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TEXAS REAL ESTATE FORMS MANUAL

volume two

2021

Texas Real Estate Forms Manual
2021 Edition

Volume 2

TEXAS REAL ESTATE FORMS MANUAL

2021 Edition

Volume 2

A project of the
Real Estate Forms Committee
of the
State Bar of Texas

Austin 2021

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International Standard Book Number: 978-1-938873-92-8
Library of Congress Control Number: 2021935779

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State Bar of Texas
Austin, Texas 78711

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Printed in the United States of America

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Chapter 16

Water Rights Conveyancing Documents

I. Overview of Water Law

§ 16.1 Introduction

Texas real estate transactions increasingly involve issues of water resources and supply. These issues affect the use and valuation of the land. In addition, transactions involving the purchase or lease of existing water rights (surface or groundwater) are becoming increasingly common. Surface water in Texas is owned by the state, but groundwater is privately owned. While both are interests in real property, the law applicable to surface water and groundwater is different. The issues in transactions involving the same are different too. This chapter provides an overview of Texas water law and some basic forms for the sale, lease or assignment, permitting, and mortgage of surface water and groundwater rights. For additional in-depth discussion of Texas surface water law, see Mary K. Sahs, ed., *Essentials of Texas Water Resources*, pt. B, "Surface Water," State Bar of Texas (6th ed. 2020).

Surface water is the property of the state. Once surface water has been appropriated, and the permittee has perfected the appropriation, the holder of the water right has superior title to all the world except the State. *See, e.g., Texas Water Rights Commission v. Wright*, 464 S.W.2d 642 (Tex. 1971); *South Texas Water Co. v. Bieri*, 247 S.W.2d 268 (Tex. App.—Galveston 1952, writ ref'd n.r.e.) (state owns the corpus of the water, appropriator owns a usufructuary right). The permittee's rights, and the transfer or conveyance of those rights, are subject to the prior appropriation doctrine and the police powers of the Texas Commission on Environmental Quality (TCEQ). *See Texas Commission on Environmental Quality v. Texas Farm Bureau*, 460 S.W.3d 264, 266 (Tex. App.—Corpus Christi–Edinburg 2015, pet. denied); Tex. Water Code § 5.013, ch. 11; 30 Tex. Admin. Code chs. 295, 297.

Groundwater in place under the land is the property of the owner of the surface estate. Tex. Water Code § 36.002(a); *see, e.g., Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 58 (Tex. 2016); *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 817, 831 (Tex. 2012); *Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118, 137–38 (Tex. App.—San Antonio 2013, pet. denied); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied). Groundwater production, as well as its sale or lease, may be regulated by a local groundwater conservation district generally operating pursuant to chapter 36 of the Texas Water Code and, if applicable, its respective enabling legislation. *See* Tex. Water Code ch. 36. These local districts are the state's preferred method of groundwater management to provide some regulation of the withdrawal and use of groundwater within their jurisdictions. *See Day*, 369 S.W.3d at 817, 835 & n.119; Tex. Water Code § 36.0015; *cf. Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., concurring) ("Actually, such districts are not just the preferred method of groundwater management, they are the only method presently available."). For additional in-depth discussion of Texas groundwater law see Mary K. Sahs, ed., *Essentials of Texas Water Resources*, pt. A, ch. 5, and

pt. C, "Groundwater," State Bar of Texas (6th ed. 2020).

As of March 2021, ninety-nine confirmed groundwater districts were operating across Texas, as well as two subsidence districts and one pending groundwater district. Thus, parties to real estate transactions must carefully consider whether they are dealing with issues of surface water rights, groundwater rights, or both, and they must also consider which regulatory entities have jurisdiction over those rights.

The TCEQ and the Texas Water Development Board (TWDB) are the two state agencies principally involved in the implementation of Texas's surface water laws and policies. The TWDB serves as the state's financier for major water projects. The regulation of water and sewer utilities, including the responsibility for rate and other economic regulation, and the jurisdiction over certain water supply and sewer service corporations, is under the Public Utility Commission of Texas. The TCEQ's jurisdiction includes water rights, water pollution and water quality, wholesale water rates, dam safety, the regulation of public sewer and drinking water systems, and limited groundwater district formation and supervision. The TCEQ is the adjudicatory body for all contested surface water rights cases and has substantive and procedural rulemaking authority. *See* Tex. Water Code § 5.013.

The TWDB is the state agency with authority for the planning of and financial assistance for water development projects. *See generally* Tex. Water Code chs. 15, 16. The TWDB makes loan and grant programs available to qualifying local governments and utilities for water supply development projects and for water quality purposes. *See generally* Tex. Water Code ch. 15; 31 Tex. Admin. Code chs. 355, 363, 367, 372, 375, 384. The TWDB is responsible for the development of the state water plan and coordination with the regional planning groups and groundwater management areas. *See generally* Tex. Water Code ch. 16, §§ 36.108–.1086; 31 Tex. Admin. Code chs. 355–358. The agency also has limited supervisory authority over groundwater district management plans, joint planning, and the development of desired future conditions for the state's groundwater resources. *See* Tex. Water Code §§ 36.108–.1086; 31 Tex. Admin. Code ch. 356.

§ 16.2 Groundwater

§ 16.2:1 Definition

Groundwater is water occurring under the surface of land, including percolating water or artesian water. *See generally* Tex. Water Code §§ 35.002(5), 36.001(5). The underflow of a surface water river or stream or the underground flow of water in confined channels is not groundwater. *See* Tex. Water Code § 11.021(a). Groundwater is presumed to be percolating unless it is proven to be otherwise. *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927); *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 237 (Tex. App.—Austin 1989, writ denied); *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 506 (Tex. App.—El Paso 1954, writ ref'd n.r.e.). The Texas Water Code defines "groundwater" as water percolating below the surface of the earth. *See* Tex. Water Code §§ 35.002(5), 36.001(5).

Artesian water is groundwater confined under pressure by an impermeable geological layer, capable of flowing "above the first impervious stratum below the surface of the ground" when properly cased in a well. *See* Tex. Water Code § 11.201. The only significant difference between the legal treatment of percolating water and artesian water is that there are statutory provisions prohibiting the waste of artesian water and relating to artesian water produced from wells in the Edwards Aquifer. *See* Tex. Water Code § 11.202(d)–(e).

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Underflow is that portion of a surface watercourse that flows through sand and gravel deposits beneath the surface of the bed or banks of a stream. Underflow is surface water and is the property of the state. Tex. Water Code § 11.021(a). The laws governing the allocation and use of surface water apply to underflow. *Burkett*, 296 S.W. at 277; *Denis*, 771 S.W.2d at 237; *see* Tex. Water Code § 11.021.

Water "confined to underground streams with definite channels" means a subsurface watercourse that has all the characteristics of a surface watercourse, including a bed, banks that form a channel, and a current of water. *Denis*, 771 S.W.2d at 237. Ownership rights for this type of subsurface watercourse are the same as for surface water. Tex. Water Code § 11.021(a); *see Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 822 & n.28 (Tex. 2012). Whether subsurface water is the underground flow of water in a defined subterranean channel or percolating groundwater is a determination that must be made on a case-by-case basis. *Burkett*, 296 S.W. at 277; *Denis*, 771 S.W.2d at 237.

§ 16.2:2 Ownership: "Rule of Capture," Theory of Absolute Ownership of Groundwater in Place, and Common-Law and Regulatory Use Restrictions

In 1904, the Texas Supreme Court applied the English common-law rule of capture to groundwater and held that the owner of land could pump unlimited quantities of water from under his land, regardless of whether his action drained water from under his neighbor's land. *Houston & T.C. Railway Co. v. East*, 81 S.W. 279 (Tex. 1904) (the "*East* case"). Under common law, a landowner could use groundwater at a location other than his land and sell groundwater that he captured below the surface of his land for off-site use by a third party. *Texas Co. v. Burkett*, 296 S.W. 273 (Tex. 1927). Texas courts subsequently upheld the right of a landowner to capture and use groundwater even when doing so affects surface water supplies. *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 233–37 (Tex. App.—Austin 1989, writ denied). *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503 (Tex. App.—El Paso 1954, writ ref'd n.r.e.). The supreme court has declined to overrule the holding of *East*, finding that the common-law rule of capture does not preclude ownership in place, and that duty has been delegated to the Texas legislature. *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 79 (Tex. 1999); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955); Tex. Const. art. XVI, § 59. In *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 827–33 (Tex. 2012), the supreme court reaffirmed the proposition in response to the State of Texas and the Edwards Aquifer Authority challenge to this well-established rule.

There are only two significant limitations at common law on the landowner's right to capture and use groundwater: (1) the landowner cannot capture and use groundwater maliciously for the purpose of injuring a neighbor or in a manner that constitutes wanton and willful waste (*City of Corpus Christi*, 276 S.W.2d 798); and (2) the landowner may be liable for damages if he negligently pumps groundwater in a manner that causes subsidence of neighboring land (*Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21 (Tex. 1978)). These limitations are recognized in section 36.002 of the Texas Water Code. Tex. Water Code § 36.002(b)(1); *see Day*, 369 S.W.3d at 832.

In recent years, Texas courts have relied on the state's more developed oil and gas jurisprudence to address issues regarding the nature and extent of a landowner's ownership interest in groundwater under his land. *See, e.g., Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 58 (Tex. 2016); *Day*, 369 S.W.3d at 817, 831;

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Edwards Aquifer Authority v. Bragg, 421 S.W.3d 118, 137–38 (Tex. App.—San Antonio 2013, pet. denied); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied). These questions have included not only whether a landowner owns groundwater in place under his land or actually vests only when the landowner has captured the groundwater by producing it and putting it to a beneficial use but also whether the landowner's interest in the groundwater is a vested right that would enable the landowner to challenge groundwater regulation by a governmental authority as an unconstitutional taking of the landowner's ownership of groundwater. The courts have also relied on oil and gas precedents to determine issues related to reservations of groundwater in place and conflicts between the severed dominant groundwater estate and servient surface estate.

In *City of Del Rio*, the trust, which was the owner of a large ranch, sold a fifteen-acre portion of the ranch to the city of Del Rio. In the sale the trust reserved the rights to all groundwater under the land but expressly surrendered any right to use the surface estate of the fifteen acres to access and develop the reserved groundwater rights. *City of Del Rio*, 269 S.W.3d at 615. The trust had never produced groundwater from the fifteen-acre tract. After the sale, the city drilled a well on the land for the production of groundwater for its municipal water supply. The trust sued the city on the grounds that the trust was the owner of the groundwater due to its reservation. The city, using an interpretation of the "rule of capture" as a theory of ownership, rather than a defense to liability for the pumping and use of groundwater in place, argued that the landowner's interest in the groundwater under his land is not a vested right but vests only when the landowner has "captured" the groundwater by pumping it and using it. Under this argument, because the trust had never produced groundwater from the fifteen-acre tract, the trust did not have an ownership interest in the groundwater that could be reserved in the deed, and therefore the city owned the groundwater under the fifteen acres. The court rejected the city's argument, holding instead that "under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation." *City of Del Rio*, 269 S.W.3d at 617. The court reasoned that the trust could access the groundwater from an adjacent tract of land without the need to access the surface estate of the fifteen-acre tract. *City of Del Rio*, 269 S.W.3d at 618–19. The Texas Supreme Court denied the city's petition for review.

In *Edwards Aquifer Authority v. Day*, the landowners sued the Edwards Aquifer Authority (EAA) on the grounds that the EAA's denial of the landowners' permit applications constituted a regulatory taking of the landowners' vested rights in the groundwater. The Texas Supreme Court affirmed many aspects of the EAA's final order regarding the permit applications at issue but remanded the case to the trial court for further proceedings on the taking claim. The supreme court affirmed the court of appeals' key holding, stating that "land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation." *Day*, 369 S.W.3d at 817. The court ruled that prior decisions neither recognized nor precluded ownership in place. The court noted that it had held oil and gas in place to be owned by the landowner long ago, and concluded "we find no reason to treat groundwater differently." *Day*, 369 S.W.3d at 823.

In a subsequent case, *Bragg*, 421 S.W.3d at 137–38, the court relied on the supreme court's ruling in *Day* that groundwater rights in place are vested rights, constitutionally protected from a government taking, including a regulatory taking resulting from the permitting decisions of groundwater conservation districts (GCDs), without just compensation. The Texas Supreme Court denied the Edwards Aquifer Authority's petition for review.

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In 2016, the supreme court again relied on Texas oil and gas precedents in *Coyote Lake Ranch*. The court held that the groundwater estate was by necessity the "dominant estate" when severed from the surface estate. *Coyote Lake Ranch*, 498 S.W.3d at 64. Relying on the rationale adopted by the court for the mineral estate, the supreme court also held that the accommodation doctrine applied in conflicts between the superior groundwater estate and the servient surface estate that are not expressly addressed in the agreements between the parties. *Coyote Lake Ranch*, 498 S.W.3d at 64.

The Texas legislature amended section 36.002 of the Water Code to address the issue of ownership of groundwater in place and the authority of GCDs to regulate the pumping and use of groundwater. To some extent this section, as amended, codifies the existing case law. *See Day*, 369 S.W.3d at 842.

Section 36.002(a) states that the "legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property." Section 36.002(b) provides that this ownership interest entitles the landowner to drill for and produce the groundwater "subject to" the authority of GCDs to limit or prohibit drilling and to regulate production as described in section 36.002(d). Section 36.002(b–1) also recognizes landowners' common law rights but provides that the "groundwater ownership and rights described by this section [do not] entitle a landowner . . . to the right to capture a specific amount of groundwater below the surface of the landowner's land." Tex. Water Code § 36.002 (b–1). While the term *vested right* is never used in the statute, section 36.002(c) expressly states that nothing in the Water Code "shall be construed as granting the authority to deprive or divest a landowner . . . of the groundwater ownership and rights described by this section." Tex. Water Code § 36.002.

The common-law rule of capture in Texas, as adopted by the supreme court in the 1904 *East* case is being eroded. GCDs, where they exist, have the authority to adopt regulations that require permits for drilling wells and pumping groundwater and that impose limitations on a landowner's ability to produce groundwater and to export it outside the district. Tex. Water Code §§ 36.001(1), 36.101, 36.113, 36.116, 36.122. Restrictive covenants that prohibit a landowner's drilling of water wells have been held to be enforceable against the right of a landowner to access its groundwater. *See Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.). For more in-depth discussion of restrictive covenants affecting real property see chapter 23 in this manual.

§ 16.2:3 Groundwater Conservation Districts and Groundwater Management

The state has the power to impose reasonable regulations on real property, including groundwater, to protect the public health and welfare, as part of its police powers. In addition, the Conservation Amendment (article XVI, section 59, of the Texas Constitution) declares the right and duty of the state to conserve and develop its natural resources and gives the legislature authority and duty to pass all laws appropriate to these conservation goals. *See* Tex. Const. art. XVI, § 59; *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955). The legislature has emphasized that groundwater conservation districts (GCDs) are the state's preferred method of groundwater management. Tex. Water Code § 36.0015; *see Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 835 & n.119 (Tex. 2012); *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 79 & n.33 (Tex. 1999). For more in-depth discussion of restrictive covenants affecting real property see Mary K. Sahs, ed., *Essentials of Texas Water*

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Resources, chs. 5 and 16, State Bar of Texas (6th ed. 2020).

GCDs may be created by special legislation or by the TCEQ on petition of landowners within the proposed district. *See* Tex. Water Code §§ 36.013–.021. Chapter 36 of the Texas Water Code sets out the main regulatory powers of general-law GCDs. Legislatively created GCDs may have powers and authority that differ from those of general-law districts. To the extent of any conflict between an individual GCD's enabling legislation and the provisions of chapter 36, the provisions of the individual GCD's special legislation controls. Tex. Water Code § 36.052(a). Although the legislation creating most districts follows closely the provisions of chapter 36, the enabling legislation of a legislatively created district must be reviewed to determine the scope of its jurisdiction and authority.

The Texas legislature has created several special-purpose districts that operate similar to GCDs but which are distinct, including the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, and the Fort Bend Subsidence District. The enabling legislation of the latter two districts, originally established as special-law GCDs, was amended in 2003 to address the particularized purpose of regulating groundwater to prevent subsidence. Tex. Spec. Dist. Code §§ 8801.003, 8834.003. These districts focus on specific purposes other than simply regulating groundwater production. The regulatory requirements for transferring groundwater rights within the EAA and these subsidence districts are unique, making it important for attorneys to understand the substantive and procedural rules of each district.

Generally, most GCDs have the authority to incur debt, levy taxes, charge for services, obtain easements, and condemn property. *See* Tex. Water Code §§ 36.101–.124. Districts may impose fees to cover administrative acts of the district and production fees on pumping authorized in the district. Tex. Water Code § 36.205. A GCD may impose additional fees for exporting water out of the district but may not impose more restrictive permit conditions on transporters than the GCD imposes on existing in-district users. *See* Tex. Water Code § 36.122. A seller of residential real property must disclose whether the seller is aware (actual knowledge, without any duty of investigation) of any portion of the property being located within a GCD or subsidence district. *See* Tex. Prop. Code § 5.008(b)(9).

Each GCD has the power to implement its statutory authority through rulemaking and permitting. *See* Tex. Water Code §§ 36.101, 36.113, 36.1131, 36.117, 36.122. District rules may include well spacing and regulation of groundwater production by well production limits, including limits based on acreage or tract size, rate of production limits, or "managed depletion" (an approach that aims to control the amount and rate of depletion districtwide over the long term). *See* Tex. Water Code § 36.116. Within certain constraints, a GCD may also regulate groundwater production in a manner designed to preserve "historic or existing use." Tex. Water Code § 36.116(b).

If land is within a GCD or a subsidence district, it is important to review the regulations of the district to determine any requirements and limitations on the landowner's ability to access and produce groundwater. All wells must be permitted, unless they are exempted by statute or the GCD's rules. Tex. Water Code §§ 36.113, 36.117. Wells used solely for domestic and livestock purposes, wells used for oil and gas production or surface mining activities, and wells existing at the time of the creation of the district are generally exempt from the permitting process. *See* Tex. Water Code § 36.117. Exempt wells may be required to be registered with the district, may have production report filing requirements, and may be subject to the payment of export fees. *See* Tex. Water Code § 36.117.

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Information and maps of groundwater conservation districts are available on the TWDB website at **www.twdb.texas.gov** and the TCEQ website at **www.tceq.texas.gov**. Copies of district rules and district management plans generally must be obtained from the individual conservation district. Contact information for GCDs may be available on the Texas Alliance of Groundwater Districts website at **https://texasgroundwater.org**.

Landowners also should be aware of the tools for groundwater management implemented by the Texas legislature, as these processes and their results can affect the regulation of groundwater in a specific area of the state. Each GCD is required to develop a comprehensive management plan that addresses various management goals, includes specific performance standards, details actions and procedures to carry out the plan, and includes estimates of various aspects of the groundwater resources within the district. *See* Tex. Water Code § 36.1071(e). However, GCDs do not follow aquifer boundaries, and more than one district may have jurisdiction over a single aquifer. The TWDB must designate "groundwater management areas" for aquifers across the state to promote coordination among GCDs. *See* Tex. Water Code § 35.004; *cf.* Tex. Water Code § 36.002(13) (defining "management area"). GCDs within a groundwater management area sharing jurisdiction over the same aquifer are required to engage in a joint planning process to determine "desired future conditions" (as adopted by the district under Water Code section 36.108) for the aquifer on a five-year recurring basis. Tex. Water Code § 36.1071(a)(8).

The TCEQ has statutory authority to designate a "priority groundwater management area" if the area is currently experiencing critical groundwater problems or is anticipated to experience them within the next twenty-five years. Critical groundwater problems contemplated by the statute include shortages or contamination of groundwater supplies and land subsidence caused by the withdrawal of groundwater. Tex. Water Code § 35.007(a). Once an area is designated a priority groundwater management area, the landowners within the area may (1) create one or more general-law GCDs, (2) have the area annexed to an adjoining GCD, or (3) create one or more GCDs through the legislative process. Tex. Water Code § 35.012(a).

§ 16.3 Practical Considerations for Conveying Groundwater Rights

§ 16.3:1 Severability and Marketing of Groundwater Rights

In *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), the Texas Supreme Court determined that groundwater rights may be severed from the surface estate and leased or sold to a party other than the owner of the surface estate. The supreme court held in *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016), that general groundwater rights were the "dominant estate" to be treated similarly to severed mineral rights. Groundwater currently is the favored source of water for water marketers, but the purchase or lease of groundwater rights presents its own challenges, not the least of which is navigating the various regulatory regimes used by different groundwater conservation districts (GCDs). Even if the real estate or groundwater rights being considered are located outside of a GCD or priority groundwater management area, due consideration should be given to the potential for creation of a groundwater conservation district in the future.

§ 16.3:2 GCD Permitting

Groundwater permitting by a local groundwater conservation district (GCD) is affected, in part, by the district's rules and management plan.

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When evaluating a prospective lease or purchase of groundwater rights from property within a GCD, the permitting implications of the transaction must be carefully considered. For example:

- Is the purchase or lease only of the groundwater rights in place or production rights, or is it also of existing permitted rights?
- Are there any existing permits, such as production or drilling permits, that can be transferred to the purchaser? If so, do the permits need to be amended to meet the purchaser's needs?
- What permits or permit amendments, if any, will the buyer need for his intended use of the groundwater, and what are the district's applicable permitting requirements?
- How and when in the closing process should the transfer of the groundwater rights and any existing permits be completed?
- Do the district's permitting requirements allow for the purchaser's desired objective?
- Are the district's water use or export fees prohibitive?
- Do the district's rules affect the relative advantage of well-field design or amount of contiguous acreage included in the permit?

Whether there is likely to be opposition to the buyer's intended use of the groundwater by landowners sharing the same aquifer, other permit holders, or interested organizations, and whether past permitting decisions of the GCD indicate that there may be difficulty in obtaining the required permits is an important part of the purchaser's due diligence. This is particularly important in areas in which there has been an increase of permitting of groundwater rights for development and transportation for use outside of the GCD. In these areas opposition may lead to contested hearings or litigation. At least one GCD refused to grant in full the requested operating and transport permits, even though the application was uncontested and the GCD staff recommended approval. *See Forestar (USA) Real Estate Group, Inc. v. Lost Pines Groundwater Conservation District*, No. 15369, 335th Dist. Ct., Lee County, Tex., filed March 14, 2014 (this case eventually settled by issuance of a smaller permit); *but see* Tex. Water Code § 36.4051(d) (allowing an applicant to seek a contested case hearing following such a decision). In another instance, a water marketer's plan to produce and transport groundwater from land not subject to a GCD, and thus not subject to production limits, was opposed by neighboring landowners who feared that the magnitude of the production would cause their wells to fail. The Texas legislature took action to give an existing GCD jurisdiction over the aquifer from which the groundwater would be produced and regulatory authority over the area previously located outside of any GCD. *See* Tex. Spec. Dist. Code §§ 8802.0035, 8802.1045.

§ 16.3:3 Other Due Diligence

Other issues a purchaser or lessee of groundwater rights should consider are the following:

- What types of legal or technical (for example, hydrogeological or well-field design) advice are necessary before closing, and should the closing be conditioned on the results of such analysis?
- What method of pricing the groundwater rights is most appropriate for the transaction? For example, should pricing be based on the amount of available or permitted production, a flat price per acre, or a hydrogeological analysis estimating the saturated thickness of groundwater under the surface?
- To what extent, if any, will groundwater rights, or the right to use some portion of the conveyed groundwater, be reserved to the owner of the surface estate?

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- What types of easement rights will be required to make use of the groundwater rights?
- What existing uses are being made of the surface (for example, agricultural or oil and gas production) that might affect the purchaser's development of the groundwater rights?
- Can the water be transported to its place of use or need? Are existing infrastructure, right-of-way, and easements available?
- What is the native quality of the groundwater?
- What is the condition of any infrastructure or groundwater production, treatment, or storage facilities to be conveyed?
- What are the terms and conditions in any existing permits authorizing production or export of groundwater?
- Does the area where the groundwater rights are located have any subsidence history?

§ 16.4 Surface Water

Surface water in Texas is owned by the state, subject to the appropriation of a right to use the water. Transactions for the purchase of appropriated rights to use surface water are quite common. Individuals and entities enter into water supply contracts to meet their needs for municipal, industrial, agricultural, or other water uses. Because most stream segments in Texas are already fully appropriated or even overappropriated, the market relating to existing water rights is necessarily dynamic. This section of the chapter addresses the nature of surface water rights under Texas law, the requirements for obtaining a new or amended surface water right from the TCEQ, and some practical considerations in surface water rights transactions.

Surface water owned by the state is defined in Texas Water Code section 11.021(a), which reads as follows:

> The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

Tex. Water Code § 11.021(a).

Navigable streams include watercourses that are navigable in fact or meet the statutory definition in Texas Natural Resources Code section 21.001(3). Section 21.001(3) defines a "navigable stream" as one retaining an average width of thirty feet from the mouth, measured from cut bank to cut bank. Tex. Nat. Res. Code § 21.001(3). The state holds the waters of navigable streams in trust for the public, and therefore such streams are subject to appropriation. *In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 444 (Tex. 1982). The state also owns the riverbed—the lands underlying navigable streams. *See State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932).

Under some circumstances, the landowner may have more or different rights to surface water that are exempt from state permitting requirements.

Domestic and Livestock Exemption: The use of water for domestic and livestock purposes is generally exempt from state water rights administration. Without obtaining a permit, a person may construct a dam or reservoir up to two hundred acre-feet in capacity for domestic and livestock purposes on his own property. Tex. Water Code § 11.142; *see* 30 Tex. Admin. Code chs. 295, 297.

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Diffused Surface Water: Diffused surface water is water on the surface of the land, such as rainfall runoff, that has not yet entered a watercourse. A watercourse is a channel, with a well-defined bed and banks, in which water flows as a stream and has a permanent source of supply. *Hoefs v. Short*, 273 S.W. 785 (Tex. 1925). Diffused surface water is the property of the owner of the soil until it enters a watercourse, at which point diffused surface water is transformed legally to public property (state water or riparian water). *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221 (Tex. 1936); *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926).

Developed Water: "Developed water" refers to water augmenting the natural streamflow that has been made available to the receiving watercourse through artificial means, such as imported surface water or groundwater pumped to the surface, including treated wastewater effluent. Generally water that is legally reduced to possession and still under the physical control of the owner of an artificial conveyance system is subject to sale or further use by the owner of the system, as long as the water does not escape his control and rejoin a watercourse. *See Guelker v. Hidalgo County WCID No. 6*, 269 S.W.2d 551 (Tex. App.—San Antonio 1954, writ ref'd n.r.e.); *cf.* Tex. Water Code § 11.042 (bed and banks authorization).

§ 16.5 General Types of Surface Water Rights

§ 16.5:1 Appropriative Water Rights

In Texas, the appropriation doctrine has developed over more than a century of legislation. The water right, documented in the form of a permit, certificate of adjudication, or certified filing, is a "usufruct" or right of use. The appropriative use is precisely defined, with the state authorizing the use of water in a specific amount, by diversion from a watercourse at a definite location, for a particular purpose, and for a use within a particular area or tract of land. It is unlawful to willfully take, divert, impound, or appropriate state water for any purpose without first complying with all applicable requirements of chapter 11 of the Water Code. Tex. Water Code §§ 11.081, 11.121; *but see* Tex. Water Code §§ 11.142–.143. Violators are also subject to civil and administrative penalties. *See* Tex. Water Code §§ 11.082, 11.0842–.0843.

Under the prior appropriation doctrine, seniority, or "first in time, first in right," each water right is assigned a specific priority date. During times of shortage, this system determines the allocation of water among appropriators by use of relative priority dates. Tex. Water Code § 11.027; *cf.* Tex. Water Code §§ 11.023–.024. Senior rights holders are entitled to fully exercise their rights before those holding junior rights receive any water. The TCEQ promulgated rules in 2012 attempting to circumvent the prior appropriation system by exempting junior water rights from suspension or adjustment "based on public health, safety, and welfare concerns." 30 Tex. Admin. Code § 36.5(c); *see* Tex. Water Code § 11.053. These rules were challenged by the Texas Farm Bureau and individual landowners as contravening the prior appropriation doctrine prescribed by section 11.027. The court found the TCEQ's rulemaking, pursuant to section 11.053, ignored the prior appropriation doctrine codified in section 11.027 and concluded that the rules exceeded the TCEQ's authority. *See Texas Commission on Environmental Quality v. Texas Farm Bureau*, 460 S.W.3d 264 (Tex. App.—Corpus Christi–Edinburg 2015, pet. denied). The TCEQ has filed notice of intention to review the chapter containing the challenged rules. TCEQ, Notice of Intention to Review, 44 Tex. Reg. 5153, 5153 (2019). Texas's prior appropriation seniority system does not apply to water in the Rio Grande River Basin below Lake Amistad. *See* Tex. Water Code § 11.3271. There, the type of water right (for example, municipal, industrial, Class A irrigation, Class B irrigation) governs who is enti-

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tled to water during times of shortage. Beneficial use is another fundamental concept in the appropriation doctrine. *See* Tex. Water Code §§ 11.023–.024. A permit authorizing use of state water under the appropriative system is a license. To the extent the appropriator actually puts the water to beneficial use, the appropriation is perfected and becomes a vested property right. *See* Tex. Water Code §§ 11.025–.026.

Even within the framework of appropriative rights, there are various limitations on a landowner's rights to use surface water, including the following.

Damage to Other Property: No person may divert or impound the natural flow of surface water in the state in a manner that damages the property of another because of the overflow of the diverted or impounded water. Tex. Water Code § 11.086(a). If property is injured by such a diversion or impoundment, the owner of the injured property may recover damages from the liable party. Tex. Water Code § 11.086(b).

Eminent Domain for Municipal Use: Section 11.033 of the Texas Water Code provides that municipalities and other governmental agencies can exercise the power of eminent domain to acquire water or property devoted to uses other than municipal and domestic purposes. Although this eminent domain provision has not been repealed or amended, the Texas Property Code imposes various additional requirements on condemnation of water rights by municipalities and provides for separate valuation of groundwater rights in excess of the market value of the fee simple estate. *See* Tex. Prop. Code §§ 21.0121, 21.0421.

Cancellation of Water Rights: Although a perfected water right is considered a vested property right, with notice and hearing the TCEQ may cancel a water right in whole or in part based on ten years of nonuse immediately before the cancellation proceeding. *See* Tex. Water Code §§ 11.172, 11.173(a); *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642 (Tex. 1971). There are now certain statutory exemptions from cancellation, including exemptions for water rights dedicated to certain conservation programs, and the TCEQ may find "justified nonuse" in cases in which the water right is being made available for private marketing or reserved for environmental use. *See* Tex. Water Code §§ 11.173(b), 11.177(b).

§ 16.5:2 Riparian Rights

A riparian water right is a right recognized at common law that entitles the owner of property adjacent to a watercourse to make "reasonable" use of the normal flow of the stream. This right is not quantified. A riparian property owner may impound and use any amount of water that is reasonably necessary for any reasonable purpose; however, the owner may not unreasonably interfere with the use of water by others. A riparian landowner may sell the water for use off-site of the riparian property, provided that the off-site use does not prejudice other riparian water users. Riparian rights holders may separate, by express conveyance, their riparian water rights from the riparian land. *See Watkins Land Co. v. Clements*, 86 S.W. 733 (Tex. 1905). On rivers for which the state has completed the water rights adjudication process, the distinction between riparian rights and appropriative rights has been removed, and riparian rights have been converted into appropriative rights for all practical purposes.

§ 16.5:3 Civil-Law Water Rights

Before the Republic of Texas adopted the common law, land grants from the sovereign were governed by civil law—either of Mexico or of Spain. These laws therefore determine the water rights relating to property originally granted from the sovereign under civil law. If a civil-law grant expressly includes a grant of water with the land, there is a legally recognizable water right. If the water right was not expressly

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granted, it is presumed that the sovereign retained the water rights when it made the land grant, and thus those water rights ultimately pass to the state of Texas. *See State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962). Like riparian rights, civil-law water rights are subject to the water rights adjudication process and thus have been quantified and merged with appropriative rights through that process.

§ 16.6 Water Rights Adjudication and Administration

The Texas Water Rights Adjudication Act provides the mechanism for the state to quantify and compile the various sorts of water rights, such as civil-law water rights, riparian water rights, certified filings, and permits. *See* Tex. Water Code §§ 11.301–.341. The final decree in each water rights adjudication is final and conclusive as to all existing and prior rights and claims to the water rights in the adjudicated stream or segment and is binding on all claimants to water rights outside that stream or segment. Tex. Water Code § 11.322(d). This statute is the exclusive means by which water rights may be recognized in Texas, and thus courts cannot recognize equitable water rights based on good-faith prior use. *In re Adjudication of Water Rights of Brazos III Segment of Brazos River Basin*, 746 S.W.2d 207 (Tex. 1988). Nearly all of the general stream adjudications for Texas have been completed.

For river basins in which a watermaster program has been established, the TCEQ administers adjudicated water rights through a watermaster and a watermaster advisory committee appointed for each water division. *See* Tex. Water Code §§ 11.326, 11.3261. Watermaster programs are intended to ensure compliance with water rights by monitoring stream flows, reservoir levels, and water use. The watermaster divides the water of the streams (or other sources of supply) in the division based on the adjudicated water rights. Tex. Water Code § 11.327(a). The watermaster also regulates controlling works and diversion works in times of shortage to protect existing water rights, prevent waste, and prevent practices in excess of adjudicated rights. Tex. Water Code § 11.327(b). Currently, there are watermaster programs only for South Texas, the Rio Grande, the Concho River, and the Brazos River. *See* 30 Tex. Admin. Code chs. 303, 304. More information on watermaster programs, including a map of the locations, can be found on the TCEQ website at **www.tceq.texas.gov**.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code §§ 304.1–.63 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. *See* 30 Tex. Admin. Code ch. 303. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so the purchase contract should address how the water allocation will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. *See* Tex. Water Code §§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due dili-

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gence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.

Attorneys dealing with water rights within the Rio Grande should be aware of recording requirements applicable to the Rio Grande watermaster in addition to those presented in section 11.136 of the Texas Water Code. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. *See* Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.7 Obtaining Surface Water Rights

A person desiring to appropriate surface water must obtain a permit from the TCEQ. *See* Tex. Water Code §§ 11.022, 11.121. The permit or amendment may be granted only if—after the proper application is filed, the required fees are paid, and notice and hearing are held—the applicant shows that (1) unappropriated water is available in the source of supply; (2) the proposed appropriation is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers various environmental and water quality assessments required by statute, and addresses a water supply need in a manner consistent with the state water plan and the relevant approved regional plan or plans; and (3) reasonable diligence will be used to avoid waste and achieve water conservation. Tex. Water Code § 11.134(b). Each of these requirements is discussed briefly below. The TCEQ also issues several types of more restrictive permits, such as seasonal permits, temporary permits, and emergency permits. Tex. Water Code §§ 11.137–.139.

§ 16.7:1 Availability of Unappropriated Water

"Unappropriated water" must be available in the source of supply for a permit to be granted. Tex. Water Code § 11.134(b)(2). The Texas Supreme Court has held "unappropriated water" to mean the amount of water remaining available for appropriation within a river basin after taking into account complete satisfaction of all existing uncanceled permits and filings valued at their recorded levels. *Lower Colorado River Authority v. Texas Department of Water Resources*, 689 S.W.2d 873 (Tex. 1984). The TCEQ's water availability models, sometimes referred to as "WAMs," for each river basin in the state and the TCEQ's regulatory criteria determine how frequently water must be available to support a

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finding that unappropriated water is available for appropriation.

§ 16.7:2 Beneficial Use

The Texas Water Code recognizes various purposes for which state water may be appropriated, stored, or diverted and ranks those uses by preference for permit issuance: domestic and municipal, agricultural and industrial, mining, hydroelectric power, navigation, recreation, public parks, game preserves, recharge into certain aquifers, and "any other beneficial use." Tex. Water Code §§ 11.023(a), (b), 11.024. The TCEQ may grant a water right application only if the proposed appropriation "is intended for a beneficial use." Tex. Water Code § 11.134(b)(3)(A).

§ 16.7:3 Nonimpairment of Existing Water Rights

The TCEQ may grant a water right (or amendment) application only if the proposed appropriation does not impair existing water rights or vested riparian rights. Tex. Water Code § 11.134(b)(3)(B). To the extent the proposed appropriation would impair water availability for existing downstream rights, the commission may include restrictions on the diversion and use of water in the new permit. Examples of such restrictions include minimum streamflow, maximum diversion rates, and seasonal restrictions intended to protect both water rights holders and the environment.

§ 16.7:4 Public Welfare

The TCEQ may grant a water right only if it finds that it would not be "detrimental to the public welfare." Tex. Water Code § 11.134(b)(3)(C). Under the commission's rules, this very broad requirement includes consideration of environmental, social, and economic impacts of the proposed appropriation. *See* 30 Tex. Admin. Code ch. 297; *cf. Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011) (TCEQ must consider public welfare factors related to its authority in water rights permitting).

§ 16.7:5 Conservation and Drought Contingency Requirements

The TCEQ may grant a water right application only if the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve "water conservation," as that term is defined by Tex. Water Code § 11.002(8)(B). Tex. Water Code § 11.134(b)(4); *see* 30 Tex. Admin. Code ch. 288. With few types of exceptions, such as applications for emergency use, temporary use, or to impound water solely for in-place use, an applicant for new or amended water rights must submit a water conservation plan and adopt reasonable conservation measures, with varying criteria for such plans depending on the water use. *See* Tex. Water Code § 11.1271. In addition to developing conservation plans, wholesale and retail public water suppliers and irrigation districts must develop and submit drought contingency plans, relating to their water rights, to be implemented during periods of water shortages and drought. Tex. Water Code § 11.1272(a); *see generally* 30 Tex. Admin. Code ch. 288.

§ 16.7:6 Other Requirements

The TCEQ may grant an application for a water right or amendment only if the proposed appropriation addresses a water supply need in a manner consistent with the state water plan and any relevant approved regional water plan, unless the commission waives this consistency requirement. Tex. Water Code §§ 11.134(b)(3)(E), 11.1501. Information regarding each of the sixteen regional water plans can be found on the "Planning" page of the TWDB's website, **www.twdb.texas.gov**.

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Various other statutory provisions require the TCEQ to consider the environmental and conservation impact of water rights applications, including the effects, if any, of the issuance of the permit on groundwater or groundwater recharge (Tex. Water Code § 11.151); the effects, if any, on the bays and estuaries of Texas (Tex. Water Code § 11.147(b)); and permit conditions necessary to maintain existing instream uses, the water quality of the river or stream to which the permit would apply (Tex. Water Code §§ 11.147(d), 11.150), and fish and wildlife habitats (Tex. Water Code §§ 11.147(e), 11.152).

The Texas Parks and Wildlife Department also has significant authority relating to certain environmental aspects of water rights applications. The TCEQ must send a copy of every water rights permit application to the department, which is entitled to participate in hearings on such applications. Information and evidence presented by the department must be considered by the TCEQ in making a final decision on a water rights application. Tex. Water Code § 11.147(f).

