method, acceptable to the Paying Agent/Registrar, requested by, and at the risk and expense of, the registered owner. If the date for the payment of the principal of or interest on the Bonds shall be a Saturday, Sunday, a legal holiday, or a day when banking institutions in the city where the Designated Payment/Transfer Office of the Paying Agent/Registrar is located are authorized by law or executive order to close, then the date for such payment shall be the next succeeding day which is not such a Saturday, Sunday, legal holiday, or day when banking institutions are authorized to close; and payment on such date shall have the same force and effect as if made on the original date payment was due. All payments of principal of, premium, if any, and interest on this Bond shall be without exchange or collection charges to the owner hereof and in any coin or currency of the United States of America which at the time of payment is legal tender for the payment of public and private debts.

This Bond is one of the series specified in its title issued in the aggregate principal amount of \$3,800,000 (herein referred to as the "Bonds") for the purpose of providing funds for the discharge and final payment of certain outstanding obligations of the City, and to pay costs

of issuance, under and in strict conformity with the Constitution and laws of the State of Texas, including Texas Government Code, Chapter 1207, as amended, and pursuant to an Ordinance adopted by the City Council of the City (herein referred to as the "Ordinance").

The Bonds are payable from the proceeds of an ad valorem tax levied, within the limitations prescribed by law, upon all taxable property in the City. Reference is hereby made to the Ordinance, a copy of which is on file in the Designated Payment/Transfer Office of the Paying Agent/Registrar, and to all of the provisions of which the owner or holder of this Bond by the acceptance hereof hereby assents, for definitions of terms; the description of and the nature and extent of the tax levied for the payment of the Bonds; the terms and conditions relating to the transfer or exchange of this Bond; the conditions upon which the Ordinance may be amended or supplemented with or without the consent of the Holders; the rights, duties, and obligations of the City and the Paying Agent/Registrar; the terms and provisions upon which this Bond may be discharged at or prior to its maturity and deemed to be no longer Outstanding thereunder; and for other terms and provisions contained therein. Capitalized terms used herein have the meanings assigned in the Ordinance.

This Bond, subject to certain limitations contained in the Ordinance, may be transferred on the Security Register only upon its presentation and surrender at the Designated Payment/Transfer Office of the Paying Agent/Registrar, with the Assignment hereon duly endorsed by, or accompanied by a written instrument of transfer in form satisfactory to the Paying Agent/Registrar duly executed by, the registered owner hereof, or his duly authorized agent. When a transfer on the Security Register occurs, one or more new fully registered Bonds of the same Stated Maturity, of authorized denominations, bearing the same rate of interest, and of the same aggregate principal amount will be issued by the Paying Agent/Registrar to the designated transferee or transferees.

The City and the Paying Agent/Registrar, and any agent of either, shall treat the registered owner whose name appears on the Security Register (i) on the Record Date as the owner entitled to payment of interest hereon, (ii) on the date of surrender of this Bond as the owner entitled to payment of principal hereof at its Stated Maturity, in whole or in part, and (iii) on any other date as the owner for all other purposes, and neither the City nor the Paying Agent/Registrar, or any agent of either, shall be affected by notice to the contrary. In the event of nonpayment of interest on a scheduled payment date and for thirty (30) days thereafter, a new record date for such interest payment (a "Special Record Date") will be established by the Paying Agent/Registrar, if and when funds for the payment of such interest have been received from the City. Notice of the Special Record Date and of the scheduled payment date of the past due interest (which shall be fifteen (15) days after the Special Record Date) shall be sent at least five (5) business days prior to the Special Record Date by United States Mail, first class postage prepaid, to the address of each registered owner appearing on the Security Register at the close of business on the last business day next preceding the date of mailing of such notice.

It is hereby certified, recited, represented and declared that the City is a body corporate and political subdivision duly organized and legally existing under and by virtue of the Constitution and laws of the State of Texas; that the issuance of the Bonds is duly authorized by law; that all acts, conditions and things required to exist and be done precedent to and in the issuance of the Bonds to render the same lawful and valid obligations of the City have been properly done, have happened and have been performed in regular and due time, form and manner as required by the Constitution and laws of the State of Texas, and the Ordinance; that the Bonds do not exceed any Constitutional or statutory limitation; and that due provision has been made for the payment of the principal of and interest on the Bonds by the levy of a tax as

stated above. In case any provision in this Bond shall be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. The terms and provisions of this Bond and the Ordinance shall be construed in accordance with and shall be governed by the laws of the State of Texas.

IN WITNESS WHEREOF, the City Council of the City has caused this Bond to be duly executed under the official seal of the City as of the Bond Date.

CITY OF MIDLAND, TEXAS

\_\_\_\_\_  
Mayor

COUNTERSIGNED:

\_\_\_\_\_  
City Secretary

(SEAL)

(c) Form of Registration Certificate of Comptroller of Public Accounts to appear on Initial Bond(s) only.

REGISTRATION CERTIFICATE OF  
COMPTROLLER OF PUBLIC ACCOUNTS

|                           |   |                    |
|---------------------------|---|--------------------|
| OFFICE OF THE COMPTROLLER | ) |                    |
|                           | ) |                    |
| OF PUBLIC ACCOUNTS        | ) | REGISTER NO. _____ |
|                           | ) |                    |
| THE STATE OF TEXAS        | ) |                    |

I HEREBY CERTIFY that this Bond has been examined, certified as to validity and approved by the Attorney General of the State of Texas, and duly registered by the Comptroller of Public Accounts of the State of Texas.

WITNESS my signature and seal of office this \_\_\_\_\_.

\_\_\_\_\_  
Comptroller of Public Accounts  
of the State of Texas

(SEAL)

- (d) Form of Certificate of Paying Agent/Registrar to appear on Definitive Bonds only.

REGISTRATION CERTIFICATE OF PAYING AGENT/REGISTRAR

This Bond has been duly issued and registered under the provisions of the within-mentioned Ordinance; the bond or bonds of the above entitled and designated series originally delivered having been approved by the Attorney General of the State of Texas and registered by the Comptroller of Public Accounts, as shown by the records of the Paying Agent/Registrar.

The designated office of the Paying Agent/Registrar in East Syracuse, New York is the "Designated Payment/Transfer Office" for this Bond.

THE BANK OF NEW YORK MELLON TRUST  
COMPANY, N.A., Dallas, Texas, as Paying  
Agent/Registrar

Registration date:

\_\_\_\_\_

By: \_\_\_\_\_  
Authorized Signature

- (e) Form of Assignment.

ASSIGNMENT

FOR VALUE RECEIVED the undersigned hereby sells, assigns, and transfers unto (Print or typewrite name, address, and zip code of transferee): \_\_\_\_\_

(Social Security or other identifying number \_\_\_\_\_) the within Bond and all rights thereunder, and hereby irrevocably constitutes and appoints

attorney to transfer the within Bond on the books kept for registration thereof, with full power of substitution in the premises.

DATED:

\_\_\_\_\_  
Signature guaranteed:

\_\_\_\_\_

\_\_\_\_\_  
NOTICE: The signature on this assignment must correspond with the name of the registered owner as it appears on the face of the within Bond in every particular.

- (f) The Initial Bond(s) shall be in the form set forth in paragraph (b) of this Section, except that the form of the single fully registered Initial Bond shall be modified as follows:

Heading and first paragraph shall read as follows:

REGISTERED  
NO. T-1

REGISTERED  
\$ \_\_\_\_\_

UNITED STATES OF AMERICA  
STATE OF TEXAS  
CITY OF MIDLAND, TEXAS  
GENERAL OBLIGATION REFUNDING BOND  
SERIES 2014

Bond Date: January 15, 2014

Registered Owner:

Principal Amount: \_\_\_\_\_ MILLION \_\_\_\_\_ HUNDRED \_\_\_\_\_  
THOUSAND DOLLARS

The City of Midland (hereinafter referred to as the "City"), a body corporate and municipal corporation in the Counties of Midland and Martin, State of Texas, for value received, acknowledges itself indebted to and hereby promises to pay to the registered owner named above, or the registered assigns thereof (the "Registered Owner"), the Principal Amount hereinabove stated on March 1 in each of the years and in principal installments in accordance with the following schedule:

| <u>STATED</u><br><u>MATURITY</u> | <u>PRINCIPAL</u><br><u>INSTALLMENTS</u> | <u>INTEREST</u><br><u>RATE</u> |
|----------------------------------|-----------------------------------------|--------------------------------|
|----------------------------------|-----------------------------------------|--------------------------------|

(Information to be inserted from schedule in Section 2 hereof).

(without right of prior redemption) and to pay interest on the unpaid Principal Amount hereof from the date of the initial delivery of the Bonds at the per annum rates of interest specified above computed on the basis of a 360-day year of twelve 30-day months; such interest being payable on March 1 and September 1 of each year, commencing September 1, 2014, until maturity. Principal installments of this Bond are payable on the Stated Maturity date to the registered owner hereof by The Bank of New York Mellon Trust Company, N.A., Dallas, Texas (the "Paying Agent/Registrar"), upon its presentation and surrender at its designated offices, initially in East Syracuse, New York, or, with respect to a successor paying agent/registrar, at the designated office of such successor (the "Designated Payment/Transfer Office"). Interest is payable to the registered owner of this Bond whose name appears on the "Security Register" maintained by the Paying Agent/Registrar at the close of business on the "Record Date", which is the 15<sup>th</sup> day of the month next preceding each interest payment date, and interest shall be paid by the Paying Agent/Registrar by check sent United States Mail, first class postage prepaid, to the address of the registered owner recorded in the Security Register or by such other method, acceptable to the Paying Agent/Registrar, requested by, and at the risk and expense of, the registered owner. If the date for the payment of the principal of or interest on the Bonds shall be a Saturday, Sunday, a legal holiday, or a day when banking institutions in the city where the Designated Payment/Transfer Office of the Paying Agent/Registrar is located are authorized by law or executive order to close, then the date for such payment shall be the next succeeding day which is not such a Saturday, Sunday, legal holiday, or day when banking institutions are authorized to close; and payment on such date shall have the same force and effect as if made on the original date payment was due. All payments of principal of, premium, if any, and interest on this Bond shall be without exchange or collection charges to the owner

hereof and in any coin or currency of the United States of America which at the time of payment is legal tender for the payment of public and private debts.

**SECTION 10: Levy of Taxes.** To provide for the payment of the “Debt Service Requirements” of the Bonds, being (i) the interest on the Bonds and (ii) a sinking fund for their payment at maturity or a sinking fund of 2% (whichever amount is the greater), there is hereby levied, and there shall be annually assessed and collected in due time, form, and manner, a tax on all taxable property in the City, within the limitations prescribed by law, and such tax hereby levied on each one hundred dollars’ valuation of taxable property in the City for the Debt Service Requirements of the Bonds shall be at a rate from year to year as will be ample and sufficient to provide funds each year to pay the principal of and interest on said Bonds while Outstanding; full allowance being made for delinquencies and costs of collection; separate books and records relating to the receipt and disbursement of taxes levied, assessed and collected for and on account of the Bonds shall be kept and maintained by the City at all times while the Bonds are Outstanding, and the taxes collected for the payment of the Debt Service Requirements on the Bonds shall be deposited to the credit of a “Special Series 2014 General Obligation Refunding Bond fund” (the “Interest and Sinking Fund”) maintained on the records of the City and deposited in a special fund maintained at an official depository of the City’s funds; and such tax hereby levied, and to be assessed and collected annually, is hereby pledged to the payment of the Bonds.

