

**CITY OF KYLE AND NOMOLAND COMPANY, LP,  
ECONOMIC DEVELOPMENT GRANT AGREEMENT**

STATE OF TEXAS           §

**KNOW ALL BY THESE PRESENTS:**

COUNTY OF HAYS           §

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**THIS ECONOMIC DEVELOPMENT GRANT AGREEMENT** (the "Agreement") is made and entered into by and between the **CITY OF KYLE** (the "City") and **NOMOLAND COMPANY, LP**, a Texas limited partnership, (the "Developer"), to be effective on this the 21<sup>st</sup> day of February, 2014. 2012 (MS)

**RECITALS**

**WHEREAS**, the Developer is the owner of certain real property located within the corporate limits of the City of Kyle, Texas, as described on Exhibit "A" attached hereto (hereinafter referred to as the "Property");

**WHEREAS**, the Developer intends to construct on the Property, a retail and commercial development which will include a Walgreens with approximately 7,700 square feet ("Walgreens"), a Sonic Drive-In with approximately 1,500 square feet, and additional commercial and retail facilities having an aggregate square footage totaling approximately 9,200 square feet (collectively, the "Development");

**WHEREAS**, the successful commercial retail development of the Property will enhance the City's ad valorem and sales tax bases, will create new employment opportunities, and will stimulate business and economic growth of the City;

**WHEREAS**, the Development will require construction of related improvements by the Developer, including, but not limited to, traffic signal and roadway improvements at the intersection of FM 150 and RM 2770, as depicted on Exhibit "B" attached hereto, and other street improvements in the neighborhood, as reflected on Exhibit "C" attached hereto (the "Development Improvements"), which will provide safety for motorists and enhanced mobility to the citizens of Kyle traveling in this area;

**WHEREAS**, the construction of the Development Improvements will improve traffic and safety for the Development, as well as other local commercial and retail developments and the residential population;

**WHEREAS**, Article III, Section 52-a of the Texas Constitution gives the Texas Legislature the authority to provide for loans and grants of public money for the development and diversification of the State's economy and the elimination of unemployment or underemployment; and

**WHEREAS**, Chapter 380, Texas Local Government Code, the City of Kyle Charter, the Texas Constitution and other applicable laws authorize the offering of economic Grants to bring employment and other valuable benefits to the community; and

**WHEREAS**, in addition to the six and a quarter percent (6.25%) sales and use tax imposed by the State, the City imposes a one and one-half percent (1.5%) sales and use tax, as authorized by Section 321.101 of the Texas Tax Code tax; and

**WHEREAS**, the City Council of the City of Kyle, Texas intends, and in connection with such intention, has adopted a Development Agreement as reflected in the minutes of the December 13, 2011 City Council meeting (the "Minutes") attached hereto as Exhibit "D," to refund one hundred percent (100%) of the one percent (1%) of the City of Kyle's portion of the annual sales and use tax proceeds generated by retail businesses located within the Property, up to and including the Maximum Grant Amount, which shall be used by the Developer to pay for actual Hard and Soft Costs associated with the Improvements, hereinafter defined for the purpose of encouraging business expansion and the creation of new jobs in the City.

**WHEREAS**, it is in the public interest of the City as determined by the City Council that this Agreement be reached with Developer to encourage the commercial development of the Property;

**WHEREAS**, in consideration of the representations made by Developer to the City, and the covenants and agreements of the Developer set forth herein, the receipt and sufficiency of which is hereby acknowledged, the City Council has approved and authorized this Agreement for development reimbursements and economic incentives;

**NOW, THEREFORE**, in consideration of the terms, conditions and covenants set forth herein, the parties hereby agree as follows:

## **I. AUTHORITY AND TERM**

### **1.1 Authority.**

The City's execution of this Agreement is authorized by Chapter 380 of the Texas Local Government Code and constitutes a valid and binding obligation of the City. The City acknowledges that Developer is acting in reliance upon the City's performance of its obligations under this Agreement in making the decision to commit substantial resources and money to the establishment of new businesses within the Property ("Property").

### **1.2 Term.**

This Agreement shall become enforceable upon the Effective Date, as hereinafter established, and shall continue until the Expiration Date, as hereinafter established, or until the Maximum Grant Amount has been reached, unless terminated sooner or extended by mutual agreement of the Parties in the manner provided for herein.

**II.**  
**DEFINITIONS**

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2.1 Definitions.

As used in this Agreement, the following terms shall have the meanings ascribed below. All undefined terms shall return their usual and customary meanings as ascribed by common and ordinary usage.

- (a) "Adversarial Proceeding" include any cause of action regarding this Agreement filed by the Developer in any state or federal court, as well as any state or federal administrative hearing, but does not include Alternate Dispute Resolution proceedings, including arbitration or mediation.
- (b) "Calendar Year" or "year" means a twelve month period of time commencing January 1, and extending therefrom for a period of twelve months to December 31.
- (c) "City" means the City of Kyle, a municipal corporation of the State of Texas.
- (d) "City Sales Tax" means the portion of such sales and use taxes as are remitted to the State of Texas by the Retail Occupants based on one and one-half percent (1.5%) of sales of taxable items and reimbursed to the City of Kyle by the State of Texas. For purposes of this Agreement, City Sales Tax shall be one percent (1%) of the City of Kyle's portion determined to be the amount remitted by a company or person to the State of Texas Comptroller of Public Accounts Office (the "Comptroller") for the benefit of the City, as set forth in the records prepared by a company or person and submitted to the Comptroller for sales within the Development.
- (e) "Code" shall mean the City of Kyle Code of Ordinances.
- (f) "Contract Progress Payment Request" ("CPRR") shall mean a request for payment due to the Developer and submitted by the Developer to the City for successfully completed work to substantiate Hard Costs and Soft Costs for Improvements, accompanied by customary documentation, including the name and address of the entity that performed the work, a description of the contract pursuant to which the payment is made, proof of payment or satisfaction, the amount of such payment, the original contract amount, total payments made to date on such contract, and estimate of remaining work to be completed on the specific improvement, the costs of such work, and any customary lien and/or subcontractor releases.
- (g) "Comply" and "compliance" mean timely, full, and complete performance of each and every requirement, obligation, duty, condition, or warranty as stated in this Agreement. "Comply" and "compliance" mean complete compliance in all material respects and do not mean substantial compliance, unless otherwise specifically stated.

- (h) "Construct" and "construction" mean construction in a good and workmanlike manner and in compliance with applicable State and local laws, codes, and regulations or valid waivers thereof or variances thereunder.
- (i) "Default" and "Act of Default" mean failure in some material respect to comply timely, fully and completely with one or more requirements, obligations, duties, terms, conditions or warranties set forth in this Agreement.
- (j) "Detailed Confidentiality Report" shall mean a report, attached hereto as Exhibit "C" provided by the State to the City in accordance with Texas Tax Code, Section 321.3022, which lists the amount of Sales and Use Tax paid (including any refunds, credits, or adjustments) by each Retailer in the Property and received by the City from the State for the sale of Taxable Items by the Retailers Consummated within the Property for specified periods which are to be used to justify the Developer's CPRR, together with such supporting documentation required herein and as the City may request.
- (k) "Developer" means Nomoland Company, LP, a Texas limited partnership.
- (l) "Development" means the multi-phased development of commercial retail improvements as generally described in the second recital above to be located on the Property.
- (m) "Development Improvements" or "Improvements" means the improvements constructed by the Developer, including, but not limited to, traffic signal and roadway improvements at the intersection of FM 150 and RM 2770, as depicted on Exhibit "B" attached hereto, and other street improvements which will provide safety for motorists and enhanced mobility to the citizens of Kyle traveling in this area, and the other development costs identified on Exhibit "C" attached hereto.
- (n) "Economic Development Grants" or "Grants" shall collectively mean sales and use tax proceeds, pursuant to CPRR, made from the City to the Developer.
- (o) "Effective Date" shall mean the date a sales and use tax generating Retailer has commenced operations and consummated the sale of Taxable Items within the Property. Grants shall not be paid by the City to the Developer for Retailers that have commenced Improvements before the execution of the Agreement by the Parties.
- (p) "Expiration Date" shall mean the earlier of:
  - i. The date of the City's reimbursement of the Maximum Grant Amount to the Developer for all Hard and Soft Costs associated with the Improvements;
  - ii. Ten (10) years from the Effective Date of this Agreement; or
  - iii. The expiration date of any "cure" period of an uncured default.

