



**CENTRAL TEXAS
Regional Mobility Authority**

AGENDA ITEM #9 SUMMARY

Authorize execution of a development agreement with Cedar Park Town Center LP and advertising for bids to construct a right-turn lane on the 183A frontage road.

Strategic Plan Relevance: Regional Mobility

Department: Engineering

Associated Costs: TBD

Funding Source: General Funds

Board Action Required: Yes

Description of Matter: In connection with the construction of a new Costco store, Cedar Park Town Center LP (the “Developer”) needs to add a right-turn lane and associated improvements to the southbound 183A frontage road, starting approximately 1,960 feet north of RM 1431 (East Whitestone Boulevard) and continuing south to the intersection with RM 1431.

The Mobility Authority and Developer have agreed on a proposed development agreement by which the Mobility Authority will bid out, manage the construction, and inspect the required work based on agreed-upon project plans. The Developer will escrow the agreed-upon estimated construction costs, plus a 15% contingency reserve and fees the Mobility Authority will incur to oversee and inspect the contractor’s work through its general engineering consultant HNTB Corporation (estimated at 8% of the construction cost). Developer’s escrowed funds establish their maximum cost. Any cost that exceeds the escrowed funds will be paid by the Mobility Authority. Any escrowed funds remaining after completion and acceptance of the improvements will be refunded to the Developer.

Reference documentation: Draft Resolution, with the draft development agreement as an exhibit

Contact for further information: Wesley M. Burford, P.E., Director of Engineering

**GENERAL MEETING OF THE BOARD OF DIRECTORS
OF THE CENTRAL TEXAS
REGIONAL MOBILITY AUTHORITY**

RESOLUTION NO. 13-___

**AUTHORIZING EXECUTION OF A DEVELOPMENT AGREEMENT WITH CEDAR
PARK TOWN CENTER LP AND ADVERTISING FOR BIDS TO CONSTRUCT A
RIGHT-TURN LANE ON THE 183A FRONTAGE ROAD.**

WHEREAS, Cedar Park Town Center LP (the “Developer”) is developing property abutting the southbound 183A frontage road at and near its intersection with RM 1431 (Easst Whitestone Boulevard); and

WHEREAS, to provide safe and sufficient access to the development and travelers on the 183A frontage road, the Developer and the Mobility Authority have negotiated a development agreement to provide a right-turn lane and associated improvements for the southbound 183A frontage road to provide safer access to the property after it is developed for retail uses; and

WHEREAS, the Executive Director recommends approval of the proposed development agreement attached to this resolution as Exhibit 1.

NOW THEREFORE, BE IT RESOLVED, that the Board of Directors hereby approves the proposed development agreement and authorizes the Executive Director to execute the development agreement with Cedar Park Town Center LP in the form or substantially in the form attached to this resolution as Exhibit 1; and

BE IT FURTHER RESOLVED, that the Executive Director is authorized to advertise for bids to construct the proposed right-turn lane in accordance with terms of the development agreement and the Mobility Authority’s procurement policies.

Adopted by the Board of Directors of the Central Texas Regional Mobility Authority on the 27th day of March, 2013.

Submitted and reviewed by:

Approved:

Andrew Martin, General Counsel
Central Texas Regional Mobility Authority

Ray A. Wilkerson
Chairman, Board of Directors
Resolution Number 13-___
Date Passed: 3/27/13

EXHIBIT 1 TO RESOLUTION NO. 13-
PROPOSED DEVELOPMENT AGREEMENT

[on the next ____ pages]

DEVELOPMENT AGREEMENT

This Development Agreement (“Agreement”) is effective March ____, 2013, and is between the CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY (“Mobility Authority”) and CEDAR PARK TOWN CENTER LP, a Texas limited partnership (“Developer”). The Mobility Authority and Developer may be referred to collectively in this Agreement as the “Parties,” and individually as a “Party.”

WHEREAS, the Mobility Authority recently completed its construction of the 183A Phase II Turnpike Project, from RM 1431 to a point north of the intersection of 183A and Hero Way (“183A”); and

WHEREAS, Developer is the owner of certain real property in the City of Cedar Park, Texas, that abuts the southbound frontage roads for 183A, consisting of Tract 1 (49.12 acres, the “Property”), as more fully described in **Exhibit 1** attached to this Agreement.

