

## AGREEMENT FOR DEVELOPER ASSUMPTION OF TXDOT AFA PROJECT

THIS AGREEMENT FOR DEVELOPER ASSUMPTION OF TXDOT AFA PROJECT ("Agreement") is entered into by and between the **CITY OF FARMERS BRANCH**, (hereinafter "City"), a Texas home rule municipality, and **CADG MERCER CROSSING HOLDING, LLC**, (hereinafter "Developer"), a Texas limited liability company. City and Developer are hereafter collectively referred to herein as "Parties" and separately as "Party".

### RECITALS

**WHEREAS**, Developer is the owner of a substantial portion if not all the land located within Planned Development District No. 99 ("PD 99"), the boundaries of which are generally depicted on **Exhibit A**, attached hereto and incorporated herein by reference ("Developer's Property"); and

**WHEREAS**, Developer intends to develop Developer's Property with a substantial number of single family, multi-family, and retail lots and has advised City that access to Developer's Property from Interstate 635 ("IH635") would be enhanced by the construction of U-Turn lanes along the east and west bound service roads of IH635 east of Luna Road (the "Project") and general depicted in **Exhibit B**, attached hereto and incorporated herein by reference; and

**WHEREAS**, construction of improvements within the IH635 right-of-way requires the consent of the State of Texas, acting through the Texas Department of Transportation ("TxDOT"), and entry of an agreement with TxDOT by a local governmental entity willing to fund the cost of the design and construction of such improvements and construct such improvement; and

**WHEREAS**, Developer desires City to enter, and City is willing to enter, into that certain *Advance Funding Agreement for a Local Government Contribution to a Transportation Improvement Project On-System*, with the Texas Department of Transportation ("TxDOT"), a copy of which is attached hereto as **Exhibit C** and incorporated herein by reference (the "TxDOT AFA") if Developer agrees to assume and perform all of City's obligations under the provisions of the TxDOT AFA, including paying for all costs relating to the design and construction of the Project;

**NOW, THEREFORE**, in consideration of the mutual covenants and obligations herein, the Parties agree as follows:

**1. Assumption of Obligation.** Developer agrees to assume and perform all responsibilities, obligations and liabilities of City set forth in the TxDOT AFA (City being identified as the "Local Government" in the TxDOT AFA) without the necessity of assigning the TxDOT AFA to Developer including, but not limited to, the design and construction of the Project. Developer acknowledges that Developer will not be a party to

the TxDOT AFA but shall at all times comply with the provisions of the TxDOT AFA as if Developer were a party to the TxDOT AFA.

**2. TxDOT AFA Advanced Payment.** Not later than five (5) days after the Effective Date, Developer shall pay to City the amount of \$78,108.00, which funds shall be used by City to pay TxDOT the advanced funds as required by the TxDOT AFA. As the Project is a PID eligible Authorized Improvement, the City will approve a Certification for Payment form submitted by the Developer to request a draw from the Project Fund under the Public Finance Authority Contract Revenue Bonds (Mercer Crossing Project), Series 2017 (the “Bonds”) with the amount of \$78,108.00.

**3. Construction Funds Escrow.** After City has reviewed and approved Developer’s contractor and contract as provided in Section 7, below, City shall notify Developer of the funds necessary to (i) fund the contract plus ten (10%) percent contingencies for construction contracts plus (ii) any additional amounts that must be paid to TxDOT or others pursuant to the TxDOT AFA (the “Construction Escrow Funds”). As the Project is a PID eligible Authorized Improvement, the City will approve a Certification for Payment form submitted by the Developer to request a draw from the Project Fund under the Bonds with the amount to fund the Construction Escrow Funds. If the Developer does not advance the Construction Escrow Funds within thirty (30) days from the date the City approves a Certification for Payment form and after approval by the City Engineer of the contractor with whom Developer intends to contract to construct the Project, this Agreement shall terminate and City shall proceed to terminate the TxDOT AFA. Developer shall deliver the Construction Escrow Funds to City in the form of a cashier’s check or funds wire transfer. City agrees to keep a separate accounting of the Construction Escrow Funds on the City’s accounting books, which records shall be available to Developer for review during City’s regular business hours. City understands and agrees that the Construction Escrow Funds shall only be used to pay for the design and construction of the Project and other costs required by the TxDOT AFA. As construction of the work on the Project progresses, Developer shall deposit additional funds with City for the costs of change orders mutually approved by City and Developer if such change order results in an increase in the cost of construction of the Project. The Construction Escrow Funds shall be held and disbursed by City as provided herein.