- (q) "Finance Department" means the Finance Department of the City of Kyle.
- (r) "Grant" shall mean, pursuant to the Agreement the payment of monies in the manner provided Article III., from one percent (1%) of the City's portion of the sales and use taxes that result from the one and one-half percent (1.5%) general City Sales Tax on the sales of taxable items collected on-site and remitted to the Comptroller of the State of Texas.
- (s) "Hard Costs" shall mean the actual, substantiated costs of construction, labor, and materials incurred by the Developer or for Improvements.
- (t) "Maximum Grant Amount" shall mean the total Hard and Soft Costs for the Tenant Improvements including the amount the City has agreed to pay to the Developer to convey to the City the tract of land where the City's water tower is located in a total amount not to exceed (\$227,000).
- (u) "On-Site" means on the Property and at the Development.
- (v) "Property" means the real property described on Exhibit "A" attached hereto.
- (w) "Project" shall mean the Improvements described in Exhibit "C" hereto for which Developer shall receive GRANTS from the sales and use tax generating Retailers.
- (x) "Retail Occupants" means all owners, and occupants of the Development and the additional retail and non-residential space uses conducting business in the Development.
- (y) "Sales and Use Tax" shall mean the one and one-half percent (1.5%) sales and use tax imposed by the City on the sale of Taxable Items Consummated in the City by the Retailers.
- (z) "Sales Tax Payment Period" or "Payment Period" shall mean a full quarter of the City's Fiscal Year, except that the first Sales Tax Payment Period shall be from the Effective Date through and include the last date of the first full quarter of the City's Fiscal Year following the Effective Date.
- (aa) "Sales Tax Receipts" shall mean one hundred percent (100%) of one percent (1) of the City receipts from the Retailer's collection of the one and one-half percent (1.5%) Sales and Use Tax as a result of the sale of Taxable Items consummated within the Property by the Retailer's for the applicable Sales Tax Payment Period.
- (bb) "Subcontractor" or "contractor" shall mean an individual, firm, or corporation having a direct contract with the Developer or the in the performance of any part of the Project.
- (cc) "Soft Costs" shall mean the costs incurred by the Developer for engineering, legal, design, fiscal security, insurance, permits, project management (including

contractor general condition expenses), and all other costs associated with the construction of Improvements which are not included in Hard Costs.

- (dd) "Taxable Items" and "taxable services" shall be ascribed the meaning provided by Chapter 151, Texas Tax Code.
- (ee) "Tenant" or "Tenants" shall mean a Retailer who pays rent to the Developer to use building space within the Property.

### III. ECONOMIC DEVELOPMENT GRANTS

#### 3.1 Grants.

The City agrees to reimburse the Developer, after the commencement of the Effective Date through Economic Development Grants ("GRANTS") not to exceed the Maximum Grant Amount for all Hard and Soft Costs and the amount the City has agreed to pay to the Developer as consideration for the Developer to convey to the City the tract of land where the City's water tower is situated ("the Maximum Grant Amount") associated with the Project. The City shall, as a condition precedent to the payment of any GRANT, reimburse the Developer only after a sales and use tax generating Retailer subject to this Agreement has commenced operations and Consummated the sale of Taxable Items within the Property.

#### 3.2 Grant Payments.

The City shall remit to the Developer Sales Tax Receipts Consummated within the Property for the Sales Tax Payment Period requested by the Developer for actual Hard and Soft Costs incurred by the Developer for Improvements within the Property associated with the Project. The GRANT to the Developer will be paid to the Developer within sixty (60) days following the City's receipt of a property completed CPRR from the Developer following the end of the City's Fiscal Year Quarter beginning with the first full City Fiscal Year Quarter following the Effective Date, and shall continue until the full payment of the Maximum Grant Amount or other method of termination of this Agreement. The Parties agree that the payment of Sales Tax Receipts to the Developer is subject to the City's actual collection of Sales Tax Receipts. In the event the Sales Tax Receipts are insufficient during the term of the Agreement to pay the GRANTS, the City shall not be obligated to pay the GRANTS and the Developer bears the risk of nonpayment. The City shall never be obligated to pay such deficit to the Developer which shall never become an obligation of any municipal fund. Notwithstanding any provision contained herein to the contrary, the Developer shall have the right to receive Sales Tax Receipt payments beginning with the first full City Fiscal Year Quarter following the Effective Date and continuing until the full payment of the Maximum Grant Amount or the Agreement is terminated by any other means

#### 3.3 Grant Limitations.

The City shall never be obligated to pay any monies above the Maximum Grant Amount and is only obligated to make GRANTS for Sales Tax Receipts actually received by the City. Developer represents that it understands that any contributions by the Developer in anticipation of reimbursement from GRANTS shall never be obligations of the general funds of the City but are only obligations of the GRANTS fund, and are subject to the extent of the Project's capacity to reimburse the Developer.

### 3.4 Grant Funds.

GRANTS to be provided herein shall be paid solely from lawful, available funds to the City. Under no circumstances shall any GRANTS include any receipts from the City's imposition and collection of Sales and Use Tax for the sale of Taxable Items at any location, business, establishment, or entity Consummated within the City other than from the sale of Taxable Items by the Retailers Consummated within the Property.

#### 3.4.1 No Bonds or Notes.

The City and Developer represent that they understand and agree that the City shall not issue any bonds or notes to cover any Project costs directly or indirectly related to this Agreement. The City understands the Developer may choose to issue notes utilizing GRANTS reimbursements for eligible costs directly or indirectly related to this Agreement. The City will not be Parties to the Developer's notes.

### 3.5 Economic Development Grant.

Subject to the full and timely performance of each of the requirements and conditions precedent set forth herein, and compliance in all material respects, with this Agreement, the City agrees to grant Developer an Economic Development Grant as set forth in this Section.

#### 3.5.1 Maximum Grant Payment.

The City agrees to pay to the Developer, an Economic Development Grant the total amount of \$227,000 (the "Total Grant Payment"), to be paid as follows: the City shall rebate to the Developer one hundred percent (100%) of the City's portion of the sales and use taxes that result from the one percent (1%) general City Sales Tax remitted to the Comptroller of the State of Texas by the Retail Occupants On-Site, in annual installments, until the Maximum Grant Payment has been met.

#### 3.5.2 Annual Grant Payments.

The City of Kyle, by and through its Finance Department, shall make a payment to the Developer by each March 31st (the "Annual Incentive Payment") equal to the amount of the City Sales Taxes received by the City which were collected

from and paid by the Retail Occupants On-Site for the sales occurring during the prior calendar year.

### 3.5.3 City Sales Tax Reporting.

The Developer shall cooperate with the City and assist the City in any manner required by the Comptroller to release any and all information related to the City Sales Tax collected within the Development. The City will request quarterly, or monthly if available, from the Comptroller all sales tax reports for City Sales Taxes collected within the Development. The Developer shall use reasonable efforts to ensure that agreements with Retail Occupants provide for the timely submission of City Sales Taxes to the Comptroller and execution of any document reasonably required for the release of such information to the City, including registering the Development and the address of the various properties therein as the point of sale for all products sold On-Site at the Development, and to take such action with the Comptroller, and such other entities as necessary, to assure that the City Sales Tax is legally billed and payable, as provided by law for sales within the City, on all products that are sold On-Site at the Development.

### 3.6. Performance Criteria.

The Developer agrees and covenants that it shall:

- (a) Upon execution of the Agreement, the Developer shall deposit in the escrow with the City \$162,367.00 (the "Nomoland Escrow"), which is the amount of the estimated construction costs of the Traffic Signal Improvements to be constructed by the State; and the City shall use the Nomoland Escrow to make the required payments to the State pursuant to the Advance Funding Agreement for the construction of the Traffic Signal Improvements; and
- (b) Construct or cause to be constructed the Development Improvements, in compliance with the plans and specifications approved by the City, with construction to commence within one hundred eighty (180) days from the date the City provides final approval of the construction plans therefor; and
- (c) Following completion of the construction of the Traffic Signal Improvements and payment in full by the City to the State pursuant to the Advance Funding Agreement, the City shall refund all funds remaining the Nomoland Escrow account to the Developer, including all accrued interest; and
- (d) Cause the Walgreens to open for business by September 30, 2012 and Sonic to be open for business by December 31, 2012; and



- (e) Subject to the provisions of Paragraph 5.3 hereof, the Developer shall forfeit any and all rights to the GRANTS provided for in this Article if the Developer fails to meet the Performance Criteria set forth above.

#### IV. CONDITIONS TO ECONOMIC DEVELOPMENT GRANTS

The obligation of the City to pay GRANTS shall be conditioned upon the Developer's continued compliance with and satisfaction of each of the conditions set forth below and in this Agreement, as solely and finally determined by the City Council of the City of Kyle, Texas without recourse.

##### 4.1 CPPR.

Developer shall, as a condition precedent to the payment of any GRANT, provide the City with a CPPR reasonably suitable for the applicable GRANT period.

##### 4.2 Detailed Confidentiality Report.

As a condition to the payment of any GRANTS hereunder, the City shall receive a Detailed Confidentiality Report for the applicable Sales Tax Payment Period for which payment of GRANTS is requested. The City shall have no duty to calculate Sales Tax Receipts, determine the Developer's entitlement to any GRANT, or pay any GRANT during the term of this Agreement until such time as the City has been provided with a Detailed Confidentiality Report for the applicable Sales Tax Payment Period. At the request of the City, the State of Texas ("State") shall provide all such documentation as may be reasonably requested by the City to evidence, support, and establish the Sales and Use Tax paid and collected (including Sales and Use Tax paid directly to the State pursuant to a direct payment permit) by the Retailers for the sale of Taxable Items by Retailers Consummated within the Property and received by the City from the State. The Detailed Confidentiality Report shall, at a minimum, contain, include, or be accompanied by the following:

- (a) A schedule detailing the amount of Sales and Use Tax proceeds collected by the Retailers and paid to the State as a result of the sale of Taxable Items Consummated in the City within the Property for the previous City Fiscal Year Quarter; and
- (b) Information concerning any refund or credit of Sales and Use Tax received by the Retailers (including any Sales and Use Tax paid directly to the State pursuant to a direct payment permit) which have previously been reported by the Retailers as Sales and Use Tax paid or collected.

