

**Vestavia Hills  
City Council Agenda  
November 25, 2013  
5:00 PM**

1. Call to Order
2. Roll Call
3. Invocation – Jim Sharp
4. Pledge of Allegiance
5. Announcements, Candidate and Guest Recognition
  - a. Park Board Interviews
  - b. Library Board Interviews
6. City Manager’s Report
7. Councilors’ Reports

**Old Business**

8. Resolution Number 4519 – A Resolution Accepting An RFP And Authorizing The Mayor And City Manager To Execute And Deliver An Agreement For Construction Management Services For The New Proposed City Hall Facility (*public hearing*)
9. Resolution Number 4520 – A Resolution Authorizing The City Manager To Execute And Deliver A Contract For Services Related To A Citizens Survey (*public hearing*)
10. Resolution Number 4521 – A Resolution Authorizing The City Manager To Take Actions Necessary To Repair And/Or Resurface A Street (*public hearing*)

**New Business**

11. Resolution Number 4523 – A Resolution Authorizing The Mayor And City Manager To Enter Into An Agreement With WEBQA, Inc., For A Citizen Reporting Management System
12. Resolution Number 4524 – A Resolution Authorizing The City Manager To Enter Into An Agreement With Environmental Design Studio For Planning And Design Services Of Proposed Gateway Signage For The Rocky Ridge Road Area
13. Resolution Number 4525 – A Resolution Authorizing The City Manager To Enter Into An Agreement With Walter Schoel Engineering Company, Inc., For Preliminary Development Services For A Planned Development Adjacent To Little Shades Creek

14. Resolution Number 4526 – A Resolution Authorizing Certain Action With Respect To General Obligation Warrants, Series 2013-A/2014, Of The City Of Vestavia Hills, Alabama
15. Resolution Number 4527 – A Resolution Declaring Certain Personal Property As Surplus And Directing The Sale/Disposal Of Said Property

**New Business (Requesting Unanimous Consent)**

16. Resolution Number 4528 – A Resolution Authorizing The City Manager To Take All Actions Necessary To Demolish The Structure Located At 1939 Old Creek Trail (*public hearing*)

**First Reading (No Action Taken At This Meeting)**

17. Resolution Number 4522 – A Resolution Ordering The Demolition Of A Building Or Structure Located At 4321 Dolly Ridge Road, Vestavia Hills, Alabama, Parcel ID# 28-22-2-010-011.000, In Compliance With Sections 11-40-30 Through 11-40-36, Sections 11-53B-1 Through 11-53B-16, Inclusive Of The Code Of Alabama, And Incompliance With Ordinance Number 2382 Of The City Of Vestavia Hills, Alabama; And Calling For The City Of Vestavia Hills To Cause Said Demolition To Be Performed And Directing The City Attorney And The City Clerk To Cause The Cost Of Such Demolition To Be Charged Against The Land On Which The Building Or Structure Exists As A Municipal Lien Or Cause Such Cost To Be Recovered In A Suit At Law Against The Owner Or Owners (*public hearing*)
18. Resolution Number 4529 – A Resolution Authorizing The City Manager To Take All Actions Necessary To Secure A Separate Meter And Breaker Box For Sicard Hollow Park (*Public Hearing*)
19. Resolution Number 4530 – Vacation – 10’ Sanitary Sewer Easement On Lot 1, Vestavia Office Park; Taralane Properties; Randy Phillips, Representing (*Public Hearing*)
20. Resolution Number 4531 - A Resolution Authorizing The City Manager To Execute And Deliver An Agreement To Conduct An Asbestos Survey And An Environmental Inspection Determining The Presence Of Polychlorinated Biphenyls (PCB), Mercury And Chlorofluorocarbons (CFC) At The Old Motor Lodge Motel, 1459 Montgomery Highway, Vestavia Hills, Alabama
21. Citizens Comments
22. Motion For Adjournment

**RESOLUTION NUMBER 4519**

**A RESOLUTION ACCEPTING AN RFP AND AUTHORIZING THE  
MAYOR AND CITY MANAGER TO EXECUTE AN AGREEMENT FOR  
CONSTRUCTION MANAGEMENT SERVICES FOR THE NEW  
PROPOSED CITY HALL FACILITY**

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VESTAVIA  
HILLS, ALABAMA, AS FOLLOWS:**

1. The City Council hereby accepts the RFP submitted by BL Harbert International LLC for construction management services for the new proposed City Hall facility; and
2. The Mayor and City Manager are hereby authorized to execute and deliver an agreement for construction management services pursuant to the agreement; and
3. Said agreement is marked as “Exhibit A,” a copy of which is attached to and incorporated into this Resolution Number 4519 as though written fully therein; and
4. This Resolution Number 4519 shall become effective immediately upon adoption and approval.

**APPROVED and ADOPTED** this the 25<sup>th</sup> day of November, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk

# AIA<sup>®</sup> Document C132<sup>™</sup> – 2009

## Standard Form of Agreement Between Owner and Construction Manager as Adviser

**AGREEMENT** made as of the 4th day of November in the year 2013  
(In words, indicate day, month and year.)

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

The City of Vestavia Hills  
513 Montgomery Highway  
Vestavia Hills, AL 35216

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

B. L Harbert International LLC  
820 Shades Creek Parkway  
Suite 3000  
Birmingham, AL 35209

for the following Project:  
(Name, location and detailed description)

Vestavia Hills City Hall  
Vestavia Hills, AL  
New City Hall

The Architect:  
(Name, legal status, address and other information)

Williams Blackstock Architects  
2204 1<sup>st</sup> Avenue South #200  
Birmingham, AL 35233

The Owner and Construction Manager agree as follows.

### ADDITIONS AND DELETIONS:

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

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

This document is intended to be used in conjunction with AIA Documents A132<sup>™</sup>–2009, Standard Form of Agreement Between Owner and Contractor, Construction Manager as Adviser Edition; A232<sup>™</sup>–2009, General Conditions of the Contract for Construction, Construction Manager as Adviser Edition; and B132<sup>™</sup>–2009, Standard Form of Agreement Between Owner and Architect, Construction Manager as Adviser Edition.

AIA Document A232<sup>™</sup>–2009 is adopted in this document by reference. Do not use with other general conditions unless this document is modified.



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### ARTICLE 1 INITIAL INFORMATION

§ 1.1 This Agreement is based on the Initial Information set forth in this Section 1.1.

*(Note the disposition for the following items by inserting the requested information or a statement such as "not applicable," "unknown at time of execution" or "to be determined later by mutual agreement.")*

§ 1.1.1 The Owner's program for the Project:

*(Identify documentation or state the manner in which the program will be developed.)*

The new City Hall facility will be approximately 50,000 to 60,000 square feet in a new multi-story facility that will primarily include: Council Chamber (seat 120), Courtroom (seat 120), Departmental offices for City Administration, Clerk, Finance, Public Services, Building Safety, Fire Administration, IT, Police Administration, Magistrate, and Holding Facility (approx.. 12 cells) with associated booking, evidence rooms, armory, and enclosed sallyport.

§ 1.1.2 The Project's physical characteristics:

*(Identify or describe, if appropriate, size, location, dimensions, or other pertinent information, such as geotechnical reports; site, boundary and topographic surveys; traffic and utility studies; availability of public and private utilities and services; legal description of the site; etc.)*

The site is located on approximately 3.6 acres of land off of Highway 31 at the existing Vestavia Hills Plaza Shopping Center with two existing buildings on the property. The existing Food World building and adjacent Joe's Ranch House will be demolished to provide land for the new facility

§ 1.1.3 The Owner's budget for the Cost of the Work, as defined in Section 6.1:

*(Provide total and, if known, a line item breakdown.)*

An overall project budget has not been fully defined at this time until the final space programming process has been completed to determine the exact size and needs of the project.

§ 1.1.4 The Owner's anticipated design and construction schedule:

**.1 Design phase milestone dates, if any:**

A preliminary design and construction schedule has been developed with the City at include general overview timeframes for completing design and construction documents in February/March 2014, with bidding and construction to follow with completion envisioned for mid-2015 for occupancy.

The Architect will be responsible for the Design phase schedule, and the Construction Manager will be responsible for developing the bidding and construction schedule. The entire team will work with the City to discuss pros/cons as well as scope for a potential early building demolition/site preparation package, with the potential need for such package being largely influenced by the geotechnical evaluation.

**.2 Commencement of construction:**

To be determined

**.3 Substantial Completion date or milestone dates:**

To be determined

**.4 Other:**

**§ 1.1.5** The Owner intends the following procurement method for the Project:  
*(Identify method such as competitive bid, negotiated Contract or multiple Prime Contracts.)*

Competitively bid multiple prime contracts.

**§ 1.1.6** The Owner's requirements for accelerated or fast-track scheduling, multiple bid packages, or phased construction are set forth below:  
*(List number and type of bid/procurement packages.)*

To be determined

**§ 1.1.7** Other Project information:  
*(Identify special characteristics or needs of the Project not provided elsewhere, such as environmentally responsible design or historic preservation requirements.)*

The project will be designed and constructed with sustainable principles that will be investigated and researched during the design process, but at this time the project will not pursue LEED certification.

**§ 1.1.8** The Owner identifies the following representative in accordance with Section 5.5:  
*(List name, address and other information.)*

Jeff Downes  
City Manager  
City of Vestavia Hills  
513 Montgomery Highway  
Vestavia Hills, AL 35216

**§ 1.1.9** The persons or entities, in addition to the Owner's representative, who are required to review the Construction Manager's submittals to the Owner are as follows:  
*(List name, address and other information.)*

Jeff Downes

City Manager  
City of Vestavia Hills  
513 Montgomery Highway  
Vestavia Hills, AL 35216

§ 1.1.10 Unless provided by the Construction Manager, the Owner will retain the following consultants and contractors:

*(List name, legal status, address and other information.)*

.1 Land Surveyor:

.2 Geotechnical Engineer:

.3 Civil Engineer:

.4 Other:

*(List any other consultants retained by the Owner, such as a Project or Program Manager, or construction contractor.)*

§ 1.1.11 The Construction Manager identifies the following representative in accordance with Section 2.4:

*(List name, address and other information.)*

Stephen Riley  
B. L. Harbert International LLC  
820 Shades Creek Parkway  
Suite 3000  
Birmingham, AL 35209

§ 1.1.12 The Construction Manager's staffing plan as required under Section 3.3.2 shall include:

*(List any specific requirements and personnel to be included in the staffing plan, if known.)*

One part time project executive  
One part time preconstruction manager during preconstruction phase  
One part time cost estimator during preconstruction phase  
One full time project manager from commencement to substantial completion  
One full time project superintendent from commencement through receipt of certificate of occupancy  
One full time assistant superintendent during key construction activities

One part time administrative assistant from commencement to project close-out

§ 1.1.13 The Construction Manager's consultants retained under Basic Services, if any:

.1 Cost Estimator:  
(List name, legal status, address and other information.)

N/A

.2 Other consultants:

N/A

§ 1.1.14 The Construction Manager's consultants retained under Additional Services:

N/A

§ 1.1.15 Other Initial Information on which the Agreement is based:

N/A

§ 1.2 The Owner and Construction Manager may rely on the Initial Information. Both parties, however, recognize that such information may materially change and, in that event, the Owner and the Construction Manager shall appropriately adjust the schedules, the Construction Manager's services and the Construction Manager's compensation.

## ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

§ 2.1 The Construction Manager shall provide the services as set forth in this Agreement.

§ 2.2 The Construction Manager shall perform its services consistent with the skill and care ordinarily provided by construction managers practicing in the same or similar locality under the same or similar circumstances. The Construction Manager shall perform its services as expeditiously as is consistent with such skill and care and the orderly progress of the Project.

§ 2.3 The Construction Manager shall provide its services in conjunction with the services of an Architect as described in AIA Document B132™-2009, Standard Form of Agreement Between Owner and Architect, Construction Manager as Adviser Edition. The Construction Manager shall not be responsible for actions taken by the Architect.

§ 2.4 The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

§ 2.5 Except with the Owner's knowledge and consent, the Construction Manager shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Construction Manager's judgment with respect to this Project.

§ 2.6 The Construction Manager shall maintain the following insurance for the duration of this Agreement. If any of the requirements set forth below exceed the types and limits the Construction Manager normally maintains, the Owner shall reimburse the Construction Manager for any additional cost.

§ 2.6.1 Comprehensive General Liability with policy limits of not less than Two Million Dollars Per Occurrence and Four Million Dollars Aggregate (\$ 2,000,000.00/\$4,000,000.00 ) for each occurrence and in the aggregate for bodily injury and property damage.

Init.

§ 2.6.2 Automobile Liability covering owned and rented vehicles operated by the Construction Manager with policy limits of not less than Two Million Dollars CSL (\$ \$2,000,000.00 ) combined single limit and aggregate for bodily injury and property damage.

§ 2.6.3 The Construction Manager may use umbrella or excess liability insurance to achieve the required coverage for Comprehensive General Liability and Automobile Liability, provided that such umbrella or excess insurance results in the same type of coverage as required for the individual policies.

§ 2.6.4 Workers' Compensation at statutory limits and Employers Liability with a policy limit of not less than One Million Dollars (\$ 1,000,000.00 ).

§ 2.6.5 Professional Liability covering the Construction Manager's negligent acts, errors and omissions in its performance of services with policy limits of not less than Three Million Dollars (\$ \$3,000,000.00 ) per claim and in the aggregate.

§ 2.6.6 The Construction Manager shall provide to the Owner certificates of insurance evidencing compliance with the requirements in this Section 2.6. The certificates will show the Owner as an additional insured on the Comprehensive General Liability, Automobile Liability, umbrella or excess policies.

### ARTICLE 3 SCOPE OF CONSTRUCTION MANAGER'S BASIC SERVICES

#### § 3.1 Definition

The Construction Manager's Basic Services consist of those described in Sections 3.2 and 3.3 and include usual and customary construction coordination and scheduling, constructability review, cost estimating, and allocation of construction activities among the Multiple Prime Contractors.

#### § 3.2 Preconstruction Phase

§ 3.2.1 The Construction Manager shall review the program furnished by the Owner and any evaluation of the Owner's program provided by the Architect, to ascertain the requirements of the Project and shall arrive at a mutual understanding of such requirements with the Owner and Architect.

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

§ 3.2.3 The Construction Manager shall prepare, and deliver to the Owner, a written Construction Management Plan that includes, at a minimum, the following: (1) preliminary evaluations required in Section 3.2.2, (2) a Project schedule, (3) cost estimates, (4) recommendations for Project delivery method, and (5) Contractors' scopes of Work, if multiple Contractors or fast-track construction will be used. The Construction Manager shall periodically update the Construction Management Plan over the course of the Project.

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

§ 3.2.5 The Construction Manager shall expeditiously review design documents during their development and advise the Owner and Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also provide recommendations to the Owner and Architect on constructability, availability of materials and labor, sequencing for phased construction, time requirements for procurement, installation and construction, and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

§ 3.2.6 The Construction Manager shall prepare and periodically update the Project schedule included in the Construction Management Plan for the Architect's review and the Owner's acceptance. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule relating to the performance of the Architect's services. The Project schedule shall coordinate and integrate the Construction Manager's services, the

Architect's services, other Owner consultants' services, and the Owner's responsibilities and highlight items that could affect the Project's timely completion.

§ 3.2.7 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals agreed to by the Owner, Construction Manager and Architect, estimates of the Cost of the Work of increasing detail and refinement. The Construction Manager shall include appropriate contingencies for design, bidding or negotiating, price escalation, and market conditions in the estimates of the Cost of the Work. Such estimates shall be provided for the Architect's review and the Owner's approval. The Construction Manager shall advise the Owner and Architect if it appears that the Cost of the Work may exceed the Owner's budget and make recommendations for corrective action.

§ 3.2.8 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall consult with the Owner and Architect and make recommendations whenever the Construction Manager determines that design details adversely affect constructability, cost or schedules.

§ 3.2.9 The Construction Manager shall provide recommendations and information to the Owner and Architect regarding the assignment of responsibilities for temporary Project facilities and equipment, materials and services for common use of the Contractors. The Construction Manager shall verify that such requirements and assignment of responsibilities are included in the proposed Contract Documents.

§ 3.2.10 The Construction Manager shall provide recommendations and information to the Owner regarding the allocation of responsibilities for safety programs among the Contractors.

§ 3.2.11 The Construction Manager shall provide recommendations to the Owner on the division of the Project into individual Contracts for the construction of various categories of Work, including the method to be used for selecting Contractors and awarding Contracts. If multiple Contracts are to be awarded, the Construction Manager shall review the Drawings and Specifications and make recommendations as required to provide that (1) the Work of the Contractors is coordinated, (2) all requirements for the Project are assigned to the appropriate Contract, (3) the likelihood of jurisdictional disputes is minimized, and (4) proper coordination is provided for phased construction.

§ 3.2.12 The Construction Manager shall update the Project schedule to include the components of the Work, including phasing of construction, times of commencement and completion required of each Contractor, ordering and delivery of products, including those that must be ordered well in advance of construction, and the occupancy requirements of the Owner.

§ 3.2.13 The Construction Manager shall expedite and coordinate the ordering and delivery of materials, including those that must be ordered well in advance of construction.

§ 3.2.14 The Construction Manager shall assist the Owner in selecting, retaining and coordinating the professional services of surveyors, special consultants and testing laboratories required for the Project.

§ 3.2.15 The Construction Manager shall provide an analysis of the types and quantities of labor required for the Project and review the availability of appropriate categories of labor required for critical phases. The Construction Manager shall make recommendations for actions designed to minimize adverse effects of labor shortages.

§ 3.2.16 The Construction Manager shall assist the Owner in obtaining information regarding applicable requirements for equal employment opportunity programs, and other programs as may be required by governmental and for quasi governmental authorities for inclusion in the Contract Documents.

§ 3.2.17 Following the Owner's approval of the Drawings and Specifications, the Construction Manager shall update and submit the latest estimate of the Cost of the Work and the Project schedule for the Architect's review and the Owner's approval.

§ 3.2.18 The Construction Manager shall submit the list of prospective bidders for the Architect's review and the Owner's approval.



**§ 3.2.19** The Construction Manager shall develop bidders' interest in the Project and establish bidding schedules. The Construction Manager, with the assistance of the Architect, shall issue bidding documents to bidders and conduct pre-bid conferences with prospective bidders. The Construction Manager shall issue the current Project schedule with each set of bidding documents. The Construction Manager shall assist the Architect with regard to questions from bidders and with the issuance of addenda.

**§ 3.2.20** The Construction Manager shall receive bids, prepare bid analyses and make recommendations to the Owner for the Owner's award of Contracts or rejection of bids.

**§ 3.2.21** The Construction Manager shall assist the Owner in preparing Construction Contracts and advise the Owner on the acceptability of Subcontractors and material suppliers proposed by Multiple Prime Contractors.

**§ 3.2.22** The Construction Manager shall assist the Owner in obtaining building permits and special permits for permanent improvements, except for permits required to be obtained directly by the various Multiple Prime Contractors. The Construction Manager shall verify that the Owner has paid applicable fees and assessments. The Construction Manager shall assist the Owner and Architect in connection with the Owner's responsibility for filing documents required for the approvals of governmental authorities having jurisdiction over the Project.

**§ 3.3 Construction Phase Administration of the Construction Contract**

**§ 3.3.1** Subject to Section 4.3, the Construction Manager's responsibility to provide Construction Phase Services commences with the award of the initial Contract for Construction and terminates on the date the Architect issues the final Certificate for Payment.

**§ 3.3.2** The Construction Manager shall provide a staffing plan to include one or more representatives who shall be in attendance at the Project site whenever the Work is being performed.

**§ 3.3.3** The Construction Manager shall provide on-site administration of the Contracts for Construction in cooperation with the Architect as set forth below and in AIA Document A232™-2009, General Conditions of the Contract for Construction, Construction Manager as Adviser Edition. If the Owner and Contractor modify AIA Document A232-2009, those modifications shall not affect the Construction Manager's services under this Agreement unless the Owner and the Construction Manager amend this Agreement.

**§ 3.3.4** The Construction Manager shall provide administrative, management and related services to coordinate scheduled activities and responsibilities of the Multiple Prime Contractors with each other and with those of the Construction Manager, the Owner and the Architect. The Construction Manager shall coordinate the activities of the Multiple Prime Contractors in accordance with the latest approved Project schedule and the Contract Documents.

**§ 3.3.5** Utilizing the construction schedules provided by the Multiple Prime Contractors, the Construction Manager shall update the Project schedule, incorporating the activities of the Owner, Architect, and Multiple Prime Contractors on the Project, including activity sequences and durations, allocation of labor and materials, processing of Shop Drawings, Product Data and Samples, and delivery and procurement of products, including those that must be ordered well in advance of construction. The Project schedule shall include the Owner's occupancy requirements showing portions of the Project having occupancy priority. The Construction Manager shall update and reissue the Project schedule as required to show current conditions. If an update indicates that the previously approved Project schedule may not be met, the Construction Manager shall recommend corrective action, if any, to the Owner and Architect.

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

**§ 3.3.7** Utilizing information from the Multiple Prime Contractors, the Construction Manager shall schedule and coordinate the sequence of construction and assignment of space in areas where the Multiple Prime Contractors are performing Work, in accordance with the Contract Documents and the latest approved Project schedule.

**§ 3.3.8** The Construction Manager shall schedule all tests and inspections required by the Contract Documents or governmental authorities, and arrange for the delivery of test and inspection reports to the Owner and Architect.

**§ 3.3.9** The Construction Manager shall endeavor to obtain satisfactory performance from each of the Multiple Prime Contractors. The Construction Manager shall recommend courses of action to the Owner when requirements of a Contract are not being fulfilled.

**§ 3.3.10** The Construction Manager shall monitor and evaluate actual costs for activities in progress and estimates for uncompleted tasks and advise the Owner and Architect as to variances between actual and budgeted or estimated costs. If the Contractor is required to submit a Control Estimate, the Construction Manager shall meet with the Owner and Contractor to review the Control Estimate. The Construction Manager shall promptly notify the Contractor if there are any inconsistencies or inaccuracies in the information presented. The Construction Manager shall also report the Contractor's cost control information to the Owner.

**§ 3.3.11** The Construction Manager shall develop cash flow reports and forecasts for the Project.

**§ 3.3.12** The Construction Manager shall maintain accounting records on authorized Work performed under unit costs, additional Work performed on the basis of actual costs of labor and materials, and other Work requiring accounting records.

**§ 3.3.12.1** The Construction Manager shall develop and implement procedures for the review and processing of Applications for Payment by Multiple Prime Contractors for progress and final payments.

**§ 3.3.12.2** Not more frequently than monthly, the Construction Manager shall review and certify the amounts due the respective Contractors as follows:

- .1** Where there is only one Contractor responsible for performing the Work, the Construction Manager shall, within seven days after the Construction Manager receives the Contractor's Application for Payment, review the Application, certify the amount the Construction Manager determines is due the Contractor, and forward the Contractor's Application and Certificate for Payment to the Architect.
- .2** Where there are Multiple Prime Contractors responsible for performing different portions of the Project, the Construction Manager shall, within seven days after the Construction Manager receives each Contractor's Application for Payment: (1) review the Applications and certify the amount the Construction Manager determines is due each Contractor, (2) prepare a Summary of Contractors' Applications for Payment by summarizing information from each Contractor's Application for Payment, (3) prepare a Project Application and Certificate for Payment, (4) certify the total amount the Construction Manager determines is due all Multiple Prime Contractors collectively, and (5) forward the Summary of Contractors' Applications for Payment and Project Application and Certificate for Payment to the Architect.

**§ 3.3.12.3** The Construction Manager's certification for payment shall constitute a representation to the Owner, based on the Construction Manager's evaluations of the Work and on the data comprising the Contractors' Applications for Payment, that, to the best of the Construction Manager's knowledge, information and belief, the Work has progressed to the point indicated and the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Construction Manager. The issuance of a Certificate for Payment shall further constitute a recommendation to the Architect and Owner that the Contractor be paid the amount certified.

**§ 3.3.12.4** The certification of an Application for Payment or a Project Application for Payment by the Construction Manager shall not be a representation that the Construction Manager has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work; (2) reviewed construction means, methods, techniques, sequences for the Contractor's own Work, or procedures; (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment; or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

**§ 3.3.13** The Construction Manager shall review the safety programs developed by each of the Multiple Prime Contractors solely and exclusively for purposes of coordinating the safety programs with those of the other Contractors and for making recommendations to the Owner for any safety programs not included in the Work of the

**Multiple Prime Contractors.** The Construction Manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the Contractor, Multiple Prime Contractors, Subcontractors, agents or employees of the Contractors or Multiple Prime Contractors or Subcontractors, or any other persons performing portions of the Work and not directly employed by the Construction Manager.