**4. Disbursement of Construction Funds.** City shall release the Construction Escrow Funds as design and/or construction of the Project progresses within ten (10) days after City’s receipt of Developer’s written draw request (each, a “Draw Request”) setting forth the amount of the requested disbursement accompanied by (a) copies of invoices from third parties evidencing the costs incurred for which payment is requested, and (b) with respect to disbursements for hard costs of construction, a copy of a certificate from the City Engineer confirming that the portion of the Project for which payment has been requested has been substantially completed (the foregoing requirements are collectively referred to herein as the “Draw Requirements”). The amount to be disbursed from the Construction Escrow Funds shall be the aggregate cost incurred in connection with the design and/or construction of the portion of the Project described in the Draw Request, as set forth in the Draw Request. City shall release the portion of the Construction Escrow Funds set forth

in the Draw Request to the parties set forth in the Draw Request. City shall act reasonably and in good faith in reviewing a Developer's Draw Request. City may object to the funding of a specific portion of the Draw Request which does not satisfy the Draw Requirements, and the balance of the Draw Request shall be funded by City.

5. **Funds on Completion of Project.** If construction of the Project has been completed and accepted by City and TxDOT, and each Draw Request submitted by Developer to City in connection therewith has been funded, the remaining balance of the Construction Escrow Funds shall be returned to Developer.

6. **Termination of TxDOT AFA.** Notwithstanding any provision contained in this Agreement to the contrary, if the TxDOT AFA is terminated: (a) the Parties shall have no further rights or obligations under this Agreement; and (b) City shall make disbursements from the Construction Escrow Funds to pay for all costs incurred related to the Project prior to the date of termination of the TxDOT AFA and return any remaining Construction Escrow Funds to Developer.

7. **City Contract Approval.** Developer understands, acknowledges, and agrees that all contracts relating to construction of the Project must comply with applicable provisions of state law and the TxDOT AFA. Developer shall not sign any contract for construction of the Project until such contract has been reviewed and approved by the City Engineer, which approval shall not be unreasonably withheld or delayed.

9. **Utility Relocation/Adjustments.** Should utilities, whether publicly or privately owned, require relocation and/or adjustment as part of the construction of the Project as called for in the TxDOT AFA, Developer shall be solely responsible for the costs of such relocations and/or adjustments.

10. **Approval of Plans.** No approval of plans and specifications by City shall be construed as representing or implying that improvements built in accordance therewith shall be free of defects. Any such approvals shall in no event be construed as representing or guaranteeing that any improvements built in accordance therewith will be designed or built in a good and workmanlike manner. Neither City nor its elected officials, officers, employees, contractors, and/or agents shall be responsible or liable in damages or otherwise to anyone submitting plans and specifications for approval by City for any defects in any plans or specifications submitted, revised, or approved, any loss or damages to any person arising out of approval or disapproval or failure to approve or disapprove any plans or specifications, any loss or damage arising from the noncompliance of such plans or specifications with any governmental ordinance or regulation, nor any defects in construction undertaken pursuant to such plans and specifications.

11. **Indemnity Against Design Defects.** Approval by TxDOT and/or the City Engineer or other TxDOT or City employee, official, consultant, employee, or officer of any plans, designs or specifications submitted by Developer or its engineer under this Agreement shall not constitute or be deemed to be a release of the responsibility and liability of Developer, its engineer, contractors, employees, officers, or agents for the