A prospective buyer or seller of water rights as part of a real estate transaction must take special note if the water is intended to be taken or diverted from one watershed or river basin to another, because special TCEQ authorization must be obtained before any such "interbasin transfers." *See* Tex. Water Code § 11.085. There are criminal penalties for taking or diverting water in violation of this statute. *See* Tex. Water Code § 11.085(q), (r). The legislature has sought to balance the interests of the basin of origin and the receiving basin. *See* Tex. Water Code § 11.085(k)–(*l*); *San Antonio v. Texas Water Commission*, 407 S.W.2d 752 (Tex. 1966). Because newly authorized interbasin transfers have junior priority to all other water rights granted before the filing of a transfer application, the feasibility of an interbasin transfer from existing water rights can be severely limited. *See* Tex. Water Code § 11.085(s). There are five narrow exceptions to the limitations imposed by section 11.085, which should be reviewed. *See* Tex. Water Code § 11.085(v).

§ 16.8 Practical Considerations for Conveying Surface Water Rights

§ 16.8:1 Severability and Marketing of Surface Water Rights

Water rights may or may not be appurtenant to a specific tract of land. State-owned surface water rights, arising from either permit or certificate of adjudication, may be transferred as an easement that passes with title to the land or may be transferred separately from the land. Tex. Water Code § 11.040(a); *Strayhorn v. Jones*, 300 S.W.2d 623, 634 (Tex. 1957). In general, title to private water rights will pass automatically with title to the land unless the water rights have been previously sold or conveyed to some third party or are specifically reserved by the grantor. *See Graham v. Kuzmich*, 876 S.W.2d 446 (Tex. App.—Corpus Christi–Edinburg 1994, no writ); *Fleming Foundation v. Texaco, Inc.*, 337 S.W.2d 846, 850 (Tex. App.—Amarillo 1960, writ ref'd n.r.e.); *see generally* 30 Tex. Admin. Code § 297.81. See the discussion at sections 16.5:1 and 16.5:2 above distinguishing private water rights from state water.

For marketing of surface water rights in Texas, there are significant restrictions on interbasin transfers, as discussed at section 16.7:6 above. Within a river basin, water transfers and marketing by regional suppliers such as river authorities are relatively straightforward. Difficulties may arise, however, when these transactions require amendment of an existing water rights permit, particularly if there are potential issues of impairment of existing senior water rights or environmental impacts. Nonetheless, there is an active market for surface water rights in some parts of Texas, particularly in the Rio Grande Valley. It should be noted that the transfer of

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water rights in the Rio Grande Valley is governed by TCEQ rules that are unique to the Rio Grande basin and administered by the Rio Grande watermaster. *See* 30 Tex. Admin. Code ch. 303. Practitioners should fully understand those rules before beginning negotiations for the sale or purchase of surface water rights in that area.

§ 16.8:2 TCEQ Permitting

In cases in which an applicant is seeking a new or amended water right, the requirements outlined generally at sections 16.7 through 16.7:6 above will govern the substantive and procedural aspects of the TCEQ's consideration of the application. Even in cases of transactions to sell or lease existing water rights, however, there may be commission requirements that must be satisfied, which could include the following:

- Do the TCEQ rules require actual amendments of the water right as a result of the transaction (for example, diversion point, place, or purpose of use)?
- If so, will notice and hearing be required? If so, is there any potential for opposition from other interests within the basin?
- Must the contract or the deed for the transaction be submitted to the TCEQ for its records?
- Do any special rules or procedures apply (for example, for transactions within the jurisdiction of a watermaster program)?

§ 16.8:3 Other Due Diligence

Among the other issues that the purchaser or lessee of surface water rights should consider are the following:

- What types of legal or technical advice are necessary before closing on the transaction, and how should the closing be conditioned on the results of such analysis?
- How much water is needed for the proposed project, in terms of firm yield requirements over the relevant time period?
- Are the existing rights valid and properly perfected?
- Can the relative priority of the water right be determined through examination of county deed records and the TCEQ's records?
- What do the TCEQ's records of existing water rights in the stream segment or basin reveal that might impact the desirability of the transaction?
- What types of easement rights will be required to make use of the surface water rights?
- Can the water be transported to its place of use or need?

§ 16.8:4 Transfer and Recording of Permits

Transfers of ownership of surface water rights must be reported to the TCEQ. *See* Tex. Water Code § 11.122. The change of ownership form, TCEQ Form 10204, may be downloaded from the commission's website, **www.tceq.texas.gov**. This form initiates the transfer process at the TCEQ, which is not complete until an approval letter, amended certificate of adjudication, or amended permit is issued to the new owner.

The permit or amended permit must be recorded with the county clerk of the county or counties in which the appropriation will be made. Tex. Water Code § 11.136. This would include at least the county or counties in which the point of diversion is located. In most cases, a certificate of adjudication or amendment must be similarly recorded in each applicable county. *See* Tex. Water Code § 11.324. For more discussion on recordation, see part IV. in this chapter.

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[Sections 16.9 and 16.10 are reserved for expansion.]

II. Groundwater Transaction Guide for Sale of Groundwater Rights for On-Site Production

§ 16.11 Sale of Groundwater Rights in Place for On-Site Production

The rights to explore for, drill for, produce, and transport groundwater can be sold under a contract of sale and conveyed by deed and easement agreement. These rights can also be leased under a groundwater lease. (But see section 16.1 above for a discussion of ownership of groundwater rights.) This part of this chapter applies to the sale and conveyance of groundwater rights for on-site production, that is, to a transaction in which the groundwater is intended to be produced from wells located on the seller's land. It does not cover the sale or conveyance of permitted groundwater for off-site production, which is addressed in part III. in this chapter, nor does it apply to the sale of surface water rights, which are addressed in part IV. Financing documents for use in transactions in which the groundwater rights, easement rights, and permit, if any, constitute the collateral, are discussed in part V.

The forms discussed in this part of the chapter are for general use. Users should be aware that modifications may be required for specific transactions. For all groundwater sales, it is imperative that the attorneys involved in the transaction identify the regulatory agencies with jurisdiction over the groundwater rights (referred to collectively in this transaction guide as the "groundwater authority") and obtain copies of all rules and regulations pertaining to groundwater as early in the transaction as possible. The rules may contain requirements that have an important bearing on the transaction, such as minimum acreage requirements for production, limitations on production, and requirements for the issuance and transfer of permits. It may be necessary for the practitioner to make modifications to the forms based on the rules of the groundwater authority. Forms 16-1, 16-2, and 16-3 in this chapter, as described in this part of the chapter, are not generally used in the sale of groundwater rights subject to the rules of the Edwards Aquifer Authority.

§ 16.12 Groundwater Rights Sales Contract, Deed, Easement, and Related Forms; Place for Recordation

If the seller is the owner of both the surface and groundwater estates in the land and is selling the groundwater and the right to use the surface estate for drilling, production, and transportation of groundwater on-site, the groundwater sales contract, form 16-1 in this chapter, should be used in the transaction. If the seller owns only groundwater rights that have already been severed from the land, together with easement rights to use the surface of the land for drilling, production, and transportation, the groundwater sales contract may be used if appropriately modified. At closing, the deed would describe both the groundwater rights and the easement rights. If the seller acquired the easement rights through a separate easement agreement, the deed would reference the recorded easement agreement. Alternatively, a separate assignment of easement rights could be used.

If the groundwater is subject to regulation by a groundwater authority, the attorney should determine whether the seller has obtained a groundwater permit. If so, the information regarding the permit should be set out in the contract, and the seller should request a transfer of the permit from the groundwater authority as

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part of the sale transaction. See section 16.17:5 below regarding permits.

All recordable documents should be recorded in the county or counties in which the land from which the groundwater and easement rights are obtained is located. Many groundwater districts do not require the recording of the permits issued in connection with groundwater rights for on-site production. If a groundwater permit is issued to the buyer in a form that may be recorded, the permit should be recorded in the real property records in the same county or counties as the deed is recorded. See part III. in this chapter.

The contract anticipates that a memorandum of contract will be recorded in the real property records when the contract is signed. The memorandum will put the public on notice of the buyer's contract rights in the event there is a significant period of time between signing the contract and closing. See form 16-16.

The basic sales documents include the following:

1. Groundwater Rights Sales Contract (form 16-1).
2. Groundwater Rights Warranty Deed (form 16-2).
3. Blanket Easement Agreement for Groundwater Rights (form 16-3).
4. Permit Transfer Request (form 16-12) or a transfer form promulgated or approved by the groundwater authority if a permit has been issued to the seller or another form promulgated by the groundwater authority, if it has a particular form for transfer. In the absence of a form promulgated by the groundwater authority, the applicant may choose to use the detailed application template included as form 16-26 in this chapter.
5. Partial Release of Lien (On-Site) (form 16-8) if the seller has an existing lien on the land and only the groundwater rights are being released from the lien at closing.
6. Release of Lien (form 10-2 in this manual) if the seller's entire lien will be released at closing.
7. Lienholder Consent and Subordination to Easement Agreement (form 16-7) if the seller has an existing lien on both the surface estate and groundwater, which will not be released as to the surface estate at closing.
8. Bill of Sale (form 5-16 in this manual) if personal property will be conveyed at closing and a more detailed description is required than the description in the deed.
9. Form UCC3 (form 9-14 in this manual), a form promulgated by the Texas secretary of state, if there is a security interest that covers or that could be construed to cover the groundwater rights, the permit, or personal property to be conveyed at closing.
10. Assignment and Assumption of Lease (form 16-14) if there is an existing lease of the groundwater.
11. Lessee Estoppel Certificate (form 16-15) used to assure the buyer that the groundwater lease is valid and is not in default and that the lessee understands the lease is being assigned.
12. Affidavit of Debts and Liens [and Indemnity] (form 16-13) (if this form is not being provided by a title company) used to provide additional protection to the buyer, especially in instances in which no title insurance will be obtained or title insurance is not available.

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13. Loan documents required by the lender.

The groundwater deed, easement, and other recordable documents should be recorded in the real property records of the county or counties in which the land is located. If the buyer has applied for a new or amended production permit from a groundwater conservation district, the permit, when issued, may not be in recordable form. While it has generally not been the practice to record these types of production permits in the real property records, recording is recommended. If the permit is not issued in a recordable form, the permittee may seek to record it as an exhibit to another recordable instrument such as an affidavit or memorandum of permit duly authorized.

§ 16.13 General Considerations

The groundwater rights sales contract for on-site production, form 16-1 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of groundwater rights is an emerging area of law, and there are no well-established terms of sale. Contracts for the purchase and sale of groundwater rights are diverse, and additional drafting may be necessary to tailor the forms to the transaction.

§ 16.14 Special Surface Use Considerations

In the sale of groundwater rights in which the groundwater will be produced using the surface estate, it is possible for the deed to convey not only an interest in the groundwater but also easement rights in the surface of the land for exploration, drilling, production, and transportation of groundwater. However, it is advisable to use a separate easement or surface use agreement to describe in detail the easement rights that the owner of the groundwater estate will have in the surface estate. The parties may also want to provide for payment terms and use restrictions that are too detailed to include in the deed. Although form 16-1 in this chapter and the groundwater warranty deed, form 16-2, provide for the sale and conveyance of groundwater rights, which include surface use rights, these provisions are intended as safeguards to ensure that surface use rights are included in the sale and conveyance. It is recommended that the optional provision for the execution of a separate easement or surface use agreement at closing be used. This additional level of effort may avoid the subsequent development of disputes creating a necessity for the courts to apply the accommodation to resolve the issues. *See Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016).

§ 16.15 Groundwater Rights Sales Contract

The following sections describe the provisions and terms of form 16-1 in this chapter and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the groundwater rights, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

§ 16.16 Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer's earnest money cannot be collected, the buyer will be in default.

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§ 16.17 Defined Terms

§ 16.17:1 Seller and Buyer

There are sections for the names of and other information concerning the seller, the buyer, and their respective attorneys. Proper identification of the parties is important, and the seller and the buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his or her own behalf. See chapter 3 in this manual for a discussion of party designations.

§ 16.17:2 Title Company/Escrow Agent

Title insurance to insure title to severed groundwater rights in Texas is not generally offered by title insurance underwriters in Texas, although currently there is at least one insurer that offers title insurance for water rights. The contract designates a title company or escrow agent to act as the escrow and closing agent to address the situation in which the property will close through a title insurance company and the situation when it will not. The title company or escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-4 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company. The escrow agent should be responsible for getting signed at closing the affidavit of debts and liens (form 16-13), the settlement statement, and similar documents typically provided by a title company.

§ 16.17:3 Surveyor

This section of the contract should be completed if a surveyor has been designated for the transaction. See section 16.21:3 below regarding survey requirements.

§ 16.17:4 Groundwater Authority

If the real property is located within a groundwater conservation district or other groundwater authority, the authority should be identified. It is imperative that the buyer's attorney consult the rules of the groundwater authority to determine all restrictions on the use and production of groundwater, requirements for sale of groundwater, and rules regarding the issuance or transfer of a permit. Generally, copies of the rules can be obtained only from the groundwater authority. The buyer's attorney should also obtain, and personally review, copies of all documents maintained by the groundwater authority pertaining to the groundwater being sold. The attorney should note all relevant information from the file, such as yearly allocations, if applicable, and should determine the feasibility of meeting all conditions of the groundwater authority's approval of the sale within the buyer's required time frame.

§ 16.17:5 Seller's Permit

It is important for the buyer to determine whether the seller has a production or other permit issued by a groundwater authority in connection with the groundwater, whether the permit will allow the use of the groundwater contemplated by the buyer, and what requirements the groundwater authority imposes for the transfer, amendment, or issuance of a permit. If the seller has been issued a permit, the permit information should be set out in the contract and a copy of the permit and all amendments provided to the buyer as part of the seller's records. If there is an existing permit, the buyer generally will want to obtain a transfer of the seller's per-

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mit, and the seller should be required to submit a request for transfer of the permit in connection with the sale transaction. If the buyer needs a modification to the permit, such as a change in the type of groundwater use permitted, the buyer can file the appropriate documentation for a request with the groundwater authority, with any transfer of the permit and change in permit terms taking effect after closing. Because the rules and procedures for groundwater authorities vary, the attorney should contact the groundwater authority to obtain information on the forms and procedures required by the specific groundwater authority. In many instances the local groundwater district will not have a form specific to the desired purpose. Form 16-26 in this chapter is an example of an application to the groundwater authority to transfer permits in the absence of a form promulgated by the authority.

Paragraph G.5. of form 16-1 addresses the buyer's right to evaluate the seller's permit during the inspection period and contains an optional paragraph if the purchase of the groundwater is contingent on the buyer's ability to obtain required permits.

§ 16.17:6 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties.

§ 16.17:7 Independent Consideration

If the buyer terminates the contract before the end of the inspection period, and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but should be paid to the seller, because that amount is the independent consideration to the seller for the buyer's right to terminate the contract.

§ 16.17:8 Real Property

The real property is the land from which the groundwater is to be sold and is described in exhibit A. Any fixtures and personal property to be conveyed with the groundwater rights at closing also should be described in exhibit A. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unenforceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention should also be given to the conveyance of appurtenant rights, such as permits, licenses, access easements, access to utilities, and similar rights. Because it is not clear whether some types of property, such as the components of a well, are personal property or fixtures, if wells or similar items are being conveyed at closing, it is advisable to treat them as both real and personal property in the conveyance documents.

§ 16.17:9 Groundwater Defined

The definition of groundwater is derived in part from *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 505–06 (Tex. App.—El Paso 1954, writ ref'd n.r.e.).

§ 16.17:10 Groundwater Rights

The contract defines groundwater rights to include the right to use the surface of the land for the exploration, drilling, and production and any governmental licenses or permits to so use the groundwater.

§ 16.17:11 Reserved Groundwater

If the seller intends to reserve ownership of or the right to use groundwater, the reserved rights should be described with specificity, including any limitation on the purpose or place of use of the groundwater or the quantity of groundwater that may be pumped. In general, it is customary

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for the seller to retain a right of usage to accommodate the seller's needs, without retention of an undivided ownership interest in the groundwater. Form 16-1 reserves the seller's right to use groundwater. The form should be amended if the parties intend for the seller to reserve an undivided interest in the groundwater and should specify the percentage interest reserved. The reservation should be carefully drafted to protect the buyer's rights in the groundwater without unnecessarily curtailing the surface owner's right to use its property. If the buyer is acquiring the groundwater for commercial use, the buyer will want to prohibit the seller from using the reserved groundwater for commercial uses or production, as well as enhanced or secondary recovery methodology. The restriction on the seller's use may include restrictions on using groundwater for oil and gas exploration or production. The seller's water production may be limited in various ways, as by specifying the amount of groundwater that can be produced from the real property on a per-year or other basis or by limiting the number of seller's wells that may be maintained in operation on the real property at any one time. The parties may wish to specify whose right to the groundwater is paramount in the event of an extreme drought or production limitations. The following is a sample reservation provision for a deed:

> Grantor reserves for itself and Grantor's successors and assigns the right to utilize Groundwater, at no cost, solely for domestic and livestock use on the Real Property. The term *domestic and livestock use* means use of the Groundwater on the Real Property solely for household uses by Grantor, Grantor's employees, and their respective families for the watering of domestic and grazing animals and for Grantor's limited oil and gas use permitted by this deed. The right to utilize Reserved Groundwater includes the right to drill, use, and operate domestic-type wells or windmills but does not include the right to drill, use, or operate any industrial-type or irrigation-type wells on the Real Property or to use Groundwater for the creation or maintenance of ponds. No Reserved Groundwater may be used for the operation of crop irrigation, feedyard purposes, dairy operations, confined animal feeding operations, mining operations, or other industrial or commercial purposes, except that Grantor will have the right to use one existing well, or to drill and use one well, for each oil and gas well drilled as reasonably necessary during the drilling, completion, recompletion, reworking, remediation, and revegetation process (but not for water flooding and secondary recovery operations). After these processes have been completed, Grantor will have the right to use these wells for domestic and livestock purposes subject to the limitations set forth in this deed. The aggregate number of wells for the production of Reserved Groundwater existing at any time on the Real Property may not exceed, on the average, one well per [**number**] acres. If at any time Grantor fails to pump all the Reserved Groundwater to which Grantor is entitled, Grantee will have the right to pump all Groundwater not pumped by the Grantor without additional consideration or compensation.

The parties may wish to provide that the seller's right to use groundwater will terminate if water sufficient to meet the seller's needs becomes available to the property from some other source, such as a public water supply system, or from other land owned by the seller. If the seller reserves the right to use groundwater for domestic purposes, the parties may wish to specify, or

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otherwise limit, the number of households that may use the groundwater for such purposes, the number of wells used for such purposes, or the total volume per year that can be pumped for such purposes.

§ 16.17:12 Hydrogeological Testing

Paragraph G.3. of form 16-1 authorizes the buyer to perform hydrogeological testing during the inspection period to determine the quality of the groundwater, to estimate the quantity of the groundwater, to establish well locations, and to form the basis for establishing the purchase price of the groundwater as described in section 16.17:13 below.

§ 16.17:13 Purchase Price

There is no standard method of determining the purchase price for groundwater rights. For example, the purchase price may be based on a dollar amount per acre of land from which the groundwater rights will be obtained, on a dollar amount per acre-foot permitted, on a dollar amount per acre-foot per acre allocated, or on the value of the groundwater rights as determined by an appraiser. The field of groundwater rights appraisal is still evolving. In areas where there are numerous groundwater sales or leases, it is possible to obtain an appraisal of groundwater rights based on comparable sales. In areas where there are few sales or lease transactions or where the water quantity or quality is highly variable, it may be difficult to obtain a reliable appraisal of groundwater rights without obtaining hydrogeological information on the groundwater. Where groundwater is obtained over a large area that may exhibit variability in water quality, volume, or sustainability, the calculation of the purchase price in the contract may be based on an estimate of these variables as determined by a hydrogeological study, so that the purchase price for groundwater in lands with a higher quality or greater volume of groundwater will be higher than the purchase price for groundwater in lands with lower quality or less sustainable groundwater.

Exhibit I may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer's obligations, that fact and the terms of the complying financing should be addressed in the contract. See chapters 6 and 8 in this manual for further discussion of financing.

§ 16.17:14 Buyer's and Seller's Liquidated Damages

These sections of the contract are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

§ 16.17:15 Title Commitment and Title Information

Only a few underwriters in Texas offer title insurance for severed groundwater rights. If the seller is not required to provide a title commitment, or if a title commitment is not available for the groundwater rights, the contract should require the seller to provide the buyer with an abstract of title. The contract provides that the buyer may have the abstract of title reviewed by an attorney of the buyer's choice, at the expense of the seller or buyer as specified in the contract. If the buyer obtains an abstract of title, the buyer should have it reviewed by an attorney who is experienced in land titles and knowledgeable about groundwater rights.

§ 16.17:16 Title Documents

In addition to traditional title instruments, such as deeds, leases, and easements, the contract defines title documents to include the seller's permit and instruments affecting title to the groundwater and the real property referenced in the title commitment or title information, survey, or UCC search or to be provided as part of

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the seller's records. Title documents may include probate records, marital records, and birth and death certificates. Under paragraph F.7. of the contract, title objections can be made on the basis of the title documents. This provides the buyer with the ability to make objections to title based on the seller's permit or unrecorded documents provided as part of the seller's records.

§ 16.18 Deadlines

Section A of the contract groups most of the deadlines for ease of reference and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence. The contract provides that closing will occur a certain number of days after the expiration of the inspection period, but closing may also be specified to occur a certain number of days following a different event or on a certain date. The closing date may also be specified as "on or before" a certain date or event.

§ 16.19 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing. Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

§ 16.19:1 Exhibit B—Representations; Environmental Matters

Exhibit B contains the parties' representations. These items are always negotiated by the parties and will vary from transaction to transaction.

§ 16.19:2 Exhibit C—Seller's Records

Exhibit C is a list of the seller's records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

§ 16.19:3 Exhibit D—Notices, Statements, and Certificates

Exhibit D lists notices, statements, and certificates required by federal and state law and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for brief discussions of each law and regulation and for references to other laws and regulations that require notices, statements, and certificates for less common transactions. Some of the statutory provisions would appear to include the sale of groundwater, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of groundwater.

§ 16.19:4 Exhibit E—Permits

Copies of the seller's permits should be attached to the contract as an exhibit. If copies cannot be attached for some reason, they should be described with specificity, including any permit numbers.

§ 16.19:5 Exhibit F—Leases and Contracts to Be Terminated

This exhibit lists the seller's leases and contracts affecting the real property or groundwater that will be terminated at or before closing.

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§ 16.19:6 Exhibit G—Leases and Contracts Not to Be Terminated

This exhibit lists the seller's leases and contracts affecting the real property or groundwater that will be assumed by the buyer or taken subject to.

§ 16.19:7 Exhibit I—Seller Financing

Exhibit I contains seller-financing terms.

§ 16.19:8 Exhibit J—Easement Agreement

The deed conveying the groundwater should grant basic surface use rights for access to, and development of, the groundwater. Forms 16-1 and 16-2 in this chapter accomplish this by defining "Groundwater Rights" to include these basic surface use rights. It is advisable, however, that the parties agree on more extensive surface use rights and surface use restrictions for both the surface owner and the groundwater rights owner and set out these rights and restrictions in a separate easement agreement. The owner of the groundwater estate has easement rights implied by law to use as much of the surface estate as is reasonably necessary to produce groundwater. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016). However, many issues can arise when the surface owner and the groundwater rights owner both use the surface estate for their respective purposes, and it is important for the parties to consider and agree on specific terms that will establish their respective rights, priorities, and limitations with regard to the use of the surface estate. It is advisable for these terms to be set out in a separate easement or surface use agreement, rather than in the deed, so that they can be described in detail, along with indemnifications and other terms that are not customary in deeds. Failure to detail the rights and obligations of the parties may result in the application of the accommodation doctrine. *Coyote Lake Ranch*, 498 S.W.3d at 64.

The easement documents included in this chapter consist of a blanket easement agreement for surface use (form 16-3), with three optional addenda that impose surface use restrictions (form 16-6, surface use restrictions addendum), require payments for use of the surface estate (form 16-5, surface damage payment addendum), and require the groundwater rights owner to limit its use of the surface estate to specific locations over time (form 16-4, easement location addendum). In light of the Texas Supreme Court's decision in *Coyote Lake Ranch*, attorneys using the easement forms should modify them as necessary to detail the respective surface use rights of the parties. Consideration should be given to incorporating into the easement documents the concept that the owners of the surface and groundwater estates will each make reasonable accommodations to the other in the use of the surface estate. Any obligation to make accommodations should be expressly stated, and the action required to fulfill this obligation should be clearly set out. The court's analysis of when the accommodation doctrine applies, discussed below, can be used as a template in drafting this language.

In *Coyote Lake Ranch*, the court held that the owner of the groundwater estate has implied easements for access and use over the surface estate as reasonably necessary to develop the groundwater and that these easements are dominant to the surface use rights of the surface owner. Despite the broad surface use rights granted to the city, the court found that the language in the deed did not address all of the surface use issues raised by the ranch owner. The court held that when the documents creating the surface use rights do not fully address questions on surface use, the accommodation doctrine can be applied to limit the surface use by the owner of the groundwater estate.

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Under the *Coyote Lake Ranch* holding, to successfully assert a claim that the accommodation doctrine applies, the surface owner must prove that—

1. the groundwater rights owner's use completely precludes or substantially impairs the existing use; and
2. there is no reasonable alternative method available to the surface owner by which the existing use can be continued; and
3. there are alternative reasonable, customary, and industry-accepted methods available to the groundwater rights owner that will allow recovery of the groundwater and also allow the surface owner to continue the existing use.

Coyote Lake Ranch, 498 S.W.3d at 64. The court's decision in this case underscores the importance of drafting surface use rights in a manner that is clear and unambiguous about the nature and extent of the authorized use.

Form 16-3 includes the grant of a 150-foot-wide sanitary control easement around each groundwater well as required by the TCEQ for wells that are part of a municipal water supply system. *See* 30 Tex. Admin. Code §§ 290.38(75), 290.41(c). The purpose of the easement is to create an area around each well in which uses that could adversely affect the quality of the groundwater are prohibited. The requirement for a sanitary control easement is included in the form because a grantee acquiring groundwater for domestic and livestock use may want this protection for its well. The blanket easement agreement also contains a provision requiring the grantor to execute a separate sanitary control easement in the form promulgated by the TCEQ at the grantee's request. The TCEQ easement form requires the specific location of the well and easement to be identified. The grantee may not know the location of future wells at the time it acquires the easement, but the grantee can have the separate sanitary control easement executed when the location of each well is established. TCEQ Form 20698 (Sanitary Control Easement) can be obtained from the TCEQ website at **www.tceq.texas.gov**.

§ 16.19:9 Exhibit K—Memorandum of Contract

If it is anticipated that there may be a significant amount of time between the date the contract is signed and the date of closing, it is advisable to have the memorandum of contract signed and recorded in the real property records to provide notice to the public of the buyer's contract rights. See form 16-16 in this chapter.

§ 16.19:10 Exhibit L—Notice of Termination of Contract

If the memorandum of contract is used, the parties should execute the notice of termination of contract form at the same time and deliver it to the title company or escrow agent for recordation in the event the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.20 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will require the buyer's tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.21 Title and Survey

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to

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give to a buyer, advising that the buyer should either have title examined by an attorney or obtain a title insurance policy, if available. *See* Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer by the deadlines stated in the contract the title commitment or title information, the survey (if required), the UCC search, and legible copies of each document referred to in these instruments.

The contract follows a typical procedure under which the buyer reviews the title commitment or title information, the survey, the seller's permit, the documents provided by the seller, and the UCC search and notifies the seller of any objections. After notice, the seller may elect to cure the buyer's objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the groundwater rights subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

Attorneys reviewing title should look for contracts or for provisions in existing oil and gas leases that allow injection or disposal into or onto the land of saltwater or other substances that can adversely affect the quality of the groundwater. In the absence of a limitation or restriction in the deed or lease, owners of the mineral estate, including oil and gas lessees, can use as much of the groundwater as is reasonably necessary to produce minerals, including using groundwater for hydraulic fracturing ("fracking"). *See Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Fleming Foundation v. Texaco, Inc.*, 337 S.W.2d 846 (Tex. App.—Amarillo 1960, writ ref'd n.r.e.).

It is unlikely that the seller will be able to modify or terminate existing oil and gas leases, so it is important to evaluate their effect on the groundwater estate. If the surface owner is also the owner of the mineral estate, the buyer can negotiate restrictions on the mineral estate limiting the use of groundwater for fracking and other forms of enhanced and secondary recovery, such as prohibiting the injection or disposal of saltwater and other substances in or on the land. Such negotiations could eliminate or limit these practices in future leases and contracts.

§ 16.21:1 Review of Title Commitment

The contract provides that the condition of title will be established by either a title commitment or an abstract of title, as agreed to by the buyer and the seller. If an abstract of title is furnished, the buyer may have the abstract of title reviewed by an attorney and obtain the attorney's written opinion of the abstract of title. The benefit of obtaining title insurance, if available, over an attorney's opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage maintained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title.

An essential reference on title insurance is the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available from the Texas Department of Insurance at **www.tdi.texas.gov/title/titleman.html**. The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment.

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The attorney should confirm that the commitment is signed and that the issuance date is not more than ninety days before the closing; otherwise, a new or revised commitment should be ordered.

Schedule A: The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured. The commitment should list two estates to be insured, the fee ownership of the groundwater estate, and the buyer's easement estate. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the contract and in the survey (if applicable).

Schedule B: The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either "Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [**recording data**] of the real property records of [**county**] County, Texas" or "Item 1 of Schedule B is hereby deleted in its entirety."
- Item 2, relating to the standard survey exception, may be amended and partially deleted to read "any shortages in area" if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the mortgagee policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.
- Item 3, relating to homestead or community property or survivorship rights, and item 4, relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation, apply only to the owner policy and cannot be deleted or amended.
- Item 5, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes.
- Item 6, relating to the terms and conditions of the documents creating the insured's interest in the land, cannot be revised. The referenced documents should, however, be reviewed.
- Item 7, relating to materialman's and mechanic's liens, applies only to the mortgagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company. For additional information about materialman's and mechanic's liens, see chapters 19, 20, and 21 in this manual.
- Item 8, relating to subordinate liens and leases, applies only to the mortgagee policy.
- Item 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder's estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken "subject to."

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All other special exceptions, such as easements, mineral interests, leases, or matters shown on a current survey, should be carefully reviewed to determine if they affect the buyer's groundwater rights. The commitment should indicate whether these exceptions apply to the groundwater estate, the easement estate, or both. If the real property consists of more than one tract of land, the commitment should specify which items apply to which tract or tracts.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on Schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the property, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer's perspective, curative matters appearing on Schedule C should be attended to by either the seller or the title company. The contract requires that the seller resolve all Schedule C items before closing, but if that provision is not used, the buyer should object to all Schedule C items in the commitment to ensure that they are not added to Schedule B of the title policy.

The *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.21:2 Review of Abstract of Title

If the seller is obligated to provide an abstract of title, the contract provides that the buyer may have the abstract of title reviewed by an attorney at either the buyer's or seller's expense, as specified in the contract. If the condition of title is to be determined based on an abstract of title, the buyer should have the abstract of title reviewed by an attorney experienced in land title examination and knowledgeable about groundwater rights, and should obtain a written opinion of title in time to make title objections within the deadline specified in section A of the contract.

The abstract of title required by the contract covers the period from the first conveyance from the sovereignty to the present. It is possible to obtain an abstractor's certificate from a title or abstract company that covers a shorter period and may contain a conclusion by the abstractor as to the identity of the current record owner of property, the existence of any outstanding liens, and other title encumbrances affecting the real property. While this information is useful, it is not a satisfactory substitute for an abstract of title as specified in the contract and an attorney's opinion of title. Often, the title or abstract company preparing the abstractor's certificate or abstract of title will limit liability for error to the amount charged for the certificate or abstract.

§ 16.21:3 Review of Survey

The seller is required to provide copies of any existing surveys under exhibit C (seller's records). The contract allows the buyer to require the seller to provide a new survey of the real property, at the seller's expense, as specified in the contract. The required survey category should be set out in the contract in the indicated place under the block for information on the surveyor. Different types of surveys and survey certifications are available, depending on the nature of the property and the requirements of the parties. An excellent resource on surveys is the *Manual of Practice for Land Surveying in the State of Texas*, published by the Texas Society of Professional Surveyors, which may be contacted at **www.tsps.org/default.aspx**. It describes the various categories and conditions for surveys in Texas, the level of accuracy required for each category of survey, matters to be depicted on the survey, and the nature of certificates.

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The attorney should keep the following points in mind when reviewing a boundary survey:

- The survey should bear a recent date and should conform to the required category and condition for the type of survey specified in the contract and location of the property.
- The certificate should be sealed and signed and should conform to any certificate specified in the contract.
- There should be a north compass bearing on the survey.
- The attorney should observe the system of reference used for the survey, locate the beginning point, and determine that it is monumented and locatable.
- The survey, particularly all course and distance notations, should be compared to the legal description either appearing on or attached to the survey. This description then should be compared to the one appearing in the contract and the title commitment or title opinion.

If a more extensive survey, such as a land title survey, is obtained, the attorney should also keep the following points in mind:

- All recorded easements appearing in the title commitment or title opinion should be located and noted on the survey with the appropriate recording data, and blanket easements should be noted in the surveyor's notes. The surveyor should also note any items shown in Schedule B that the surveyor determines do not affect the real property. Conversely, the attorney should examine the survey for any matters (such as easements) not appearing in the title commitment or title opinion.
- The survey should be examined for the location of improvements. The attorney should determine if the improvements protrude onto adjoining property or easement areas, if there are encroachments of improvements from adjoining property onto the property, and if there are building setback line violations.
- The survey should be examined for the depiction of overhead lines, roadways, or other uses of the property that are not within an easement area covered by a recorded easement, as these may indicate the existence of prescriptive easement rights. Any written notations on the survey, such as those relating to rights of parties in possession, should be reviewed to determine their effects on the property and its anticipated use.
- The property should have legal and adequate access to public streets or roads.
- The survey should show the existence and location of utilities.
- The surveyor's certificate should indicate the location of the floodplain, if applicable.

§ 16.21:4 Review of UCC Search

The contract includes provisions for the conveyance of personal property and fixtures and requires that the seller furnish UCC searches of the UCC records of the Texas secretary of state and the UCC records of any other appropriate state. It should be remembered that groundwater permits, wells, and other property may fall within broad collateral descriptions such as "equipment" and "general intangibles" in security agreements and financing statements.

§ 16.22 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the groundwater and real property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned,

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except for the independent consideration provided in the contract.

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer's inspection of the property. Except for the environmental indemnity stated in exhibit B (if used), the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party's own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence. *See Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity, if used, shifts risk for the seller's own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

It is prudent for the purchaser of groundwater rights to be produced on site, whether or not previously severed, to obtain an environmental site assessment on the land overlying the groundwater that meets the requirements of the "all appropriate inquiries" rule under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, in order to secure protection as an "innocent landowner" from strict liability for groundwater contamination. While there is no case law in which the owner of a groundwater right has been held strictly liable for groundwater contamination as a result of his ownership of the groundwater right, the owner of a mineral estate has been held to be an "owner" under CERCLA because it is the owner of a fee simple estate separate from the surface estate. *See City of Grass Valley v. Newmont Mining Corp.*, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4287603 (E.D. Cal. Dec. 4, 2007) (also cited in *Halliburton Energy Services, Inc. v. NL Industries*, 648 F. Supp. 2d 840, 896–97 (S.D. Tex. 2009)). An owner of a groundwater rights estate would, under the court's reasoning in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), be the owner of a fee simple estate separate from the surface estate and could, therefore, be held to have strict liability for groundwater contamination. *See* William D. Dugat, *All Appropriate Inquiries in Connection with Groundwater Purchases*, *in* The Changing Face of Water Rights in Texas, State Bar of Texas (2015).

The contract provides that the earnest money will be deposited in one lump sum. The parties alternatively may agree that the buyer is obligated to deposit additional earnest money after agreed conditions have been satisfied—for example, if the buyer decides not to terminate the contract at the end of the inspection period and to proceed to closing.

§ 16.23 Representations and Warranties

Representations and warranties are negotiated by the parties with specific reference to the transaction. They may include such matters as ownership of the real property and groundwater rights; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations (for example, "as is" language); presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken "subject to."

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In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller's representations and warranties, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller's opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.
- The seller makes no representations or warranties that are not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation), or in the closing documents.

The following optional clauses are also provided:

- The buyer agrees to accept the property in its "as is, where is" condition, investigate the property on the buyer's own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.
- The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.
- The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties' representations are true and correct when made and must be true and correct at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim, after substantial obligations have been paid or incurred, that the other party is not authorized to consummate the transaction. While the seller's organizational documents should be available at the time of execution of the contract, the buyer's organizational documents are often not prepared until shortly before closing.

§ 16.24 Condition of Property until Closing; Cooperation; No Recording

The parties' signing of the contract obligates them concerning maintenance and operation of the property, casualty damage, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties' agreement not to record the contract. Oil and gas leases may be of concern to the buyer of groundwater, because the lessee has the right to use groundwater in connection with its operations whether that right is stated in the

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lease or not. In addition, oil and gas leases may expressly allow the lessee to use significant amounts of groundwater for flooding or secondary recovery operations or may permit activities that could contaminate the groundwater, such as the injection or disposal of saltwater onto the real property. Paragraph I.2. of the contract contains provisions that restrict the ability of the seller to enter into oil and gas leases before and after closing.

§ 16.25 Termination

The contract provides for disposition of the earnest money after termination and for posttermination obligations in certain events. If the memorandum of contract is used, the title company or escrow agent should record the notice of termination of contract if the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.26 Closing

The contract provides that, unless the parties agree otherwise before closing, certain closing documents will use the forms contained in the current edition of the *Texas Real Estate Forms Manual*. This approach defers the time and expense of negotiating the closing documents until after the contract is signed, while providing certainty if the parties do not otherwise negotiate closing documents. Alternately, the closing documents can be negotiated before the contract is signed and, if so, should be attached as exhibits to the contract.

The contract allocates closing obligations and transaction costs between the parties.

The contract provides that the buyer acquires possession of the property at closing. The parties may agree, however, on earlier or later possession by the buyer. If the buyer takes possession before closing, a groundwater lease may be appropriate.

Although it is not common, a seller or buyer may be represented by a real estate broker in a groundwater transaction. Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

If either the buyer or the seller is licensed as a real estate salesperson or real estate broker and is acting as a broker in the transaction, a disclosure to that effect is required under the Real Estate License Act. *See* Tex. Occ. Code § 1101.652(b)(16).

§ 16.27 Default and Remedies

The contract provides that the buyer may elect one of the following remedies for the seller's default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller's representations are not true and correct or if a warranty set forth in the contract is breached. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties' remedies, but remedies are often negotiated.

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The contract provides that the party prevailing in litigation is entitled to recover attorney's fees and court and other costs.

§ 16.28 Assignment

The contract contains alternate clauses concerning assignment. The buyer either may not assign the contract or may assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.

§ 16.29 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.29:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder's written payoff statement. The lienholder should be requested through an authorized representative to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed.

Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic's lien claims, federal or state tax liens, property taxes, paving assessments, and abstracted judgments that affect the property. For additional information about materialman's and mechanic's liens, see chapters 19, 20, and 21 in this manual.