**§ 3.3.14** The Construction Manager shall determine in general that the Work of each Contractor is being performed in accordance with the requirements of the Contract Documents and notify the Owner, Contractor and Architect of defects and deficiencies in the Work. The Construction Manager shall have the authority to reject Work that does not conform to the Contract Documents and shall notify the Architect about the rejection. The failure of the Construction Manager to reject Work shall not constitute the acceptance of the Work. The Construction Manager shall record any rejection of Work in its daily log and include information regarding the rejected Work in its progress reports to the Architect and Owner pursuant to Section 3.3.20.1. Upon written authorization from the Owner, the Construction Manager may require and make arrangements for additional inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed, and the Construction Manager shall give timely notice to the Architect of when and where the tests and inspections are to be made so that the Architect may be present for such procedures.

**§ 3.3.15** The Construction Manager shall advise and consult with the Owner and Architect during the performance of its Construction Phase Services. The Construction Manager shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Construction Manager shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors, since these are solely the Contractor's rights and responsibilities under the Contract Documents. The Construction Manager shall not be responsible for a Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Construction Manager shall be responsible for the Construction Manager's negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or Multiple Prime Contractors, Subcontractors, or their agents or employees, or any other persons or any other persons or entities performing portions of the Work.

**§ 3.3.16** The Construction Manager shall transmit to the Architect requests for interpretations and requests for information of the meaning and intent of the Drawings and Specifications with its written recommendation, and assist in the resolution of questions that may arise.

**§ 3.3.17** The Construction Manager shall review requests for changes, assist in negotiating Contractors' proposals, submit recommendations to the Architect and Owner, and, if they are accepted, prepare Change Orders and Construction Change Directives that incorporate the Architect's modifications to the Contract Documents.

**§ 3.3.18** The Construction Manager shall assist the Initial Decision Maker in the review, evaluation and documentation of Claims, subject to Section 4.3.1.7.

**§ 3.3.19** Utilizing the submittal schedules provided by each Contractor, the Construction Manager shall prepare, and revise as necessary, a Project submittal schedule incorporating information from the Owner, Owner's consultants, Owner's separate contractors and vendors, governmental agencies, and all other participants in the Project under the management of the Construction Manager. The Project submittal schedule and any revisions shall be submitted to the Architect for approval. The Construction Manager shall promptly review all Shop Drawings, Product Data, Samples and other submittals from the Multiple Prime Contractors for compliance with the submittal requirements of the Contract, coordinate submittals with information contained in related documents, and transmit to the Architect those that the Construction Manager recommends for approval. The Construction Manager's actions shall be taken in accordance with the Project submittal schedule approved by the Architect, or in the absence of an approved Project submittal schedule, with such reasonable promptness as to cause no delay in the Work or in the activities of the Contractor, other Multiple Prime Contractors, the Owner, or the Architect.

**§ 3.3.20** The Construction Manager shall keep a daily log containing a record of weather, each Contractor's Work on the site, number of workers, identification of equipment, Work accomplished, problems encountered, and other similar relevant data as the Owner may require.

**§ 3.3.20.1** The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information identified below:

- .1 Work completed for the period;
- .2 Project schedule status;
- .3 Submittal schedule and status report, including a summary of remaining and outstanding submittals;
- .4 Request for information, Change Order, and Construction Change Directive status reports;
- .5 Tests and inspection reports;
- .6 Status report of nonconforming and rejected Work;
- .7 Daily logs;
- .8 Summary of all Multiple Prime Contractors' Applications for Payment;
- .9 Cumulative total of the Cost of the Work to date including the Construction Manager's compensation and reimbursable expenses at the job site, if any;
- .10 Cash-flow and forecast reports; and
- .11 Any other items the Owner may require:

N/A

**§ 3.3.20.2** In addition, for Projects constructed on the basis of the Cost of the Work, the Construction Manager shall include the following additional information in its progress reports:

- .1 Contractor's work force report;
- .2 Equipment utilization report;
- .3 Cost summary, comparing actual costs to updated cost estimates; and
- .4 Any other items as the Owner may require:

N/A

**§ 3.3.21** Utilizing the documents provided by the Contractor, the Construction Manager shall maintain at the site one copy of all Contracts, Drawings, Specifications, addenda, Change Orders and other Modifications, in good order and marked currently to record all changes and selections made during construction, and in addition, approved Shop Drawings, Product Data, Samples and similar required submittals. The Construction Manager shall maintain records, in duplicate, of principal building layout lines, elevations of the bottom of footings, floor levels and key site elevations certified by a qualified surveyor or professional engineer. The Construction Manager shall make all such records available to the Architect and the Contractor, and upon completion of the Project, shall deliver them to the Owner.

**§ 3.3.22** The Construction Manager shall arrange for the delivery, storage, protection and security of Owner-purchased materials, systems and equipment that are a part of the Project until such items are incorporated into the Work.

**§ 3.3.23** With the Architect and the Owner's maintenance personnel, the Construction Manager shall observe the Contractor's or Multiple Prime Contractors' final testing and start-up of utilities, operational systems and equipment and observe any commissioning as the Contract Documents may require.

**§ 3.3.24** When the Construction Manager considers each Contractor's Work or a designated portion thereof is substantially complete, the Construction Manager shall, jointly with the Contractor, prepare for the Architect a list of incomplete or unsatisfactory items and a schedule for their completion. The Construction Manager shall assist the Architect in conducting inspections to determine whether the Work or designated portion thereof is substantially complete.

**§ 3.3.25** When the Work or designated portion thereof is substantially complete, the Construction Manager shall prepare, and the Construction Manager and Architect shall execute, a Certificate of Substantial Completion. The Construction Manager shall submit the executed Certificate to the Owner and Contractor. The Construction Manager shall coordinate the correction and completion of the Work. Following issuance of a Certificate of Substantial Completion of the Work or a designated portion thereof, the Construction Manager shall evaluate the completion of the Work of the Contractor or Multiple Prime Contractors and make recommendations to the Architect when Work is ready for final inspection. The Construction Manager shall assist the Architect in conducting final inspections.

§ 3.3.26 The Construction Manager shall forward to the Owner, with a copy to the Architect, the following information received from the Contractor or Multiple Prime Contractors: (1) certificates of insurance received from the Contractor or Multiple Prime Contractors; (2) consent of surety or sureties, if any, to reduction in or partial release of retainage or the making of final payment; (3) affidavits, receipts, releases and waivers of liens or bonds indemnifying the Owner against liens; and (4) any other documentation required of the Contractor under the Contract Documents, including warranties and similar submittals.

§ 3.3.27 The Construction Manager shall deliver all keys, manuals, record drawings and maintenance stocks to the Owner. The Construction Manager shall forward to the Architect a final Project Application for Payment and Project Certificate for Payment or final Application for Payment and final Certificate for Payment upon the Contractor's compliance with the requirements of the Contract Documents.

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

§ 3.3.29 Upon request of the Owner, and prior to the expiration of one year from the date of Substantial Completion, the Construction Manager shall, without additional compensation, conduct a meeting with the Owner to review the facility operations and performance.

#### ARTICLE 4 ADDITIONAL SERVICES

§ 4.1 Additional Services listed below are not included in Basic Services but may be required for the Project. The Construction Manager shall provide the listed Additional Services only if specifically designated in the table below as the Construction Manager's responsibility, and the Owner shall compensate the Construction Manager as provided in Section 11.2.

*(Designate the Additional Services the Construction Manager shall provide in the second column of the table below. In the third column indicate whether the service description is located in Section 4.2 or in an attached exhibit. If in an exhibit, identify the exhibit.)*

| Services   | Responsibility<br>(Construction Manager,<br>Owner or<br>Not Provided) | Location of Service Description<br>(Section 4.2 below or in an exhibit<br>attached to this document and<br>identified below) |
|--|---|--|
| § 4.1.1 Measured drawings  | Owner   |  |
| § 4.1.2 Architectural interior design<br>(B252™-2007)                | Owner   |  |
| § 4.1.3 Tenant-related services                                      | Not provided  |  |
| § 4.1.4 Commissioning (B211™-2007)                                   | Owner – with assistance<br>by Construction Manager                    |  |
| § 4.1.5 LEED® certification (B214™-2007)                             | Owner – with assistance<br>by Construction Manager                    |  |
| § 4.1.6 Furniture, furnishings, and equipment<br>design (B253™-2007) | Owner   |  |
|  |   |  |

§ 4.2 Insert a description of each Additional Service designated in Section 4.1, if not further described in an exhibit attached to this document.

N/A

§ 4.3 Additional Services may be provided after execution of this Agreement, without invalidating this Agreement. Except for services required due to the fault of the Construction Manager, any Additional Services provided in accordance with this Section 4.3 shall entitle the Construction Manager to compensation pursuant to Section 11.3.

§ 4.3.1 Upon recognizing the need to perform the following Additional Services, the Construction Manager shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The

Construction Manager shall not proceed to provide the following services until the Construction Manager receives the Owner's written authorization:

- .1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including, but not limited to, size, quality, complexity, the Owner's schedule or budget for Cost of the Work, or procurement or delivery method, or bid packages in addition to those listed in Section 1.1.6;
- .2 Services necessitated by the enactment or revision of codes, laws or regulations or official interpretations after the date of this Agreement;
- .3 Preparation of documentation for alternate bid or proposal requests proposed by the Owner;
- .4 Preparation for, and attendance at, a public presentation, meeting or hearing;
- .5 Preparation for, and attendance at a dispute resolution proceeding or legal proceeding, except where the Construction Manager is party thereto;
- .6 Providing consultation concerning replacement of Work resulting from fire or other cause during construction and furnishing services required in connection with the replacement of such Work;
- .7 Assistance to the Initial Decision Maker, if other than the Architect; or
- .8 Service as the Initial Decision Maker.

§ 4.3.2 To avoid delay in the Construction Phase, the Construction Manager shall provide the following Additional Services, notify the Owner with reasonable promptness, and explain the facts and circumstances giving rise to the need. If the Owner subsequently determines that all or parts of those services are not required, the Owner shall give prompt written notice to the Construction Manager, and the Owner shall have no further obligation to compensate the Construction Manager for those services:

- .1 Services in evaluating an extensive number of Claims submitted by a Contractor or others in connection with the Work when the Architect is serving as the Initial Decision Maker.
- .2 To the extent the Construction Manager's Basic Services are affected, providing Construction Phase Services 60 days after (1) the date of Substantial Completion of the Work or (2) the anticipated date of Substantial Completion, identified in Initial Information, whichever is earlier.
- .3 Services required in an emergency to coordinate the activities of a Contractor or Multiple Prime Contractors in the event of risk of personal injury or serious property damage, consistent with Section 3.3.13.

§ 4.3.3 If the services covered by this Agreement have not been completed within ( eighteen (18) ) months of the date of this Agreement, through no fault of the Construction Manager, extension of the Construction Manager's services beyond that time shall be compensated as Additional Services.

## ARTICLE 5 OWNER'S RESPONSIBILITIES

§ 5.1 Unless otherwise provided for under this Agreement, the Owner shall provide information in a timely manner regarding requirements for and limitations on the Project, including the Owner's program, other objectives, schedule, constraints and criteria, special equipment, systems, and site requirements. Within 15 days after receipt of a written request from the Construction Manager, the Owner shall furnish the requested information as necessary and relevant for the Construction Manager to evaluate, give notice of, or enforce any lien rights, if any.

§ 5.2 The Owner shall establish and periodically update the Owner's budget for the Project, including (1) the budget for the Cost of the Work as defined in Section 6.1, (2) the Owner's other costs, and (3) reasonable contingencies related to all of these costs. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner shall notify the Construction Manager and Architect. The Owner and the Architect, in consultation with the Construction Manager, shall thereafter agree to a corresponding change in the budget for the Cost of the Work or in the Project's scope and quality.

§ 5.3 The Owner acknowledges that accelerated, phased or fast-track scheduling provides a benefit, but also carries with it the risk of additional costs. If the Owner selects accelerated, phased or fast-track scheduling, the Owner agrees to include in the budget for the Project sufficient contingencies to cover such costs.

§ 5.4 The Owner shall retain an Architect to provide services, duties and responsibilities as described in AIA Document B132-2009, Standard Form of Agreement Between Owner and Architect, Construction Manager as Adviser Edition. The Owner shall provide the Construction Manager a copy of the executed agreement between the Owner and Architect, and any further modifications to the agreement.



**§ 5.5** The Owner shall identify a representative authorized to act on the Owner's behalf with respect to the Project. The Owner shall render decisions pertaining to documents the Construction Manager submits in a timely manner in order to avoid unreasonable delay in the orderly and sequential progress of the Construction Manager's services.

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

**§ 5.7** Unless provided by the Construction Manager, the Owner shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

**§ 5.8** The Owner shall coordinate the services of its own consultants with those services provided by the Construction Manager. Upon the Construction Manager's request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner's consultants. The Owner shall furnish the services of consultants other than those designated in this Agreement, or authorize the Construction Manager to furnish them as an Additional Service, when the Construction Manager requests such services and demonstrates that they are reasonably required by the scope of the Project. The Owner shall require that its consultants maintain professional liability insurance and other liability insurance as appropriate to the services provided.

**§ 5.9** The Owner shall furnish tests, inspections and reports required by law or the Contract Documents, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

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

**§ 5.11** The Owner shall provide prompt written notice to the Construction Manager and Architect if the Owner becomes aware of any fault or defect in Project, including errors, omissions or inconsistencies in the Architect's Instruments of Service or any fault or defect in the Construction Manager's services.

**§ 5.12** The Owner reserves the right to perform construction and operations related to the Project with the Owner's own forces, and to award contracts in connection with the Project which are not part of the Construction Manager's responsibilities under this Agreement. The Construction Manager shall notify the Owner if any such independent action will interfere with the Construction Manager's ability to perform the Construction Manager's responsibilities under this Agreement. When performing construction or operations related to the Project, the Owner agrees to be subject to the same obligations and to have the same rights as the Contractors.

**§ 5.13** Except as otherwise provided in this Agreement, or when direct communications have been specially authorized, the Owner shall endeavor to communicate with the Contractor and the Construction Manager's consultants through the Construction Manager about matters arising out of or relating to the Contract Documents. The Owner shall promptly notify the Construction Manager of any direct communications that may affect the Construction Manager's services.

**§ 5.14** Before executing the Contract for Construction, the Owner shall coordinate the Construction Manager's duties and responsibilities set forth in the Contract for Construction with the Construction Manager's services set forth in this Agreement. The Owner shall provide the Construction Manager a copy of the executed agreements between the Owner and Contractors, including the General Conditions of the Contracts for Construction.

§ 5.15 The Owner shall provide the Construction Manager access to the Project site prior to commencement of the Work and shall obligate the Contractor to provide the Construction Manager access to the Work wherever it is in preparation or progress.

## ARTICLE 6 COST OF THE WORK

§ 6.1 For purposes of this Agreement, the Cost of the Work shall be the total cost to the Owner to construct all elements of the Project designed or specified by the Architect and shall include the contractors' general conditions costs, overhead and profit. The Cost of the Work includes the compensation of the Construction Manager and Construction Manager's Consultants during the Construction Phase only, including compensation for reimbursable expenses at the job site, if any. The Cost of the Work does not include the compensation of the Architect, the costs of the land, rights-of-way, financing, contingencies for changes in the Work or other costs that are the responsibility of the Owner.

§ 6.2 The Owner's budget for the Cost of the Work is provided in Initial Information, and may be adjusted throughout the Project as required under Sections 5.2 and 6.4. Evaluations of the Owner's budget, preliminary estimates for the Cost of the Work and detailed estimates of the Cost of the Work prepared by the Construction Manager represent the Construction Manager's judgment as a person or entity familiar with the construction industry. It is recognized, however, that neither the Construction Manager nor the Owner has control over the cost of labor, materials or equipment, over Contractors' methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Construction Manager cannot and does not warrant or represent that bids or negotiated prices will not vary from the budget proposed, established or approved by the Owner, or from any cost estimate or evaluation prepared by the Construction Manager.

§ 6.3 If the Architect is providing detailed cost estimating services as an Additional Service, and a discrepancy exists between the Construction Manager's cost estimates and the Architect's cost estimates, the Architect and the Construction Manager shall work cooperatively to conform the cost estimates to one another.

§ 6.4 If, prior to the conclusion of the Design Development Phase, the Construction Manager's estimate of the Cost of the Work exceeds the Owner's budget for the Cost of the Work, the Construction Manager, in consultation with the Architect, shall make appropriate recommendations to the Owner to adjust the Project's size, quality or budget, and the Owner shall cooperate with the Construction Manager and Architect in making such adjustments.

§ 6.5 If the estimate of the Cost of the Work at the conclusion of the Design Development Phase exceeds the Owner's budget for the Cost of the Work, the Owner shall

- .1 give written approval of an increase in the budget for the Cost of the Work;
- .2 in consultation with the Construction Manager and Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work; or
- .3 implement any other mutually acceptable alternative.

## ARTICLE 7 COPYRIGHTS AND LICENSES

The Construction Manager and the Construction Manager's consultants, if any, shall not own or claim a copyright in the Instruments of Service. The Construction Manager, the Construction Manager's consultants, if any, and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project. If the Owner and Construction Manager intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions.

## ARTICLE 8 CLAIMS AND DISPUTES

### § 8.1 General

§ 8.1.1 The Owner and Construction Manager shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Construction Manager waive all claims and causes of action not commenced in accordance with this Section 8.1.1.

§ 8.1.2 To the extent damages are covered by property insurance, the Owner and Construction Manager waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages,

except such rights as they may have to the proceeds of such insurance as set forth in AIA Document A232-2009, General Conditions of the Contract for Construction. The Owner or the Construction Manager, as appropriate, shall require of the contractors, consultants, agents and employees of any of them similar waivers in favor of the other parties enumerated herein.

§ 8.1.3 The Construction Manager shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Construction Manager, its employees and its consultants in the performance of professional services under this Agreement. The Construction Manager's duty to indemnify the Owner under this provision shall be limited to the available proceeds of insurance coverage.

§ 8.1.4 The Construction Manager and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.

## § 8.2 Mediation

§ 8.2.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. If such matter relates to or is the subject of a lien arising out of the Construction Manager's services, the Construction Manager may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by binding dispute resolution.

§ 8.2.2 The Owner and Construction Manager shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration proceeding is stayed pursuant to this section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 8.2.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 8.2.4 If the parties do not resolve a dispute through mediation pursuant to this Section 8.2, the method of binding dispute resolution shall be the following:  
*(Check the appropriate box. If the Owner and Construction Manager do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.)*

- Arbitration pursuant to Section 8.3 of this Agreement
- Litigation in a court of competent jurisdiction
- Other: *(Specify)*

## § 8.3 Arbitration

§ 8.3.1 If the parties have selected arbitration as the method for binding dispute resolution in this Agreement any claim, dispute or other matter in question arising out of or related to this Agreement subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by

the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the arbitration.

§ 8.3.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim, dispute or other matter in question would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim, dispute or other matter in question.

§ 8.3.2 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

§ 8.3.3 The award rendered by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

#### § 8.3.4 Consolidation or Joinder

§ 8.3.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 8.3.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 8.3.4.3 The Owner and Construction Manager grant to any person or entity made a party to an arbitration conducted under this Section 8.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Construction Manager under this Agreement.

### ARTICLE 9 TERMINATION OR SUSPENSION

§ 9.1 If the Owner fails to make payments to the Construction Manager in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Construction Manager's option, cause for suspension of performance and cause for termination or, at the Construction Manager's option, cause for suspension of performance of services under this Agreement. If the Construction Manager elects to suspend services, the Construction Manager shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the Construction Manager shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Construction Manager shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Construction Manager's services. The Construction Manager's fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.2 If the Owner suspends the Project, the Construction Manager shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Construction Manager shall be compensated for expenses incurred in the interruption and resumption of the Construction Manager's services. The Construction Manager's fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Construction Manager, the Construction Manager may terminate this Agreement by giving not less than seven days' written notice.

§ 9.4 Either party may terminate this Agreement upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

§ 9.5 The Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause.

§ 9.6 In the event of termination not the fault of the Construction Manager, the Construction Manager shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Section 9.7.

§ 9.7 Termination Expenses are in addition to compensation for the Construction Manager's services and include expenses directly attributable to termination for which the Construction Manager is not otherwise compensated, plus an amount for the Construction Manager's anticipated profit on the value of the services not performed by the Construction Manager, as set forth below.

§ 9.7.1 In the event of termination for the Owner's convenience prior to commencement of construction, the Construction Manager shall be entitled to receive payment for services performed, costs incurred by reason of such termination and reasonable overhead and profit on Preconstruction services not completed during the Preconstruction Phase.

§ 9.7.2 In the event of termination for the Owner's convenience after commencement of construction, the Construction Manager shall be entitled to receive payment for services performed and costs incurred by reason of such termination, along with reasonable overhead and profit on services not completed during the Construction Phase.

#### ARTICLE 10 MISCELLANEOUS PROVISIONS

§ 10.1 This Agreement shall be governed by the law of the place where the Project is located, except that if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 8.3.

§ 10.2 Terms in this Agreement shall have the same meaning as those in AIA Document A232-2009, General Conditions of the Contract for Construction, except for purposes of this Agreement, the term "Work" shall include the work of all Contractors under the administration of the Construction Manager.

§ 10.3 The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Construction Manager shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement.

§ 10.4 If the Owner requests the Construction Manager to execute certificates, the proposed language of such certificates shall be submitted to the Construction Manager for review at least 14 days prior to the requested dates of execution. If the Owner requests the Construction Manager to execute consents reasonably required to facilitate assignment to a lender, the Construction Manager shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to the Construction Manager for review at least 14 days prior to execution. The Construction Manager shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement.

§ 10.5 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Construction Manager.

§ 10.6 Unless otherwise required in this Agreement, the Construction Manager shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site.

§ 10.7 The Construction Manager shall have the right to include photographic or artistic representations of the design of the Project among the Construction Manager's promotional and professional materials. The Construction Manager shall be given reasonable access to the completed Project to make such representations. However, the Construction Manager's materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Construction Manager in writing of the specific information considered by the Owner to be confidential or proprietary. The Owner shall provide professional credit for the Construction Manager in the Owner's promotional materials for the Project.

Init.

§ 10.8 If the Construction Manager or Owner receives information specifically designated by the other party as "confidential" or "business proprietary," the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except to (1) its employees, (2) those who need to know the content of such information in order to perform services or construction solely and exclusively for the Project, or (3) its consultants and contractors whose contracts include similar restrictions on the use of confidential information.

#### ARTICLE 11 COMPENSATION

§ 11.1 For the Construction Manager's Basic Services described under Article 3, the Owner shall compensate the Construction Manager as follows:

§ 11.1.1 For Preconstruction Phase Services in Section 3.2:

*(Insert amount of, or basis for, compensation, including stipulated sums, multiples or percentages.)*

Refer to 11.1.2

§ 11.1.2 For Construction Phase Services in Section 3.3:

*(Insert amount of, or basis for, compensation, including stipulated sums, multiples or percentages.)*

Six hundred seventy five thousand dollars (\$675,000) lump sum

On a monthly basis, The Construction Manager shall be compensated for construction services as follows:

.1 Cost of reimbursable expenses during this period including, but not limited to site offices, site storage, utilities, safety supplies, office supplies, office equipment and other items required to properly manage the project not to exceed the overall guaranteed maximum price.

.2 Cost of director personnel expenses during this period including, but not limited to superintendent, project manager, assistant superintendent, and on-site administrative assistant not to exceed the overall guaranteed maximum price.

.3 Home office overhead and profit equal to 1.0% of the total cost of construction completed during this period not to exceed the overall guaranteed maximum price.

§ 11.2 For Additional Services designated in Section 4.1, the Owner shall compensate the Construction Manager as follows:

*(Insert amount of, or basis for, compensation. If necessary, list specific services to which particular methods of compensation apply.)*

For Additional Services designated in Section 4.1, the Owner shall compensate the Construction Manager based on unit rates which include the cost of raw labor, labor burden, corporate office overhead and profit.

§ 11.3 For Additional Services that may arise during the course of the Project, including those under Section 4.3, the Owner shall compensate the Construction Manager as follows:

*(Insert amount of, or basis for, compensation.)*

For Additional Services that may arise during the course of the Project, including those under Section 4.3, the Owner shall compensate the Construction Manager based on unit rates which include the cost of raw labor, labor burden, corporate office overhead and profit.

§ 11.4 Compensation for Additional Services of the Construction Manager's consultants when not included in Sections 11.2 or 11.3, shall be the amount invoiced to the Construction Manager plus percent ( %), or as otherwise stated below:

N/A

§ 11.5 The hourly billing rates for services of the Construction Manager and the Construction Manager's consultants, if any, are set forth below. The rates shall be adjusted in accordance with the Construction Manager's and Construction Manager's consultants' normal review practices.