WHEREAS, to facilitate traffic management for the benefit of both the public and for the users and occupants of the Property after the Property is developed, Developer has proposed construction of a new frontage road lane and associated improvements in the southbound 183A frontage road abutting and serving the Property, starting at a point located approximately 1,960 feet north of RM 1431, continuing south to the intersection of the southbound 183A frontage road with RM 1431 (the “Roadway Project”), and

WHEREAS, this Agreement establishes the Parties respective obligations with respect to the Roadway Project.

NOW THEREFORE, the Mobility Authority and Developer hereby agree as follows:

A. ROADWAY PROJECT

1. The Roadway Project is further defined as construction of a 12-ft wide frontage road lane, curbed and guttered, together with all required and related construction and drainage improvements, as generally illustrated by **Exhibit 2** to this Agreement.
2. Developer has prepared and provided to the Mobility Authority the design and construction documents required for the Roadway Project, including plans in accordance to TxDOT Standards and Specifications; a Construction Manual that includes all documents, specifications, special provisions, special specifications and general notes required by the Mobility Authority; a Construction Schedule; native CADD files used in the development of the construction documents; an electronic file in PDF format for each document provided under this paragraph; and any other documents identified by the Mobility Authority as necessary to construct the Roadway Project (the “Project Plans”). Based on the Project Plans, Developer has provided the Engineer’s Cost Estimate set forth in **Exhibit 3**. The Mobility Authority has reviewed and approved the Project Plans and the Engineer’s Cost Estimate.

3. No later than five days after the effective date of this Agreement, Developer shall pay the full amount of the Engineer's Cost Estimate established by **Exhibit 3** into an escrow account established in accordance with and subject to the Escrow Agreement attached as **Exhibit 4** to this Agreement (the "Escrow Agreement").
4. The Mobility Authority shall procure and supervise the construction contract for the Roadway Project in accordance with the Mobility Authority's Procurement Policies established by the Mobility Authority Policy Code. The Mobility Authority shall initiate the procurement process required to hire a contractor to build the Roadway Project no later than ten days after:
 - a. the Escrow Agreement has been executed by the Mobility Authority, the Developer, and the escrow agent identified in that agreement (the "Escrow Agent"), and a duly-executed counterpart original of that escrow agreement has been delivered to the Escrow Agent; and
 - b. Developer has deposited funds equal to the Engineer's Cost Estimate with the Escrow Agent to be held in escrow under the Escrow Agreement.
5. Developer shall pay all third party costs incurred by the Mobility Authority for the procurement, construction, and construction oversight of the Roadway Project (the "Actual Cost"), in an amount not to exceed the Engineer's Cost Estimate deposited into escrow. The Mobility Authority may draw upon the funds deposited by Developer into the escrow account in accordance with the terms and conditions of the Escrow Agreement. After completion and acceptance of the Roadway Project by the Mobility Authority and after the Mobility Authority has established and paid the Actual Cost, any funds remaining in the escrow account, including any accrued interest, shall be returned to Developer. The Mobility Authority shall within a reasonable time after a written request by Developer from time to time furnish Developer with an accounting of the Actual Cost.
6. The Mobility Authority shall oversee the construction of the Roadway Project in an effective manner to assure timely and proper completion thereof in accordance with the Project Plans. The Mobility Authority shall require the contractor awarded the Roadway Project not to unreasonably interfere with the contemporaneous development on the Property and the Mobility Authority shall exercise commercially reasonable efforts to enforce such obligation.

B. DEFAULT; REMEDIES; TERMINATION

1. Either Party may terminate this Agreement if the other Party defaults in its obligation and, after receiving notice of the default and of the non-defaulting Party's intent to terminate, fails to cure the default no later than ten days after receipt of that notice.
2. This Agreement will terminate on the date when all Escrowed Funds have been disbursed in accordance with the terms of the Escrow Agreement, or September 30, 2013, whichever date is earlier.

