

**CITY OF EL PASO, TEXAS**  
**DEPARTMENT HEAD'S SUMMARY REQUEST FOR COUNCIL ACTION (RCA)**

**DEPARTMENT:** Engineering

**AGENDA DATE:** February 26, 2008

**CONTACT PERSON/PHONE:** R. Alan Shubert, City Engineer (X4423)

**DISTRICT(S) AFFECTED:** 8

**SUBJECT:**

THAT the City Manager be authorized to sign a Developer's Participation Agreement between the CITY OF EL PASO and JARDINES DEL VALLE LP, to allow the City to participate in the cost of the construction of improvements for Ocotillo Street, in an amount not to exceed sixty thousand eight hundred and sixty four dollars and 30/100 (\$60, 864.30) in accordance with Local Government Code Section 212.071, and with Section 19.28.030 of the City Subdivision Code.

**BACKGROUND / DISCUSSION:**

This agreement allows the City to pay an amount not to exceed \$68,864.30 toward the cost of improvements to Ocotillo Street. This amount is less than the maximum allowable 30% of the total estimated cost for the subdivision. The developer must complete the construction within 60 days of notification of the approval of the project plans.

**PRIOR COUNCIL ACTION:**

None

**AMOUNT AND SOURCE OF FUNDING:**

Funding from 2006 Certificates of Obligation under project number PCP08ST03, fund – 27263, DeptID – 99331117, and account – 508027.

**BOARD / COMMISSION ACTION:**

N/A

\*\*\*\*\* REQUIRED AUTHORIZATION \*\*\*\*\*

**LEGAL:** (if required) \_\_\_\_\_ **FINANCE:** (if required) \_\_\_\_\_

**DEPARTMENT HEAD:** \_\_\_\_\_

(Example: if RCA is initiated by Engineering, client department should sign also)

*Information copy to appropriate Deputy City Manager*

**APPROVED FOR AGENDA:**

**CITY MANAGER:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

**RESOLUTION**

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

THAT the City Manager be authorized to sign a Developer's Participation Agreement between the CITY OF EL PASO and JARDINES DEL VALLE LP, to allow the City to participate in the cost of the construction of improvements for Ocotillo Street, in an amount not to exceed sixty thousand eight hundred and sixty four dollars and 30/100 (\$60, 864.30) in accordance with Local Government Code Section 212.071, and with Section 19.28.030 of the City Subdivision Code.

**ADOPTED this the \_\_\_\_\_ day of \_\_\_\_\_, 2008.**

THE CITY OF EL PASO

\_\_\_\_\_  
John Cook  
Mayor

ATTEST:

\_\_\_\_\_  
Richarda Duffy Momsen  
City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Lupe Cuellar  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
R. Alan Shubert, P.E.  
City Engineer

THE STATE OF TEXAS  
COUNTY OF EL PASO

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§  
§

**DEVELOPER PARTICIPATION  
AGREEMENT**

This Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_ 2008, by and between the **CITY OF EL PASO**, hereinafter referred to as the "City", and Jardines del Valle LP, hereinafter referred to as the "Developer."

**WITNESSETH**

**WHEREAS**, the City desires to construct the improvement of Ocotillo Street from Country Club Road north a distance of approximately 753 feet for an area of approximately 669 square yards which is the City's right-of-way; and

**WHEREAS**, the Developer, in conjunction with its construction of a residential subdivision known as Jardines del Valle, desires to proceed with development of the City's aforementioned right-of-way upon approval by the City of the improvement plan (the "Project"); and

**WHEREAS**, Texas Local Government Code §212.071 authorizes a municipality with 5,000 or more inhabitants to enter into a contract with a developer of a non-building public improvement to construct such improvements, without a competitive bidding procedure; and

**WHEREAS**, Texas Local Government Code §212.072 allows the municipality to participate in the construction cost, in an amount not to exceed thirty (30%) percent of the total contract price without complying with the competitive sealed bidding procedure of Texas Local Government Code Chapter 252; and