(If applicable, attach an exhibit of hourly billing rates or insert them below.)

| Employee or Category      | Rate (\$0.00) |
|---------------------------|---------------|
| Operations Manager        | \$105         |
| Safety Director           | \$90          |
| Senior Project Manager    | \$95          |
| Preconstruction Manager   | \$95          |
| Project Manager           | \$75          |
| Superintendent            | \$95          |
| Assistant Project Manager | \$50          |
| Assistant Superintendent  | \$65          |
| Field Office Manager      | \$32          |
| MEP Coordinator           | \$65          |
| Estimator                 | \$45          |
| Safety Manager            | \$65          |
| MEP Design Reviewer       | \$75          |

**§ 11.6 Compensation for Reimbursable Expenses**

**§ 11.6.1** Reimbursable Expenses are in addition to compensation for Basic and Additional Services and include expenses incurred by the Construction Manager and the Construction Manager's consultants directly related to the Project, as follows:

- .1 Transportation and authorized out-of-town travel and subsistence;
- .2 Long distance services, dedicated data and communication services, teleconferences, Project Web sites, and extranets;
- .3 Fees paid for securing approval of authorities having jurisdiction over the Project;
- .4 Printing, reproductions, plots, standard form documents;
- .5 Postage, handling and delivery;
- .6 Expense of overtime work requiring higher than regular rates, if authorized in advance by the Owner;
- .7 Professional photography, and presentation materials requested by the Owner;
- .8 Construction Manager's consultant's expense of professional liability insurance dedicated exclusively to this Project, or the expense of additional insurance coverage or limits if the Owner requests such insurance in excess of that normally carried by the Construction Manager's consultants;
- .9 All taxes levied on professional services and on reimbursable expenses;
- .10 Site office expenses; and
- .11 Other similar Project-related expenditures.

**§ 11.6.2** For Reimbursable Expenses the compensation shall be the expenses incurred by the Construction Manager and the Construction Manager's consultants plus Zero percent ( 0 %) of the expenses incurred.

**§ 11.7 Payments to the Construction Manager**

**§ 11.7.1** An initial payment of Zero ( \$ 0 ) shall be made upon execution of this Agreement and is the minimum payment under this Agreement. It shall be credited to the Owner's account in the final invoice.

**§ 11.7.2** Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed. Payments are due and payable upon presentation of the Construction Manager's invoice. Amounts unpaid Thirty ( 30 ) days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Construction Manager.  
(Insert rate of monthly or annual interest agreed upon.)

Prime +1 %

**§ 11.7.3** The Owner shall not withhold amounts from the Construction Manager's compensation to impose a penalty or liquidated damages on the Construction Manager, or to offset sums requested by or paid to Contractors for the cost of changes in the Work unless the Construction Manager agrees or has been found liable for the amounts in a binding dispute resolution proceeding.

Init.

§ 11.7.4 Records of Reimbursable Expenses, expenses pertaining to Additional Services, and services performed on the basis of hourly rates shall be available to the Owner at mutually convenient times.

**ARTICLE 12 SPECIAL TERMS AND CONDITIONS**

Special terms and conditions that modify this Agreement are as follows:

**ARTICLE 13 SCOPE OF THE AGREEMENT**

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

§ 13.2 This Agreement is comprised of the following documents listed below:

- .1 AIA Document C132™–2009, Standard Form Agreement Between Owner and Construction Manager as Adviser
- .2 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed, or the following:

N/A

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

N/A

- .4 Other documents:  
*(List other documents, if any, including additional scopes of service forming part of the Agreement.)*

N/A

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

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

Jeff Downes City Manager  
City of Vestavia Hills  
\_\_\_\_\_  
*(Printed name and title)*

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

James O. Rein President & COO  
B. L. Harbert International LLC  
\_\_\_\_\_  
*(Printed name and title)*

PATRICK H. BOONE  
ATTORNEY AND COUNSELOR AT LAW  
NEW SOUTH FEDERAL SAVINGS BUILDING, SUITE 705  
215 RICHARD ARRINGTON, JR. BOULEVARD NORTH  
BIRMINGHAM, ALABAMA 35203-3720

TELEPHONE (205) 324-2018

FACSIMILE (205) 324-2295

November 19, 2013

By Hand Delivery

City Manager Jeffrey D. Downes  
Vestavia Hills Municipal Center  
513 Montgomery Highway  
Vestavia Hills, Alabama 35216

In Re: Construction Manager Contract By and Between the City of Vestavia Hills, Alabama, as  
"Owner," and B.L. Harbert International, LLC, as "Construction Manager"

Dear Mr. Downes:

On November 5, 2013, Melissa Hipp furnished me with a copy of a proposed  
Construction Manager Contract by and between the City of Vestavia Hills, Alabama, as  
"Owner," and B.L. Harbert International, LLC, as "Construction Manager."

Resolution Number 4519 authorizing Mayor Zaragoza and you to execute and deliver the  
Construction Manager Agreement was introduced for a first reading at the City Council meeting  
on November 13, 2013. It is my understanding that the City Council will consider approval of  
Resolution Number 4519 at its regularly scheduled meeting on November 25, 2013.

You have requested that I review the Construction Manager Agreement and provide you  
with my written legal opinion. The purpose of this letter is to comply with this request.

**I. FACTS**

A. LAND: The City has contracted to purchase the real estate and improvements  
situated at:

1. That portion of the land in Vestavia Plaza formerly occupied by Food  
World; and
2. The land formerly occupied by Joe's Ranch House.

It is my understanding that the closing for the sale and purchase of both parcels is  
scheduled for Wednesday, November 20, 2013.

**B. ARCHITECT:** On March 25, 2013, the City Council enacted Resolution Number 4421 authorizing the Mayor and City Manager to execute an Agreement with Williams Blackstock Architects, P.C. to provide architectural and engineering services for the development and construction of a new Municipal Center on the land described in section A above. I want to point out that the Standard Form Agreement Between Owner and Architect was AIA Document B-101-2007 and an Addendum thereto prepared by me.

**C. CONSTRUCTION MANAGER:** On November 25, 2013, the City Council will consider approval of Resolution Number 4519 authorizing the Mayor and you to execute an Agreement by and between the City of Vestavia Hills, Alabama, as "Owner," and B.L. Harbert International, LLC, as "Construction Manager," for construction management services for the development and construction of the new Municipal Center on the land described in section A above. The proposed Standard Form Agreement Between Owner and Construction Manager as advisor is AIA Document C-132-2009.

## **II. LEGAL ISSUE**

Does the proposed Construction Manager Agreement meet the requirements of Alabama law?

## **III. LEGAL OPINION**

It is my legal opinion that the proposed Construction Manager Agreement meets the requirements of Alabama law.

## **IV. RECOMMENDATIONS**

**A.** Section 3.3.3 of the proposed Construction Manager Agreement provides as follows:

**"§3.3.3** The Construction Manager shall provide on-site administration of the Contracts for Construction in cooperation with the Architect as set forth below and in AIA Document A232<sup>TM</sup>-2009, General Conditions of the Contract for Construction, Construction Manager as Adviser Edition...."

I recommend that the portion of AIA Document A232<sup>TM</sup>-2009 be added to the Construction Manager Agreement so that the City will know what on-site administration of the Contracts for Construction will be provided by the Construction Manager.

November 19, 2013

page 3

B. Section 5.4 of the proposed Construction Manager Agreement provides as follows:

“§5.4 The Owner shall retain an Architect to provide services, duties and responsibilities as described in AIA Document B132-2009, Standard Form of Agreement Between Owner and Architect, Construction Manager as Adviser Edition....”

I have telephoned Stephen Riley and Dan Prince at B.L. Harbert International, LLC (802-2891) to make them aware of my two recommendations, but have not as yet been able to talk with them. Stephen Riley returned my telephone call yesterday afternoon when I was out. I telephoned him again this morning, but was unable to reach him.

## V. CONCLUSION

I recommend that the Construction Manager be made aware that the City has heretofore contracted with the Architect using AIA Document B101-2007 rather than AIA Document 132-2009 and also that the attachment of the General Conditions be made to the Construction Manager Agreement.

Please call me if you have any questions regarding this matter.

Sincerely,



Patrick H. Boone  
Attorney for City of Vestavia Hills, Alabama

PHB:gp

cc: Mayor Alberto C. Zaragoza, Jr. (by hand)  
City Clerk Rebecca Leavings (by hand)

**RESOLUTION NUMBER 4520**

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE  
AND DELIVER A CONTRACT FOR SERVICES RELATED TO A  
CITIZENS SURVEY**

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VESTAVIA  
HILLS, ALABAMA, AS FOLLOWS:**

1. The City Manager is hereby authorized to execute and deliver a contract for services related to a citizens survey; and
2. Said agreement is marked as "Exhibit A," a copy of which is attached to and incorporated into this Resolution Number 4520 as though written fully therein; and
3. This Resolution Number 4520 shall become effective immediately upon adoption and approval.

**APPROVED and ADOPTED** this the 25<sup>th</sup> day of November, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk



# Contract for Services and Scope of Work

## Between ETC Institute and the City of Vestavia Hills, Alabama

### ARTICLE I: SCOPE OF SERVICES

1. **Overview of Services to Be Performed.** ETC Institute will design and administer a citizen survey for the City of Vestavia Hills, Alabama. The survey will be administered during the early Spring of 2014. The final report will be completed in February of 2014.
2. **Maximum fixed fee.** The total fee for the project is \$14,200. This includes \$11,700 to design and administer the survey, and \$2,500 for geocoding the data with maps.
3. **ETC Institute's responsibilities.** The tasks that will be performed by ETC Institute as part of this agreement include the following:
  - a. finalizing the methodology for administering the survey based on input from the City.
  - b. designing a survey instrument that is up to 20 minutes in length (7 pages).
  - c. selecting a random sample of households to be surveyed
  - d. setting up the database
  - e. conducting a pretest of the survey instrument
  - f. completing 400 surveys by a combination of mail, phone, and internet (ETC Institute's costs includes all labor, postage and printing associated with the administration of the survey). The results of a random sample of 400 completed surveys will have a precision of at least +/-5% at the 95% level of confidence.
  - g. conducting data entry and quality control review for all completed surveys
  - h. providing complete printouts of the data
  - i. conducting benchmarking analysis that shows how the results for Vestavia Hills compare to other cities in other *DirectionFinder*® cities.
  - j. Geocoding the results, and providing response multiple maps.

- k. conducting importance-satisfaction analysis to identify the types of improvements that will have the most impact on satisfaction with city services.
  - l. completing a final report that will include an executive summary, charts and graphs, geocoded maps, benchmarking analysis, importance-satisfaction analysis, tables showing the results to all questions on the survey, and a copy of the survey instrument.
  - m. making an on-site presentation of the survey results to the City.
4. Responsibilities for the City of Vestavia Hills will include the following:
- a. approving the survey instrument
  - b. providing a cover letter for the mail version of the survey
  - c. identifying requests for subanalysis of the data as appropriate

## **ARTICLE II: PAYMENT FOR SERVICES**

1. Invoices will be submitted upon completion of tasks described in Article I, Section 3, of this agreement as follows:
  - a. Invoice #1: \$4,970. The first invoice will be submitted upon completion of tasks a, b, c, d, and e. The deliverable for this payment will be an approved copy of the survey instrument.
  - b. Invoice #2: \$7,100. The second invoice will be submitted upon completion of tasks f, g, and h. The deliverable for this invoice will be a printout that shows the overall results for 400 completed surveys.
  - c. Invoice #3: \$2,130. The third invoice will be submitted upon completion of task i, j, k, l, and m. The deliverable for this invoice will be 10 color copies of the final report, which will include geocoding, benchmarking analysis, and importance-satisfaction analysis.

## **ARTICLE III: MISCELLANEOUS PROVISIONS**

1. Change in Scope. The Scope of Services, for this contract shall be subject to modification or supplement upon the written agreement of the contracting parties. Any such modification in the Scope of Services shall be incorporated in this agreement by supplemental agreement executed by the parties.

2. Termination of Contract. This agreement may be terminated by either party upon 14 days written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party. If the contract is terminated by the City, the City shall reimburse ETC Institute for the full value of any tasks that have been initiated, up to the total amount of the next scheduled invoice.
3. Rights to Use the Data. ETC Institute has the right to use the data as a component of ETC Institute's DirectionFinder® benchmarks, but ETC Institute will not release specific results for the City of Vestavia Hills without written approval from the City.

**IN WITNESS WHEREOF, the parties hereto have caused this agreement to be signed by their duly authorized officers.**

Alberto C. Zaragoza Jr., Mayor

\_\_\_\_\_

Date \_\_\_\_\_

Jeffrey Downes, City Manager

\_\_\_\_\_

Date \_\_\_\_\_

Karen Falk, ETC Institute, Vice President

  
\_\_\_\_\_

Date 10/28/2013

**RESOLUTION NUMBER 4521**

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO TAKE ALL ACTIONS NECESSARY TO REPAIR AND/OR RESURFACE A STREET**

**BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:**

1. The City Manager is hereby authorized to take all actions necessary to repair and/or resurface public improvements within the Castlehill Subdivision as detailed in a report from the City Engineer to the City Manager in an amount not to exceed \$78,650, a copy of which is marked as “Exhibit A”, attached to and incorporated into this Resolution Number 4521 as through written fully therein; and
2. The City Manager shall utilize funds derived from sureties held for public infrastructure improvements in the amount of \$23,957 which shall net the anticipated expenses from “capital funds” at an amount not to exceed \$54,693; and
3. This Resolution Number 4521 shall become effective immediately upon adoption and approval.

**ADOPTED and APPROVED** this the 25<sup>th</sup> day of November, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk

**CITY OF VESTAVIA HILLS**  
**DEPARTMENT OF PUBLIC SERVICES**  
**OFFICE OF CITY ENGINEER**  
**INTER-DEPARTMENT MEMO**

**November 5, 2013**

To: Jeff Downes, City Manager

CC: Brian Davis, Director of Public Services

From: Christopher Brady, City Engineer

RE: infrastructure repair and completion items for Castlehill Subdivision

---

Following is documentation outlining approximate costs associated with completing and repairing the public infrastructure of the CastleHill subdivision. I would recommend these items be completed prior to the City accepting dedication of the roadway and public right-of-way.

Approximate costs can be summarized as:

|  |          |
|--|----------|
| Asphalt paving and repairs                     | \$49,000 |
| Concrete valley gutter repairs                 | \$13,550 |
| Drainage infrastructure completion and repairs | \$16,100 |
| Total Estimated Costs                          | \$78,650 |

These costs, specifically valley gutter and drainage repairs, include some utilization of City labor and equipment to minimize costs.

I will also note that original plat of the subdivision indicated sidewalks were initially planned for the subdivision. These sidewalks were not constructed. Due to terrain, right-of-way constraints, and potential reconstruction of driveways, I would recommend the City consider potential acceptance without sidewalk.

Please let me know if any questions,

-Christopher



**Cost Estimate  
 Infrastructure Repair and Completion Items  
 CastleHill Subdivision**

updated: 30-Oct-13

**Item # Asphalt Paving**

description: 1700 LF of 22' wide asphalt pavement, including 1 cul-de-sac

- Final seal coat was not provided by developer.
- Multiple utility cuts have been made but not sufficiently repaired.
- Many areas where subgrade of asphalt has deteriorated due to lack of maintenance.

|   |                     |         |           |          |
|---|---------------------|---------|-----------|----------|
| 1 | 1" Overlay          | 6000 sy | \$ 6.50   | \$39,000 |
| 2 | 3" Asphalt Patching | 50 ton  | \$ 200.00 | \$10,000 |

**Concrete Valley Gutter**

description: 3500 LF of 24" concrete valley gutter

- Multiple utility cuts and damage to valley gutter that was not repaired.

|   |                                   |        |          |          |
|---|-----------------------------------|--------|----------|----------|
| 3 | Remove and replace valley gutter* | 500 lf | \$ 27.10 | \$13,550 |
|---|-----------------------------------|--------|----------|----------|

\*price includes City providing some labor in removal of existing damaged sections and providing materials at City cost; some skilled labor would be contracted.

**Drainage Structure Repair and Completion**

description: various issues with drainage infrastructure (see drainage report attached)

- Some areas of pipe are clogged with debris and are to be reinspected after flushing.
- Concrete pipe was placed without sealing joints.
- 84" pipe was placed without an upstream headwall resulting in erosion and slope stability concerns.
- At least one inlet was not constructed properly and is to be rebuilt to standards.

|   |                                   |   |  |           |
|---|-----------------------------------|---|--|-----------|
| 4 | Flush and clear debris from pipes | anticipated no costs if utilize City forces and equipment |  |           |
| 5 | 84" RCP, seal gaps                |   |  | \$3,000 * |
| 6 | 24" RCP, seal gaps                |   |  | \$3,000 * |
| 7 | 84" Headwall construction, CIP    |   |  | \$7,800 * |
| 8 | S-inlet, partial reconstruction   |   |  | \$2,300 * |

\*price includes anticipated utilization of available City forces and equipment; some skilled labor would be contracted; materials purchased at City cost

|                              |                 |
|------------------------------|-----------------|
| <b>Total Estimated Costs</b> | <b>\$78,650</b> |
|------------------------------|-----------------|





# DUNN CONSTRUCTION COMPANY, INC.

P. O. DRAWER 11967  
BIRMINGHAM, AL 35202  
PHONE: (205) 510-0256

TO: City of Vestavia

FROM: EVANS DUNN

ATTN: Christopher Brady  
Phone

DATE: 9/26/2013

## SCHEDULE A

**JOB: Castle Hill**

| ITEM NO.                          | DESCRIPTION                      | QUANTITY | UNIT | UNIT PRICE           | SCHEDULED TOTAL    |
|-----------------------------------|----------------------------------|----------|------|----------------------|--------------------|
| <b>WORK ITEMS ARE AS FOLLOWS:</b> |                                  |          |      |                      |                    |
| 1                                 | 1" Asphalt Overlay               | 6,000    | SY   | \$6.50               | \$ 39,000.00       |
| 2                                 | 3" Asphalt Patching              | 50       | Ton  | \$200.00             | \$ 10,000.00       |
| 3                                 | Remove and replace valley gutter | 200      | LF   | \$30.00              | \$ 6,000.00        |
|                                   |                                  |          |      | <i>approx 500 LF</i> | <i>\$15,000.00</i> |
| Estimated Total                   |                                  |          |      |                      | \$ 55,000.00       |

**Note:** Assumed an average of 3" for the areas to be patched  
Valley Gutter is an estimated qty

SUBMITTED BY: \_\_\_\_\_  
EVANS DUNN



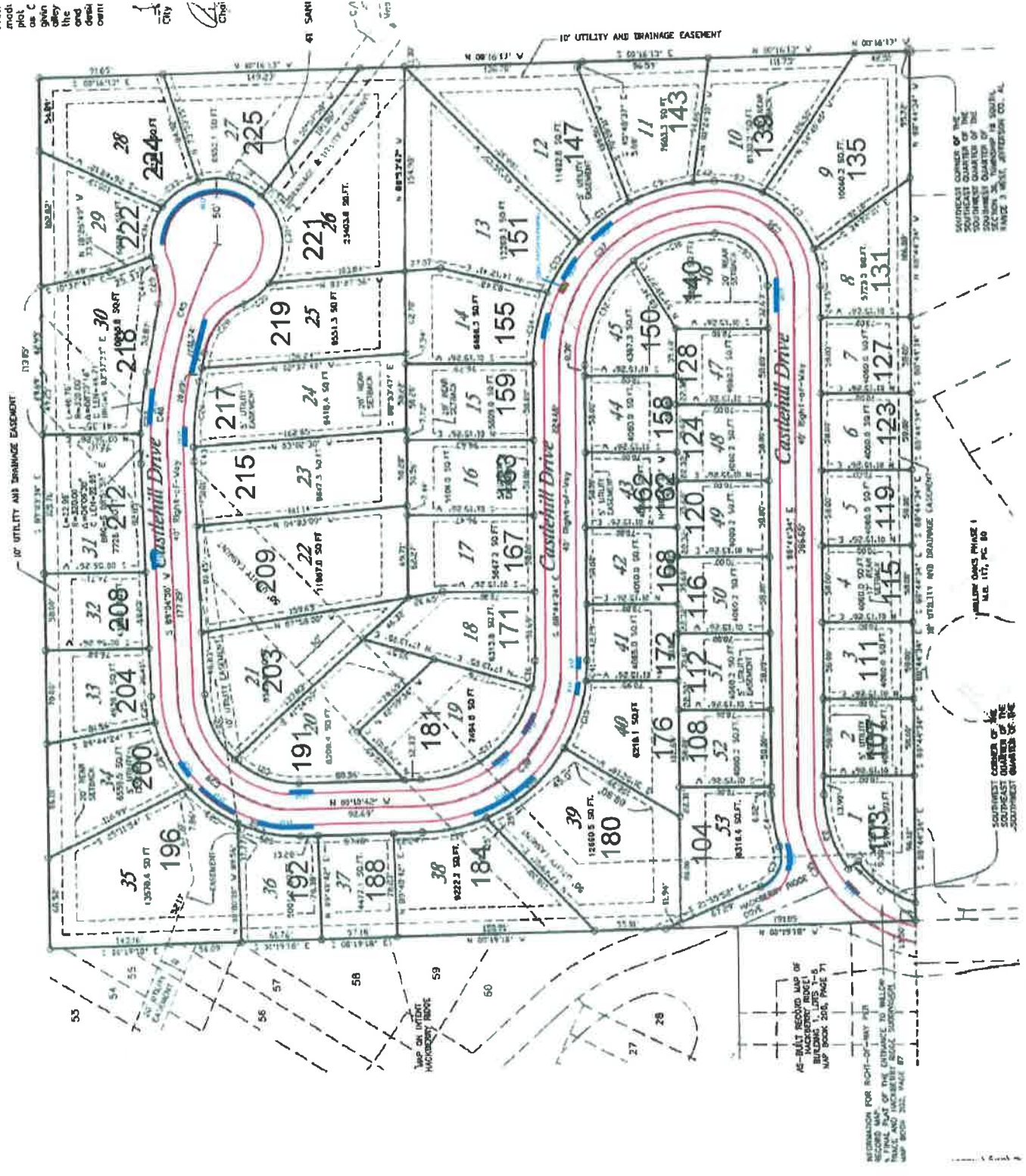
# VALLEY GUTTER REPLACEMENT

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City  
Choi

CITY OF HOOVER, BOARD OF EDUCATION  
NO DEED REFERENCE



SOUTHWEST CORNER OF THE  
SOUTHWEST QUARTER OF THE  
SECTION 36, TOWNSHIP 18 SOUTH,  
RANGE 3 WEST, JEFFERSON CO., AL.

UTILITY LINES PHASE 1  
SEC. 17, T. 18

SOUTHWEST CORNER OF THE  
SOUTHWEST QUARTER OF THE  
SECTION 36, TOWNSHIP 18 SOUTH,  
RANGE 3 WEST, JEFFERSON CO., AL.