##### 4.3 Retailers' Report.

During the term of this Agreement beginning with the Effective Date, the Developer shall provide the City and maintain during the term of this Agreement a list of each Retailer that occupies or occupied the Property during the applicable Sales Tax Payment Period, including the taxpayer identification number, taxpayer outlet number (as shown on the Texas Sales Tax Permit), taxpayer name, taxpayer location as reported to the State of Texas, and any other

information required by the State of Texas to generate and provide the City with the Comptroller's Detailed Confidentiality Report for the applicable Sales Tax Payment Period. During any Sales Tax Payment Period, the City shall only remit GRANTS for Retailers that appear on the Detailed Confidentiality Report that contracted with Developer to lease space within the Property during the Sales Tax Payment Period in which the City were notified by the Developer of the Retailers' occupancy status and who appear on the Sales Tax Certificate.

#### 4.4 Sales Tax Disclosure.

Developer shall use commercially reasonable efforts to include in each lease executed after the execution date of this Agreement, language which requires Retailers, and their successors and assigns to sign or cause to be signed any documentation necessary to authorize the State Comptroller's Office to release and disclose to the City, for the term of this Agreement, any and all Sales and Use Tax information relating to any Retailer generating Sales and Use Tax proceeds within the Property, including, as necessary, a form in materially the same format as that attached hereto as Exhibit "E."

#### 4.5 Audit.

Developer shall, upon reasonable prior written notice to the City Secretary and during normal business hours, have the right to audit and inspect the City's records, books, and all other relevant records related to this Agreement. The City shall, upon reasonable prior written notice to the Developer and during normal business hours, have the right to audit and inspect the Developer's records, books, and all other relevant records related to this Agreement. The Parties agree to maintain the appropriate confidentiality of such records, unless disclosure of such records and information shall be required by law.

#### 4.6 Recapture.

In the event of default, the City shall, after providing Developer notice and an opportunity to cure, have the right to recapture GRANTS, pursuant to Section 5.3 hereof, provided to Developer for the Improvements pursuant to this Agreement.

#### 4.7 Guidelines for Submission.

The City Manager or his designee shall develop guidelines setting forth the specific details and procedural requirements for the timely submission of CPPR(s) and the disbursement of GRANTS pursuant to this Agreement, including appropriate penalties for late, deficient, or untimely submissions. Such guidelines shall be implemented by written order signed by the City Manager.

## V. COVENANTS AND DUTIES

Developer makes the following covenants and warranties to the City, and agrees to timely and fully perform the obligations and duties contained this Agreement. Any false or

substantially misleading statements contained herein or failure to timely and fully perform those obligations and duties within this Agreement shall be an act of Default by the Developer.

5.1 Developer's Covenants and Duties. – DEVELOPER MAY NOT BE THE CONTRACTOR FOR IMPROVEMENTS.

- 5.1.1 Developer is authorized to do business and is in good standing in the State of Texas and shall remain in good standing in the State of Texas and the United States of America during any term of this Agreement.
- 5.1.2 The execution of this Agreement has been duly authorized by the Developer, and the individual signing this Agreement on behalf of the Developer is empowered to execute such Agreement and bind the company. Said authorization, signing, and binding effect is not in contravention of any law, rule, regulation, or of the provisions of Developer's company agreement, by-laws, or of any agreement or instrument to which Developer is a party to or by which it may be bound. No litigation or governmental proceeding is pending against or affecting the Developer and to the Developer's actual knowledge no such litigation or governmental proceeding is expected or anticipated.
- 5.1.3 The Developer is not a party to any bankruptcy proceedings currently pending or contemplated, and Developer has not been informed of any potential involuntary bankruptcy proceedings.
- 5.1.4 To its current, actual knowledge, Developer has acquired and maintained all necessary rights, licenses, permits, and authority to carry on its business in the City and will continue to use its best efforts to maintain all necessary rights, licenses, permits, and authority.
- 5.1.5 The funds herein granted shall be used solely for the purpose of constructing Improvements within the Property and associated with the Project, including all Hard Costs and Soft Costs.
- 5.1.6 Developer shall timely and fully comply with all of the terms and conditions of this Agreement.
- 5.1.7 Developer is not currently in arrears in any payment of ad valorem taxes (or any other obligation) to the City of Kyle, the Hays County Independent School District or Hays County.
- 5.1.8 Developer agrees to obtain or cause to be obtained, all necessary permits and approvals from City and/or all other governmental agencies having jurisdiction over the construction of the Improvements within the Property. Developer shall not be entitled to any waiver of any municipal permit, inspection or other development fees imposed by City Code.

- 5.1.9 Developer shall prepare plans and specifications for the Improvements prior to starting any construction as required by City Code.
- 5.1.10 Developer agrees to require the Improvements to be constructed substantially in accordance with (i) the plans and specifications approved by the City, (ii) applicable federal, state, and local laws and ordinances, and (iii) this Agreement. Developer also agrees to provide bi-annual reports of leasing status upon the reasonable request of the City.
- 5.1.11 Developer shall be responsible for paying, or causing to be paid, to City and all other governmental agencies the cost of all applicable permit fees and licenses required for construction of the Project. Developer's Tenants agree to comply with all City ordinances and rules in effect at the time this Agreement is executed. Developer, in its sole discretion, may choose to comply with any or all City ordinances and rules promulgated after the Effective Date of this Agreement.
- 5.1.12 Developer shall have a continuing duty to cooperate with the City in providing all necessary information to assist City in complying with this Agreement; and to execute such other and further documents as may be reasonably required to comply herewith.
- 5.1.13 Developer shall pay, or cause to be paid, monthly rates and charges for all utilities (such as water, electricity, and sewer services) used by the Developer in regard to the development of the Project, the Property for all areas owned by the Developer during construction of the Project, and for so long as the Developer owns those areas.
- 5.1.14 With respect to Improvements, Developer or shall make a good faith effort to contract with or hire local qualified workers, companies, and Historically Underutilized Businesses in the manner prescribed by State Law in subcontracting any of the construction work required to be performed under the Improvements or this Agreement. Contracts for the construction of Improvements reimbursed by the Grant Funds shall be competitively bid in compliance with Chapter 252 of the Local Government Code, and be constructed by or on behalf of the Developer, in compliance with all applicable law. Should the Developer not competitively bid an Improvement, the Developer must obtain written approval by the City in order to be eligible for partial reimbursement of those Project Costs not competitively bid pursuant to the regulations set forth in Chapters 252 Local Government Code.
- 5.1.15 The provisions of Chapter 2258, Texas Government Code, are expressly made a part of this Agreement. In accordance with the provisions of Chapter 2258, a schedule of the general prevailing rate of per diem wages in this locality for each craft or type of workman needed to perform this Agreement shall be made part of this Agreement. Developer shall forfeit as a penalty to the City Sixty Dollars (\$60.00) for each laborer, workman, or mechanic employed, for each calendar day, or portion thereof, that such laborer, workman or mechanic is paid less than

the said stipulated rates for any work done under said contract, by Developer or any subcontractor under the Developer. The establishment of prevailing wage rates in accordance with Chapter 2258, Texas Government Code shall not be construed to relieve the Developer from his obligation under any Federal or State Law regarding the wages to be paid to or hours worked by laborers, workmen or mechanics insofar as applicable to the work to be performed under this Agreement. The Developer, in the execution of this Agreement, agrees that he shall not discriminate in his employment practices against any person because of race, color, creed, sex or origin. The Developer shall not engage in employment practices that have the effect of discriminating against employees or prospective employees because of race, color, religion, national origin, sex, age, handicap or political belief or affiliation

5.1.16 Developer Bears Risk of Reimbursement. The Developer represents that it understands that any contributions made by the Developer in anticipation of reimbursement from GRANT funds shall not be, nor shall be construed to be, financial obligations of the City. The Developer shall bear all risks known or unknown associated with reimbursement, including, but not limited to: pre-development agreement costs, incorrect estimates of GRANT funds, changes in tax rates or tax collections, changes in State Law or interpretations thereof, changes in market or economic conditions impacting the Project, changes in interest rates or capital markets, changes in building and development code requirements, changes in City policy, default by unanticipated events covered under legal doctrine of force majeure, and/or other unanticipated factors.

5.1.17 Financing. The cost of the Improvements and related expenses associated with the Project shall be funded through the use of the Developer's own capital or through credit secured solely by the Developer. The Developer may use any or part of the Property as collateral for the construction loan or loans, as required for the financing of the Project. The City will use available GRANT funds, up to the Maximum Grant Amount provided herein, to reimburse the Developer for eligible Hard and Soft Costs it has expended. These GRANT fund reimbursements made to the Developer are not intended to fully reimburse the Developer for all of its costs incurred in connection with performing its obligations under this Agreement.

## 5.2 City Covenants and Duties.

The City is obligated to pay the Developer an amount not to exceed the Maximum Grant Amount from sources contemplated by this Agreement over a period not to exceed ten (10) years, subject to Developer's timely and full satisfaction of all applicable duties and terms within this Agreement, as solely determined by the City Council of the City of Kyle, Texas. Further, City obligations to pay the Developer shall cease upon the earlier of: (1) payment in full of the Maximum Grant Amount; (2) reaching the Agreement's Expiration Date; or (3) Uncured Default by the Developer.