C. MISCELLANEOUS PROVISIONS

1. Actions Performable; Venue. The Mobility Authority and the Developer agree that all actions to be performed under this Agreement are performable in Williamson County, Texas. The parties agree that the exclusive venue for any lawsuit arising out of or relating to this Agreement will be in Williamson County, Texas, and waive the right to sue or be sued elsewhere.
2. Governing Law. The Mobility Authority and Developer agree that this Agreement has been made under the laws of the State of Texas in effect on this date, and that any interpretation of this Agreement at a future date shall be made under the laws of the State of Texas.
3. Complete Agreement; Amendment. This Agreement represents the entire agreement between the parties regarding the Roadway Project and supersedes all oral statements and prior writings relating to this Agreement. This Agreement may not be amended except by an instrument in writing signed by Developer and the Mobility Authority.
4. Exhibits. All exhibits and attachments attached hereto are incorporated herein by this reference.

Exhibit 1	-	Description of the Properties
Exhibit 2	-	Roadway Project Illustration
Exhibit 3	-	Engineer's Cost Estimate
Exhibit 4	-	Escrow Agreement

5. Notice. All notices, demands or other requests, and other communications required or permitted under this Agreement or which any Party may desire to give, shall be in writing and shall be deemed to have been given on the sooner to occur of (i) receipt by the Party to whom the notice is hand-delivered, with a written receipt of notice provided by the receiving Party, or (ii) two business days after deposit in a regularly maintained express mail receptacle of the United States Postal Service, postage prepaid, or registered or certified mail, return receipt requested, express mail delivery, addressed to such Party at the respective addresses set forth below, or such other address as each Party may from time to time designate by written notice to the others as herein required or (iii) facsimile transmission on which standard confirmation has been received by the sending Party:

For the Mobility Authority:

Mike Heiligenstein, Executive Director
Central Texas Regional Mobility Authority
301 Congress Avenue, Suite 650
Austin, TX 78701
(512) 996-9784 (facsimile)

For the Developer:

CEDAR PARK TOWN CENTER LP
c/o Mr. Michael Ainbinder
The Ainbinder Company
2415 W. Alabama, Suite 205
Houston, Texas 77098
(713) 892-5656 (facsimile)

6. Force Majeure. Whenever a period of time is prescribed by this Agreement for action to be taken by either Party, the Party shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, terrorist acts or activities, governmental laws, regulations, or restrictions, or any other causes of any kind whatsoever which are beyond the control of such party.
7. Assignment. This Agreement may be assigned by the Developer. The Developer must deliver to the Mobility Authority a written acknowledgement from the entity being assigned the Developer's position in this Agreement, acknowledging this Agreement and committing to assume all of the Developer's obligations included in this Agreement. No assignment of this Agreement shall release Developer from its obligations under this Agreement, but rather Developer and its assignee shall be jointly and severally liable for those obligations.
8. Signature Warranty Clause. The signatories to this Agreement represent and warrant that they have the authority to execute this Agreement on behalf of the Mobility Authority and Developer, respectively.

CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY

By: _____
Mike Heiligenstein, Executive Director

CEDAR PARK TOWN CENTER LP

By: Ainbinder Cedar Park, LLC

By: _____
Michael C. Ainbinder
Chairman, CEO and Manager

Exhibit 1 - Description of the Property

[to be provided]

Exhibit 2 - Roadway Project Illustration

[to be provided]

Exhibit 3 - Engineer's Cost Estimate

[to be provided]

Exhibit 4 - Escrow Agreement

[on the following eight pages]

ESCROW AGREEMENT

This Escrow Agreement (“Escrow Agreement”) is dated March _____, 2013, between CEDAR PARK TOWN CENTER LP, a Texas limited partnership (“Developer”), the CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY (“Mobility Authority”), a Texas political subdivision, and VERITAS TITLE PARTNERS, L.P. (“Veritas”), as the Escrow Agent. Developer, Mobility Authority, and Veritas may be referred to collectively in this Escrow Agreement as the “Parties,” and individually as a “Party.”

RECITALS

WHEREAS, Developer and Mobility Authority have entered into a Development Agreement effective March _____, 2013 (the “Development Agreement”) to fund certain roadway and related improvements described in that agreement (the “Roadway Project”);

WHEREAS, Developer has agreed in the Development Agreement to place \$_____ in an escrow account as a source of funds to be used by Mobility Authority to build the Roadway Project; and

WHEREAS, Veritas has agreed to serve as the escrow agent for Developer and Mobility Authority in accordance with the terms and conditions of this Escrow Agreement.