AS-BUILT RECORD MAP OF  
HOOPER, BOARD OF EDUCATION  
MAP BOOK 208, PAGE 71

REGISTRATION FOR RIGHT-OF-WAY PER  
SEMI-CIRCLE OF THE ENTRANCE TO ALLOW  
TRAIL AND INACCESSIBLE ROAD SURROUNDS  
MAP BOOK 208, PAGE 71



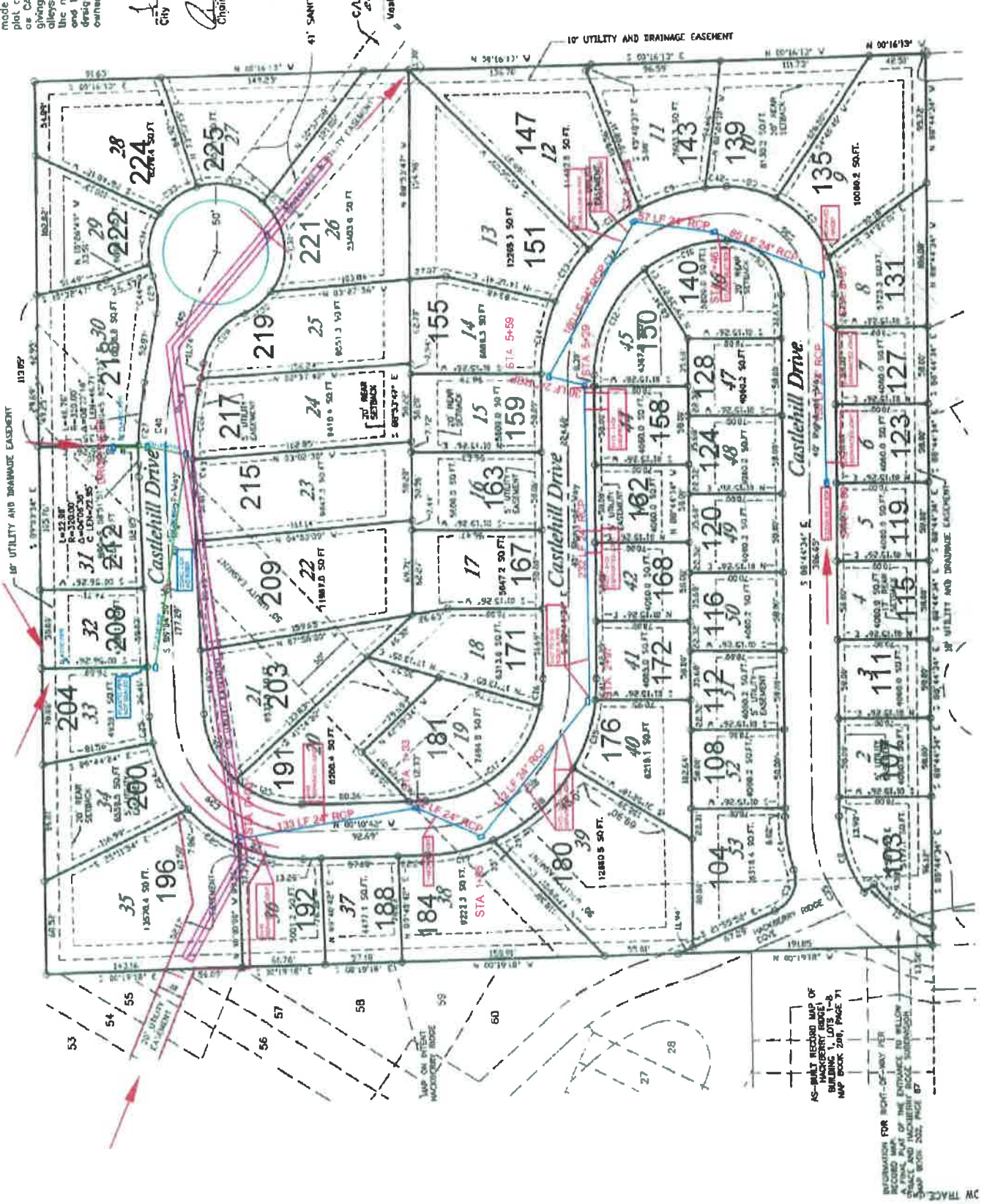
# STORM DRAINAGE SYSTEM

State  
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City  
Chair

CITY OF HOOPER, BOARD OF EDUCATION  
NO DEED REFERENCE

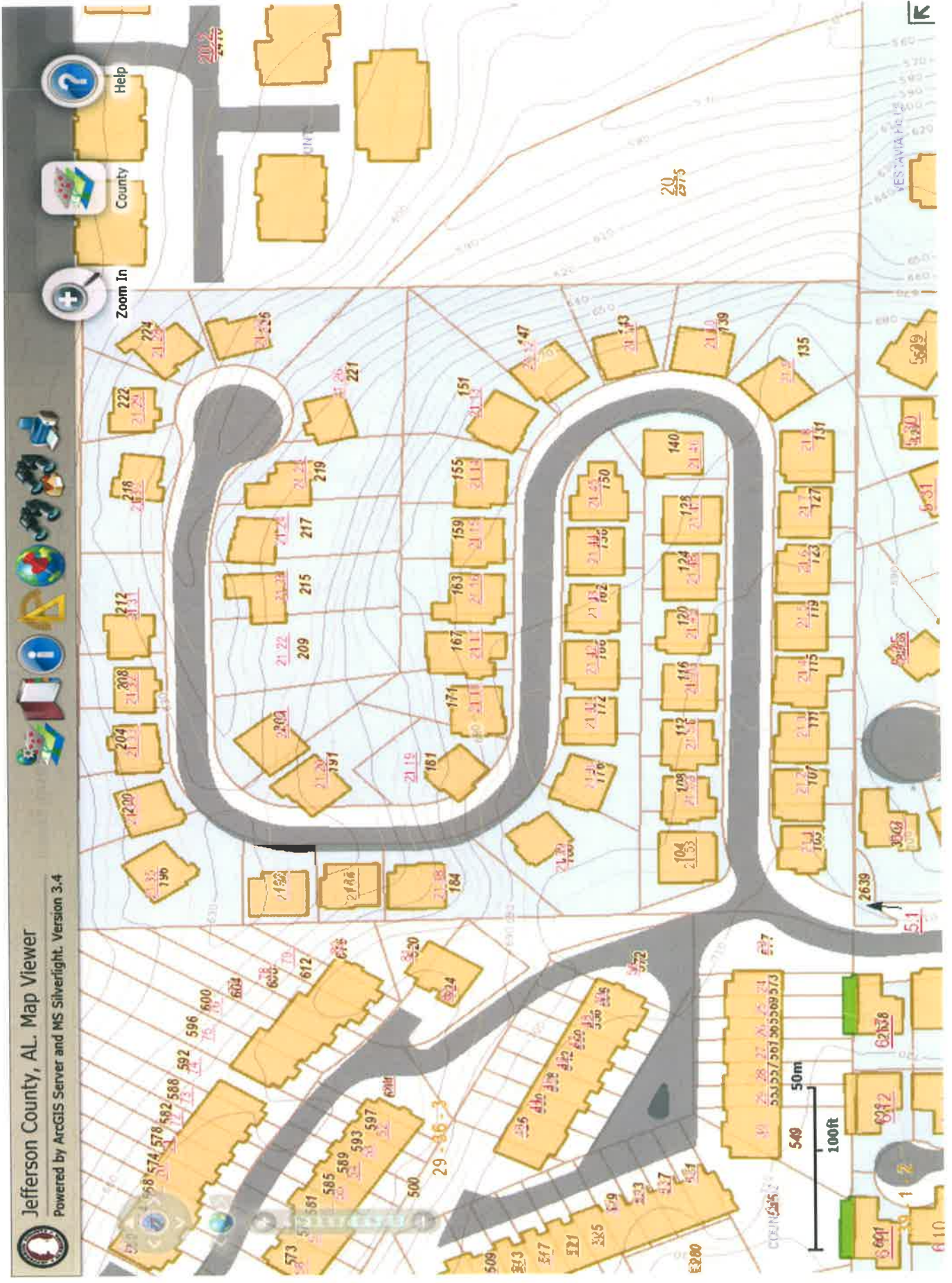


AS-BUILT SECTION MAP OF  
BACKGERRY BRIDGE  
BUILDING 1, LOTS 1-9  
MAP BOOK 206, PAGE 71

INFORMATION FOR RIGHT-OF-WAY USER  
RECORDED MAP OF THE ENTRANCE TO BULLDOG  
A TRAIL AND FACILITIES TO BULLDOG  
MAP BOOK 206, PAGE 67

CW TRACE





Pipe Inspection

Location: Castlehill Subdivision

Date completed: 10/18/13



Photo 1: debris in pipe, 24" RCP,





Photo 2 and 3: gap in pipe, 84" RCP

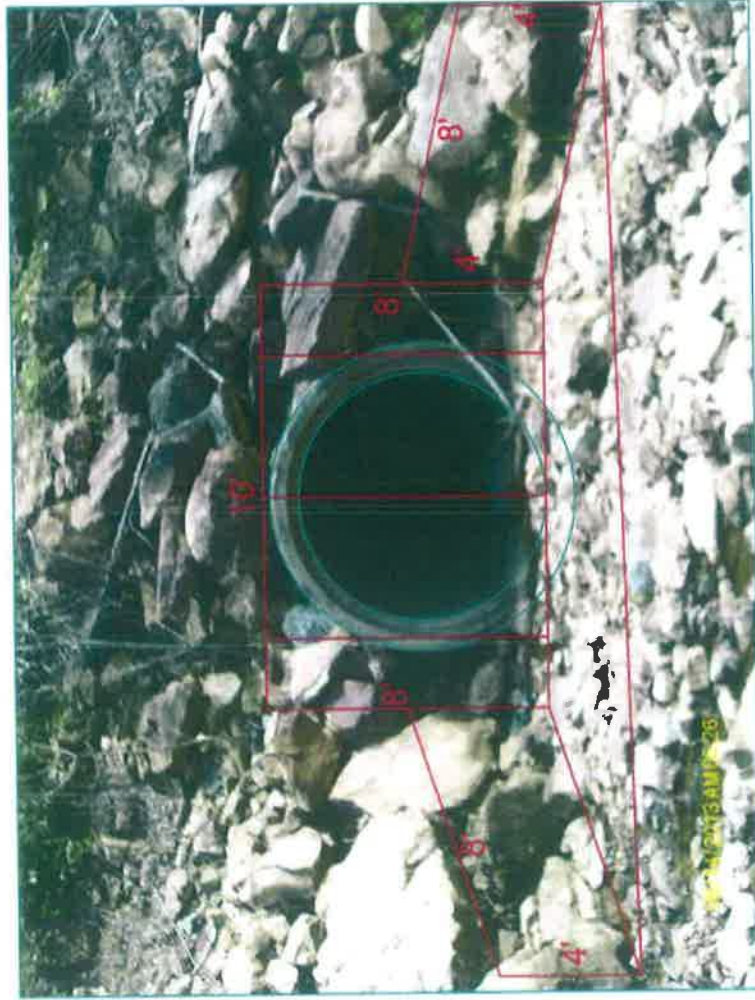


Photo 4: debris in pipe, 24" RCP



Photo 5: cable installed through walls of pipe

CONSTRUCT 84" HEADWALL



6 SHEETS PLYWOOD

5 2X6X8

10 2X4X8

10 2X4X14

10 CY CONC.

**RESOLUTION NUMBER 4523**

**A RESOLUTION AUTHORIZING THE MAYOR AND CITY MANAGER  
TO EXECUTE AND DELIVER AN AGREEMENT WITH WEBQA FOR A  
CITIZEN REPORTING MANAGEMENT SYSTEM**

**BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF  
VESTAVIA HILLS, ALABAMA, AS FOLLOWS:**

1. The Mayor and City Manager are hereby authorized to execute and deliver an agreement with WEBQA, Inc. (WEBQA) for Citizen Request Management and 311 services to promote citizen self-service over the web and email and handle service over the phone, voicemail and walk-in; and
2. A copy of said agreement is marked as “Exhibit A,” attached and incorporated into this Resolution Number 4523 as though written fully therein; and
3. This Resolution shall be effective immediately upon adoption and approval.

**ADOPTED and APPROVED** this the 25<sup>th</sup> day of November, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk



THIS SERVICE(S) AGREEMENT (the "Agreement") between WEBQA, Inc. ("WEBQA") with its principal place of business at 900 S. Frontage Road, Suite 110 Woodridge, IL, 60517 and The Vestavia Hills, AL, with its principal place of business at 513 Montgomery Highway Vestavia Hills, AL 35216 ("Customer") is made effective as of 11/01/13 ("Effective Date").

**1. WEBQA DELIVERY OF SERVICE(S):**

WEBQA grants to Customer a non-exclusive, non-transferable, limited license to access and use the WebQA Service(s) on the Authorized Website(s) identified in Schedule A in consideration of the fees and terms described in Schedule A.

**2. CUSTOMER RESPONSIBILITIES:**

Customer acknowledges it is receiving only a limited license to use the Service(s) and related documentation, if any, and shall obtain no title, ownership nor any other rights in or to the Service(s) and related documentation, all of which title and rights shall remain with WebQA. However, Customer will retain ownership of all its data in the system.

Customer agrees that (1) this license is limited to applications for its own use and may not lease or rent the Service(s) nor offer its use for others; (2) WebQA is not responsible for content placed into the system; (3) that the system will not be used to capture confidential information of any kind such as social security numbers or individual financial data or other sensitive data; and, (4) that it will maintain the Authorized Website(s) identified in Schedule A, provide WEBQA with all information reasonably necessary to setup or establish the Service(s) on Customer's behalf, and allow a "Powered by GovQA" logo with a hyperlink to WebQA's website home page on the Authorized Website.

**3. SERVICE(S) LEVELS:**

WEBQA will use commercially reasonable efforts to backup and keep the Service(s) and Authorized Website(s) in operation consistent with applicable industry standards and will respond to customers' requests for support during normal business hours.

THE SERVICE(S) ARE PROVIDED ON AN "AS IS" BASIS, AND CUSTOMER'S USE OF THE SERVICE(S) IS AT ITS OWN RISK. WEBQA DOES NOT WARRANT THAT THE SERVICE(S) WILL BE UNINTERRUPTED OR ERROR-FREE OR UNEFFECTED BY FORCE MAJEURE EVENTS.

**4. WARRANTY AND LIABILITY:**

WEBQA MAKES NO REPRESENTATION OR WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE SERVICE(S) AND SHALL HAVE NO LIABILITY FOR ANY CONSEQUENTIAL DAMAGES OF ANY KIND INCLUDING, BUT NOT LIMITED TO, DATA LOSS AND BUSINESS INTERRUPTION, AND THE PARTIES AGREE THAT THE ONLY REMEDIES THAT SHALL BE AVAILABLE TO CUSTOMER UNDER THIS AGREEMENT SHALL BE THOSE EXPRESSLY SET FORTH IN THIS AGREEMENT. WEBQA'S LIABILITY UNDER ALL CIRCUMSTANCES INVOLVED HEREIN IS EXPRESSLY LIMITED TO THE AMOUNT RECEIVED UNDER THIS AGREEMENT.

**5. TERMINATION:**

Either party may terminate this agreement without cause if the terminating party gives the other party sixty (60) days written notice prior to termination. Should Customer terminate without cause after the first date of the then current term as defined in the attached schedule, Customer must pay the balance of the current contracted term and this payment obligation will immediately become due.

WebQA may terminate service(s) if payments are not received by WebQA as specified in Schedule A. All monies associated to the current term will be due immediately.

Upon any termination, WebQA will discontinue Service(s) under this agreement; WebQA will provide Customer with an electronic copy of all of Customer's data, if requested and for a cost of no more than \$2,500; and, provisions of this Agreement regarding Ownership, Liability, Confidentiality and Miscellaneous will continue to survive.

**6. ACCEPTABLE USE:**

Customer represents and warrants that the Service(s) will only be used for lawful purposes, in a manner allowed by law, and in accordance with reasonable operating rules, policies, terms and procedures. WEBQA may, upon misuse of the Service(s), request Customer to terminate access to any individual and Customer agrees to promptly comply with such request unless such misuse is corrected.

**7. SERVICE INITIATION:**

Customer agrees to all customer activities as stated on Schedule A.

**8. CONFIDENTIALITY:**

Each party hereby agrees to maintain the confidentiality of the other party's proprietary materials and information, including but not limited to, all information, knowledge or data not generally available to the public which is acquired in connection with this Agreement, unless disclosure is required by law. Each party hereby agrees not to copy, duplicate, or transcribe any confidential documents of the other party except as required in connection with their performance under this Agreement. Customer acknowledges that the Service(s) contain valuable trade secrets, which are the sole property of WebQA, and Customer agrees to use reasonable care to prevent other parties from learning of these trade secrets or have unauthorized access to the Service(s). WebQA will use reasonable efforts to insure that any WebQA contractors maintain the confidentiality of proprietary materials and information.

**9. MISCELLANEOUS PROVISIONS:**

This Agreement will be governed by and construed in accordance with the laws of the State of Alabama.

WEBQA may not assign its rights and obligations under this Agreement, in whole or part, without prior written consent of Customer, which consent will not be unreasonably withheld.

**10. ACCEPTANCE:**

Authorized representatives of Customer and WEBQA have read the foregoing and all documents incorporated therein and agree and accept such terms effective as of the date first written above.

**Customer:** \_\_\_\_\_

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_ Date: \_\_\_\_\_

**WebQA Inc.**

Signature: \_\_\_\_\_

Print Name: John Dilenschneider

Title: CEO Date: \_\_\_\_\_

**SCHEDULE A**

**A. Service(s): Customer Subscribes to Service(s):**

| Subscribed Services                     |  |
|---|--|
| <b>GovQA CRM Service</b>                | Citizen Request Management (CRM) and 311 services that the customer will use to promote citizen self-service over the web and email and to handle service over the phone, web, voicemail and walk-in.  |
| <b>GovQA Citizen Mobile Application</b> | <b>Branded City of Vestavia Hills, AL Public CRM Mobile Application</b><br>A CRM focused mobile application for use by the general public consisting of a branded splash page with the customer’s logo. This mobile application will provide the ability to: (a) view FAQ’s (frequently asked questions), (b) create/view requests and (c) configure additional buttons to link to various pages of the city website as well as other websites. This mobile application will be available on the iPhone and Android platforms. |
| <b>GovQA Staff Mobile Application</b>   | A CRM Administration mobile application created for city staff to perform BASIC request handling/processing functions. Request processing functions include: (a) creation, (b) editing, (c) reassignment, (d) note and picture creation, (e) message response, and (f) change status. This mobile application will be available on the iPhone and Android platforms.   |

**Data:** Customer data is owned by customer. 10 GB storage free; additional 10GB is \$20/mo

**Authorized website:** <http://www.mygovhelp.com/vestaviahillsal/>

**B. WebQA Implementation Services:**

- (a) One-time setup of Citizen Portal with branded labeling to the look and feel of Customer website (or iframe)
- (b) Branded labeling of Landing Page to the look and feel of Customer website (or iframe)
- (c) One-time setup and load of up to 50 Answers into knowledgebase
- (d) One-time setup and load of up to 20 Services Requests with 2 rules per Service(s) Request
- (e) Forms and Letter templates: Up to 10 custom letter templates
- (f) Future Branding to Customer Website is included once per billable term. Otherwise branding is billed at \$95/hr.

**C. Customer Implementation Activities:**

- (a) Hold an implementation kickoff meeting with WebQA 15 days after contract signing.
- (b) Build and execute Project Plan to be fully implemented within 120 days of contract signing

**D. WebQA Training and Ongoing Support:**

- (a) One Online Administrator training
- (b) Two Online training session for all users
- (c) Ongoing support through system videos and knowledgebase
- (d) Periodic webinars to train and update customers on new features
- (e) **NOTE:** Customer will log ALL ISSUES, including high-priority, into WEBQA SUPPORT PORTAL at [www.supportqa.com](http://www.supportqa.com) to receive customer service.

**E. Fees:**

| Software Subscription Costs                     |              |                |
|---|--------------|----------------|
| Software License(s)                             | Monthly Cost | Annual Cost    |
| <b>GovQA CRM Application</b>                    | \$450        | \$5,400        |
| <b>GovQA Citizen Mobile Application</b>         | \$0          | \$0            |
| <b>GovQA City Staff Mobile Application</b>      | \$0          | \$0            |
| <b>Total (Includes all Service(s) upgrades)</b> | <b>\$450</b> | <b>\$5,400</b> |

| One Time Implementation Costs   |            |
|---|------------|
| <b>GovQA CRM Application Implementation and Configuration</b>               | N/C        |
| <b>GovQA City Staff Mobile Application Implementation and Configuration</b> | N/C        |
| <b>Total</b>  | <b>N/C</b> |

**F. Terms:**

**Initial Term Starting: November 1, 2013 Ending: October 31, 2014.** Upon the expiration of this initial term, the term will continue to auto-renew to subsequent annual Optional Terms unless Customer notifies WEBQA in writing of its intention not to extend the term at least sixty (60) days prior to expiration of the current term end date. Renewal terms will not increase by more than eight percent. Customer will hold a kickoff meeting to launch implementation no later than 15 days from contract start date.



# WEBQA SERVICE(S) AGREEMENT

Resolution 4523 - Exhibit A

**Special System Refresh:** At the start of the third year of this contract, Customer will be entitled to a Special System Refresh that involves updating workflow rules and knowledgebase settings. This refresh will incorporate all new and available technologies not already implemented for the customer as part of WebQA's automated updates.

**G. Billing:** All fees are exclusive of taxes, billed on an annual basis at time of contract signing, and due upon receipt of invoice. Furthermore, invoices accrue 1% per month past due and customer is responsible for all costs, including attorney fees, for the collections of invoices.

**H. Remittance:** All payments should be made directly to WebQA. WebQA mailing address for all payments is:  
**WebQA Accounts Receivable Department**, 900 S. Frontage Road Suite 110, Woodridge, IL 60517

**I. Contacts:** Organization Name \_\_\_\_\_

**Main Contact Name:** \_\_\_\_\_ **Title:** \_\_\_\_\_  
**Address:** \_\_\_\_\_ **City** \_\_\_\_\_ **State:** \_\_\_\_ **Zip:** \_\_\_\_\_  
**Work Phone:** \_\_\_\_\_ **Cell:** \_\_\_\_\_ **Email:** \_\_\_\_\_ **Fax:** \_\_\_\_\_

**Billing Contact Name:** \_\_\_\_\_ **Title:** \_\_\_\_\_  
**Address:** \_\_\_\_\_ **City** \_\_\_\_\_ **State:** \_\_\_\_ **Zip:** \_\_\_\_\_  
**Work Phone:** \_\_\_\_\_ **Cell:** \_\_\_\_\_ **Email:** \_\_\_\_\_ **Fax:** \_\_\_\_\_  
**Purchase Order Number:** \_\_\_\_\_ **Duns Number:** \_\_\_\_\_

PATRICK H. BOONE  
ATTORNEY AND COUNSELOR AT LAW  
NEW SOUTH FEDERAL SAVINGS BUILDING, SUITE 705  
215 RICHARD ARRINGTON, JR. BOULEVARD NORTH  
BIRMINGHAM, ALABAMA 35203-3720  
TELEPHONE (205) 324-2018  
FACSIMILE (205) 324-2295

To: Melissa  
please note  
requested change  
and coordinate  
action w/  
web QA.

Thy  
JB/11-8-13

November 7, 2013

By Hand Delivery

City Manager Jeffrey D. Downes  
Vestavia Hills Municipal Center  
513 Montgomery Highway  
Vestavia Hills, Alabama 35216

In Re: Proposed Services Agreement by and between WEBQA, Inc. Agreement ("WEBQA")  
and the City of Vestavia Hills, Alabama ("City")

Dear Mr. Downes:

On October 30, 2013, Melissa Hipp furnished me with a copy of a Services Agreement ("Agreement") by and between WEBQA, Inc. ("WEBQA") and the City of Vestavia Hills, Alabama ("City") with a request that I review the same and furnish you with my written legal opinion. The purpose of this letter is to comply with your request.

**I. FACTS**

The proposed Lease/Sale Agreement provides, among other things, that Pitney Bowes will furnish certain services to the City for and in consideration of Five Thousand Four Hundred Dollars (\$5,400.00) payable over a period of twelve (12) months at the rate of Four Hundred Fifty Dollars (\$450.00) per month.

**II. LEGAL ISSUE ONE**

**A. LEGAL QUESTION ONE:** Is the Agreement subject to the Alabama Competitive Bid Law?

**B. ANSWER TO LEGAL QUESTION ONE:** In my opinion, the answer to the Legal Question One is in the negative.

C. **BASIS FOR LEGAL OPINION:** I base my legal opinion upon Title 41-16-20, *Code of Alabama, 1975*, which reads in pertinent part as follows:

“(a) With the exception of contracts for public works whose competitive bidding requirements are governed exclusively by Title 39, all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars (\$15,000) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars (\$15,000) or more, made by or on behalf of any...governing bodies of the municipalities of the state...shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.”

The total consideration (\$5,400.00) pursuant to this Agreement is less than Fifteen Thousand Dollars (\$15,000.00) and, therefore, not subject to the Competitive Bid Law.

### III. **LEGAL ISSUE TWO**

A. **LEGAL QUESTION TWO:** May the City legally enter into the Agreement for a period of up to three (3) years?

B. **ANSWER TO LEGAL QUESTION TWO:** In my opinion, the answer to the Legal Question Two is in the affirmative.

C. **BASIS FOR LEGAL OPINION:** I base my legal opinion upon Alabama Competitive Bid Law applicable to municipalities, which provides in Title 41-16-57(f), *Code of Alabama, 1975*:

“(f) Contracts for the purchase of personal property or contractual services shall be let for periods not greater than three years. Contracts for the leasing of motor vehicles by local governing bodies shall be let for periods not greater than five years. Lease-purchase contracts for capital improvements and repairs to real property shall be let for periods not greater than 10 years and all other lease-purchase contracts shall be let for periods not greater than 10 years.”

#### IV. LEGAL ISSUE THREE

A. LEGAL QUESTION FIVE: Can the City legally indemnify third parties?

B. ANSWER TO LEGAL QUESTION FIVE: In my opinion, the answer to the Legal Question Three is in the negative.

C. BASIS FOR LEGAL OPINION: I recommend that the language of Section 6 requiring the Customer ("City") to indemnify WEBQA be deleted. My recommendation is based upon the following authorities:

(a) Constitution of Alabama of 1901: Section 94, as amended by Amendments 112 and 558, of the *Constitution of Alabama* provides as follows:

"The Legislature shall not have power to authorize any county, city, town or other subdivision of this state to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever."