### 5.3 Substantial Compliance and Default.

5.3.1 Default by Developer. If the Developer should Default with respect to any obligation of this Agreement and should fail to cure within sixty (60) days after receipt of written notice of such Default from the City, then the Developer shall pay to the City liquidated damages as provided for herein. The harm caused by a breach of this Agreement is difficult to estimate and damages from a breach are not readily ascertainable and, therefore, the Parties agree that the following liquidated damages are a fair and reasonable forecast of the just compensation that should be paid by the Developer to the City if a breach occurs:

- (a) Within years one -five from the Effective Date of this Agreement, the liquidated damages are seventy-five percent (75%) of the GRANT(S) paid to the Developer by the City to the date of the breach;
- (b) Between years five-ten from the Effective Date of this Agreement, the liquidated damages are fifty percent (50%) of the GRANT(S) paid to the Developer by the City to the date of the breach;

5.3.2 Failure by either Party to timely and substantially comply with any performance requirement, duty, or covenant shall be considered an act of Default if uncured within sixty (60) days of receiving written notice from the other Party. Failure of the Developer to timely and substantially cure a default will give the City the right to terminate this Agreement, as solely and finally determined by the City Council of the City of Kyle, Texas.

## VI. DEVELOPMENT STANDARDS

6.1 In the event of a conflict between any requirements of this Agreement, all Exhibits hereto, and any applicable Code requirement, the more stringent requirement shall control. For any issues not covered by this Agreement, the more stringent of the applicable Code section(s) or State law shall control.

## VII. TERMINATION

### 7.1 Termination.

This Agreement shall terminate upon the earliest occurrence of any one or more of the following:

- (a) The written agreement of the Parties;
- (b) The Agreement's Expiration Date;
- (c) An uncured Default by the Developer; or

(d) The Payment of the Maximum Grant Amount.

7.2 Termination by Maximum Grant Amount.

If the Agreement is terminated by reaching the Maximum Grant Amount, the City is required to issue a letter to the Developer stating that the Maximum Grant Amount has been reached.

7.3 Extension beyond Term and Reimbursement.

In recognition of the fact that GRANTS are, by necessity, calculated and paid after taxes have been levied and paid to the City and, therefore, will always be paid in arrears, the Expiration Date of this Agreement will be extended until any and all GRANTS relating to applicable Sales Tax Receipts during the effective term of the Agreement have been paid in full by the City to the Developer. Notwithstanding the above, the Development Standards set forth in Section VI of this Agreement and all other substantive requirements imposed upon Developer shall be perpetual and shall not terminate unless specified otherwise in this Agreement. The Parties hereto agree that the City cannot guarantee that GRANT Funds shall completely reimburse the Developer, but that the GRANT Funds paid to Developer during the effective term hereof shall constitute the total reimbursement to the Developer for the construction of the Improvements regardless of the actual cost thereof.

## VIII. DISPUTE RESOLUTION

8.1 Mediation.

If a dispute arises out of or relates to this Agreement or the breach thereof, the Parties shall first in good faith seek to resolve the dispute through negotiation between the upper management of each respective Party. If such dispute cannot be settled through negotiation, the Parties agree to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association, Dallas, Texas, before resorting to arbitration, litigation, or some other dispute resolution procedure; provided that a Party may not invoke mediation unless it has provided the other Party with written notice of the dispute and has attempted in good faith to resolve such dispute through negotiation. Notwithstanding the foregoing, any Party may seek immediate equitable relief, without attempting to settle a dispute through mediation, in any case where such Party is entitled to equitable relief by law, the terms of the Agreement, or otherwise. All costs of negotiation, mediation, and arbitration collectively known as alternate dispute resolution ("ADR") shall be assessed equally between the City and Developer with each party bearing their own costs for attorney's fees, experts, and other costs of ADR and any ensuing litigation.

8.2 During the term of this Agreement, if Developer files and/or pursues an adversarial proceeding against the City regarding this Agreement without first engaging in good faith mediation of the dispute, then, at the City's option, all access to the GRANTS provided for

hereunder may be deposited with a mutually acceptable escrow agent that will deposit such funds in an interest bearing account until the resolution of such adversarial proceeding.

8.3 Under no circumstances will the GRANT funds received under this Agreement be used, either directly or indirectly, to pay costs or attorney fees incurred in any adversarial proceeding regarding this Agreement against City.

## IX. MISCELLANEOUS

### 9.1 Binding Agreement.

The terms and conditions of this Agreement shall be binding on and inure to the benefit of the City, Developer, and their respective successors and assigns. The City Manager or his designee shall be responsible for the administration of this Agreement and shall have the authority to execute any instruments, duly approved by the City Council of the City of Kyle, Texas, on behalf of the City related thereto.

### 9.2 Mutual Assistance.

City and Developer will do all things reasonably necessary or appropriate to carry out the terms and provisions of this Agreement and to aid and assist each other in carrying out such terms and provisions.

### 9.3 Representations and Warranties.

City represents and warrants to the Developer that this Agreement is within its authority, and it is duly authorized and empowered to enter into this Agreement, unless otherwise ordered by a court of competent jurisdiction. Developer represents and warrants to the City that it has the requisite authority to enter into this Agreement.

### 9.4 Assignment.

Developer shall have the right to assign all of its rights, duties, and obligations under this Agreement to a duly qualified third party with the prior written approval of the City Council of the City of Kyle, Texas. The Agreement may not be assigned unless and until the Assignee agrees to perform without limitation each and every obligation imposed on Assignor (Developer) herein, and the City receives and accepts adequate assurance in suitable form and manner of Assignee's ability to undertake such obligations. In the event of an assignment approved by the City as provided for herein, Developer shall be relieved of any and all liability under the Agreement incurred after the effective date thereof.

### 9.5 Independent Contractors.

9.5.1 It is expressly understood and agreed by all Parties hereto that in performing their services hereunder, the Developer shall never be an agent of the City and all consultants or contractors engaged by the Developer will be Developer's



independent contractors. The Parties hereto understand and agree that the City will not be liable for any claims that may be asserted by any third party occurring in connection with services performed by the Developer.

9.5.2 By entering into this Agreement, the Parties do not waive, and shall not be deemed to have waived, any rights, immunities, or defenses either may have, including the defense of Parties, and nothing contained herein shall ever be construed as a waiver of sovereign or immunity by the City with such rights being expressly reserved to the fullest extent authorized by law and to the same extent which existed prior to the execution of this Agreement.

9.6 Notice.

Any notice required or permitted to be delivered hereunder shall be deemed delivered by actual delivery or by depositing the same in the United States Mail, postage prepaid and certified with return receipt requested, addressed to the Party at the address set forth below:

If to City:

City Manager  
City of Kyle  
PO Box 40  
Kyle, TX 78640

With a mandatory copy to:

Frank J. Garza  
Davidson & Troilo, P.C.  
7550 W. IH10, Ste. 800  
San Antonio, Texas 78229

If intended for Developer:

Nomoland Company, L.P.  
Attn: Reeder E. Ratliff  
P.O. Box 22775  
Oklahoma City, OK 73123-1775

Either Party may designate a different address at any time upon written notice to the other Party.

9.7 Governing Law.

The Agreement shall be governed by the laws of the State of Texas, and exclusive venue for any action concerning this Agreement shall be in Hays County, Texas. The Parties agree to submit to the personal and subject matter jurisdiction of said court.

9.8 Amendment.

This Agreement may be amended by mutual written agreement of the Parties, as approved by the City Council of the City of Kyle, Texas.

9.9 Legal Construction.

In the event any 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 other provisions of this Agreement, and it is the intention of the Parties to this Agreement that, in lieu of each provision that is found to be illegal, invalid, or unenforceable, a provision be added to this Agreement which is legal, valid and enforceable and is as similar in terms as possible to the provision found to be illegal, invalid, or unenforceable.

9.10 Interpretation.

Each of the Parties has been represented by counsel of their choosing in the negotiation and preparation of this Agreement. Regardless of which Party prepared the initial draft of this Agreement, this Agreement shall, in the event of any dispute, whatever its meaning or application, be interpreted fairly and reasonably and neither more strongly for or against any Party.

9.11 Entire Agreement.

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter covered in this Agreement. There is no other collateral oral or written agreement between the Parties that, in any manner, relates to the subject matter of this Agreement, except as provided for in any Exhibits attached hereto or duly approved amendments to this Agreement, as approved by the City Council of the City of Kyle, Texas.

9.12 Recitals.

The recitals to this Agreement are incorporated herein as findings of fact.

9.13 Paragraph Headings.

The paragraph headings contained in this Agreement are for convenience only and will in no way enlarge or limit the scope or meaning of the various and several paragraphs.

9.14 Counterparts.

This Agreement may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

9.15 Exhibits.

Any Exhibits attached hereto are incorporated by reference for all purposes.

9.16 Survival of Covenants.

Any of the representations, warranties, covenants, and obligations of the Parties, as well as any rights and benefits of the Parties, pertaining to a period of time following the termination of this Agreement shall survive termination.