The closing agent must also determine the amounts of closing costs, such as surveying expenses, attorney's fees, brokers' commissions, and loan fees.

§ 16.29:2 Ad Valorem Taxes and Groundwater Authority Fees

Currently groundwater is not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller, if they are due and payable at the time of closing. Under current law, the sale of the groundwater rights, at least when the buyer retains sufficient reserved groundwater to enable it to continue its existing use of the real property, would not appear to trigger the assessment of rollback taxes. Consequently, the contract provides that if the real property has been, or at any time after closing is, the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code, the seller will be responsible for the payment of any such taxes, penalties, and interest, including rollback taxes. If the seller is not reserving sufficient groundwater to continue the seller's existing use of the real property, the parties should consider modifying this provision.

After closing, the seller will continue to pay all ad valorem taxes and assessments due in connection with the real property before delinquency, except that if ad valorem taxes are ever assessed separately against the buyer's groundwater rights after closing, the buyer will be responsible for paying such taxes and assessments if the buyer is obligated to pay such taxes under applicable law. After closing, the buyer will be responsible for paying all fees, assess-

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ments, taxes, and charges of any kind imposed by the groundwater authority or any successor authority in connection with the buyer's use of the groundwater, and the seller will be obligated to pay such taxes and assessments with regard to the reserved groundwater, if any. The provisions regarding taxes should be set out in the deed and easement agreement signed by the parties at closing.

§ 16.29:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

Closing Statements: Closing statements may be on either the federally prescribed settlement statement, the State Board of Insurance settlement statement, or a separate seller's, buyer's, or borrower's statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties' agreement with the numbers and computations appearing on the statement.

Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties' marital status will likely be required at closing by the title company, escrow agent, or a party's attorney.

Financing documents are typically prepared by the lender's attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, their attorneys, or an attorney for the closing agent.

§ 16.29:4 Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file with the Internal Revenue Service an information return relating to the transaction and is subject to penalties for failing to report. *See* 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by delivering the seller's closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with "good funds" as defined by the regulations of the Texas State Board of Insurance or immediately available funds. See Procedural Rule P-27, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

If it is not necessary to disburse funds at closing, the parties need not comply with the "good funds" rule, and payment may be made in other ways.

In a lending transaction, the attorney for the lender should consider obtaining an insured closing service letter from the title insurance underwriter, if title insurance is available, whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company relating to the handling of closing funds. See forms T-50 and T-51 of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. See **www.tdi.texas.gov/title/titlemm5.html**.

§ 16.29:5 Recording Documents

The title company or escrow agent is responsible for recording documents intended to be recorded. This responsibility extends to the

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recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that it is properly executed and notarized, the exhibits referred to in the document are attached, and the name and address of the person to whom the document is to be returned after recording is included.

§ 16.29:6 Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, disposition of funds, and distribution of documents received by the closing agent.

§ 16.30 Additional Considerations

§ 16.30:1 Transactions Involving Foreign Persons

Buyer: If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Tax Act of 1980. *See* 26 U.S.C. § 6039C.

Seller: With certain exceptions, anyone purchasing real property located in the United States from a foreign person must withhold 15 percent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. *See* 26 U.S.C. § 1445(a), (b). The transferee should assume that the seller is a foreign person until the contrary is established, because transferees act at their own peril until they obtain a nonforeign affidavit. *See* 26 U.S.C. § 1445(b)(2). The nonforeign affidavits (forms 26-19 and 26-20 in this manual) are suggested for use in all transactions.

§ 16.30:2 Closing Checklist

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

§ 16.30:3 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or title company's certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies.

[Sections 16.31 through 16.40 are reserved for expansion.]

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III. Groundwater Transaction Guide for Sale of Permitted Groundwater Rights for Off-Site Production

§ 16.41 Sale of Permitted Groundwater Rights for Production Off-Site

The rights to produce and transport groundwater can be sold under a contract of sale and conveyed by deed and easement agreement. These rights can also be leased under a groundwater lease. (But see section 16.1 above for a discussion of ownership of groundwater rights.) This part of this chapter applies to the sale and conveyance of permitted groundwater rights for off-site production. The sale or conveyance of groundwater for on-site production is addressed in part II. of this chapter. The sale and conveyance of surface water rights is addressed in part IV. Financing documents for use in transactions in which the groundwater rights and permit constitute the collateral are discussed in part V.

The forms discussed in this part of this chapter are for general use. Users should be aware that modifications may be required for specific transactions. For all groundwater sales, it is imperative that attorneys involved in the transaction identify the regulatory agencies with jurisdiction over the groundwater rights (referred to collectively in this transaction guide as the "groundwater authority") and obtain copies of all rules and regulations pertaining to groundwater as early in the transaction as possible. The rules may contain requirements that have an important bearing on the transaction, such as minimum acreage requirements for production, limitations on production, and requirements for the issuance and transfer of permits. It may be necessary for the practitioner to make modifications to the forms based on the rules of the groundwater authority. The forms require significant modifications for use in the sale of groundwater subject to the rules of the Edwards Aquifer Authority.

§ 16.42 Groundwater Rights Sales Contract, Deed, and Related Forms; Place for Recordation

Whether the seller is the owner of both the surface and groundwater estates in the land or is the owner only of groundwater pursuant to ownership of all or part of a permit for production of groundwater, if the seller is selling the permitted groundwater for production at a location other than the land from which the original permit was derived, only the groundwater sales contract, form 16-9 in this chapter, should be used in the transaction. Specifically, in some groundwater authorities, notably the Edwards Aquifer Authority (EAA), a purchaser may buy all or a portion of the unrestricted right to produce groundwater pursuant to the terms of a permit issued by the EAA and then elect to withdraw the water from a location different from the original permit location as long as the new location is within the jurisdiction of the EAA. Form 16-9 specifically contemplates a transaction in which a groundwater authority has issued a permit for the production of groundwater, and the groundwater, through the mechanism of the permit, is what is being sold. The production of the groundwater will occur at a well location other than the land set forth in the permit. The new location for production will be designated by the buyer at some point in the transfer mechanism with the groundwater authority. With these types of transactions, it is never contemplated that the buyer will actually produce groundwater on the land owned by the seller, and, in fact, the contract and the subsequent deed prohibit the buyer from having access to the land owned by the seller.

For transactions entered into after September 1, 2019, the Texas legislature has created additional mechanisms for the transfer of groundwater permitted by the EAA for irrigation purposes

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on "historically irrigated land." *See* Acts 2019, 86th Leg., R.S., ch. 904, § 1 (H.B. 3656), eff. Sept. 1, 2019 (amending § 1.34 of the Edwards Aquifer Authority Act, Acts 1993, 73d Leg., R.S., ch. 626, § 1.34 (S.B. 1477), eff. Sept. 1, 1993). Previously, a holder of a permit for irrigation was not authorized to lease more than 50 percent of the irrigation rights initially permitted. House Bill 3656 sets out conditions under which a permit holder may seek approval from the EAA to sell or lease the remaining water rights for historically irrigated land and adds new definitions for the terms *developed land*, *historically irrigated land*, and *land no longer practicable to farm*.

In order to sever all or a portion of the remaining water rights, the permit holder must demonstrate to the satisfaction of the EAA, based on rules adopted by the EAA to implement House Bill 3656, (1) that the historically irrigated land has become developed land or is no longer practicable to farm, and/or (2) that the land cannot be developed because of its topography or location within a floodplain.

Subject to approval by the EAA, the permit holder may sever the water rights in proportion to the part of the land that meets such requirements. The approval of a severance of water rights affected by House Bill 3656 is subject to a contested case hearing in accordance with EAA rules. House Bill 3656 expressly prohibits the EAA from adopting rules that would expand either the type of land that is considered to be "developed land" or "land no longer considered practicable to farm."

House Bill 3656 also authorizes the EAA to adopt rules that would allow a permit holder to lease all or part of the water rights for use in irrigation granted in the initial permit to another person for irrigating land, whether or not the land to be irrigated is the same land to which the original permit was granted, so long as the land is within the boundaries of the EAA's jurisdiction.

All recordable documents, including the new permit when issued, should be recorded in the county or counties in which the land from which the groundwater and permit rights were originally obtained is located. In addition, if a new withdrawal location is selected in a different county, all of the same documents, including the new permit, should also be recorded in that county. For example, if the original permit was derived from land in Medina County, but the new withdrawal location is to be in Bexar County, all documentation should be recorded in both Medina and Bexar counties. Although not required, deeds, deeds of trust, and other recordable documents may, in addition, be filed in any county in which land from which the permit is derived is located. This may include land that was at one time owned or leased by the permit holder or the holder's predecessor in title. This serves as a means of giving actual notice of the groundwater rights and liens to persons looking in the real property records of these counties.

The basic sales documents include the following:

1. Groundwater Rights Sales Contract (Off-Site) (form 16-9).
2. Groundwater Rights Warranty Deed (Off-Site) (form 16-10).
3. Permit Transfer Request (forms 16-12 and 16-26) or a transfer form promulgated or approved by the groundwater authority or another form promulgated by the groundwater authority, if it has a particular form for transfer.
4. Partial Release of Lien (form 16-11) if the seller has an existing lien on the land and only the groundwater rights are being released from the lien at closing.

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5. Release of Lien (form 10-2 in this manual) if the seller's entire lien will be released at closing.
6. Form UCC3 (form 9-14 in this manual), a form promulgated by the Texas secretary of state, if there is a security interest that covers or that could be construed to cover the groundwater or the permit to be conveyed at closing.
7. Assignment and Assumption of Lease (form 16-14) if there is an existing lease of the groundwater.
8. Lessee Estoppel Certificate (form 16-15) used to assure the buyer that the groundwater lease is valid and not in default and that the lessee understands the lease is being assigned.
9. Affidavit of Debts and Liens [and Indemnity] (form 16-13) (if this form is not being provided by a title company) used to provide additional protection to the buyer, especially in instances in which no title insurance will be obtained or title insurance is not available.
10. Loan documents required by the lender.

§ 16.43 General Considerations

The groundwater rights sales contract, form 16-9 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of groundwater is an emerging area of law, and there are no well-established terms of sale. Contracts for the purchase and sale of groundwater are diverse, and additional drafting may be necessary. The following commentary is organized in the same order as the sections of the contract.

§ 16.44 Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer's earnest money cannot be collected, the buyer will be in default.

§ 16.45 Defined Terms

§ 16.45:1 Seller and Buyer

There are sections for the names of and other information concerning the seller, the buyer, and their attorneys. Proper identification of the parties is important, and the seller and buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his own behalf. See chapter 3 in this manual for a discussion of party designations. It should be noted that if the owner of the real property and the owner of the permit are not the same party, the attorney for the buyer must make certain that both parties sign all closing documents. Most groundwater authorities will not mediate ownership of groundwater rights.

§ 16.45:2 Title Company or Escrow Agent

Title insurance to insure title to groundwater rights in Texas is not generally offered by title insurance underwriters in Texas, although currently there is at least one insurer that offers title insurance for water rights. To the extent it is available, the title insurance product is a variation of a title policy on the real property. In many ways, it may not provide the parties with the complete coverage and closing details they are used to receiving in a land closing and title

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policy. For that reason, many sales of groundwater, in particular permitted groundwater transactions, are completed through the use of a title opinion based on information prepared by a title company. Nonetheless, the contract designates a title company or escrow agent to act as the escrow and closing agent in order to address either option. The title company or escrow agent is responsible for closing the transaction and receiving and disbursing funds under the terms of the contract. If a title opinion is provided as evidence of title to the groundwater rights, it should be reviewed by an attorney who is knowledgeable about land titles and groundwater rights.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-4 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company.

§ 16.45:3 Surveyor

A survey is rarely used in the sale of permitted groundwater, as the underlying issue is not the location of the real property but rather the chain of title related to the real property and the permit. If there is a need for a survey, a section could be drafted for the contract.

§ 16.45:4 Groundwater Authority

Generally, for a groundwater transaction involving a permit, the real property is located within a groundwater conservation district or other groundwater authority, and the authority should be identified. It is imperative that the buyer's attorney consult the rules of the groundwater authority to determine all restrictions on the use and production of groundwater, requirements for sale of groundwater, and rules regarding the issuance or transfer of a permit. Generally, copies of the rules can be obtained only from the groundwater authority. The buyer's attorney should also obtain, and personally review, copies of all documents maintained by the groundwater authority pertaining to the groundwater and permit being sold. The attorney should note all relevant information from the file, such as yearly allocations, if applicable, and should determine the feasibility of meeting all conditions of the groundwater authority's approval of the sale within the buyer's required time frame.

§ 16.45:5 Seller's Permit

It is important for the buyer to determine the status of the seller's permit issued by the groundwater authority in connection with the groundwater and what the groundwater authority requires for the transfer of the permit. Cooperation by the seller in the transfer of the permit should be set out in the contract and is paramount to the buyer's efforts to obtain approval of the transfer. All permit information should be set out in the contract. The contract should address the timing of the filing of application to transfer the permit to the buyer and whether approval of the groundwater authority is a condition of closing. Form 16-26 in this chapter is an example of an application to the groundwater authority to transfer permits in the absence of a form promulgated by the authority.

§ 16.45:6 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties.

§ 16.45:7 Independent Consideration

If the buyer terminates the contract before the end of the inspection period and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but

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should be paid to the seller, because that amount is the independent consideration to the seller for the buyer's right to terminate the contract.

§ 16.45:8 Real Property

The real property is the land from which the groundwater or permit is to be sold and is described in exhibit A of the contract. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unenforceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention also should be given to the conveyance of appurtenant rights, such as permits, licenses, and similar rights.

§ 16.45:9 Groundwater Defined

The definition of groundwater is derived in part from *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 505–06 (Tex. App.—El Paso 1954, writ ref'd n.r.e.).

§ 16.45:10 Groundwater Rights

The contract defines groundwater rights to include the right to withdraw a stated quantity of groundwater from a specific aquifer as described in the permit (the "groundwater") and all rights and interests relating to the groundwater, including—

> all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights . . . .

§ 16.45:11 Reserved Groundwater

Generally, the seller will retain ownership of some permitted rights; however, a specific reservation is not usually required, as the description of the groundwater will specify what number of acre-feet of water will be sold out of the permit. In addition, if the permit being transferred is that of an irrigation groundwater right, in some groundwater districts, there is a certain required acre-feet of groundwater that cannot be severed or sold from the real property. In the case of the Edwards Aquifer Authority (EAA), one acre-foot of irrigation groundwater is known as the base water and, with a few specific exceptions, cannot be sold from the real property from which it derived. The EAA's rules related to the reservation of one acre-foot of irrigation groundwater and the permit holder's ability to secure authorizations from the EAA to transfer those rights, either by sale or lease, were challenged by several landowners, the Uvalde County Underground Water Conservation District, the city of Uvalde, and Uvalde County in *Uvalde County Underground Water Conservation District v. Edwards Aquifer Authority*, No. 2018-01-31972-CV (38th Dist. Ct., Uvalde County, Tex. Nov. 2, 2018). In response to the litigation, House Bills 1479, 3644, and 3656 were considered by the Texas legislature during the 86th legislative session. House Bill 3656 passed and became effective September 1, 2019.

For transactions entered into after September 1, 2019, the Texas legislature has created additional mechanisms for the transfer of groundwater permitted by the EAA for irrigation purposes on "historically irrigated land." *See* Acts 2019, 86th Leg., R.S., ch. 904, § 1 (H.B. 3656), eff. Sept. 1, 2019 (amending § 1.34 of the Edwards Aquifer Authority Act, Acts 1993, 73d Leg., R.S., ch. 626, § 1.34 (S.B. 1477), eff. Sept. 1, 1993). Previously, a holder of a permit for irrigation was not authorized to lease more than 50 percent of the irrigation rights initially permitted. House Bill 3656 sets out conditions under

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which a permit holder may seek approval from the EAA to sell or lease the remaining water rights for historically irrigated land. See section 16.42 above for an in-depth discussion of the requirements.

§ 16.45:12 Purchase Price

There is no standard method of determining the purchase price for groundwater rights; however, in the case of permitted groundwater, the sales have been based most often on a price per acre-foot of water. Variations on this model include pricing on a per-acre-foot-permitted basis or a per-acre-foot-per-acre allocation. The field of groundwater rights appraisal is still evolving. In areas in which there are numerous groundwater sales, such as the Edwards Aquifer, it is possible to obtain an appraisal of groundwater rights based on comparable sales. The contract provides for the purchase price based on a stated price per acre of groundwater being purchased. The buyer will be paying for the groundwater under each acre of land, based on a stated price per acre, regardless of how much or how little water is actually under the land. Exhibit E of the contract may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer's obligations, that fact and the terms of the complying financing should be addressed in the contract. See chapters 6 and 8 in this manual for further discussion of financing.

§ 16.45:13 Buyer's and Seller's Liquidated Damages

The liquidated damages sections of the contract are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

§ 16.45:14 Title Commitment and Title Information

Title insurance may not be available to insure title to groundwater rights, but even if available, the parties may agree not to procure title insurance. If the seller is not required to provide a title commitment, the contract requires the seller to provide the buyer with title information. The contract provides that the buyer may have the title information reviewed by an attorney of the buyer's choice, at the expense of the seller or buyer as specified in the contract. If the buyer obtains title information, the buyer should have it reviewed by an attorney who is experienced in land titles and knowledgeable about groundwater rights.

§ 16.45:15 Title Documents

The contract defines title documents to include the seller's "Permit and instruments affecting title to the Groundwater and the Real Property" referenced in the title commitment or title information and UCC search. These documents are to be provided as part of the seller's records. Under paragraph F.6. of the contract, title objections can be made on the basis of the title documents. This provides the buyer with the ability to make objections to title based on the seller's permit or unrecorded documents provided as part of the seller's records.

§ 16.46 Deadlines

Section A of the contract contains most of the deadlines, grouped for ease of reference, and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence and that closing will occur a certain number of days after the expiration of the inspection period, but closing may also be specified to occur a certain number of days following a different event or on

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a certain date. The closing date may also be specified as "on or before" a certain date or event.

§ 16.47 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing. Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

§ 16.47:1 Exhibit B—Representations; Environmental Matters

Exhibit B contains the parties' representations. These items are always negotiated by the parties and will vary from transaction to transaction.

§ 16.47:2 Exhibit C—Seller's Records

Exhibit C is a list of the seller's records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

§ 16.47:3 Exhibit D—Notices, Statements, and Certificates

Exhibit D lists notices, statements, and certificates required by federal and state law and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for brief discussions of laws and regulations that require notices, statements, and certificates. Some of the statutory provisions would appear to include the sale of groundwater, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of groundwater.

§ 16.47:4 Exhibit E—Seller Financing

Exhibit E contains seller-financing terms.

§ 16.47:5 Exhibit F—Memorandum of Contract

If it is anticipated that there may be a significant amount of time between the date the contract is signed and the date of closing, it is advisable to have the memorandum of contract signed and recorded in the real property records to provide notice of the buyer's contract rights. See form 16-16 in this chapter.

§ 16.47:6 Exhibit G—Notice of Termination of Contract

If the memorandum of contract is used, the parties should execute the notice of termination of contract form at the same time and deliver it to the title company or escrow agent for recordation in the event the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.48 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will require the buyer's tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.49 Title

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to give to a buyer, advising that the buyer should either have the title examined by an attorney or obtain a title insurance policy, if available. Tex. Occ. Code § 1101.652(b)(29). If a broker or

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salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer the title commitment or title information, the UCC search, and legible copies of each document referred to in these instruments by the deadlines stated in the contract. The contract follows a typical procedure under which the buyer reviews the title commitment or title information, the seller's permit, the documents provided by the seller, and the UCC search and notifies the seller of any objections. After notice, the seller may elect to cure the buyer's objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the groundwater subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

§ 16.49:1 Review of Title Commitment

The contract provides that the condition of title will be established by either a title commitment or title information, as agreed to by the buyer and the seller. If title information is furnished, the buyer may have the title information reviewed by an attorney and obtain the attorney's written opinion of the title information. The benefit of obtaining title insurance, if such insurance is available, over an attorney's opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage maintained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title. See also section 16.21:1 above.

An essential reference on title insurance is the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available from the Texas Department of Insurance at **www.tdi.texas.gov/title/titleman.html**. The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment. The attorney should confirm that the commitment is signed, and the issuance date is not more than ninety days before the closing. Otherwise, a new or revised commitment should be ordered.

Schedule A: The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured, including the correct number of acre-feet of groundwater and the correct reference to the permit. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the contract.

Schedule B: The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either "Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [**recording data**] of the real property records of [**county**] County, Texas" or "Item 1 of Schedule B is hereby deleted in its entirety."
- Item 3, relating to homestead or community property or survivorship rights, should be reviewed to verify ownership right.
- Item 5, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes.

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- Item 6, relating to the terms and conditions of the documents creating the insured's interest in the land, cannot be revised. The referenced documents should, however, be reviewed.
- Item 7, relating to materialman's and mechanic's liens, applies only to the mortgagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company. For additional information about materialman's and mechanic's liens, see chapters 19, 20, and 21 in this manual.
- Item 8, relating to subordinate liens and leases, applies only to a mortgagee policy and may not be applicable for every water transaction.
- Item 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder's estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken "subject to."

All other special exceptions should be carefully reviewed to determine if they affect the buyer's groundwater rights. If there is more than one set of groundwater rights being insured, the commitment should specify which exceptions apply to which set of groundwater rights.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on Schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the property, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer's perspective, curative matters appearing on Schedule C should be attended to by either the seller or the title company. The contract requires that the seller resolve all Schedule C items before closing, but if that provision is not used, the buyer should object to all Schedule C items in the commitment to ensure that they are not added to Schedule B of the title policy.

The *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.49:2 Review of Abstract of Title or Title Information

If the seller is obligated to provide an abstract of title or title information, the contract provides that the buyer may have the abstract of title or title information reviewed by an attorney at either the buyer's or seller's expense, as specified in the contract. If the condition of title is to be determined based on an abstract of title or title information, the buyer should have it reviewed by an attorney experienced in land title examination and knowledgeable about groundwater rights, and should obtain a written opinion of title in time to make title objections within the deadline specified in section A. of the contract.

The abstract of title required by the contract covers the period from the first conveyance from the sovereignty to the present. It is possible to obtain an abstractor's certificate from a title or abstract company that covers a shorter period and may contain a conclusion by the abstractor as to the identity of the current record owner of property, the existence of any outstanding liens, and other title encumbrances affecting the real property. While this information is useful, it is

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not a satisfactory substitute for an abstract of title or title information as specified in the contract and an attorney's opinion of title. Often, the title or abstract company preparing the abstractor's certificate or abstract of title will limit liability for error to the amount charged for the certificate or abstract.

§ 16.49:3 Review of Survey

A survey is not required for a transaction involving off-site production.

§ 16.49:4 Review of UCC Search

The contract includes provisions that require the seller to furnish searches of the UCC records of the Texas secretary of state and the UCC records of any other appropriate state. Groundwater permits, wells, and other property may fall within broad collateral descriptions such as "equipment" and "general intangibles" in security agreements and financing statements.

§ 16.50 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the groundwater and real property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned, except for the independent consideration provided in the contract.

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer's inspection of the property, although in the case of the purchase of permitted groundwater to be produced from another location, the need to visually inspect the real property is rare. Generally, inspection periods in these types of contracts are used more as a feasibility period, allowing the buyer time to evaluate the overall purchase of the groundwater rather than inspect the actual property.

Except for the environmental indemnity stated in exhibit B (if used), the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party's own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence. *See Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity, if used, shifts risk for the seller's own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

The contract provides that the earnest money will be deposited in one lump sum. The parties alternatively may agree that the buyer is obligated to deposit additional earnest money after agreed conditions have been satisfied—for example, if the buyer decides not to terminate the contract at the end of the inspection period and to proceed to closing.

§ 16.51 Representations and Warranties

Representations and warranties are negotiated by the parties with specific reference to the transaction. They may include such matters as ownership of the real property and groundwater, organization of the parties, authority to execute the contract and close the transaction, condition of title, pending litigation and claims that may ripen into litigation, pending or threatened condemnation or other taking, disclaimer of representations (for example, "as is" language), compliance with all laws, status of leases, payment of ad valorem taxes, and status of debt to be assumed or taken "subject to."

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In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller's representations and warranties, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller's opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.
- The seller makes no representations or warranties that are not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation), or in the closing documents.

The following optional clauses are also provided:

- The buyer agrees to accept the property in its "as is, where is" condition, investigate the property on the buyer's own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.
- The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties' representations are true and correct when made and must be true and correct at closing, or the buyer may terminate the contract. Termination of the contract may not be a satisfactory remedy for the buyer, in which case other remedies could be negotiated, such as a reduction in the sales price.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim, after substantial obligations have been paid or incurred, that the other party is not authorized to consummate the transaction. While the seller's organizational documents should be available at the time of execution of the contract, the buyer's organizational documents are often not prepared until shortly before closing.

§ 16.52 Condition of Property until Closing; Cooperation; No Recording

The parties' signing of the contract obligates them concerning the groundwater, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties' agreement not to record the contract.

§ 16.53 Termination

The contract provides for disposition of the earnest money after termination and for postermination obligations in certain events. If the memorandum of contract is used, the title com-

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pany or escrow agent should record the notice of termination of contract if the contract is terminated before closing. See form 16-17 in this chapter.

§ 16.54 Closing

The contract provides that, unless the parties agree otherwise before closing, certain closing documents will use the forms contained in the current edition of the *Texas Real Estate Forms Manual*. This approach defers the time and expense of negotiating the closing documents until after the contract is signed, while providing certainty if the parties do not otherwise negotiate closing documents. Alternately, the closing documents can be negotiated before the contract is signed and, if so, should be attached as exhibits to the contract.

The contract allocates closing obligations and transaction costs between the parties.

The contract provides that the buyer acquires possession of the groundwater at closing; however, the groundwater authority may not actually approve the transfer of the permit until weeks after closing. For this reason, the continued cooperation of the seller, if necessary, is required should there be any impediment at the office of the groundwater authority.

If closing is performed by an escrow agent, the escrow agent should be responsible for getting the affidavit of debts and liens (form 16-13 in this chapter), the settlement statement, and similar documents typically provided by a title company, signed at closing.

Although it is not common, a seller or buyer may be represented by a real estate broker in a groundwater transaction. Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

If either the buyer or the seller is licensed as a real estate salesperson or real estate broker and is acting as a broker in the transaction, a disclosure to that effect is required under the Real Estate License Act. Tex. Occ. Code § 1101.652(b)(16).

§ 16.55 Default and Remedies

The contract provides that each party may elect one of the following remedies for the other's default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller's representations are not true and correct or if a warranty set forth in the contract is breached, and as noted earlier, if termination is not a satisfactory remedy for the buyer, other remedies such as a reduction in the purchase price can be negotiated and included in the contract. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties' remedies, but remedies are often negotiated.

The contract provides that the party prevailing in litigation is entitled to recover attorney's fees and court and other costs.

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§ 16.56 Assignment

The contract contains alternate clauses concerning assignment. The buyer may either not assign the contract or assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.

§ 16.57 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.57:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder's written payoff statement. The lienholder should be requested, through an authorized representative, to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed. In many cases, when only permitted groundwater is being sold, the lender will provide only a partial release and the amount of the payoff will be determined by a lender formula related to the value of the permitted water compared with the remaining value of the mortgaged asset.

Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic's lien claims, federal or state tax liens, property taxes, estate taxes, and abstracted judgments that affect the real property or groundwater. For additional information about materialman's and mechanic's liens, see chapters 19, 20, and 21 in this manual.

The closing agent must also determine the amounts of closing costs, attorney's fees, brokers' commissions, and loan fees.

§ 16.57:2 Ad Valorem Taxes and Groundwater Authority Fees

Currently groundwater is not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller if they are due and payable at the time of closing. The sale of the groundwater, at least when the buyer retains sufficient reserved groundwater to enable it to continue its existing use of the real property, would not appear to trigger the assessment of rollback taxes. Consequently, the contract provides that if the real property has been, or at any time after closing is, the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code, the seller will be responsible for the payment of any such taxes, penalties, and interest, including rollback taxes. If the seller is not reserving sufficient groundwater to continue the seller's existing use of the real property, the parties should consider modifying this provision.

After closing, the seller will continue to pay all ad valorem taxes and assessments due in connection with the real property before delinquency. However, if ad valorem taxes are assessed separately against the buyer's groundwater rights after closing, the buyer will be responsible for paying such taxes and assessments if the buyer is obligated to pay such taxes under applicable law. After closing, the buyer will be responsible for paying all fees, assess-

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ments, taxes, and charges of any kind imposed by the groundwater authority or any successor authority in connection with the buyer's use of the groundwater; the seller will be obligated to pay such taxes and assessments with regard to the reserved groundwater, if any. The provisions regarding taxes should be set out in the groundwater deed signed by the parties at closing.

§ 16.57:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

Closing Statements: Closing statements may be on either the federally prescribed HUD-1 settlement statement, the State Board of Insurance settlement statement, or a separate seller's, buyer's, or borrower's statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties' agreement with the numbers and computations appearing on the statement.

Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties' marital status will likely be required at closing by the title company, escrow agent, or a party's attorney.

Financing documents are typically prepared by the lender's attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, their attorneys, or an attorney for the closing agent.

§ 16.57:4 Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file an information return with the Internal Revenue Service relating to the transaction and is subject to penalties for failing to report. *See* 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by delivering the seller's closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with "good funds" as defined by the regulations of the Texas State Board of Insurance. See Procedural Rule P-27, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

If it is not necessary to disburse funds at closing, the parties need not comply with the "good funds" rule, and payment may be made in other ways.

In a lending transaction, the attorney for the lender should consider obtaining an insured closing service letter from the title insurance underwriter, if title insurance is available, whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company relating to the handling of closing funds. See forms T-50 and T-51 of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. See **www.tdi.texas.gov/title/titlemm5.html**.

§ 16.57:5 Recording Documents

The title company or escrow agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for

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notes paid at closing. Each document should be checked before recording to ensure that exhibits referred to in the document are attached and the name and address of the person to whom the document is to be returned after recording is included. The deed and other recordable documents should be recorded in the county or counties in which the groundwater is permitted to be withdrawn.

§ 16.57:6 Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, if applicable, disposition of funds, and distribution of documents received by the closing agent.

§ 16.58 Additional Considerations

§ 16.58:1 Transactions Involving Foreign Persons

Buyer: If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Tax Act of 1980. 26 U.S.C. § 6039C.

Seller: With certain exceptions, anyone purchasing real property located in the United States from a foreign person must withhold 15 percent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. *See* 26 U.S.C. § 1445(a), (b). The transferee should assume that the seller is a foreign person until the contrary is established, because transferees act at their own peril until they obtain a nonforeign affidavit. 26 U.S.C. § 1445(b)(2). The nonforeign affidavits (forms 26-19 and 26-20 in this manual) are suggested for use in all transactions.

§ 16.58:2 Closing Checklist

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

§ 16.58:3 Postclosing Considerations

After closing, if a title policy has been obtained, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or title company's certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies. If no title company is involved in the transaction, the closing agent should perform this task.

[Sections 16.59 and 16.60 are reserved for expansion.]

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IV. Surface Water Rights Transaction Guide

§ 16.61 Sale of Surface Water Rights

This part of the chapter applies to the sale and conveyance of surface water evidenced by a permit or certificate of adjudication. It does not cover the sale or conveyance of groundwater rights, which is covered in parts II. and III. of this chapter.

Surface water in Texas is generally owned by the state. One may obtain a right to use the state's surface water under the state's statutory appropriation process. Under this process, the state may grant precisely defined surface water rights, evidenced by a permit or certificate of adjudication. The surface water rights consist of the right to use water in a specific amount, from a specified body of water, by diversion at a definite location or locations ("point of diversion") for a specified use.

If the surface water is authorized for use in connection with an identified tract of land (as in the case of water permitted for irrigating a specific tract of land), the water right is considered "appurtenant" to that land unless the water right is held by a water corporation or governmental entity authorized to supply water to others. 30 Tex. Admin. Code § 297.81. If land subject to an appurtenant surface water right is conveyed, the water right passes with the conveyance of title to the land, unless the water right has been expressly reserved or excepted or the water right has been granted for the irrigation of land not owned by the applicant. 30 Tex. Admin. Code § 297.81. Once a surface water right has been put to beneficial use according to its terms, the right is "perfected" and becomes a vested property interest. Tex. Water Code §§ 11.025–.026.

The forms contained in this chapter are for general use. The forms conveying surface water rights assume that the water rights to be conveyed have already been appropriated, as is the case with most surface water rights in Texas. Surface water rights that are the subject of a proposed transfer will therefore be represented by either a permit or a certificate of adjudication. The term *permit* refers to the document the Texas Commission on Environmental Quality (TCEQ) or its predecessor water authority issued when the surface water right was first appropriated. If the applicable river basin or stream segment has not been adjudicated, or if a new water right is recognized following the conclusion of adjudication proceedings, the document evidencing the water right will usually be a TCEQ permit. The surface water rights, whether evidenced by a permit or a certificate of adjudication, are real property. See sections 16.5:1 through 16.5:3 above.

Adjudication occurs when existing water rights (whether represented by permit, certified filing, or riparian rights) for a particular river basin or stream segment are subjected to administrative and judicial proceedings that recognize ownership of water rights and determine the quantities, priority dates, and other terms and conditions of each of the water rights from that river basin or stream segment. *See generally* Tex. Water Code §§ 11.301–.324. At the conclusion of the adjudication process, the recognized holders of then-existing water rights are issued certificates of adjudication to show what rights have been adjudicated to them in that proceeding. Thereafter, that certificate of adjudication is the document evidencing the owner's surface water rights and is required to be recorded with the county clerk of each county in which the appropriation is made. Tex. Water Code § 11.324. Most stream adjudications in Texas were concluded in the 1970s and 1980s. The Upper Rio Grande adjudication was completed in 2007.

Thus, new (or any postadjudication) surface water rights issued by the TCEQ are in the form of a water rights permit. As with certificates of

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adjudication, the law requires the permit to be recorded with the county clerk of the county in which the appropriation is to be made. Tex. Water Code § 11.136. An existing certificate of adjudication is amended, when necessary, through the same TCEQ process as for water rights permits. The processes for obtaining a permit for previously unappropriated surface water rights and for adjudicating water rights in Texas are beyond the scope of this chapter.

As early in the surface water transaction as possible, it is imperative that the attorneys involved (1) examine the permit or certificate of adjudication evidencing the water rights, including all amendments to it; (2) identify the regulatory agencies with jurisdiction over the surface water rights (referred to collectively in this part of the chapter as the "water authority"); (3) obtain copies of all rules and regulations pertaining to the surface water rights; and (4) obtain a title report or title commitment on any appurtenant land to determine whether the surface water rights have been previously severed or whether there are liens on the land that may affect the water rights. The rules and regulations for surface water rights transactions may vary depending on the river basin involved in the transaction. *See* 30 Tex. Admin. Code chs. 281, 288, 295, 297–299, 303, 304. If the transaction involves an interbasin transfer, there are other statutory and regulatory implications affecting the water rights, which are beyond the scope of this chapter. *See* Tex. Water Code § 11.085; 30 Tex. Admin. Code §§ 295.13, 295.155, 295.177, 297.1, 297.18.

The TCEQ is the water authority that has jurisdiction over all surface water rights transactions in Texas, including the issuance, amendment, cancellation, and transfer of water rights permits. *See* Tex. Water Code §§ 5.011–.013; Tex. Water Code ch. 11. For river basins in which a watermaster has been appointed, the TCEQ administers adjudicated water rights through a watermaster and a watermaster advisory committee appointed for each water division. *See* Tex. Water Code §§ 11.326, 11.3261. *See generally* 30 Tex. Admin. Code chs. 303, 304. The watermaster divides the water of the streams (or other sources of supply) in the division based on the adjudicated water rights. Tex. Water Code § 11.327(a). The watermaster also regulates controlling works and diversion works in times of shortage to protect existing water rights, prevent waste, and prevent practices in excess of adjudicated rights. Tex. Water Code § 11.327(b). Currently, there are watermaster programs for South Texas, the Rio Grande, the Concho River, and the Brazos River.

More information regarding the watermaster programs can be found on the TCEQ's website at **www.tceq.texas.gov**.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code chs. 303, 304 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so, the purchase contract should address how the water allocation will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. *See* Tex. Water Code

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§§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due diligence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.

§ 16.62 Surface Water Rights Sales Contract and Related Forms; Place for Recordation

The surface water rights sales contract, form 16-18 in this chapter, represents an approach to the sale of surface water rights under which a conditional closing of the transaction first occurs, pending the required water authority's prior approval of the transaction. Once the water authority (that is, the TCEQ) has approved the change in ownership and any amendments to the permit or certificate of adjudication sought by the buyer or required by the TCEQ, there is a final closing of the transaction. Alternatives to this "conditional closing followed by a final closing" approach include granting the buyer an option to purchase the water rights, or leasing the water rights to the buyer, pending TCEQ approval; however, the water right must be used in accordance with the terms of the permit or certificate of adjudication until such time as the TCEQ has granted any necessary amendments to the permit/certificate of adjudication.

The basic sales documents include the following:

1. Surface Water Rights Sales Contract (form 16-18).
2. TCEQ Change of Ownership Form (Form TCEQ-10204), plus any additional applications, forms, and supplemental materials necessary to obtain the amendments to the permit or certificate of adjudication to accommodate the buyer's intended use of the water rights.
3. Surface Water Rights Conveyance—Conditional (form 16-19). Frequently, this is the only conveyance document used by the parties, as they deem the conditional conveyance final once the stated condition—TCEQ approval of necessary amendments—has occurred.
4. TCEQ Amendment to Permit or Certificate of Adjudication, or letter amendment (Form TCEQ-10201).
5. Surface Water Rights Conveyance—Unconditional (form 16-20).

In addition, the release of lien (form 10-2) or partial release of lien (form 10-3) in this manual, bill of sale (form 5-16), assignment and assumption of lease (form 5-21), and other forms may need to be adapted for use in connection with the transaction.

Although many attorneys rely on the files maintained by the TCEQ to determine ownership of surface water rights, rather than the real property records, recordation of surface water rights documents in the county real property records is still a legal requirement. *See* Tex. Water Code § 11.136. The attorney for the buyer of a surface water right should be aware that the buyer is responsible for making sure that the certificate of adjudication, permit, or any amendments, the surface water conveyance document, and other recordable real property documents are recorded with the county clerk of the appropriate county or counties. *See* Tex. Water Code § 11.136. In some instances, there can be uncertainty as to which of two or more locations is the correct place for recordation. If there is uncertainty, it is advisable to record the document in all the locations.