accuracy and competency of their design and specifications. Such approval shall not be deemed to be an assumption of such responsibility or liability by TxDOT or City for any defect in the design and specifications prepared by Developer's consulting engineer, officers, agents, servants, or employees, it being the intent of the Parties that approval by TxDOT, the City Engineer or other TxDOT or City employee, official, consultant, or officer signifies TxDOT and/or City approval of only the general design concept of the improvements to be constructed. **In this connection, Developer shall indemnify, defend, and hold harmless City and the State of Texas, their officials, officers, agents, servants and employees, from any loss, damage, liability or expense on account of damage to property and injuries, including death, to any and all persons which may arise out of any defect, deficiency or negligence of the engineer designs and specifications to the extent prepared or caused to be prepared by Developer or Developer's consulting engineer and incorporated into any improvements constructed in accordance therewith, and Developer shall defend at its own expense any suits or other proceedings brought against TxDOT, City, and/or their respective officials, officers, agents, servants or employees, or any of them, on account thereof, to pay all expenses and satisfy all judgments which may be incurred by or rendered against them, collectively or individually, personally or in their official capacity, in connection herewith.**

**12. Indemnification Generally.** Developer agrees to defend, indemnify and hold City, its elected officials, officers, agents and employees, harmless against any and all claims, lawsuits, judgments, costs and expenses for personal injury (including death), property damage or other harm for which recovery of damages is sought that may arise out of or be occasioned by Developer's breach of any of the terms or provisions of this Agreement, or by any negligent act or omission of Developer, its officers, agents, associates, employees, affiliates, contractors or subcontractors, in the performance of this Agreement; except that the indemnity provided for in this paragraph shall not apply to any liability resulting from the sole negligence of City, its officers, agents, employees or separate contractors, and in the event of joint and concurrent negligence of both Developer and City, responsibility, if any, shall be apportioned comparatively in accordance with the laws of the State of Texas, without, however, waiving any governmental immunity available to City under Texas law and without waiving any defenses of the Parties under Texas law. The provisions of this paragraph are solely for the benefit of the Parties and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

**13. Indemnity Against Claims from the State:** Developer further agrees to indemnify, defend, and hold City harmless against any claims made by TxDOT against City, its officers, employees, and agents, related to damages accruing to the State of Texas for breach of contract or by reason of injuries to the right-of-way, roadbed, pavement, bridges, signs, and other highway facilities owned by the State, when such damages are caused by the intentional or negligent act or omission of Developer, its officers, employees, or contractors in the construction, operation, maintenance or rehabilitation of the Project.

**14. Insurance.** Prior to commencement of construction of the Project, Developer shall purchase and have in full force and effect insurance with the minimum amount of coverage described in this Section 14. Developer shall furnish City and the State of Texas, by and through TxDOT, with the Texas Department of Transportation's Certificate of Insurance, as required by the **TxDOT AFA**, evidencing that Developer has in full force and effect the below listed insurance coverage under one or more insurance policies:

A. Worker's Compensation Insurance: Minimum Coverage Limits: Statutory

B. Commercial General Liability Insurance:

Minimum Coverage Limits: Bodily Injury/Property Damage: \$1,000,000 combined single limit each occurrence and in the aggregate

C. Texas Business Automobile Liability Insurance:

Minimum Coverage Limits:

Bodily Injury: \$250,000 each person/\$500,000 each occurrence

Property Damage: \$100,000 each occurrence

City and the State of Texas must be included as "Additional Insureds" by Endorsement to policies issued for coverages listed in B and C above. A "Waiver of Subrogation Endorsement" in favor of City and the State of Texas shall be a part of each policy for coverages listed in A, B and C, above. A copy of these endorsements shall be submitted to City and the State of Texas with the evidence of coverage prior to commencement of construction of the Project. Developer and/or its contractor shall be responsible for any deductions stated in the policy. Developer shall provide that all provisions of this Agreement concerning liability, duty, standard of care, together with the indemnification or defense provisions herein, shall be underwritten by contractual coverage sufficient to include such obligations within applicable policies. All insurance coverage required by this Section 14 must remain in full force and effect until after completion of construction of the Project and acceptance of the Project for maintenance by the State of Texas.

**15. Contractor Payment and Performance Bonds.** Prior to Developer's contractor commencing any work on the Project, Developer's contractor shall obtain for the protection of City and the State of Texas a payment bond and performance bond in the amount of the contract amount for the Project in compliance with Chapter 2253, Texas Government Code.