**WHEREAS**, the Developer's construction of the street improvements will be an economic benefit to local tax payers, will enhance availability to the park and therefore, this Agreement is in the best interest of the citizens of the City; and

**WHEREAS**, the Developer and the City agree that the Developer shall construct the street and subdivision improvements and the City will participate in the construction costs of the improvements to the street; and

**NOW, THEREFORE**, in consideration of the promises and of the mutual covenants and agreements of the parties hereto, the City and Developer do agree as follows:

**I. Term Of The Agreement**

This Agreement shall automatically terminate after the construction of the Street is completed, the City Engineer has inspected the Street to assure that City street specifications have been met, the City has paid the City's share to the Developer, and the City has accepted

the Street for maintenance. If the City Engineer determines that the City's specifications have not been met, Developer shall be responsible for any necessary corrections and alterations and all costs associated with any necessary corrections and alterations. The City shall not be responsible nor participate in any costs accrued in such instance. In addition, Developer agrees to give a warranty on its work in accordance with the requirements of the City Code.

## **II. Scope of Project**

(a) The Developer will construct approximately 669 square yards of Ocotillo Street from Country Club Road a distance of approximately 753 feet by approximately 8 feet wide.

(b) The Developer agrees to provide all necessary drawings, plans, and specifications, according to the applicable City design standards and policies for the Project, as well as accepted engineering principles and practices to provide for the street improvements. The Project shall be constructed in accordance with the grading plans and building plans approved by the City.

(c) The Developer agrees that all Project construction and materials shall be subject to inspection and approval by the City. All Project materials must conform to City specifications and are subject to quality control testing by the City at the Developer's sole cost and expense.

(d) Additionally, the Developer shall provide all traffic control for construction. The Developer agrees to provide adequate traffic controls designed to cause minimum inconvenience to motorists, pedestrians and adjacent property owners.

(e) The Developer acknowledges that all site preparation, including but not limited to street improvements must be completed in accordance with plans approved by the City prior to the issuance of a building permit for the Project. The City will use its best efforts to cause the Project to be approved by the City as soon as reasonably possible. However, the City does not guarantee that approval will be granted. **The City shall not be liable for any damages which may occur if the Project is not approved or if the Project is abandoned for any reason because of the conduct of third parties or any other factors, and the Developer hereby releases the City from any such liability.**

(f) All Project construction shall be completed by the Developer within **60 days** after the approval of said plans and notice to Developer of said approval, unless otherwise extended by written amendment and approval by the City. It is hereby understood and mutually agreed, by the Developer and the City that the date of beginning and the time for completion of the Project are **ESSENTIAL CONDITIONS** in the Agreement. It is further mutually understood and agreed that the construction on the project shall begin upon the plan approval and communicated notice of that approval to Developer.

(g) The Developer agrees that said work shall be pursued regularly, diligently, and uninterrupted at such a rate of progress as shall ensure completion of the Project within the time specified. It is expressly understood and agreed, by the Developer and the City, that the time for the completion of the Project is a reasonable time for completion.

**(h) If the Developer shall neglect, fail or refuse to complete the Project within the time herein specified, or any proper extension granted by the City or to maintain the Project and such neglect, failure or refusal to complete or maintain the Project results in any safety issue to persons or property as reasonably identified by the City Engineer or his designee, the Developer agrees that the City may issue a stop work order for any work in progress under any issued building permit for the Project, and the Developer waives any and all causes of action it may have against the City arising from the City's stop work order. Additionally, the Developer will defend, indemnify and hold the City harmless from any and all causes of action any third party may have against the City arising from the City's stop work order.**

(i) In the event that Developer fails to complete the project, the City reserves the right to complete the construction and assess the costs of completion to the Developer for payment.

(j) The Developer agrees to warrant to the City that all work in connection with the Project shall be performed in a good and workmanlike manner, strictly in accordance with the approved plans, and as otherwise provided in this Agreement. This warranty shall remain in full force and effect for a period of one (1) year from and after the date of the City's final acceptance of the Project. No mechanics liens shall ever be threatened or filed against the property identified as the Project. It is understood and agreed that, notwithstanding the acceptance of the Project by the City, the Developer remains fully responsible for the repair and maintenance of the Project as such relates to the Developer's warranty of the Project for a period of one (1) year from the date of the City's acceptance of the Project for maintenance.