The Mayor, City Manager, Director of Finance and City Secretary of the City, individually or jointly, are hereby authorized and directed to cause to be transferred to the Paying Agent/Registrar for the Bonds, from funds on deposit in the Interest and Sinking Fund, amounts sufficient to fully pay and discharge promptly each installment of interest and principal of the Bonds as the same accrues or matures; such transfers of funds to be made in such manner as will cause collected funds to be deposited with the Paying Agent/Registrar on or before each principal and interest payment date for the Bonds.

**SECTION 11: Mutilated - Destroyed-Lost and Stolen Bonds.** In case any Bond shall be mutilated, destroyed, lost or stolen, the Paying Agent/Registrar may execute and deliver a replacement Bond of like form and tenor, and in the same denomination and bearing a number not contemporaneously outstanding, in exchange and substitution for such mutilated Bond, or in lieu of and in substitution for such destroyed, lost or stolen Bond, only upon the approval of the City and after (i) the filing by the Holder thereof with the Paying Agent/Registrar of evidence satisfactory to the Paying Agent/Registrar of the destruction, loss or theft of such Bond, and of the authenticity of the ownership thereof and (ii) the furnishing to the Paying Agent/Registrar of indemnification in an amount satisfactory to hold the City and the Paying Agent/Registrar harmless. All expenses and charges associated with such indemnity and with the preparation, execution and delivery of a replacement Bond shall be borne by the Holder of the Bond mutilated, destroyed, lost or stolen.

Every replacement Bond issued pursuant to this Section shall be a valid and binding obligation, and shall be entitled to all the benefits of this Ordinance equally and ratably with all other Outstanding Bonds; notwithstanding the enforceability of payment by anyone of the destroyed, lost, or stolen Bonds.

The provisions of this Section are exclusive and shall preclude (to the extent lawful) all other rights and remedies with respect to the replacement and payment of mutilated, destroyed, lost or stolen Bonds.

SECTION 12: Satisfaction of Obligation of City. If the City shall pay or cause to be paid, or there shall otherwise be paid to the Holders, the principal of, premium, if any, and interest on the Bonds, at the times and in the manner stipulated in this Ordinance, then the pledge of taxes levied under this Ordinance and all covenants, agreements, and other obligations of the City to the Holders shall thereupon cease, terminate, and be discharged and satisfied.

Bonds or any principal amount(s) thereof shall be deemed to have been paid within the meaning and with the effect expressed above in this Section when (i) money sufficient to pay in full such Bonds or the principal amount(s) thereof at maturity therefor, together with all interest due thereon, shall have been irrevocably deposited with and held in trust by the Paying Agent/Registrar, or an authorized escrow agent, or (ii) Government Securities shall have been irrevocably deposited in trust with the Paying Agent/Registrar, or an authorized escrow agent, which Government Securities have been certified by an independent accounting firm to mature as to principal and interest in such amounts and at such times as will insure the availability, without reinvestment, of sufficient money, together with any moneys deposited therewith, if any, to pay when due the principal of and interest on such Bonds, or the principal amount(s) thereof, on and prior to the Stated Maturity thereof. The City covenants that no deposit of moneys or Government Securities will be made under this Section and no use made of any such deposit which would cause the Bonds to be treated as "arbitrage bonds" within the meaning of Section 148 of the Internal Revenue Code of 1986, as amended, or regulations adopted pursuant thereto.

Any moneys so deposited with the Paying Agent/Registrar, or an authorized escrow agent, and all income from Government Securities held in trust by the Paying Agent/Registrar, or an authorized escrow agent, pursuant to this Section which is not required for the payment of the Bonds, or any principal amount(s) thereof, or interest thereon with respect to which such moneys have been so deposited shall be remitted to the City or deposited as directed by the City. Furthermore, any money held by the Paying Agent/Registrar for the payment of the principal of and interest on the Bonds and remaining unclaimed for a period of three (3) years after the Stated Maturity of the Bonds, for which such moneys were deposited and are held in trust to pay, shall, upon the request of the City, be remitted to the City against a written receipt therefor. Notwithstanding the above and foregoing, any remittance of funds from the Paying Agent/Registrar to the City shall be subject to any applicable unclaimed property laws of the State of Texas.

The term "Government Securities", as used herein, shall mean (i) direct noncallable obligations of the United States of America, including obligations the principal of and interest on which are unconditionally guaranteed by the United States of America, (ii) noncallable obligations of an agency or instrumentality of the United States, including obligations unconditionally guaranteed or insured by the agency or instrumentality and, on the date of their acquisition or purchase by the City, are rated as to investment quality by a nationally recognized investment rating firm not less than AAA or its equivalent, (iii) noncallable obligations of a state or an agency or a county, municipality, or other political subdivision of a state that have been refunded and that, on the date of their acquisition or purchase by the City, are rated as to investment quality by a nationally recognized investment rating firm not less than AAA or its equivalent and (iv) any other then authorized securities or obligations that may be used to defease obligations such as the Bonds under the then applicable laws of the State of Texas.

SECTION 13: OrdinanceaContract- Amendments - Outstanding Bonds. This Ordinance shall constitute a contract with the Holders from time to time, be binding on the City, and shall not be amended or repealed by the City so long as any Bond remains Outstanding except as permitted in this Section and in Section 28 hereof. The City may, without the consent of or



notice to any Holders, from time to time and at any time, amend this Ordinance in any manner not detrimental to the interests of the Holders, including the curing of any ambiguity, inconsistency, or formal defect or omission herein. In addition, the City may, with the consent of Holders holding a majority in aggregate principal amount of the Bonds then Outstanding, amend, add to, or rescind any of the provisions of this Ordinance; provided that, without the consent of all Holders of Outstanding Bonds, no such amendment, addition, or rescission shall (1) extend the time or times of payment of the principal of, premium, if any, and interest on the Bonds, reduce the principal amount thereof, or the rate of interest thereon, or in any other way modify the terms of payment of the principal of, premium, if any, or interest on the Bonds, (2) give any preference to any Bond over any other Bond, or (3) reduce the aggregate principal amount of Bonds required to be held by Holders for consent to any such amendment, addition, or rescission.

The term "Outstanding" when used in this Ordinance with respect to Bonds means, as of the date of determination, all Bonds theretofore issued and delivered under this Ordinance, except:

- (1) those Bonds cancelled by the Paying Agent/Registrar or delivered to the Paying Agent/Registrar for cancellation;
- (2) those Bonds deemed to be duly paid by the City in accordance with the provisions of Section 12 hereof; and
- (3) those mutilated, destroyed, lost, or stolen Bonds which have been replaced with Bonds registered and delivered in lieu thereof as provided in Section 11 hereof.

#### SECTION 14: Covenants to Maintain Tax-Exempt Status.

(a) Definitions. When used in this Section, the following terms have the following meanings:

"Closing Date" means the date on which the Bonds are first authenticated and delivered to the initial purchasers against payment therefor.

"Code" means the Internal Revenue Code of 1986, as amended by all legislation, if any, effective on or before the Closing Date.

"Computation Date" has the meaning set forth in Section 1.148-1(b) of the Regulations.

"Gross Proceeds" means any proceeds as defined in Section 1.148-1(b) of the Regulations, and any replacement proceeds as defined in Section 1.148-1(c) of the Regulations, of the Bonds.

"Investment" has the meaning set forth in Section 1.148-1(b) of the Regulations.

"Nonpurpose Investment" means any investment property, as defined in Section 148(b) of the Code, in which Gross Proceeds of the Bonds are invested and which is not acquired to carry out the governmental purposes of the Bonds.

“Rebate Amount” has the meaning set forth in Section 1.148-1(b) of the Regulations.

“Regulations” means any proposed, temporary, or final Income Tax Regulations issued pursuant to Sections 103 and 141 through 150 of the Code, and 103 of the Internal Revenue Code of 1954, which are applicable to the Bonds. Any reference to any specific Regulation shall also mean, as appropriate, any proposed, temporary or final Income Tax Regulation designed to supplement, amend or replace the specific Regulation referenced.

“Yield” of (1) any Investment has the meaning set forth in Section 1.148-5 of the Regulations and (2) the Bonds has the meaning set forth in Section 1.148-4 of the Regulations.

(b) Not to Cause Interest to Become Taxable. The City shall not use, permit the use of, or omit to use Gross Proceeds or any other amounts (or any property the acquisition, construction or improvement of which is to be financed directly or indirectly with Gross Proceeds) in a manner which if made or omitted, respectively, would cause the interest on any Bond to become includable in the gross income, as defined in Section 61 of the Code, of the owner thereof for federal income tax purposes. Without limiting the generality of the foregoing, unless and until the City receives a written opinion of counsel nationally recognized in the field of municipal bond law to the effect that failure to comply with such covenant will not adversely affect the exemption from federal income tax of the interest on any Bond, the City shall comply with each of the specific covenants in this Section.

(c) No Private Use or Private Payments. Except as permitted by Section 141 of the Code and the Regulations and rulings thereunder, the City shall at all times prior to the last Stated Maturity of Bonds:

(1) exclusively own, operate and possess all property the acquisition, construction or improvement of which is to be financed or refinanced directly or indirectly with Gross Proceeds of the Bonds (including property financed with Gross Proceeds of the Refunded Obligations), and not use or permit the use of such Gross Proceeds (including all contractual arrangements with terms different than those applicable to the general public) or any property acquired, constructed or improved with such Gross Proceeds in any activity carried on by any person or entity (including the United States or any agency, department and instrumentality thereof) other than a state or local government, unless such use is solely as a member of the general public; and

(2) not directly or indirectly impose or accept any charge or other payment by any person or entity who is treated as using Gross Proceeds of the Bonds or any property the acquisition, construction or improvement of which is to be financed or refinanced directly or indirectly with such Gross Proceeds (including property financed with Gross Proceeds of the Refunded Obligations), other than taxes of general application within the City or interest earned on investments acquired with such Gross Proceeds pending application for their intended purposes.

(d) No Private Loan. Except to the extent permitted by Section 141 of the Code and the Regulations and rulings thereunder, the City shall not use Gross Proceeds of the Bonds to make or finance loans to any person or entity other than a state or local government. For

purposes of the foregoing covenant, such Gross Proceeds are considered to be “loaned” to a person or entity if: (1) property acquired, constructed or improved with such Gross Proceeds is sold or leased to such person or entity in a transaction which creates a debt for federal income tax purposes; (2) capacity in or service from such property is committed to such person or entity under a take-or-pay, output or similar contract or arrangement; or (3) indirect benefits, or burdens and benefits of ownership, of such Gross Proceeds or any property acquired, constructed or improved with such Gross Proceeds are otherwise transferred in a transaction which is the economic equivalent of a loan.

(e) Not to Invest at Higher Yield. Except to the extent permitted by Section 148 of the Code and the Regulations and rulings thereunder, the City shall not at any time prior to the final Stated Maturity of the Bonds directly or indirectly invest Gross Proceeds in any Investment (or use Gross Proceeds to replace money so invested), if as a result of such investment the Yield from the Closing Date of all Investments acquired with Gross Proceeds (or with money replaced thereby), whether then held or previously disposed of, exceeds the Yield of the Bonds.