NOW, THEREFORE, for Parties agree as follows:

1. **Incorporation of Recitals and Findings.** The Recitals above are a part of this agreement. Capitalized words and phrases that are not defined in this Escrow Agreement have the meaning given in the Development Agreement.
2. **Appointment of Escrow Agent.** Developer and Mobility Authority hereby appoint Veritas to act as escrow agent (“Escrow Agent”) and to act as their agent with respect to the Escrowed Items, and Escrow Agent hereby accepts such appointment. The Escrow Items shall include the Escrow Agreement and the Escrowed Funds as set forth in paragraphs 3 and 4 below.
3. **Deposit of Escrow Agreement with Escrow Agent.** No later than five business days after all Parties have signed this Escrow Agreement, Developer shall deliver one duly-executed counterpart original of this Escrow Agreement to Escrow Agent.
4. **Deposit of Escrowed Funds.** Concurrently with the delivery of the duly-executed counterpart original of this Escrow Agreement to Escrow Agent, Developer shall deposit with Escrow Agent the sum of \$_____ (the “Escrowed Funds”). Escrow Agent shall not be responsible for the collection of the Escrowed Funds and may fully rely on Developer to assure the Escrowed Funds are timely deposited.

- (a) Escrow Agent shall keep all the Escrowed Funds in one or more interest-bearing accounts under the name and tax identification number of Developer and insured by the FDIC. Escrow Agent shall not be liable in the event of loss of the Escrowed Funds due to failure of the bank or savings and loan institution.
- (b) Any interest which accrues on the Escrowed Funds shall be paid to the person/entity receiving any amounts remaining in the Escrow at the close of the Escrow, in accordance with the terms of this Escrow Agreement.

5. **Escrow Term.** The Escrow shall close when all of the Escrowed Funds are disbursed in accordance with Sections 6 and 9 below, as applicable.

6. **Disbursement of Escrowed Funds to Mobility Authority.** Escrow Agent is instructed to disburse payments from the Escrowed Funds to the Mobility Authority in accordance with the following procedures:

- (a) Mobility Authority will submit a draw request to Escrow Agent stating and representing as true and correct the payment or payments made by Mobility Authority to outside contractors to provide services relating to bidding and oversight of the construction contract and to pay the contract price for construction of the Roadway Project to the bidder selected for the contract. A true and correct copy of each draw request submitted to the Escrow Agent shall be submitted contemporaneously by Mobility Authority to Developer using the same method of notice Mobility Authority uses under Section 11(c) to submit the draw request to Escrow Agent.
- (b) Within five business days after the date Escrow Agent receives a draw request, Escrow Agent shall disburse the draw amount to Mobility Authority.
- (c) The draw request shall be completed using the form attached as Exhibit 1.
- (d) The Escrow Agent shall pay each completed draw request forwarded by Mobility Authority to Escrow Agent. The draw request shall be paid in the dollar amount actually submitted in writing by Mobility Authority, if sufficient Escrowed Funds are available.

7. **Documentation and Audit of Draw Requests.**

- (a) Mobility Authority shall keep and maintain records to document and support that each individual draw request paid to Mobility Authority has been used only for one or more of the authorized purposes established by Section 6(a) of this Escrow Agreement. Records maintained under this subsection shall be made available for review and copying by Developer upon Developer's written request.
- (b) All of Mobility Authority's expenditures under this Escrow Agreement shall be subject to audit by Developer, at Developer's request and sole expense.

8. **Disbursement of Remaining Escrowed Funds.** Escrow Agent shall disburse to Developer any funds that remain in the Escrow Account no later than ten days after receipt of notice from Mobility Authority to Escrow Agent and to Developer that the Roadway Project has been completed and accepted by Mobility Authority and that all funds eligible for disbursement to Mobility Authority under Section 6(a) have been disbursed to Mobility Authority.