9.17 Employment of Undocumented Workers.

During the term of this Agreement, the Developer agrees to not knowingly employ any undocumented workers, and, if convicted of a violation under 8 U.S.C. Section 1324a(1), the Developer shall be in Default and pay the liquidated damages set forth in Section 5.3.1. The Developer is not liable for an unknown violation of this Section by a person with whom the Developer contracts; provided, however, the identical federal law requirements provided for herein shall be included as part of any agreement or contract, which Developer enters into with any , subsidiary, assignee, affiliate, or franchisee for which GRANTS provided herein will be used. Nomoland, L.P. shall provide a certification in the form attached as Exhibit F. hereto.

9.18 Indemnification.

**DEVELOPER COVENANTS AND AGREES TO FULLY INDEMNIFY AND HOLD HARMLESS, CITY AND ITS ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS, AGENTS, ATTORNEYS AND REPRESENTATIVES, INDIVIDUALLY AND COLLECTIVELY, FROM AND AGAINST ANY AND ALL COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES, FINES, PENALTIES, PROCEEDINGS, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY AND SUITS OF ANY KIND AND NATURE, INCLUDING BUT NOT LIMITED TO, PERSONAL INJURY PROPERTY DAMAGE OR DEATH MADE UPON CITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO DEVELOPER'S NEGLIGENCE, WILLFUL MISCONDUCT OR CRIMINAL CONDUCT IN ITS ACTIVITIES UNDER THIS AGREEMENT, INCLUDING ANY SUCH ACTS OR OMISSIONS OF DEVELOPER OR DEVELOPER'S AGENTS, OFFICERS, DIRECTORS, REPRESENTATIVES, EMPLOYEES, CONSULTANTS OR SUBCONSULTANTS, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES WHILE IN THE EXERCISE OR PERFORMANCE OF THE RIGHTS OR DUTIES UNDER THIS AGREEMENT, ALL WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. THE PROVISIONS OF THIS INDEMNIFICATION ARE SOLELY FOR THE BENEFIT OF THE CITY AND ARE NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY. DEVELOPER SHALL PROMPTLY ADVISE CITY IN WRITING OF ANY CLAIM OR DEMAND AGAINST CITY RELATED TO OR ARISING OUT OF DEVELOPER'S ACTIVITIES UNDER THIS AGREEMENT AND SHALL SEE TO THE INVESTIGATION AND**

**DEFENSE OF SUCH CLAIM OR DEMAND AT DEVELOPER'S COST TO THE EXTENT REQUIRED UNDER THE INDEMNITY IN THIS PARAGRAPH. CITY SHALL HAVE THE RIGHT, AT ITS OPTION AND EXPENSE, TO PARTICIPATE IN SUCH DEFENSE WITHOUT RELIEVING DEVELOPER OF ANY OF ITS OBLIGATIONS UNDER THIS PARAGRAPH.**

**IT IS THE EXPRESS INTENT OF THE PARTIES TO THIS AGREEMENT, THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH, IS AN INDEMNITY EXTENDED BY DEVELOPER TO INDEMNIFY, PROTECT AND HOLD HARMLESS CITY ITS AGENTS, OFFICERS, EMPLOYEES AND ASSIGNS, FROM THE CONSEQUENCES OF THE CITY'S OWN NEGLIGENCE BUT NOT INTENTIONAL MISCONDUCT; PROVIDED HOWEVER, THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH SHALL APPLY ONLY, TO THE EXTENT OF ANY COMPARATIVE NEGLIGENCE STATUTES AND FINDINGS, WHEN THE NEGLIGENT ACT OF CITY IS A CONTRIBUTORY CAUSE OF THE RESULTANT INJURY, DEATH, OR DAMAGE, AND IT SHALL HAVE NO APPLICATION WHEN THE NEGLIGENT ACT OF CITY IS THE SOLE CAUSE OF THE RESULTANT INJURY, DEATH, OR DAMAGE. DEVELOPER FURTHER AGREES TO DEFEND, AT ITS OWN EXPENSE AND ON BEHALF OF CITY AND IN THE NAME OF CITY ANY CLAIM OR LITIGATION BROUGHT AGAINST CITY AND THEIR ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS AND REPRESENTATIVES, IN CONNECTION WITH ANY SUCH INJURY, DEATH, OR DAMAGE FOR WHICH THIS INDEMNITY SHALL APPLY, AS SET FORTH ABOVE.**

**THE DEVELOPER SHALL ALSO INDEMNIFY THE CITY AND ITS RESPECTIVE OFFICIALS AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES, DAMAGES, CAUSES OF ACTIONS, SUITS AND LIABILITIES ARISING OUT OF THE DEVELOPER'S GENERAL CONTRACTOR'S ACTIONS RELATED TO THE CONSTRUCTION OF THE IMPROVEMENTS.**

**IT IS THE EXPRESS INTENT OF THIS SECTION THAT THE INDEMNITY PROVIDED TO THE CITY SHALL SURVIVE THE TERMINATION AND/OR EXPIRATION OF THIS AGREEMENT AND SHALL BE BROADLY INTERPRETED AT ALL TIMES TO PROVIDE THE MAXIMUM INDEMNIFICATION OF THE CITY AND ITS OFFICERS, EMPLOYEES AND ELECTED OFFICIALS PERMITTED BY LAW.**

9.19 Insurances; Subcontractors.

9.19.1 The Developer shall maintain, at their own cost and expense, such usual, customary, and appropriate insurance as will protect Developer and City from all claims for damages to persons and to property which may arise from any operations under this Agreement, or any of its amendments. The following are the types of insurance policies and the minimum limits of insurance coverage

which shall be maintained by the Developer, and its contractors and subcontractors during the construction of the Improvements. All insurance shall contain a provision that the coverage afforded will not be cancelled, materially changed, or renewal refused until at least thirty (30) days prior written notice has been given to the City. All such insurance shall remain in effect until completion and acceptance by the City of the Improvements. Except for worker's compensation insurance, both the City shall be named as additional insured on all policies of insurance provided for herein and the City shall be provided with certificates naming each entity on all policies of insurance required hereby.

- 9.19.2 Prior to commencing any work, Developer shall request from its Contractors and provide to the City at the address shown above Certificates of Insurance under all such policies, certifying compliance with the minimum coverage outlined below. All policies shall be endorsed to provide that in the event of cancellation or reduction of coverage during the policy period, thirty (30) days advance written notice of such cancellation or reduction will be mailed to the City of Kyle, P.O. Box 40 Kyle, Texas 78640.
- 9.19.3 Insurance shall be carried with financially responsible insurance companies, licensed in the State of Texas, with an A.M. Best Rating of A(-) or better.
- 9.19.4 Developer shall ensure and contractor have Worker's Compensation and Employer's Liability Insurance. A copy of a certificate of insurance, a certificate of authority to self-insure issued by the Commission, or a coverage agreement showing statutory worker's compensation insurance coverage for the 's and 's contractors' employees providing services on the Project for the duration of the Project must be submitted to the City.
- 9.19.4.1 If the coverage period shown on the Developer or Entity's current certificate of coverage ends during the duration of the Project, the Developer and s must, prior to the end of the coverage period, file a new certificate of coverage with the City showing that coverage has been extended.
- 9.19.4.2 Waiver of subrogation against the City.
- 9.19.5 Comprehensive General Liability Insurance. With limits of liability for bodily injury of not less than \$1,000,000.00 any one occurrence, and for property damage of not less than \$1,000,000.00 any one occurrence, and \$2,000,000.00 aggregate. Such insurance shall include the following:
- 9.19.5.1 Entity's protective liability, covering liability for work sublet.
- 9.19.5.2 Developer has the contractual liability, insuring the indemnity agreements contracted in this Agreement.

9.19.5.3 Coverage for damage due to collapse of or structural injury to any buildings or structure due to excavation, tunneling, pile driving, cofferdam or caisson work or dredging; to moving, shoring, underpinning, raising, or demolition of any building or structure, or removal or rebuilding of any structural support thereof; to blasting or explosions; or to wires, conduits, pipes, mains, sewers, tanks, tunnels, or any other property below the surface of the ground.

9.19.5.4 Waiver of subrogation against the City.

9.19.6 Comprehensive Automobile Liability Insurance. With limits of liability for bodily injury of not less than \$1,000,000.00 any one person, and \$2,000,000.00 any one occurrence, and for property damage of not less than \$1,000,000.00 any one occurrence. Such coverage shall include owned, hired, and non-owned vehicles. Policy shall be endorsed as follows:

9.19.6.1 Waiver of subrogation against the City.

9.19.6.2 City shall be shown as additional insured.

9.19.7 The failure of the Developer at anytime to provide the insurance required by Section 9.19 shall be considered a material breach of this Agreement for which the City shall be entitled to damages, including termination of the Agreement for uncured violations.

## 9.20 Additional Instruments.

City and Developer agree and covenant to cooperate, negotiate in good faith, and to execute such other and further instruments and documents as may be reasonably required to fulfill the public purposes provided for and included within this Agreement.

## 9.21 Forfeiture.

The Developer shall forfeit any and all rights to the Annual Grant Payments set forth in Section 2 of this Agreement if the Developer fails to meet the Performance Criteria set forth in Section 3 above, subject to the provisions of Sections 5 and 6 hereof.