(f) Not Federally Guaranteed. Except to the extent permitted by Section 149(b) of the Code and the Regulations and rulings thereunder, the City shall not take or omit to take any action which would cause the Bonds to be federally guaranteed within the meaning of Section 149(b) of the Code and the Regulations and rulings thereunder.

(g) Information Report. The City shall timely file the information required by Section 149(e) of the Code with the Secretary of the Treasury on Form 8038-G or such other form and in such place as the Secretary may prescribe.

(h) Rebate of Arbitrage Profits. Except to the extent otherwise provided in Section 148(f) of the Code and the Regulations and rulings thereunder:

(1) The City shall account for all Gross Proceeds (including all receipts, expenditures and investments thereof) on its books of account separately and apart from all other funds (and receipts, expenditures and investments thereof) and shall retain all records of accounting for at least six years after the day on which the last outstanding Bond is discharged. However, to the extent permitted by law, the City may commingle Gross Proceeds of the Bonds with other money of the City, provided that the City separately accounts for each receipt and expenditure of Gross Proceeds and the obligations acquired therewith.

(2) Not less frequently than each Computation Date, the City shall calculate the Rebate Amount in accordance with rules set forth in Section 148(f) of the Code and the Regulations and rulings thereunder. The City shall maintain such calculations with its official transcript of proceedings relating to the issuance of the Bonds until six years after the final Computation Date.

(3) As additional consideration for the purchase of the Bonds by the Purchasers and the loan of the money represented thereby and in order to induce such purchase by measures designed to insure the excludability of the interest thereon from the gross income of the owners thereof for federal income tax purposes, the City shall pay to the United States out of its general fund, other appropriate fund, or, if permitted by applicable Texas statute, regulation or opinion of the Attorney General of the State of Texas, the Interest and Sinking Fund, the amount that when added to the future value of previous rebate

payments made for the Bonds equals (i) in the case of a Final Computation Date as defined in Section 1.148-3(e)(2) of the Regulations, one hundred percent (100%) of the Rebate Amount on such date; and (ii) in the case of any other Computation Date, ninety percent (90%) of the Rebate Amount on such date. In all cases, the rebate payments shall be made at the times, in the installments, to the place and in the manner as is or may be required by Section 148(f) of the Code and the Regulations and rulings thereunder, and shall be accompanied by Form 8038-T or such other forms and information as is or may be required by Section 148(f) of the Code and the Regulations and rulings thereunder.

(4) The City shall exercise reasonable diligence to assure that no errors are made in the calculations and payments required by paragraphs (2) and (3), and if an error is made, to discover and promptly correct such error within a reasonable amount of time thereafter (and in all events within one hundred eighty (180) days after discovery of the error), including payment to the United States of any additional Rebate Amount owed to it, interest thereon, and any penalty imposed under Section 1.148-3(h) of the Regulations.

(i) Not to Divert Arbitrage Profits. Except to the extent permitted by Section 148 of the Code and the Regulations and rulings thereunder, the City shall not, at any time prior to the earlier of the Stated Maturity or final payment of the Bonds, enter into any transaction that reduces the amount required to be paid to the United States pursuant to Subsection (h) of this Section because such transaction results in a smaller profit or a larger loss than would have resulted if the transaction had been at arm's length and had the Yield of the Bonds not been relevant to either party.

(j) Bonds Not Hedge Bonds. (1) At the time the original obligations refunded by the Bonds were issued, the City reasonably expected to spend at least 85% of the spendable proceeds of such obligations within three years after such obligations were issued and (2) not more than 50% of the proceeds of the original obligations refunded by the Bonds were invested in Nonpurpose Investments having a substantially guaranteed Yield for a period of 4 years or more.

(k) Current Refunding. The Bonds are being issued to pay and discharge in full the Refunded Obligations and such payment of the Refunded Obligations will occur within ninety (90) days after the issuance of the Bonds.

(l) Elections. The City hereby directs and authorizes the Mayor, City Manager, Director of Finance and City Secretary of the City, individually or jointly, to make elections permitted or required pursuant to the provisions of the Code or the Regulations, as they deem necessary or appropriate in connection with the Bonds, in the Certificate as to Tax Exemption or similar or other appropriate certificate, form or document.

SECTION 15: Sale of Bonds-Official Statement Approval. The Bonds authorized by this Ordinance have been and are hereby sold to Wells Fargo Bank, N.A., Raymond James & Associates, Inc. and RBC Capital Markets, LLC (herein collectively referred to as the "Purchasers") in accordance with the Purchase Contract dated January 28, 2014 (the "Purchase Contract"), attached hereto as **Exhibit B** and incorporated herein by reference as a part of this Ordinance for all purposes. The Mayor is hereby authorized and directed to execute the Purchase Contract for and on behalf of the City and as the act and deed of this City Council, and in regard to the approval and execution of the Purchase Contract, the City Council hereby finds, determines and declares that the terms of sale are in the best interests of the City and the

representations, warranties and agreements of the City contained therein are true and correct in all material respects and shall be honored and performed by the City. The Initial Bond shall be registered as provided in the Purchase Contract.

Furthermore, the use of the Preliminary Official Statement by the Purchasers in connection with the public offering and sale of the Bonds is hereby ratified, confirmed and approved in all respects. The final Official Statement, which reflects the terms of sale (together with such changes approved by the Mayor, City Manager, Director of Finance and City Secretary of the City, any one or more of said officials), shall be and is hereby in all respects approved and the Purchasers are hereby authorized to use and distribute said final Official Statement, dated January 28, 2014, in the reoffering, sale and delivery of the Bonds to the public. The Mayor and City Secretary are further authorized to execute and deliver for and on behalf of the City copies of said Official Statement in final form as may be required by the Purchasers, and such final Official Statement in the form and content executed by said officials shall be deemed to be approved by the City Council and constitute the Official Statement authorized for distribution and use by the Purchasers.

**SECTION 16: Control and Custody of Bonds.** The Mayor of the City shall be and is hereby authorized to take and have charge of all necessary orders and records pending investigation by the Attorney General of the State of Texas, including the printing and supply of definitive Bonds, and shall take and have charge and control of the Initial Bond(s) pending the approval thereof by the Attorney General, the registration thereof by the Comptroller of Public Accounts and the delivery thereof to the Purchasers.

**SECTION 17: Proceeds of Sale.** Immediately following the delivery of the Bonds, the proceeds of sale (less those proceeds of sale designated to pay costs of issuance and additional proceeds being deposited to the Interest and Sinking Fund) shall be deposited with the paying agent/registrars for the Refunded Obligations for the redemption of the Refunded Obligations on the respective redemption dates designated therefor in Section 18 below. The proceeds of sale of the Bonds not so deposited with the paying agent/registrars for the refunding of the Refunded Obligations shall be disbursed for payment of costs of issuance, or deposited in the Interest and Sinking Fund for the Bonds. Such proceeds of sale may be invested in authorized investments and any investment earnings realized may be deposited in the Interest and Sinking Fund as shall be determined by the City Council of the City. Additionally, on or immediately prior to the date of the delivery of the Bonds, the Director of Finance or other appropriate City official shall cause to be transferred in immediately available funds to the paying agent for the Refunded Obligations from moneys on deposit in the interest and sinking funds maintained for the payment of the Refunded Obligations the sum of \$472,565 to accomplish the refunding.

**SECTION 18: Redemption of Refunded Obligations.**

(a) The Series 2003 Refunded Certificates shall be redeemed and the same are hereby called for redemption on February 28, 2014, at the price of par plus accrued interest to the date of redemption. The City Secretary is hereby authorized and directed to file a copy of this Ordinance, together with a suggested form of notice of redemption to be sent to certificateholders, with The Bank of New York Mellon Trust Company, N.A., (successor paying agent/registrars to JPMorgan Chase Bank), in accordance with the redemption provisions applicable to such certificates of obligation; such suggested form of notice of redemption being attached hereto as **Exhibit C-1** and incorporated herein by reference as a part of this Ordinance for all purposes.

(b) The Series 2005 Refunded Certificates shall be redeemed and the same are hereby called for redemption on March 1, 2014, at the price of par plus accrued interest to the date of redemption. The City Secretary is hereby authorized and directed to file a copy of this Ordinance, together with a suggested form of notice of redemption to be sent to certificateholders, with The Bank of New York Mellon Trust Company, N.A., (successor paying agent/registrar to JPMorgan Chase Bank, N.A.), in accordance with the redemption provisions applicable to such certificates of obligation; such suggested form of notice of redemption being attached hereto as **Exhibit C-2** and incorporated herein by reference as a part of this Ordinance for all purposes.

(c) The redemption of the Refunded Obligations described above being associated with the refunding of such Refunded Obligations, the approval, authorization and arrangements herein given and provided for the redemption of such Refunded Obligations on the respective redemption dates designated therefor and in the manner provided shall be irrevocable upon the issuance and delivery of the Bonds; and the City Secretary is hereby authorized and directed to make all arrangements necessary to notify the holders of such Refunded Obligations of the City's decision to redeem such Refunded Obligations on the dates and in the manner herein provided and in accordance with the ordinances authorizing the issuance of such Refunded Obligations and this Ordinance.

SECTION 19: Notices to Holders-Waiver. Wherever this Ordinance provides for notice to Holders of any event, such notice shall be sufficiently given (unless otherwise herein expressly provided) if in writing and sent by United States Mail, first class postage prepaid, to the address of each Holder appearing in the Security Register at the close of business on the business day next preceding the mailing of such notice.

In any case where notice to Holders is given by mail, neither the failure to mail such notice to any particular Holders, nor any defect in any notice so mailed, shall affect the sufficiency of such notice with respect to all other Bonds. Where this Ordinance provides for notice in any manner, such notice may be waived in writing by the Holder entitled to receive such notice, either before or after the event with respect to which such notice is given, and such waiver shall be the equivalent of such notice. Waivers of notice by Holders shall be filed with the Paying Agent/Registrar, but such filing shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

SECTION 20: Cancellation. All Bonds surrendered for payment, transfer, redemption, exchange or replacement, if surrendered to the Paying Agent/Registrar, shall be promptly cancelled by it and, if surrendered to the City, shall be delivered to the Paying Agent/Registrar and, if not already cancelled, shall be promptly cancelled by the Paying Agent/Registrar. The City may at any time deliver to the Paying Agent/Registrar for cancellation any Bonds previously certified or registered and delivered which the City may have acquired in any manner whatsoever, and all Bonds so delivered shall be promptly cancelled by the Paying Agent/Registrar. All cancelled Bonds held by the Paying Agent/Registrar shall be returned to the City.

SECTION 21: Legal Opinion. The obligation of the Purchasers to accept delivery of the Bonds is subject to being furnished a final legal opinion of Fulbright & Jaworski LLP approving such Bonds as to their validity, said opinion to be dated and delivered as of the date of delivery and payment for such Bonds. A true and correct reproduction of said opinion is hereby authorized to be printed on or attached to the definitive Bonds or an executed counterpart thereof shall accompany the global Bonds deposited with DTC.

SECTION 22: CUSIP Numbers. CUSIP numbers may be printed or typed on the definitive Bonds. It is expressly provided, however, that the presence or absence of CUSIP numbers on the definitive Bonds shall be of no significance or effect as regards the legality thereof and neither the City nor attorneys approving the Bonds as to legality are to be held responsible for CUSIP numbers incorrectly printed or typed on the definitive Bonds.