**16. Force Majeure.** It is expressly understood and agreed by the Parties that if the substantial completion of the construction of any improvements contemplated hereunder is delayed by reason of war, civil commotion, acts of God, inclement weather, governmental restrictions, regulations, or interferences, fire or other casualty, court injunction, necessary condemnation proceedings, act of any other party, its

affiliates/related entities and/or their contractors, or any circumstances which are reasonably beyond the control of the Party obligated or permitted under the terms of this Agreement to do or perform the same, regardless of whether any such circumstance is similar to any of those enumerated or not, the Party so obligated or permitted shall be excused from doing or performing the same during such period of delay, so that the time period applicable to such design or construction requirement shall be extended for a period of time equal to the period such Party was delayed.

**17. Term.** The term of this Agreement shall begin on the date it is signed by authorized representatives of all Parties the Effective Date, and end upon the complete performance of all obligations and conditions precedent by the Parties.

**18. Events of Default and Remedies**

A. A default shall exist if either Party fails to perform or observe any material provision contained in this Agreement. A Party shall immediately notify the defaulting Party in writing upon becoming aware of any change in the existence of any condition or event which would constitute a default by the defaulting Party, or, with the giving of notice or passage of time, or both, would constitute a default by the defaulting Party under this Agreement. Such notice shall specify the nature and the period of existence thereof and what action, if any, the notifying Party requires or proposes to require with respect to curing the default.

B. If a default shall occur and continue, after thirty (30) days written notice to cure default, City or Developer may, at their respective option, terminate this Agreement or pursue any and all remedies to which the Party may be entitled to, at law or in equity, in accordance with Texas law. City shall not, however, have the right to terminate this Agreement for so long as Developer proceeds in good faith and with due diligence to remedy and correct the default, provided, that Developer has commenced to cure such default within the 30 days following notice, has furnished proof satisfactory to the City that it is providing the correction and that the default is cured within sixty (60) days after Developer receives additional notice. City, solely at its discretion, may extend the time periods in increments of thirty (30) days.

**19. Venue And Governing Law.** This Agreement is performable in Dallas County, Texas, and original venue of any action arising out of this Agreement shall be exclusively in the State District Courts of Dallas County, Texas. This Agreement shall be governed and construed in accordance with the laws of the State of Texas.

**20. Notices.** Any notice required by this Agreement shall be deemed to be properly served if deposited in the U.S. mails by certified letter, return receipt requested, addressed to the recipient's address shown below, subject to the right of either Party to designate a different address by notice given in the manner just described.

If intended for City, to:  
City Manager

If intended for Developer, to:  
Mehrdad Moayedi

City of Farmers Branch  
13000 William Dodson Parkway  
Farmers Branch, Texas 75234

CADG Mercer Crossing Holding,  
LLC  
1800 Valley View Lane, Suite 30  
Farmers Branch, Texas 75234

Copy to:

Peter G. Smith  
Nichols, Jackson, Dillard, Hager & Smith,  
L.L.P.  
500 North Akard, Suite 1800  
Dallas, Texas 75201

**21. Severability.** In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof. Further, in lieu of deleting each clause or provision that is found to be invalid, illegal, or unenforceable, the Parties shall, where legally possible and subject to any necessary approval, amend the Agreement in writing to provide for a replacement provision which is valid, legal and enforceable and is as similar in terms as possible to the provisions found to be invalid, illegal, or unenforceable.

**22. Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument.

**23. Captions.** The captions to the various clauses of this Agreement are for informational purposes only and shall not alter the substance of the terms and conditions of this Agreement.

**24. Successors and Assigns.** The terms and conditions of this Agreement are binding upon the successors and assigns of all Parties.

**25. Entire Agreement.** This Agreement embodies the complete agreement of the Parties, superseding all oral or written previous and contemporary agreements between the Parties and relating to matters in this Agreement, and except as otherwise provided herein cannot be modified without written agreement of the Parties.

**26. Effective Date.** This Agreement shall be effective on the date when signed by authorized representatives of the Parties ("Effective Date").

SIGNED AND AGREED this \_\_\_\_ day of \_\_\_\_\_, 2017.