## 9.22 Force Majeure.

The term "force majeure" as employed herein shall mean and refer, without limitation, to acts of God; strikes and/or lockouts; acts of public enemies, orders of any kind of the government of the United States, the State of Texas or any civil or military authority (other than the City); insurrections; riots; lightning, earthquakes, fires, hurricanes, storms, floods and other natural disasters; washouts and other weather-related delays; restraint of government and people; civil disturbances; explosions; or other causes not reasonably within the control of the party claiming such inability.

If, by reason of force majeure, any party hereto shall be rendered wholly or partially unable to carry out its obligations under this Agreement, then such party shall give written notice of the full particulars of such force majeure to the other party within ten (10) days after the occurrence thereof. The obligations of the party giving such notice, to the extent effected by the force majeure, shall be suspended during the continuance of the inability claimed, except as hereinafter provided, but for no longer period, and the party shall endeavor to remove or overcome such inability with all reasonable dispatch.

It is understood and agreed that the settlement of strikes and lockouts shall be entirely within the discretion of the party having the difficulty, and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require that the settlement be unfavorable in the judgment of the party having the difficulty.

#### 9.23 Representations and Warranties by the Developer.

The Developer makes the following representation and warranties as applicable. Any false or substantially misleading statement contained herein shall be a Default under Section 5 above:

#### 9.24 Section or Other Headings.

Section or other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement..

#### 9.25 Applicable Law and Venue.

This Agreement is made and all obligations arising hereunder shall be construed and interpreted under the laws of the State of Texas and the venue for any action arising from this Agreement shall be Hays County, Texas,

#### 9.26 Counterparts.

This Agreement may be executed in multiple counterparts, each of which shall be considered an original, but all of which shall constitute one instrument.

Any party may change the address which notices are to be sent by giving the other parties written notice in the manner provided in this Section.

EXECUTED to be effective this the 21<sup>st</sup> day of February, <sup>2012</sup> ~~2011~~ <sup>(85)</sup>

NOMOLAND COMPANY, LP,  
a Texas limited liability company

By:

SDI Finance, LLC, an Oklahoma limited liability company, its General Partner

By: Reeder E. Ratliff  
Reeder E. Ratliff, Vice President

CITY OF KYLE, TEXAS  
a Home Rule Municipality and Political Subdivision of the State of Texas

By: Lucy Johnson  
Lucy Johnson  
Mayor

ATTEST:

By: Amelia Sanchez  
Amelia Sanchez  
City Secretary

APPROVED AS TO FORM

RT

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

Attorney for the Nomoland Company, L.P.  
and SDI Finance, LLC, its General Partner

APPROVED AS TO FORM:

DAVIDSON & TROILO, P.C.  
7550 W. IH10, Ste. 800  
San Antonio, Texas 78229

By: Frank J. Garza  
Frank J. Garza  
Attorney for the City of Kyle



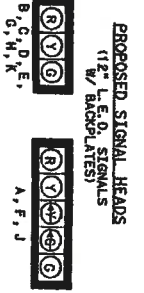
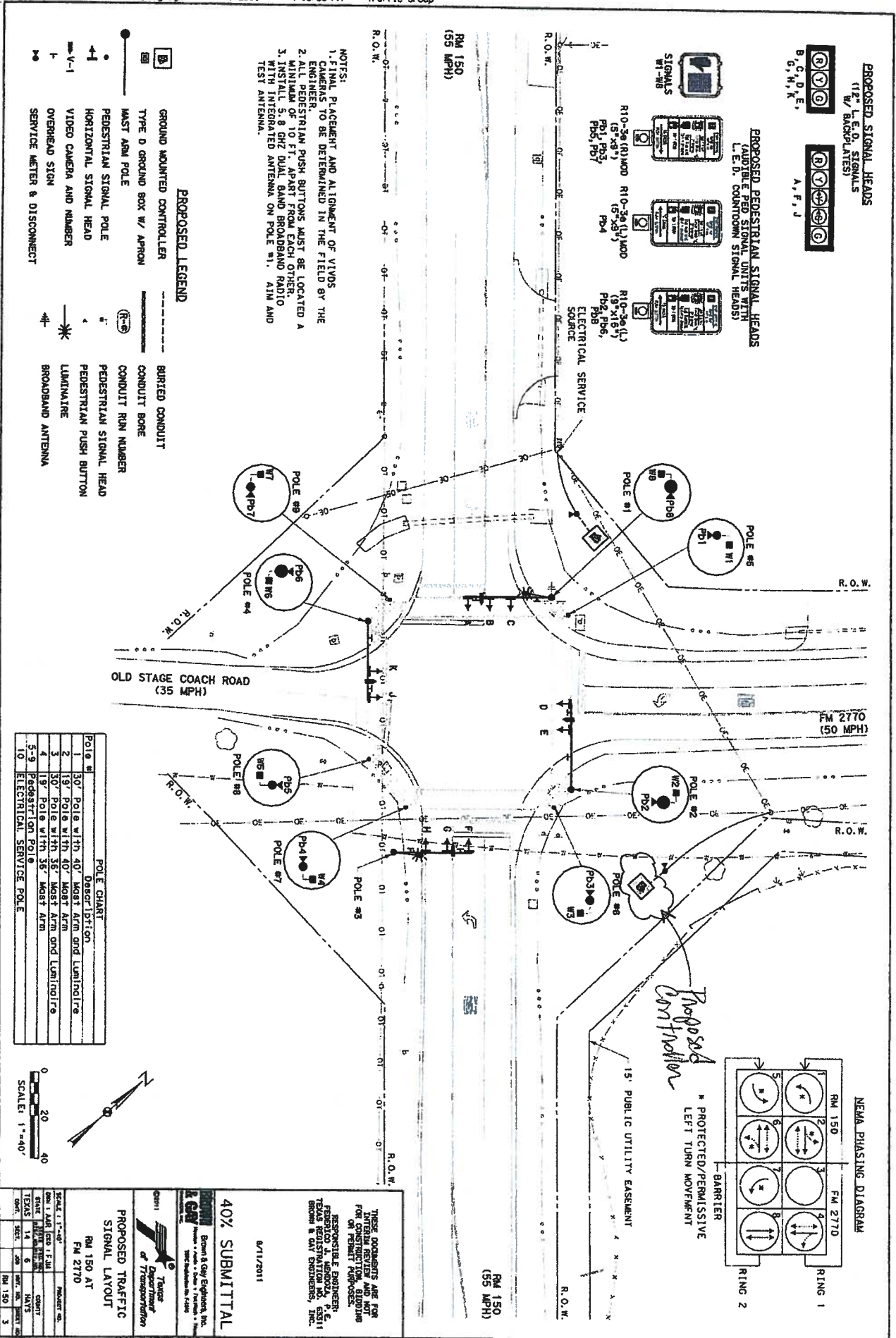
EXHIBIT "A"  
Description of Property

	Bk	Vol	Pg
12004810	OPR	4287	482



**EXHIBIT "B"**  
**Description of Traffic Signal Improvements**

	Bk	Vol	Pg
12004810	OPR	4287	484



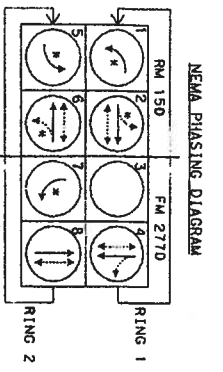
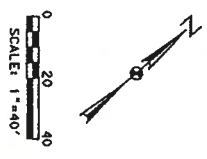
**PROPOSED PEDESTRIAN SIGNAL HEADS**  
 (MINIMUM 8" SIGNAL HEADS)  
 L, E, D, B, C, DOWNDOWN SIGNAL HEADS

- NOTES:**
1. FINAL PLACEMENT AND ALIGNMENT OF VIDEOS CAMERAS TO BE DETERMINED IN THE FIELD BY THE ENGINEER.
  2. ALL PEDESTRIAN PUSH BUTTONS MUST BE LOCATED A MINIMUM OF 10 FT. APART FROM EACH OTHER.
  3. INSTALL 5.8 GHZ DUAL BAND BROADBAND RADIO WITH INTEGRATED ANTENNA ON POLE #1, AIN AND TEST ANTENNA.

- PROPOSED LEGEND**
- GROUND MOUNTED CONTROLLER
  - TYPE D GROUND BOX W/ APRON
  - MAST ARM POLE
  - PEDESTRIAN SIGNAL POLE
  - HORIZONTAL SIGNAL HEAD
  - VIDEO CAMERA AND NUMBER
  - OVERHEAD SIGN
  - SERVICE METER & DISCONNECT
  - BURIED CONDUIT
  - CONDUIT BORE
  - CONDUIT RUN NUMBER
  - PEDESTRIAN SIGNAL HEAD
  - PEDESTRIAN PUSH BUTTON
  - LUMINAIRE
  - BROADBAND ANTENNA

**POLE CHART**

Pole #	Description
1	30' Pole with 40' Mast Arm and Luminaire
2	19' Pole with 40' Mast Arm
3	30' Pole with 36' Mast Arm and Luminaire
4	19' Pole with 36' Mast Arm
5-9	Pedestrian Pole
10	ELECTRICAL SERVICE POLE



THESE DRAWINGS ARE FOR  
 INTERIM REVIEW AND NOT  
 FOR CONSTRUCTION, BIDDING  
 OR PERMIT PURPOSES.