SECTION 23: Benefits of Ordinance. Nothing in this Ordinance, expressed or implied, is intended or shall be construed to confer upon any person other than the City, the Paying Agent/Registrar and the Holders, any right, remedy, or claim, legal or equitable, under or by reason of this Ordinance or any provision hereof, this Ordinance and all its provisions being intended to be and being for the sole and exclusive benefit of the City, the Paying Agent/Registrar and the Holders.

SECTION 24: Inconsistent Provisions. All ordinances, orders or resolutions, or parts thereof, which are in conflict or inconsistent with any provision of this Ordinance are hereby repealed to the extent of such conflict, and the provisions of this Ordinance shall be and remain controlling as to the matters contained herein.

SECTION 25: Governing Law. This Ordinance shall be construed and enforced in accordance with the laws of the State of Texas and the United States of America.

SECTION 26: Effect of Headings. The section headings herein are for convenience of reference only and shall not affect the construction hereof.

SECTION 27: Construction of Terms. If appropriate in the context of this Ordinance, words of the singular number shall be considered to include the plural, words of the plural number shall be considered to include the singular, and words of the masculine, feminine or neuter gender shall be considered to include the other genders.

SECTION 28: Continuing Disclosure Undertaking.

(a) Definitions. As used in this Section, the following terms have the meanings ascribed to such terms below:

“MSRB” means the Municipal Securities Rulemaking Board.

“Rule” means SEC Rule 15c2-12, as amended from time to time.

“SEC” means the United States Securities and Exchange Commission.

(b) Annual Reports. The City shall provide annually to the MSRB (1) within six months after the end of each fiscal year, beginning in or after 2014, financial information and operating data with respect to the City of the general type included in the final Official Statement, being the information described in **Exhibit D** hereto, and (2) if not provided as part of such financial information and operating data, audited financial statements of the City, when and if available. Any financial statements so provided shall be prepared in accordance with the accounting principles described in **Exhibit D** hereto, or such other accounting principles as the City may be required to employ from time to time pursuant to state law or regulation, and audited, if the City commissions an audit of such statements and the audit is completed within the period during which they must be provided.

If the City changes its fiscal year, it will notify the MSRB of the change (and of the date of the new fiscal year end) prior to the next date by which the City otherwise would be required to provide financial information and operating data pursuant to this Section.

The financial information and operating data to be provided pursuant to this Section may be set forth in full in one or more documents or may be included by specific reference to any document available to the public on the MSRB's Internet Web site or filed with the SEC.

(c) Notice of Certain Events. The City shall provide notice of any of the following events with respect to the Bonds to the MSRB in a timely manner and not more than ten (10) business days after occurrence of the event:

1. Principal and interest payment delinquencies;
2. Non-payment related defaults, if material;
3. Unscheduled draws on debt service reserves reflecting financial difficulties;
4. Unscheduled draws on credit enhancements reflecting financial difficulties;
5. Substitution of credit or liquidity providers, or their failure to perform;
6. Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB), or other material notices or determinations with respect to the tax status of the Bonds, or other material events affecting the tax status of the Bonds;
7. Modifications to rights of holders of the Bonds, if material;
8. Bond calls, if material, and tender offers;
9. Defeasances;
10. Release, substitution, or sale of property securing repayment of the Bonds, if material;
11. Rating changes;
12. Bankruptcy, insolvency, receivership, or similar event of the City, which shall occur as described below;
13. The consummation of a merger, consolidation, or acquisition involving the City or the sale of all or substantially all of its assets, other than in the ordinary course of business, the entry into of a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and
14. Appointment of a successor or additional trustee or the change of name of a trustee, if material.

For these purposes, any event described in the immediately preceding subsection (c)12 is considered to occur when any of the following occur: the appointment of a receiver, fiscal agent, or similar officer for the City in a proceeding under the United States Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the City, or if such jurisdiction has been assumed by leaving the existing governing body and officials or officers in possession but subject to the supervision and orders of a court or governmental authority, or the entry of an order confirming a plan of reorganization, arrangement, or liquidation by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the City.

The City shall notify the MSRB, in a timely manner, of any failure by the City to provide financial information or operating data in accordance with subsection (b) of this Section by the time required by such Section.



(d) Filings with the MSRB. All financial information, operating data, financial statements, notices and other documents provided to the MSRB in accordance with this Section shall be provided in an electronic format prescribed by the MSRB and shall be accompanied by identifying information as prescribed by the MSRB.

(e) Limitations, Disclaimers, and Amendments. The City shall be obligated to observe and perform the covenants specified in this Section while, but only while, the City remains an “obligated person” with respect to the Bonds within the meaning of the Rule, except that the City in any event will give the notice required by subsection (c) hereof of any Bond calls and defeasance that cause the City to be no longer such an “obligated person.”

The provisions of this Section are for the sole benefit of the Holders and beneficial owners of the Bonds, and nothing in this Section, express or implied, shall give any benefit or any legal or equitable right, remedy, or claim hereunder to any other person. The City undertakes to provide only the financial information, operating data, financial statements, and notices which it has expressly agreed to provide pursuant to this Section and does not hereby undertake to provide any other information that may be relevant or material to a complete presentation of the City’s financial results, condition, or prospects or hereby undertake to update any information provided in accordance with this Section or otherwise, except as expressly provided herein. The City does not make any representation or warranty concerning such information or its usefulness to a decision to invest in or sell Bonds at any future date.

UNDER NO CIRCUMSTANCES SHALL THE CITY BE LIABLE TO THE HOLDER OR BENEFICIAL OWNER OF ANY BOND OR ANY OTHER PERSON, IN CONTRACT OR TORT, FOR DAMAGES RESULTING IN WHOLE OR IN PART FROM ANY BREACH BY THE CITY, WHETHER NEGLIGENT OR WITHOUT FAULT ON ITS PART, OF ANY COVENANT SPECIFIED IN THIS SECTION, BUT EVERY RIGHT AND REMEDY OF ANY SUCH PERSON, IN CONTRACT OR TORT, FOR OR ON ACCOUNT OF ANY SUCH BREACH SHALL BE LIMITED TO AN ACTION FOR MANDAMUS OR SPECIFIC PERFORMANCE.

No default by the City in observing or performing its obligations under this Section shall constitute a breach of or default under this Ordinance for purposes of any other provision of this Ordinance.

Nothing in this Section is intended or shall act to disclaim, waive, or otherwise limit the duties of the City under federal and state securities laws.

Notwithstanding anything to the contrary in this Ordinance, the provisions of this Section may be amended by the City from time to time to adapt to changed circumstances resulting from a change in legal requirements, a change in law, or a change in the identity, nature, status, or type of operations of the City, but only if (1) the provisions of this Section, as so amended, would have permitted an underwriter to purchase or sell Bonds in the primary offering of the Bonds in compliance with the Rule, taking into account any amendments or interpretations of the Rule to the date of such amendment, as well as such changed circumstances, and (2) either (a) the Holders of a majority in aggregate principal amount (or any greater amount required by any other provision of this Ordinance that authorizes such an amendment) of the Outstanding Bonds consent to such amendment or (b) a person that is unaffiliated with the City (such as nationally recognized bond counsel) determines that such amendment will not materially impair the interests of the Holders and beneficial owners of the Bonds. The provisions of this Section may also be amended from time to time or repealed by the City if the SEC amends or repeals the applicable provisions of the Rule or a court of final jurisdiction determines that such provisions are invalid, but only if and to the extent that reservation of the City’s right to do so

would not prevent underwriters of the initial public offering of the Bonds from lawfully purchasing or selling Bonds in such offering. If the City so amends the provisions of this Section, it shall include with any amended financial information or operating data next provided pursuant to subsection (b) hereof an explanation, in narrative form, of the reasons for the amendment and of the impact of any change in the type of financial information or operating data so provided.

SECTION 29: Severability. If any provision of this Ordinance or the application thereof to any circumstance shall be held to be invalid, the remainder of this Ordinance and the application thereof to other circumstances shall nevertheless be valid, and the City Council hereby declares that this Ordinance would have been enacted without such invalid provision.

SECTION 30: Further Procedures. Any one or more of the Mayor, City Manager, Director of Finance and City Secretary of the City are hereby expressly authorized, empowered and directed from time to time and at any time to do and perform all such acts and things and to execute, acknowledge and deliver in the name and on behalf of the City all agreements, instruments, certificates or other documents, whether mentioned herein or not, as may be necessary or desirable in order to carry out the terms and provisions of this Ordinance and the issuance of the Bonds. In addition, prior to the initial delivery of the Bonds, the Mayor, City Manager, Director of Finance and City Secretary of the City or Bond Counsel to the City are each hereby authorized and directed to approve any changes or corrections to this Ordinance or to any of the documents authorized and approved by this Ordinance: (i) in order to cure any ambiguity, formal defect, or omission in the Ordinance or such other document; or (ii) as requested by the Attorney General of the State of Texas or his representative to obtain the approval of the Bonds by the Attorney General. In the event that any officer of the City whose signature shall appear on any document shall cease to be such officer before the delivery of such document, such signature nevertheless shall be valid and sufficient for all purposes the same as if such officer had remained in office until such delivery.

SECTION 31: Incorporation of Findings and Determinations. The findings and determinations of the City Council contained in the preamble hereof are hereby incorporated by reference and made a part of this Ordinance for all purposes as if the same were restated in full in this Section.

SECTION 32: Public Meeting. It is officially found, determined, and declared that the meeting at which this Ordinance is adopted was open to the public and public notice of the time, place, and subject matter of the public business to be considered at such meeting, including this Ordinance, was given, all as required by Texas Government Code, Chapter 551, as amended.

SECTION 33: Effective Date. In accordance with the provisions of Texas Government Code, Section 1201.028, as amended, this Ordinance shall be in force and effect from and after its passage on the date shown below and it is so ordained.

[Remainder of page left blank intentionally.]

PASSED AND APPROVED, this January 28, 2014.

CITY OF MIDLAND, TEXAS

---

Jerry F. Morales, Mayor

ATTEST:

---

Amy M. Turner, City Secretary

(City Seal)

APPROVED AS TO FORM:

---

Keith Stretcher, City Attorney

## **EXHIBIT A**

### **PAYING AGENT/REGISTRAR AGREEMENT**

**EXHIBIT B**  
**PURCHASE CONTRACT**

## EXHIBIT C-1

### NOTICE OF REDEMPTION

CITY OF MIDLAND, TEXAS  
TAX AND LIMITED PLEDGE REVENUE  
CERTIFICATES OF OBLIGATION  
SERIES 2003

Dated February 15, 2003

NOTICE IS HEREBY GIVEN that the certificates of obligation of the above series maturing on and after March 1, 2014, and aggregating in the principal amount of \$2,055,000 have been called for redemption on February 28, 2014 at the redemption price of par and accrued interest to the date of redemption, such certificates being identified as follows:

| <u>Year of<br/>Maturity</u> | <u>Principal<br/>Amount</u> | <u>CUSIP<br/>Number</u> |
|-----------------------------|-----------------------------|-------------------------|
| 2014                        | \$ 375,000                  |                         |
| 2015                        | 390,000                     |                         |
| 2016                        | 410,000                     |                         |
| 2017                        | 430,000                     |                         |
| 2018                        | 450,000                     |                         |

ALL SUCH CERTIFICATES shall become due and payable on February 28, 2014 and interest thereon shall cease to accrue from and after said redemption date and payment of the redemption price of said certificates shall be paid to the registered owners of the certificates only upon presentation and surrender thereof to The Bank of New York Mellon Trust Company (successor paying agent/registrars to JPMorgan Chase Bank) at its designated office at the following address:

| <u>First Class/Registered/Certified</u>                                                                                 | <u>Express Delivery/Courier</u>                                                                                                    | <u>By Hand Only</u>                                                                                                                                                |
|-------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The Bank of New York<br>Mellon Trust Company, N.A.<br>Global Corporate Trust<br>P.O. Box 396<br>East Syracuse, NY 13057 | The Bank of New York<br>Mellon Trust Company, N.A.<br>Global Corporate Trust<br>111 Sanders Creek Pkwy.<br>East Syracuse, NY 13057 | The Bank of New York Mellon<br>Trust Company, N.A.<br>Global Corporate Trust<br>Corporate Trust Window<br>101 Barclay Street, 1st Floor East<br>New York, NY 10286 |

THIS NOTICE is issued and given pursuant to the terms and conditions prescribed for the redemption of said certificates and pursuant to an ordinance by the City Council of the City of Midland, Texas.

