

## AMENDMENT NO. 1 TO CONSENT AND DEVELOPMENT AGREEMENT

This "Amendment No. 1 to Consent and Development Agreement" ("Amendment 1") is by and between the City of Kyle, Texas, a Texas municipal corporation ("City") and EB Windy Hill, L.P., a Texas limited partnership ("Developer"). City and Developer are sometimes referred to herein as the "Parties". The Parties hereby agree as follows:

### RECITALS

The parties have heretofore entered into that certain "Consent and Development Agreement (the "Original Agreement") and now desire to amend the Original Agreement as set forth herein to (1) provide for further agreements regarding possible decertification of Monarch Water Company's ("Monarch") water certificate of convenience and necessity ("CCN") over the Mud Tract (as that term is defined in the Original Agreement); (2) in the event that item (1) is accomplished, further address the issue of the City providing water and/or wastewater service to the Mud Tract and/or the Annexation Tract and provide for the possible lease to, and use by, the City of water and wastewater facilities constructed by the Developer on behalf of the District prior to the District's purchase from the Developer by the District and subsequent transfer of same to the City by the District. Now, therefore, for and in consideration of the mutual agreements herein set forth and other good and valuable consideration, the sufficiency of which is hereby acknowledged by all parties, the City and the Developer agree as follows:

### ARTICLE I. EFFECT OF ORIGINAL AGREEMENT AND AMENDMENT NO. 1

Sec. 1.01 The purpose of this Amendment No. 1 is to further amend the Original Agreement as herein provided. However, the parties reaffirm the Original Agreement in all respects, and it shall remain in full force and effect except as amended by this Amendment No. 1. If there is a conflict between the Original Agreement and this Amendment No. 1, this Amendment No. 1 shall prevail. Capitalized terms used in this Amendment No. 1 have the same meaning as provided in the Original Agreement, except as otherwise provided in the Recitals to this Amendment No. 1.

Sec. 1.02 The term of this Amendment No. 1 is the same as the term of the Original Agreement and any renewals thereof.

### ARTICLE II. AMENDMENTS TO ORIGINAL AGREEMENT

Sec. 2.01 Developer agrees to use diligent efforts, as described further herein, to attempt to decertify Monarch's CCN over the MUD Tract and, if such decertification is approved by the Texas Commission on Environmental Quality ("TCEQ"), and upon payment of damages, if any, to Monarch (1) Section 2.01 (j) of the Original Agreement shall be null and void and (2) the provisions of proposed new Sections 5.02-5.05 in Section 2.02 in this Amendment 1 shall become effective to govern the relationships between the City, the Developer and the District regarding the provision of water and wastewater service to the areas within the boundaries of the District after its creation.

Section 2.02. The following provisions are added to the Original Agreement as a new Article V to read as follows:

#### ARTICLE V. WATER, WASTEWATER AND DRAINAGE FACILITIES

##### Sec. 5.01. Decertification of Monarch Water Certificate of Convenience and Necessity

Developer and City agree that Developer may file, and if filed shall use diligent efforts to prosecute, a petition with TCEQ to decertify Monarch's CCN over the MUD Tract. Developer may file such petition with the TCEQ for such decertification by itself or, at the City's sole option, in combination with the City as a co-petitioner. Developer shall pay all costs to prepare, file and prosecute the petition. If the TCEQ decertifies Monarch's CCN over the MUD Tract as a result of such petition, then, upon completion by the Developer of all other necessary steps, if any, to authorize the City to provide retail water service to the MUD Tract, the remaining provisions of this Article V shall be effective.

##### Sec. 5.02. Ownership of System

Developer will construct and own the District's Water System, the District's Wastewater System, and the District's Drainage System. It is anticipated that after payment of reimbursement by the District, Developer will convey ownership of the District's Drainage System from time to time to the District for operation and maintenance (and the District may subsequently convey its Drainage System to Hays County for operation and maintenance) and will convey District's Water System and the District's Wastewater System to the District which shall promptly convey them to the City for operation and maintenance by the City to enable City to provide retail water and wastewater service in the District. After completion of construction of any portions of the District's Water System and the District's Wastewater System and prior to conveyance of such facilities, the Developer shall lease the facilities to the City for use, maintenance and operation by the City to enable City to provide retail water and wastewater service in the District pursuant to a lease substantially in the form attached as Exhibit A attached hereto and incorporated herein by reference for all intents and purposes. The City agrees that the District shall have an undivided interest in the capacity of the District's Water System and the District's Wastewater System, up to the capacity designed for the provision of retail water and wastewater service to the District by the City to the extent of the designed capacity of the conveyed systems and the payment of associated costs of said facilities by the District and Developer. In no way should this section be interpreted to mean that the District shall have an undivided interest in capacities that exceed the amount needed to service the District, or in any capacities that the City should require to be included as oversizing pursuant to Section 5.05 below. The City agrees to apply to residents and customers in the District the same service policies, and to charge the same rates and charges of those residents and customers, as the City does for its own residents and customers, understanding that the District will pay rates according to the schedules for Outside City Limits customers, as established in Appendix A Fee Schedule of the City of Kyle's Municipal Code, as amended from time to time, for the duration that the District has not executed an accepted annexation request to the City for inclusion within the city

limits. At the time the District is annexed into the city limits of the City, the District shall then be entitled to pay In City rates.