The Texas Water Code states that the TCEQ is required to transfer the certificate of adjudication or permit for recordation to the county clerk of the county in which appropriation is made. Tex. Water Code §§ 11.136, 11.324. In practice,

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however, the TCEQ does not do this. Instead the TCEQ sends the certificate of adjudication, permit, or amendment to the applicant for recordation along with a card. The applicant must send the document and card to the county clerk of the proper county or counties for recordation. In general, the certificate, permit, or amendment should be recorded in each county in which the points of diversion are located. If the water right is appurtenant to land, the certificate, permit, or amendment should also be recorded in the county or counties in which the water is used (that is, where the land is located). If a TCEQ amendment issued in connection with the transfer changed the land to which the water right is appurtenant to a different county, the conveyance document should be recorded in both counties. The county clerk is required to index the document by the name of the applicant and the stream or source of the water supply. Tex. Water Code §§ 11.136, 11.324. The county clerk should fill out the card with the recording information and send it to the TCEQ. It is incumbent on the attorney to make sure the county clerk records the documents and provides the information to the TCEQ. The attorney should also obtain the recording information for the attorney's own records. The attorney should ensure that proper postage is added to the card provided by the TCEQ for completion and return mailing by the county clerk(s). This will increase the likelihood of the card's being returned to the TCEQ.

It is important to identify the county or counties in which the documents affecting the surface water rights should be recorded to ensure that the public is put on constructive notice. Section 297.83 of the TCEQ regulations states that the "written instrument evidencing a water right ownership transfer shall be recorded in the office of the county clerk," but does not specify in which county clerk's office the instrument should be recorded. *See* 30 Tex. Admin. Code § 297.83. *See generally* Tex. Water Code § 11.136. As a rule, a surface water right conveyance document should be recorded in the real property records of each county in which the points of diversion and places of use are located. In addition, if the surface water rights are appurtenant to land (and there is no proposed amendment to change the land to which the surface water rights are appurtenant), the conveyance documents should also be recorded in the real property records of each county in which the land is located. If, however, the sale transaction contemplates an amendment that changes the land to which the surface water rights are appurtenant, only the final surface water rights conveyance—unconditional form should be recorded in each county in which the land is located. Recordation of the initial surface water rights conveyance—conditional document, before the TCEQ approved the amendment changing the land to which the surface water rights are appurtenant, could cloud the records and titles if the TCEQ did not approve the requested amendment.

As an added precaution, it is advisable to record the final documents in the real property records of each county in which the water is used, if different from the county or counties in which the points of diversion are located. It is helpful to have duplicate originals of the conveyance document executed for this purpose. Deeds of trust, leases, and other real estate documents pertaining to the surface water rights should be recorded in the same counties as the conveyance document.

The law requires an owner of a surface water right to promptly inform the executive director of the TCEQ of any transfer of water right or change of the owner's address. *See* Tex. Water Code § 11.122; 30 Tex. Admin. Code § 297.82. Persons seeking to transfer surface water rights must file with the TCEQ executive director certified copies or photocopies of the recorded instruments establishing the complete chain of title between the owners of record and the new owner, along with the change of ownership form

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and the required fee. 30 Tex. Admin. Code § 297.83.

If the surface water rights are subject to the jurisdiction of a watermaster, the TCEQ Watermaster Operations Rules require the new owner to promptly inform the TCEQ executive director of the change of ownership and provide the appropriate ownership documents. 30 Tex. Admin. Code §§ 303.44, 304.43. If the new ownership record is not complete, the executive director will inform the alleged owner by letter of the required submission. For a sixty-day period following the date of that letter, the watermaster will honor "declarations of intent" by the alleged owner in accordance with the water right; after that, however, no such declaration will be honored until the executive director informs the watermaster of the approved change in ownership. 30 Tex. Admin. Code § 304.43.

Because the place for recordation of surface water rights documents is somewhat unusual, there may be some benefit in recording duplicate originals of the conveyance document in additional county records, in order to provide actual notice of the buyer's surface water rights to any person who may consult these records. As examples, additional locations may include Travis County (where the TCEQ main administrative office is located) and, if the water rights are subject to regulation by a watermaster, the county in which the administrative office of the watermaster is located.

Attorneys dealing with water rights where a watermaster is located should be aware of recording requirements. *See generally* 30 Tex. Admin. Code chs. 303, 304. This is particularly true for water rights subject to the jurisdiction of the Rio Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. *See* Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.63 General Considerations

The surface water rights sales contract, form 16-18 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. For each contract, the basic elements of the transaction are, in general, stated in the sections to be completed at the beginning of the form. Some provisions, however, are required to be completed throughout the contract. The general terms that follow in the form may be used for many transactions. However, the sale of surface water rights is an emerging

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area of law, and there are no well-established terms of sale. The terms in contracts for the purchase and sale of surface water rights are diverse and heavily negotiated. Additional drafting may be necessary to tailor the forms to the transaction.

§ 16.64 Surface Water Rights Sales Contract

The following sections describe the provisions and terms of form 16-18 in this chapter and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the surface water rights, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

§ 16.65 Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer's earnest money cannot be collected, the buyer will be in default.

§ 16.66 Defined Terms

§ 16.66:1 Seller and Buyer

There are sections for the names of and other information concerning the seller, the buyer, and their attorneys. Proper identification of the parties is important, and the seller and buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his own behalf. See chapter 3 in this manual for a discussion of party designations.

§ 16.66:2 Title Company or Escrow Agent

Title insurance to insure title to surface water rights in Texas is no longer generally offered by Texas title insurance underwriters, and it is uncertain whether it will be available in the future. Even if available, parties may choose not to obtain title insurance or to close the transaction through a title company. The contract designates a title company or escrow agent to act as the escrow and closing agent in order to address either option. The title company or escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract.

It is advisable to have a written escrow agreement between the title company or escrow agent, the buyer, and the seller that defines the rights and duties of the title company or escrow agent. Form 4-4 in this manual is an escrow agent receipt and escrow agreement. It can be modified for use with an escrow agent other than a title company.

In surface water transactions in which no appurtenant land is being transferred, the parties generally do not provide for a survey. The form provides optional language, however, if there is appurtenant land to be surveyed.

§ 16.66:3 Water Authority

The water rights authorities with jurisdiction over the subject surface water rights will include, at a minimum, the TCEQ. There may also be a watermaster appointed for the river basin and division in which the water rights are located. See section 16.6 above.

§ 16.66:4 Permit or Certificate of Adjudication

Permits and certificates of adjudication have a TCEQ number designation and establish the pri-

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ority date of the water rights. In addition, the permit or certificate of adjudication, as it may have been previously amended, will describe the water rights authorized in the particular river basin and stream, including any rights of diversion, use, or storage. Diversion and use rights will include, at a minimum, the following details: (1) quantity, expressed in terms of a right to divert a certain number of acre-feet of water, often also limited to a certain rate of diversion (expressed in gallons per minute or cubic feet per second), from a particular watercourse; (2) the current ownership; (3) the place of use; (4) the purpose of use (for example, municipal, irrigation, industrial, recreational); and (5) the precise location of the point or points of diversion. Depending on the river basin from which the water rights are derived, there may be further descriptions. For example, Rio Grande Valley water rights are further described by class (for example, "Class B Water Rights"), a designation relating to the priority and use of the water rights. The permit or certificate of adjudication will also identify any other special terms or conditions defining the water rights or affecting the owner's exercise of those rights (for example, streamflow restriction requirements or other environmental or conservation requirements).

§ 16.66:5 Buyer's Intended Use of Water Rights

The description of the buyer's intended use (purpose and place of use) of the water rights is important for purposes of determining what amendments to the permit or certificate of adjudication must be obtained from the TCEQ and any other applicable water authority, such as a watermaster, before the transfer of the water rights. The approval process can be both costly and lengthy, particularly if the buyer's intended use requires amendments to the permit or certificate beyond ownership of the water rights, and especially if these amendments are contested by the TCEQ staff, by other water rights holders in the basin, or by other affected parties.

The statement of the buyer's intended use also affects the parties' rights in the event of condemnation before conveyance of the water rights.

§ 16.66:6 Water Rights

The description of the water rights to be conveyed will be based on the permit or certificate of adjudication, amended as needed to accommodate the buyer's intended use, including the rights of diversion, use, or storage set out in the permit or certificate of adjudication, as described in section 16.61 above. Surface water rights may be conveyed in whole or in part, like land. The contract should clearly indicate if only portions of the water rights are being conveyed. The parties can contract for the sale and purchase of all or a portion of (1) the number of acre-feet authorized to be diverted, (2) the diversion rate, (3) storage capacity, or (4) storage reservoirs authorized by the water right. Accordingly, the parties should be specific regarding components of the water right to be sold.

§ 16.66:7 Appurtenant Land

The surface water rights to be sold may be appurtenant to specific land. The description of any appurtenant land is important, regardless of whether the appurtenant land is also to be purchased by the buyer. There may be liens on the appurtenant land that, absent language in the lien documents to the contrary, attach to the water rights. A description of the appurtenant land is therefore important to the buyer's due diligence inquiries, the title investigation, and the determination of the need for lien releases, subordination agreements, or other documents required at closing.

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If the water rights permit authorizes the irrigation of specific land, it generally will be appurtenant to the land, unless the water right is owned by a water supply corporation, water district, river authority, or governmental entity authorized to supply water to others. 30 Tex. Admin. Code § 297.81(b). If the buyer intends to use the water on land other than as specified in the permit or certificate of adjudication, an amendment to the permit or certificate of adjudication must be obtained before use. The land to which the water rights are appurtenant may not be the land from which the water is diverted. The permit or certificate of adjudication, or other water authority records, will identify the land authorized to be irrigated ("place of use") to which the permit or certificate of adjudication is appurtenant. Under current TCEQ rules, conveyance of the land to which water rights are appurtenant conveys the water rights, unless the conveyance specifically reserves or excepts the water rights, or the water right has been granted for the irrigation of land not owned by the applicant. 30 Tex. Admin. Code § 297.81(a).

If the water rights are appurtenant to land and the land is not also being conveyed to the buyer, the attorney should verify that the water rights can be severed from the land under applicable statutory, regulatory, and case law. *See Herrmann v. Lindsey*, 136 S.W.3d 286 (Tex. App.—San Antonio 2004, no pet.); *see generally* 30 Tex. Admin. Code § 297.81. If the appurtenant land is also being purchased by the buyer, the drafter can adapt the additional provisions in the forms in chapter 4 in this manual. If the buyer will purchase a portion of the land and a portion of the water rights with which to irrigate the land, the parties should expressly describe in the contract the specific allocation of the water rights to the specific tract of land.

In addition, any fixtures and personal property to be conveyed with the land or the surface water rights should be described in the applicable contract forms. Contract provisions discussed in section 16.21:4 above, providing for UCC searches, should be inserted into the contract form if fixtures or personal property are included in the transaction.

§ 16.66:8 Reserved Surface Water Rights

The seller of surface water rights may retain ownership of some permitted rights; however, a specific reservation is not usually required, as the description of the surface water will specify the number of acre-feet of water that will be sold out of the certificate of adjudication.

In instances in which surface water rights are appurtenant to land, however, if the seller is selling the land and some portion of the water rights, the conveyance of the land and unsevered surface water rights will be by deed, and the seller should expressly state in the contract and the deed the acre-feet of surface water rights that will be severed from the land and retained by the seller. After closing, the seller will generally need to file an application with the TCEQ either to change the designated land on which the severed agricultural or irrigation water rights may be used and the point of diversion or to change the use of the severed water rights from agricultural or irrigation to some other permitted use and to obtain approval of a new point of diversion.

If the water right is being purchased independently of the appurtenant land, and the parties agree that the buyer will have certain use rights on the appurtenant land, such as the right to use the same diversion point(s) or to use storage facilities located at the land, the parties will need to address these property rights in the contract by providing for the seller to grant or convey an easement, a license, a lease, or another property interest at closing.

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§ 16.66:9 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties. Additional factors unique to surface water rights transactions include the required prior approval from the TCEQ and any other applicable water authority, and a generally longer due diligence period.

The parties therefore often provide for more than one earnest money deposit, either over a period of time or based on certain events. In the description of the initial and each additional earnest money deposit inserted into the form, the drafter needs to specify the time when each earnest money deposit is to be made and whether each earnest money deposit is refundable or nonrefundable, in relation to the occurrence of events as the parties proceed towards conditional and final closing of the transaction.

§ 16.66:10 Independent Consideration

If the buyer terminates the contract before the end of the inspection period and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount should not be returned to the buyer but should be paid to the seller, because that amount is the independent consideration to the seller for the buyer's right to terminate the contract.

§ 16.66:11 Purchase Price

There is no standard method of determining the purchase price for surface water rights. For further discussion on this topic, the attorney may want to consult Martyn C. Glen, *Valuation of Water Rights*, *in* The Changing Face of Water Rights in Texas, State Bar of Texas (2004). Exhibit F may be used if the parties agree to seller financing of the purchase. If obtaining third-party financing is a condition to the buyer's obligations, that fact and the terms of the complying financing should be addressed in the contract. See part V. in this chapter and chapters 6 and 8 in this manual for further discussions of financing.

§ 16.66:12 Buyer's and Seller's Liquidated Damages

These sections of the contract are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

§ 16.66:13 Title Commitment/Title Information

Title insurance to insure title to surface water rights in Texas is no longer generally offered by Texas title insurance underwriters, and it is uncertain whether it will be available in the future. If title insurance is not available, or if the parties agree not to procure title insurance, the contract may instead call for an opinion of counsel to be provided as evidence of title. In that event, certain title information, on which the buyer's title inspection is to be based, is to be delivered to the buyer.

§ 16.66:14 Title Documents

The contract defines title documents to include the permit or certificate of adjudication and instruments affecting title to the surface water rights and the real property referenced in the title commitment or title information. Under paragraph G.3. of the contract, the buyer can terminate the contract on the basis of the title commitment and title documents and the seller's failure or refusal to cure the buyer's objections to matters disclosed therein. This provides the buyer with the ability to make objections to title based on the permit or certificate of adjudication or unrecorded documents provided as part of the seller's records.

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In addition to checking these documents, the buyer should also review (1) the annual water use reports the seller has filed with the TCEQ, (2) the priority of the seller's water rights relative to other water rights in the same source of supply, and (3) the TCEQ's current records and any applicable TCEQ or watermaster rules reflecting any loss of water rights or priority as a result of the seller's nonuse.

An attorney representing a purchaser or lender acquiring an interest in water rights that are subject to a watermaster program should become familiar with the applicable statutory and program provisions at Tex. Water Code §§ 11.325–.3291, 30 Tex. Admin. Code chs. 303, 304 (Watermaster Operations), and the TCEQ website. Water rights in the Rio Grande below Lake Amistad are allocated on an account basis based on the use of the water, such as municipal and irrigation, instead of on a seniority basis, with priority being given to municipal use. If, in any given month, surplus water is identified over the water needed for municipal use, the water is allocated to the other accounts, such as irrigation. In purchasing water rights, the buyer should determine whether an allocation has been made to the seller, and if so, the purchase contract should address how the water allocation will be divided between the parties at closing. The cost of administration of water rights by watermasters is allocated among the adjudicated water rights holders, and assessments are made by the TCEQ. In general, no water may be diverted, taken, or stored by or delivered to a person while he is delinquent in the payment of his assessed costs. *See* Tex. Water Code §§ 11.329, 11.455. Purchasers should determine the amount of assessments that have been made against a seller and the payment status as part of their due diligence. The purchase contract should address the manner in which these assessments will be allocated at closing, if appropriate.

§ 16.67 Deadlines

Section A of the contract groups most of the deadlines for ease of reference. Most of the deadlines are stated in terms of a specified number of days after the effective date of the contract or another specific date. The contract provides that time is of the essence; however, final closing cannot occur until such time as the TCEQ, and any other applicable water authority, has approved the change in ownership and any other amendments to the permit or certificate of adjudication representing the water rights.

§ 16.68 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction. Paragraph B.1. lists the documents for the conditional closing (before the TCEQ or other water authority approval of the transaction). The parties might consider adding to the list of documents for the conditional closing a power of attorney appointing the buyer as agent of the seller to pursue the necessary proceedings with the TCEQ for approval of the sale and any amendments to the certificate of adjudication or permit. Paragraph B.2. lists the documents for the final closing. Form 16-20 in this chapter is for conveyance of the surface water rights once the TCEQ has approved the change of ownership and any other amendments to the permit or certificate of adjudication. The parties sometimes do not provide for or sign a final unconditional conveyance document, instead relying on the TCEQ's issuance of an amendment to the certificate or permit as satisfying the condition stated in the earlier conditional conveyance document. Both paragraphs B.1. and B.2. in the contract serve as checklists to prepare for closing.

Section C contains a number of exhibits. The attorney should choose the specific exhibits appropriate for the sale.

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§ 16.68:1 Exhibit C—Representations; Environmental Matters

Exhibit C contains the parties' representations. These items are always negotiated by the parties and will vary from transaction to transaction. Exhibit C is offered as a checklist; however, not all items will necessarily apply to a sale of surface water rights, and the buyer may want to seek additional representations or warranties with respect to water quality, environmental matters, and the like.

§ 16.68:2 Exhibit D—Seller's Records

Exhibit D is a list of the seller's records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

§ 16.68:3 Exhibit E—Notices, Statements, and Certificates

Exhibit E lists notices, statements, and certificates required by federal and state law and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for brief discussions of laws and regulations that require notices, statements, and certificates. Some of the statutory provisions would appear to include the sale of surface water rights, simply because they apply to a sale or conveyance of real property, and no exemption is made for the sale of surface water rights.

§ 16.68:4 Exhibit F—Seller Financing

Exhibit F contains seller-financing terms.

§ 16.69 Investment of Earnest Money

The contract provides that the buyer may direct the title company or escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the title company will require the buyer's tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service.

§ 16.70 Title

The contract requires that the seller provide to the buyer by the deadlines stated in the contract the title commitment or title information and legible copies of each document referred to in these instruments.

The contract follows a typical procedure in which the buyer reviews the title commitment or title information, with the permit or certificate of adjudication and the documents provided by the seller. The buyer's review is done during the inspection period. The buyer then has a right to terminate the contract based on the buyer's review or can notify the seller of any objections. After notice, the seller may elect to cure the buyer's objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the surface water rights subject to the uncured matters or terminate the contract. However, the seller is obligated to resolve all items listed on Schedule C of the title commitment at or before closing and to cure title matters that arise by, through, or under the seller after the contract is signed.

The contract provides that the condition of title will be established by either a title commitment or an abstract of title, as agreed to by the buyer and the seller. If an abstract of title is furnished, the buyer may have the abstract of title reviewed by an attorney and obtain the attorney's written opinion of the abstract of title. The benefit of obtaining title insurance over an attorney's opinion of title is that title insurers are required to maintain reserves to cover claims that are greater than the malpractice coverage main-

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tained by most law firms. Consequently, there is an increased likelihood of recovery if an error is made by the title company in its determination of title.

An essential reference on title insurance is the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available from the Texas Department of Insurance at **www.tdi.texas.gov/title/titleman.html**. The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment. The attorney should confirm that the commitment is signed and the issuance date is not more than ninety days before the closing. Otherwise, a new or revised commitment should be ordered.

Schedule A: The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured. Record title should be vested in the seller. The attorney also should confirm that the property description is correct and conforms to the description in the contract.

Schedule B: The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either "Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [**recording data**] of the real property records of [**county**] County, Texas" or "Item 1 of Schedule B is hereby deleted in its entirety."
- Item 2 is the standard, preprinted survey exception. It generally would not apply to a transaction involving only surface water rights. If the surface water rights are being conveyed along with land, this exception may be amended and partially deleted to read "any shortages in area" if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the mortgagee policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.
- Standard preprinted exceptions item 3 (relating to homestead or community property or survivorship rights) and item 4 (relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation) apply only to the owner policy and cannot be deleted or amended.
- Item 5, relating to property taxes, can be reviewed for the status of tax payments and the existence of rollback taxes; however, taxes generally are not involved in a transaction involving only surface water rights.
- Item 6, relating to the terms and conditions of the documents creating the insured's interest in the land, cannot be revised. The referenced documents should, however, be reviewed.
- Item 7, relating to materialman's and mechanic's liens, applies only to the mort-

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gagee policies on interim construction loans and may be deleted if satisfactory evidence that the paragraph does not apply is furnished to the title company. This exception would not generally apply to a transaction involving only surface water rights. For additional information about materialman's and mechanic's liens, see chapters 19, 20, and 21 in this manual.

- Item 8, relating to subordinate liens and leases, applies only to the mortgagee policy.
- Item 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder's estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken "subject to."

All other special exceptions should be carefully reviewed to determine if and how they affect the buyer's surface water rights.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on Schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the water rights, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer's perspective, curative matters appearing on Schedule C should be attended to by either the seller or the title company. The contract requires that the seller resolve all Schedule C items before closing, but if that provision is not used, the buyer should object to all Schedule C items in the commitment to ensure that they are not added to Schedule B of the title policy.

The *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* should be consulted for information on the various types of policies and endorsements that are available and their respective costs.

§ 16.71 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the surface water rights and real property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned. The inspection is based on the seller's records and information in either the title commitment and documents referenced therein, if the parties have provided for title insurance, or the title information as defined.

§ 16.72 Representations and Warranties

Representations and warranties are negotiated by the parties with specific reference to the transaction. They may include such matters as ownership of the real property and surface water rights; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations (for example, "as is" language); presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other

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special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken "subject to."

In negotiating representations, the parties should specify whether representations are to be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller's representations and warranties, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller's opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.
- The seller makes no representations or warranties that are not stated in the contract, including exhibit E (notices, statements, and certificates required by law and regulation), or in the closing documents.

The following optional clauses are also provided:

- The buyer agrees to accept the property in its "as is, where is" condition, investigate the property on the buyer's own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.
- The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.
- The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit C must be revised accordingly.

The contract provides that the parties' representations are true and correct when made and must be true and correct at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim, after substantial obligations have been paid or incurred, that the other party is not authorized to consummate the transaction. While the seller's organizational documents should be available at the time of execution of the contract, the buyer's organizational documents are often not prepared until shortly before closing.

§ 16.73 Conveyance of Water Rights—Conditional; Application for Approval; Cooperation; Condition of Water Rights until Final Closing; Memorandum/No Recording of Contract

The parties' signing of the contract and the expiration of the inspection period without the

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buyer's termination of the contract obligates the seller to conditionally convey the water rights to the buyer, pending the TCEQ's and any other required water authority's approval of the change in ownership and any amendments necessary to accommodate the buyer's intended use. It also obligates the parties to pursue and cooperate in the water authority approval process, to maintain and operate the water rights in a certain manner pending the approval process, and to proceed in a certain fashion in the event of condemnation or claims affecting the water rights. The contract also sets out the parties' agreement not to record the contract; however, given the sometimes lengthy duration involved in obtaining water authority approval, the buyer may want to record a memorandum of the contract in the public records. See form 16-16 in this chapter.

Form 16-19 is a proposed form of conditional conveyance to be signed by the parties at the initial, conditional closing on the contract. The surface water rights are not deemed transferred, however, until the TCEQ (and any other applicable water authority) has approved the change in ownership and any amendments to the certificate or permit. The parties often do not execute a second unconditional conveyance document (form 16-20); rather, once the condition (TCEQ approval) has been satisfied through issuance of the amended certificate or permit, the conveyance is treated as final.

§ 16.74 Conditions of Contract and Termination

The contract provides for disposition of the earnest money if the TCEQ does not approve the transfer of ownership and any other amendments sought by the buyer by a specific date and after any other termination of the contract. It also provides for posttermination obligations. It is possible that the TCEQ's approval of a transfer may be overturned on judicial review, and the parties may want to provide how the sale is affected if judicial review is sought by a protestant.

§ 16.75 Final Closing

Once the TCEQ has approved the transaction and issued any necessary amendments to the permit or certificate of adjudication, the parties proceed to the final closing. The contract allocates closing obligations and transaction costs between the parties. In the case of irrigation surface water rights, the water rights will become appurtenant to the land approved for the "place of use" in the amended certificate or permit. To facilitate title examinations, the parties may want to describe this appurtenant property in an unconditional conveyance document signed at the final closing (form 16-20 in this chapter). The parties do not want to describe this property as appurtenant in the initial, conditional conveyance document (form 16-19), because of the risk that the TCEQ or other applicable water authority may not approve the transaction. There may be a cloud on the title to the water rights if the water rights were described as appurtenant to property in the initial conditional conveyance but not later approved as appurtenant to property by the applicable water authority.

§ 16.76 Default and Remedies

The contract provides that the buyer may elect one of the following remedies for the seller's default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller's representations are not true and correct or if a warranty set forth in the contract is breached. The parties may be entitled to payment of actual damages and perhaps of consequential damages if the untruth or breach is first discovered after closing. The contract is drafted to limit the parties' remedies, but remedies are often negotiated.

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The contract provides that the party prevailing in litigation is entitled to recover attorney's fees and court and other costs.

§ 16.77 Assignment

The contract contains alternate clauses concerning assignment. The buyer either may not assign the contract or may assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.

§ 16.78 Closing Functions

The party handling the closing (the title company or escrow agent) commonly attends to the matters discussed in the following sections.

§ 16.78:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder's written payoff statement. The lienholder should be requested through an authorized representative to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed.

Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic's lien claims, federal or state tax liens, property taxes, paving assessments, and abstracted judgments that affect the property. For additional information about materialman's and mechanic's liens, see chapters 19, 20, and 21 in this manual.

The closing agent must also determine the amounts of closing costs, such as surveying expenses, attorney's fees, brokers' commissions, and loan fees.

§ 16.78:2 Ad Valorem Taxes

Currently surface water rights are not assessed and taxed independently from the surface estate for ad valorem tax purposes. Consequently, the contract does not provide for a proration of ad valorem property taxes at closing, but it does require that the taxes be paid in full at closing by the seller if they are due and payable at the time of closing.

§ 16.78:3 Closing Documents

The closing agent may be expected to prepare or provide several documents.

Closing Statements: Closing statements may be on either the federally prescribed HUD-1 settlement statement, the State Board of Insurance settlement statement, or a separate seller's, buyer's, or borrower's statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties' agreement with the numbers and computations appearing on the statement.

Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and the parties' marital status will likely be required at closing by the title company, escrow agent, or a party's attorney.

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Financing documents are typically prepared by the lender's attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, their attorneys, or an attorney for the closing agent.

§ 16.78:4 Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file an information return with the Internal Revenue Service relating to the transaction and is subject to penalties for failing to report. *See* 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by delivering the seller's closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with "good funds" as defined by the regulations of the Texas State Board of Insurance. See Procedural Rule P-27, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

If it is not necessary to disburse funds at closing, the parties need not comply with the "good funds" rule, and payment may be made in other ways.

If title insurance is obtained through a title agent or fee attorney, the attorney for the lender and buyer should consider obtaining an insured closing service letter from the title insurance underwriter whose policies are to be issued. This letter indemnifies the lender or buyer for certain wrongful acts of the title agent or fee attorney relating to the handling of closing funds. See forms T-50 and T-51 of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. See **www.tdi.texas.gov/title/titlemm5.html**.

§ 16.78:5 Recording Documents

The title company or escrow agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that it is properly executed and notarized, the exhibits referred to in the document are attached, and the name and address of the person to whom the document is to be returned after recording is included.

Section 297.83 of the Texas Commission on Environmental Quality regulations currently provides only that the "written instrument evidencing a water right ownership transfer shall be recorded in the office of the county clerk." 30 Tex. Admin. Code § 297.83. It does not specify in which county clerk's office the instrument should be recorded. To assure notice to all persons in affected counties, the parties may want to prepare several duplicate originals to be filed in Travis County (where the TCEQ is located) and in each of the counties (1) from which the water is appropriated (that is, diverted), (2) in which the water is used, (3) in which any of the appurtenant land is located, and (4) in which the watermaster is located.

Attorneys dealing with water rights within a watermaster operation should be aware of the notice and recording requirements applicable to watermaster operations. *See generally* 30 Tex. Admin. Code chs. 303, 304. This is particularly true for the Rio Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. *See* Tex. Water Code § 11.3271. Under one subsection

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(j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

§ 16.78:6 Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, disposition of funds, and distribution of documents received by the closing agent.

§ 16.79 Additional Considerations

§ 16.79:1 Transactions Involving Foreign Persons

Buyer: If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Tax Act of 1980. *See* 26 U.S.C. § 6039C.

Seller: With certain exceptions, anyone purchasing real property located in the United States from a foreign person must withhold 15 percent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. *See* 26 U.S.C. § 1445(a), (b). The transferee should assume that the seller is a foreign person until the contrary is established, because transferees act at their own peril until they obtain a nonforeign affidavit. *See* 26 U.S.C. § 1445(b)(2). The nonforeign affidavits (forms 26-19 and 26-20 in this manual) are suggested for use in all transactions.

§ 16.79:2 Closing Checklist

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

§ 16.79:3 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

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An original or title company's certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies.

If the transaction fails to close, but the TCEQ and any other water authority have approved the transfer or any amendments to the permit or certificate of adjudication, the parties can ask the TCEQ and any other water authority to delete the amendment to the permit or certificate of adjudication.

[Section 16.80 is reserved for expansion.]

V. Water Rights Lien Documents

§ 16.81 General Considerations

The lien forms contained in this chapter may be used, with appropriate modification, for either groundwater rights or surface water rights transactions.

To address both the real and the personal property characteristics of water rights, it is advisable to incorporate both deed-of-trust provisions and security agreement provisions in loan documents. This can be done in one or more documents, depending on the transaction. The water rights deed of trust (form 16-21 in this chapter) is an adaptation to water rights of the basic deed of trust (form 8-1 in this manual). The water rights security agreement (form 16-22) is an adaptation of form 9-2, the basic form for security agreement found in chapter 9. Depending on the nature and use of the water rights being pledged, and the other collateral associated with those water rights, the additional clauses and forms from chapters 8 and 9 should be added to the basic forms appearing in this chapter. These additional clauses from chapters 8 and 9 are thus referenced in this chapter and should be inserted into the form 16-21 and form 16-22, as appropriate.

In any transaction, the pledged water rights may have both real and personal property characteristics. For example, surface water rights are real property, requiring use of a deed of trust. Once the water is transported for use, however, the water may become personal property. In addition, the permit or certificate of adjudication evidencing the surface water rights may constitute a separate property right. It is not clear under existing case law whether the permit or certificate of adjudication would constitute an interest in real property, similar to a license or land development permit, or whether it would be considered personal property in the nature of a general intangible. Consequently, it is advisable to use both a deed of trust and a security agreement with financing statements in loans secured by groundwater or surface water rights, to ensure that the lender has a lien on all real and personal property. The separate security agreement (form 16-22, adapted from the basic form for security interests in personalty) may be used if there is other purely personal property that secures the loan. Form 16-21 (which includes the additional security agreement language of clause 8-9-10) may be used to create both the real property lien and a personal property security interest in a single deed of trust document when there is no other personal property.

In other types of transactions, for example, groundwater rights completely severed from real property and represented by only permits (as described in part III. of this chapter) or groundwater rights for on-site production and for which a groundwater permit may have been

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issued (as described in part II.), the groundwater rights are real property, the produced water may be personal property, and the permit itself may be either an interest in real property or a general intangible under the Texas Uniform Commercial Code.

If a facility such as a well or pipeline is included in the collateral, this property may constitute either a fixture or equipment. Consequently, it is advisable to describe this type of facility in the deed of trust and security agreement and to file financing statements as both a fixture filing and a personal property filing.

In loan transactions in which water rights, permits, or facilities are used as collateral, the attorney drafting the loan documents will want to consider the importance of including in the loan documents a UCC article 9 security agreement, UCC financing statements, and a deed of trust to address both the real and the personal property aspects of water rights. The places for recording the deed of trust and financing statements are discussed in section 16.81:4 below.

In addition to using a deed of trust and security agreement, the attorney should consider using other documents to more fully protect the lender's lien rights, particularly in instances in which the water rights are subject to the jurisdiction of a water authority (for example, the TCEQ, a watermaster, or a groundwater district authority). Persons dealing with water rights, including the water authority itself, may not check the real property records or the UCC lien records (particularly those in another state) before taking action in connection with the water rights. They instead may look solely at the information filed in the water authority's records. There is currently no mechanism for recording liens in the records of any water authority. Furthermore, there is no statutory or case law that clearly requires a water authority to consult real property records or UCC lien records, or to acknowledge the rights of a lender, before authorizing a modification, termination, or transfer of a permit.

Consequently, the owner of the water rights pledged as collateral may adversely affect the value of those water rights to the lender by obtaining a change in the permitted use of the water rights or transferring the permit in whole or in part to another person without the lender's knowledge. The lender may then have a difficult time reestablishing its rights in the collateral. In order to put the water authority, and persons checking the water authority's records, on actual notice of the lender's lien on the water rights, the attorney may want to file a form for notice of lender's rights in the records of the water authority. The attorney may also want to have the owner of the water rights give written instructions to the water authority directing it not to take any action with regard to the permit or certificate of adjudication without the written authorization of the lender. Because there is no formal mechanism for filing such notice or instructions with a water authority, it is possible that the water authority may reject such a filing or refuse to comply with the instructions. Nevertheless, the lender will be in a better position to assert its rights against the water authority or a person who obtained a transfer of the permit or certificate, if such notice or instructions were delivered to the water authority, to be placed in the records pertaining to the permit or certificate for the pledged water rights. One or more of the following forms may be used: memorandum of groundwater loan (form 16-23), notice of the lender's interest in water rights (form 16-24), and the permittee's instruction letter to water authority (form 16-25).

§ 16.81:1 Groundwater vs. Surface Water

Form 16-21 and form 16-22 in this chapter are designed for establishing a lien on or security interest in either groundwater or surface water rights. The forms contain suggested alternative

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rity interest in water rights, is an adaptation of form 9-2, the security agreement found in chapter 9 in this manual.

If water rights are considered real property, an argument can be made that the secured transactions provisions of chapter 9 of the Business and Commerce Code do not apply to liens or security interests in water rights. Chapter 9 contains a real property interest exclusion. With an exception for fixtures, the creation or transfer of an interest in or a lien on real property, including a lease or rents, as defined by section 64.001 of the Property Code, is not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(d)(11). By comparison, however, the definition of "account" under chapter 9 explicitly includes rights to payment for property (real or personal) sold. Tex. Bus. & Com. Code § 9.102(a)(2). In addition, security interests in farm products are governed by chapter 9 of the Business and Commerce Code, and specifically include supplies produced or used in farming operations, including aquatic farming operations. *See* Tex. Bus. & Com. Code § 9.102(a)(34), (a)(35).

To eliminate the risks associated with water rights collateral being classified as either exclusively real or exclusively personal property to which different rules may apply, a lender may ask the debtor to provide both a deed of trust and a security agreement. Although the deed of trust (form 16-21) contains security agreement language that may be sufficient to create a lien on the personal property aspect of water rights, the additional provisions in the security agreement (form 16-22) may provide greater clarity and guidance regarding the parties' rights and obligations, particularly if related collateral for the loan has strictly personal property characteristics.

The rules for creating and perfecting a security interest are complex. Accordingly, in the context of any particular transaction, the attorney should consult chapter 9 in this manual, giving due consideration to all of the types of collateral involved in the loan transaction. The rules relating to classification and definitions of collateral, creation, attachment, perfection, priority, choice of law, and other issues will vary, depending on the transaction. Chapter 9 in this manual contains instructions that will provide guidance in completing and modifying form 16-22 and additional clauses that should be considered. Because of the complexity of the rules for creating and perfecting a security interest, the attorney should also consult the statutory text, the official comments, secondary sources, and any relevant case law.

§ 16.81:4 Attachment, Perfection, and Recording

There are currently no express rules governing attachment and perfection of a security interest in water rights. For other types of collateral, there are four basic methods of perfecting an attached security interest, although as few as one of those methods may be effective, depending on the specific category of collateral. Those methods include (1) a properly completed financing statement (*see* Tex. Bus. & Com. Code § 9.102(a)(39)) filed in the appropriate UCC filing offices, (2) possession of the collateral in the secured party, (3) the secured party's control of the collateral, and (4) in a few cases, automatic perfection on attachment of a security interest. If there are alternative methods of perfection, one secured party may obtain priority over another secured party, depending on the method used to perfect. For guidance on the various methods of attachment and perfection, consult sections 9.4 and 9.5 in this manual.

The lender should record the deed of trust in the place for recordation of the deed or conveyance documents described in section 16.12 above (groundwater rights for production on-site), in section 16.42 (permitted groundwater rights for production off-site), and in section 16.62 (surface water rights), as applicable. Given the

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ambiguities surrounding attachment and perfection of a security interest in water rights, and the different locations from which surface water rights or permitted groundwater rights may originate or be used, a lender may want to use as many means as it can to make sure persons are put on actual and constructive notice of the lender's lien rights and security interests. Consequently, note should be taken of the additional alternative places for recording documents described in sections 16.42, 16.62, and 16.78:5.

Attorneys dealing with water rights within a watermaster operation should be aware of the notice and recording requirements applicable to watermaster operations. *See generally* 30 Tex. Admin. Code chs. 303, 304. This is particularly true for the Rio Grande watermaster. There are two subsections (j) to section 11.3271 of the Texas Water Code adopted by the legislature in 2003 that have never been reconciled. *See* Tex. Water Code § 11.3271. Under one subsection (j), the watermaster with jurisdiction over the Rio Grande is made the official recorder for all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens that the TCEQ authorizes or requires to be filed in connection with a water right relating to water in the lower, middle, or upper basin of the Rio Grande and that are subject to a permit, certified filing, or certificate of adjudication, and the filing will have the same legal effect as filing under other law for the same type of instrument. Under the other subsection (j), the watermaster is required to maintain a central repository that includes certified copies of all instruments, including deeds, deeds of trust, and liens that the TCEQ requires to be filed in connection with the same type of water rights as are described in the first-referenced subsection (j), and it is expressly stated that on and after September 1, 2003, a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster and all requirements under other law are met. It would be prudent when conveying rights or interests in water rights in the Rio Grande to record a duplicate set of original documents with the Texas watermaster, as well as in the real property records of the county or counties in which the documents are otherwise authorized to be recorded, and to also file a certified copy of the documents recorded in the county real property records (at least with regard to liens) with the watermaster.

Because water rights, permits, and facilities have both real and personal property characteristics, financing statements used in the loan transaction should be treated as applying to both fixtures and personal property and should be recorded in the appropriate locations as provided by the Uniform Commercial Code (title 1 of the Texas Business and Commerce Code). If applicable law requires the financing statement to be filed with the secretary of state of a state other than Texas (for example, in the state of the debtor's location), the lender may still want to file an additional financing statement with the Texas secretary of state, to provide actual notice of the security interest to persons who check for filings in Texas. The UCC forms are available in a fill-in-the-blank format over the Internet from the Texas secretary of state at **www.sos.state.tx.us/ucc/uccforms.shtml**. For guidance in filling out the UCC forms, consult sections 9.13 through 9.17 in this manual.

[Sections 16.82 through 16.89 are reserved for expansion.]

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VI. Additional Resources

§ 16.90 Additional Resources

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Form 16-1

Groundwater Rights Sales Contract

[For Sale of Groundwater Rights in Place for On-Site Production
If Seller Owns Groundwater and Surface Estate]

This contract to buy and sell groundwater rights [**include if applicable:** and fixtures and personal property] is between Seller and Buyer as identified below and is effective on the date ("Effective Date") of the last of the signatures by Seller and Buyer as parties to this contract and by [Title Company/Escrow Agent] to acknowledge receipt of the Earnest Money. Buyer must deliver the Earnest Money to [Title Company/Escrow Agent] and obtain a signature acknowledging receipt of the Earnest Money before the Earnest Money Deadline provided in paragraph A.1. for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller: [**include the names of all persons owning the groundwater; also include all owners of the surface of the property, if different from the owners of the groundwater**]

Address:

Phone:

E-mail:

Type of entity:

Seller's Attorney:

Law firm:

Address:

Phone:

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E-mail:

Seller's Broker:

Brokerage firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer's Attorney:

Law firm:

Address:

Phone:

E-mail:

Buyer's Broker:

Brokerage firm:

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Address:

Phone:

E-mail:

[Title Company/Escrow Agent]: [**identify title company or, if title insurance will not be obtained, identify person who will act as escrow agent**]

Address:

Phone:

E-mail:

[Underwriter:]

Include the following if applicable.