THE BANK OF NEW YORK MELLON TRUST  
COMPANY, N.A.,  
as Paying Agent/Registrar  
2001 Bryan Street, 11<sup>th</sup> Floor  
Dallas, Texas 75201

## EXHIBITC-2

### NOTICE OF REDEMPTION

CITY OF MIDLAND, TEXAS  
TAX AND LIMITED PLEDGE REVENUE  
CERTIFICATES OF OBLIGATION  
SERIES 2005

Dated February 15, 2005

NOTICE IS HEREBY GIVEN that the certificates of obligation of the above series maturing on and after March 1, 2015, and aggregating in the principal amount of \$2,365,000, have been called for redemption on March 1, 2014 at the redemption price of par and accrued interest to the date of redemption, such certificates being identified as follows:

| <u>Year of<br/>Maturity</u> | <u>Principal<br/>Amount</u> | <u>CUSIP<br/>Number</u> |
|-----------------------------|-----------------------------|-------------------------|
| 2015                        | \$ 355,000                  |                         |
| 2016                        | 370,000                     |                         |
| 2017                        | 385,000                     |                         |
| 2018                        | 400,000                     |                         |
| 2019                        | 420,000                     |                         |
| 2020                        | 435,000                     |                         |

ALL SUCH CERTIFICATES shall become due and payable on March 1, 2014 and interest thereon shall cease to accrue from and after said redemption date and payment of the redemption price of said certificates shall be paid to the registered owners of the certificates only upon presentation and surrender thereof to The Bank of New York Mellon Trust Company (successor paying agent/registrar to JPMorgan Chase Bank, N.A.) at its designated office at the following address:

| <u>First Class/Registered/Certified</u>                                                                                 | <u>Express Delivery/Courier</u>                                                                                                    | <u>By Hand Only</u>                                                                                                                                                |
|-------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The Bank of New York<br>Mellon Trust Company, N.A.<br>Global Corporate Trust<br>P.O. Box 396<br>East Syracuse, NY 13057 | The Bank of New York<br>Mellon Trust Company, N.A.<br>Global Corporate Trust<br>111 Sanders Creek Pkwy.<br>East Syracuse, NY 13057 | The Bank of New York Mellon<br>Trust Company, N.A.<br>Global Corporate Trust<br>Corporate Trust Window<br>101 Barclay Street, 1st Floor East<br>New York, NY 10286 |

THIS NOTICE is issued and given pursuant to the terms and conditions prescribed for the redemption of said certificates and pursuant to an ordinance by the City Council of the City of Midland, Texas.

THE BANK OF NEW YORK MELLON TRUST  
COMPANY, N.A.,  
as Paying Agent/Registrar  
2001 Bryan Street, 11<sup>th</sup> Floor  
Dallas, Texas 75201

## **EXHIBIT D**

### **DESCRIPTION OF ANNUAL FINANCIAL INFORMATION**

The following information is referred to in Section 28 of this Ordinance.

#### **Annual Financial Information and Operating Data**

The financial information and operating data with respect to the City to be provided annually in accordance with such Section are as specified (and included in Appendix B or under the Tables of the Official Statement referred to) below:

1. Financial information of the general type included in the Official Statement as Appendix B for the most recently concluded fiscal year.
2. The information included in Tables 1 through 6 and 8 through 15 of the Official Statement.

#### **Accounting Principles**

The accounting principles referred to in such Section are generally those described in Appendix B to the Official Statement, as such principles may be changed from time to time to comply with state law or regulation.



325 North St. Paul Street  
Suite 800  
Dallas, Texas 75201-3852

214-953-8705 Direct  
800-678-3792 Toll Free

**George H. Williford**  
Managing Director

george.williford@firstsw.com

Date: January 16, 2014

To: Pam Simecka  
Bob McNaughton

Re: Planned Bond Refunding

---

Refunding or refinancing of the Series 2003 and 2005 certificates of obligation issues has been planned, in order to realize future debt service savings. The combined principal amount of the two issues, subject to refinancing, is \$4.42 million.

Based upon market conditions at the present time, projected annual savings would be approximately \$40,000 per year for fiscal years 2015 through 2020, totaling approximately \$240,000. Total present value savings, as a percent of the \$4.42 million principal balance to be refunded is currently projected at approximately 5.2%.

Because the size of the two issues to be refunded is not exceptionally large, and especially because the remaining term of the combined issues is short (2020 final maturity), the above savings levels justify taking advantage of the refunding opportunity. In fact, we would recommend proceeding with refunding so long as market conditions at the time of pricing would provide present value savings above 3.5% of the refunded principal amount, or if average annual savings are at least \$30,000.

Please call on me with any questions, and for any additional information needed.

# RatingsDirect®

---

## Summary:

## Midland, Texas; General Obligation

### Primary Credit Analyst:

Sarah L Smaardyk, Dallas (1) 214-871-1428; sarah.smaardyk@standardandpoors.com

### Secondary Contact:

Kate Choban, Dallas (1) 214-871-1420; kate.choban@standardandpoors.com

### Research Contributor:

Ann M Richardson, Dallas (1) 214-765-5878; ann.richardson@standardandpoors.com

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Rationale

Outlook

Related Criteria And Research

## Summary:

# Midland, Texas; General Obligation

### Credit Profile

US\$29.0 mil tax and ltd pledge rev certs of oblig ser 2014 dtd 01/15/2014 due 03/01/2034

|                         |            |     |
|-------------------------|------------|-----|
| <i>Long Term Rating</i> | AA+/Stable | New |
|-------------------------|------------|-----|

US\$3.895 mil GO rfdg bnds ser 2014 dtd 01/15/2014 due 03/01/2020

|                         |            |     |
|-------------------------|------------|-----|
| <i>Long Term Rating</i> | AA+/Stable | New |
|-------------------------|------------|-----|

Midland GO

|                         |            |          |
|-------------------------|------------|----------|
| <i>Long Term Rating</i> | AA+/Stable | Affirmed |
|-------------------------|------------|----------|

## Rationale

Standard & Poor's Ratings Services assigned its 'AA+' long-term rating to Midland, Texas' series 2014 combination tax and limited pledge revenue certificates of obligation and general obligation (GO) refunding bonds. At the same time, Standard & Poor's affirmed its 'AA+' long-term rating and underlying rating (SPUR) on the city's GO debt outstanding. The outlook is stable.

The bonds are secured by the city's pledge to levy ad valorem tax. The certificates are secured by the city's continuing and direct annual ad valorem tax levied by the city, with additional security provided by a limited pledge of net revenue of the city's waterworks and sewer system, not to exceed \$2,500.

The ratings reflect our assessment of the following factors for the city:

- Adequate to strong economy that remains anchored by a prominent, but cyclical, oil and gas production sector;
- Very strong budgetary flexibility, with fiscal 2012 audited reserves at 59.6% of general fund expenditures;
- Strong budgetary performance in fiscal 2012;
- Very strong liquidity providing very strong cash levels to cover both debt service and expenditures;
- Strong management with good financial policies; and
- Strong debt and contingent liabilities, with low overall net debt as a percentage of market value.

### Adequate to strong economy

We consider Midland's economy to be adequate to strong. Midland centers on the Permian Basin oil region, which is home to more than 20% of the nation's oil reserves, and regularly supplies more than 60% of all oil and gas produced in Texas. During the past several years, the city has worked to diversify the employment base, and the leading employers are found in the education, oil and gas, and medical fields. In addition, the city serves as a regional trade, service, and medical center for West Texas. Service sector growth, particularly in retail and distribution-related positions, has further diversified the economy. Traditionally, county unemployment has tracked below the state and national levels and was 3.5% for 2012. The city has projected per capita effective buying income of 105.7% of the U.S. Per capita market value for the city is \$70,811 for fiscal 2014. Assessed value (AV) has increased by a cumulative 36% since fiscal 2010 to reach approximately \$8.84 billion for fiscal 2014.

### **Very strong budget flexibility**

In our opinion, the city's budgetary flexibility remains very strong, with reserves above 50% of expenditures for the past three years and no plans to significantly spend them down. The city anticipates reserves for fiscal 2013 will be approximately \$10 million more than fiscal 2012 levels, and will also include several planned expenditures primarily for capital outlay purposes. For audited fiscal 2012, reserves were \$49.1 million, or 59.6% of expenditures.

### **Strong budgetary performance**

The city's budgetary performance has been strong overall, in our view, with a surplus of 12.3% for the general fund and a surplus of about 11.6% for total governmental funds in fiscal 2012. For fiscal 2013, the city is estimating a slight increase of about \$343,000 after transfers into the general fund. For total governmental funds, the city is estimating a deficit of roughly \$3.7 million for fiscal 2013. The fiscal 2014 budget is balanced. Taxes account for the majority of the city's general fund. Sales taxes increased between fiscal 2010 and fiscal 2012, and partial collections for fiscal 2013 indicate this trend will continue. Property tax collections remain very healthy, with current collections averaging above 98% each year. We expect sales taxes will remain at least level, and with property taxes remaining healthy, the city will be in a good position to maintain its strong performance.

### **Very strong liquidity**

Supporting the city's finances is liquidity we consider very strong, with total government available cash as a percent of total governmental fund expenditures and as a percent of debt service both above 90%. We believe the city has strong access to external liquidity. The city has issued bonds, mainly GO bonds and revenue bonds, frequently during the past 10 years.

### **Strong management conditions**

We view the city's management conditions as strong, with "good" financial practices. Among the highlights of the city's management techniques is the city finance department's monthly monitoring and reporting of the current fund budget to ensure compliance and to allow corrective actions to be taken to ensure a balanced budget. The city's finance department also forecasts revenues and expenditures by looking at historical trends and revenue growth projections. Also, the city provides monthly updates on the budget and quarterly reports on investment holdings to the city council. Although the city does have a formal three-year long-term financial plan, the plan only takes into account general growth assumptions. Midland also has a five-year rolling capital plan, with the majority of the projects funded through the budget. The city's investment policy is conservative, and quarterly reports are provided to the council. The city maintains a formal fund balance policy of maintaining a 25% general fund reserve, and, although that policy is not set in statute, in recent years the city's reserves have exceeded the stated policy. The city does not have a formal debt policy but informally seeks to keep tax-supported debt below 8% of total AV.

### **Strong debt and contingent liability profile**

In our opinion, the city's debt and contingent liability profile is strong, with total governmental fund debt service as a percentage of total governmental fund expenditures at 4.5%, and with net direct debt as a percentage of total governmental fund revenue at 60.8%. In addition, overall net debt equals just 2.8% of market value. The city has no plans to issue additional debt within the next two years.