9. **Resignation of Escrow Agent.** Escrow Agent reserves the right to resign hereunder, upon 20 days prior written notice to Mobility Authority and Developer. In the event of said resignation, and prior to the effective date thereof, either (a) Mobility Authority and Developer, by joint written notice to Escrow Agent, shall designate a successor escrow agent to assume the responsibilities of Escrow Agent under this Escrow Agreement, and Escrow Agent shall immediately deliver all of the Escrowed Funds in Escrow Agent's possession to such successor escrow agent, or (b) if Mobility Authority and Developer do not agree on a successor escrow agent, or if they fail to deliver to Escrow Agent such written notice, Escrow Agent shall be entitled to interplead the Escrowed Funds into a court with proper jurisdiction in Williamson County, Texas.

10. **Escrow Fee.** Escrow Agent waives any right to receive a fee in connection with its services under this Escrow Agreement.

11. **Miscellaneous.**

(a) Time is of the essence with respect to each and every provision of this Escrow Agreement and in the performance, occurrence, fulfillment or satisfaction of each and every term and condition of the escrow created hereby.

(b) Escrow Agent shall be entitled to assume that documents and writings that are deposited into escrow or that are received in the course of carrying out its instructions hereunder are genuine and are in fact signed by the person or persons purporting to execute them, and Escrow Agent is entitled to act upon and use such documents and writings, unless and until Escrow Agent has actual knowledge of facts or circumstances that would cause a reasonably prudent person to suspect that they are not genuine. Escrow Agent shall not be responsible or liable for the accuracy, validity or appropriateness of any document or request submitted to it, and may fully rely on such document or request in acting or proceeding in accordance with this Escrow Agreement.

(c) All notices, demands, draw or other requests, and other communications required or permitted hereunder or which any Party may desire to give, shall be in writing and shall be deemed to have been given on the sooner to occur of (i) receipt by the Party to whom the notice is hand-delivered, with a written receipt of notice provided by the receiving Party, or (ii) two business days after deposit in a regularly maintained express mail receptacle of the United States Postal Service, postage prepaid, or registered or certified mail, return receipt requested, express

mail delivery, addressed to such Party at the respective addresses set forth below, or such other address as each Party may from time to time designate by written notice to the others as herein required, or (iii) facsimile or electronic mail transmission (the latter of scanned documents in formats such as .pdf or .tif) for which confirmation of receipt by the other parties has been obtained by the sending Party:

Escrow Agent: Veritas Title Partners. L.P.
Attn: Sandra Paige
2415 W. Alabama, Suite 203
Houston, Texas 77098
(713) 482-2802
(713) 482-2840 (facsimile)
Email: spaige@veritastitlepartners.com

Developer: Cedar Park Town Center LP
c/o Mr. Michael Ainbinder
The Ainbinder Company
2415 W. Alabama, Suite 205
Houston, Texas 77098
(713) 892-5600
(713) 892-5656 (facsimile)
Email: mca@ainbinder.com

Mobility Authority: Central Texas Regional Mobility Authority
Attn: Wes Burford, Director of Engineering
301 Congress Avenue, Suite 650
Austin, Texas 78701
(512) 996-9778
(512) 996-9784 (facsimile)
Email: wburford@ctrma.org

- (d) Escrow Agent shall not be obligated to determine or resolve conflicting demands or claims to funds, documents or items deposited in escrow or conflicting demands or claims concerning the validity or interpretation of, or performance under, this Escrow Agreement. Until such conflicting demands or claims have been determined, resolved or eliminated by written agreement of the Parties, a valid amendment to this Escrow Agreement or a final order of judgment of the court of competent jurisdiction, Escrow Agent shall be authorized to (i) refrain from carrying out its duties hereunder, and to retain in escrow any funds, documents or items that are the subject of the conflict or that may be dependent on or affected by the resolution of the conflict or (ii) interplead the subject matter of this Escrow into any court of competent jurisdiction and the act of such interpleader shall immediately relieve Escrow Agent of its duties, liabilities and responsibilities hereunder. In that regard, the Parties hereto expressly acknowledge Escrow Agent's right to interplead the Escrowed Items into a court

of competent jurisdiction in Williamson County, Texas, as provided by this Escrow Agreement.