### **III. Project Funding**

The City agrees to participate in the cost of construction of the improvements in an amount not to exceed thirty (30%) percent of the total estimated construction cost for the Project. The Developer and City agree that the total estimated construction cost for the subdivision improvements is **NINE HUNDRED THOUSAND DOLLARS AND 00/100 (\$900,000.00)**. Within thirty (30) days of presentation to the City of written statement from Developer certifying that the street extension has been constructed according to the approved subdivision plans, and the City's inspection and approval of the constructed improvements, the City will reimburse Developer in an amount not to exceed **SIXTY THOUSAND EIGHT HUNDRED SIXTY FOUR DOLLARS AND 30/100 (\$60,864.30)** which is less than thirty percent (30%) of the total estimated construction cost for Jardines del Valle subdivision.

#### **IV. Termination**

This Agreement may be terminated by the City, upon thirty (30) days written notice for any reason.

#### **V. Ownership and Right of Access**

Developer hereby acknowledges the ownership rights of the City to its right-of-way, as well as the rights of the City, its agents, contractors and subcontractors to enter upon and construct and install any equipment that may be required, pursuant to the Contract, to complete the Project. This right of access shall include the right to use or modify any Developer equipment or Facilities as deemed necessary by the City. Additionally, in the event that additional authorization is required, Developer agrees to promptly execute the required documents at the request of the City.

#### **VI. Relationship of the Parties**

Developer acknowledges that it is not an agent, servant, or employee of the City and is therefore, responsible for its own actions performed by itself, its agents or employees during the term of this Agreement.

#### **VII. Insurance**

Developer agrees to obtain liability insurance for this project, designating the City of El Paso as an additional insured party. Such insurance policy shall be issued by an insurance company duly authorized to do business in the State of Texas and shall be subject to approval of the City after review by the City Attorney as to form and the City Engineer as to sufficiency, pursuant to the El Paso Municipal Code, Section 13.16.010. The maximum amount recoverable under such policy shall not be less than **TWO HUNDRED FIFTY THOUSAND DOLLARS AND 00/100 (\$250,000.00)** for death or injury to any person in any one accident, **FIVE HUNDRED THOUSAND DOLLARS AND 00/100 (\$500,000.00)** for death or injury to two or more persons in any one accident, and **ONE HUNDRED THOUSAND DOLLARS AND 00/100 (\$100,000.00)** for property damage.

#### **VIII. Bond Required**

The Developer agrees to execute a performance bond for one hundred percent (100%) of the Project costs to secure fulfillment of all the Developer's obligations under this Agreement. The bond will be in a form approved by the City. The bond must be executed by a corporate surety in accordance with Texas Government Code, Chapter 2253. The bond shall identify the City as Owner and Obligee and shall bind both the Developer and the Surety, their heirs, administrators, executors, successors and assignees, jointly and severally. The bonds shall expressly provide that the Developer shall faithfully render performance under this Agreement and shall remain in full force and

effect until all requirements of the Agreement have been performed to the City's satisfaction.

#### **IX. Increased Costs**

This Agreement is a lump sum contract and it is anticipated that additional costs could arise from change, site conditions or latent defects; however, Developer agrees that the Developer will be solely responsible for payment of all increased costs in the construction of the facilities, regardless of the cause.