The city provides pension benefits through a nontraditional, joint contributory, hybrid-defined benefit plan: the Texas Municipal Retirement Plan. It has contributed 100% of the annual required contribution (ARC) in each of the past three

years. The combined ARC pension costs and other postemployment benefit pay-as you-go costs for fiscal 2012 were about 12% of expenditures, and the city does not anticipate these costs will increase substantially in the near term. The city's pension liability is 87.8% funded. The city provides pension benefits, through a single-employer defined benefit plan, for all of its fire fighters not covered by the Texas Municipal Retirement System. As of Jan. 1, 2012, the city's unfunded actuarial accrued liability totaled \$101.2 million, with a funded ratio of 72.2%, for the Fireman's Relief and Retirement Fund.

### Strong institutional framework

We consider the Institutional Framework score for Texas cities as strong. See Institutional Framework score for Texas.

## Outlook

The stable outlook reflects our view of the city's consistent financial performance, which is supported by strong management. We do not expect to revise the ratings during the next two years because we believe the city will maintain strong reserves as the Midland regional economy continues to grow.

## Related Criteria And Research

### Related Criteria

USPF Criteria: Local Government GO Ratings Methodology And Assumptions, Sept. 12, 2013

### Related Research

- S&P Public Finance Local GO Criteria: How We Adjust Data For Analytic Consistency, Sept. 12, 2013
- Institutional Framework Overview: Texas Local Governments

### Ratings Detail (As Of January 17, 2014)

#### Midland GO

*Unenhanced Rating*

AA+(SPUR)/Stable

Affirmed

Many issues are enhanced by bond insurance.

Complete ratings information is available to subscribers of RatingsDirect at [www.globalcreditportal.com](http://www.globalcreditportal.com). All ratings affected by this rating action can be found on Standard & Poor's public Web site at [www.standardandpoors.com](http://www.standardandpoors.com). Use the Ratings search box located in the left column.

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## SAVINGS

Midland, TX  
 Refund 2003 & 2005  
 General Obligation Refunding Bonds, Series 2014  
 Non BQ AAA Scale as of January 16, 2014

| Date       | Prior<br>Debt Service | Prior<br>Receipts | Prior<br>Net Cash Flow | Refunding<br>Debt Service | Savings    |
|------------|-----------------------|-------------------|------------------------|---------------------------|------------|
| 09/30/2014 | 535,125.00            | 475,427.22        | 59,697.78              | 59,697.78                 |            |
| 09/30/2015 | 884,947.50            |                   | 884,947.50             | 844,450.00                | 40,497.50  |
| 09/30/2016 | 892,460.00            |                   | 892,460.00             | 850,700.00                | 41,760.00  |
| 09/30/2017 | 898,300.00            |                   | 898,300.00             | 857,450.00                | 40,850.00  |
| 09/30/2018 | 901,200.00            |                   | 901,200.00             | 863,300.00                | 37,900.00  |
| 09/30/2019 | 445,800.00            |                   | 445,800.00             | 403,400.00                | 42,400.00  |
| 09/30/2020 | 443,700.00            |                   | 443,700.00             | 402,900.00                | 40,800.00  |
|            | 5,001,532.50          | 475,427.22        | 4,526,105.28           | 4,281,897.78              | 244,207.50 |

Savings Summary

|                               |            |
|-------------------------------|------------|
| Savings PV date               | 02/27/2014 |
| Savings PV rate               | 1.988980%  |
| PV of savings from cash flow  | 227,380.08 |
| Plus: Refunding funds on hand | 3,898.30   |
| Net PV Savings                | 231,278.38 |

Note: Preliminary, for discussion purposes only.

## SUMMARY OF REFUNDING RESULTS

Midland, TX  
Refund 2003 & 2005  
General Obligation Refunding Bonds, Series 2014  
Non BQ AAA Scale as of January 16, 2014

|                                            |              |
|--------------------------------------------|--------------|
| Dated Date                                 | 02/27/2014   |
| Delivery Date                              | 02/27/2014   |
| Arbitrage yield                            | 1.293294%    |
| Escrow yield                               |              |
| Value of Negative Arbitrage                |              |
| Bond Par Amount                            | 3,880,000.00 |
| True Interest Cost                         | 1.497011%    |
| Net Interest Cost                          | 1.560262%    |
| All-In TIC                                 | 1.988980%    |
| Average Coupon                             | 3.289361%    |
| Average Life                               | 3.149        |
| Par amount of refunded bonds               | 4,420,000.00 |
| Average coupon of refunded bonds           | 3.872840%    |
| Average life of refunded bonds             | 2.921        |
| PV of prior debt to 02/27/2014 @ 1.988980% | 4,734,070.55 |
| Net PV Savings                             | 231,278.38   |
| Percentage savings of refunded bonds       | 5.232543%    |

Note: Preliminary, for discussion purposes only.



## SUMMARY OF BONDS REFUNDED

Midland, TX  
Refund 2003 & 2005  
General Obligation Refunding Bonds, Series 2014  
Non BQ AAA Scale as of January 16, 2014

| Bond                                       | Maturity Date | Interest Rate | Par Amount   | Call Date  | Call Price |
|--------------------------------------------|---------------|---------------|--------------|------------|------------|
| Tax and Ltd Pledge Rev C/O Ser 2003, 2003: |               |               |              |            |            |
| SERIES                                     | 03/01/2014    | 3.600%        | 375,000.00   | 02/28/2014 | 100.000    |
|                                            | 03/01/2015    | 3.700%        | 390,000.00   | 02/28/2014 | 100.000    |
|                                            | 03/01/2016    | 3.700%        | 410,000.00   | 02/28/2014 | 100.000    |
|                                            | 03/01/2017    | 3.800%        | 430,000.00   | 02/28/2014 | 100.000    |
|                                            | 03/01/2018    | 4.000%        | 450,000.00   | 02/28/2014 | 100.000    |
|                                            |               |               | 2,055,000.00 |            |            |
| Tax and Ltd Pledge Rev C/O Ser 2005, 2005: |               |               |              |            |            |
| SERIES                                     | 03/01/2015    | 3.500%        | 355,000.00   | 03/01/2014 | 100.000    |
|                                            | 03/01/2016    | 3.500%        | 370,000.00   | 03/01/2014 | 100.000    |
|                                            | 03/01/2017    | 3.600%        | 385,000.00   | 03/01/2014 | 100.000    |
|                                            | 03/01/2018    | 4.000%        | 400,000.00   | 03/01/2014 | 100.000    |
|                                            | 03/01/2019    | 4.000%        | 420,000.00   | 03/01/2014 | 100.000    |
|                                            | 03/01/2020    | 4.000%        | 435,000.00   | 03/01/2014 | 100.000    |
|                                            |               |               | 2,365,000.00 |            |            |
|                                            |               |               | 4,420,000.00 |            |            |

Note: Preliminary, for discussion purposes only.



## **Fitch Rates Midland, TX's GO Bonds and COs 'AAA'; Outlook Stable** Ratings

Endorsement Policy

16 Jan 2014 4:31 PM (EST)

Fitch Ratings-Austin-16 January 2014: Fitch Ratings assigns an initial 'AAA' rating to Midland, Texas' (the city) following obligations:

- \$29 million tax and limited pledge revenue certificates of obligation (COs), series 2014;
- \$3.9 million general obligation (GO) refunding bonds, series 2014

The GO bonds and COs will be sold via negotiation on January 27. Proceeds of the COs will be used for general purpose improvements, including public safety facilities, information technology, equipment, parks and recreation projects, and street improvements. The GO bonds will be used to refund the series 2003 and 2005 COs for debt service savings.

In addition Fitch assigns an 'AAA' rating on the following GO bonds and COs currently outstanding (pre-refunding):

- \$28.9 million tax and limited pledge revenue COs, series 2012;
- \$2.3 million GO refunding bonds, series 2009;
- \$8.5 million tax and limited pledge revenue COs, series, 2009;
- \$1.7 million combination tax and revenue refunding bonds, series 2007;
- \$49.7 million tax and limited pledge revenue COs, series 2007; --\$4.6 million GO refunding bonds, series 2006A;
- \$20 million GO refunding bonds, series 2006B;
- \$2.7 million tax and limited pledge revenue COs, series 2005;
- \$2.1 million tax and limited pledge revenue COs, series 2003.

The Rating Outlook is Stable.

### **SECURITY**

The GO bonds and COs are payable from a direct annual ad valorem tax levied, limited to \$2.00 per \$100 taxable assessed valuation (TAV), against all taxable property within the city. The COs are further secured by a limited pledge of net revenues of the city's water and sewer system.

### **KEY RATING DRIVERS**

**FAVORABLE ECONOMIC METRICS:** The city serves as the commercial hub and corporate headquarters for Permian Basin energy activity. As such, the city's unemployment levels have been consistently low and wealth levels are high. Government, education and medical top employers lend some stability to the local economy.

**PRUDENT FISCAL MANAGEMENT:** The city's prudent fiscal practices and conservative budgeting are evidenced in its stable financial history despite its inherent vulnerability tied to the energy sector.

**LONG TREND OF SOLID RESERVES:** The city has built up solid general fund balance reserves and consistently has maintained levels well above its formal policy for at least the last ten fiscal years.

**SALES TAX GROWTH:** The city's sales tax receipts have jumped most dramatically in the last three years resulting from rapid population growth. Although sales taxes comprise a large percent of the city's revenue base, the city strategically sets aside a certain portion to spend on capital outlays or to add to fund balance. Additionally, Fitch notes its solid reserve levels temper risk to sales tax volatility.

**MODEST OVERALL DEBT LEVELS:** The city's overall debt burden is moderately low, with a manageable capital plan that is partly funded on a pay-go basis. Principal amortization is average.

**DIVERSE TAX BASE:** As the regional hub of the Permian Basin, the city's tax base is diverse despite the economic dependence on the oil and gas sector. The top ten taxpayers account for less than 5% of TAV.

#### RATING SENSITIVITIES

**WEAKENED FINANCIAL PROFILE:** The rating is sensitive to shifts in fundamental credit characteristics, including the city's strong reserves which help to mitigate exposure to oil and gas price fluctuations and the inherent cyclicity of sales tax revenues. The Stable Outlook reflects Fitch's expectation that such shifts are unlikely.

#### CREDIT PROFILE

The city is the county seat for Midland County (GO bonds rated 'AAA' by Fitch). It is located in the Permian Basin region, about 300 miles west of Dallas. The Permian Basin is one of the United States largest mineral reservoirs with exploration and drilling for additional reserves continuing. The city's 2014 estimated population of 124,804 accounts for nearly 90% of the county's total population.

#### STABLE FINANCIAL OPERATIONS WITH STRONG RESERVE LEVELS

Fitch considers the city's financial profile a significant credit strength. Financial performance has been consistently positive, with the general fund reporting annual surpluses and increasing reserves in four of the last five fiscal years. The general fund reported net operating surplus of \$10.1 million in fiscal 2012, which followed another \$10.5 million surplus in fiscal 2011. Even in years of contracting or stagnant revenue, management promptly has responded with budgetary measures to yield stable operating performance.