In my opinion, it would be a violation of Article IV, Section 94(a) of the *Constitution of Alabama* for the City to indemnify the Consultant for actions, costs, expenses, damages and liabilities.

(b) Limits of Liability of Municipalities: Section 11-93-2, *Code of Alabama, 1975*, establishes the maximum amount of damages recoverable against governmental entities. The recovery of damages under any judgment against a city shall be limited to \$100,000.00 for bodily injury or death for one person in any single occurrence and to \$300,000.00 in the aggregate where more than two persons have claims or judgments on account of bodily injury or death arising out of any single occurrence. This statute also provides in pertinent part that recovery of damages under any judgment against a city shall be limited to \$100,000 for damage for loss of property arising out of any single occurrence. It is my opinion that if a city agreed to indemnify third parties, then in such event it would waive these limits of liability.

(c) Public Officials Are Entitled To Discretionary Function Immunity: Public officials who act within the scope of their authority in performing functions involving discretion are entitled to discretionary function immunity. *Woods v. Wilson*, 539 So.2d 224 and *Hilliard v. Huntsville*, 585 So.2d 889.

It is my opinion that if the City agreed to indemnify a third party, then in such event such indemnity agreement could waive the discretionary function immunity for its public employees.

November 7, 2013

Page 4

(d) **Wantonness:** There is no cause of action against a municipality for wantonness. *Hilliard v. City of Huntsville*, 585 So.2d 889 (Ala.1991) and Title 11-47-190, *Code of Alabama, 1975*. If the City agreed to indemnify another party and that indemnitee was guilty of wanton conduct, then in such events the City would effectively waive its right under the Hilliard case.

(e) **Intentional Torts:** Likewise, there is no action against a municipality for intentional torts. *Altmayer v. City of Daphne*, 613 So.2d 366 (Ala.1993). If the indemnitee committed an intentional tort, then in such event the City would waive its rights under the *Altmayer* case.

(f) **Punitive Damages:** In Alabama, municipalities are not liable for punitive damages (Article I, §§ 1, 5, 6, 7, 9, 11, 13 and 22 of *Alabama Constitution*). Under an indemnity agreement, the City would be required to pay punitive damages if punitive damages were awarded against an indemnitee.

(g) **General Comprehensive Liability Insurance:** The City has general comprehensive liability insurance coverage pursuant to an insurance policy issued by One Beacon Insurance Company and written by its agent, J. Smith Lanier & Co. In very general terms, that policy states in substance that One Beacon will pay damages to others for which the law holds the named insureds responsible. Therefore, if a City employee is guilty of negligence that results in a judgment against the City, then in such event One Beacon will pay that judgment in accordance with the terms, provisions and conditions. In my judgment, the insurance limits are more than sufficient to protect against the negligent acts of City employees.

Please call me if you have any questions regarding any of the matters set forth in this legal opinion.

Sincerely,



Patrick H. Boone  
Vestavia Hills City Attorney

PHB:gp

cc: Mayor Alberto C. Zaragoza, Jr. (by hand)

**RESOLUTION NUMBER 4524**

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AND DELIVER AN AGREEMENT WITH ENVIRONMENTAL DESIGN STUDIO FOR GATEWAY SIGNAGE IN THE ROCKY RIDGE ROAD AREA**

**BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:**

1. The City Manager is hereby authorized to execute and deliver an agreement with Environmental Design Studio for design services for gateway signage in the Rocky Ridge Road area; and
2. A copy of said agreement is marked as "Exhibit A," attached and incorporated into this Resolution Number 4524 as though written fully therein; and
3. This Resolution shall be effective immediately upon adoption and approval.

**ADOPTED and APPROVED** this the 25<sup>th</sup> day of November, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk





November 5, 2013

Jeff Downes  
City Manager  
City of Vestavia Hills  
513 Montgomery Highway  
Vestavia Hills Alabama 35216

Re: Village of Rocky Ridge Signage, Vestavia Hills, Alabama

Jeff:

Thank you for the opportunity to respond to your request for proposal for Landscape Architectural services. We look forward to the opportunity to work with you on this project and others in the future.

Please accept this as our proposal for Landscape Architectural Services for the construction plans and detail drawings for the proposed gateway signs for Rocky Ridge, Vestavia Hills, Alabama. After your review of the proposal, please call me with any questions and or clarifications that you may require.

We propose our scope of service to be as follows:

**I. Basic Services:**

A. Site Review:

- I. Utilize GIS data (from the City) to prepare base maps.
- II. Study and determine prospective locations.

B. Design Development Drawings:

- I. Prepare Design Development level drawings of the seasonal banner-style sign. Colors and graphics per Graphic Designer.
- II. Prepare Design Development level drawings to convey proposed sign face, materials, mounting methods, etc..
- III. Prepare maps to convey the proposed locations for two of the larger Gateway signs.

- IV. Prepare a Design Development level drawings for the planting plan for the base of the Gateway sign.
- V. Meet with the City Manager to discuss the proposed design.
- VI. Revise the Design Development drawings as required.

C. Construction Documents:

- I. Prepare detailed layout drawings for two locations of the larger sign, for three or four locations of the smaller signs and for 4-8 locations of the banner-style signs.
- II. Prepare detailed elevations of the three sign types, showing the dimensions, materials, colors, etc. of the proposed signs as necessary for bidding from design/build sign contractors.
- III. Prepare construction details as necessary to convey design intent to the contractor. (The contractor will be responsible for preparation and submittal of shop drawings for review.)
- IV. Prepare detailed planting plan for the signs with details and plant material schedule, details, plant material schedule, etc.
- V. Review shop drawings to verify that they are generally in keeping with the design intent and specifications shown on the construction drawings.

D. Construction Administration:

- I. On site representation at kick-off meeting.
- II. On site review for Certification of Substantial Completion.

**II. Additional or Optional Services:**

- A. Meetings and coordination with Alabama Department of Transportation. EDS, Inc. will prepare documents related ALDOT approval process on an hourly basis per the following schedule.
- B. Electrical Engineering, Surveying, Structural Engineering, etc.
- C. Additional Services consist of any professional services provided which are not specifically described above and as mutually agreed upon between the Client and the Landscape Architect. Such services include, but are not limited to: meetings or hearings, detailed shop drawings, easements or surveying, or multiple submittals to the municipality beyond minor revisions.
- D. Additional services will be billed at typical hourly rates, as requested by the Client.

**III. Schedule of Hourly Rates:**

- A. Principal: \$125.00/hr.
- B. Administrative: \$35.00/hr.

**IV. City's Responsibilities:**

- A. Base information in .dwg format for our use.
- B. Detailed program information regarding requirements for the project.
- C. Final logo design, district name and font/type specifications related to the project.
- D. Request and obtain bids. Prepare contracts, notices and other legal

exhibits.

Environmental Design Studio, Inc. is prepared to provide the above stated professional basic services for a stipulated fee of \$5,000 based on preliminary designs prepared by EDS, Inc. in July of 2010.

Reimbursable expenses such as printing, copies, long distance, and mileage will be billed at our cost plus a 10% administrative fee.

Thank you for your confidence in Environmental Design Studio, Inc. If you have any questions concerning the details of the proposal, please call me, so that we can discuss or make any necessary changes. Your signature in the space provided will authorize us to proceed.

Regards,

Environmental Design Studio, Inc.



Duane Pritchett

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City Council of Vestavia Hills

---

Date

PATRICK H. BOONE  
ATTORNEY AND COUNSELOR AT LAW  
NEW SOUTH FEDERAL SAVINGS BUILDING, SUITE 705  
215 RICHARD ARRINGTON, JR. BOULEVARD NORTH  
BIRMINGHAM, ALABAMA 35203-3720  

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TELEPHONE (205) 324-2018  
FACSIMILE (205) 324-2295

November 20, 2013

By Hand Delivery

City Manager Jeffrey D. Downes  
Vestavia Hills Municipal Center  
513 Montgomery Highway  
Vestavia Hills, Alabama 35216

In Re: Proposed Agreement By and Between Environmental Design Studio, Inc.  
("EDS") and the City of Vestavia Hills, Alabama ("City")

Dear Mr. Downes:

On November 18, 2013, Melissa Hipp furnished me with a copy of a proposed Agreement ("Agreement") by and between Environmental Design Studio, Inc. ("EDS") and the City of Vestavia Hills, Alabama ("City") with a request that I review the same and furnish you with my written legal opinion. The purpose of this letter is to comply with your request.

**I. FACTS**

The proposed Agreement provides that EDS will provide landscape architectural services for the construction plans and detail drawings for the proposed gateway signs for Rocky Ridge in the City of Vestavia Hills, Alabama. The Agreement provides that the contract price for the basic services will be a total of Five Thousand Dollars (\$5,000.00). The Agreement also provides that should the City want additional services, then those additional services provided by EDS will be provided at a fixed hourly rate.

## II. LEGAL ISSUE

A. LEGAL QUESTION: Is the Agreement subject to the *Alabama* Competitive Bid Law?

B. ANSWER TO LEGAL QUESTION: In my opinion, the answer to the legal question is in the negative.

C. BASIS FOR LEGAL OPINION:

(1) I base my legal opinion upon Title 41-16-20, *Code of Alabama, 1975*, which reads in pertinent part as follows:

“(a) With the exception of contracts for public works whose competitive bidding requirements are governed exclusively by Title 39, all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars (\$15,000) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars (\$15,000) or more, made by or on behalf of any...governing bodies of the municipalities of the state...shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.”

The total consideration (\$5,000.00) pursuant to this Agreement is less than Fifteen Thousand Dollars (\$15,000.00) and, therefore, not subject to the Competitive Bid Law.



(2) I also base my opinion upon Title 41-16-51(a)(3), *Code of Alabama, 1975*, which exempts this agreement from the Alabama Competitive Bid Law and reads as follows:

“(3) Contracts for securing services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, **consultants**, certified public accountants, public accountants, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part.”

### III. CONCLUSION

It is my legal opinion that the Agreement meets the requirements of Alabama law.

Please call me if you have any questions regarding any of the matters set forth in this legal opinion.

Sincerely,



Patrick H. Boone  
Vestavia Hills City Attorney

PHB:gp

cc: Mayor Alberto C. Zaragoza, Jr. (by hand)  
City Clerk Rebecca Leavings (by hand)

**RESOLUTION NUMBER 4525**

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AND DELIVER AN AGREEMENT WITH WALTER SCHOEL ENGINEERING COMPANY, INC., FOR PRELIMINARY DEVELOPMENT SERVICES FOR A PLANNED DEVELOPMENT ADJACENT TO LITTLE SHADES CREEK**

**BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:**

1. The City Manager is hereby authorized to execute and deliver an agreement with Walter Schoel Engineering Company, Inc. for preliminary development services for a planned development adjacent to Little Shades Creek; and
2. A copy of said agreement is marked as "Exhibit A," attached and incorporated into this Resolution Number 4525 as though written fully therein; and
3. This Resolution shall be effective immediately upon adoption and approval.

**ADOPTED and APPROVED** this the 25<sup>th</sup> day of November, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk

**AGREEMENT FOR CONSULTING SERVICES**

**BETWEEN**

**THE CITY OF VESTAVIA HILLS**

**AND**

**WALTER SCHOEL ENGINEERING COMPANY, INC.**

**FOR**

**PRELIMINARY DEVELOPMENT SERVICES**

**FOR A PLANNED DEVELOPMENT ADJACENT TO LITTLE SHADES CREEK**

**Vestavia Hills, Alabama**

**November 12, 2013**

This **AGREEMENT**, entered into by and between **The City of Vestavia Hills**, hereinafter referred to as the **Client**, and **Walter Schoel Engineering Company, Inc.**, hereinafter referred to as the **Consultant**, is for preliminary Consulting Services associated with a study of a planned development adjacent to Little Shades Creek in the Cahaba Heights area of Vestavia Hills.

**SCOPE OF WORK**

**1) DEVELOPMENT OF PROJECT BASE INFORMATION**

The Consultant will develop a base topographic and boundary CAD drawing of the project area. This base drawing will use topography from the Jefferson County GIS and boundary information from tax records, or as provided to the Consultant. Flood information for Little Shades Creek will be compiled into the base CAD drawing.

Proposed Fee                      \$4,100

**2) PRELIMINARY ENGINEERING AND ASSISTANCE WITH PLANNING OF THE COMMERCIAL DEVELOPMENT**

The Consultant will consult with the Client and the Client's Architect in the planning of the development. The Consultant will investigate utilities and develop preliminary engineering, including grading, drainage, and stormwater management for the proposed development. Stormwater management planning and preliminary design will be developed using Low Impact Design practices, in order to reduce or eliminate any impacts to Little Shades Creek. The detailed scope is as follows:

- Consult with the Client and the Client's Architect
- Import site plans, etc., from the Architect
- Development of preliminary grading and stormwater management scheme for the development
- Development of Low Impact Design drainage features

Proposed Fee                      \$ 7,700



**4) EVALUATION OF COMMERCIAL AND REHABILITATION PROJECT AS A GRANT FUNDED PROJECT**

Funding is available from the State Government under programs to promote green infrastructure. The flood plain rehabilitation and the use of Green Infrastructure in the commercial re-development would be considered candidates for such funding. Due to the likely development of a portion of the Little Shades Creek flood plain in the commercial area, it is probable that an overall project of flood plain rehabilitation with a small encroachment will provide greater environmental benefits and be more likely to receive funding. This question will be examined in this analysis. The detailed scope is as follows:

- Evaluation of commercial area and buy out area for overall impacts on floodplain values
- Evaluate environmental benefits and costs such as increases in flood plain storage
- Evaluate stormwater impacts (rate and volume) from the project and LID components
- Preparation of brief summary report

Proposed Fee                      \$5,500

This is the study phase of what could develop into a detailed study and grant application, FEMA permitting, Civil design and construction project. Should the project be deemed to have merit, future phases of work would be scoped and proposals submitted.

**NOT INCLUDED IN SCOPE OF WORK**

- 1) Development of grant application
- 2) Final design
- 3) FEMA permitting
- 4) Field surveying of any kinds
- 5) Corps of Engineers consultation or permitting

**FEE SUMMARY**

|  |                 |
|--|-----------------|
| 1) Development of Project Base Information                                       | \$ 4,100        |
| 2) Preliminary Engineering and Planning Assistance                               | \$ 7,700        |
| 3) Evaluation of Commercial and Rehabilitation Project as a Grant Funded Project | <u>\$ 5,500</u> |
|  | \$ 17,300       |

\*Reimbursables should be budgeted at 6.5% of the total above

## **PAYMENT TERMS**

The Consultant will bill the Client monthly based on work completed during the billing period. Work completed will be based upon a percentage of completion for Lump Sum Fees, and will be based on time and materials at the attached schedule of unit rates for Hourly Estimates and Not to Exceed agreements. Payments are due within thirty (30) days of invoice date. The Client's obligation to pay for services is in no way dependent upon the Client's ability to obtain financing, obtain approval from any governmental or regulatory agencies, real estate closing, receipt of payment from other parties or upon successful completion of the project. If payment is not received within thirty (30) days from date of invoice, the amounts may include a late charge of 1½ % per month, calculated from said thirtieth (30<sup>th</sup>) day. Should Consultant incur attorney's fees for collection of payment, the amount owed to Consultant shall include any and all said fees. Failure to make payment within sixty (60) days shall constitute a waiver of the right to dispute the accuracy and appropriateness of the invoice. In addition, Consultant reserves the right to suspend services under this Agreement until such time as payment is made in full for all amounts due for services rendered and expenses incurred has been received.

## **Schedule of Unit Rates – Effective Through 12/31/2013**

|   |                       |
|---|-----------------------|
| Senior Principal                                | \$ 225.00 per hour    |
| Principal                                       | \$ 170.00 per hour    |
| Chief Land Surveyor                             | \$ 150.00 per hour    |
| Senior Project Manager                          | \$ 140.00 per hour    |
| Project Manager 2                               | \$ 125.00 per hour    |
| Project Manager 1                               | \$ 110.00 per hour    |
| Senior Professional                             | \$ 120.00 per hour    |
| Project Professional                            | \$ 105.00 per hour    |
| Staff Professional                              | \$ 90.00 per hour     |
| Senior Designer / Survey Draftsman / Specialist | \$ 90.00 per hour     |
| Designer / Survey Draftsman / Specialist 2      | \$ 80.00 per hour     |
| Designer / Survey Draftsman / Specialist 1      | \$ 70.00 per hour     |
| Field Survey Party                              | \$ 150.00 per hour    |
| Laser Scanning Field Crew                       | \$ 400.00 per hour    |
| Laser Scanning Specialist                       | \$ 125.00 per hour    |
| Intern/Support                                  | \$ 55.00 per hour     |
| Courier   | \$ 25.00 per delivery |
| Transportation                                  | \$ 0.50 per mile      |
| Materials (Stakes and Hubs)                     | \$ 0.35 each          |
| (Flagging)                                      | \$ 2.50 per roll      |
| (Iron Pins and Caps)                            | \$ 5.00 each          |
| (Spray Paint)                                   | \$ 5.00 per can       |

Printing and other reimbursable expenses will be charged at cost, and are not included in the fee basis described above. Sub-consultant invoices will be billed to the client at a rate of 110% of the sub-consultant invoice. Overtime rates may apply for work required during non-standard work hours.

## **GENERAL TERMS AND CONDITIONS**

- 1) Services performed under this Agreement will be conducted in a manner consistent with that level of care and skill exercised by members of the profession currently practicing under similar conditions. Plans, specifications, and submittals will be prepared in accordance with the written standards of the governing authorities having jurisdiction. Any extraordinary requirements for approvals will be considered additional services. No other warranty, expressed or implied, is made. Nothing in this agreement is intended to create, nor shall it be construed to create, a fiduciary duty owed by either party to the other party.
- 2) The Client hereby agrees that to the fullest extent permitted by law the Consultant's total liability to Client for any and all injuries, claims, losses, expenses of damages whatsoever arising out of or in any way relating to the project, the site, or this Agreement, from any cause or causes including but not limited to the Consultant's negligence, errors, omissions, strict liability, breach of contract, breach of warranty shall not exceed the greater of the total amount paid by the Client for the services of the Consultant under this contract or \$50,000.00, whichever is greater. The Consultant's liability shall expire one (1) year from the completion date of the provision of services for each phase of the work.
- 3) The figures given above and in the body of this Agreement are based on the Scope of Work as described herein. If the above outlined Scope of Services is changed, or if there are other services that may be requested by the Client, these additional services will also be performed at the above unit rates, or a revised fee will be negotiated to the satisfaction of both the Client and Consultant at that time. The Consultant reserves the right to adjust these unit rates for inflation costs on a one-year interval from the date of this proposal.
- 4) All claims, disputes, and other matters in controversy between Consultant and Client arising out of or in any way related to this agreement (other than as a result of Client's failure to pay amounts due hereunder) will be submitted to mediation before, and as a condition precedent to, other remedies provided by law. Mediation shall be held in the county where the project is located, and if the parties cannot agree on a mediator then one shall be appointed by the American Arbitration Association (AAA). Parties agree to split cost of mediation 50-50.
- 5) Services not expressly set forth in writing as basic or additional services and listed in the proposal to this Agreement are excluded from the scope of the Consultant's services, and the Consultant assumes no duty to the Client to perform such services.
- 6) Client, at its expense, will provide the Consultant with all required site information, existing plans, reports, studies, project schedules and similar information that is contained in Client's files. The Consultant may rely on the information provided by the Client without verification. The Client shall participate with the Consultant by providing all information and criteria in a timely manner, review documents and make decisions on project alternatives to the extent necessary to allow the Consultant to perform the scope of work within established schedules.
- 7) Consultant shall secure and maintain insurance as required by law or statutory requirements which will protect him from claims under the workers compensation acts and from claims for bodily injury, death, or property damage that may arise from the performance of his services under and pursuant to this Agreement. Certificates of such coverage will be provided to Client upon request.
- 8) All reports, plans, documents, or other materials resulting from the Consultant's efforts shall remain the property of the Consultant and are intended solely for the purpose of this Agreement. Any reuse by Client for purposes outside of this Agreement or any failure to follow Consultant's recommendations without Consultant's written permission shall be at the user's sole risk.
- 9) This Agreement may be terminated by either party upon seven (7) days written notice in the event of substantial failure to perform in accordance with the terms of the agreement by the other party through no fault of the terminating party. If this Agreement is terminated, it is agreed that Consultant shall be paid for total charges for labor performed to the termination notice date, plus reimbursable charges.

- 10) Neither party to this Agreement will be liable to the other party for delays in performing the services, nor for the direct or indirect cost resulting from such delays, that may result from labor strikes, riots, war, acts of governmental authorities, extraordinary weather conditions or other natural catastrophes, or any other cause beyond the reasonable control of either party.
- 11) The invalidity of any portion of this Agreement will not and shall not be deemed to affect the validity of any other provision. In the event that any provision of this Agreement is held to be invalid, the parties agree that the remaining provisions shall be deemed to be in full force and effect.
- 12) The Consultant shall not be responsible for construction site safety or construction procedures, nor will the Consultant be responsible for the quality of the work performed by the contractor or other consultants.
- 13) Consultant may, at Client's request and for Client's convenience, provide documents in electronic format. Data, words, graphical representations, and drawings that are stored on electronic media or which are transmitted electronically, may be subject to uncontrollable alteration. The printed, signed and sealed hard copy is the actual professional instrument of service. In the event of a discrepancy between the electronic document and the hardcopy document, the hardcopy document will prevail.

**PROPOSAL ACCEPTANCE**

**SUBMITTED:**

**Consultant:** Walter Schoel Engineering Company, Inc.

**Signature:** Walter Schoel III

**Name:** Walter Schoel III,

**Title:** President

**Date:** November 12, 2013

**ACCEPTED:**

**Client:** The City of Vestavia Hills

**Signature:** \_\_\_\_\_

**Name:** \_\_\_\_\_

**Title:** \_\_\_\_\_

**Date:** \_\_\_\_\_

Please print or type the following information for the individual, firm or corporation responsible for payment.

**Company:** \_\_\_\_\_

**Client or Client's authorized representative:** \_\_\_\_\_

**Street Address:** \_\_\_\_\_

**City, State, Zip:** \_\_\_\_\_

**Phone Number:** \_\_\_\_\_ **Fax Number:** \_\_\_\_\_

**Email Address:** \_\_\_\_\_

**Client's Project Number:** \_\_\_\_\_ **Client's Purchase Order Number:** \_\_\_\_\_

PATRICK H. BOONE  
ATTORNEY AND COUNSELOR AT LAW  
NEW SOUTH FEDERAL SAVINGS BUILDING, SUITE 705  
215 RICHARD ARRINGTON, JR. BOULEVARD NORTH  
BIRMINGHAM, ALABAMA 35203-3720

TELEPHONE (205) 324-2018

FACSIMILE (205) 324-2295

November 21, 2013

By Hand Delivery

City Manager Jeffrey D. Downes  
Vestavia Hills Municipal Center  
513 Montgomery Highway  
Vestavia Hills, Alabama 35216

In Re: Agreement By and Between the City of Vestavia Hills, Alabama  
and Walter Schoel Engineering Company, Inc.

Dear Mr. Downes:

On November 18, 2013, Melissa Hipp furnished me with a copy of a proposed Agreement for Consulting Services by and between the City of Vestavia Hills, Alabama ("Client") and Walter Schoel Engineering Company, Inc. ("Consultant") for preliminary development services for a planned development adjacent to Little Shades Creek in Cahaba Heights ("Agreement") with a request that I review the Agreement and provide you with my written legal opinion. The purpose of this letter is to comply with your request.

**I. FACTS**

The Agreement provides in Section 2 of the General Terms and Conditions (on page 4) as follows:

"2) The Client hereby agrees that to the fullest extent permitted by law the Consultant's total liability to Client for any and all injuries, claims, losses, expenses of damages whatsoever arising out of or in any way relating to the project, the site, or this Agreement, from any cause or causes including but not limited to the Consultant's negligence, errors, omissions, strict liability, breach of contract, breach of warranty shall not exceed the greater of the total amount paid by the Client for the services of the Consultant under this contract or \$50,000.00, whichever is greater. The Consultant's liability shall expire one (1) year from the completion date of the provision of services for each phase of the work."

## II. LEGAL ISSUE

Can the City legally agree to the terms, provisions and conditions of Section 2 of the General Terms and Conditions of the Agreement?

## III. LEGAL OPINION

It is my legal opinion that the answer to the legal question is in the negative.

## IV. BASIS FOR LEGAL OPINION

I base my legal upon the following:

### A. STATUTE OF LIMITATIONS:

(1) **Negligence:** Title 6-2-38, *Code of Alabama, 1975*, provides that an action to recover damages for negligence must be commenced within two (2) years.

(2) **Section 2 of General Terms and Conditions of Agreement (Page 4):** Section 2 provides "The Consultant's liability shall expire one year from the completion date of the provision of services for each phase of the work."