- (e) This Escrow Agreement may be amended only by means of a written amendment signed by all the Parties to this Escrow Agreement. Any purported oral amendment of this Escrow Agreement shall be ineffective and invalid.
- (f) This Escrow Agreement may be executed in counterparts, each of which individually shall be an original and all of which together shall constitute but one and the same document. Any signature page to any counterpart of this Escrow Agreement may be detached from such counterpart without impairing the legal effect of the signature thereon and thereafter attached to another counterpart identical thereto except having to it additional signature pages.
- (g) The captions contained in this Escrow Agreement are for purposes of identification only and shall not be considered in construing this Escrow Agreement.
- (h) This Escrow Agreement shall be governed by and construed in accordance with the laws in the State of Texas. The Parties agree that the exclusive venue for any lawsuit arising out of or relating to this Escrow Agreement will be in Williamson County, Texas, and waive the right to sue or be sued elsewhere.
- (i) This Escrow Agreement shall be binding on the Parties hereto and their respective heirs, executives, administrators, successors and assigns when all Parties have executed and delivered a counterpart hereof.
- (j) Each Party represents that it has full power and authority rightfully to execute and deliver this Escrow Agreement and to perform the actions contemplated hereby.

12. **Conflict with Development Agreement.** In the event of a conflict between any term, provision or condition of the Development Agreement and this Escrow Agreement, the terms, conditions and provisions of the Development Agreement shall govern with respect to Developer and Mobility Authority. Escrow Agent shall be bound by only the terms and stipulations of this Escrow Agreement.

13. **Effective Date.** The Effective Date shall be the date the last of the Parties shown below executes this Escrow Agreement.

14. **Term.** This Escrow Agreement shall terminate when all Escrowed Funds have been disbursed in accordance with the terms hereof. The provisions of Section 7 of this Escrow Agreement shall survive such termination for a period of two years.

Executed to be effective as of the Effective Date.

MOBILITY AUTHORITY:

CENTRAL TEXAS REGIONAL MOBILITY
AUTHORITY

By: _____

Name: Mike Heiligenstein

Title: Executive Director

Date: _____

DEVELOPER:

CEDAR PARK TOWN CENTER LP

By: Ainbinder Cedar Park, LLC

By: _____

Michael C. Ainbinder

Chairman, CEO and Manager

Date: _____

ESCROW AGENT:

VERITAS TITLE PARTNERS, L.P.

By: _____

Name:

Title: _____

Date: _____

EXHIBIT 2

DRAW REQUEST

Date: _____

Veritas Title Partners, L.P.
Attn: Sandra Paige
2415 W. Alabama, Suite 203
Houston, Texas 77098

Re: Escrow Agreement by and between CEDAR PARK TOWN CENTER LP, a Texas limited partnership (“Developer”), the CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY (“Mobility Authority”), a Texas political subdivision, and VERITAS TITLE PARTNERS LP. (“Escrow Agent”)

To Whom It May Concern:

In connection with the above captioned escrow, the undersigned hereby requests disbursement from the captioned escrow as follows:

\$ _____ draw request for Payment Period: _____, 2013.

\$ _____ Amount Remaining in Escrow following Current Draw.

The undersigned certifies that these funds are requested exclusively for the purpose of:

1. Reimbursement of costs paid by the Mobility Authority to HNTB Corporation, its General Engineering Consultant, for services relating to procurement and oversight of the construction contract.
2. Reimbursement of costs paid by the Mobility Authority to _____, its _____, for services relating to procurement and oversight of the construction contract.
3. Reimbursement of costs paid by the Mobility Authority to _____, the general contractor selected by the Mobility Authority, for costs and charges incurred under the contract to construct the Roadway Project.

The undersigned further certifies that:

1. all work described by this draw request has been undertaken in compliance with applicable local, state, and federal laws and regulations; and

2. the Mobility Authority has provided a true and correct copy of this draw request to Developer contemporaneously with submission of this draw request to the Escrow Agent, using the same method of notice it used to give notice of this draw request to Escrow Agent.

True and correct records and documents are available and in the possession of the Mobility Authority to document the expenses included in this draw request.

CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

cc: CEDAR PARK TOWN CENTER, L.P.
c/o Mr. Michael Ainbinder
The Ainbinder Company
2415 W. Alabama, Suite 205
Houston, Texas 77098