For fiscal 2013, management expects to close the year with balanced results even after an \$8 million non-recurring capital outlay. The projected ending fund balance of \$58.8 million represents 56% of recurring expenditures during fiscal 2013. The fiscal 2014 adopted budget is structurally balanced. Sales tax receipts for the first quarter of 2014 are outpacing the budget.

#### SALES TAX REVENUE GROWTH

As increased oil and gas drilling activity has bumped up the city's population and attracted additional retailers, the city's sales tax receipts have jumped most dramatically in the last three years. Although sales tax revenues are comprising a larger percent of the city's resource base, the council is developing a strategic plan to use sales tax funds in excess of a certain amount (one-third of general fund revenues) for non-recurring uses, one time capital improvements, or to enhance fund balance reserves in order to maintain a minimum of 30% in reserves, slightly above the 25% formal fund balance policy level. Fitch notes the city's conservative budgeting practices and consistently high reserve levels temper credit concerns over volatility in sales tax performance.

#### ENERGY-BASED ECONOMY WITH A DIVERSE TAX BASE

The city is located in the heart of the Permian Basin reservoir serving as the commercial hub in one of the country's largest oil and gas reservoirs whose exploration and drilling has fueled strong economic activity. The city covers approximately 66 square miles of the vast Permian Basin and its property valuation is much more diverse than the county's with the top ten taxpayers comprising less than 5%, compared to 16% for the county.

Although the economic activity realized by the oil and gas sector is significant to the city, real oil, gas and other mineral values comprise less than 1% of the fiscal 2014 tax base, with residential accounting for 60% and industrial and commercial valuations at 18%. Lending stability to the local economy, five of the top ten employers are Midland Independent School District, Midland Memorial Hospital, Midland College, the city, and the county.

The October 2013 unemployment rate of 3.0% reflects several years of solid employment base growth. Wealth levels as measured by median household income and per capita personal income are high. The cost of living is growing and a higher level of demand than supply for housing has resulted in higher than average property appreciation.

#### MODEST OVERALL DEBT

The overall debt burden remains moderately low at \$2,229 per capita and 2.8% to market value, with manageable capital needs. Principal amortization is about average. The city plans to cash fund about \$11.5 million in projects over fiscal years 2014 and 2015 then plans to return to market for another bond sale in 2016 to fund the fiscals 2016 and 2017 CIP. Fitch

expects the city's debt profile will remain stable despite the growth related capital pressures given the city's historically conservative pay-go practices and debt policy.

Pension benefits for all employees except fire fighters are provided through the Texas Municipal Retirement System, a statewide agent multiple employer plan. The city's funding position in this plan is a healthy 83% as of Dec. 2011. Pension benefits for fire fighters are provided through a single-employer defined benefit plan. The city's 65% funded position (at Fitch's adjusted 7% rate of return) as of the latest valuation date (Jan. 2012) in this plan is considered weak due to an open 41-year amortization period. Other post-employment benefits (OPEB) are funded on a pay-go basis, but benefits are not so generous. On a combined basis, the city's carrying costs, including debt service as well as contributions for pension and OPEB paygo expense approximate an affordable 16% of governmental spending.

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Additional information is available at 'www.fitchratings.com'

In addition to the sources of information identified in Fitch's Tax-Supported Rating Criteria, this action was additionally informed by information from Creditscope, Texas Municipal Advisory Council, and IHS Global Insight.

Applicable Criteria and Related Research:

--'Tax-Supported Rating Criteria' (Aug. 14, 2012);  
--'U.S. Local Government Tax-Supported Rating Criteria' (Aug. 14, 2012);  
--'2014 Outlook: North American Oil & Gas' (Dec. 12, 2013).

**Applicable Criteria and Related Research:**

Tax-Supported Rating Criteria  
U.S. Local Government Tax-Supported Rating Criteria  
2014 Outlook: North American Oil & Gas (Strong Oil Prices Continue to Support Energy Complex)

**Additional Disclosure**

Solicitation Status

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FOR WHICH THE LEAD ANALYST IS BASED IN AN EU-REGISTERED ENTITY CAN BE FOUND ON THE ENTITY SUMMARY PAGE FOR THIS ISSUER ON THE FITCH WEBSITE.

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# City Council Agenda

Approved for Agenda:  
**rpatrick**  
City Manager's Office

**MEETING DATE:** January 28, 2014

**TO:** CITY COUNCIL/CITY MANAGER

**FROM:** Jim Compton, Planning Division Manager

**SUBJECT:** Consider a motion to approve the preliminary plat of the Pines at Mira Vista being a 21.85-acre tract of land out of Section 11, Block "X", H.P. Hilliard Survey, City and County of Midland, Texas. (Generally located on the west side of N. State Hwy 349, west of Pueblo.) District-1

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## **Purpose:**

Consider the preliminary plat of the Pines at Mira Vista.

## **Recommended City Council Action**

☒ Approve

☐ Deny

☐ Direction/Informational

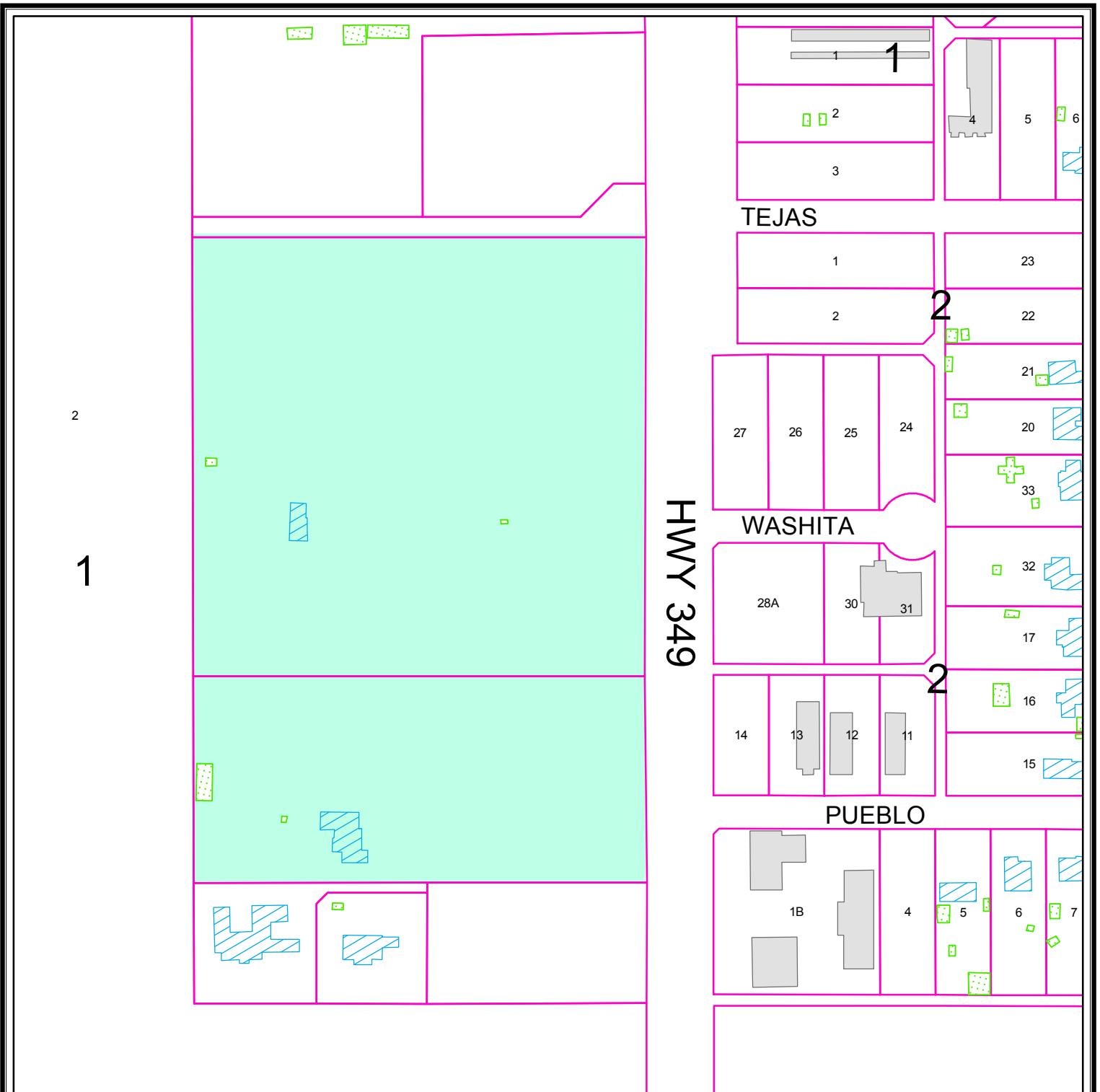
## **Fiscal Impact:**

There is no cost to the City to process this request.

## **Discussion:**

The applicant is seeking to plat 82 lots for a new subdivision called the Pines at Mira Vista. There will be three common areas that will also act as drainage detention areas throughout the proposed development. Plats with common areas require City Council approval. After the January 14, 2014, City Council meeting the applicant requested that the minimum lot size be lowered from 5,500 SF to 5,000 SF. Staff supports this new revised request. There have been no further public comments received on this plat.