(3) **Agreements, Etc. To Limit Time Void:** Title 6-2-15, *Code of Alabama, 1975*, provides in words and figures as follows:

"§6-2-15. **Agreements, etc. to limit time void.** Except as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void."

### B. GENERAL COMPREHENSIVE LIABILITY INSURANCE POLICY FOR THE CITY:

(1) **Section 2 General Terms and Conditions of Agreement (Page 4):** Section 2 provides that the liability of the Consultant shall not exceed the greater of the total amount paid by the City for the services of the Consultant under the Contract or \$50,000.00, whichever is greater.

(2) **Joint Liability:** Title 11-47-191(b), *Code of Alabama, 1975*, provides as follows:

“(b) When a judgment shall be obtained against a municipality and the other party liable as provided in subsection (a) of this section, execution shall issue against the other defendant or defendants in the ordinary form and shall not be demandable of the city or town unless the other defendants are insolvent and the same cannot be made out of their property, and the city or town shall pay only so much of the said judgment as cannot be collected from the other defendants.”

(3) **Prejudice the Rights of the City General Comprehensive Liability Insurance Carrier and Jeopardize Coverage:** Based upon Title 11-47-191(b), *Code of Alabama, 1975*, it is my legal opinion that if the City agreed to Section 2 of the General Terms and Conditions that it would prejudice the rights of the City general comprehensive liability insurance carrier and jeopardize coverage under the policy.

C. **MUNICIPALITIES CANNOT SPEND PUBLIC FUNDS TO INDEMNIFY THIRD PARTIES:** It is my legal opinion that to agree to shorten the Statute of Limitations and limit the amount of damages would in effect constitute an indemnity agreement. It is my further legal opinion that municipalities in Alabama cannot spend public funds to indemnify third parties. I base my legal opinions upon the following legal authorities:

(1) **Constitution of Alabama of 1901:** Section 94, as amended by Amendments 112 and 558, of the *Constitution of Alabama* provides as follows:

“The Legislature shall not have power to authorize any county, city, town or other subdivision of this state to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever.”

In my opinion, it would be a violation of Article IV, Section 94(a) of the *Constitution of Alabama* for the City to indemnify the Consultant for actions, costs, expenses, damages and liabilities.

(2) **Limits of Liability of Municipalities:** Section 11-93-2, *Code of Alabama, 1975*, establishes the maximum amount of damages recoverable against governmental entities. The recovery of damages under any judgment against a city shall be limited to \$100,000.00 for bodily injury or death for one person in any single occurrence and to \$300,000.00 in the aggregate where more than two persons have claims or judgments on account of bodily injury or death arising out of any single occurrence. This statute also provides in pertinent part that recovery of damages under any judgment against a city shall be limited to \$100,000 for damage for loss of property arising out of any single occurrence. It is my opinion that if a city agreed to indemnify third parties, then in such event it would waive these limits of liability.

(3) **Public Officials Are Entitled To Discretionary Function Immunity:**

Public officials who act within the scope of their authority in performing functions involving discretion are entitled to discretionary function immunity. *Woods v. Wilson*, 539 So.2d 224 and *Hilliard v. Huntsville*, 585 So.2d 889.

It is my opinion that if the City agreed to indemnify a third party, then in such event such indemnity agreement could waive the discretionary function immunity for its public employees.

**V. CONCLUSION**


It is my legal opinion that everything in the Agreement, except for Section 2 of the General Terms and Conditions on page 4 thereof, meets the requirements of Alabama law.

**VI. MY RECOMMENDATION**

I recommend that Section 2 of the General Terms and Conditions of the Agreement on page 4 be deleted from the Agreement in its entirety. Once Section 2 is removed, I recommend that the City Council approve and adopt a resolution authorizing you to execute and deliver the Agreement for and on behalf of the City of Vestavia Hills, Alabama.

Please call me if you have any questions regarding any of the matters stated in this legal opinion.

Sincerely,



Patrick H. Boone  
Attorney for City of Vestavia Hills, Alabama

PHB:gp

cc: Mayor Alberto C. Zaragoza, Jr. (by hand)  
City Clerk Rebecca Leavings (by hand)



**EXCERPTS FROM THE MINUTES OF A REGULAR MEETING OF  
THE CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA**

The City Council of the City of Vestavia Hills met in regular public session at the City Hall in the City of Vestavia Hills, Alabama, at 5:00 p.m. on November 25, 2013. The meeting was called to order by the Mayor, and the roll was called with the following results:

Present:        Alberto C. Zaragoza, Jr., Mayor  
                 Steve Ammons, Mayor Pro-Tempore  
                 John Henley  
                 George Pierce  
                 Jim Sharp

Absent:         None

\* \* \*

The Mayor stated that a quorum was present and that the meeting was open for the transaction of business.

\* \* \*

Thereupon, the following resolution was introduced in writing by the Mayor, and considered by the City Council:

## RESOLUTION NUMBER 4526

### A RESOLUTION AUTHORIZING CERTAIN ACTION WITH RESPECT TO GENERAL OBLIGATION WARRANTS, SERIES 2013-A/2014, OF THE CITY OF VESTAVIA HILLS, ALABAMA

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA (the "City Council"), as follows:

**Section 1.** The City Council has found and determined, and does hereby find, determine and declare, as follows:

(a) The City Council has determined it is in the best interests of the City of Vestavia Hills, Alabama (the "City") to acquire, construct and install the following capital improvements and facilities (collectively the "Series 2013-A/2014 Improvements"):

- (i) a city hall and facilities for the administration of the City;
- (ii) public highways, roads, streets, bridges, and other public ways, and related public facilities and infrastructure improvements.

(b) It is necessary and desirable for the City Council to authorize the structure and offering to the public market of general obligation warrants of the City, on a tax-exempt basis, of Series 2013-A/2014 (the "Series 2013-A/2014 Warrants") for the foregoing purposes.

**Section 2.** Subject to Section 3 and Section 4 hereof, the City Council does hereby approve, adopt, authorize, direct, ratify and confirm:

(a) the determination of the proposed structure and sources of payment and uses of proceeds of the Series 2013-A/2014 Warrants by Sterne, Agee & Leach, Inc., as underwriter (the "Underwriter");

(b) the preparation of the financing documents for the Series 2013-A/2014 Warrants by Maynard, Cooper & Gale, P.C., as bond counsel;

(c) the terms, and distribution by the Underwriter, of a preliminary official statement with respect to the Series 2013-A/2014 Warrants, on behalf of the City Council, in substantially the form and content attached hereto as Exhibit A, upon completion by the City;

(d) the terms and provisions of a warrant purchase agreement (the "Warrant Purchase Agreement") with respect to the Series 2013-A/2014 Warrants, by the City and the Underwriter, in substantially the form and content attached hereto as Exhibit B.

**Section 3.** Subject to Section 4 hereof, the Mayor of the City is hereby authorized and directed to execute and deliver the Warrant Purchase Agreement with respect to the Series 2013-A/2014 Warrants, upon the terms for such warrants as approved by the City Council pursuant to Section 4 hereof, for and in the name of the City.

**Section 4.** The issuance and sale of the Series 2013-A/2014 Warrants by the City shall be subject to:

(a) the final approval and authorization thereof by the City Council, including without limitation the purposes, use of proceeds, principal amounts, terms of maturity and payment dates, interest rates, offering prices and redemption prices and terms, and costs of issuance and credit enhancement, if any; and

(b) the approving legal opinion of Maynard, Cooper & Gale, P.C., as bond counsel.

**Section 5.**

(a) If it becomes necessary for the City to expend any funds for the Series 2013-A/2014 Improvements prior to the issuance of the Series 2013-A/2014 Warrants, as described above, the City Council hereby declares its official intent that (i) proceeds of such Warrants be used to reimburse the City for capital expenditures made by the City from the funds thereof in the General Fund of the City in amounts not exceeding the lesser of the amounts spent therefor which are eligible for reimbursement under Treas. Reg. 1.150-2 or the total cost of the Series 2013-A/2014 Improvements, and (ii) any such reimbursement be made in accordance with Treas. Reg. 1.150-2.

(b) The City Council hereby approves the engagement of Sterne, Agee & Leach, Inc. to provide all financial advice, investment banking services, and underwriting services with respect to the offering, sale and issuance of the Series 2013-A/2014 Warrants and Maynard, Cooper & Gale, P.C., to act as Bond Counsel to the City in connection with the issuance of the Series 2013-A/2014 Warrants.

**Section 6.** All actions heretofore taken, and all agreements, documents, instruments and notices heretofore executed, delivered or made, by any of the officers of the City with respect to any matters referenced herein are hereby ratified and confirmed.

**Section 7.** All resolutions, or parts thereof, of the City Council in conflict or inconsistent with any provision of this resolution hereby are, to the extent of such conflict or inconsistency, repealed.

**Section 8.** General

(a) This Resolution shall take effect immediately.

(b) All ordinances, resolutions, orders, or parts thereof, in conflict or inconsistent with this Resolution hereby are, to the extent of such conflict or inconsistency, repealed.



DONE, ORDERED, ADOPTED and APPROVED this \_\_\_\_ day of \_\_\_\_\_, 2013.

---

Alberto C. Zaragoza, Jr., Mayor

S E A L

Attest: \_\_\_\_\_  
City Clerk

After said resolution had been discussed and considered in full by the Council, it was moved by Councilmember \_\_\_\_\_ that said resolution be now placed upon its final passage and adopted. The motion was seconded by Councilmember \_\_\_\_\_. The question being put as to the adoption of said motion and the final passage and adoption of said resolution, the roll was called with the following results:

Ayes:            Alberto C. Zaragoza, Jr., Mayor  
                     Steve Ammons, Mayor Pro-Tempore  
                     John Henley  
                     George Pierce  
                     Jim Sharp

Nays:            None

The Mayor thereupon declared said motion carried and the resolution passed and adopted as introduced and read.

\* \* \* \*

There being no further business to come before the meeting, it was moved and seconded that the meeting be adjourned. Motion carried.

Minutes approved:

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
Member of the City Council

\_\_\_\_\_  
Member of the City Council

\_\_\_\_\_  
Member of the City Council

\_\_\_\_\_  
Member of the City Council

SEAL

Attest: \_\_\_\_\_  
City Clerk

STATE OF ALABAMA       )  
JEFFERSON COUNTY       )

**CERTIFICATE OF CITY CLERK**

I, the undersigned, do hereby certify that (1) I am the duly elected, qualified and acting City Clerk of the City of Vestavia Hills, Alabama (the "Municipality"); (2) as Clerk of the Municipality I have access to all original records of the Municipality and I am duly authorized to make certified copies of its records on its behalf; (3) the above and foregoing pages constitute a complete, verbatim and compared copy of excerpts from the minutes of a regular meeting of the City Council of the Municipality duly held on November 25, 2013, the original of which is on file and of record in the minute book of the City Council in my custody; (4) the resolution set forth in such excerpts is a complete, verbatim and compared copy of such resolution as introduced and adopted by the City Council on such date; and (5) said resolution is in full force and effect and has not been repealed, amended or changed.

IN WITNESS WHEREOF, I have hereunto set my hand as Clerk of the Municipality and have affixed the official seal of the Municipality, this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Clerk of the City of Vestavia Hills,  
Alabama

SEAL



**RESOLUTION NUMBER 4527**

**A RESOLUTION DETERMINING THAT CERTAIN  
PERSONAL PROPERTY IS NOT NEEDED FOR  
PUBLIC OR MUNICIPAL PURPOSES AND  
DIRECTING THE SALE/DISPOSAL OF SAID  
SURPLUS PROPERTY**

**WITNESSETH THESE RECITALS**

**WHEREAS**, the City of Vestavia Hills, Alabama, is the owner of personal property detailed in the attached "Exhibit A"; and

**WHEREAS**, the City has determined that it would be in the best public interest to sell said property.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:**

1. The City Manager is hereby authorized to sell and/or dispose of the above-referenced surplus personal property; and
2. This Resolution Number 4527 shall become effective immediately upon adoption and approval.

**DONE, ORDERED, APPROVED and ADOPTED** on this the 25<sup>th</sup> day of November, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk

# Memo

To: Rebecca Leavings

From: Chief Rary

Date: 11/19/13

Re: Surplus Vehicles

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We request the following vehicles be declared surplus at the next City Council meeting.

2000 Ford Crown Victoria (Police Interceptor)  
VIN# 2FAFP71W7YX144830—Bad engine (Mileage estimate 104,780)

2005 Ford Crown Victoria (Police Interceptor)  
VIN# 2FAFP71W25X160915—Wrecked (Mileage estimate 124,776)

2003 Ford Crown Victoria (Police Interceptor)  
VIN# 2FAFP71W13X202973--Bad engine (Mileage estimate—131,822)

Thank you in advance for your assistance.

Best regards,

Chief Dan Rary

# Memo

**To:** Rebecca Leavings, City Clerk  
**From:** Lt. Brian Gilham  
**Date:** April 22, 2013  
**Re:** Request to Surplus Vehicles

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Ms. Leavings,

We request, for the next VH City Council Meeting, that the listed vehicles below be listed as "Surplus Vehicle" so that they can be sold on auction at [www.govdeals.com](http://www.govdeals.com).

2007 Ford Crown Victoria

VH City Asset #: 10727

VIN: 2FAFP71W87X130210

Mileage: 158,966

2007 Ford Crown Victoria

VH City Asset #: 10729

VIN: 2FAFP71W17X130212

Mileage: 161,818 (Estimate)

Thank You

**RESOLUTION NUMBER 4528**

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO TAKE ALL ACTIONS NECESSARY TO DEMOLISH THE STRUCTURE LOCATED AT 1939 OLD CREEK TRAIL**

**BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:**

1. The City Manager is hereby authorized to take all actions necessary to demolish the structure located at 1939 Old Creek Trail pursuant to Resolution Number 4495, adopted and approved by the Vestavia Hills City Council on September 9, 2013 (reconvened on September 23, 2013); and
2. An estimate of said demolition is marked as "Exhibit A" and is attached to and incorporated into this Resolution Number 4528 as though written fully therein; and
3. This Resolution Number 4528 is effective immediately upon adoption and approval.

**ADOPTED and APPROVED** this the 25<sup>th</sup> day of November, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk

**RESOLUTION NUMBER 4522**

**A RESOLUTION ORDERING THE DEMOLITION OF A BUILDING OR STRUCTURE LOCATED AT 4321 DOLLY RIDGE ROAD, VESTAVIA HILLS, ALABAMA, PARCEL ID# 28-22-2-010-011.000, IN COMPLIANCE WITH SECTIONS 11-40-30 THROUGH 11-40-36, SECTIONS 11-53B-1 THROUGH 11-53B-16, INCLUSIVE, OF THE *CODE OF ALABAMA*, AND IN COMPLIANCE WITH ORDINANCE NUMBER 2382 OF THE CITY OF VESTAVIA HILLS, ALABAMA; AND CALLING FOR THE CITY OF VESTAVIA HILLS TO CAUSE SAID DEMOLITION TO BE PERFORMED AND DIRECTING THE CITY ATTORNEY AND THE CITY CLERK TO CAUSE THE COST OF SUCH DEMOLITION TO BE CHARGED AGAINST THE LAND ON WHICH THE BUILDING OR STRUCTURE EXISTS AS A MUNICIPAL LIEN OR CAUSE SUCH COST TO BE RECOVERED IN A SUIT AT LAW AGAINST THE OWNER OR OWNERS**

**WHEREAS**, the appropriate Municipal Officials determined that the condition of the building or structure located at 4321 Dolly Ridge Road, Vestavia Hills, Alabama, Parcel I.D. Number 28-22-2-010-011.000 is in such a condition as to make it dangerous to the life, health, property, morals, safety, or general welfare of the public or the occupants.

**WHEREAS**, contemporaneously with the filing of “Finding of Public Nuisance, Notice and Order to Remedy and Notice of Lis Pendens” on October 18, 2013, a copy of same was sent via certified mail, properly addressed and postage prepaid to:

A. All person or persons, firm, association, or corporation last assessing the subject property for state taxes to the address on file in the Jefferson County Tax Collector’s Office;

B. The record property owner or owners (including any owner or owners of an interest in the subject property) as shown from a search of records of the Office of the Judge of Probate of Jefferson County, Alabama, at the owner or owners’ last known address and at the address of the subject property;

C. All mortgagees of record as shown from a search of the records of the Office of the Judge of Probate of Jefferson County, Alabama, to the address set forth in the mortgage or, if no address for the mortgagee is set forth in the mortgage, to the address determined to be the correct address by the appropriate Municipal Officials;

D. All lien holders of record as shown from a search of the records of the Office of the Judge of Probate of Jefferson County, Alabama to the address set forth in the statement of lien or, if no address for the lien holder is set forth in the

statement of lien, to the address determined to be the correct address by the appropriate Municipal Officials; and

E. Such other persons who are otherwise known to the City Clerk or to the appropriate Municipal Officials who could have an interest in the subject property;

**WHEREAS**, contemporaneously with the filing of the “Finding of Public Nuisance, Notice and Order to Remedy, and Notice of Lis Pendens”, a copy of the same was posted at or within three feet of an entrance to the building on the subject property and posted in three public places located within the City of Vestavia Hills: 1) Vestavia Hills Municipal Center, 2) Vestavia Hills Library in the Forest, and 3) Vestavia Hills Civic Center.

**WHEREAS**, notice that the appropriate Municipal Officials have made a finding that the subject property is a dangerous building because it is unsafe to the extent that it is a public nuisance and is subject to demolition and that a public hearing would be held on a certain date was also given to all interested parties and to the public at large by publication in the *Alabama Messenger*.

**BE IT RESOLVED** by the City Council of the City of Vestavia Hills, Alabama while in regular session on Monday, December 9, 2013 at 5:00 p.m. (continued to September 23, 2013), as follows:

**Section 1.** A Public Hearing was held on September 9, 2013 at 5:00 p.m. and after due deliberation the City Council of the City of Vestavia Hills, Alabama finds that the structure standing at 4321 Dolly Ridge Road, Vestavia Hills, AL 35243, Parcel ID# 28-22-2-010-011.000 is unsafe to the extent of becoming a public nuisance to the citizens of the City of Vestavia Hills, Alabama and is due to be condemned and demolished in compliance with Sections 11-40-30 through 11-40-36 and Sections 11-53B-1 through 11-53B-16, inclusive, of the Code of Alabama (1975), and Ordinance Number 2382 of the City of Vestavia Hills, Alabama;

**Section 2.** That the City of Vestavia Hills shall cause said demolition to be performed by its own employees and/or by contractor(s); and

**Section 3.** That the City Attorney and the City Clerk are hereby directed to cause the cost of such demolition to be charged against the land on which the building or structure is located and shall constitute a lien on the property for the amount of the assessment or cause such cost to be recovered in a suit at law against the owner or owners.

**ADOPTED** this the 9<sup>th</sup> day of December, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk

**CERTIFICATION OF CITY CLERK**

**STATE OF ALABAMA    )**

**JEFFERSON COUNTY    )**

I, Rebecca Leavings, City Clerk of the City of Vestavia Hills, Alabama, do hereby certify that the above and foregoing is a true and correct copy of a Resolution duly and legally adopted by the City Council of the City of Vestavia Hills, Alabama, on the 9<sup>th</sup> day of December, 2013 while in regular session on Monday, December 9, 2013, and the same appears of record in the minute book of said date of said City.

Witness my hand and seal of office this \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Rebecca Leavings, City Clerk

1200 PARK PLACE TOWER ■ 2001 PARK PLACE NORTH ■ BIRMINGHAM, ALABAMA 35203  
(205) 324-4400 ■ Facsimile: (205) 322-1163

October 18, 2013

**VIA HAND DELIVERY**

Ms. Becky Leavings  
City of Vestavia Hills  
513 Montgomery Highway  
Vestavia Hills AL 35216

**RE: Lis Pendens**

Dear Becky:

Please find enclosed five copies of the filed-stamped Lis Pendens notice for the demolition of real property located at 4321 Dolly Ridge Road. One copy of this notice is for your file. The other four copies need to be posted in the following locations within three days of today:

1. 4321 Dolly Ridge Road.
2. Vestavia Hills Municipal Center.
3. Vestavia Hills Library in the Forest.
4. Vestavia Hills Civic Center.

Should you have any questions or need any additional information, please let me know.

Very truly yours,



Kelly Thrasher Fox

Enclosures


cc: Mark T. Waggoner, Esq.  
Benjamin S. Goldman, Esq.

567036



**IN THE PROBATE COURT OF JEFFERSON COUNTY, ALABAMA**

CITY OF VESTAVIA HILLS, ALABAMA )  
 )  
 v. )  
 )  
 ROBERT M. BOYER; )  
 APCO EMPLOYEES CREDIT UNION; )  
 JEFFERSON COUNTY SEWER SERVICE )  
 OFFICE; )  
 BIRMINGHAM WATER WORKS )  
 )  
 See below for legal description. )



20131018001145890 1/10  
 BK: LR201319 Pg: 1997  
 Jefferson County, Alabama  
 I certify this instrument filed on:  
 10/18/2013 08:37:11 AM NOTICE  
 Judge of Probate- Alan L. King

**FINDING OF PUBLIC NUISANCE, NOTICE AND ORDER TO REMEDY,  
 AND NOTICE OF LIS PENDENS**

**TAKE NOTICE that:**

COMES NOW, the City of Vestavia Hills, Alabama (“the City”), by and through its Appropriate Municipal Officials, its City Clerk, and its Attorney to provide notice pursuant to Ordinance No. 2382 of the City that the Appropriate Municipal Officials have made a finding that a building located within the City is a dangerous building because it is unsafe to the extent that it is a public nuisance and subject to demolition. The building is located on the following described property, to wit, which will be described hereafter as “the Subject Property”:

**STREET ADDRESS:**

4321 Dolly Ridge Road, Vestavia Hills, AL 35243

**LEGAL DESCRIPTION:**

Part of the Southeast Quarter of the Northwest Quarter of Section 22, Township 18 South, Range 2 West, more particularly described as follows:

Commence at the Southeast corner of said 1/4-1/4 section and run thence Westwardly along the South line thereof for a distance of 535.1 feet to the Southwest corner of Lot 24, in Block B-2, according to the Survey of New Markle Heights, as recorded in Map Book 16, Page 20, in the Office of the Judge of Probate of Jefferson County, Alabama; run thence Northwardly along the West line of said Lot 24 for a distance of 95.50 feet to the point of beginning of the tract herein described; from the point of beginning thus

obtained continue Northwardly along the West line of said Lot 24 for a distance of 115.0 feet to the Southeast corner of Lot 23, in Block B-2, in said survey; run thence Westwardly along the South line of said Lot 23, and along the South line of Lot 1, in Block B-2, in said survey, for a distance of 326.55 feet to the Easterly line of Dolly Ridge Road (formerly Caldwell Mill Road) as now located and constructed with a 50 foot right-of-way as granted to Jefferson County, Alabama, by deed recorded in Volume 2555, Page 259; run thence Southwestwardly along the Easterly line of said road for a distance of 133.18 feet; run thence Eastwardly and parallel to the South line of said 1/4-1/4 section for a distance of 397.62 feet to the Point of Beginning. Property located in Jefferson County, Alabama, Birmingham Division.

**PARCEL IDENTIFICATION NUMBER:**

28-22-2-010-011.000

The City provides further notice as follows:

1. In *Ellis v. City of Montgomery*, the United States District Court for the Middle District of Alabama stated that, in cases such as this where a municipality seeks the demolition of building by use of its police powers, "A simple *lis pendens* filing after sending notice to the current owner of a property would place subsequent purchasers on record notice that demolition could occur." *Ellis v. City of Montgomery*, 460 F.Supp.2d 1301, 1307 (M.D. Ala. 2006). Here, the City is invoking the procedure recommended by the District Court.
2. By the filing of this Notice, the City is not claiming any right, title, or interest in the subject property. Rather, the purpose of this Notice is to put all interested parties on notice of the City's intent to exercise its authority provided by law and specifically by the City's ordinances.
3. Ordinance No. 2382 of the City is "An Ordinance to Amend the Official Policies and Procedures of the City of Vestavia Hills, Alabama, Regarding Unsafe Structures and Dangerous Buildings." The below-signed Appropriate Municipal Officials are the persons designated to exercise the authority and perform the duties delegated by Ordinance No. 2382.