Surveyor:

Address:

Phone:

E-mail:

Survey Category:

Continue with the following.

If there is no groundwater authority with jurisdiction over the real property, modify the contract as appropriate.

Groundwater Authority: [**list any groundwater conservation districts or other groundwater authority with jurisdiction over the real property**]

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Seller's Permit: [**describe and provide all of seller'spermits, e.g., [permit title]** Permit No. [**number**], issued and approved by [**name of groundwater authority**] on [**date**].]

Earnest Money: $[**amount**]

Real Property: The Real Property described in Exhibit A [**include if applicable:** together with the fixtures and personal property described in Exhibit A]. [**Include if a survey is required under the contract:** The metes-and-bounds description of the Real Property, as reflected by the Survey, will automatically be incorporated into this contract in Exhibit A and will supersede any prior Exhibit A when the Survey is approved by Seller and Buyer, and the acreage will be automatically adjusted to the acreage amount reflected by the Survey.]

Groundwater: All of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

Groundwater Rights: (1) The legal title to the Groundwater [**include if applicable:** subject to the Reserved Groundwater] and the right to test, explore for, drill for, develop, withdraw, capture, or otherwise beneficially use the Groundwater; (2) the right to use the surface of the Real Property for access to and to explore for, develop, treat, produce, and transport the Groundwater; and (3) all permits, licenses, or other governmental authorizations relating to any of the foregoing. If a separate Easement Agreement is required by this contract, the Groundwater Rights include the easement rights.

> If the seller does not reserve any groundwater for use in connection with the surface estate, modify the contract as appropriate.

Reserved Groundwater: Seller reserves the right to use the Groundwater in connection with its surface estate in the Real Property for the following purposes only: [**state purposes for**

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which the reserved groundwater may be used and any limit on the quantity of reserved groundwater that seller may use including any limit on the number of wells that seller may drill or maintain].

Excepted Groundwater: Seller excepts from the sale the rights to use the Groundwater in connection with prior grants or conveyances or grants to use the Groundwater affecting the conveyance.

Buyer's Intended Use of Groundwater: [**specify**]

Purchase Price:

Select one of the following.

$[**amount**], which is determined on the basis of [**describe basis for determining purchase price, e.g.,** $[**amount**] per acre of Real Property from which the Groundwater Rights are obtained] [**include if applicable:** and $[**amount**] for the personal property and fixtures].

Or

To be determined after obtaining the hydrogeological information described in paragraph G.3. during the Inspection Period. [**State the basis on which price is to be calculated, including any applicable provisions in paragraph G.3. below**] [**include if applicable:** and $[**amount**] for the personal property and fixtures].

Continue with the following.

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:

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Payment schedule:

See exhibit I for additional terms and conditions.

Third-party-financed portion:

Buyer's Liquidated Damages: $[**amount**]

Seller's Additional Liquidated Damages: $[**amount**]

Title Information: If Seller is not required to provide a Title Commitment and Title Policy, Seller will have the obligation to provide to Buyer, at Seller's expense, the Title Information as defined in paragraph F.3. Buyer may have the Title Information reviewed and obtain a written opinion of title by an attorney selected by Buyer, at [Seller/Buyer]'s expense.

Title Documents: The Seller's Permit and instruments affecting title to the Groundwater and the Real Property referenced in the [Title Commitment/Title Information] [, Survey,] and UCC Search are to be provided as part of Seller's Records.

A. Deadlines and Other Dates

All deadlines in this contract expire at 5:00 P.M. local time where the Real Property is located. If a deadline falls on a Saturday, Sunday, or national holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or national holiday. A national holiday is a holiday designated by the federal government. Time is of the essence.

A.1. Earnest Money Deadline: [**date**]

Select one of the following.

A.2. Delivery of Title Commitment: [[**date**]/[**number**] days after the Effective Date]

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A.2. Delivery of Title Information: [[**date**]/[**number**] days after the Effective Date]

Select one of the following.

A.3. Delivery of Survey: No Survey is required.

Or

A.3. Delivery of Survey: [[**date**]/[**number**] days after the Effective Date]

Continue with the following.

A.4. Delivery of UCC Search: [[**date**]/[**number**] days after the Effective Date]

A.5. Delivery of legible copies of the Title Documents: [[**date**]/[**number**] days after the Effective Date]

A.6. Delivery of Title Objections: [[**date**]/[**number**] days after delivery of the last of the [Title Commitment/Title Information], [Survey,] UCC Search, and legible copies of the Title Documents]

A.7. Delivery of Seller's Records as specified in Exhibit C: [[**date**]/[**number**] days after the Effective Date]

A.8. End of Inspection Period: [[**date**]/[**number**] days after the Effective Date, or at the date specified if the Inspection Period is extended]

A.9. Closing Date: [[**date**]/[**number**] days after the End of the Inspection Period]

A.10. Closing Time: [**time**]

B. Closing Documents

B.1. At Closing, Seller will deliver the following items:

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Include all applicable items.

Groundwater Rights [General/Special] Warranty Deed [**include if applicable:** with Vendor's Lien] ("Groundwater Rights Warranty Deed")

Easement Agreement for Groundwater Rights as shown in Exhibit J

Release of Lien

Partial Release of Lien as to Groundwater Rights

Lienholder Consent and Subordination to Easement Agreement

Assignment of Seller's Permit or transfer form promulgated or approved by relevant groundwater authority

Bill of Sale

IRS Nonforeign Person Affidavit

Evidence of Seller's authority to close this transaction

Notices, statements, and certificates as specified in Exhibit D

Affidavit of Debts and Liens

Assignment and Assumption of Leases

Assignment and Assumption of Contracts

Tenant Estoppel Certificate

Releases of any leases or contracts affecting the Groundwater Rights that will be terminated at Closing

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B.2. At Closing, Buyer will deliver the following items:

Include all applicable items.

Balance of Purchase Price

Easement Agreement for Groundwater Rights

Evidence of Buyer's authority to close this transaction

Deceptive Trade Practices Act waiver

Assignment and Assumption of Leases

Seller-financing documents

Promissory Note

Deed of Trust

Security Agreement

Financing Statement

Loan Documents required by third-party lender

Releases of any leases, contracts, or other legal interests affecting the Groundwater agreed to be terminated before or at Closing

Continue with the following.

The documents listed in this section B. are collectively known as the "Closing Documents." The Closing Documents for which forms exist in the current edition of the *Texas Real Estate Forms Manual* (State Bar of Texas) will be prepared using those forms.

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C. Exhibits

The following are attached to and are a part of this contract:

Exhibit A—Description of the Real Property [**include if applicable:** and Fixtures and Personal Property]

Exhibit B—Seller's Representations and Warranties

Exhibit C—Seller's Records

Exhibit D—Notices, Statements, and Certificates

Exhibit E—Copies of Seller's Permits issued by the Groundwater Authority

Exhibit F—List of Seller's leases or other contracts affecting the Groundwater Rights or Real Property to be terminated before Closing

Exhibit G—List of Seller's leases or other contracts affecting the Groundwater Rights or Real Property that will survive Closing

Exhibit H—Groundwater Rights Warranty Deed

[**Include if applicable:** Exhibit I—Seller Financing Addendum]

[**Include if applicable:** Exhibit J—Easement Agreement]

[**Include if applicable:** Exhibit K—Memorandum of Contract]

[**Include if applicable:** Exhibit L—Notice of Termination of Contract]

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D. Purchase and Sale of Groundwater Rights

Seller agrees to sell and convey the Groundwater Rights to Buyer, and Buyer agrees to buy and pay Seller for the Groundwater Rights. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

E. Interest on Earnest Money

Buyer may direct [Title Company/Escrow Agent] to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to [Title Company/Escrow Agent] and satisfying [Title Company/Escrow Agent]'s requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will become part of the Earnest Money.

F. Title [and Survey]

F.1. Review of Title. The following statutory notice is provided to Buyer on behalf of the real estate licensees, if any, involved in this transaction: Buyer is advised that it should either have the abstract covering the Real Property examined by an attorney of Buyer's own selection or be furnished with or obtain a policy of title insurance.

Include the following if applicable.

F.2. Title Commitment; Title Policy. "Title Commitment" means a Commitment for Issuance of an Owner Policy of Title Insurance by Title Company, as agent for Underwriter, or directly by Underwriter, stating the condition of title to the Groundwater and the Real Property. The effective date stated in the Title Commitment must be after the Effective Date of this contract. "Title Policy" means an Owner Policy of Title Insurance issued by Title Company, as agent for Underwriter, or directly by Underwriter, in conformity with the last Title Commitment delivered to and approved by Buyer.

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Continue with the following.

F.3. Title Information. "Title Information" means an abstract of title prepared by a title insurance company or an abstract company licensed by the Texas State Board of Insurance, covering the period from the first conveyance of title to the Real Property out of the sovereignty to the Effective Date, and containing complete and legible copies of all the deeds, easements, liens, and other documents affecting title to the Real Property and the Groundwater.

Include the following if applicable.

F.4. Survey. "Survey" means an on-the-ground, staked plat of survey and metes-and-bounds description of the Real Property, prepared by Surveyor or another surveyor satisfactory to [Title Company/Escrow Agent], dated after the Effective Date, and certified to Seller, Buyer, [Title Company/Escrow Agent], and any other person specified by Buyer, to comply with the current standards and specifications as published by the Texas Society of Professional Surveyors for the Survey Category.

Continue with the following.

F.5. UCC Search. "UCC Search" means written reports stating the instruments that are on file in the Texas secretary of state's UCC records, the UCC records of any other appropriate state, and the UCC records in the jurisdiction in which the Seller is organized, showing as debtor Seller and all other owners of the Real Property and Groundwater [**include if applicable:** and fixtures and personal property] during the five years before the Effective Date of this contract.

F.6. Delivery of [Title Commitment/Title Information], [Survey,] UCC Search, and Title Documents. Seller must deliver the [Title Commitment/Title Information] to Buyer and Buyer's attorney by the deadline stated in paragraph A.2. above; the Survey, if required,

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by the deadline stated in paragraph A.3.; the UCC Search by the deadline stated in paragraph A.4.; and legible copies of the Title Documents by the deadline stated in paragraph A.5.

F.7. Title Objections. Buyer has until the deadline stated in paragraph A.6. above ("Title Objection Deadline") to review the Survey, [Title Commitment/Title Information], UCC Search, and legible copies of the Title Documents, notify Seller of Buyer's objections to any of them, and request any additional information needed to evidence Seller's title to the Real Property and the Groundwater ("Title Objections"). Buyer will be deemed to have approved all matters reflected by the Survey, [Title Commitment/Title Information], Title Documents, and UCC Search to which Buyer has made no Title Objection by the Title Objection Deadline. The matters that Buyer either approves or is deemed to have approved are "Permitted Exceptions." If Buyer notifies Seller of any Title Objections, Seller has five days from receipt of Buyer's notice to notify Buyer whether Seller agrees to cure the Title Objections before Closing ("Cure Notice"). If Seller does not timely give its Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections before Closing, Buyer may, within five days after the deadline for the giving of Seller's Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed to close, subject to Seller's obligations to resolve the items [listed in Schedule C of the Title Commitment/listed in the Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date, and cure only the Title Objections that Seller has agreed to cure in the Cure Notice. At or before Closing, Seller must resolve the items that are [listed in Schedule C of the Title Commitment/listed in the Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date of this contract, and cure the Title Objections that Seller has agreed to cure.

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G. Inspection Period

G.1. Review of Seller's Records. Seller, at Seller's expense, will deliver to Buyer copies of Seller's Records specified in Exhibit C, or otherwise make those records available for Buyer's review, by the deadline stated in paragraph A.7. above.

G.2. Entry onto Real Property. Buyer may enter the Real Property before Closing to perform all investigations Buyer deems appropriate, at Buyer's cost, including exploration for, drilling for, and testing of Groundwater, subject to the following conditions.

G.2.a. Buyer must deliver evidence to Seller that Buyer has liability insurance for its proposed inspection activities, with coverages and in amounts that are substantially the same as those maintained by Seller or with such lesser coverages and in such lesser amounts as are reasonably satisfactory to Seller.

G.2.b. Buyer may not interfere in any material manner with existing operations or occupants of the Real Property.

G.2.c. Buyer must notify Seller in advance of Buyer's plans to conduct tests so that Seller may be present during the tests.

G.2.d. If the Real Property is physically altered because of Buyer's inspections, Buyer must return the Real Property to its preinspection condition promptly after the alteration occurs.

G.2.e. Buyer must deliver to Seller copies of all inspection reports that Buyer prepares or receives from third-party consultants or contractors within three days after their preparation or receipt.

G.2.f. Buyer must abide by any other reasonable entry rules imposed by Seller.

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G.3. Hydrogeological Testing. Buyer has the right to perform investigations to estimate the quality, quantity, and sustainability of the Groundwater.

Include the following if the purchase price will be determined based on hydrogeological testing.

The parties agree that the Purchase Price is to be determined based on [**specify basis for pricing the groundwater rights, such as average saturated foot of groundwater or some other calculation related to the estimated quality, quantity, or sustainability of the groundwater available for production**]. Buyer will perform investigations during the Inspection Period, at [Buyer's/Seller's/both parties'] expense, to estimate the quality, quantity, and sustainability of the Groundwater. Buyer and Seller will select a mutually acceptable independent hydrogeologist ("Hydrogeologist") to perform the evaluation of the Groundwater. If Seller and Buyer are not able to choose a hydrogeologist within twenty days after the Effective Date, each will select a hydrogeologist, and the two hydrogeologists selected will choose a third hydrogeologist to perform the evaluation. The investigations will include such test drilling, logging, and data analysis on the Real Property [**include if applicable:** and on property within the region of the Real Property] as Hydrogeologist deems appropriate. If [Seller/Buyer] desires more test wells than Hydrogeologist determines is necessary, [Seller/Buyer] may cause additional test wells to be drilled and logged at [Seller/Buyer]'s expense. The data from Buyer's investigations, Seller's logs, if applicable, and Seller's Records will be submitted to Hydrogeologist. The parties agree to be bound by the determination of Hydrogeologist.

G.4. Appraisal of Groundwater. Buyer has the right to have an appraisal performed of the Groundwater Rights, Seller's Permits (if any), and the Real Property. The cost of the appraisal [will be paid at Closing by [Buyer/Seller]/will be shared at Closing by Buyer and Seller].

G.5. Adequacy of Seller's Permit. If a Seller's Permit has been issued, Buyer will have the right to determine whether Seller's Permit, on transfer to Buyer, will be adequate for

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Buyer's intended use of the Groundwater, whether an alternative permit or permit amendment will be required, and the requirements of the Groundwater Authority for the transfer of Seller's Permit. Seller will cooperate with Buyer at all times in obtaining any information and forms required from the Groundwater Authority. On Buyer's request, Seller, at [Seller's/ Buyer's] expense, will execute and transmit to the Groundwater Authority all necessary applications, forms, and documentation required for the transfer of Seller's Permit to Buyer, provided that the transfer will not be effective until Closing. Seller will not take any action before or after Closing to oppose the transfer of Seller's Permit to Buyer, the issuance of an amendment to Seller's Permit, or other permitting sought by Buyer to enable Buyer to use the Groundwater for Buyer's Intended Use of the Groundwater.

Include the following if buyer's obligation to purchase is contingent on permitting.

Buyer's obligation to purchase the Groundwater Rights is contingent on the Groundwater Authority approving, before the expiration of the Inspection Period, the Required Permitting (as defined below) contingent on Closing or, in the sole discretion of Buyer, providing sufficient assurance that the Groundwater Authority will issue the Required Permitting after Closing. Required Permitting means [issuance of a production permit authorizing [**specify**]/ transfer of Seller's Permit/transfer of Seller's Permit and amendment of the Permit to authorize [**specify**]]. Buyer will initiate action to obtain the Required Permitting promptly after the Effective Date and diligently pursue obtaining the Required Permitting during the Inspection Period. [**Include if applicable:** If Buyer has been unable to obtain approval of the Required Permitting, or assurance satisfactory to Buyer of obtaining the Required Permitting after Closing, despite Buyer's diligence, Buyer will have the right to extend the Inspection Period solely for the purpose of obtaining the Required Permitting for a period not to exceed [**number**] days, by giving Seller written notice of the extension before the termination of the Inspection Period. Buyer's right to terminate this contract before the end of the extension period is limited to the failure to obtain, or to obtain satisfactory assurance of, the Required Permitting.]

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G.6. Environmental Assessment. Buyer has the right to conduct environmental assessments of the Real Property and Groundwater. Seller will provide, or will designate a person with knowledge of the use and condition of the Real Property and Groundwater to provide, information requested by Buyer or Buyer's agent or representative regarding the use and condition of the Real Property and Groundwater during the period of Seller's ownership of the Property. Seller will cooperate with Buyer in obtaining and providing to Buyer, its agent, or representative information regarding the Real Property and Groundwater.

G.7. Buyer's Right to Terminate. Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period.

G.8. Buyer's Indemnity and Release of Seller

G.8.a. Indemnity. Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney's fees, expenses, or claims arising out of Buyer's investigation, except those arising out of the acts or omissions of Seller and those for repair or remediation of existing conditions discovered by Buyer's inspection. The obligations of Buyer under this provision will survive termination of this contract and Closing.

G.8.b. Release. Buyer releases Seller and those persons acting on Seller's behalf from all claims and causes of action (including claims for attorney's fees and court and other costs) resulting from Buyer's investigation of the Groundwater and Real Property.

H. Representations and Warranties

The parties' representations stated in Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date. Seller will promptly notify Buyer if Seller becomes aware that any of the representations are not true and correct.

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I. Condition of the Property until Closing; Cooperation; No Recording of Contract

I.1. Maintenance and Operation. Until Closing, Seller will (a) maintain the Real Property [**include if applicable:** , the personal property and fixtures,] and the Groundwater Rights as they existed on the Effective Date [**include if applicable:** , except for reasonable wear and tear and casualty damage]; (b) use the Real Property and the Groundwater Rights in the same manner as they were used on the Effective Date; [and] (c) comply with all permits, contracts, laws, and regulations affecting the Real Property and the Groundwater Rights [**include if applicable:** ; and (d) not transfer or dispose of any of the personal property and fixtures, except to sell inventory, replace equipment, and use supplies in the normal course of operating the personal property and fixtures]. [**Include if applicable:** Until the end of the Inspection Period, Seller will not enter into, amend, or terminate any contract that affects the personal property and fixtures other than in the ordinary course of operating such property and will promptly give notice to Buyer of each new, amended, or terminated contract, including a copy of the contract, in sufficient time so that Buyer may consider the new information before the end of the Inspection Period. If Seller's notice is given within three days before the end of the Inspection Period, the Inspection Period will be extended for three days.] Until the end of the Inspection Period, Seller will not (a) grant or convey any easement, lease, license, option, or other right affecting the Real Property or the Groundwater Rights, including the right to use the Groundwater; (b) enter into any lease or agreement that allows the surface of the Real Property to be mined or excavated; or (c) enter into any oil and gas lease [**include if applicable:** or surface use agreement or subsurface use agreement that does not comply with paragraph I.2. below]. After the end of the Inspection Period, Seller may not enter into, amend, or terminate any contract that affects the Groundwater, the Groundwater Rights, or the Real Property without first obtaining Buyer's written consent.

I.2. Oil and Gas Leases. Before and after Closing, Seller will not enter into any oil and gas lease [affecting the Real Property/or surface use agreement that allows (a) flooding of

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the Real Property, (b) injection into or disposal of saltwater or other substance onto the Real Property, or (c) use of Groundwater for any purpose other than drilling, completion, recompletion, reworking, remediation, and revegetation]. This provision will survive Closing and will be set forth in one or more of the Closing Documents.

I.3. Condemnation. Seller will notify Buyer promptly after Seller receives notice that any part of the Real Property or Groundwater Rights has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer's intended use of the Groundwater Rights by giving notice to Seller within fifteen days after receipt of Seller's notice to Buyer (or before Closing if Seller's notice is received less than fifteen days before Closing). The condemnation will be deemed to materially affect Buyer's intended use of the Groundwater Rights if [**specify reason, e.g.,** the condemnation would result in Buyer's not being able to produce more than [**number**] acre-feet of Groundwater]. If Buyer does not terminate this contract, (a) Buyer and Seller will each have the right to appear and defend their respective interests in the Groundwater Rights in the condemnation proceedings; (b) any award in condemnation will be assigned to Buyer to the extent necessary to compensate Buyer for the loss of or reduction in the Groundwater Rights; and (c) if the taking occurs before Closing, the description of the Real Property or Groundwater Rights will be revised to delete the portion taken.

I.4. Claims; Hearings. Seller will notify Buyer promptly after Seller receives notice of any claim or administrative hearing that is threatened, filed, or initiated before Closing that affects the Groundwater Rights.

I.5. Cooperation. Seller will cooperate with Buyer (a) before and after Closing to transfer the applications, permits, and licenses held by Seller and used in the production of the Groundwater and to obtain any consents necessary for Buyer to withdraw or produce the Groundwater; (b) before closing, with any reasonable evaluation, inspection, or study of the

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Real Property or the Groundwater; and (c) in all other matters related to, or arising out of or in connection with, this contract. These provisions will survive Closing.

I.6. Casualty or Other Loss or Damage. Until Closing has been completed and funded, Seller will bear the risk of any damage, casualty, or other loss to the Real Property or Groundwater Rights [**include if applicable:** and the personal property and fixtures]. If any damage, casualty, or other loss results in a material adverse change in the quality, quantity, or usability of the Groundwater, Buyer will have the right to terminate this contract. [**Include if applicable:** If personal property or fixtures are damaged by casualty, the portion of the purchase price attributable to the personal property and fixtures will be equitably reduced.]

I.7. Memorandum of Contract; Termination of Contract; No Recording of Contract. At the request of Buyer, Seller will execute a memorandum of this contract, in a mutually acceptable form, to be recorded in the real property records of [**county**] County, Texas. At the time the memorandum is signed, Buyer and Seller will also sign a termination of contract in recordable form and deposit it into escrow with [Title Company/Escrow Agent]. The parties authorize [Title Company/Escrow Agent] to record the termination of contract as provided in section J. below. Neither Buyer nor Seller may file this contract in the real property records of any county. If either party records this contract, the other party may terminate this contract and record a notice of termination.

J. Termination

J.1. Disposition of Earnest Money after Termination

J.1.a. To Buyer. If Buyer terminates this contract in accordance with any of Buyer's rights to terminate, then unless Seller delivers notice of Seller's objection to [Title Company/Escrow Agent]'s release of the Earnest Money to Buyer within five days after Buyer delivers Buyer's termination notice to Seller and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Seller, to deliver the Ear-

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nest Money to Buyer, less $100, which will be paid to Seller as consideration for the right granted by Seller to Buyer to terminate this contract. [Title Company/Escrow Agent] will record the termination of contract and return the Earnest Money to Buyer on receipt of Seller's authorization.

J.1.b. To Seller. If Seller terminates this contract in accordance with any of Seller's rights to terminate, then unless Buyer delivers notice of Buyer's objection to [Title Company/Escrow Agent]'s release of the Earnest Money to Seller within five days after Seller delivers Seller's termination notice to Buyer and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Buyer, to pay and deliver the Earnest Money to Seller and to record the termination of contract. [Title Company/Escrow Agent] will record the termination of contract and pay the Earnest Money to Seller on receipt of Buyer's authorization.

J.2. Duties after Termination. If this contract is terminated, Buyer will promptly return to Seller all of Seller's Records in Buyer's possession or control. After return of the documents and copies, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract or that expressly survive termination of this contract.

K. Closing

K.1. Closing. This transaction will close at [Title Company/Escrow Agent]'s offices at the Closing Date and Closing Time. At Closing, the following will occur:

K.1.a. Closing Documents. The parties will execute and deliver the Closing Documents.

K.1.b. Payment of Purchase Price. Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to [Title Company/Escrow Agent]

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in funds acceptable to [Title Company/Escrow Agent]. The Earnest Money will be applied to the Purchase Price.

K.1.c. Disbursement of Funds; Recording; Copies. [Title Company/Escrow Agent] will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the deed and the other Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties' written instructions.

K.1.d. Delivery of Originals. Seller will deliver to Buyer the originals of Seller's Records.

K.1.e. Possession. Seller will deliver possession of the Groundwater Rights to Buyer, subject to the Permitted Exceptions existing at Closing and any liens and security interests created at Closing to secure financing for the Purchase Price.

K.2. Transaction Costs

K.2.a. Seller's Costs. Seller will pay [the basic charge for the Title Policy/the cost of providing the Title Information as specified in this contract, if not previously paid by Seller]; one-half of the escrow fee charged by [Title Company/Escrow Agent]; the costs to prepare the Groundwater Rights Warranty Deed and the Easement Agreement and addenda, if required by this contract; the costs to obtain, deliver, and record any releases of liens, lender's consent, and subordination to Buyer's easement rights required in connection with the sale; the costs to cure and record the documents to cure Title Objections agreed or required to be cured by Seller and to resolve matters shown in Schedule C of the Title Commitment; [**include if applicable:** Title Company's inspection fee to delete from the Title Policy the customary exception for rights of parties in possession;] the costs to obtain the [Survey,] UCC Search[,] and certificates or reports of ad valorem taxes; the costs to deliver copies of the instruments described in paragraph A.5. above and Seller's Records; any other costs expressly required to be paid by Seller in this contract; and Seller's attorney's fees and expenses.

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K.2.b. Buyer's Costs. Buyer will pay one-half of the escrow fee charged by [Title Company/Escrow Agent]; the costs to obtain, deliver, and record all documents other than those to be obtained or recorded at Seller's expense; [**include if applicable:** the additional premium for the "survey/area and boundary deletion" in the Title Policy, if the deletion is requested by Buyer, as well as the cost of any other endorsements or modifications of the Title Policy requested by Buyer;] [**include if applicable:** the costs of work required by Buyer to have the Survey reflect matters other than those required under this contract except changes required for curative purposes;] the costs to obtain financing of the Purchase Price, including the incremental premium costs of the loan title policy and endorsements and deletions required by Buyer's lender; any other costs expressly required to be paid by Buyer in this contract; and Buyer's attorney's fees and expenses.

K.2.c. Taxes, Fees, and Assessments. At Closing, Seller will pay any ad valorem taxes and assessments, including penalties and interest (collectively, "Taxes"), in connection with the Real Property and the Groundwater that are owing for prior calendar years. Seller will pay all Taxes in connection with the Real Property and Groundwater for the current calendar year, if payable at the time of Closing. After Closing, Seller will continue to pay all Taxes due in connection with the Real Property (including the Reserved Groundwater) before delinquency, except that if ad valorem taxes are assessed separately against Buyer's Groundwater Rights after Closing, Buyer will be responsible for paying such taxes and assessments if Buyer is obligated to pay such taxes under applicable law. After Closing, each party will have the right to protest taxes that the party is responsible for paying, provided that the protesting party does not allow the taxes to become delinquent. If the Real Property has been, or is at any time after Closing, the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code or under any other provision of law, and additional taxes, penalties, or interest are assessed pursuant to Code section 23.55 or under such other provision of law, Seller will be responsible for the payment of any such taxes, penalties, and interest, including rollback taxes. If Seller fails to pay Taxes for

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which Seller is responsible when due, Seller authorizes Buyer to pay Taxes and on such payment to (i) be subrogated to all liens held by the taxing authority against the Real Property as security for the Taxes paid, (ii) have the right to set off amounts paid against amounts owed to Seller, if any, under the terms of the Closing Documents, and (iii) seek reimbursement of amounts paid in accordance with applicable law. Buyer will have the right, but not the obligation, to pay the Taxes. If Buyer pays the Taxes, at Buyer's request Seller will promptly take the action required by section 32.06 of the Texas Tax Code to authorize a transfer of the tax lien to Buyer.

After Closing, Buyer will be responsible for paying all fees, assessments, taxes, and charges of any kind imposed by the Groundwater Authority, or any successor authority, in connection with Buyer's use, development, pumping, or transportation of the Groundwater. Buyer will timely pay any taxes assessed by any taxing authority against any equipment or personal property of Buyer located on the Real Property and any fees or costs charged by any Groundwater Conservation District or other regulatory body for Buyer's development, pumping, transportation, or use of the Groundwater.

These provisions will survive Closing and will be set out in one or more of the Closing Documents.

K.2.d. Proration of Expenses and Income. Except as provided in paragraph K.2.c. above, all items of expense or income arising in connection with the use or operation of the Groundwater will be prorated as of the Closing Date. Seller will pay all bills and expenses that could give rise to a lien against the Real Property or Groundwater at or before Closing.

K.2.e. Brokers' Commissions. Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney's fees, and court and other costs arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker's or finder's fee or commission because of this transaction or this contract,

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whether the claimant is disclosed to the indemnitee or not. At Closing, each party will provide the other party with a release of broker's or appraiser's liens from all brokers or appraisers for which each party was responsible.

K.3. Issuance of Title Policy. Seller will cause [Title Company/Escrow Agent] to issue the Title Policy, if required, to Buyer as soon as practicable after Closing.

L. Default and Remedies

L.1. Seller's Default; Remedies before Closing. If Seller fails to perform any of its obligations under this contract, or if any of Seller's representations are not true and correct as of the Effective Date or on the Closing Date or any of its warranties have been breached ("Seller's Default"), Buyer may elect either of the following as its sole and exclusive remedy before Closing:

L.1.a. Termination; Liquidated Damages. Buyer may terminate this contract by giving notice to Seller on or before the Closing Date and Closing Time and have the Earnest Money, less the $100 as described above, returned to Buyer. If Seller's Default occurs after Buyer has incurred costs to investigate the Real Property or Groundwater after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer's actual out-of-pocket expenses incurred to investigate the Real Property and Groundwater after the Effective Date ("Buyer's Expenses") or the amount of Buyer's Liquidated Damages, within ten days after Seller's receipt of an invoice from Buyer stating the amount of Buyer's Expenses accompanied by reasonable evidence of Buyer's Expenses.

L.1.b. Specific Performance. Unless Seller's Default relates to the untruth or incorrectness of Seller's representations for reasons not reasonably within Seller's control, Buyer may enforce specific performance of Seller's obligations under this contract, but any such action must be initiated, if at all, within ninety days after the breach or alleged breach of this

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contract. If title to the Groundwater Rights is awarded to Buyer, the conveyance will be subject to the matters stated in the [Title Commitment/Title Information].

L.2. Seller's Default; Remedies after Closing. If Seller's representations are not true and correct at Closing for reasons reasonably within Seller's control and Buyer does not become aware of the untruth or incorrectness until after Closing, Buyer will have all the rights and remedies available at law or in equity. If Seller fails to perform any of its obligations under this contract that survive Closing, Buyer will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.3. Buyer's Default; Remedies before Closing. If Buyer fails to perform any of its obligations under this contract ("Buyer's Default"), Seller may terminate this contract by giving notice to Buyer on or before Closing and have the Earnest Money paid to Seller. If Buyer's Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller's actual out-of-pocket expenses incurred after the Effective Date to perform its obligations under this contract ("Seller's Expenses") or the amount of Seller's Additional Liquidated Damages, within ten days after Buyer's receipt of an invoice from Seller stating the amount of Seller's Expenses accompanied by reasonable evidence of Seller's Expenses. The foregoing constitute Seller's sole and exclusive remedies for a default by Buyer before Closing.

L.4. Buyer's Default; Remedies after Closing. If Buyer fails to perform any of its obligations under this contract that survive Closing, Seller will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.5. Liquidated Damages. The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that the Earnest Money and the amounts provided

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above are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

L.6. Attorney's Fees. If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

M. Miscellaneous Provisions

M.1. Notices. Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday; and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday. Any address for notice may be changed by not less than ten days' prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

M.2. Entire Agreement. This contract, its exhibits, and any Closing Documents delivered at Closing are the entire agreement of the parties concerning the sale and use of the Groundwater Rights and the use of the Reserved Groundwater and Real Property. There are no representations, warranties, agreements, or promises between the parties pertaining to the Groundwater Rights, Reserved Groundwater, Real Property, sale and use of the Groundwater Rights, or use of the Reserved Groundwater and Real Property, and neither party is relying on

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any statements or representations of any agent of the other party, that are not in those documents.

M.3. Amendment. This contract may be amended only by an instrument in writing signed by the parties.

Select one of the following.

M.4. Prohibition of Assignment. Buyer may not assign this contract or any of Buyer's rights under it without Seller's prior written consent, and any attempted assignment is void.

Or

M.4. Assignment. Buyer may assign this contract and Buyer's rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void.

Continue with the following.

M.5. Survival. The provisions of this contract that expressly survive termination or Closing and other obligations of this contract that cannot be performed before termination of this contract or before Closing survive termination of this contract or Closing, and the legal doctrine of merger does not apply to these matters. If there is any conflict between the Closing Documents and this contract, the Closing Documents control.

M.6. Choice of Law; Venue. This contract is to be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county in which all, or the majority, of the Real Property is located.

M.7. Waiver of Default. It is not a waiver of default if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

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M.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this contract.

M.9. Severability. If a provision of this contract is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this contract, and this contract is to be construed as if the unenforceable provision is not a part of the contract.

M.10. Ambiguities Not to Be Construed against Party Who Drafted Contract. The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this contract.

M.11. No Special Relationship. The parties' relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

M.12. Counterparts. If this contract is executed in multiple counterparts, all counterparts taken together constitute this contract. Copies of signatures to this contract are effective as original signatures.

M.13. Confidentiality. The parties will keep confidential this contract, this transaction, and all information learned in the course of this transaction, except to the extent disclosure is required by law or court order, to enable third parties to advise or assist Buyer to investigate the Groundwater Rights and the Real Property, or by either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

M.14. Binding Effect. This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

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Include the following only if the buyer has agreed to waive its rights under the DTPA.

M.15. Waiver of Consumer Rights. BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 *ET SEQ.* OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

Continue with the following.

_____

[Name and title of seller]
Date:

_____

[Name and title of buyer]
Date:

[Title Company/Escrow Agent] acknowledges receipt of Earnest Money in the amount of $_____ and a copy of this contract executed by both Buyer and Seller.

[Name of title company/escrow agent]
By:_____
Name:
Title:
Date:

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Exhibit A

Description of the Real Property [and Fixtures and Personal Property]

Include legal description of the land.

Include the following if applicable.

The following described fixtures and personal property: [**describe fixtures and property**].

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Exhibit B

Seller's Representations and Warranties

A. Seller's Representations to Buyer

Seller represents and warrants to Buyer that the following are true and correct as of the Effective Date and will be true and correct as of the Closing Date:

> If the seller is an individual or is acting in a representative capacity, some of the items should be modified.

A.1. Authority. Seller is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this contract. This contract is binding on Seller. This contract is, and all documents required by this contract to be executed and delivered to Buyer at Closing will be, duly authorized, executed, and delivered by Seller.

A.2. Litigation. Seller has not received written notice and has no actual knowledge of any litigation pending or threatened against Seller that might affect the Groundwater Rights, the Real Property, [**include if applicable:** the fixtures and personal property,] or Seller's ability to perform its obligations under this contract [**include if applicable:** , except [**specify**]].

A.3. Violation of Laws. Seller has not received written notice of violation of any law, ordinance, regulation, or requirements affecting the Real Property, the Groundwater, [**include if applicable:** the fixtures and personal property,] or Seller's use of the Real Property [,/or] Groundwater [**include if applicable:** , or fixtures and personal property] [**include if applicable:** , except [**specify**]].

A.4. Licenses, Permits, and Approvals. Seller has not received written notice that any license, permit, or approval necessary to use the Real Property [,/or] the Groundwater

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[**include if applicable:** , or the fixtures and personal property] in the manner in which it is currently used has expired or will not be renewed on expiration or that any material condition will be imposed in order to use such permit or license or obtain its renewal [**include if applicable:** , except [**specify**]].

A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Seller has not received written notice of any condemnation, zoning, or land-use proceedings affecting the Real Property [,/or] the Groundwater [**include if applicable:** , or the fixtures and personal property] or any written inquiries or notices by any governmental authority or third party with respect to condemnation or the presence of hazardous materials affecting the Real Property [,/or] the Groundwater [**include if applicable:** , or the fixtures and personal property] [**include if applicable:** , except [**specify**]].

A.6. No Other Obligation to Sell or Restriction against Sale. Seller has not obligated itself to sell all or any portion of the Real Property [,/or] the Groundwater [**include if applicable:** , or the fixtures and personal property] to any person other than Buyer. Seller's performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound [**include if applicable:** , except [**specify**]].

A.7. No Liens. On the Closing Date, the Groundwater Rights [**include if applicable:** and the fixtures and personal property] to be conveyed under the contract will be free and clear of all liens and encumbrances of any nature not arising by, through, or under Buyer except the Permitted Exceptions or liens to which Buyer has given its consent in writing. If an Easement Agreement is executed at Closing, any lien on the surface estate permitted by Buyer will be subordinated to Buyer's easement rights.

A.8. No Rights of Possession or Use. There are no persons presently in possession of the Real Property [,/or] the Groundwater [**include if applicable:** , or the fixtures and personal property] or having any rights to possession of the Real Property [,/or] the Groundwater

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[**include if applicable:** , or the fixtures and personal property] or rights, either present or future, to explore for, use, produce, or withdraw the Groundwater other than Seller [**include if applicable:** , except [**specify**]].

A.9. Good Title. Seller has good and indefeasible fee simple title to the Real Property and the Groundwater [**include if applicable:** , and to the fixtures and personal property,] free and clear of all mortgages, liens, licenses, encumbrances, leases, tenancies, security interests, covenants, conditions, restrictions, rights-of-way, easements, judgments, and other matters affecting title [**include if applicable:** , except [**specify**]].

A.10. No Bills or Claims. There will be no unpaid bills or claims in connection with any repair or work performed or material furnished to the Real Property [**include if applicable:** and the fixtures and personal property] or otherwise relating to the Groundwater for the benefit of Seller as of the Closing Date, and all bills attributable to or affecting the Groundwater or the Real Property [**include if applicable:** and the fixtures and personal property] will be paid by Seller in full before Closing.

A.11. No Adverse Matters. To the best of Seller's knowledge, there is no (a) change contemplated in any applicable laws, ordinances, or restrictions, including the rules of the Groundwater Authority; (b) judicial or administrative action threatened or pending against the Real Property, the Groundwater, [**include if applicable:** the fixtures and personal property,] or Seller; (c) action by adjacent landowners pending or threatened against the Real Property, the Groundwater, [**include if applicable:** the fixtures and personal property,] or Seller; or (d) natural or artificial condition on the Real Property [,/or] the Groundwater [**include if applicable:** , or relating to the fixtures and personal property] that would have a material adverse effect on the Real Property [,/or] the Groundwater [**include if applicable:** , or the fixtures and personal property].