RESPONSIBLE ENGINEER:  
 FREDERICK J. VANDERKAM, P.E.  
 TRAFFIC GROUP, INC.  
 10000 W. 11TH AVENUE, SUITE 100  
 BROOMFIELD, CO 80020

DATE: 8/11/2011

**40% SUBMITTAL**

Scale: 1" = 40'

PROJECT NO. RM 150 AT FM 2770

DATE: 8/11/2011

SCALE: 1" = 40'

DATE: 8/11/2011

DATE: 8/11/2011

DATE: 8/11/2011

DATE: 8/11/2011

EXHIBIT "C"

Estimated Costs Associated with the Development Improvements

Estimated cost of construction of the Traffic Signal  
Improvements to be constructed by the State  
(\$162,367.00 + 20% contingency) \$195,000

Estimated costs of engineering, design and  
surveying fees relating to the Traffic Signal  
Improvements paid by the Developer 30,000

Estimated amount of consideration to be paid by  
the City to Developer for the conveyance of the  
tract of land under the City's water tower. 2,000

**Total Estimated Costs:** \$227,000 Bk Vol Pg  
12004810 OPR 4287 486

Exhibit "D."  
Minutes

	Bk	Vol	Ps
12004810	OPR	4287	487

Exhibit "E"  
Copy of Advance Funding Agreement

	Bk	Vol	Pg
12004810	OPR	4287	488



# Texas Department of Transportation

P.O. DRAWER 15426 • AUSTIN, TEXAS 78761-5426 • (512) 832-7000

December 5, 2011

Hays County  
CSJ: 0914-00-262  
FM 150 at FM 2770 signal

Mr. Lanny Lambert  
City Manager  
City of Kyle  
100 W. Center Street  
Kyle, Texas 78640

Bk	Vol	Pg
12004810	OPR	4287 489

Attn: Jerry Hendrix, Director of Community Development

Dear Mr. Lambert:

Attached for signatures are two copies of an Advance Funding Agreement for the above project. Construction consists of the installation of a traffic signal on RM 150 at RM 2770.

Please return both signed and dated documents to this office for further processing. A check made payable to the Texas Department of Transportation in the amount of \$162,367 will be due upon receipt of a fully executed agreement and before any work can be done by the State.

If you have any questions, please contact me at (512) 832-7050.

Sincerely,

Patricia L. Crews-Weight, P.E.  
Director of Design  
Austin District

cc: Donald E. Nyland, P.E., South Travis Area Engineer  
Mark Mohr

#### THE TEXAS PLAN

REDUCE CONGESTION • ENHANCE SAFETY • EXPAND ECONOMIC OPPORTUNITY • IMPROVE AIR QUALITY  
PRESERVE THE VALUE OF TRANSPORTATION ASSETS

An Equal Opportunity Employer



STATE OF TEXAS §  
COUNTY OF TRAVIS §

**ADVANCE FUNDING AGREEMENT FOR VOLUNTARY  
LOCAL GOVERNMENT CONTRIBUTIONS  
TO TRANSPORTATION IMPROVEMENT  
PROJECTS WITH NO REQUIRED MATCH  
ON-SYSTEM**

Bk Vol Pg  
12004810 OPR 4287 490

**THIS AGREEMENT** is made by and between the State of Texas, acting by and through the Texas Department of Transportation, called the "State", and the City of Kyle, acting by and through its duly authorized officials, called the "Local Government."

**WITNESSETH**

**WHEREAS**, Transportation Code, Chapters 201, 221, 227, and 361, authorize the State to lay out, construct, maintain, and operate a system of streets, roads, and highways that comprise the State Highway System; and,

**WHEREAS**, Government Code, Chapter 791, and Transportation Code, §201.209 and Chapter 221, authorize the State to contract with municipalities and political subdivisions; and,

**WHEREAS**, Commission Minute Order Number 112237 authorizes the State to undertake and complete a highway improvement generally described as install traffic signal; and,

**WHEREAS**, the Local Government has requested that the State allow the Local Government to participate in said improvement by funding that portion of the improvement described as install traffic signal on RM 150 at RM 2770, called the "Project"; and,

**WHEREAS**, the State has determined that such participation is in the best interest of the citizens of the State;

**NOW, THEREFORE**, in consideration of the premises and of the mutual covenants and agreements of the parties hereto, to be by them respectively kept and performed as hereinafter set forth, the State and the Local Government do agree as follows:

**AGREEMENT**

**1. Time Period Covered**

This agreement becomes effective when signed by the last party whose signing makes the agreement fully executed, and the State and the Local Government will consider it to be in full force and effect until the Project described in this agreement has been completed and accepted by all parties or unless terminated, as provided for by this agreement.

**2. Project Funding and Work Responsibilities**

A. The State will authorize the performance of only those Project items of work which the Local Government has requested and has agreed to pay for as described in Attachment A, Payment Provision and Work Responsibilities which is attached to and made a part of this contract. In addition to identifying those items of work paid for by payments to the State, Attachment A, Payment Provision and Work Responsibilities, also specifies those Project items of work that

are the responsibility of the Local Government and will be carried out and completed by the Local Government, at no cost to the State.

- B. At least sixty (60) days prior to the date set for receipt of the construction bids, the Local Government shall remit its remaining financial share for the State's estimated construction oversight and construction costs.
- C. In the event that the State determines that additional funding by the Local Government is required at any time during the Project, the State will notify the Local Government in writing. The Local Government shall make payment to the State within thirty (30) days from receipt of the State's written notification.
- D. Whenever funds are paid by the Local Government to the State under this agreement, the Local Government shall remit a check or warrant made payable to the "Texas Department of Transportation Trust Fund." The check or warrant shall be deposited by the State in an escrow account to be managed by the State. Funds in the escrow account may only be applied by the State to the Project. If, after final Project accounting, excess funds remain in the escrow account, those funds may be applied by the State to the Local Government's contractual obligations to the State under another advance funding agreement with approval by appropriate personnel of the Local Government.

**3. Right of Access**

If the Local Government is the owner of any part of the Project site, the Local Government shall permit the State or its authorized representative access to the site to perform any activities required to execute the work.

**4. Adjustments Outside the Project Site**

The Local Government will provide for all necessary right of way and utility adjustments needed for performance of the work on sites not owned or to be acquired by the State.

**5. Responsibilities of the Parties**

The State and the Local Government agree that neither party is an agent, servant, or employee of the other party and each party agrees it is responsible for its individual acts and deeds as well as the acts and deeds of its contractors, employees, representatives, and agents.

**6. Document and Information Exchange**

The Local Government agrees to electronically deliver to the State all general notes, specifications, contract provision requirements and related documentation in a Microsoft® Word or similar document. If requested by the State, the Local Government will use the State's document template. The Local Government shall also provide a detailed construction time estimate including types of activities and month in the format required by the State. This requirement applies whether the local government creates the documents with its own forces or by hiring a consultant or professional provider. At the request of the State, the Local Government shall submit any information required by the State in the format directed by the State.

**7. Interest**

The State will not pay interest on funds provided by the Local Government. Funds provided by the Local Government will be deposited into, and retained in, the State Treasury.

**8. Inspection and Conduct of Work**

Unless otherwise specifically stated in Attachment A, Payment Provision and Work Responsibilities, to this contract, the State will supervise and inspect all work performed

hereunder and provide such engineering inspection and testing services as may be required to ensure that the Project is accomplished in accordance with the approved plans and specifications. All correspondence and instructions to the contractor performing the work will be the sole responsibility of the State. Unless otherwise specifically stated in Attachment A to this contract, all work will be performed in accordance with the Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges adopted by the State and incorporated in this agreement by reference, or special specifications approved by the State.

**9. Increased Costs**

- A.** In the event it is determined that the funding provided by the Local Government will be insufficient to cover the State's cost for performance of the Local Government's requested work, the Local Government will pay to the State the additional funds necessary to cover the anticipated additional cost. The State shall send the Local Government a written notification stating the amount of additional funding needed and stating the reasons for the needed additional funds. The Local Government shall pay the funds to the State within thirty (30) days of the written notification, unless otherwise agreed to by all parties to this agreement. If the Local Government cannot pay the additional funds, this contract shall be mutually terminated in accordance with Article 11 – Termination. If this is a fixed price agreement as specified in Attachment A, Payment Provision and Work Responsibilities, this provision shall only apply in the event changed site conditions are discovered or as mutually agreed upon by the State and the Local Government.
- B.** If any existing or future local ordinances, commissioners court orders, rules, policies, or other directives, including but not limited to outdoor advertising billboards and storm water drainage facility requirements, are more restrictive than State or Federal Regulations, or if any other locally proposed changes, including but not limited to plats or replats, result in increased costs, then any increased costs associated with the ordinances or changes will be paid by the Local Government. The cost of providing right of way acquired by the State shall mean the total expenses in acquiring the property interests either through negotiations or eminent domain proceedings, including but not limited to expenses related to relocation, removal, and adjustment of eligible utilities.

**10. Maintenance**

Upon completion of the Project, the State will assume responsibility for the maintenance of the completed Project unless otherwise specified in Attachment A to this agreement.