4. The Appropriate Municipal Officials find that the building located on the Subject Property is a “dangerous building” within the meaning of Ordinance No. 2382 because of the following defects:

- (1) Exclusive of the foundation, the building shows thirty-three (33) percent, or more, of damage or deterioration of one (1) or more supporting members, or fifty (50) percent of damage or deterioration of the non-supporting enclosing or outside walls or covering;
- (2) The building has been damaged by fire, wind, earthquake, flood, sinkhole, deterioration, neglect, abandonment, vandalism, or any other cause so as to have become dangerous to life, health, property, morals, safety, or general welfare of the public or the occupants;
- (3) The building has become or is so damaged, dilapidated, decayed, unsafe, unsanitary, lacking in maintenance, vermin or rat infested, containing filth or contamination, lacking proper ventilation, lacking sufficient illumination, or so utterly fails to provide the amenities essential to decent living that it is unfit for human habitation, or is likely to cause sickness or disease, so as to work injury to the life, health, property, morals, safety, or general welfare of the public or the occupants;
- (4) The building is neglected, damaged, dilapidated, unsecured, or abandoned so as to become an attractive nuisance to children who might play in or on the building, structure, part of building or structure, party wall, or foundation to their danger, has become a harbor for vagrants, criminals, or immoral persons, or enables persons to resort to the building, structure, part of building or structure, party wall, or foundation for committing a nuisance or an unlawful act; and
- (5) The building has a portion remaining on a site after the demolition or destruction of the same or is abandoned so as to constitute such building, structure, part of building or structure, party wall, or foundation as an attractive nuisance or hazard to the public.

5. The Appropriate Municipal Officials find that the building on the Subject Property is substantially damaged or decayed, or deteriorated from its original value or structure (not including the value of the land).

6. The Appropriate Municipal Officials find that the building on the Subject Property cannot be reasonably repaired so that it will no longer exist in violation of the terms of Ordinance No. 2382.

7. Notice is hereby given to remedy the unsafe or dangerous condition by demolition of the building on the Subject Property within forty-five (45) days of the date of this Notice to the Appropriate Municipal Officials' satisfaction. In the event the owner does not comply within the time specified herein to the Appropriate Municipal Officials' satisfaction, the demolition shall be accomplished by the City and the cost thereof assessed against the Subject Property and such cost shall constitute a lien against the Subject Property.

8. The Appropriate Municipal Officials find that the building on the Subject Property is in such condition as to make it dangerous to the life, health, property, morals, safety, or general welfare of the public or the occupants. Therefore, the Appropriate Municipal Officials order that the building on the Subject Property be and remain vacated until demolished.

9. A public hearing as provided for by Section 5-146(a) set forth in Ordinance No. 2382 shall be held on the finding of the Appropriate Municipal Officials in the Council Chambers at the Vestavia Hills Municipal Center, 513 Montgomery Highway, Vestavia Hills, AL 35216, on the 9<sup>th</sup> day of December, 2013, at 5:00 p.m. At that time, the City Council shall hold a public hearing to receive any objections to the finding by the Appropriate Municipal Officials that the building or structure is unsafe to the extent of becoming a public nuisance. A written request for a public hearing is not necessary. At the public hearing, the City Council shall also receive any written objections to the finding by the Appropriate Municipal Officials. Any such written objection must be submitted to the City Clerk prior to the start of the City Council meeting at which the public hearing is held. No action shall be taken on the finding of the Appropriate Municipal Officials until determination thereon is made by the City Council. Upon holding the hearing, the City Council shall determine whether or not the building or structure is unsafe to the extent that it is a public nuisance. If it is determined by the

City Council that the building or structure is unsafe to the extent that it is a public nuisance, the City Council shall order demolition of the building at the expense of the City and assess the expenses of the move or demolition on the land on which the building stands or to which it is attached. Any person aggrieved by the decision of the City Council at the hearing may, within ten (10) days thereafter, appeal to the Circuit Court of Jefferson County, Alabama, Birmingham Division, upon filing with the Clerk of the Circuit Court of Jefferson County, Alabama, Birmingham Division, notice of the appeal and bond for security of costs in the form and amount to be approved by the Circuit Clerk. For further particulars, see Ordinance No. 2382.

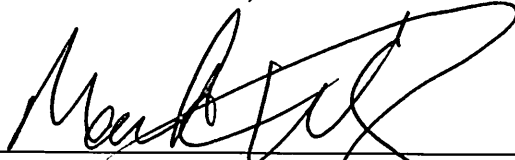
10. A failure by the Vestavia Hills City Council to act on the findings of the Appropriate Municipal Officials within ninety (90) days from the date of this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*" shall constitute an abdication of the Appropriate Municipal Officials' findings. However, this shall in no way prevent the City from reinitiating the proceedings authorized by Ordinance No. 2382 at any time so long as all the requirements of Ordinance No. 2382 are satisfied anew. Furthermore, this does not require that the ordered demolition take place within ninety (90) days from the date of this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*." A failure by the City to accomplish the demolition of the building within one hundred eighty (180) days of the passage of the resolution by the City Council ordering the same shall constitute an abdication of the City Council's order unless certain conditions further explained in Ordinance No. 2382 are satisfied. For further particulars, see Ordinance No. 2382. Anyone interested in the status of these proceedings should inquire with the Vestavia Hills City Clerk at (205) 978-0184 or at 513 Montgomery Highway, Vestavia Hills, AL 35216.

11. It is unlawful for any person, or for any agent, servant or employee of such person, to obstruct or interfere with the Appropriate Municipal Officials in carrying out the purposes of Ordinance No. 2382.

12. It is unlawful for any person, or for any agent, servant or employee of such person, to mutilate, destroy, tamper with this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*."

13. It is unlawful for any person to enter, access, or be upon the building that the Appropriate Municipal Officials have ordered to be vacated pursuant to this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*" except for the purposes of demolishing the same.

14. It is unlawful for any person who has received this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*" to sell, transfer, mortgage, lease, encumber, or otherwise dispose of the building that is the subject of the same to another until such person shall first furnish the grantee, transferee, mortgagee, or lessee a true copy of this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*" and shall furnish to the Appropriate Municipal Officials a signed and notarized statement from the grantee, transferee, mortgagee, or lessee acknowledging the receipt of this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*" and fully accepting the responsibility without condition for making the corrections or repairs required by this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*."



---

Mark T. Waggoner, Attorney for the  
City of Vestavia Hills, Alabama

**OF COUNSEL:**

Hand Arendall LLC  
2001 Park Place North, Suite 1200  
Birmingham, AL 35203  
E-mail: [mwaggoner@handarendall.com](mailto:mwaggoner@handarendall.com)  
Phone: (205) 324-4400 Fax: (205) 322-1163

**VERIFICATION OF THE APPROPRIATE MUNICIPAL OFFICIALS**

We, the undersigned, Keith Blanton and Greg Gilchrist state as follows: We are the Building Official and Fire Marshal, respectively, for the City of Vestavia Hills, Alabama, and for purposes of administering Ordinance No. 2382, we are the "Appropriate Municipal Officials." We hereby offer the findings made in this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*," make such orders as are offered herein, and provide such notice as is specified herein.

DONE this the 18<sup>th</sup> day of October, 2013.



\_\_\_\_\_  
Keith Blanton, Building Official and  
Appropriate Municipal Official  
City of Vestavia Hills, Alabama



\_\_\_\_\_  
Greg Gilchrist, Fire Marshal and  
Appropriate Municipal Official  
City of Vestavia Hills, Alabama

This Instrument Prepared By:

Mark T. Waggoner  
Hand Arendall LLC  
2001 Park Place North, Suite 1200  
Birmingham, AL 35203  
E-mail: [mwaggoner@handarendall.com](mailto:mwaggoner@handarendall.com)  
Phone: (205) 324-4400  
Fax: (205) 322-1163

**CERTIFICATE OF SERVICE**

Contemporaneously with the filing of this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*," a copy of the same has been sent via certified mail, properly addressed and postage prepaid, to all of the following persons on this the 18<sup>th</sup> day of October, 2013:

A. The person or persons, firm, association, or corporation last assessing the Subject Property for state taxes to the address on file in the Jefferson County Tax Collector's Office:

Robert M. Boyer  
4321 Dolly Ridge Road  
Vestavia Hills, AL 35243

B. The record property owner or owners (including any owner or owners of an interest in the Subject Property) as shown from a search of the records of the office of the Judge of Probate of Jefferson County, Alabama, at the owner or owners' last known address and at the address of the Subject Property:

Robert M. Boyer  
4321 Dolly Ridge Road  
Vestavia Hills, AL 35243

C. All mortgagees of record as shown from a search of the records of the office of the Judge of Probate of Jefferson County, Alabama, to the address set forth in the mortgage or, if no address for the mortgagee is set forth in the mortgage, to the address determined to be the correct address by the Appropriate Municipal Official:

APCO Employees Credit Union  
1608 7<sup>th</sup> Avenue North  
Birmingham, AL 35203

D. All lien holders of record as shown from a search of the records of the office of the Judge of Probate of Jefferson County, Alabama to the address set forth in the statement of lien or, if no address for the lien holder is set forth in the statement of lien, to the address determined to be the correct address by the Appropriate Municipal Official:



There are no lien holders of record.

E. Such other persons who are otherwise known to the City Clerk or to the

Appropriate Municipal Official who could have an interest in the Subject Property:

Jefferson County Sewer Service Office  
Room 800  
Jefferson County Courthouse  
716 Richard Arrington Jr. Blvd. North  
Birmingham, AL 35203  
Attention: Alicia

Birmingham Water Works  
Room 800  
Jefferson County Courthouse  
716 Richard Arrington Jr. Blvd. North  
Birmingham, AL 35203  
Attention: Monike Johnson

No other person is otherwise known to the City Clerk or to the Appropriate Municipal Official to have an interest in the Subject Property.

Contemporaneously with the filing of this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*," a copy of the same has been posted at or within three feet of an entrance to the building on the Subject Property.

Contemporaneously with the filing of this "Finding of Public Nuisance, Notice and Order to Remedy, and Notice of *Lis Pendens*," a copy of the same has been posted in three public places located within the City: 1.) at Vestavia Hills Municipal Center, 2.) at the Vestavia Hills Library in the Forest, and 3.) at the Vestavia Hills Civic Center.

Notice that the Appropriate Municipal Official has made a finding that the Subject Property is a dangerous building because it is unsafe to the extent that it is a public nuisance and is subject to demolition and that a public hearing will be held on the date assigned herein will also be given to all interested parties and to the public at large by publication in the *Alabama Messenger*.

*Keith Blanton*

Keith Blanton, City of Vestavia Hills, Alabama Building  
Official and Appropriate Municipal Official for Purposes  
of Administering Ordinance No. 2382

*Greg Gilchrist*

Greg Gilchrist, Fire Marshal for City of Vestavia Hills,  
Alabama and Appropriate Municipal Official for Purposes  
of Administering Ordinance No. 2382

*Rebecca Leavings*

Rebecca Leavings, City Clerk  
City of Vestavia Hills, Alabama

20131018001145890 10/10  
Bk: LR201319 Pg:1997  
Jefferson County, Alabama  
10/18/2013 08:37:11 AM NOTICE  
Fee - \$45.00

Total of Fees and Taxes-\$45.00  
NICOLE

**RESOLUTION NUMBER 4529**

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO TAKE ALL ACTIONS NECESSARY TO SECURE A SEPARATE ELECTRICAL METER AND BREAKER BOX AT THE SICARD HOLLOW ATHLETIC FACILITY**

**BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:**

1. The City Manager is hereby authorized to take all actions necessary to secure a separate electric meter and breaker box for the athletic facility complex located on Sicard Hollow Road at a cost not to exceed \$8,000; and
2. This Resolution Number 4529 shall become effective immediately upon adoption and approval.

**ADOPTED and APPROVED** this the 9<sup>th</sup> day of December, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk

**City of Vestavia Hills Public Services  
513 Montgomery Highway  
Vestavia Hills, AL 35216  
205.978.0150**

## **Interoffice Memo**

November 19, 2013

TO: Jeff Downes  
City Manager

FROM: Brian C. Davis *bcd*  
Public Services Director

RE: Power Meter at Sicard Hollow

We have been working with Alabama Power and Astro Electric to separate the athletic field lighting from the concession/restroom building in order to save money. Inguinity, our consultants that help us lower our utility bills; have suggested we add a separate meter to save on our power bills.

Astro Electric has given a proposal to add a separate meter, which also requires adding an additional breaker box and pulling wires for the second meter. The estimated cost is \$7,987.00. This is an unbudgeted item; therefore we need to take it to the council for their approval.

According to estimates, we can expect to break even in no more than 6 months. This should lower the costs for the athletic field lights, and it should also lower the costs to operate the concession stand.

I would like to place this on the council agenda for a first read at the next meeting, with action on the December 9, meeting.

Please let me know if you have any questions.

**RESOLUTION NUMBER 4530**

**A RESOLUTION APPROVING AND ASSENTING  
TO A DECLARATION OF VACATION**

**WITNESSETH THESE RECITALS**

**WHEREAS**, a Declaration signed by the owners of all the lands abutting the following described sanitary sewer easement situated in the City of Vestavia Hills, Jefferson County, Alabama, vacating said sanitary sewer easement, has been duly presented to the City Council of the City of Vestavia Hills, Alabama, for assent and approval of said governing body; and

**WHEREAS**, a copy of said Declaration with map attached is marked as “Exhibit A”, attached hereto and incorporated into this Resolution by reference as though set out fully herein; and

**WHEREAS**, the above-referenced sanitary sewer easement is commonly referred to as “a sanitary sewer easement” and is more particularly described as follows:

Commence at the NW corner of Lot 1 as recorded in Map Book 141, Page 28 in the Office of the Judge of Probate, Jefferson County, Alabama and run S89.37 29W for 100.69 feet, thence N77.05 45W for 108.26 feet, thence N71.43 28W for 43.31 feet to the centerline of point of beginning of a 10 foot wide easement, thence N02.12 26E for 90.15 feet to the centerline point of ending of said easement. Contains 901.50 square feet.

**WHEREAS**, it appears to the City Council of the City of Vestavia Hills, Alabama, that said vacated easement shall be relocated to allow for a sanitary sewer easement and for convenient and reasonable means of access as well as sewer access to be afforded to all utilities running through the tract of land or eventually located in said tract of land; and

**WHEREAS**, an instrument detailing said tract of land and dedicating the use of said property as a sanitary sewer easement for the location of utilities and sewer facilities shall be filed in the Office of the Judge of Probate and a copy shall be attached to this

Resolution Number 4530 prior to recordation of the vacation of this portion of right-of-way.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA,** that the vacation of the hereinabove described sanitary sewer easement is assented to and approved and the same is hereby vacated pursuant to the provision of Section 23-4-20 of the Code of Alabama, 1975.

**BE IT FURTHER RESOLVED AS FOLLOWS:**

This vacation shall not become effective or filed for record in the Office of the Judge of Probate, of Jefferson County, Alabama unless and until the occurrence and completion of all of the following conditions:

1. That the owners of all of the lands abutting the above-described property (that sanitary sewer easement sought to be vacated) shall have executed and delivered a perpetual, permanent and public easement (the “easement”) over, along and under the herein-described property granting to the general public and utility companies the right to install sewer facilities, cable television facilities and utility facilities for power, gas, telephone or other public services; and
2. That said easement shall be approved by the City Engineer of the City of Vestavia Hills, Alabama; and
3. That the easement shall be filed for record in the Office of the Judge of Probate of Jefferson County, Alabama; and

**RESOLVED, DONE AND ORDERED,** on this the 9<sup>th</sup> day of December, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk

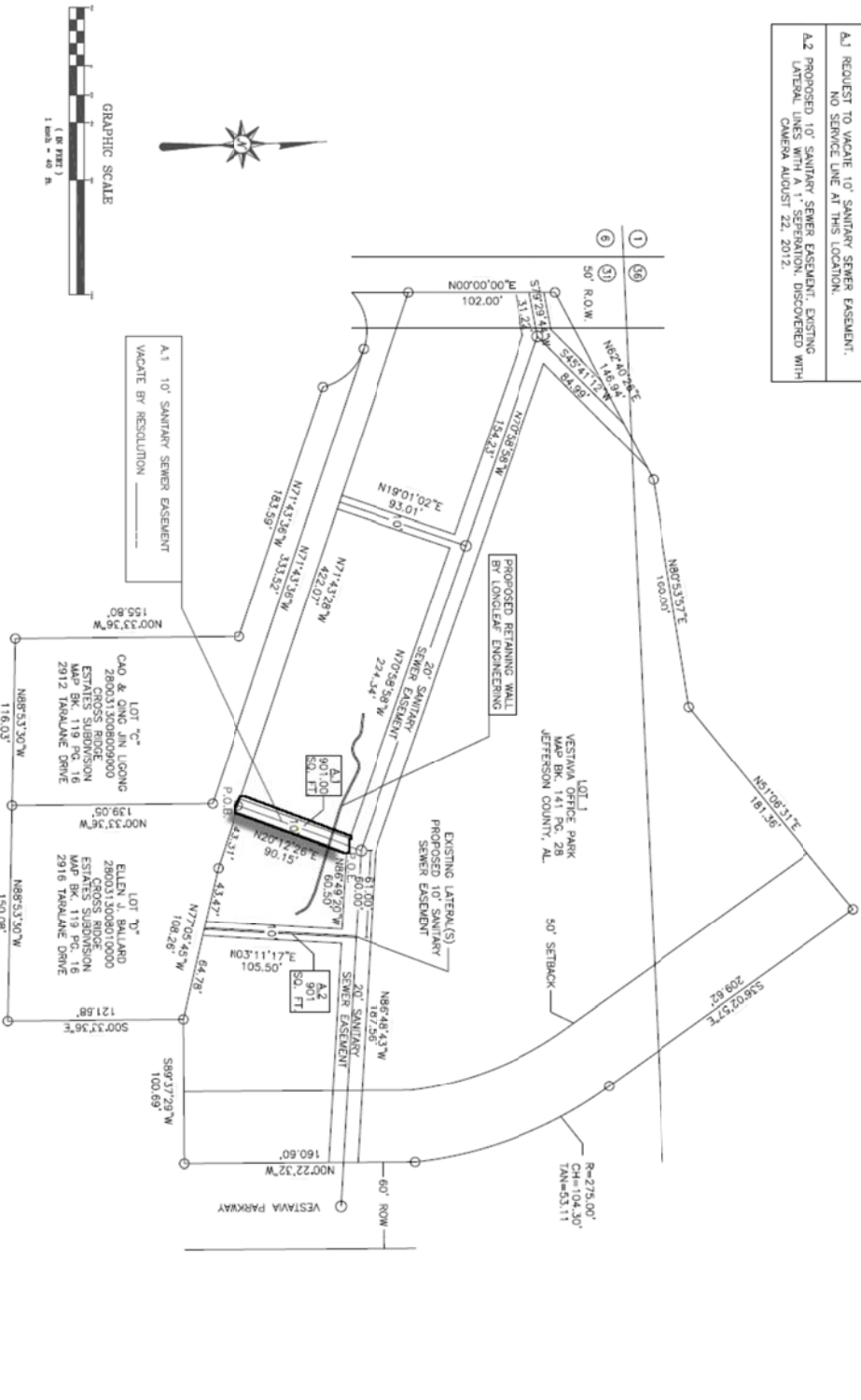
**CERTIFICATION**

I, the undersigned qualified Clerk of the City of Vestavia Hills, Alabama, do hereby certify that the above and foregoing is a true copy of a Resolution lawfully passed and adopted by the City Council of the City named therein, at a regular meeting of such Council held on the 9<sup>th</sup> day of December, 2013, and that such Resolution is of record in the Minute Book of the City at page \_\_\_\_\_ thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City on this the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

Rebecca Leavings  
City Clerk

NOTES:  
A1 REQUEST TO VACATE 10' SANITARY SEWER EASEMENT.  
NO SERVICE LINE AT THIS LOCATION.  
A2 PROPOSED 10' SANITARY SEWER EASEMENT, EXISTING LATERAL LINES WITH A 1" SEPARATION, DISCOVERED WITH CAMERA AUGUST 22, 2012.



NOTES:  
1. ALL EXPOSURE ON THIS MAP ARE FOR PRIVATE UTILITIES, SANITARY SEWER.

CITY CLERK, CITY OF VESTAVIA HILLS DATE



## Rebecca Leavings

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**Subject:** FW: .pdf

Ms. Rebecca Leavings  
City of Vestavia Hills

Date: November 18, 2013

Re: Vestavia Office Park Easement Vacation  
10' sewer easements (A.1, to be vacated / A.2, proposed to replace A.1)

Ms. Leavings:

This responds to previous communications regarding the above referenced easements. It appears that the above referenced easements, existing and proposed (A.1 and A.2, respectively) were intended to address "private sanitary sewer service lines" only between two separate property owners. Jefferson County is not a party to said easements and as such Jefferson County does not have any ownership interest whatsoever in said easements. For a note of record, Jefferson County does have existing 20' sanitary sewer easements crossing subject property in several locations as noted and shown on the "Easement Vacation" drawing provided by you. If you should have any questions regarding the aforementioned, you may contact me.

Sincerely,  
Richard Mixon  
Plans Examiner  
Jefferson County Environmental Services Department

STATE OF ALABAMA  
JEFFERSON COUNTY

DECLARATION OF VACATION

We, the undersigned, constituting all of the owners of all property abutting Vestavia Office Park as same appears on the Plat of Cahaba Ridge Estates *which* Plat is recorded in Plat Book 141, at Page 28, in the Probate Office of Jefferson County, Alabama, do hereby declare that each of said Plats embraced within the boundaries of said Vestavia Office Park as the same appears of record on the Plat to be vacated, and said Sanitary Easement (A.1) is hereby declared vacated. The undersigned do hereby respectfully represent and warrant as follows:

1. This Declaration of Vacation of Sanitary Easement A.1 is prepared, executed, delivered and recorded to and in accordance with the provisions of Section 23-4-20 and Section 35-2-54, Code of Alabama, 1975.

2. It is in the best public interest that Sanitary Easement A.1 be closed and vacated.

3. Such vacation will not deprive other property owners of a convenient and reasonable means of ingress and egress to their property.

4. Sanitary Easement A.1 is situated in the City of Vestavia Hills, Jefferson County, Alabama, and appears at A.1 to be vacated was intended for sanitary lateral serving 2912 and 2916 Taralane Drive, camera discovered the actual laterals 60.50 feet east of existing 10 foot easement to be vacated, Detail A.1 attached.

\_\_\_\_\_. A copy of the map reflecting the location of said easement is attached hereto and incorporated into this Declaration of Vacation as a part hereof.

5. The street address and legal descriptions of all property abutting owners and the names and addresses of the owner of said abutting properties are as follows:

CONFIDENTIAL

The following information was obtained from a confidential source who has provided reliable information in the past. It is being furnished to you for your information only. It is not to be disseminated outside your office.

The above information was obtained from a confidential source who has provided reliable information in the past. It is being furnished to you for your information only. It is not to be disseminated outside your office.

CONFIDENTIAL

The following information was obtained from a confidential source who has provided reliable information in the past. It is being furnished to you for your information only. It is not to be disseminated outside your office.

CONFIDENTIAL

The following information was obtained from a confidential source who has provided reliable information in the past. It is being furnished to you for your information only. It is not to be disseminated outside your office.

CONFIDENTIAL

A. Street Address: 2916 Taralane Drive, Vestavia Hills, AL.  
Legal Description: Map Book 119 Page 16  
\_\_\_\_\_  
Owners' Name(s): ELLEN J. BALLARD

B. Street Address: 100 Vestavia Pkwy, Vestavia Hills, AL.  
Legal Description: Lot 1, Vestavia Office Park as  
recorded in Map Book 141, Page 28  
\_\_\_\_\_  
Owners' Name(s): Taralane Properties

C. Street Address: \_\_\_\_\_  
Legal Description: \_\_\_\_\_  
\_\_\_\_\_  
Owners' Name(s): \_\_\_\_\_

D. Street Address: \_\_\_\_\_  
Legal Description: \_\_\_\_\_  
\_\_\_\_\_  
Owners' Name(s): \_\_\_\_\_

E. Street Address: \_\_\_\_\_  
Legal Description: \_\_\_\_\_  
\_\_\_\_\_  
Owners' Name(s): \_\_\_\_\_

F. Street Address: \_\_\_\_\_  
Legal Description: \_\_\_\_\_  
\_\_\_\_\_  
Owners' Name(s): \_\_\_\_\_

6. All of the undersigned do hereby declare Sanitary Easement A.1 to be vacated and respectfully request the assent of the City Council of the City of Vestavia Hills, Alabama, to said vacation of Sanitary Easement A.1 and its approval of the same.

IN WITNESS THEREOF, the undersigned have hereunto set our hands and seals on this the \_\_\_\_\_ day of October, 20 13.

**SIGNATURES OF ABUTTING PROPERTY OWNERS:**

*(notary on following pages)*

sign here X → Ellen J. Ballard Ellen J. Ballard  
October 25, 2013

Thomas Spruell Thorsen III

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

STATE OF ALABAMA

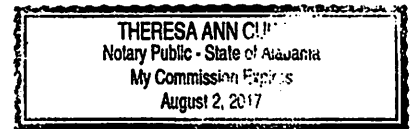
GENERAL ACKNOWLEDGMENT

JEFFERSON COUNTY

I, the undersigned authority, a Notary Public, in and for said County, in said State, hereby certify that THOMAS STRACTON and \_\_\_\_\_, whose names are signed to the foregoing Declaration of Vacation, and who are known to me, acknowledged before me on this day that being informed of the contents of the instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal, this the 16<sup>th</sup> day of October, 2013.