#### **X. Indemnification**

**Developer or its insurer will INDEMNIFY, DEFEND AND HOLD the City, its officers, agents and employees, HARMLESS FOR AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE, (INCLUDING BUT NOT LIMITED TO ATTORNEY FEES AND COSTS) FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON ARISING OUT OF OR RELATED TO THIS AGREEMENT. Without modifying the conditions of preserving, asserting or enforcing any legal liability against the City as required by the City Charter or any law, the City will promptly forward to Developer every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein. Developer will 1) investigate or cause the investigation of accidents or occurrences involving such injuries or damages; 2) negotiate or cause to be negotiated the claim as the Developer may deem expedient; and 3) defend or cause to be defended on behalf of the City all suits for damages even if groundless, false or fraudulent, brought because of such injuries or damages. Developer will pay all judgments in actions defended by Developer pursuant to this section along with all attorneys' fees and costs incurred by the City including interest accruing to the date of payment by Developer, and premiums on any appeal bonds. The City, at its election will have the right to participate in any such negotiations or legal proceedings to the extent of its interest. The City will not be responsible for any loss of or damage to the Developer's property from any cause.**

#### **XI. Non-Assignability**

Subject to Article XVII below, the parties hereto agree that the rights of the Developer and the City under this Agreement are not assignable and will survive the sale, rental, gift or devise of any property adjacent to the Project.

#### **XII. Notice**

All notices provided for herein shall be sufficient if sent by certified mail, return receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

CITY: The City of El Paso  
Attn: Mayor  
2 Civic Center Plaza, 10<sup>th</sup> Floor  
El Paso, Texas 79901-1196

copy to: City Engineer  
2 Civic Center Plaza, 4<sup>th</sup> Floor  
El Paso, Texas 79901-1196

DEVELOPER: Mr. Jose Rico  
Jardines del Valle  
2501 East Yandell  
El Paso, Texas 79903

or such other addresses as the parties may designate to each other in writing from time to time.

### **XIII. Law Governing Agreement**

The laws of the State of Texas shall govern the validity, performance, interpretation and enforcement of this Agreement. Venue shall be in the courts of El Paso, County, Texas.

### **XIV. Interpretation**

The City and Developer agree that this Agreement has been freely negotiated by both parties and that in any controversy, dispute or contest over the meaning, interpretation, validity or enforceability of this Agreement, or any of its terms or conditions, there shall be no inference, presumption or conclusion drawn whatsoever against either party by virtue of that party having drafted this Agreement or any portion thereof.

### **XV. Severability**

If any provision of this Agreement is prohibited by law or otherwise determined to be illegal, invalid or unenforceable in a court of competent jurisdiction, such provision shall not affect the validity of the remaining provisions of this Agreement; instead, the Agreement shall be construed as if it did not contain the illegal, invalid or unenforceable provision(s) and the rights and obligations of the parties shall be construed and enforced accordingly.

### **XVI. Future Maintenance Work**

The City shall be responsible for any maintenance or repairs of the street improvements. The City's obligations for such work shall begin upon completion of the

Project as defined by the Agreement and upon expiration of Developer's warranty. The City agrees that Developer is not responsible for any maintenance and repair of such work after expiration of Developer's warranty.

**XVII. Entire Agreement**

This Agreement constitutes and expresses the entire agreement between the parties and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement shall not be amended or modified except by written instrument signed by both parties.

**XVIII. Authority to Contract**

All persons that are signatories to this Agreement represent that they have authority to enter into this Agreement and bind their respective organizations thereto.

CITY OF EL PASO:

\_\_\_\_\_  
Joyce Wilson, City Manager

DEVELOPER:

JARDINES DEL VALLE LP

\_\_\_\_\_  
By: Jose Rico, Partner

APPROVED AS TO FORM:

\_\_\_\_\_  
Guadalupe Cuellar  
Assistant City Attorney

APPROVED AS TO CONTENT:

\_\_\_\_\_  
R. Alan Shubert, P.E.  
City Engineer

**ACKNOWLEDGMENTS**

THE STATE OF TEXAS    )  
  )  
COUNTY OF EL PASO    )

This instrument was acknowledged before me on this \_\_\_\_\_ day of \_\_\_\_\_, 2008 by \_\_\_\_\_, as \_\_\_\_\_ of the City of El Paso.

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

(ACKNOWLEDGMENTS CONTINUE ON THE FOLLOWING PAGE)

THE STATE OF TEXAS    )  
  )  
COUNTY OF EL PASO    )

This instrument was acknowledged before me on this 12 day of February, 2008 by Jose Rico.

Maria T Chacon  
Notary Public, State of Texas