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A.12. Compliance with Laws. Seller has at all times complied with and operated in compliance with all applicable federal, state, and local laws, regulations, and ordinances regarding the Real Property [,/and] the Groundwater [**include if applicable:** , and the fixtures and personal property,] including rules of the Groundwater Authority. Seller will promptly notify Buyer of any noncompliance notice received by Seller.

A.13. No Environmental Contamination. Seller has not caused any environmental contamination of the Real Property or the Groundwater and has no knowledge of the existence of any environmental contamination of the Real Property or the Groundwater.

A.14. No Hazardous Substances. No Hazardous Substances are located on the Real Property or in the Groundwater or have been released into the environment or deposited, discharged, placed, or disposed of at, on, under, or near the Real Property or the Groundwater or transported to or from the Real Property [**include if applicable:** , except for aboveground fuel storage tanks and other substances used by Seller in its routine operation of the Real Property, all of which are used and stored on the Real Property in compliance with all applicable laws, rules, and regulations]. To Seller's knowledge, no portion of the Real Property is being used or has been used at any previous time for the generation, storage, handling, or disposal of any Hazardous Substances at, on, under, or in the Real Property or Groundwater, or any portion thereof, nor is there any actual or threatened investigation, inquiry, proceeding, litigation, or claim of any kind by any person or governmental authority relating to such matters. "Hazardous Substances" means, but is not limited to, any substance that is or contains (a) any "hazardous substance" as now defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended (42 U.S.C. § 9601 *et seq.*), or regulations promulgated under CERCLA; (b) any "hazardous waste" as now defined in the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901 *et seq.*) or regulations promulgated under RCRA; (c) any substance regulated by the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*); (d) gasoline, diesel fuel, or other petroleum

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hydrocarbons; (e) asbestos and asbestos-containing materials in any form, whether friable or nonfriable; (f) polychlorinated biphenyls; (g) radon gas; and (h) any additional substances or materials (whether solid, liquid, or gas) that are classified, defined, or listed as pollutants, hazardous wastes, hazardous substances, hazardous materials, extremely hazardous wastes, regulated substances, toxic substances, or words of similar meaning or regulatory effect under the foregoing statutes or any other present federal, state, or local laws, statutes, ordinances, rules, regulations, and the like or the common law or any other applicable laws relating to the Real Property. "Hazardous Substances" includes, without limitation, any substance the presence of which on the Real Property (a) requires reporting, investigation, or remediation under the statutes cited above or (b) causes or threatens to cause a nuisance on any portion of the Real Property or adjacent property or poses or threatens to pose a hazard to the environment or the health or safety of persons on any portion of the Real Property or adjacent property.

A.15. No Underground Storage Tanks. To the best of Seller's knowledge and belief, no underground storage tanks are located on the Real Property or were previously located on the Real Property and subsequently removed and filled [**include if applicable:** , except [**specify**]].

A.16. Oil, Gas, and Minerals. To the best of Seller's knowledge, Seller owns all the oil, gas, and other mineral rights beneath the surface of the Real Property [**include if applicable:** , except [**specify**]].

Include the following if applicable.

A.17. No Other Representations or Warranties. Except as stated above [**include if applicable:** or in the notices, statements, and certificates set forth in Exhibit D] or in the Closing Documents, Seller makes no representations or warranties with respect to the Real Property [,/or] the Groundwater Rights [**include if applicable:** , or the fixtures and personal property].

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Include the following if the conveyance is on an "as is" basis.

B. "As Is, Where Is"

THIS CONTRACT IS AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT THOSE IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

SELLER DISCLAIMS ALL WARRANTIES AND REPRESENTATIONS REGARDING THE QUANTITY, QUALITY, OR SUSTAINABILITY OF GROUNDWATER THAT CAN BE PRODUCED FROM THE REAL PROPERTY, OR THE AVAILABILITY NOW OR IN THE FUTURE OF PERMITTING NECESSARY FOR BUYER TO USE THE GROUNDWATER FOR ANY PURPOSE. SELLER FURTHER DISCLAIMS ALL WARRANTIES AND REPRESENTATIONS WITH RESPECT TO THE FITNESS OF THE GROUNDWATER RIGHTS AND GROUNDWATER FOR ANY PARTICULAR USE OR PURPOSE.

[**Include if applicable:** BUYER ACKNOWLEDGES THAT THE LOCAL GROUNDWATER DISTRICT'S RULES AND REGULATIONS OR PERMITTING DECISIONS MAY LIMIT THE VOLUME OF GROUNDWATER PRODUCED FROM THE REAL PROPERTY AND THE PURPOSE OR PLACE OF ITS USE, AS WELL AS THE LOCATION OF ANY WELL, ITS DEPTH, OR RATE OF PRODUCTION.]

BUYER IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS. BUYER IS NOT RELYING ON ANY INFORMATION REGARDING THE GROUNDWATER OR THE REAL PROPERTY PROVIDED BY ANY PERSON, OTHER THAN BUYER'S OWN INSPECTION AND THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

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The provisions of this section B. regarding the Real Property [,/and] the Groundwater Rights [**include if applicable:** , and the fixtures and personal property] [will/will not] be included in the deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

> Include the following if the seller retains no liability for environmental matters after closing. Because of the joint use of the real property and groundwater after closing, the buyer's attorney may want to limit the release to environmental problems existing before closing.

C. Environmental Matters

AFTER CLOSING, BUYER RELEASES SELLER FROM LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY (1) UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE; OR (2) ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY. [**Include if applicable: THIS RELEASE APPLIES EVEN WHEN THE ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY RESULT FROM SELLER'S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER'S REPRESENTATIVE.**]

The provisions of this section C. regarding the Real Property and Groundwater will be included in the Groundwater Rights Warranty Deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

D. Buyer's Representations to Seller

Buyer represents to Seller that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date:

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If the buyer is an individual or is acting in a representative capacity, some of the items should be modified.

D.1. Authority. Buyer is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this contract. This contract is binding on Buyer. This contract is, and all documents required by this contract to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Buyer.

Include other representations from the buyer to the seller as needed.

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Exhibit C

Seller's Records

To the extent that Seller has possession or control of the following items pertaining to the Real Property or Groundwater [**include if applicable:** and the fixtures and personal property], Seller will deliver or make the items or complete, legible, and accurate copies of them available to Buyer by the deadline stated in paragraph A.7.:

Select items as agreed by the parties.

Records and Reports

governmental licenses, certificates, permits, and approvals, specifically including Seller's Permit

all environmental reports and other information regarding the environmental condition of the Real Property or Groundwater

current tax certificate showing taxes assessed and owed against the Real Property and any tax exemption, special use, or other valuation or exemption applicable to the Real Property

records of regulatory proceedings or violations regarding the Real Property or Groundwater

any survey of all or any portion of the Real Property

abstracts of title relating to the Real Property or Groundwater

other: [**specify**]

Groundwater

all documents related to the use or condition of Groundwater, including:

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water well logs

drilling logs

hydrogeological information and reports

information on the location of existing water wells

information on plugged wells

soil reports

production records

other: [**specify**]

Leases, Licenses, Agreements, and Encumbrances

all leases, licenses, agreements, and encumbrances (including all amendments and exhibits) affecting title to or use of the Real Property [,/or] Groundwater [**include if applicable:** , or the fixtures and personal property] that have not been recorded in the real property records of the county or counties in which the Real Property is located

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Exhibit D

Notices, Statements, and Certificates

Certain notices must be contained in the contract and others must be provided as separate notices. Please refer to the statutory requirements for each notice.

The notices, statements, and certificates (arranged by their application to particular transactions) that are listed below are [**include as applicable:** included in the sales contract [and]/attached for delivery to Buyer], and Buyer acknowledges receipt of the notices, statements, and certificates by executing this contract:

Include one or more of the following paragraphs as applicable and modify section headers and paragraph numbers as appropriate.

A. Consumer Notices

Notice of Cancellation. Notice concerning the purchaser's three-day right of rescission under a contract to purchase real property if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business, (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business, and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney, (2) the transaction is negotiated by a licensed real estate broker, or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property, as described in chapter 601 of the Texas Business and Commerce Code.

If applicable, attach form 4-5 in this manual to the end of this exhibit D.

And/Or

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B. Residential Transaction Notices

B.1. Seller's Disclosure of Property Condition. Seller's disclosure of the condition of residential property, described in section 5.008 of the Texas Property Code.

If applicable, attach the full text of Tex. Prop. Code § 5.008, with all relevant information filled in, to the end of this exhibit D.

And/Or

B.2. Notice of Membership in Property Owners Association. Notice concerning the sale of single-family residential property that is subject to membership in a property owners association, described in section 5.012 of the Texas Property Code.

If applicable, attach form 23-8 to the end of this exhibit D.

And/Or

B.3. Seller's Disclosure of Location of Conditions under Surface of Unimproved Real Property. Seller's disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.013 of the Texas Property Code. A seller of unimproved property to be used for residential purposes shall provide the purchaser written notice disclosing the location of any transportation pipeline to the best of the seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known by the seller, the seller shall indicate that fact in the notice. A seller is not required to give this notice if (a) the seller is obligated under the terms of the contract to furnish a title insurance commitment to the buyer before closing and (b) the buyer is entitled to terminate the contract if the buyer's objections to title as permitted by the contract are not cured by the seller before closing.

No form is provided, because the sales contract portion of this form 16-1 satisfies the provisions for exemption from disclosure.

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And/Or

B.4. Notice of Obligation to Pay Public Improvement District Assessment. Seller's disclosure that a single-family residential property is located within a public improvement district, described in section 5.014 of the Texas Property Code.

If applicable, attach form 4-6 to the end of this exhibit D.

And/Or

B.5. Residential Contracts for Deed. Notice regarding the sale of property used or to be used as the purchaser's residence if the contract does not provide for delivery of a deed from the seller to the purchaser within 180 days after the final execution of the contract.

See Tex. Prop. Code §§ 5.069–.074.

And/Or

B.6. Notice Regarding Insulation to Buyer of New Home. Notice concerning insulation to be installed in a new home, described in section 460.16 of title 16 of the Code of Federal Regulations.

If applicable, attach form 4-7 to the end of this exhibit D.

And/Or

B.7. Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. Lead-based paint warning statement, described in section 745.100 *et seq.* of title 40 of the Code of Federal Regulations.

If applicable, attach form 4-8 to the end of this exhibit D.

And/Or

B.8. Asbestos Disclosure Notice. Notice concerning asbestos, described in sections 1910.1001 and 1926.1101 of title 29 of the Code of Federal Regulations.

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If applicable, attach form 4-9 to the end of this exhibit D.

And/Or

B.9. Notice Regarding Sale Subject to a Recorded Lien. Notice to the purchaser and each lienholder required under Texas Property Code section 5.016 that property being sold will be conveyed subject to a lien.

If applicable, attach form 4-10 to the end of this exhibit D.

And/Or

C. Condominium Transaction Notices

C.1. Acknowledgment of Receipt of Condominium Documents. Condominium declaration, bylaws, and association rules, described in section 82.156 of the Texas Property Code.

If applicable, attach form 24-8 to the end of this exhibit D.

And/Or

C.2. Condominium Resale Certificate. Resale certificate from the condominium owners association or waiver of resale certificate, described in section 82.157 of the Texas Property Code.

If applicable, attach condominium resale certificate promulgated by the Texas Real Estate Commission, available at **www.trec.texas.gov/forms/condominium-resale-certificate**, or form 24-7 (waiver of condominium resale certificate) to the end of this exhibit D.

And/Or

D. All Real Property Transaction Notices

D.1. Storage Tanks Disclosure Provider. Notice concerning underground storage tanks, described in section 334.9 of title 30 of the Texas Administrative Code.

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If applicable, attach form 4-11 to the end of this exhibit D.

And/Or

D.2. Notice to Purchaser Regarding Restrictive Covenants. Notice of deed restrictions, described in section 212.155 of the Texas Local Government Code.

If applicable, attach form 4-12 to the end of this exhibit D.

And/Or

D.3. Notice to Purchaser Regarding Coastal Area Property. Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code.

If applicable, attach form 4-13 to the end of this exhibit D.

And/Or

D.4. Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway. Notice concerning public easements to the public beach, described in section 61.025 of the Texas Natural Resources Code.

If applicable, attach form 4-14 to the end of this exhibit D.

And/Or

D.5. Notice Regarding Possible Liability for Additional Taxes. Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code.

If applicable, attach form 4-15 to the end of this exhibit D.

And/Or

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D.6. Notice Regarding Possible Annexation. Notice concerning the sale of property located outside the limits of a municipality that may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality, described in section 5.011 of the Texas Property Code.

If applicable, attach form 4-16 to the end of this exhibit D.

And/Or

D.7. Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider. Notice for property in a certificated service area of a utility service provider, described in section 13.257 of the Texas Water Code.

If applicable, attach form 4-17 to the end of this exhibit D.

And/Or

D.8. Utility District Notice. Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in section 49.452 of the Texas Water Code, with the form of notice to be used being dependent on whether the property (a) is located in whole or in part within the extraterritorial jurisdiction of one or more home-rule municipalities but is not located within the corporate boundaries of a municipality, (b) is located in whole or in part within the corporate boundaries of a municipality, or (c) is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities.

If applicable, attach form 4-18 to the end of this exhibit D.

And/Or

D.9. Notice to Purchaser of Property Located in Certain Annexed Water Districts. Notice required by section 54.016(h)(4)(A) of the Texas Water Code when property being sold is in a water or sanitary sewer district that entered a contract with a city with a population

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of 1.18 million or less under which the city is permitted to set rates in the district after annexation that are different from rates charged other residents of the city.

If applicable, attach form 4-19 to the end of this exhibit D.

And/Or

D.10. Notice to Purchaser that Property Is Located within the Area of the Alignment of a Transportation Project. Notice required under Texas Local Government Code section 232.0033 that all or part of the subdivision in which the property being sold is located is within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to a future transportation corridor identified in a contract between the Texas Department of Transportation and a county under Texas Transportation Code section 201.619.

If applicable, attach form 4-20 to the end of this exhibit D.

And/Or

D.11. Certificates of Mold Remediation. Notice pursuant to section 1958.154 of the Texas Occupations Code, titled "Certificate of Mold Remediation; Duty of Property Owner," requiring a property owner who sells property that has been issued a certificate of mold remediation pursuant to this section to deliver copies to the purchaser of each certificate of mold remediation issued for the property within the preceding five years.

And/Or

D.12. Notice of Water Level Fluctuations. Notice to purchasers of residential or commercial property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Texas Water Code chapter 11, that has storage capacity of at

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least 5,000 acre-feet at the impoundment's normal level, provided pursuant to Texas Property Code section 5.019.

If applicable, attach form 4-21 to the end of this exhibit D.

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Exhibit E

Seller's Permits

Attach seller's permits issued by the groundwater authority.

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Exhibit F

Seller's Leases and Contracts to Be Terminated

List seller's leases or other contracts affecting the groundwater rights or real property to be terminated before closing.

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Exhibit G

Seller's Leases and Contracts to Survive Closing

List seller's leases or other contracts affecting the groundwater rights or real property that will survive closing.

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Exhibit H

Groundwater Rights Warranty Deed

Attach groundwater rights warranty deed. See form 16-2 in this chapter.

Exhibit I

Seller Financing Addendum

A. Promissory Note. The promissory note ("Note") will be payable by Buyer ("Maker") to the order of Seller ("Payee") at the place designated by Payee. The Note may be prepaid in whole or in part at any time without penalty, premium, or restriction of any kind. Any prepayments are to be applied to the payment of the installments of principal last maturing, and interest will immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in the contract. The Note will be payable as follows:

Select one of the following.

In one payment due [**number**] days after the date of the Note with interest payable [at maturity/monthly/quarterly/annually].

Or

In [**number**] installments of $[**amount**] each [including interest/plus interest] beginning [**number**] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [**date**], when the entire balance of the Note will be due and payable.

Or

Interest only in [**number**] installments for the first [**number**] year[s] and thereafter in [**number**] installments of $[**amount**] each [including interest/plus interest] beginning [**number**] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [**date**], when the entire balance of the Note will be due and payable.

Or

Other: [**specify**].

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Continue with the following.

B. Deed of Trust and Security Agreement. The deed of trust and security agreement ("Deed of Trust") securing the Note will provide for the following:

Select one of the following.

B.1. Assumption without Consent. The Property may be sold, transferred, or conveyed without the consent of Payee, provided any subsequent buyer or transferee assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property.

Or

B.1. Assumption with Consent. The Property may be sold, transferred, or conveyed provided that (a) any subsequent buyer assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments and (b) Maker or the subsequent buyer obtains prior written consent to such a sale from Payee. Consent will be based on the subsequent buyer's credit history, with no change in interest rate or terms, and may not be unreasonably withheld, conditioned, or delayed. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. If all or any part of the Property is sold, conveyed, leased for a period longer than three years, leased with an option to purchase, otherwise sold (including by contract for deed), or otherwise transferred or conveyed without prior written consent of Payee, Payee may, at Payee's sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by

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reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. [Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property./The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Property.]

Or

B.1. Prohibition against Assumption. If all or any part of the Property is sold, transferred, or conveyed without the prior written consent of Payee, Payee may, at Payee's sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Payee has no obligation to consent to any such sale or conveyance of the Property, and Payee is entitled to condition any consent on a change in the interest rate that will thereafter apply to the Note and any other change in the terms of the Note or Deed of Trust that Payee in Payee's sole discretion deems appropriate. A lease for a period longer than three years, a lease with an option to purchase, or a contract for deed will be deemed to be a sale, transfer, or conveyance of the Property for purposes of this provision. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Property.

Select one of the following.

B.2. Without Escrow. Maker will furnish to Payee annually, before the taxes become delinquent, copies of tax receipts showing that all taxes on the Property have been

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paid. Maker will furnish to Payee annually evidence of current paid-up insurance naming Payee as an insured.

Or

B.2. With Escrow. Maker will, in addition to the principal and interest installments, deposit with Payee a pro rata part of the estimated annual ad valorem taxes on the Property and a pro rata part of the estimated annual insurance premiums for the improvements on the Property. These tax and insurance deposits are only estimates and may be insufficient to pay total taxes and insurance premiums. Maker must pay any deficiency within thirty days after notice from Payee. Maker's failure to pay the deficiency will constitute a default under the Deed of Trust. If any superior lienholder on the Property is collecting escrow payments for taxes and insurance, this paragraph will be inoperative as long as payments are being made to the superior lienholder.

Continue with the following.

B.3. Cross-Default. Any act or occurrence that would constitute a default under the terms of any lien superior to the lien securing the Note will constitute a default under the Deed of Trust securing the Note.

C. Recourse Provisions. The Note and Deed of Trust are subject to the following provisions:

Select one of the following.

Full Recourse. Maker will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Maker in the Deed of Trust.

Or

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No Recourse. Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. The sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker.

Or

Partial Recourse. Except as set forth below, Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. Except as set forth below, the sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker. Maker will have full recourse liability for any loss or damage actually suffered or incurred by Payee or other holder of the Note by reason of—

1. taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the Property that accrue before foreclosure;

2. unpaid premiums for insurance required hereunder that accrue before foreclosure;

3. damage to the Property to the extent such damage would be otherwise covered by insurance required hereunder that was not maintained;

4. all rents, issues, profits, and income derived from the Property after a default occurs and not expended for debt service or operating expenses of the Property before foreclosure;

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5. tenant security deposits for leases of the Property not forfeited by or refunded to the tenants;

6. any condemnation or insurance proceeds not paid or applied as required in the Deed of Trust;

7. damage to and depreciation of the Property beyond normal wear and tear caused by the negligence of Maker or the failure of Maker to keep the Property in good repair and condition;

8. the return of or reimbursement for personal property taken from the Property by or on behalf of Maker and not replaced with personal property of equal utility and value;

9. damages resulting from fraud or misrepresentation by Maker;

10. damages resulting from breach of any warranty of title by Maker;

11. interest on the Note from the date of default through foreclosure, payment, or settlement of the debt;

12. all interest on the Note during any bankruptcy proceeding of Maker and all reasonable attorney's fees and expenses incurred as a result of Maker's bankruptcy; and

13. all attorney's fees and expenses incurred by Payee to collect any of the foregoing amounts.

Continue with the following.

_____

Buyer/Maker

_____

Seller/Payee

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Exhibit J

Easement Agreement

Attach any easement agreement for the surface use of the real property. See form 16-3 in this chapter for a blanket easement agreement for groundwater rights.

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Exhibit K

Memorandum of Contract

Attach a memorandum of contract if applicable. See form 16-16 in this chapter.

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Exhibit L

Notice of Termination of Contract

Attach a notice of termination of contract if applicable. See form 16-17 in this chapter.

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Form 16-2

Groundwater Rights Warranty Deed

[For Use If Grantor Owns Both Groundwater and Surface Estate]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

See form 5-6 in this manual for consideration clauses.

Real Property: [**describe real property from which the groundwater will be obtained**]

Include the following if applicable.

Personal Property: All personal property rights relating to the Groundwater, together with the following items of personal property and fixtures: [**list items**] [**include if applicable:** and all of Grantor's right, title, and interest in the [**permit title**] Permit No. [**number**], issued and approved by [**name of groundwater authority**] on [**date**]].

Continue with the following.

Groundwater: All of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath

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the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

Groundwater Rights: (1) The Groundwater [**include if applicable:** save and except the Reserved Groundwater] and the right to test, explore for, drill for, develop, withdraw, capture, or otherwise beneficially use the Groundwater; (2) the right to use the surface of the Real Property for access to and to explore for, develop, treat, produce, and transport the Groundwater; and (3) all permits, licenses, or other governmental authorizations relating to any of the foregoing.

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

Select as appropriate.

None

Or

Grantor reserves the right to use the Groundwater in connection with its surface estate in the Real Property for the following purposes only: [**state purposes for which the reserved groundwater may be used and any limit on the quantity of the reserved groundwater that the grantor may use including any limit on the number of wells that the grantor may drill or maintain**].

To create additional reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the

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Groundwater Rights, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Groundwater Rights to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof [**include if applicable:** , except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty].

If the conveyance includes personal property, include clause 5-9-13. If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

_____

[**Name of grantor**]

If the deed imposes contractual obligations on the grantee, include the following signature line.

_____

[**Name of grantee**]

Include acknowledgments.

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Form 16-3

Blanket Easement Agreement for Groundwater Rights

[For Use with Groundwater Rights Warranty Deed (On Site)]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

[Grantor's Lienholder:]

[Grantor's Lienholder's Mailing Address:]

Easement Property: [**describe the property subject to the easement, which may be all or part of the real property**]

Real Property: [**describe the property in which the grantee has groundwater rights or attach field notes as exhibit A**]

"Deed" means the Groundwater Rights Deed in which Grantor conveyed the Groundwater Rights to Grantee, recorded in the real property records of the county or counties in which the Real Property is located.

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"Facilities" means aboveground, underground, surface or subsurface pipelines, electric transmission and communication lines and conduits, communication towers, pumps, monitor wells, water wells and well sites (whether production wells or test or exploratory wells), water storage tanks, water treatment facilities, pump station facilities, pumping plant facilities, buildings, machinery, equipment, meters, tangible personal property, roads, gates, bridges, culverts, erosion control structures, fences, cattle guards, and all other necessary, desirable, or convenient installations, appurtenances, facilities, and structures related thereto.

"Force Majeure" means act of war, civil disobedience, insurrection, act of terrorism, act of God, strike, prolonged drought, or prolonged or extreme weather conditions, or other event beyond the reasonable control of a party giving rise to a delay in performance that was not foreseeable and that could not have been avoided through the exercise of reasonable care.

"Groundwater" means all of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

"Groundwater Rights" means the title to the Groundwater and other rights conveyed to Grantee in the Deed.

"Sanitary Control Easement" means an easement around the circumference of a well to prohibit uses that could cause contamination of the groundwater in accordance with the requirement for municipal water supply wells prescribed by the Texas Commission on Environmental Quality (TCEQ) under sections 290.38(73) and 290.41(c) of title 30 of the Texas Administrative Code and as provided in TCEQ Form 20698.

"Surface Water" means any water, flowing or stationary, naturally presenting itself above the top layer of soil, be that top layer of soil a lake or stream bed, whether the source of the water is from runoff, overflow, springs, or seeps.

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"Water" means Groundwater or Surface Water.

Easement Purpose: The installation, construction, operation, use, maintenance, repair, modification, removal, replacement, and upgrade of Grantee's Facilities on, from, and across the Easement Property as may be necessary or desirable in connection with the exploration, monitoring, testing, drilling, extracting, capturing, collection, development, pumping, treatment, withdrawal, production, transmission, transportation, storage, supply, and beneficial use of the Groundwater and other utilization of the Groundwater Rights [**include if applicable:** , including the transportation of groundwater obtained from other real property].

Consideration: This agreement is executed in connection with the Deed. Consideration paid under the Deed constitutes full consideration for the rights granted under this agreement [**include if applicable:** , except for payments required by the Surface Damage Payment Addendum].

Reservations and Exceptions from Conveyance: [**describe any reservations and exceptions from the conveyance in this instrument**]

Exceptions to Warranty: [**describe any exceptions to the warranties in this instrument**]

Grant of Easement: Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee's heirs, successors, and assigns an easement over, on, under, and across the Easement Property for the Easement Purpose, together with (1) a sanitary control easement around each well site sufficient to meet the requirements of law; (2) the right to use roads, driveways, and access ways, and the right of ingress and egress at all times across the [Real Property/Easement Property] for reasonable access to and use of the Easement Property and Grantee's Facilities for the Easement Purpose; and (3) all and singular the rights and appurtenances thereto in any way belonging (collectively, the "Easement"), to have and

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to hold the Easement to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part thereof, except as to the Reservations from Conveyance and Exceptions to Warranty [**include if applicable:** , to the extent that such claim arises by, through, or under Grantor, but not otherwise].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. *Character of Easement.* The Easement is a nonexclusive blanket easement and is irrevocable, subject to the terms of this agreement. The Easement is for the benefit of Grantee and Grantee's heirs, successors, and assigns who at any time own all or any portion of the Groundwater Rights conveyed to Grantee in the Deed.

2. *Duration of Easement.* The duration of the Easement is perpetual.

3. *Reservation of Rights.* Grantor reserves for Grantor and Grantor's heirs, successors, and assigns the right to continue to use and enjoy the Easement Property for all purposes that do not interfere with or interrupt the use or enjoyment of the Easement by Grantee for the Easement Purpose, except as limited by the terms of this agreement.

4. *Improvement and Maintenance of Easement Property.* Improvement and maintenance of the Easement Property for the Easement Purpose will be at the sole expense of Grantee, except as otherwise provided by this agreement. Grantee has the right to eliminate any encroachments into the Easement Property. On written request by Grantee, Grantor will execute or join in the execution of easements for drainage, electricity, or utility facilities serving the Easement Property.

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5. *Use of Water.* Grantee will have the Groundwater Rights provided in the Deed. The compensation paid by Grantee under the Deed [**include if applicable:** and the Surface Damage Payment Addendum] is the only compensation to which Grantor is entitled if Grantee's exercise of its rights causes a decline in the Surface Water or Groundwater available to Grantor.

6. *Taxes.* Grantor will be responsible for paying all ad valorem property taxes or assessments assessed against the Easement Property ("Taxes") before delinquency. If Grantor fails to do so, Grantor authorizes Grantee to pay the Taxes, and on such payment, (a) to be subrogated to all liens held by the taxing authority against the Easement Property as security for the Taxes paid, (b) to have the right to set off amounts paid against amounts owed to Grantor under this agreement, and (c) to seek reimbursement of amounts paid in accordance with applicable law. Grantee will have the right, but not the obligation, to pay the Taxes. If Grantee pays the Taxes, at Grantee's request Grantor will promptly take the action required by section 32.06 of the Texas Tax Code to authorize a transfer of the tax lien to Grantee. Grantee will timely pay any taxes assessed by any taxing authority against Grantee's Facilities or easement estate in the Easement Property as well as any fees or costs charged by any Groundwater Conservation District or other regulatory body for Grantee's development, pumping, transportation, or use of the Groundwater.

7. *Addenda.* The following [is/are] attached to and [is/are] a part of this agreement:

Select as applicable.

Easement Location Addendum

Surface Damage Payment Addendum

Surface Use Restrictions Addendum

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8. *Abandonment of Facilities.* The occurrence of abandonment is to be determined solely by Grantee or by a court of competent jurisdiction. On abandonment of any easement or portion of an easement granted on the Easement Property for the production or transportation of water, Grantee will have one year in which to remove the Facilities, at Grantee's option or in accordance with any written agreement regarding removal between Grantor and Grantee, and to restore the site to its approximate original condition to the extent reasonably practicable. If Grantee does not remove the Facilities, Grantor will become the owner of the Facilities, and Grantee will execute and deliver to Grantor all documents reasonably necessary to indicate that the Facilities have been abandoned and that title to the abandoned Facilities and easements and, to the extent owned by Grantee, all communications lines, electric power lines, poles, and appurtenances serving the abandoned Facilities have reverted to Grantor.

9. *Cooperation.* Grantor will cooperate with Grantee as reasonably necessary to enable Grantee to obtain any consents or permits necessary for Grantee to withdraw or produce the Groundwater, provided that Grantor will not be obligated to incur any costs thereby. Grantor and Grantee will cooperate with one another in the use of the Real Property, the Easement Property, and the Groundwater in order to effectuate the terms of this agreement.

10. *Modifications.* This Easement Agreement may be modified or terminated by the written agreement of Grantor and Grantee, provided, however, that if the Easement Property is divided into two or more tracts, this agreement may be modified or terminated as to any tract by Grantee and the owner of that portion of the Easement Property at the time the modification or termination is requested, without the requirement for the consent of any owner of any other portion of the Easement Property. Such modification or termination will be binding on and affect only the rights of Grantee and the owner of the portion of the Easement Property who enters into the modification or termination of this agreement with regard to that owner's tract and will not affect the terms and provisions of this agreement as they apply to any other portion of the Easement Property.

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11. *Equitable Rights of Enforcement.* This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement, provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies provided by this agreement or available at law or in equity. All rights and remedies provided by this agreement or available at law or in equity are cumulative, not exclusive, and may be exercised successively or concurrently.

12. *Attorney's Fees.* If any party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

13. *Force Majeure.* Any provision in this agreement to the contrary notwithstanding, if a party is delayed in the performance of an obligation under this agreement due to an event of Force Majeure, that party will be given an extension of one day for each day in which the party was unable to perform its obligation due to the event of Force Majeure.

14. *Binding Effect.* This agreement binds and inures to the benefit of the parties and their respective heirs, successors, and assigns. The covenants and conditions stated in this agreement run with the land.

15. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

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16. *Counterparts.* This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

17. *Waiver of Default.* It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

18. *Further Assurances.* Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement. At the request of Grantee, Grantor will execute a separate Sanitary Control Easement for each of Grantee's wells in the form attached as Exhibit B or on another form supplied by Grantee meeting TCEQ requirements.

19. *Indemnity.* Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to (a) breach or default of any provision of this agreement by the indemnifying party or (b) the negligent acts or omissions of the indemnifying party, its employees, agents, representatives, or persons with whom it contracts for the performance of activities on the Easement Property.

20. *Entire Agreement.* This agreement, all attached exhibits and addenda, and the Deed constitute the entire agreement of the parties concerning the grant of the Easement by Grantor to Grantee. There are no representations, warranties, agreements, or promises pertaining to the grant of the Easement that are not in those documents. All addenda and exhibits to this agreement are incorporated herein.

21. *Legal Construction.* If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among

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the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

22. *Notices.* Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein. If the Easement Property is divided into two or more tracts, Grantee will be deemed to have complied with any notice requirement under this agreement if Grantee provides written notice only to the owners of the tracts directly affected by the matter for which notice is being given.

23. *Recitals.* Any recitals in this agreement are represented by the parties to be accurate and constitute a part of the substantive agreement.

24. *Dispute Resolution.* If a dispute arises between the parties with regard to the rights or obligations of the parties as set forth in this agreement, the aggrieved party will provide written notice of its complaint or claim to the other party with sufficient specificity to enable the recipient to determine the cause and nature of the complaint. On receipt of the notice, the receiving party will have a reasonable period of time, not to exceed thirty days, in which to respond in writing to the other party. If the parties are not able to resolve the issues to their mutual satisfaction through negotiation within thirty days after the commencement of

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negotiations, or within such longer period as the parties may agree on, the parties agree to mediate the matter in good faith before instituting a suit for damages or exercising any right to terminate expressly provided by this agreement.

25. *Time.* Time is of the essence. Unless otherwise specified, all references to "days" mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

Include the following if applicable.

26. *Partial Releases.* Grantor and Grantee acknowledge that Grantor may need portions of the Easement Property released from this Blanket Easement from time to time in order to use, sell, or finance portions of the Easement Property. If, before the installation of Facilities by Grantee, Grantor makes a written request for a partial release of any portion of this Blanket Easement to Grantee, Grantee will, within forty-five days after receipt of the request, provide Grantor with written consent to the partial release or with proposed plans showing Grantee's intended use of the area. If the request is granted, Grantor, at Grantor's expense, will provide the partial release, in a mutually acceptable form, and the field-note description of the area to be released. Grantee may condition the partial release on Grantor's conveyance of easement rights to replace those being released. If Grantee fails to respond to Grantor in writing within the required time, Grantee will be deemed to have consented to the partial release and will execute the partial release of the area when presented by Grantor. If Grantee fails to do so in a timely manner, Grantor will have the right to execute the partial release on behalf of Grantee and to record it in the real property records as evidence of the release.

Include the following if applicable.

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27. *Relocation of Facilities.* After the installation of Facilities by Grantee, Grantor will have the right to require Grantee to execute a partial release of the easement rights granted under this Easement Agreement and to relocate Facilities installed in an easement area if all the following conditions are met: (a) Grantor pays for all surveying and document preparation costs for the area to be released and easements required to be provided by Grantor; (b) Grantor provides a comparable replacement easement to Grantee, at Grantor's expense, for the easement to be released and all additional easements on Grantor's or neighboring properties necessary for the operation of Grantee's relocated Facilities, in form and content reasonably acceptable to Grantee; (c) the proposed relocation will not materially increase the cost of operating Grantee's Facilities or result in a material adverse change in the efficiency or productivity of Grantee's Facilities; (d) Grantor pays for the reasonable costs arising from the relocation of Grantee's Facilities, including, to the extent applicable, site preparation work, making additions or alterations to the Facilities in order to connect them to Grantee's remaining Facilities, hydrological investigations in connection with determining water quality and quantity, drilling replacement wells, the construction of new roads if necessary to provide reasonable access to the new easement or Facilities, plugging wells in accordance with applicable legal requirements, and the removal of debris; and (e) reimbursement to Grantee for any loss of profits or increase in operating costs during the period in which the relocation of the Facilities occurs and that result from the relocation activities. To initiate the process, Grantor must make written request to Grantee for the relocation, identifying with reasonable particularity the easement or easement areas to be released. Grantee will have a reasonable period of time, not to exceed ninety days, in which to make an initial evaluation and response to Grantor regarding the cost and feasibility of relocating Grantee's Facilities. If Grantee believes that the proposed relocation will not meet the conditions of (c) above, or that Grantor will not be able to provide suitable replacement easements or is not financially able to pay the costs of relocation, Grantee will notify Grantor of the basis for its determination. If Grantor does not agree with Grantee, Grantor will have the right to pursue dispute resolution

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as provided in paragraph 24. above. If the parties are able to reach an agreement on the terms for the relocation, they will commit those terms to writing. Grantee may require Grantor to escrow funds, furnish a letter of credit, or provide other reasonable guarantee of Grantor's financial ability to perform its obligations as a condition to entering into the relocation agreement.

Continue with the following.

_____

[Name of grantor]

_____

[Name of grantee]

If applicable, include the following consent and subordination or the separate lienholder consent and subordination at form 16-7 in this chapter.

Consent and Subordination by Lienholder

Lienholder, as the holder of [a] lien[s] on the Real Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordinates its lien[s] to the rights and interests of Grantee, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Grantee.

_____

[Name of lienholder]

Include acknowledgment.

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Exhibit A

Real Property

Describe the property in which the grantee has groundwater rights or attach field notes.

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Exhibit B

Sanitary Control Easement

[TCEQ Form 20698]

Texas Commission on Environmental Quality

SANITARY CONTROL EASEMENT

DATE:

GRANTOR(S):

GRANTOR'S ADDRESS:

GRANTEE:

GRANTEE'S ADDRESS:

SANITARY CONTROL EASEMENT: Purpose, Restrictions, and Uses of Easement:

1. The purpose of this easement is to protect the water supply of the well described and located below by means of sanitary control.

2. The construction, existence, and/or operation of the following within a 150-foot radius of the well described and located below are prohibited: septic tank or sewage treatment perforated drainfields; areas irrigated by low dosage, low angle spray on-site sewage facilities; absorption beds; evapotranspiration beds; abandoned, inoperative or improperly constructed water wells of any depth; underground petroleum and chemical storage tanks or liquid transmission pipelines; sewage treatment plants; sewage wet wells; sewage pumping stations; drainage ditches which contain industrial waste discharges or wastes from sewage treatment systems; animal feed lots; solid waste disposal sites, landfill and dump sites; lands on which sewage plant or septic tank sludge is applied; lands irrigated by sewage plant efflu-

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ent; military facilities; industrial facilities; wood-treatment facilities; liquid petroleum and petrochemical production, storage, and transmission facilities; Class 1, 2, 3, and 4 injection wells; pesticide storage and mixing facilities; and all other constructions or operations that could pollute the groundwater sources of the well that is the subject of this easement. For the purpose of this easement, improperly constructed water wells are those wells which do not meet the surface and subsurface construction standards for a public water supply well.

3. The construction, existence and/or operation of tile or concrete sanitary sewers, sewer appurtenances, septic tanks, storm sewers, cemeteries, and/or the existence of livestock in pastures is specifically prohibited within a 50-foot radius of the water well described and located below.

4. This easement permits the construction of homes or buildings upon the Grantor's property, and farming and ranching operations, as long as all items in Restrictions Nos. 2 and 3 are recognized and followed.

The Grantor's property subject to this Easement is described in the documents recorded at: Volume [**number**], Pages [**number**] of the real property records of [**county**] County, Texas.

PROPERTY SUBJECT TO EASEMENT:

All of that area within a 150 foot radius of the water well located [**number**] feet at a radial of degrees from the [**specify**] corner of Lot [**number**], of a Subdivision of Record in Book [**number**], Page [**number**] of the County Plat Records, [**county**] County, Texas.

TERM:

This easement shall run with the land and shall be binding on all parties and persons claiming under the Grantor(s) for a period of two years from the date that this easement is

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recorded; after which time, this easement shall be automatically extended until the use of the subject water well as a source of water for public water systems ceases.

ENFORCEMENT:

Enforcement of this easement shall be proceedings at law or in equity against any person or persons violating or attempting to violate the restrictions in this easement, either to restrain the violation or to recover damages.

INVALIDATION:

Invalidation of any one of these restrictions or uses (covenants) by a judgment or court order shall not affect any of the other provisions of this easement, which shall remain in full force and effect.

FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, the Grantor does hereby grant and convey to Grantee and to its successors and assigns the sanitary control easement described in this easement.