*Theresa Ann Curtis*  
Notary Public



STATE OF ALABAMA

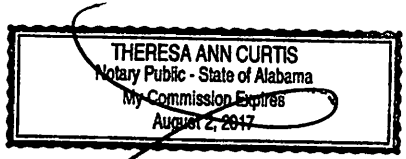
GENERAL ACKNOWLEDGMENT

JEFFERSON COUNTY

I, the undersigned authority, a Notary Public, in and for said County, in said State, hereby certify that \_\_\_\_\_ and \_\_\_\_\_, whose names are signed to the foregoing Declaration of Vacation, and who are known to me, acknowledged before me on this day that being informed of the contents of the instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public



STATE OF ALABAMA

GENERAL ACKNOWLEDGMENT

JEFFERSON COUNTY

I, the undersigned authority, a Notary Public, in and for said County, in said State, hereby certify that Ellen J. Bauard and \_\_\_\_\_, whose names are signed to the foregoing Declaration of Vacation, and who are known to me, acknowledged before me on this day that being informed of the contents of the instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal, this the 25<sup>th</sup> day of October, 2013.

Rhonda Stone  
Notary Public State of Alabama  
Cullman County

**Rhonda Stone**  
**My Commission Expires 05/08/2017**

STATE OF ALABAMA

GENERAL ACKNOWLEDGMENT

JEFFERSON COUNTY

I, the undersigned authority, a Notary Public, in and for said County, in said State, hereby certify that \_\_\_\_\_ and \_\_\_\_\_, whose names are signed to the foregoing Declaration of Vacation, and who are known to me, acknowledged before me on this day that being informed of the contents of the instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

**RESOLUTION NUMBER 4531**

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AND DELIVER AN AGREEMENT TO CONDUCT AN ASBESTOS SURVEY AND AN ENVIRONMENTAL INSPECTION DETERMINING THE PRESENCE OF POLYCHLORINATED BIPHENYLS (PCB), MERCURY AND CHLOROFLUOROCARBONS (CFC) AT THE OLD MOTOR LODGE MOTEL, 1459 MONTGOMERY HIGHWAY, VESTAVIA HILLS, ALABAMA**

**BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:**

1. The City Manager is hereby authorized to execute and deliver an agreement with ERG Environmental, Inc. to conduct an asbestos survey and an environmental inspection determining the presence of polychlorinated biphenyls (PCB), mercury and chlorofluorocarbons (CFC) at the old Motor Lodge Motel, 1459 Montgomery Highway, Vestavia Hills, Alabama; and
2. A copy of said agreement is marked as "Exhibit A," attached and incorporated into this Resolution Number 4531 as though written fully therein; and
3. This Resolution shall be effective immediately upon adoption and approval.

**ADOPTED and APPROVED** this the 9<sup>th</sup> day of December, 2013.

Alberto C. Zaragoza, Jr.  
Mayor

ATTESTED BY:

Rebecca Leavings  
City Clerk



ERG Environmental, Inc.  
262 Yeager Parkway, Suite D  
Pelham, Alabama 35124  
205-664-2535 \* Fax - 205-664-0648

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January 8, 2013 - Revised October 31, 2013

City Of Vestavia Hills  
Department Of Building Safety  
513 Montgomery Highway  
Vestavia Hills, Alabama 35216

ATTN: Mr. Jeff Downes, City Manager

SUBJECT: Proposal To Conduct An Asbestos Survey And To Conduct An Environmental Inspection Determining The Presence Of Polychlorinated Biphenyls (PCB's), Mercury & Chlorofluorocarbons (CFC) At The Old Motor Lodge Motel, 1459 Montgomery Highway, Vestavia Hills, Alabama -  
**ERGE PROPOSAL NO. 3682**

Dear Mr. Downes:

ERG Environmental, Inc. (ERGE) is pleased to submit this proposal to you for consideration in conducting a survey for asbestos-containing materials and conducting an environmental inspection determining the presence of Polychlorinated Biphenyls (PCB's), Mercury & Chlorofluorocarbons (CFC) at the above reference facility. This proposal also covers our fees associated with this work.

#### **QUALIFICATIONS**

ERGE is a diverse environmental consulting firm specializing in industrial hygiene, asbestos and lead-based paint program management, and other areas associated with occupational safety and health. ERG Environmental, Inc. employs professionals with various environmental disciplines including professional engineers, industrial hygienists, and building science specialists who are familiar with the particular concerns related to the handling of hazardous materials. The firm is approved by the United States Environmental Protection Agency, the Alabama Department Of Environmental Management and the Jefferson County Department Of Health to perform this type of work.

#### **SCOPE OF SERVICE**

ERG Environmental will provide the necessary equipment and State of Alabama accredited asbestos personnel to conduct an asbestos survey of the building. All asbestos samples will be collected in accordance with EPA's NESHAP regulations and analyzed using Polarized Light Microscopy (PLM) at a laboratory which holds current accreditation. An engineering report will be prepared based on all survey results.

ERGE will also conduct a visual environmental inspection for the presence of Polychlorinated Biphenyls (PCB), mercury vapor-containing equipment and Chlorofluorocarbons (CFC).

PCB's such as fluorescent light ballasts, hydraulic elevators and lifts, electrical transformers, etc. will be visually inspected. A limited number of light ballast will be inspected for labels noting PCB content. Mercury vapor-containing equipment (such as fluorescent lights, mercury vapor bulbs, high intensity discharge lights, other lamps as well as liquid mercury-containing equipment such as switches, thermostats and other temperature control devices, etc.) will also be visually inspected. Chlorofluorocarbons (CFC's such as refrigerators, air conditioning units, walk-in coolers, freezers, etc.) will also be noted during the inspection.

No bulk sampling or analytical testing will be conducted as part of the visual inspection. ERGE will include in our report the inspection results for the presence of visually noted suspect PCB's, CFC's and Mercury containing equipment and will include the approximate number of each component.

**COST OF SERVICE**

ERG Environmental will conduct the above work for the following fees:

|  |                   |
|--|-------------------|
| <b>CONDUCTING AN ASBESTOS SURVEY AND CONDUCTING AN ENVIRONMENTAL INSPECTION FOR THE PRESENCE OF SUSPECT PCB, CFC AND MERCURY, ALL SAMPLE ANALYSIS &amp; REPORT PREPARATION</b> |                   |
| <b>LUMP SUM</b>  | <b>\$3,762.00</b> |

**INVOICING**

ERGE will invoice the City Of Vestavia Hills on a monthly basis during the course of the project. ERGE's payment terms are net 30 days. Attached, please find ERGE's *General Terms & Conditions*.

ERG Environmental will be pleased to work with your firm during this project. Should you find this proposal acceptable, please sign and return one copy to this office. If you have any questions or if we can be of further service, please contact this office at your convenience.

Sincerely,  
Lamar Gilliland  
Vice President

**ACCEPTED:**

\_\_\_\_\_  
**SIGNATURE**

\_\_\_\_\_  
**TITLE**

\_\_\_\_\_  
**DATE**

1. It is understood that this Proposal is valid for a period of ninety (90) days. Upon the expiration of that period of time or the delay or suspension of the services, **ERGE** reserves the right to review the proposed basis of payment and fees, to allow for changing costs, as well as to adjust the period of performance to conform to work loads. References herein to "**ERGE**" are deemed to refer to **ERG Environmental, Inc.** and to its affiliates, subsidiaries and officers, employees and representatives of such companies.
2. Invoices will be submitted periodically (customarily on a monthly basis), and terms are net cash in U.S. dollars, due and payable upon receipt of invoice. Unpaid balances shall be subject to an additional charge at the rate of one (1.0) percent per month from the date of invoice. In addition, **ERGE** may, after giving seven (7) days written notice to **CLIENT**, suspend services without liability until the **CLIENT** has paid in full all amounts due **ERGE** on account for services rendered and expenses incurred, including interest on past-due invoices. Payment of invoices is not subject to discounting by **CLIENT**. Time is of the essence in payment of invoices, and timely payment is a material part of the consideration of any Agreement between **ERGE** and **CLIENT**. The **CLIENT** agrees to pay reasonable attorney's fees and court costs, should it become necessary for collection.
3. Unless the Proposal provides otherwise, the proposed fees constitute **ERGE**'s estimate of the effort and charges required to complete the Project as we understand it to be defined. For those projects involving conceptual or process development work, activities often are not fully definable in the initial planning. In any event, as the project progresses, the facts developed may dictate a change in direction, additional effort or suspension in effort, which may alter the scope. **ERGE** will inform the **CLIENT** of such situations so that negotiation of change in scope and adjustment to the time of performance can be accomplished as required. If such change, additional effort or suspension of effort, results in an increase or decrease in the cost of or time required for performance of the services, whether or not changed by any order, an equitable adjustment shall be made and the Agreement modified accordingly.

Costs and schedule commitments shall be subject to re-negotiation for unreasonable delays caused by the **CLIENT**'s failure to provide specified facilities or information, or for delays caused by unpredictable occurrences or force of nature, such as fires, floods, riots, strikes, unavailability of labor or materials, delays or defaults by suppliers of materials or services, process shutdown, acts of God or of the public enemy, or acts or regulations of any governmental agency. Temporary work stoppage caused by any of the above will result in additional cost (reflecting a change in scope) beyond that outlined in this proposal.
4. Where the method of contract payment is based on a cost reimbursement (i.e. hourly rates or time-and-material) basis, the following provisions shall apply:
  - a. The minimum time segment for charging of field work is four (4) hours. The minimum time segment for charging the work done at any of **ERGE**'s offices is one-half hour. Where applicable, rental charges will be applied to the Project to cover the cost of pilot-scale facilities or equipment, apparatus, instrumentation, or other technical machinery. When such charges are applicable, the **CLIENT** will be advised at the start of an assignment, task, or phase. Analysis performed in **ERGE**'s laboratories will be billed on a unit-cost-per-analysis basis unless specified otherwise in the proposal.
  - b. Expenses properly chargeable to the work, which are reimbursable at cost shall include travel and subsistence expenses of personnel when away from their office on business directly or indirectly connected with the Project, identifiable communication, shipping, printing, and reproduction costs; professional and technical subcontractors; identifiable drafting and stenographic supplies; computer time and software; and expendable materials and supplies purchased specifically for the Project. A ten (10) percent handling and administrative charge will be added to those foregoing items which are purchased from outside sources. When **ERGE**, subsequent to initiation of services, finds that specialized equipment is needed to perform the services, it will purchase the equipment as a reimbursable expense.
  - c. Invoices for effort on a cost-reimbursement basis will be submitted showing labor (hours worked) and total expenses, but not actual documentation. If requested by **CLIENT**,
- 4c. documentation will be provided at the cost of providing such documentation, including labor and copying costs.
5. No termination of this Project by the **CLIENT** shall be effective unless seven days written notice of intent to terminate, together with the reasons and details therefor, has been received by a principal or officer of **ERGE** and

an opportunity for consultation been given. A final invoice will be calculated on the first or fifteenth of the month (whichever comes first) following receipt of such termination notice and the elapse of the seven day period (the effective date of termination).

Either **ERGE** or the **CLIENT** may terminate any Agreement, in whole or in part, in writing, if the other party substantially fails to fulfill its obligations under the Agreement through no fault of the terminating party. Where method of contract payment is "lump sum", the final invoice will include all services and expenses associated with the Project up to the effective date of termination. Where method of contract payment is based on cost reimbursement, the final invoice will include all services and expenses associated with the project up to the effective date of termination. In any event, an equitable adjustment shall be made to provide for termination settlement costs **ERGE** incurs relating to commitments which had become firm before termination, and for a reasonable profit for services performed.

6. **ERGE** will serve as the professional representative of **CLIENT** as defined by this Proposal or under any Agreement and will provide advice, consultation and services to the **CLIENT** in accordance with generally accepted professional practice. Therefore, estimates of cost, approvals, recommendations, opinions, and decisions by **ERGE** are made on the basis of **ERGE's** experience, qualifications, and professional judgment. **ERGE** makes no warranty or guarantee, expressed or implied, regarding the services or work to be provided under this Proposal or any related Agreement. Notwithstanding any other provision of these General Terms and Conditions, and unless otherwise subject to a greater limitation, **ERGE's** liability to the **CLIENT** for any loss or damage, including, but not limited to, special and consequential damages, arising out of or in connection with the Proposal or any related Agreement from any cause, with the Proposal or any related Agreement from any cause, including **ERGE's** professional negligence, errors or omissions shall not exceed the greater of \$50,000.00 or the total compensation received by **ERGE** hereunder, and **CLIENT** hereby releases **ERGE** from any liability above such amount.
7. **ERGE** agrees to purchase at its own expense, Worker's Compensation insurance, Comprehensive General Liability insurance, and Engineer's Professional Liability insurance and will, upon request, furnish insurance certificates to **CLIENT**. **ERGE** agrees to indemnify **CLIENT** for the hazards covered by **ERGE's** insurance subject to the limitation of liability contained in Section

6. **ERGE** agrees to purchase whatever additional insurance is requested by **CLIENT** (presuming such insurance is available, from carriers acceptable to **ERGE**) provided the premiums for additional insurance are reimbursed by **CLIENT**.

8. It is understood and agreed that, in seeking the professional services of **ERGE** under this Agreement, **CLIENT** may be requesting **ERGE** to undertake uninsurable obligations for **CLIENT's** benefits involving the presence or potential presence of hazardous substances. Therefore, except for activities relating to hazardous waste disposal, cleanup or environmental liability including specification of a product, material or process containing asbestos; and also except for activities resulting in the actual, alleged or threatened discharge, dispersal, release or escape of pollutants ("*pollutants*" meaning any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste and waste materials to be recycled, reconditioned or reclaimed) (which exposure is excluded from **ERGE's** insurance coverage) **ERGE** shall indemnify the **CLIENT** for any loss or damage solely caused by the professional negligence, errors or omissions of **ERGE** in performance of the services under this Proposal or any related Agreement, subject to the limitation of liability contained in Section 6.
9. With respect to claims, damages, losses and expenses which are related to hazardous waste disposal or cleanup or environmental liability, as described in Section 8 and to the extent the same are not covered by the insurance maintained by **ERGE** described in Section 7, the **CLIENT** shall, to the extent permitted by law, defend, indemnify and hold harmless **ERGE** and its employees, independent professional associates, consultants and subcontractors from and against all such claims, damages, losses and expenses arising out of or resulting from the performance of the **ERGE** services under this Agreement including, but no limited to **ERGE's** professional negligence, errors or omissions. **CLIENT** agrees to name **ERGE** and **ERGE's** independent professional associates, consultants and subcontractors as additional insureds under all insurance policies and bonds carried by **CLIENT** with respect to the Project.
10. **CLIENT** shall not offer to employ or employ any **ERGE** employee assigned to the Project during the term of this Proposal or any Agreement or for a period of six months after completion of the services or Project under this Proposal or any Agreement.
11. **ERGE** shall maintain as confidential and not disclose to

others without **CLIENT's** prior written consent, all information obtained from **CLIENT**, not otherwise previously known to **ERGE** or in the public domain, as **CLIENT** expressly designates in writing to be "**CONFIDENTIAL**". The provisions of this paragraph shall not apply to information in whatever form which (1) is published or comes into the public domain through no fault of **ERGE** (2) is furnished by or obtained from a third party who is under no obligation to keep the information confidential, or (3) is required to be disclosed by law on order of a court, administrative agency or other authority with proper jurisdiction.

**CLIENT** agrees that **ERGE** may use and publish **CLIENT's** name and a general description of **ERGE's** services with respect to the Project in describing **ERGE's** experience and qualifications to other **CLIENT's** or potential **CLIENT's**.

12. All documents, including drawings and specifications prepared or furnished by **ERGE** (and **ERGE's** independent professional associates, consultants and subcontractors) pursuant to this Agreement are instruments of service in respect to the Project and **ERGE** shall retain an ownership and property interest therein whether or not the Project is completed. **CLIENT** may make and retain copies for information and reference in connection with the Project however, such documents are not intended or represented to be suitable for reuse by **CLIENT** or others on extensions of the Project or on any other project. Any reuse without written verification or adaptation by **ERGE** for the specific purpose intended will be at **CLIENT's** sole risk and without liability or legal exposure to **ERGE**, or to **ERGE's** independent professional associates, consultants or sub-contractors, and **CLIENT** shall indemnify and hold harmless **ERGE** and **ERGE's** independent professional associates, consultants and subcontractors from any and all costs, expenses, fees, losses, claims, demands, liabilities, suits, actions and damages whatsoever arising out of or resulting therefrom. Any such verification or adaptation will entitle **ERGE** to further compensation at rates to be agreed upon by **CLIENT** and **ERGE**.

13. To the extent they are inconsistent or contradictory, expressed terms of the Proposal take precedence over these General Terms and Conditions. It is understood and agreed that the services or work performed under this Proposal or any Agreement are not subject to any provision of any Uniform Commercial Code. Any terms and conditions set forth in **CLIENT's** purchase order, requisition, or other notice or authorization to proceed are inapplicable to the services under this Proposal or any

related agreement, except when specifically provided for in full on the face of such purchase order, requisition, or notice or authorization or **ERGE's** performance of work subsequent to receipt thereof does not constitute acceptance of any terms or conditions other than those set forth herein.

14. The technical and pricing information contained in this proposal or Agreement is to be considered Confidential and Proprietary and is not to be disclosed or otherwise made available to third parties without the express written consent of **ERGE**.
15. This Agreement is to be governed by and construed in accordance with the law of the principal place of business of **ERGE**.



**PATRICK H. BOONE**  
**ATTORNEY AND COUNSELOR AT LAW**  
**NEW SOUTH FEDERAL SAVINGS BUILDING, SUITE 705**  
**215 RICHARD ARRINGTON, JR. BOULEVARD NORTH**  
**BIRMINGHAM, ALABAMA 35203-3720**

TELEPHONE (205) 324-2018

FACSIMILE (205) 324-2295

November 21, 2013

By Hand Delivery

City Manager Jeffrey D. Downes  
Vestavia Hills Municipal Center  
513 Montgomery Highway  
Vestavia Hills, Alabama 35216

In Re: Proposed Agreement By and Between ERG Environmental, Inc.  
and the City of Vestavia Hills, Alabama

Dear Mr. Downes:

On November 20, 2013, Melissa Hipp provided me with a copy of a Proposal submitted by ERG Environmental, Inc. ("ERGE") to the City of Vestavia Hills, Alabama ("City") wherein ERGE offers to conduct an asbestos survey and an environmental inspection of the old Motor Lodge Motel situated at 1459 Montgomery Highway in the City of Vestavia Hills, Alabama for and in consideration of \$3,762.00. You have requested that I review the agreement and furnish you with my written legal opinion. The purpose of this letter is to comply with your request.

**I. FACTS**

The general terms and conditions of the agreement provide, among other things, in substance as follows:

- A. Section 6 limits the liability of ERGE to an amount not to exceed the greater of \$50,000.00 or the total compensation received by ERGE.
- B. Section 9 requires the City to defend, indemnify and hold harmless ERGE.
- C. Section 9 requires the City to name ERGE and its associates, consultants and subcontractors as additional insureds under all insurance policies and bonds carried by the City with respect to the project.



## II. LEGAL ISSUE ONE

Can the City legally enter into a written agreement limiting the liability of ERGE and agreeing to defend, indemnify and hold harmless ERGE?

## III. ANSWER TO LEGAL ISSUE ONE

It is my legal opinion that the answer to the Legal Issue One is in the negative.

## IV. BASIS FOR LEGAL OPINION

I am aware that the Supreme Court of Alabama has decided the following cases holding that a limitation of liability clause in a contract is enforceable.

- (1) *Saia Food Distributors and Club, Inc. v. Security Link From Ameritech, Inc. and ADT Security*, 902 So.2<sup>nd</sup> 46 (2004).
- (2) *Fox Alarm Company, Inc. v. Claude Wadsworth*, 913 So.2d 1070 (2005).
- (3) *Harris Moran Seed Company, Inc. v. Phillips*, 949 So.2d 916 (2006).

Private parties dealing by and between themselves have far more latitude and flexibility than municipalities have. A city has only the authority delegated to it by the Legislature and *The Constitution of Alabama of 1901* limits the expenditure of public funds for public purposes. I readily admit that private parties may enter into agreements limiting liability, but it is my opinion that municipalities cannot do so.

I base my legal opinion upon the following reasons:

A. MUNICIPALITIES CANNOT SPEND PUBLIC FUNDS TO INDEMNIFY THIRD PARTIES: It is my legal opinion that municipalities in Alabama cannot spend public funds to indemnify third parties. I base my legal opinions upon the following legal authorities:

(a) Constitution of Alabama of 1901: Section 94, as amended by Amendments 112 and 558, of the *Constitution of Alabama* provides as follows:

“The Legislature shall not have power to authorize any county, city, town or other subdivision of this state to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever.”

In my opinion, it would be a violation of Article IV, Section 94(a) of the *Constitution of Alabama* for the City to indemnify the Consultant for actions, costs, expenses, damages and liabilities.

**B. LIMITS OF LIABILITY OF MUNICIPALITIES:** Section 11-93-2, *Code of Alabama, 1975*, establishes the maximum amount of damages recoverable against governmental entities. The recovery of damages under any judgment against a city shall be limited to \$100,000.00 for bodily injury or death for one person in any single occurrence and to \$300,000.00 in the aggregate where more than two persons have claims or judgments on account of bodily injury or death arising out of any single occurrence. This statute also provides in pertinent part that recovery of damages under any judgment against a city shall be limited to \$100,000 for damage for loss of property arising out of any single occurrence. It is my opinion that if a city agreed to indemnify third parties, then in such event it would waive these limits of liability.

**C. PUBLIC OFFICIALS ARE ENTITLED TO DISCRETIONARY FUNCTION IMMUNITY:** Public officials who act within the scope of their authority in performing functions involving discretion are entitled to discretionary function immunity. *Woods v. Wilson*, 539 So.2d 224 and *Hilliard v. Huntsville*, 585 So.2d 889.

It is my opinion that if the City agreed to indemnify a third party, then in such event such indemnity agreement could waive the discretionary function immunity for its public employees.

**D. JOINT LIABILITY:** Title 11-47-191(b), *Code of Alabama, 1975*, provides as follows:

“(b) When a judgment shall be obtained against a municipality and the other party liable as provided in subsection (a) of this section, execution shall issue against the other defendant or defendants in the ordinary form and shall not be demandable of the city or town unless the other defendants are insolvent and the same cannot be made out of their property, and the city or town shall pay only so much of the said judgment as cannot be collected from the other defendants.”

**E. PREJUDICE THE RIGHTS OF THE CITY GENERAL COMPREHENSIVE LIABILITY INSURANCE CARRIER AND JEOPARDIZE COVERAGE:** Based upon Title 11-47-191(b), *Code of Alabama, 1975*, it is my legal opinion that if the City agreed to Section 6 of the General Terms and Conditions by limiting liability that it would prejudice the rights of the City general comprehensive liability insurance carrier and jeopardize coverage under the policy.

## **V. LEGAL ISSUE TWO**

Can the City legally name ERGE as an additional insured on its general comprehensive liability insurance policies?

## **VI. ANSWER TO LEGAL ISSUE TWO**

It is my legal opinion that the answer to the Legal Issue Two is in the affirmative; provided, however:

A. The general comprehensive liability insurance carrier for the City agrees to naming ERGE as an additional insured; and

B. That ERGE names the City and its servants, agents and employees as additional insureds under its general comprehensive liability insurance policies.

## **VII. MY RECOMMENDATIONS**

I recommend the following amendments to the agreement:

A. Delete the limitation of liability of ERGE.

B. Delete the requirement of the City to defend, indemnify and hold harmless ERGE.

C. Ask our general comprehensive liability insurance carrier about the naming of ERGE as an additional insured under the City policy.

D. Request ERGE to name the City and its servants, agents and employees as additional insureds under its general comprehensive liability insurance policies.

It is my legal opinion that the agreement will meet the requirements of Alabama law after the two deletions to the agreement are made.

## **VIII. ADDITIONAL COMMENTS**

In 2007, the Vestavia Hills Board of Education razed two buildings on the campus of Vestavia Hills Elementary School Cahaba Heights. ERGE was involved in that project. ERGE did an excellent job and their people were good to work with. The project was a positive experience.

November 21, 2013  
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Please call me if you have any questions regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick H. Boone". The signature is fluid and cursive, with a long horizontal stroke at the end.

Patrick H. Boone  
Vestavia Hills City Attorney

PHB:gp

cc: Mayor Alberto C. Zaragoza, Jr. (by hand)  
City Clerk Rebecca Leavings (by hand)