**Attachments:** Maps.



## LOCATION MAP

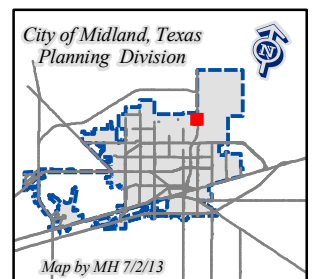
**P - 13 - 059**

**Scale: 1" = 250'**

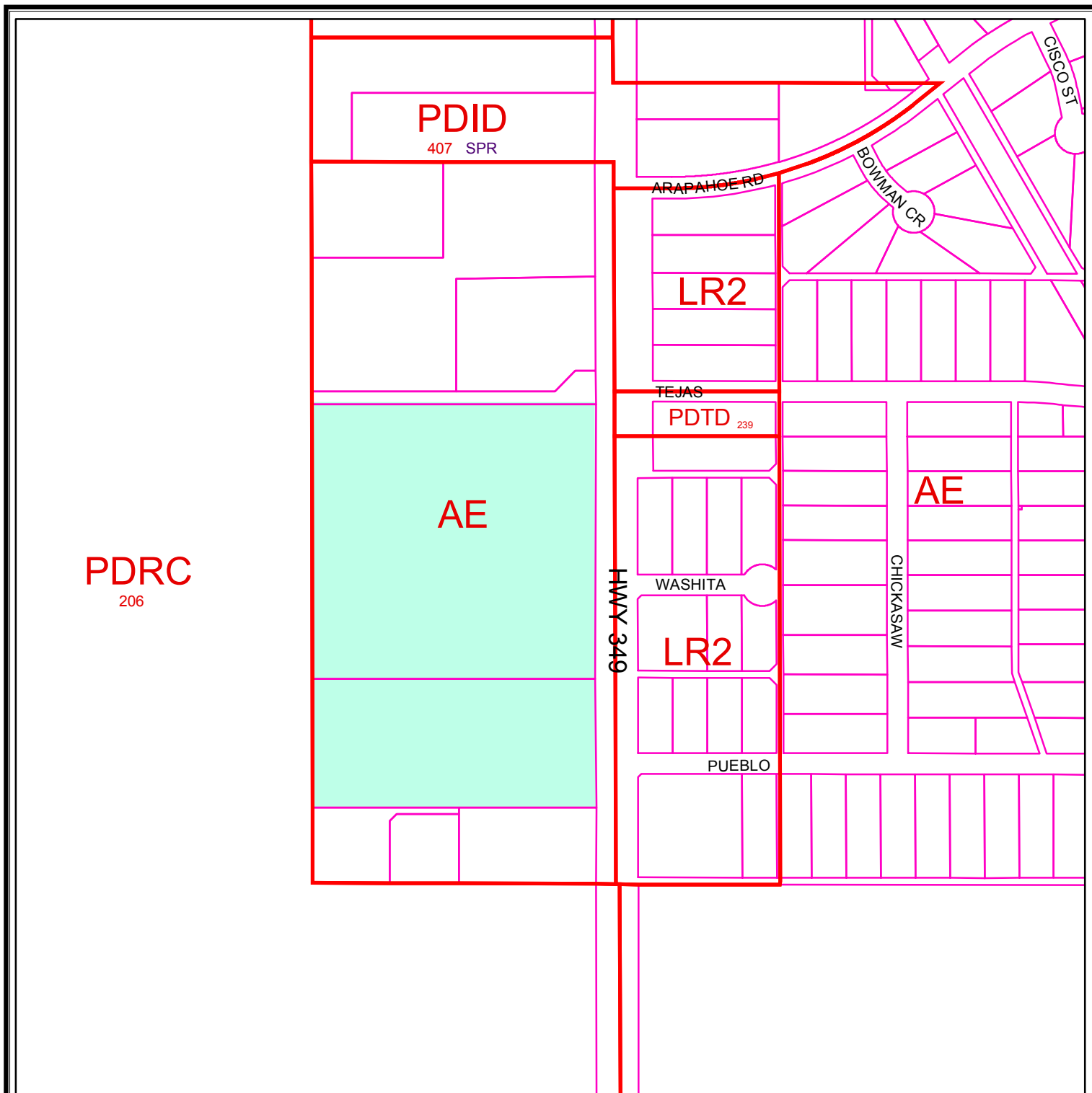
Proposed plat of The Pines at Mira Vista, being a 21.85-acre tract of land out of Section 11, Block "X", H. P. Hilliard Survey, City and County of Midland, Texas.

### LEGEND

- CITY LIMITS
- PARCEL
- PUBLIC BLDGS
- PRIVATE BLDGS
- ACCESSORY BLDGS



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## ZONING MAP

P - 13 - 059

Scale: 1" = 400'

Proposed plat of The Pines at Mira Vista, being a 21.85-acre tract of land out of Section 11, Block "X", H. P. Hilliard Survey, City and County of Midland, Texas.

## LEGEND

ZONING  PARCELS

### ZONING DISTRICTS:

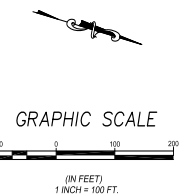
|               |                          |                   |                      |
|---------------|--------------------------|-------------------|----------------------|
| FD            | FUTURE DEVELOPMENT       | BP                | BUSINESS PARK        |
| PD            | PLANNED DISTRICT         | P                 | PARKING              |
| AE            | AGRICULTURE ESTATE       | 01, 02            | OFFICE               |
| CE            | COUNTRY ESTATE           | NS                | NEIGHBORHOOD SERVICE |
| 1F1, 1F2, 1F3 | ONE-FAMILY DWELLING      | LR1, LR2, LR3     | LOCAL RETAIL         |
| MH            | MOBILE HOME DWELLING     | C1, C2, C3        | COMMERCIAL           |
| TH            | TOWNHOUSE DWELLING       | IP, IP1, IP2, IP3 | INDUSTRIAL PARK      |
| 2F            | TWO-FAMILY DWELLING      | LI                | LIGHT INDUSTRY       |
| MF1, MF2      | MULTIPLE FAMILY DWELLING | HI                | HEAVY INDUSTRY       |

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PRELIMINARY PLAT  
THE PINES AT MIRA VISTA  
BEING 21.85 ACRES OUT OF SECTION 11  
BLOCK X, H.P. HILLIARD SURVEY,  
CITY AND COUNTY OF MIDLAND, TEXAS



GENERAL LOCATION MAP

| Parcel Line Table |        |                  |
|-------------------|--------|------------------|
| Line #            | Length | Direction        |
| L1                | 14.14  | N30° 26' 39.63"E |
| L2                | 28.28  | S59° 33' 20.37"W |
| L3                | 28.25  | S30° 30' 39.63"W |
| L4                | 28.32  | N59° 29' 20.37"W |
| L5                | 14.14  | S59° 33' 20.37"E |
| L6                | 12.49  | N36° 48' 42.81"E |
| L7                | 28.25  | N30° 30' 39.63"E |
| L8                | 28.32  | S59° 29' 20.37"E |
| L9                | 25.22  | S16° 31' 38.51"W |
| L10               | 16.60  | N48° 27' 26.22"W |
| L11               | 14.76  | S80° 29' 39.51"W |
| L12               | 32.35  | N16° 31' 38.51"E |
| L13               | 28.25  | N30° 30' 39.63"E |
| L14               | 14.76  | N4° 09' 17.71"W  |
| L15               | 28.32  | S59° 29' 20.37"E |
| L16               | 28.28  | S30° 26' 39.63"W |
| L17               | 23.11  | S75° 26' 39.63"W |
| L18               | 81.73  | S55° 18' 59.88"W |
| L19               | 78.70  | S55° 18' 59.88"W |
| L20               | 19.56  | S75° 26' 39.63"W |
| L21               | 28.28  | N59° 33' 20.37"W |
| L22               | 28.25  | N30° 30' 41.76"E |
| L23               | 28.32  | S59° 29' 18.24"E |
| L24               | 14.14  | N59° 33' 20.37"W |
| L25               | 14.14  | N30° 26' 39.63"E |
| L26               | 29.00  | S58° 05' 42.89"E |
| L27               | 14.14  | S30° 26' 39.63"W |
| L28               | 14.14  | N59° 33' 20.37"W |
| L29               | 27.49  | N32° 01' 35.64"E |
| L30               | 14.14  | S30° 26' 39.63"W |
| L31               | 14.14  | S59° 33' 20.37"E |

| Curve Table |        |        |        |                 |              |
|-------------|--------|--------|--------|-----------------|--------------|
| Curve #     | Length | Radius | Delta  | Chord Direction | Chord Length |
| C1          | 255.92 | 50.00  | 293.27 | N75° 26' 40"E   | 55.00        |
| C2          | 255.92 | 50.00  | 293.27 | S75° 26' 40"W   | 55.00        |
| C3          | 255.92 | 50.00  | 293.27 | S75° 26' 40"W   | 55.00        |
| C4          | 137.99 | 155.00 | 51.01  | N10° 56' 57"E   | 133.48       |
| C5          | 86.50  | 100.00 | 49.56  | S10° 13' 29"W   | 83.83        |
| C6          | 82.88  | 410.00 | 11.58  | N81° 41' 23"E   | 82.74        |
| C7          | 80.62  | 410.00 | 11.27  | N76° 01' 37"W   | 80.49        |
| C8          | 80.95  | 410.00 | 11.19  | N61° 59' 48"W   | 79.92        |
| C9          | 80.91  | 410.00 | 11.31  | N40° 15' 35"W   | 80.78        |
| C10         | 123.47 | 410.00 | 17.25  | S23° 10' 58"E   | 123.00       |
| C11         | 546.53 | 350.00 | 89.47  | S59° 17' 22"E   | 492.67       |
| C12         | 160.53 | 50.00  | 183.95 | S27° 40' 21"W   | 99.94        |
| C13         | 255.93 | 50.00  | 293.27 | S75° 26' 37"W   | 55.00        |
| C14         | 353.73 | 240.00 | 84.45  | S56° 46' 46"E   | 322.57       |
| C15         | 385.15 | 260.00 | 84.87  | N56° 59' 35"W   | 350.89       |



- 1. SELLING A PORTION OF THIS ADDITION BY METES AND BOUNDS MAY BE A VIOLATION OF CITY ORDINANCE AND STATE LAW AND SUBJECT TO FINES AND WITHHOLDING OF UTILITIES AND BUILDING PERMITS.
- 2. APPROVAL OF A SITE PLAN BY THE CITY OF MIDLAND MAY BE REQUIRED BEFORE THE DEVELOPMENT OF ANY LOT AND BEFORE A BUILDING PERMIT MAY BE OBTAINED.

THE PINES AT MIRA VISTA

SCALE: 1" = 100'

DATE: NOVEMBER 2012

DRAWN BY: JAW/CHE APPROVED BY: [Signature]

FILE NAME: [Blank]

PRELIMINARY PLAT

PROJECT NUMBER: 11-MED007

NEWTON ENGINEERING, P.C.  
2004 N. Big Spring St.  
Midland, Texas 79701  
(409) 692-1100

## Amy Turner

---

**From:** Genora Young  
**Sent:** Tuesday, January 21, 2014 4:40 PM  
**To:** Amy Turner  
**Subject:** FW: TIRZ

---

**From:** Blonkvist, Michael [mailto:michael.blonkvist@rbc.com]  
**Sent:** Thursday, October 03, 2013 10:45 AM  
**To:** Mark Wellen; Genora Young  
**Cc:** Emms, Hillery (RBC Wealth Mgmt)  
**Subject:** TIRZ

Mark and Genora,  
I am very sorry to inform you that I am no longer going to be able to sit on the board or the TIRZ. I was informed yesterday that, due to RBC helping to underwrite City bonds that I am in violation by sitting on the TIRZ board. I really wish that I could stay on because I truly enjoy it but it is a direct conflict of interest in the eyes of compliance.

Please let me know what I need to do to proceed in removing myself from the board. Again, I am very disappointed that this is the case.

**Michael Blonkvist**  
Financial Advisor  
Associate Vice President-  
Consulting Group

**Blonkvist Investment Group**  
**RBC Wealth Management**  
550 W Texas, Suite 120  
Midland, TX 79701  
T (432) 687-8967 F (432) 687-8965 C (432) 413-3983

**Email:** [Michael.Blonkvist@rbc.com](mailto:Michael.Blonkvist@rbc.com)  
**Web:** [www.BlonkvistInvestmentGroup.com](http://www.BlonkvistInvestmentGroup.com)  
**Connect:** [www.rbcwmconnect.com](http://www.rbcwmconnect.com)

**Corporate Site:** [Click Here](#)

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## Mary Pena

---

**From:** Amy Turner  
**Sent:** Tuesday, January 21, 2014 8:30 AM  
**To:** Mary Pena  
**Subject:** FW: Planning and Zoning: Becky Ferguson

-----Original Message-----

From: Becky FERGUSON [mailto:beckybaskinferguson@me.com]  
Sent: Monday, January 20, 2014 6:40 AM  
To: Amy Turner  
Subject: Fwd: Planning and Zoning: Becky Ferguson

>  
> Good Morning Amy,  
>  
> I received in the mail an agenda for the upcoming Planning and Zoning meeting. Some months back, I agreed to be considered as an alternate but had received no official notice since. I'm sorry to report that I cannot serve as either alternate or member at this time. Thanks for passing this on to those who need to know.  
>  
> Warm regards,  
>  
> Becky Baskin Ferguson  
> 1704 Storey Avenue  
> Midland, Texas 79701  
> [Bluewheat@aol.com](mailto:Bluewheat@aol.com)  
> 432-684-3834  
> 432-556-8245 (Cell)  
>  
> Sent from my iPad