Sec. 5.03. Title to Property and Easements

Developer agrees to provide District adequate title to property on which the District's Water System and the District's Wastewater System are constructed so as to provide acceptable access for the City to provide the necessary service to the Development.

Sec. 5.04. Rules Governing Use of Water and Wastewater Systems

1. City may adopt and impose water conservation measures upon customers and users of water in the Development so long as such measures are the same as those imposed by the City on its other retail customers within the City limits.
2. The City may adopt and impose rules governing the discharge of wastewater into the District's Wastewater System that are consistent with the City's Industrial Waste Ordinance.

Sec. 5.05. Impact Fee Payment; Developer and District to Pay all Costs for Water and Wastewater Facilities Serving the District

The Developer (subject to reimbursement by the District) shall pay the City's standard charges for impact fees for water service from the City at the time service is connected to each retail service unit; provided, however, Developer shall receive an offset against the City's water impact fee in an amount equal to the amount of such water impact fee attributable to the mutually agreed to capital projects for water facilities leased, and/or dedicated, to the City as provided in this Amendment 1 that benefit the City's system as a whole. Subject to the foregoing, Developer, at Developer's sole option, may elect to pre-pay the City's water impact fees (or relevant portion thereof considering any offsets as provided above) and any applicable reservation rates for all retail water connections in a platted subdivision at, or after, the time of approval of the final plat of a subdivision, in which event water capacity shall be committed, and reserved, by the City for such section. The City reserves the right to request oversizing of water facilities, such as elevated tanks, storage tanks, pumping stations, vaults, and transmission lines. In the case the City requests oversizing of facilities, the Developer or District shall negotiate in good faith to enter into a construction agreement to accommodate the City's request. The Developer will not pay wastewater or drainage impact fees to the City because the Developer, subject to reimbursement by the District, will pay for the construction of all wastewater and drainage facilities necessary to provide service to the area within the District.

CITY OF KYLE, TEXAS

Attest:

By: *Amelia Jacoby*

By: *[Signature]*



EB WINDY HILL, L.P.  
By its General Partner EBWH GP, INC.

By: *[Signature]*  
Douglas E. Fike  
President

**EXHIBIT A**

**WATER AND WASTEWATER FACILITIES LEASE AGREEMENT**

**STATE OF TEXAS** §

**COUNTY OF HAYS** §

**Effective Date:** October 3, 2012

**Lessor:** \_\_\_\_\_  
c/o Freeman & Corbett  
8500 Bluffstone Cove, Ste. B-104  
Austin, Texas 78759

**Lessee:** City of Kyle  
Attn: City Manager  
P.O. Box 40  
Kyle, Texas 78640

**Leased Facilities:** The water and wastewater facilities described on Exhibit A hereto

**Term:** From the Commencement Date to the earlier of termination of the Consent Agreement (as hereafter defined) or the "Conveyance Date" as hereafter defined

**Rent:** Ten Dollars and other good and valuable consideration as set forth herein, the sufficiency of which is acknowledged by Lessor

**Commencement Date:** October 3, 2012

**Termination Date:** The earlier of termination of the Consent Agreement (as hereafter defined) or the "Conveyance Date" as hereafter defined

**Use of Leased Facilities:** To provide water and wastewater service to the area within the boundaries of Crosswinds Municipal Utility District

Lessor and Lessee are parties to that certain agreement, as amended, originally entitled "Consent and Development Agreement" (such agreement and amendment(s) thereto being collectively referred to as the "Consent Agreement"). Pursuant to the Consent Agreement, the

Texas Commission on Environmental Quality has created Crosswinds Municipal Utility District (the "District"). The Consent Agreement provides, among other things, that Lessor is to construct and sell to the District, who shall then transfer to Lessee, certain water and wastewater facilities including the Leased Facilities described on Exhibit A hereto, and that between the time that such facilities are constructed and the time that such facilities are paid for and conveyed to the District and subsequently to Lessee, the developers in the District, including Lessor, shall lease such facilities to Lessee for use, operation and maintenance. The purpose of this Lease is to evidence Lessor's lease of the Leased Facilities to Lessee as contemplated in the Consent Agreement. Accordingly, this lease shall terminate at the earlier of thirty years after the Commencement Date or the date of conveyance of the Leased Facilities to Lessor by the District (the "Conveyance Date").

During the term of this Lease, Lessee shall be (i) entitled to use the Leased Facilities for the purpose of providing water and wastewater service to customers within the boundaries of the District and (ii) responsible for operating and maintaining the Leased Facilities prior to conveyance to the Termination Date.

**LESSOR:**

ER WINDY HILL, LP  
By: [Signature]  
Name: DOUGLAS E. FIFE  
Title: PRES ERWH LP, FIVE  
GENERAL PARTNER

**LESSEE:**

City of Kyle, Texas  
By: [Signature]  
Name: Lucy Johnson  
Title: Mayor