**City of Farmers Branch, Texas**

By: \_\_\_\_\_  
Charles S. Cox, City Manager

ATTEST:

\_\_\_\_\_  
Amy Piukana, City Secretary

APPROVED AS TO FORM:

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

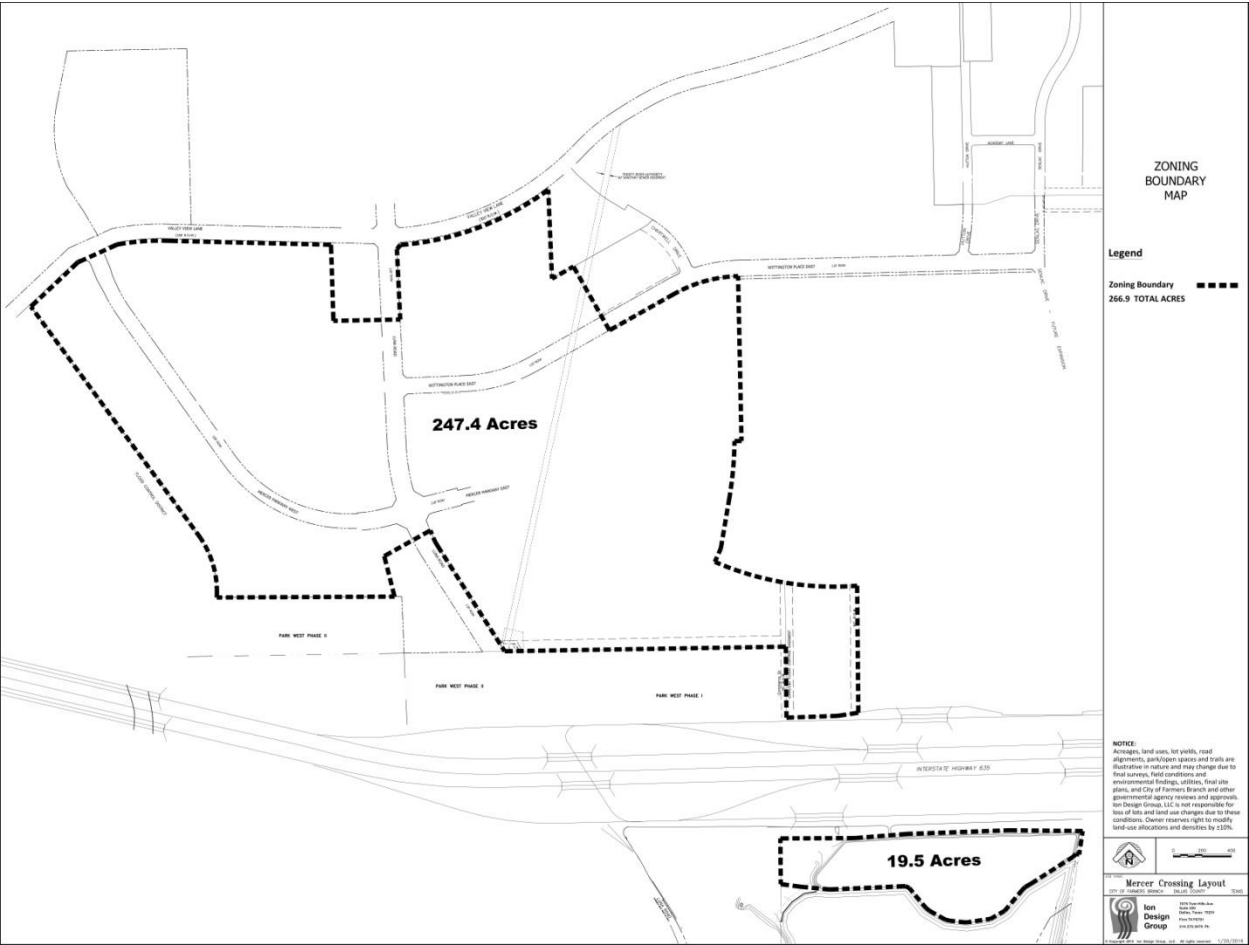
SIGNED AND AGREED this \_\_\_\_ day of \_\_\_\_\_, 2017.