_____

[Name of grantor]

Include acknowledgment.

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Form 16-4

Easement Location Addendum

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantee:

Easement Agreement:

Easement Property:

Real Property:

Easement Location Period:

This Easement Location Addendum modifies the Easement Agreement. Terms defined in the Easement Agreement have the same meaning in this Addendum. The terms of the Easement Agreement that are not modified by this Addendum remain in effect.

Although the Easement Agreement initially grants a blanket Easement over the Easement Property, it is the intention of the parties that the easement location be restricted to (1) the areas to be occupied by Grantee's Facilities, including roads to be constructed by Grantee, and (2) roads, driveways, and access ways to the Easement Property and Grantee's Facilities.

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At least [**number**] days before the expiration of the Easement Location Period, Grantee will provide Grantor with a map or sketch showing the areas to be occupied by Grantee's Facilities, which may include areas to be used immediately and those reserved for future expansion. Grantor may request changes in location of any of the Facilities within [**number**] days after Grantor's receipt of Grantee's proposal. Grantee will accommodate any requested change that does not materially increase Grantee's construction or operation costs or adversely affect the use or efficiency of Grantee's Facilities. Grantee, at its expense, will provide a field-note description of the area to be occupied by its Facilities at least [**number**] days before the expiration of the Easement Location Period, and the parties will execute and record an amendment to the Easement Agreement that identifies the Easement Property as (1) the area or areas described by field notes to be occupied by Grantee's Facilities, together with any additional area needed as a sanitary control site around each well in order to meet the requirements of law for the protection of water produced from the well, and (2) roads, driveways, and access ways over the [Real Property/Easement Property] to access the Easement Property and Grantee's Facilities. The amendment may restrict the types of uses allowed in each identified easement location. [**Include if applicable:** The amendment will also provide Grantee with the right to use reasonable portions of the Real Property adjacent to or in the vicinity of the Easement Property as needed for construction staging areas, parking, and storing vehicles and equipment during construction or maintenance activities.]

Grantee's easement rights in the areas to be occupied by its Facilities are exclusive. Grantee's easement rights in roads, driveways, and access ways are nonexclusive. [**Include if applicable:** After Grantee has [identified the areas to be occupied by its Facilities/provided field notes for the areas to be occupied by its Facilities], paragraph 26. of the Easement Agreement will no longer apply.]

If Grantee fails to identify the location of its Facilities and to provide a field-note description of the area or areas to be occupied by its Facilities as provided in this Addendum,

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and the failure is not cured through the dispute resolution procedure set out in the Easement Agreement, Grantor may terminate the Easement Agreement as to any Easement Property on which Grantee has not installed Facilities or provided a field-note description by giving Grantee written notice of termination. Grantee authorizes Grantor to execute and record a release evidencing that termination.

_____

[Name of grantor]

_____

[Name of grantee]

Include acknowledgment.

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Form 16-5

Surface Damage Payment Addendum

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantee:

Easement Property:

Real Property:

Easement Agreement:

This Surface Damage Payment Addendum modifies the Easement Agreement. Terms defined in the Easement Agreement have the same meaning in this Addendum. The terms of the Easement Agreement that are not modified by this Addendum remain in effect.

1. *Damage Payments.* Grantee agrees to pay Grantor, in addition to any other consideration paid for the Easement, the following amounts as damages for use of the Easement Property:

The following are examples of possible damage provisions.

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Item for Which Payment Is Due	Amount of Payment Due	Time Payment Due
Water well location other than test well or monitoring wells (on area not larger than 1 acre), compensation will be $[**amount**] for each additional acre occupied	$[**amount**] per location	Before drilling or construction
Sanitary Control Easement	$[**amount**] per location	Before drilling or construction
Pumping plant sites, including tank battery and related Facilities (on area not larger than [**number**] acres), compensation will be $[**amount**] for each additional acre occupied; if water wells and pumping plant sites are installed at the same location, Grantee will pay separate damages for each	$[**amount**] per location	Before construction
Aboveground pipeline appurtenances, including tank batteries if not on well site or pumping plant site (except for signs required by law) (on area not larger than [**number**] acres), compensation will be $[**amount**] for each additional acre occupied	$[**amount**] per location except $[**amount**] per air valves	Before construction
Use of existing roads on Real Property	$[**amount**] per [rod/linear foot]	Before construction of Facilities
Pipelines (underground)	$[**amount**] per [rod/linear foot]	Before beginning of ditching for pipelines
New roads constructed by or on behalf of Grantee	$[**amount**] per [rod/linear foot]	Before beginning construction of road
Electric or communications lines placed on Real Property	$[**amount**] per [rod/linear foot]	Before construction of Facilities

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Fences—removal	$[**amount**] per [rod/linear foot]	Before beginning construction
Fences—new	$[**amount**] per [rod/linear foot]	Before beginning construction

2. *Injury to Grantor's Property.* Grantee will be liable and will promptly provide reasonable compensation to Grantor for any damage to Grantor's improvements, livestock, or real or personal property caused by the negligence of Grantee, its employees, agents, invitees, representatives, or contractors while performing services or acts on the Real Property. The amount of damages will be determined in accordance with the provisions of paragraph 24. of the Easement Agreement.

3. *Injury to Grantee's Property.* Grantor will be liable and will compensate Grantee for any damage to Grantee's Facilities or real or personal property caused by the negligence of Grantor, its employees, agents, invitees, representatives, or contractors. The amount of damages will be determined in accordance with the provisions of paragraph 24. of the Easement Agreement.

4. *Interest.* Amounts owing under this agreement that are not paid when due will accrue interest at the highest interest rate allowed by applicable law.

_____

[**Name of grantor**]

_____

[**Name of grantee**]

Include acknowledgment.

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Form 16-6

Surface Use Restrictions Addendum

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantee:

Real Property:

Easement Property:

Facilities Construction Period:

Easement Agreement:

"Residence Unit" means a residential structure, together with barns, sheds, and associated outbuildings.

"Hazardous Substances" means, but is not limited to, any substance that is or contains (1) any "hazardous substance" as defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended (42 U.S.C. § 9601 *et seq.*), or regulations promulgated under CERCLA; (2) any "hazardous waste" as now defined in the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901 *et seq.*) or regulations promulgated under RCRA; (3) any substance regulated by the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*); (4) gasoline, diesel fuel, or other petroleum hydrocarbons; (5) asbestos and asbestos-containing materials in any form, whether

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friable or nonfriable; (6) polychlorinated biphenyls; (7) radon gas; and (8) any additional substances or materials (whether solid, liquid, or gas) that are classified, defined, or listed as pollutants, hazardous wastes, hazardous substances, hazardous materials, extremely hazardous wastes, regulated substances, toxic substances, or words of similar meaning or regulatory effect under the foregoing statutes or any other present federal, state, or local laws, statutes, ordinances, rules, regulations, and the like or the common law or any other applicable laws relating to the Real Property. "Hazardous Substances" includes, without limitation, any substance the presence of which on the Real Property (1) requires reporting, investigation, or remediation under the statutes cited above or (2) causes or threatens to cause a nuisance on any portion of the Real Property or adjacent property or poses or threatens to pose a hazard to the environment or the health or safety of persons on any portion of the Real Property or adjacent property.

This Surface Use Restrictions Addendum modifies the Easement Agreement. Terms defined in the Easement Agreement have the same meaning in this Addendum. The terms of the Easement Agreement that are not modified by this Addendum remain in effect.

The following are samples of possible surface use restrictions.

1. Grantee agrees that it will—

   a. provide Grantor with a set of its plans for the Facilities at least sixty days before the commencement of initial construction of the Facilities;

   b. provide Grantor with at least thirty days' notice before the commencement of the initial construction of its Facilities;

   c. complete initial construction of its Facilities before the expiration of the Facilities Construction Period;

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d. construct, maintain, and operate all Facilities in a good and workmanlike manner, in good working order, and in accordance with all applicable laws and the terms of the Easement Agreement;

e. remove from the Easement Property and properly dispose of all trash and debris caused by Grantee, including any fencing, brush, and trees taken down by Grantee and unused materials, parts, tools, and equipment after construction or maintenance;

f. use existing roads on the Easement Property when feasible for ingress and egress;

g. provide Grantor, on request, with reasonable access to or copies of Grantee's records relating to Grantee's Facilities on the Easement Property, including permits, well logs, test results, and the location of underground Facilities;

h. restore and revegetate any area disturbed by Grantee in connection with its activities on the Easement Property to approximately the condition existing immediately before the commencement of the activity;

i. promptly repair, remove, or replace any damaged or destroyed Facility;

j. require its employees, agents, representatives, and contractors to comply with the provisions of this Addendum;

k. pay its proportionate share for upkeep and maintenance of roads used by Grantor and Grantee;

l. promptly repair any damage to roads caused by Grantee, its employees, agents, representatives, or contractors;

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m. comply with any reasonable rules established by Grantor for the use of the Easement Property during Grantee's activities;

n. conduct its operations on the Easement Property in accordance with all applicable laws;

o. comply with the Construction Provisions set out below; and

p. comply with all rules and regulations of any governmental entity, including a local groundwater conservation district, with jurisdiction over the Real Property.

2. Grantee will not—

a. own or use in any manner any Surface Water located on the Easement Property not pumped from Grantee's Facilities;

b. construct a well within [**number**] feet of any Residence Unit existing on the Easement Property on the date of the Easement Agreement, or within [**number**] feet of any Residence Unit constructed on the Easement Property after the date of the Easement Agreement, or within [**number**] feet of an existing groundwater well, without the written consent of Grantor;

c. hunt or fish [**include if applicable:** or carry or allow possession of any firearms, explosives, or incendiary devices] on the Real Property;

d. extract or mine any caliche or gravel from the Real Property for building or road construction without a written agreement with Grantor;

e. store vehicles on the Easement Property, except in permitted staging areas when construction activities are in progress;

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f. store any equipment or materials on the Easement Property that Grantee does not intend to use within the next six months for construction or maintenance on the Easement Property;

g. obstruct Grantor's access to its buildings, equipment, crops, or livestock or unreasonably interfere with Grantor's use of or operations on the Easement Property;

h. cause or permit contamination of the Easement Property or the Groundwater by Hazardous Substances;

i. cut or damage trees on the Easement Property, unless reasonably necessary for Grantee's use of the Easement; or

j. construct a well or produce groundwater without first securing all necessary authorizations, including permits from any local groundwater conservation district with jurisdiction.

3. Grantor agrees that it will—

a. include in any mineral lease or any grant or reservation of mineral rights or interests, and any amendment to an existing mineral lease or reservation, a provision prohibiting the grantee from using Groundwater from the Real Property for any purpose other than drilling, completion, recompletion, reworking, remediation, and revegetation and from injecting or disposing of saltwater on the Real Property;

b. require its employees, invitees, agents, representatives, grantees, assigns, and contractors to comply with the provisions of this Addendum;

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c. conduct its activities and operations on the Easement Property in accordance with applicable laws;

d. promptly repair any damage caused by Grantor to roads used by Grantee, its employees, invitees, agents, representatives, or contractors; and

e. pay its proportionate share for upkeep and maintenance of roads used by Grantor and Grantee.

4. Grantor will not—

a. create Groundwater-fed or -maintained lakes or ponds on the Easement Property, other than reasonable livestock drinking tanks or ponds;

b. cause or permit contamination of the Easement Property or the Groundwater by Hazardous Substances;

c. construct or permit construction by a third party of any improvements or utilities within [**number**] feet of the Easement Property without Grantee's prior written consent; or

d. contract for or allow the use of Groundwater by any third party without Grantee's prior written consent.

5. *Construction Provisions.* Unless otherwise agreed to by the parties in writing:

a. Any new roads built by Grantee will not be wider, on average, than [**number**] feet.

b. Grantee will construct new roads to its Facilities with a top course of crushed caliche covering the entire length and width. Roads constructed by Grantee

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for access to monitoring wells or for temporary use may be constructed to lesser standards agreed on by the parties.

c. Pipeline easements that are not blanket easements will be no greater than [**number**] feet in width on each side of the center line of the pipeline.

d. If the Easement Property is not a blanket easement, Grantee will have the right to use reasonable portions of the Real Property adjacent to or in the vicinity of the Easement Property as needed for construction staging areas, parking, and storing vehicles and equipment during construction or maintenance activities.

e. All pipelines and underground Facilities will be buried to a depth of at least [**number**] inches below the surface of the ground.

f. Grantee will use reasonable efforts to construct and maintain its Facilities in a manner that does not cause or contribute to erosion of the Easement Property or damage to Grantor's livestock.

g. Grantee will restore any fencing that it temporarily removes for the purpose of constructing improvements and will take reasonable measures to contain livestock while the fencing is down or being restored.

_____

[**Name of grantor**]

_____

[**Name of grantee**]

Include acknowledgment.

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Form 16-7

Lienholder Consent and Subordination to Easement Agreement

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Note and Lien Are Described in the Following Documents: [**include recording information**]

Easement Holder:

Easement Holder's Mailing Address:

Easement Agreement: The Easement Agreement dated [**date**], executed by Borrower to the Easement Holder recorded in [**recording data**] of the real property records of [**county**] County, Texas.

Real Property:

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For value received, Holder of Note and Lien hereby consents to the Easement Agreement. Holder of Note and Lien subordinates the lien referenced above and all liens held by it regardless of how created or evidenced to the rights and interests of the Easement Holder and its successors and assigns. Foreclosure of the lien or liens will not extinguish the Easement.

_____

[Name of lienholder]

By:

_____

[Name of representative]

_____

[Title]

Include acknowledgment.

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Form 16-8

Partial Release of Lien

[Water Rights On-Site Production]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Owner of Groundwater Rights:

Owner's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Note and Lien Are Described in the Following Documents: [**include recording information**]

"Groundwater" means all of the underground water, percolating water, artesian water, and any other water from any and all depths and reservoirs, formations, depths and horizons beneath the surface of the Real Property, excluding underflow or flow in a defined subterranean channel.

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"Reserved Groundwater" means the right of the Borrower to use Groundwater in, on, and under the Real Property as more fully set out and described in the Groundwater Rights Warranty Deed from Borrower to Owner of Groundwater Rights of even date, recorded in the county or counties where the Real Property is located.

"Real Property" means the following: [**describe real property**].

"Property to Be Released from Lien" means all the Groundwater now or in the future located in, on, or under the Real Property, excepting and excluding the Reserved Groundwater, together with all associated rights related to the Groundwater, including but not limited to the right to capture, explore for, drill for, develop, withdraw, produce, transport, or otherwise beneficially use the Groundwater; the nonexclusive right to use as much of the surface of the Real Property as is reasonably necessary for the exercise of the associated rights, including the right of ingress and egress; and all permits, licenses, or other governmental authorizations relating to any of the foregoing, including rights under any permit issued by the applicable governmental authority.

For value received, Holder of Note and Lien releases only the Property to Be Released from Lien and from all liens held by Holder of Note and Lien, without regard to how they were created or evidenced.

When the context requires, singular nouns and pronouns include the plural.

_____

[**Name of lienholder**]

By:

_____

[**Name of representative**]

_____

[**Title**]

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Include acknowledgment.

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Form 16-9

Groundwater Rights Sales Contract

[For Sale of Permitted Groundwater Rights for Off-Site Production]

This contract to buy and sell groundwater rights is between Seller and Buyer as identified below and is effective on the date ("Effective Date") of the last of the signatures by Seller and Buyer as parties to this contract and by [Title Company/Escrow Agent] to acknowledge receipt of the Earnest Money. Buyer must deliver the Earnest Money to [Title Company/ Escrow Agent] and obtain a signature acknowledging receipt of the Earnest Money before the Earnest Money Deadline provided in paragraph A.1. below for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller: [**include the names of all persons owning the groundwater**]

Address:

Phone:

E-mail:

Type of entity:

Seller's Attorney:

Law firm:

Address:

Phone:

E-mail:

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Seller's Broker:

Brokerage firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer's Attorney:

Law firm:

Address:

Phone:

E-mail:

Buyer's Broker:

Brokerage firm:

Address:

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Phone:

E-mail:

[Title Company/Escrow Agent]: [**identify title company, or if title insurance will not be obtained, identify person who will act as escrow agent**]

Address:

Phone:

E-mail:

[Underwriter:]

Groundwater Authority: [**list any groundwater conservation districts or other groundwater authority with jurisdiction over the real property**]

Seller's Permit: [**describe and provide all of seller's permits, e.g.,** [**permit title**] Permit No. [**number**], issued and approved by [**name of groundwater authority**] on [**date**].]

Earnest Money: $[**amount**]

Real Property: The Real Property described in Exhibit A.

Groundwater Rights: Seller's legal title and perpetual right to withdraw up to [**number**] acre-feet per year of Groundwater from the [**name**] Aquifer permitted [irrigation/industrial/[and/or] municipal] groundwater (the "Groundwater") relating to the Real Property. The Groundwater Rights include all of the real and personal property rights, appurtenances, hereditaments, licenses, and contracts, if any, related to or pertaining to the Groundwater, including Permit[s] No[s]. [**number[s]**] [**include if recorded:** , recorded in Volume [**number**], Page [**number**], of the Official Public Records of [**county**] County,

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Texas] (the "Permit"), as amended or modified, as applicable, insofar as it pertains to the Groundwater Rights, including, but not limited to—

1. all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights (the "Appurtenant Rights");

2. all permit rights (including the right in and to the Permit that relates to the Groundwater Rights) allowing for possession, withdrawal, or use of the Groundwater Rights (the "Permit Rights"); and

3. all other rights to withdraw and beneficially use the Groundwater, Appurtenant Rights, Permit, or Permit Rights, together with all modifications, amendments, renewals, extensions, or successor or substitute permits relating to any of the above-described items.

Purchase Price:

Include the following if applicable.

$[**amount**], which is determined on the basis of $[**amount**] per acre-foot of Groundwater.

Continue with the following.

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:

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Payment schedule:

See exhibit E for additional terms and conditions.

Buyer's Liquidated Damages: $[**amount**]

Seller's Additional Liquidated Damages: $[**amount**]

Title Information: If Seller is not required to provide a Title Commitment and Title Policy, Seller will have the obligation to provide to Buyer, at Seller's expense, the Title Information as defined in paragraph F.3. below. Buyer may have the Title Information reviewed and obtain a written opinion of title by an attorney selected by Buyer, at [Seller/Buyer]'s expense.

Title Documents: The Permit and instruments affecting title to the Groundwater and the Real Property referenced in the [Title Commitment/Title Information] and UCC Search are to be provided as part of Seller's Records.

A. Deadlines and Other Dates

All deadlines in this contract expire at 5:00 P.M. local time where the Real Property is located. If a deadline falls on a Saturday, Sunday, or national holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or national holiday. A national holiday is a holiday designated by the federal government. Time is of the essence.

A.1. Earnest Money Deadline: [**date**]

Select one of the following.

A.2. Delivery of Title Commitment: [[**date**]/[**number**] days after the Effective Date]

Or

A.2. Delivery of Title Information: [[**date**]/[**number**] days after the Effective Date]

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Continue with the following.

A.3. Delivery of UCC Search: [[**date**]/[**number**] days after the Effective Date]

A.4. Delivery of legible copies of the Title Documents: [[**date**]/[**number**] days after the Effective Date]

A.5. Delivery of Title Objections: [[**date**]/[**number**] days after delivery of the last of the [Title Commitment/Title Information], UCC Search, and legible copies of the Title Documents]

A.6. Delivery of Seller's records as specified in Exhibit C: [[**date**]/[**number**] days after the Effective Date]

A.7. End of Inspection Period: [[**date**]/[**number**] days after the Effective Date]

A.8. Closing Date: [[**date**]/[**number**] days after the End of the Inspection Period]

A.9. Closing Time: [**time**]

B. Closing Documents

B.1. At Closing, Seller will deliver the following items:

Include all applicable items.

Select one of the following.

Groundwater General Warranty Deed [**include if applicable:** with Vendor's Lien]

Or

Groundwater Special Warranty Deed [**include if applicable:** with Vendor's Lien]

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Continue with the following.

Release of Lien

Partial Release of Lien as to Groundwater Rights

Assignment of Seller's Permit or transfer form promulgated or approved by relevant groundwater authority

IRS Nonforeign Person Affidavit

Evidence of Seller's authority to close this transaction

Notices, statements, and certificates as specified in Exhibit D

Assignment of Leases

Tenant Estoppel Certificate

Affidavit of Debts and Liens [**include if applicable:** and Indemnity]

B.2. At Closing, Buyer will deliver the following items:

Include all applicable items.

Balance of Purchase Price

Evidence of Buyer's authority to close this transaction

Deceptive Trade Practices Act waiver

Seller-financing documents

Promissory Note

Deed of Trust

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Security Agreement

Financing Statement

Loan Documents required by third-party lender

Releases of any leases, contracts, or other legal interests affecting the Groundwater agreed to be terminated before or at Closing

Continue with the following.

The documents listed in this section B. are collectively known as the "Closing Documents." The Closing Documents for which forms exist in the current edition of the *Texas Real Estate Forms Manual* (State Bar of Texas) will be prepared using those forms.

C. Exhibits

The following are attached to and are a part of this contract:

Exhibit A—Description of the Real Property

Exhibit B—Seller's Representations and Warranties

Exhibit C—Seller's Records

Exhibit D—Notices, Statements, and Certificates

[**Include if applicable:** Exhibit E—Seller Financing Addendum]

[**Include if applicable:** Exhibit F—Memorandum of Contract]

[**Include if applicable:** Exhibit G—Notice of Termination of Contract]

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D. Purchase and Sale of Groundwater Rights

Seller agrees to sell and convey the Groundwater Rights to Buyer, and Buyer agrees to buy and pay Seller for the Groundwater Rights. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

E. Interest on Earnest Money

Buyer may direct [Title Company/Escrow Agent] to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to [Title Company/Escrow Agent] and satisfying [Title Company/Escrow Agent]'s requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will become part of the Earnest Money.

F. Title

F.1. Review of Title. The following statutory notice is provided to Buyer on behalf of the real estate licensees, if any, involved in this transaction: Buyer is advised that it should either have the abstract covering the Real Property examined by an attorney of Buyer's own selection or be furnished with or obtain a policy of title insurance.

Include the following if applicable.

F.2. Title Commitment; Title Policy. "Title Commitment" means a Commitment for Issuance of an Owner Policy of Title Insurance by Title Company, as agent for Underwriter, or directly by Underwriter, stating the condition of title to the Groundwater Rights and the Real Property. The effective date stated in the Title Commitment must be after the Effective Date of this contract. "Title Policy" means an Owner Policy of Title Insurance issued by Title Company, as agent for Underwriter, or directly by Underwriter, in conformity with the last Title Commitment delivered to and approved by Buyer.

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Include the following if applicable.

F.3. Title Information. "Title Information" means an abstract of title prepared by a title insurance company or an abstract company licensed by the Texas State Board of Insurance, covering the period from the first conveyance of title to the Real Property out of the sovereignty to the Effective Date, and containing complete and legible copies of all the deeds, easements, liens, and other documents affecting title to the Real Property and the Groundwater Rights.

Continue with the following.

F.4. UCC Search. "UCC Search" means written reports stating the instruments that are on file in the Texas secretary of state's UCC records, the UCC records of any other appropriate state, and the UCC records in the jurisdiction in which the Seller is organized, showing as debtor Seller and all other owners of the Real Property and Groundwater Rights [**include if applicable:** and fixtures and personal property] during the five years before the Effective Date of this contract.

F.5. Delivery of [Title Commitment/Title Information], UCC Search, and Title Documents. Seller must deliver the [Title Commitment/Title Information] to Buyer and Buyer's attorney by the deadline stated in paragraph A.2. above; the UCC Search by the deadline stated in paragraph A.3.; and legible copies of the Title Documents by the deadline stated in paragraph A.4.

F.6. Title Objections. Buyer has until the deadline stated in paragraph A.5. above ("Title Objection Deadline") to review the [Title Commitment/Title Information], UCC Search, and legible copies of the Title Documents, notify Seller of Buyer's objections to any of them, and request any additional information needed to evidence Seller's title to the Real Property and the Groundwater Rights ("Title Objections"). Buyer will be deemed to have approved all matters reflected by the [Title Commitment/Title Information], Title Documents,

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and UCC Search to which Buyer has made no Title Objection by the Title Objection Deadline. The matters that Buyer either approves or is deemed to have approved are "Permitted Exceptions." If Buyer notifies Seller of any Title Objections, Seller has five days from receipt of Buyer's notice to notify Buyer whether Seller agrees to cure the Title Objections before Closing ("Cure Notice"). If Seller does not timely give its Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections before Closing, Buyer may, within five days after the deadline for the giving of Seller's Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed to close, subject to Seller's obligations to resolve the items [listed in Schedule C of the Title Commitment/listed in the Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date, and cure only the Title Objections that Seller has agreed to cure in the Cure Notice. At or before Closing, Seller must resolve the items that are [listed in Schedule C of the Title Commitment/listed in the Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date of this contract, and cure the Title Objections that Seller has agreed to cure.

G. Inspection Period

G.1. Review of Seller's Records. Seller, at Seller's expense, will deliver to Buyer copies of Seller's Records specified in Exhibit C, or otherwise make those records available for Buyer's review, by the deadline stated in paragraph A.6. above.

G.2. Adequacy of Seller's Permit. Buyer will have the right to determine whether the Permit, on transfer to Buyer, will be adequate for Buyer's intended use of the Groundwater Rights, whether an alternative permit will be required, and the requirements of the Groundwater Authority for the transfer of Permit. Seller will cooperate with Buyer at all times in obtaining any information and forms required from the Groundwater Authority. On Buyer's request, Seller, at Seller's expense, will execute and transmit to the Groundwater Authority all necessary applications, forms, and documentation required for the transfer of Seller's Permit

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to Buyer, provided that the transfer will not be effective until Closing. Seller will not take any action before or after Closing to oppose the transfer of Seller's Permit to Buyer, the issuance of an amendment to Seller's Permit, or other permitting sought by Buyer to enable Buyer to use the Groundwater for Buyer's Intended Use of the Groundwater.

G.3. Buyer's Right to Terminate. Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period.

G.4. Buyer's Indemnity and Release of Seller

G.4.a. Indemnity. Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney's fees, expenses, or claims arising out of Buyer's investigation of the Groundwater Rights and Real Property. The obligations of Buyer under this provision will survive termination of this contract and Closing.

G.4.b. Release. Buyer releases Seller and those persons acting on Seller's behalf from all claims and causes of action (including claims for attorney's fees and court and other costs) resulting from Buyer's investigation of the Groundwater and Real Property.

G.5. Appraisal of Groundwater. Buyer has the right to have an appraisal performed of the Groundwater Rights, the Real Property, and Seller's Permits. The cost of the appraisal [will be paid at Closing by [Buyer/Seller]/will be shared at Closing by Buyer and Seller].

H. Representations and Warranties

The parties' representations stated in Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date. Seller will promptly notify Buyer if Seller becomes aware that any of the representations are not true and correct.

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I. Condition of the Property until Closing; Cooperation; No Recording of Contract

I.1. Maintenance and Operation. Until Closing, Seller will (a) maintain the Real Property [**include if applicable:** , the personal property and fixtures,] and the Groundwater Rights as they existed on the Effective Date, except for reasonable wear and tear and casualty damage; (b) use the Real Property and the Groundwater Rights in the same manner as they were used on the Effective Date; and (c) comply with all contracts, laws, and governmental regulations affecting the Real Property and the Groundwater Rights. Until the end of the Inspection Period, Seller will not grant or convey any easement, lease, license, or other right affecting the Real Property or the Groundwater Rights. After the end of the Inspection Period, Seller may not enter into, amend, or terminate any contract that affects the Groundwater Rights or the Real Property without first obtaining Buyer's written consent.

I.2. Condemnation. Seller will notify Buyer promptly after Seller receives notice that any part of the Real Property or Groundwater Rights has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer's intended use of the Groundwater Rights by giving notice to Seller within fifteen days after receipt of Seller's notice to Buyer (or before Closing if Seller's notice is received less than fifteen days before Closing). The condemnation will be deemed to materially affect Buyer's intended use of the Groundwater Rights if [**specify reason, e.g.,** the condemnation would result in Buyer's not being able to produce more than [**number**] acre-feet of Groundwater]. If Buyer does not terminate this contract, (a) Buyer and Seller will each have the right to appear and defend their respective interests in the Groundwater Rights in the condemnation proceedings; (b) any award in condemnation will be assigned to Buyer to the extent necessary to compensate Buyer for the loss of or reduction in the Groundwater Rights; (c) if the taking occurs before Closing, the description of the Real Property or Groundwater Rights will be revised to delete the portion taken; and (d) no change in the Purchase Price will be made.

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I.3. Claims; Hearings. Seller will notify Buyer promptly after Seller receives notice of any claim or administrative hearing that is threatened, filed, or initiated before Closing that involves or directly affects the Groundwater Rights.

I.4. Cooperation. Seller will cooperate with Buyer (a) before and after Closing to transfer the applications, permits, and licenses held by Seller and used in the production of the Groundwater and to obtain any consents necessary for Buyer to withdraw or produce the Groundwater; (b) before Closing, with any reasonable evaluation, inspection, or study of the Real Property or the Groundwater; and (c) in all other matters related to, or arising out of or in connection with, this contract.

I.5. Casualty or Other Loss or Damage. Until Closing has been completed and funded, Seller will bear the risk of any damage, casualty, or other loss to the Real Property or Groundwater [**include if applicable:** and the personal property and fixtures]. If any damage, casualty, or other loss results in a material adverse change in the quality, quantity, or usability of the Groundwater, Buyer will have the right to terminate this contract.

I.6. Memorandum of Contract; Termination of Contract; No Recording of Contract. At the request of Buyer, Seller will execute a memorandum of this contract, in a mutually acceptable form, to be recorded in the real property records of [**county**] County, Texas. At the time the memorandum is signed, Buyer and Seller will also sign a termination of contract in recordable form and deposit it into escrow with [Title Company/Escrow Agent]. The parties authorize [Title Company/Escrow Agent] to record the termination of contract as provided in section J. below. Neither Buyer nor Seller may file this contract in the real property records of any county. If either party records this contract, the other party may terminate this contract and record a notice of termination.

J. Termination

J.1. Disposition of Earnest Money after Termination

J.1.a. To Buyer. If Buyer terminates this contract in accordance with any of Buyer's rights to terminate, then unless Seller delivers notice of Seller's objection to [Title Company/Escrow Agent]'s release of the Earnest Money to Buyer within five days after Buyer delivers Buyer's termination notice to Seller and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized without any further authorization from Seller, to deliver the Earnest Money to Buyer, less $100, which will be paid to Seller as consideration for the right granted by Seller to Buyer to terminate this contract. [Title Company/Escrow Agent] will record the termination of contract and return the Earnest Money to Buyer on receipt of Seller's authorization.

J.1.b. To Seller. If Seller terminates this contract in accordance with any of Seller's rights to terminate, then unless Buyer delivers notice of Buyer's objection to [Title Company/Escrow Agent]'s release of the Earnest Money to Seller within five days after Seller delivers Seller's termination notice to Buyer and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Buyer, to pay and deliver the Earnest Money to Seller and to record the termination of contract. [Title Company/Escrow Agent] will record the termination of contract and pay the Earnest Money to Seller on receipt of Buyer's authorization.

J.2. Duties after Termination. If this contract is terminated, Buyer will promptly return to Seller all of Seller's Records in Buyer's possession or control. After return of the documents and copies, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract or that expressly survive termination of this contract.

K. Closing

K.1. Closing. This transaction will close at [Title Company/Escrow Agent]'s offices at the Closing Date and Closing Time. At Closing, the following will occur:

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K.1.a. Closing Documents. The parties will execute and deliver the Closing Documents.

K.1.b. Payment of Purchase Price. Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to [Title Company/Escrow Agent] in funds acceptable to [Title Company/Escrow Agent]. The Earnest Money will be applied to the Purchase Price.

K.1.c. Disbursement of Funds; Recording; Copies. [Title Company/Escrow Agent] will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the Groundwater Deed and the other Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties' written instructions.

K.1.d. Delivery of Originals. Seller will deliver to Buyer the originals of Seller's Records.

K.1.e. Possession. Seller will deliver possession of the Groundwater Rights to Buyer, subject to the Permitted Exceptions existing at Closing and any liens and security interests created at Closing to secure financing for the Purchase Price.

K.2. Transaction Costs

K.2.a. Seller's Costs. Seller will pay [the basic charge for the Title Policy/the cost of providing the Title Information as specified in this contract, if not previously paid by Seller]; one-half of the escrow fee charged by [Title Company/Escrow Agent]; the costs to prepare the Groundwater Rights Deed; the costs to obtain, deliver, and record any releases of liens or lender's consent; the costs to cure and record the documents to cure Title Objections agreed or required to be cured by Seller and to resolve matters [shown in Schedule C of the Title Commitment/raised in the Title Information]; the costs to obtain the UCC Search and certificates or reports of ad valorem taxes; the costs to deliver copies of the instruments described in para-

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graph A.4. above; any other costs expressly required to be paid by Seller in this contract; and Seller's attorney's fees and expenses.

K.2.b. Buyer's Costs. Buyer will pay one-half of the escrow fee charged by [Title Company/Escrow Agent]; the costs to obtain, deliver, and record all documents other than those to be obtained or recorded at Seller's expense; the costs to obtain financing of the Purchase Price, including the incremental premium costs of the loan title policy and endorsements and deletions required by Buyer's lender, if applicable; any other costs expressly required to be paid by Buyer in this contract; and Buyer's attorney's fees and expenses.

K.2.c. Taxes, Fees, and Assessments. At Closing, Seller will pay any ad valorem taxes and assessments, including penalties and interest (collectively, "Taxes"), in connection with the Real Property and the Groundwater Rights that are owing for prior calendar years. Seller will pay all Taxes in connection with the Real Property and Groundwater Rights for the current calendar year, if payable at the time of Closing. After Closing, Seller will continue to pay all Taxes due in connection with the Real Property before delinquency, except that if ad valorem taxes, if any, are assessed separately against Buyer's Groundwater Rights after Closing, Buyer will be responsible for paying such taxes and assessments if Buyer is obligated to pay such taxes under applicable law. After Closing, each party will have the right to protest taxes that the party is responsible for paying, provided that the protesting party does not allow the taxes to become delinquent.

After Closing, Buyer will be responsible for paying all fees, assessments, taxes, and charges of any kind imposed by the Groundwater Rights Authority, or any successor authority, in connection with the Groundwater Rights.

These provisions will survive Closing and will be set out in one or more of the Closing Documents.

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K.2.d. Income and Expenses. Except as provided in paragraph K.2.c. above, all items of expense, including fees paid to any Groundwater Authority, or income arising in connection with the use or operation of the Groundwater Rights will be prorated as of the Closing Date. Seller will pay all bills and expenses that could give rise to a lien against the Real Property or Groundwater Rights at or before Closing.

K.2.e. Postclosing Adjustments. If errors in the prorations made at Closing are identified within ninety days after Closing, Seller and Buyer will make postclosing adjustments to correct the errors within fifteen days of receipt of notice of errors.

K.2.f. Brokers' Commissions. Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney's fees, and court and other costs arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker's or finder's fee or commission because of this transaction or this contract, whether the claimant is disclosed to the indemnitee or not. At Closing, each party will provide the other party with a release of broker's or appraiser's liens from all brokers or appraisers for which each party was responsible.

K.3. Issuance of Title Policy. Seller will cause [Title Company/Escrow Agent] to issue the Title Policy, if required, to Buyer as soon as practicable after Closing.

L. Default and Remedies

L.1. Seller's Default; Remedies before Closing. If Seller fails to perform any of its obligations under this contract, or if any of Seller's representations are not true and correct as of the Effective Date or on the Closing Date or any of Seller's warranties have been breached ("Seller's Default"), Buyer may elect either of the following as its sole and exclusive remedy before Closing:

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L.1.a. Termination; Liquidated Damages. Buyer may terminate this contract by giving notice to Seller on or before the Closing Date and Closing Time and have the Earnest Money, less the $100 as described above, returned to Buyer. If Seller's Default occurs after Buyer has incurred costs to investigate the Real Property and Groundwater Rights after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer's actual out-of-pocket expenses incurred to investigate the Real Property and Groundwater Rights after the Effective Date ("Buyer's Expenses") or the amount of Buyer's Liquidated Damages, within ten days after Seller's receipt of an invoice from Buyer stating the amount of Buyer's Expenses accompanied by reasonable evidence of Buyer's Expenses.

L.1.b. Specific Performance. Unless Seller's Default relates to the untruth or incorrectness of Seller's representations for reasons not reasonably within Seller's control, Buyer may enforce specific performance of Seller's obligations under this contract, but any such action must be initiated, if at all, within ninety days after the breach or alleged breach of this contract. If title to the Groundwater Rights is awarded to Buyer, the conveyance will be subject to the matters stated in the [Title Commitment/Title Information].

L.2. Seller's Default; Remedies after Closing. If Seller's representations are not true and correct at Closing for reasons reasonably within Seller's control and Buyer does not become aware of the untruth or incorrectness until after Closing, Buyer will have all the rights and remedies available at law or in equity. If Seller fails to perform any of its obligations under this contract that survive Closing, Buyer will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.3. Buyer's Default; Remedies before Closing. If Buyer fails to perform any of its obligations under this contract ("Buyer's Default"), Seller may elect either of the following as its sole and exclusive remedy before Closing:

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L.3.a. Termination; Liquidated Damages. Seller may terminate this contract by giving notice to Buyer on or before Closing and have the Earnest Money paid to Seller. If Buyer's Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller's actual out-of-pocket expenses incurred after the Effective Date to perform its obligations under this contract ("Seller's Expenses") or the amount of Seller's Additional Liquidated Damages, within ten days after Buyer's receipt of an invoice from Seller stating the amount of Seller's Expenses accompanied by reasonable evidence of Seller's Expenses.

L.3.b. Specific Performance. Seller may enforce specific performance of Buyer's obligations under this contract. If title to the Groundwater Rights is awarded to Buyer, the conveyance will be subject to the matters stated in the [Title Commitment/Title Information].

L.4. Buyer's Default; Remedies after Closing. If Buyer fails to perform any of its obligations under this contract that survive Closing, Seller will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.5. Liquidated Damages. The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that the Earnest Money and the amounts provided above are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

L.6. Attorney's Fees. If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

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M. Miscellaneous Provisions

M.1. Notices. Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday; and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday. Any address for notice may be changed by not less than ten days' prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

M.2. Entire Agreement. This contract, its exhibits, and any Closing Documents delivered at Closing are the entire agreement of the parties concerning the sale and use of the Groundwater Rights and the use of the Real Property. There are no representations, warranties, agreements, or promises between the parties pertaining to the Groundwater Rights and Real Property, sale and use of the Groundwater Rights, or use of the Real Property, and neither party is relying on any statements or representations of any agent of the other party, that are not in those documents.

M.3. Amendment. This contract may be amended only by an instrument in writing signed by the parties.

Select one of the following.

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M.4. Prohibition of Assignment. Buyer may not assign this contract or any of Buyer's rights under it without Seller's prior written consent, and any attempted assignment is void.

Or

M.4. Assignment. Buyer may assign this contract and Buyer's rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void.

Continue with the following.