**11. Termination**

- A.** This agreement may be terminated in the following manner:
1. By mutual written agreement and consent of both parties;
  2. By either party upon the failure of the other party to fulfill the obligations set forth in this agreement; or
  3. By the State if it determines that the performance of the Project is not in the best interest of the State.
- B.** If the agreement is terminated in accordance with the above provisions, the Local Government will be responsible for the payment of Project costs incurred by the State on behalf of the Local Government up to the time of termination.
- C.** Upon completion of the Project, the State will perform an audit of the Project costs. Any funds due to the Local Government, the State, or the Federal Government will be promptly paid by the owing party.

**12. Notices**

All notices to either party by the other required under this agreement shall be delivered personally or sent by certified or U.S. mail, postage prepaid or sent by electronic mail, (electronic notice being permitted to the extent permitted by law but only after a separate written consent of the parties), addressed to such party at the following addresses:

Local Government:	State:
City of Kyle Attn: City Manager 100 W. Center Street Kyle, Texas 78640	Director of Contract Services Texas Department of Transportation 125 E. 11 <sup>th</sup> Street Austin, Texas 78701

All notices shall be deemed given on the date so delivered or so deposited in the mail, unless otherwise provided in this agreement. Either party may change the above address by sending written notice of the change to the other party. Either party may request in writing that such notices shall be delivered personally or by certified U.S. mail and such request shall be honored and carried out by the other party.

**13. Sole Agreement**

In the event the terms of the agreement are in conflict with the provisions of any other existing agreements between the Local Government and the State, the latest agreement shall take precedence over the other agreements in matters related to the Project.

**14. Successors and Assigns**

The State and the Local Government each binds itself, its successors, executors, assigns, and administrators to the other party to this agreement and to the successors, executors, assigns, and administrators of such other party in respect to all covenants of this agreement.

**15. Amendments**

By mutual written consent of the parties, this agreement may be amended prior to its expiration.

**16. State Auditor**

The state auditor may conduct an audit or investigation of any entity receiving funds from the State directly under the contract or indirectly through a subcontract under the contract. Acceptance of funds directly under the contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. An entity that is the subject of an audit or investigation must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit.

**17. Insurance**

If this agreement authorizes the Local Government or its contractor to perform any work on State right of way, before beginning work the entity performing the work shall provide the State with a fully executed copy of the State's Form 1560 Certificate of Insurance verifying the existence of coverage in the amounts and types specified on the Certificate of Insurance for all persons and entities working on State right of way. This coverage shall be maintained until all work on the

CSJ # 0914-00-262  
District # 14 - Austin  
Code Chart 64 # 22850  
Project: Install Traffic Signal

State right of way is complete. If coverage is not maintained, all work on State right of way shall cease immediately and the State may recover damages and all costs of completing the work.

**18. Signatory Warranty**

Each signatory warrants that the signatory has necessary authority to execute this agreement on behalf of the entity represented.

**THIS AGREEMENT IS EXECUTED** by the State and the Local Government in duplicate.

**THE LOCAL GOVERNMENT**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Typed or Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

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12004810 DPR 4287 494

**THE STATE OF TEXAS**

\_\_\_\_\_  
Cathy T. Floyd, CPA  
South Regional Support Center Director

\_\_\_\_\_  
Date

**ATTACHMENT A  
 PAYMENT PROVISION AND WORK RESPONSIBILITIES**

Description	Total Estimated Cost	Federal Participation		State Participation		Local Participation		
		%	Cost	%	Cost	%	Cost	
Engineering (by Local Government)	\$ 30,000.00	0%	\$0	0%	\$0	100%	\$ 30,000.00	
Construction (by State)	\$ 162,367.00	0%	\$0	0%	\$0	100%	\$ 162,367.00	
<b>Subtotal</b>	<b>\$ 192,367.00</b>		<b>\$0</b>		<b>\$0</b>		<b>\$ 192,367.00</b>	
Direct State Cost for Prelim. Engineer. \$ 4,428	Environm. Direct State Costs (20%)	\$ 0.00	0%	\$0	100%	\$ 0.00	0%	\$0
	Right of Way Direct State Costs (20%)	\$ 0.00	0%	\$0	100%	\$ 0.00	0%	\$0
	Engineer. Direct State Costs (40%)	\$ 4,428.00	0%	\$0	100%	\$ 4,428.00	0%	\$0
	Utility Direct State Costs (20%)	\$ 0.00	0%	\$0	100%	\$ 0.00	0%	\$0
Construction Engineering (by State)	\$ 13,280.00	0%	\$0	100%	\$ 13,280.00	0%	\$0	
Construction Direct State Costs	\$ 1,461.00	0%	\$0	100%	\$ 1,461.00	0%	\$0	
Indirect State Costs (7.27%)	\$ 13,985.08	0%	\$0	100%	\$ 13,985.08	0%	\$0	
<b>Subtotal</b>	<b>\$ 33,154.08</b>		<b>\$0</b>		<b>\$ 33,154.08</b>		<b>\$0</b>	
<b>TOTAL</b>	<b>\$ 225,521.08</b>		<b>\$0</b>		<b>\$ 33,154.08</b>		<b>\$ 192,367.00</b>	

Initial payment by the Local Government to the State: \$0  
 Payment by the Local Government to the State before construction: \$ 162,367.00  
 Estimated total payment by the Local Government to the State \$ 162,367.00 This is an estimate.  
 The final amount of Local Government participation will be based on actual costs.

**Work Responsibilities:**

**1. Engineering Services**

- a. The Local Government shall prepare or cause to be prepared the engineering plans, specifications, and estimates (PS&E) necessary for the development of the Project. The PS&E shall be prepared in accordance with all applicable laws, policies and regulations, deemed necessary by the State.
- b. The engineering plans shall be developed in accordance with the Texas Department of Transportation *Roadway Design Manual*, the current edition of the *Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges* and the Texas Accessibility Standards. A project development schedule of design activities shall be supplied to the TxDOT South Travis Area Engineer office upon initiation of the Project.
- c. The Local Government shall submit a copy of the redlined plans provided by the State with all applicable plan submittals to indicate that QC/QA was undertaken.
- d. The Local Government shall submit the completed PS&E to the State for review and approval a minimum of twenty weeks prior to the beginning of construction work.

**2. Utilities**

The Local Government shall be responsible for the adjustment, removal, or relocation of utility facilities in accordance with applicable State laws, regulations, rules, policies, and procedures, including any cost to the State of a delay resulting from the Local Government's failure to ensure that utility facilities are adjusted, removed, or relocated before the scheduled beginning of construction. The Local Government will not be reimbursed with federal or state funds for the cost of required utility work. The Local Government must obtain advance approval for any variance from established procedures. Before a construction contract is let, the Local Government shall provide, at the State's request, a certification stating that the Local Government has completed the adjustment of all utilities that must be adjusted before construction is completed.

**3. Construction Responsibilities**

- a. The State shall advertise for construction bids, issue bid proposals, receive and tabulate the bids and award and administer the contract for construction of the Project. Administration of the contract includes the responsibility for construction engineering and for issuance of any change orders, supplemental agreements, amendments or additional work orders which may become necessary subsequent to the award of the construction contract.
- b. The State will use its approved contract letting and award procedures to let and award the construction contract.
- c. The State will award the contract up to a cost equal to 20% over the latest Engineer's Estimate. The Local Government shall be responsible for 100% of the construction costs of any contract so awarded.

Exhibit F.  
Undocumented Worker Certification

	Bk	Vol	Pg
12004810	OPR	4287	497



STATE OF TEXAS §

KNOW ALL BY THESE PRESENTS:

COUNTY OF HAYS §

Chapter 2264, Subchapter B, Texas Government Code requires that any public agency or economic development corporation shall require a business that submits an application to receive a public subsidy to include a statement certifying that the business does not and will not knowingly employ an undocumented worker.

Nomoland Company, L.P. and SDI Finances, LLC its General Partner certify that its operation within the City of Kyle, Texas ("City") does not and will not knowingly employ an undocumented worker, as defined in Chapter 2264, Subchapter A, Texas Government Code, as amended (the "Act");

Pursuant to the Act, if Nomoland Company, L.P. and/or SDI Finances, LLC its General Partner are convicted of a violation under 8 U.S.C. Section 1324a(f), after receiving any public subsidy, Nomoland Company, L.P. and SDI Finances, LLC its General Partner shall promptly give the City written notice of such violation and shall repay the amount of the Grants provided for herein with interest, at a rate of 6.75% per annum not later than the 120<sup>th</sup> day after the date Nomoland Company, L.P. and SDI Finances, LLC its General Partner notify the City of the violation.

I am authorized to make this application on behalf of Nomoland Company, L.P. and SDI Finances, LLC its General Partner. I hereby certify that the information set forth herein is true and correct.

Nomoland Company, L.P. and SDI Finances, LLC its General Partner

By: Reeder E. Rattiff

Reeder E. Rattiff

Type or Print Name

Title: Vice President

Date: February 13, 2012

Before me Margaret J. Oden on this day personally appeared Reeder E. Rattiff proved to me on the oath of same to be the person whose name is subscribed to the forgoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 13<sup>th</sup> day of February, 2012



Margaret J. Oden  
Notary Public in and for the State of Texas  
My Commission Expires: 04/15/2014