**Developer: CADG Mercer Crossing  
Holding, LLC**

By: \_\_\_\_\_  
Mehrdad Moayedi, Manager



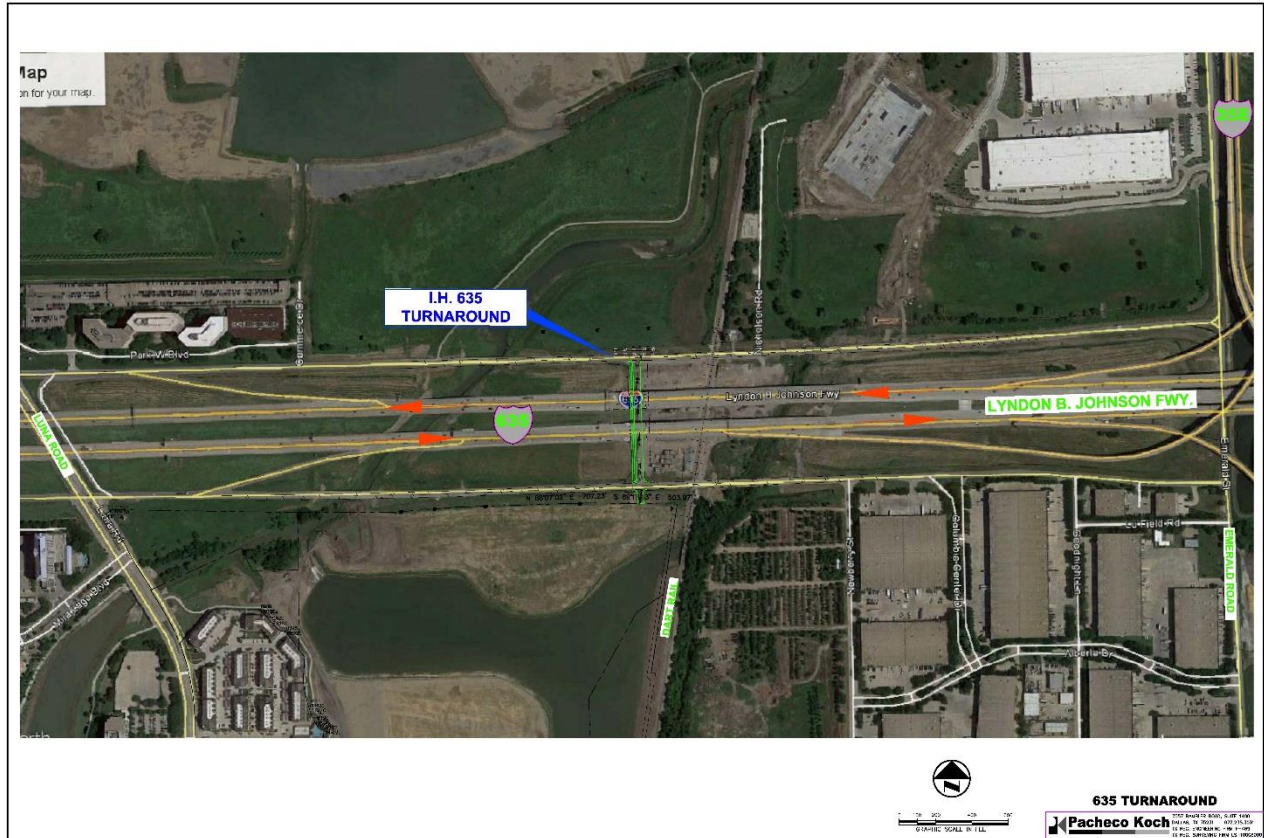
**EXHIBIT “A”**  
**Boundaries of Planned Development District No. 99**



## EXHIBIT "B"

### Project Location

The construction of one-lane U-turns on eastbound and westbound frontage roads on IH 635 at 2950 feet East of Luna Road in the City of Farmers Branch, Dallas County



**EXHIBIT “C”**  
**Copy of TxDOT AFA**

(To Be Attached)