M.5. Survival. The provisions of this contract that expressly survive termination or Closing and other obligations of this contract that cannot be performed before termination of this contract or before Closing survive termination of this contract or Closing, and the legal doctrine of merger does not apply to these matters. If there is any conflict between the Closing Documents and this contract, the Closing Documents control.

M.6. Choice of Law; Venue. This contract is to be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county in which the Real Property out of which the Permit is derived is located.

M.7. Waiver of Default. It is not a waiver of default if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

M.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this contract.

M.9. Severability. If a provision of this contract is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the

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unenforceability does not affect any other provision of this contract, and this contract is to be construed as if the unenforceable provision is not a part of the contract.

M.10. Ambiguities Not to Be Construed against Party Who Drafted Contract. The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this contract.

M.11. No Special Relationship. The parties' relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

M.12. Counterparts. If this contract is executed in multiple counterparts, all counterparts taken together constitute this contract. Copies of signatures to this contract are effective as original signatures.

M.13. Confidentiality. The parties will keep confidential this contract, this transaction, and all information learned in the course of this transaction, except to the extent disclosure is required by law or court order, to enable third parties to advise or assist Buyer to investigate the Groundwater Rights and the Real Property, or by either party to close this transaction. Remedies for violations of this provision are limited to injunctions and no damages or rescission may be sought or recovered as a result of any such violations.

M.14. Binding Effect. This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

Include the following only if the buyer has agreed to waive its rights under the DTPA.

M.15. Waiver of Consumer Rights. BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 *ET SEQ.* OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS

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AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

Continue with the following.

_____

[**Name and title of seller**]
Date:

_____

[**Name and title of buyer**]
Date:

[Title Company/Escrow Agent] acknowledges receipt of Earnest Money in the amount of $_____ and a copy of this contract executed by both Buyer and Seller.

[**Name of title company/escrow agent**]
By:_____
Name:
Title:
Date:

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Exhibit A

Description of the Real Property

Include legal description of the land.

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Exhibit B

Seller's Representations and Warranties

A. Seller's Representations to Buyer

Seller represents and warrants to Buyer that the following are true and correct as of the Effective Date and will be true and correct as of the Closing Date:

> If the seller is an individual or is acting in a representative capacity, some of the items should be modified.

A.1. Authority. Seller is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this contract.

A.2. Litigation. Seller has not received written notice and has no actual knowledge of any litigation pending or threatened against Seller that might affect the Groundwater Rights, the Real Property, or Seller's ability to perform its obligations under this contract [**include if applicable:** , except [**specify**]].

A.3. Violation of Laws. Seller has not received written notice of violation of any law, ordinance, regulation, or requirements affecting the Real Property, the Groundwater Rights, or Seller's use of the Real Property or Groundwater Rights [**include if applicable:** , except [**specify**]].

A.4. Licenses, Permits, and Approvals. Seller has not received written notice that any license, permit, or approval necessary to use the Groundwater Rights in the manner in which they are currently used has expired or will not be renewed on expiration or that any material condition will be imposed in order to use such permit or license or obtain its renewal [**include if applicable:** , except [**specify**]].

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A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Seller has not received written notice of any condemnation, zoning, or land-use proceedings affecting the Real Property or the Groundwater Rights or any written inquiries or notices by any governmental authority or third party with respect to condemnation or the presence of hazardous materials affecting the Real Property or the Groundwater Rights [**include if applicable:** , except [**specify**]].

A.6. No Other Obligation to Sell or Restriction against Sale. Seller has not obligated itself to sell all or any portion of the Real Property or the Groundwater Rights to any person other than Buyer. Seller's performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound [**include if applicable:** , except [**specify**]].

A.7. No Liens. On the Closing Date, the Groundwater Rights to be conveyed under the contract will be free and clear of all liens and encumbrances of any nature not arising by, through, or under Buyer except the Permitted Exceptions or liens to which Buyer has given its consent in writing.

A.8. No Rights of Possession or Use. There are no persons presently in possession of the Real Property or the Groundwater or having any rights to possession of the Real Property or the Groundwater or rights, either present or future, to explore for, use, produce, or withdraw the Groundwater other than Seller [**include if applicable:** , except [**specify**]].

A.9. Good Title. Seller has good and indefeasible fee simple title to the Real Property and the Groundwater Rights, free and clear of all mortgages, liens, licenses, encumbrances, leases, tenancies, security interests, covenants, conditions, restrictions, rights-of-way, easements, judgments, and other matters affecting title [**include if applicable:** , except [**specify**]].

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A.10. No Bills or Claims. There will be no unpaid bills or claims in connection with any repair or work performed or material furnished to the Real Property or otherwise relating to the Groundwater Rights for the benefit of Seller as of the Closing Date, and all bills attributable to or affecting the Groundwater Rights and the Real Property will be paid by Seller in full before Closing.

A.11. No Adverse Matters. To the best of Seller's knowledge, there is no (a) change contemplated in any applicable laws, ordinances, or restrictions, including the rules of the Groundwater Authority; (b) judicial or administrative action threatened or pending against the Real Property, the Groundwater Rights, or Seller; or (c) action by adjacent landowners pending or threatened against the Real Property, the Groundwater Rights, or Seller.

A.12. Compliance with Laws. Seller has at all times complied with and operated in compliance with all applicable federal, state, and local laws, regulations, and ordinances regarding the Real Property and the Groundwater Rights, including rules of the Groundwater Authority. Seller will promptly notify Buyer of any noncompliance notice received by Seller.

B. "As Is, Where Is"

THIS CONTRACT IS AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT THOSE IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

SELLER DISCLAIMS ALL WARRANTIES AND REPRESENTATIONS REGARDING THE QUANTITY, QUALITY, OR RELIABILITY OF THE GROUNDWATER OR THE AVAILABILITY NOW OR IN THE FUTURE OF AMENDMENTS TO THE PERMIT NECESSARY FOR BUYER TO USE THE GROUNDWATER FOR ANY PURPOSE. SELLER FURTHER DISCLAIMS ALL WARRANTIES AND REPRESENTATIONS WITH RESPECT TO THE FITNESS OF THE GROUNDWATER FOR ANY PARTICULAR USE.

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[**Include if applicable:** BUYER ACKNOWLEDGES THAT THE LOCAL GROUNDWATER DISTRICT'S RULES AND REGULATIONS OR PERMITTING DECISIONS MAY LIMIT THE VOLUME OF GROUNDWATER PRODUCED FROM THE REAL PROPERTY AND THE PURPOSE OR PLACE OF ITS USE, AS WELL AS THE LOCATION OF ANY WELL, ITS DEPTH, OR RATE OF PRODUCTION.]

BUYER IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS. BUYER IS NOT RELYING ON ANY INFORMATION REGARDING THE GROUNDWATER OR THE REAL PROPERTY PROVIDED BY ANY PERSON, OTHER THAN BUYER'S OWN INSPECTION AND THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

The provisions of this section B. regarding the Groundwater Rights [will/will not] be included in the Groundwater Rights Warranty Deed with appropriate modification of terms as the context requires.

C. Buyer's Representations to Seller

Buyer represents to Seller that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date:

> If the buyer is an individual or is acting in a representative capacity, some of the items should be modified.

C.1. Authority. Buyer is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this contract. This contract is binding on Buyer. This contract is, and all documents required by this contract to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Buyer.

> Include other representations from the buyer to the seller as needed.

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Exhibit C

Seller's Records

To the extent that Seller has possession or control of the following items pertaining to the Real Property or Groundwater Rights, Seller will deliver or make the items or complete, legible, and accurate copies of them available to Buyer by the deadline stated in paragraph A.6.:

Select items as agreed by the parties.

Records and Reports

governmental licenses, certificates, permits, and approvals, specifically including Seller's Permit and any other information related to the Permit, including but not limited to a copy of Seller's application for the Permit

current tax certificate showing taxes assessed and owed against the Real Property and any tax exemption, special use, or other valuation or exemption applicable to the Real Property

records of regulatory proceedings or violations regarding the Real Property or Groundwater Rights

any survey of all or any portion of the Real Property

abstracts of title or prior title policies relating to the Real Property or Groundwater Rights

groundwater production records

other: [**specify**]

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Leases, Licenses, Agreements, and Encumbrances

all leases, licenses, agreements, and encumbrances (including all amendments and exhibits) affecting title to or use of the Real Property or Groundwater Rights that have not been recorded in the real property records of the county or counties in which the Real Property is located

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Exhibit D

Notices, Statements, and Certificates

Certain notices must be contained in the contract and others must be provided as separate notices. Please refer to the statutory requirements for each notice.

The notices, statements, and certificates (arranged by their application to particular transactions) that are listed below are [**include as applicable:** included in the sales contract/ [and] attached for delivery to Buyer], and Buyer acknowledges receipt of the notices, statements, and certificates by executing this contract:

Include one or more of the following paragraphs as applicable and modify section headers and paragraph numbers as appropriate.

A. Consumer Notices

Notice of Cancellation. Notice concerning the purchaser's three-day right of rescission under a contract to purchase real property if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business; (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property, as described in chapter 601 of the Texas Business and Commerce Code.

If applicable, attach form 4-5 in this manual to the end of this exhibit D.

And/Or

B. Residential Transaction Notices

B.1. Seller's Disclosure of Property Condition. Seller's disclosure of the condition of residential property, described in section 5.008 of the Texas Property Code.

If applicable, attach the full text of Tex. Prop. Code § 5.008, with all relevant information filled in, to the end of this exhibit D.

And/Or

B.2. Notice of Membership in Property Owners Association. Notice concerning the sale of single-family residential property that is subject to membership in a property owners association, described in section 5.012 of the Texas Property Code.

If applicable, attach form 23-8 to the end of this exhibit D.

And/Or

B.3. Seller's Disclosure of Location of Conditions under Surface of Unimproved Real Property. Seller's disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.013 of the Texas Property Code. A seller of unimproved property to be used for residential purposes shall provide the purchaser written notice disclosing the location of any transportation pipeline to the best of the seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known by the seller, the seller shall indicate that fact in the notice. A seller is not required to give this notice if (a) the seller is obligated under the terms of the contract to furnish a title insurance commitment to the buyer before closing and (b) the buyer is entitled to terminate the contract if the buyer's objections to title as permitted by the contract are not cured by the seller before closing.

No form is provided, because the sales contract portion of this form 16-9 satisfies the provisions for exemption from disclosure.

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And/Or

B.4. Notice of Obligation to Pay Public Improvement District Assessment. Seller's disclosure that a single-family residential property is located within a public improvement district, described in section 5.014 of the Texas Property Code.

If applicable, attach form 4-6 to the end of this exhibit D.

And/Or

B.5. Residential Contracts for Deed. Notice regarding the sale of property used or to be used as the purchaser's residence if the contract does not provide for delivery of a deed from the seller to the purchaser within 180 days after the final execution of the contract.

See Tex. Prop. Code §§ 5.069–.074.

And/Or

B.6. Notice Regarding Insulation to Buyer of New Home. Notice concerning insulation to be installed in a new home, described in section 460.16 of title 16 of the Code of Federal Regulations.

If applicable, attach form 4-7 to the end of this exhibit D.

And/Or

B.7. Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. Lead-based paint warning statement, described in section 745.100 *et seq.* of title 40 of the Code of Federal Regulations.

If applicable, attach form 4-8 to the end of this exhibit D.

And/Or

B.8. Asbestos Disclosure Notice. Notice concerning asbestos, described in sections 1910.1001 and 1926.1101 of title 29 of the Code of Federal Regulations.

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If applicable, attach form 4-9 to the end of this exhibit D.

And/Or

B.9. Notice Regarding Sale Subject to a Recorded Lien. Notice to the purchaser and each lienholder required under Texas Property Code section 5.016 that property being sold will be conveyed subject to a lien.

If applicable, attach form 4-10 to the end of this exhibit D.

And/Or

C. Condominium Transaction Notices

C.1. Acknowledgment of Receipt of Condominium Documents. Condominium declaration, bylaws, and association rules, described in section 82.156 of the Texas Property Code.

If applicable, attach form 24-8 to the end of this exhibit D.

And/Or

C.2. Condominium Resale Certificate. Resale certificate from the condominium owners association or waiver of resale certificate, described in section 82.157 of the Texas Property Code.

If applicable, attach condominium resale certificate promulgated by the Texas Real Estate Commission, available at **www.trec.texas.gov/forms/condominium-resale-certificate**, or form 24-7 (waiver of condominium resale certificate) to the end of this exhibit D.

And/Or

D. All Real Property Transaction Notices

D.1. Storage Tanks Disclosure Provider. Notice concerning underground storage tanks, described in section 334.9 of title 30 of the Texas Administrative Code.

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If applicable, attach form 4-11 to the end of this exhibit D.

And/Or

D.2. Notice to Purchaser Regarding Restrictive Covenants. Notice of deed restrictions, described in section 212.155 of the Texas Local Government Code.

If applicable, attach form 4-12 to the end of this exhibit D.

And/Or

D.3. Notice to Purchaser Regarding Coastal Area Property. Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code.

If applicable, attach form 4-13 to the end of this exhibit D.

And/Or

D.4. Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway. Notice concerning public easements to the public beach, described in section 61.025 of the Texas Natural Resources Code.

If applicable, attach form 4-14 to the end of this exhibit D.

And/Or

D.5. Notice Regarding Possible Liability for Additional Taxes. Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code.

If applicable, attach form 4-15 to the end of this exhibit D.

And/Or

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D.6. Notice Regarding Possible Annexation. Notice concerning the sale of property located outside the limits of a municipality that may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality, described in section 5.011 of the Texas Property Code.

If applicable, attach form 4-16 to the end of this exhibit D.

And/Or

D.7. Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider. Notice for property in a certificated service area of a utility service provider, described in section 13.257 of the Texas Water Code.

If applicable, attach form 4-17 to the end of this exhibit D.

And/Or

D.8. Utility District Notice. Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in section 49.452 of the Texas Water Code, with the form of notice to be used being dependent on whether the property (a) is located in whole or in part within the extraterritorial jurisdiction of one or more home-rule municipalities but is not located within the corporate boundaries of a municipality, (b) is located in whole or in part within the corporate boundaries of a municipality, or (c) is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities.

If applicable, attach form 4-18 to the end of this exhibit D.

And/Or

D.9. Notice to Purchaser of Property Located in Certain Annexed Water Districts. Notice required by section 54.016(h)(4)(A) of the Texas Water Code when property being sold is in a water or sanitary sewer district that entered a contract with a city with a

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population of 1.18 million or less under which the city is permitted to set rates in the district after annexation that are different from rates charged other residents of the city.

If applicable, attach form 4-19 to the end of this exhibit D.

And/Or

D.10. Notice to Purchaser that Property Is Located within the Area of the Alignment of a Transportation Project. Notice required under Texas Local Government Code section 232.0033 that all or part of the subdivision in which the property being sold is located is within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to a future transportation corridor identified in a contract between the Texas Department of Transportation and a county under Texas Transportation Code section 201.619.

If applicable, attach form 4-20 to the end of this exhibit D.

And/Or

D.11. Certificates of Mold Remediation. Notice pursuant to section 1958.154 of the Texas Occupations Code, titled "Certificate of Mold Remediation; Duty of Property Owner," requiring a property owner who sells property that has been issued a certificate of mold remediation pursuant to this section to deliver copies to the purchaser of each certificate of mold remediation issued for the property within the preceding five years.

And/Or

D.12. Notice of Water Level Fluctuations. Notice to purchasers of residential or commercial property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Texas Water Code chapter 11, that has storage capacity of at least 5,000 acre-feet at the impoundment's normal level, provided pursuant to Texas Property Code section 5.019.

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If applicable, attach form 4-21 to the end of this exhibit D.

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Exhibit E

Seller Financing Addendum

A. Promissory Note. The promissory note ("Note") will be payable by Buyer ("Maker") to the order of Seller ("Payee") at the place designated by Payee. The Note may be prepaid in whole or in part at any time without penalty, premium, or restriction of any kind. Any prepayments are to be applied to the payment of the installments of principal last maturing, and interest will immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in the contract. The Note will be payable as follows:

Select one of the following.

In one payment due [**number**] days after the date of the Note with interest payable [at maturity/monthly/quarterly/annually].

Or

In [**number**] installments of $[**amount**] each [including interest/plus interest] beginning [**number**] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [**date**], when the entire balance of the Note will be due and payable.

Or

Interest only in [**number**] installments for the first [**number**] year[s] and thereafter in [**number**] installments of $[**amount**] each [including interest/plus interest] beginning [**number**] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [**date**], when the entire balance of the Note will be due and payable.

Or

Other: [**specify**].

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Continue with the following.

B. Deed of Trust and Security Agreement. The deed of trust and security agreement ("Deed of Trust") securing the Note will provide for the following:

Select one of the following.

B.1. Assumption without Consent. The Property may be sold, transferred, or conveyed without the consent of Payee, provided any subsequent buyer or transferee assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property.

Or

B.1. Assumption with Consent. The Property may be sold, transferred, or conveyed provided that (a) any subsequent buyer assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments and (b) Maker or the subsequent buyer obtains prior written consent to such a sale from Payee. Consent will be based on the subsequent buyer's credit history, with no change in interest rate or terms, and may not be unreasonably withheld, conditioned, or delayed. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. If all or any part of the Property is sold, conveyed, leased for a period longer than three years, leased with an option to purchase, otherwise sold (including by contract for deed), or otherwise transferred or conveyed without prior written consent of Payee, Payee may, at Payee's sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by

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reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. [Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property./The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Property.]

Or

B.1. Prohibition against Assumption. If all or any part of the Property is sold, transferred, or conveyed without the prior written consent of Payee, Payee may, at Payee's sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Payee has no obligation to consent to any such sale or conveyance of the Property, and Payee is entitled to condition any consent on a change in the interest rate that will thereafter apply to the Note and any other change in the terms of the Note or Deed of Trust that Payee in Payee's sole discretion deems appropriate. A lease for a period longer than three years, a lease with an option to purchase, or a contract for deed will be deemed to be a sale, transfer, or conveyance of the Property for purposes of this provision. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Property.

Continue with the following.

B.2. Cross-Default. Any act or occurrence that would constitute a default under the terms of any lien superior to the lien securing the Note will constitute a default under the Deed of Trust securing the Note.

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C. Recourse Provisions. The Note and Deed of Trust are subject to the following provisions:

Select one of the following.

Full Recourse. Maker will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Maker in the Deed of Trust.

Or

No Recourse. Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. The sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker.

Continue with the following.

_____

Buyer/Maker

_____

Seller/Payee

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Exhibit F

Memorandum of Contract

Attach a memorandum of contract if applicable. See form 16-16 in this chapter.

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Exhibit G

Notice of Termination of Contract

Attach a notice of termination of contract if applicable. See form 16-17 in this chapter.

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Form 16-10

Groundwater Rights Warranty Deed

[For Sale of Permitted Groundwater Rights for Off-Site Production]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Groundwater Authority: [**list any groundwater conservation districts or other groundwater authority with jurisdiction over the real property**]

Consideration:

See form 5-6 in this manual for consideration clauses.

Real Property: [**describe real property from which groundwater rights will be obtained**]

Groundwater Rights: Seller's perpetual right to withdraw up to [**number**] acre-feet per year of [**name**] Aquifer permitted [irrigation/industrial/[and/or] municipal] groundwater (the "Groundwater") relating to the Real Property. The Groundwater Rights include all of the real and personal property rights, appurtenances, hereditaments, licenses, and contracts, if any, related to or pertaining to the Groundwater, including Permit[s] No[s]. [**number[s]**] [**include if recorded:** , recorded in Volume [**number**], Page [**number**], of the Offi-

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cial Public Records of [**county**] County, Texas] (the "Permit"), as amended or modified, as applicable, insofar as it pertains to the Groundwater Rights, including, but not limited to—

1. all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights (the "Appurtenant Rights");

2. all permit rights (including the right in and to the Permit that relates to the Groundwater Rights) allowing for possession, withdrawal, or use of the Groundwater Rights (the "Permit Rights"); and

3. all other rights to withdraw and beneficially use the Groundwater, Appurtenant Rights, Permit, or Permit Rights, together with all modifications, amendments, renewals, extensions, or successor or substitute permits relating to any of the above-described items.

Reservations from Conveyance:

1. Notwithstanding anything herein contained to the contrary, it is understood and agreed that Grantee or its successors or assigns will not enter upon or use the surface of the Real Property for conducting any surface or drilling operations related to the Groundwater Rights.

2. Any beneficial use of the Groundwater Rights from the Real Property will be by way of transfer of the permitted withdrawal rights to a withdrawal point on other lands.

> To create additional reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:

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1. Any existing limitations, restrictions, applicable rules, or other conditions now in effect or that may be adopted or imposed by the Groundwater Authority, including but not limited to the limitations and conditions to the rights to withdraw and beneficially use Groundwater Rights as recited in the Permit.

2. Any physical aspect of the water including but not limited to: availability, existence, utility, recoverability, source, quality, condition, potability, chemistry, or other characteristics of water, if any, lying on, under, or over the land or lands or that may be produced or used from the land or lands.

3. Lack of a right of access.

4. All groundwater rights from any formations or aquifers under the Real Property other than the [**indicate aquifer or groundwater rights formation**] formation. This conveyance is limited to Groundwater Rights from the [**indicate aquifer or groundwater rights formation**] formation.

5. Any subsequent decrease in the amount of water available for withdrawal under the Permit or the portion conveyed to Grantee that is the result of any pro rata reduction applied to all holders of Permits for withdrawal of Groundwater Rights by the Groundwater Authority or any governmental entity with authority to restrict Groundwater Rights withdrawals.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Groundwater Rights, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Groundwater Rights to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any

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part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

Groundwater Authority fees on the use of the Groundwater Rights, if any, before the date of this Deed will be paid by Grantor; subsequent Groundwater Authority fees for the Groundwater Rights or Permit are the responsibility of Grantee.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

_____

[Name of grantee]

Include acknowledgments.

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Form 16-11

Partial Release of Lien

[Water Rights Off-Site Production]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Owner of Groundwater Rights:

Owner's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Note and Lien Are Described in the Following Documents: [**include recording information**]

Real Property: [**describe real property from which groundwater rights will be obtained**]

Groundwater Rights: Seller's perpetual right to withdraw up to [**number**] acre-feet per year of [**name**] Aquifer permitted [irrigation/industrial/[and/or] municipal] groundwater (the

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"Groundwater") relating to the Real Property. The Groundwater Rights include all of the real and personal property rights, appurtenances, hereditaments, licenses, and contracts, if any, related to or pertaining to the Groundwater, including Permit[s] No[s]. [**number[s]**] [**include if recorded:** , recorded in Volume [**number**], Page [**number**], of the Official Public Records of [**county**] County, Texas] (the "Permit"), as amended or modified, as applicable, insofar as it pertains to the Groundwater Rights, including, but not limited to—

1. all of the real and personal property rights, appurtenances, authorities, licenses, consents, and contracts, if any, relating to or pertaining to the Groundwater, which will also include all common-law property rights in and to the Groundwater as well as those rights or interests that now or in the future may be useful or necessary to withdraw or otherwise beneficially use the Groundwater Rights (the "Appurtenant Rights");

2. all permit rights (including the right in and to the Permit that relates to the Groundwater Rights) allowing for possession, withdrawal, or use of the Groundwater (the "Permit Rights"); and

3. all other rights to withdraw and beneficially use the Groundwater, Appurtenant Rights, Permit, or Permit Rights, together with all modifications, amendments, renewals, extensions, or successor or substitute permits relating to any of the above-described items.

Property to Be Released from Lien: the Groundwater Rights.

For value received, Holder of Note and Lien releases only the Groundwater Rights from Lien and from all liens held by Holder of Note and Lien, without regard to how they were created or evidenced.

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When the context requires, singular nouns and pronouns include the plural.

_____

[Name of lienholder]

By:

_____

[Name of representative]

_____

[Title]

Include acknowledgment.

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Form 16-12

Permit Transfer Request

[**Date**]

[**Name and address of groundwater authority**]

Re: Application for Transfer of Ownership of [**permit title**] Permit No. [**number**] (the "Permit")

[**Salutation**]

I am the current owner of the groundwater rights in the land located within the [**name of groundwater authority**] (the "Groundwater Authority") and the owner of the Permit. I have entered into a contract with [**name of buyer**] ("Buyer") to sell Buyer my entire ownership interest in the water rights that are the subject of the Permit. By this letter, I am requesting that the Groundwater Authority transfer the Permit to reflect Buyer's purchase of my ownership interest, with the express condition that the transfer be "effective on the date of closing of Buyer's purchase of the ownership interest in the water rights that are the subject of the permit referenced above." I understand that following closing Buyer will provide to the Groundwater Authority appropriate documentation of the purchase.

Because Buyer is requiring issuance of a satisfactory permit from the Groundwater Authority in connection with closing, I request your prompt attention to this matter. If you have questions or require additional information regarding this application, please [**describe contact information, e.g.,** call my office at [**telephone number**]].

_____

[**Name of grantor**], Permittee

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Form 16-13

Affidavit of Debts and Liens [and Indemnity]

Date:

Contract of Sale

Date:

Seller:

Buyer:

Property:

Permit No.: [**include specific reference to all surface water permits and groundwater permits associated with the property**]

Affiant:

Lender:

Title Insurance Provider

Agent:

Underwriter:

Include the following if applicable.

Commitment for Title Insurance

GF#:

Issuance Date [and Time]:

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Continue with the following.

Closer:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. Affiant is [Seller/[the president/an authorized partner/a general partner/[**describe other representative capacity**] of Seller]] and authorized to make this affidavit [on behalf of Seller].

2. Seller is the owner of [an undivided interest in] the Property [**include if applicable:** together with the other persons identified above as Seller] and Permit No. [**number**].

3. Seller has performed its obligations under the Contract by [**include as applicable:** providing Buyer with copies of or access to all records required to be furnished to Buyer/ terminating all lease, service, or maintenance agreements required to be terminated/obtaining the release of all liens, security instruments, and encumbrances required to be released/ [**describe other obligations**]].

4. Seller has not granted any rights or interests in the Property during the pendency of the Contract, and there are no leases, contracts to sell the Property, or parties in possession of the Property [**include if applicable:** , except [**specify**]].

5. Seller has made no improvements to the Property that have not been fully paid for or that could give rise to any mechanic's and materialman's liens or adverse claims [**include if applicable:** , except [**specify**]].

6. Seller has not received notice of any adverse claim, violation of applicable law, notice of default, notice of intent to condemn, or threatened lawsuit or proceeding that could

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adversely affect the Property or Buyer's rights in the Property or Permit No. [**number**] [**include if applicable:** , except [**specify**]].

7. There are no unpaid debts, judgments, liens, or obligations affecting the Property [**include if applicable:** , except [**specify**]].

8. Seller has paid all fees and filed all reports required by the [Texas Commission on Environmental Quality/[**name of applicable groundwater authority**]], and there are no outstanding deficiencies or violations related to Permit No. [**number**].

9. Affiant acknowledges that this affidavit is made to induce Buyer to purchase the Property [**include as applicable:** [and/,] Lender to make a loan to Buyer secured by the Property/[and/,] Title Insurance Provider to insure title to the Property subject only to the exceptions shown in Schedule B of the Commitment for Title Insurance/[and] Closer to close this transaction].

Include the following if applicable.

10. The representations and warranties set out in the Contract are still true and correct [**include if applicable:** , except [**specify**]].

Include the following if applicable.

11. The indemnification obligations set out in the Contract are hereby acknowledged and confirmed.

Continue with the following.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

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Notary Public, State of Texas

Include the following if applicable.

Indemnity

For valuable consideration, [Affiant/Seller] indemnifies and agrees to defend and hold Buyer [and [Lender/Title Insurance Provider/Closer]] harmless from all losses, damages, judgments, and expenses, including attorney's fees and court and other costs, that Buyer [and [Lender/Title Insurance Provider/Closer]] suffer[s], incur[s] or pay[s] because any part of this Affidavit is not true or completely correct.

[**Name of affiant or seller**]

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Form 16-14

Assignment and Assumption of Lease

[Water Rights]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Assignor:

Assignor's Mailing Address:

Assignee:

Assignee's Mailing Address:

[Real Property:]

Water Rights:

Lease

Date:

Lessor:

Lessor's Address:

Lessee:

Lessee's Address:

Amendments:

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Consideration:

Assignor is conveying the Water Rights to Assignee by warranty deed dated this date.

Assignor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Lease, assigns to Assignee all of Assignor's right, title, and interest in and to the Lease. Assignor binds Assignor and Assignor's heirs and successors to warrant and forever defend all and singular Lessor's interest in the Lease to Assignee and Assignee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof [**include if applicable:** when the claim is by, through, or under Assignor but not otherwise], except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Lease.

Assignee assumes and agrees to perform Lessor's obligations under the Lease arising after this date. The obligation to repay security and prepaid rental deposits to Lessee under the Lease is limited to the amount of cash delivered or credited by Assignor to Assignee with respect to security and prepaid rental deposits. Assignee will indemnify, defend, and hold Assignor harmless from any loss, attorney's fees, expenses, or claims arising out of or related to Assignee's failure to perform any of the obligations of Lessor under the Lease after this date.

Assignor will indemnify, defend, and hold Assignee harmless from any loss, attorney's fees, expenses, or claims arising out of or related to Assignor's failure to perform any of the obligations of Lessor under the Lease before this date.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of assignor]

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_____

[**Name of assignee**]

Include acknowledgments. Attach exhibits.

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Form 16-15

Lessee Estoppel Certificate
[Water Rights]

Date:

Lease

Date:

Lessor:

Lessee:

Water Rights:

Amendments:

Addressee:

Lessee certifies to Addressee that—

1. Lessee has accepted and is in possession of the Water Rights.

2. All requirements under the Lease required to be performed through the date of this certificate have been completed to the satisfaction of Lessee.

3. Neither Lessor nor Lessee is in default in the performance of the Lease.

4. The current rent is [**amount**] dollars ($[**amount**]) per [**term**] payable [**describe due date, e.g.,** on the first of the month], and has been paid through [**date**]. The next payment is due on [**date**]. No rent under the Lease has been paid more than thirty days in advance of its due date.

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5. The Lease term ends on [**date**], and Lessee has no right or option to purchase all or any part of the Water Rights.

6. Lessee has not paid a security or other deposit with respect to the Lease except as follows: [**describe**].

7. Lessee has not given Lessor written notice of any dispute between Lessor and Lessee, and Lessee has no knowledge of any event that, with the giving of notice, the passage of time, or both, would constitute a default by Lessor under the Lease.

8. Lessee has not assigned the Lease in whole or in part.

9. The Lease is valid, enforceable, and unmodified except for the Amendments.

10. Lessee understands that Addressee is relying on the representations in this certificate.

Include the following if applicable.

11. Lessee will give Addressee written notice of any default by Lessor under the Lease that would entitle Lessee to terminate the Lease and sixty days in which to cure the default before taking action to terminate the Lease.

Include the following if applicable.

12. Lessee has notice that Lessor's interest in the Lease, the rents, and all other sums due in connection with the Lease have been or will be assigned to Addressee as security for a loan. The loan documents authorize Addressee to obtain rents directly from Lessee if Lessor defaults on the loan, and Lessee agrees that it will pay the rent directly to Addressee on receipt of a written request by Addressee.

Include the following if applicable.

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13. In the event that Addressee succeeds to the interest of Lessor or any successor to Lessor, then Lessee hereby agrees to attorn to and accept Addressee and to recognize Addressee as its Lessor under the Lease for the remaining term and at Lessor's request will sign and deliver an attornment agreement to Lessor.

Continue with the following.

_____

[Name of lessee]

By _____

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Form 16-16

Memorandum of Contract

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Contract: [Groundwater Rights Sale Contract/Surface Water Rights Sale Contract]

Date:

Seller:

Buyer:

Description of Water Rights:

This Memorandum of Contract is given to evidence Buyer's right to acquire the Water Rights pursuant to the terms of the Contract. Buyer and Seller will execute a notice of termination of the Contract if the Contract is terminated before completion of the sale.

Buyer:

_____

[**Name of buyer**]

STATE OF TEXAS

COUNTY OF [**county**]

This instrument was acknowledged before me on [**date**] by [**name**].

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_____

Notary Public, State of Texas

Seller:

_____

[**Name of seller**]

STATE OF TEXAS

COUNTY OF [**county**]

This instrument was acknowledged before me on [**date**] by [**name**].

_____

Notary Public, State of Texas

After recording, return to:
[**name and address**]

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Form 16-17

Notice of Termination of Contract

[Water Rights]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Contract: [Groundwater Rights Sale Contract/Surface Water Rights Sale Contract]

Date:

Seller:

Buyer:

Description of Water Rights:

This Notice of Termination of Contract is given to evidence the termination of the Contract, which is more fully described in that Memorandum of Contract recorded under Document No. [**number**] in the Official Public Records of [**county**] County, Texas.

Seller and Buyer hereby agree that the Contract was terminated before completion of the sale, and Seller is the owner of the Water Rights free from any claims by Buyer.

Buyer:

_____

[**Name of buyer**]

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STATE OF TEXAS

COUNTY OF [**county**]

This instrument was acknowledged before me on [**date**] by [**name**].

_____

Notary Public, State of Texas

Seller:

_____

[**Name of seller**]

STATE OF TEXAS

COUNTY OF [**county**]

This instrument was acknowledged before me on [**date**] by [**name**].

_____

Notary Public, State of Texas

After recording, return to:
[**name and address**]

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Form 16-18

This form is for the sale of surface water rights when water rights have already been severed from the land or when water rights are to be severed from the land to which they are appurtenant. The form should be modified as appropriate.

Surface Water Rights Sales Contract

Permit/Certificate of Adjudication No[s].

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

This contract to buy and sell surface water rights is between Seller and Buyer as identified below and is effective on the date ("Effective Date") of the last of the signatures by Seller and Buyer as parties to this contract and by [Title Company/Escrow Agent] to acknowledge receipt of the [Initial] Earnest Money. Buyer must deliver the [Initial] Earnest Money and obtain a signature acknowledging receipt of the [Initial] Earnest Money before the [Initial] Earnest Money Deadline provided in paragraph A.1. below for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller:

Address:

Phone:

E-mail:

Type of entity:

Seller's Attorney:

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Law firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer's Attorney:

Law firm:

Address:

Phone:

E-mail:

Include the following if applicable.

Surveyor:

Survey Category:

Continue with the following.

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[Title Company/Escrow Agent]: [**identify title company, or if title insurance will not be obtained, identify person who will act as escrow agent**]

Address:

Phone:

E-mail:

[Underwriter:]

Water [Authority/Authorities]: The Texas Commission on Environmental Quality (TCEQ) and [**list any other applicable agencies or governmental bodies or authorities having jurisdiction over the administration of the water rights, e.g., a watermaster or other river or basin water authority**]

Seller's Permit/Certificate of Adjudication No[s].: [**list all permits and certificates of adjudication, including numbers, that are the subject of the sale and attach copies of each together with all amendments thereto as exhibit A**]

Appurtenant Land: [**provide legal description of any land to which the water rights are appurtenant or attach field notes as exhibit B**]

Buyer's Intended Use of Water Rights:

Water Rights: Seller's Permit/Certificate of Adjudication No[s]. [**number[s]**]

Select one of the following.

All right, title, and interest in and to Permit/Certificate No. [**number**] as amended, dated [**date**], issued by the TCEQ to [**name of seller**], concerning the right to appropriate surface waters of the state of Texas in the [**identify water body**] for [**purpose, e.g., irrigation, municipal, industrial, recreational purposes**] (the "Permit/Certificate").

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Or

The following portion of the Water Rights: [**specify portion being sold, such as number of acre-feet authorized to be diverted**]

[**Include if applicable:** These Water Rights are currently appurtenant to the Appurtenant Land, but will be amended to change the [**include as applicable:** place of use/place of appropriation/purpose of use/point of diversion/[**other provision for which amendment of the current certificate is sought**]] from [**describe place of use, place of appropriation, purpose of use, point of diversion, or other provision in the current certificate for which amendment is sought, as applicable**] to [**describe place of use, place of appropriation, purpose of use, point of diversion, or other amendment to the water right sought by buyer**] [**include if applicable:** and to sever the Water Rights from the Appurtenant Land in the Permit/Certificate to make the water rights appurtenant to the land described on Exhibit [**exhibit number/letter**] attached to this contract]].

Include the following if the water rights are within the Rio Grande and are allocated on an account basis, and attach the TCEQ Rio Grande Water Division Monthly Report statements for the applicable period as an exhibit at the end of this contract.

Seller's Current Year Water Allocation: The amount of water allocated to Seller by the Rio Grande Watermaster for the year beginning January 1, [**year**], and ending December 31, [**year**], as more fully described in Exhibit [**exhibit number/letter**]. The Seller's Water Rights being sold and conveyed to Buyer will include [all/[**describe portion**]] of the Seller's Current Year Water Allocation.

Include the following if the water rights are subject to a watermaster program.

Water Rights Assessments: The amount assessed by the TCEQ for the watermaster program for the period beginning January 1, [**year**], and ending December 31 of the year in which the sale closes. Seller shall pay all Water Rights Assessments when due for the period

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during which Seller owns the Water Rights and shall provide proof of payment at or prior to closing. Seller shall escrow any amounts necessary to pay for assessments that will be billed or become payable after closing, attributable to Seller's ownership of the Water Rights prior to closing. This provision shall survive closing.

Continue with the following.

Earnest Money: $[**amount**]

[Initial Earnest Money:]

[Additional Earnest Money:]

Depending on the anticipated time for obtaining TCEQ approval, the parties may want to provide for more than one additional earnest money deposit. If there is more than one additional earnest money deposit, the parties should specify whether and the extent to which (1) each is refundable or non-refundable, coordinating with section J. of this contract, and (2) to be applied to the purchase price under paragraph K.2.b.

Independent Consideration: $[**amount**] of the Earnest Money constitutes Independent Consideration given for Buyer's right to terminate during the Inspection Period under paragraph G.2. The Independent Consideration will be applied to the Purchase Price at closing, but [will/will not] be returned to Buyer if Buyer terminates this contract during the Inspection Period.

Purchase Price

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:

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Payment schedule:

See exhibit F for additional terms and conditions.

Third-party-financed portion:

Total purchase price:

Buyer's Liquidated Damages: $[**amount**]

Seller's Additional Liquidated Damages: $[**amount**]

[Title Commitment/Title Information]: If no Title Commitment is required, Seller will have the obligation to provide to Buyer, at [Buyer/Seller]'s expense, the Title Information as defined in paragraph F.2. below.

Title Documents: Seller's [Certificate of Adjudication/[**specify other water authority document**]] and instruments affecting title to the Water Rights and the Real Property referenced in the [Title Commitment/Title Information] [and as otherwise provided as part of Seller's Records].

County for Performance:

A. Deadlines and Other Dates

All deadlines in this contract expire at 5:00 P.M. local time where the point of diversion of the Water Rights is located. If a deadline falls on a Saturday, Sunday, or national holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or national holiday. A national holiday is a holiday designated by the federal government. Time is of the essence.

A.1. [Initial] Earnest Money Deadline: [**date**]

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A.2. Delivery of Seller's records as specified in Exhibit D: [[**date**]/[**number**] days after the Effective Date]

Select one of the following.

A.3. Delivery of Title Commitment to [Water Rights [and/or Appurtenant Land]]: [[**date**]/[**number**] days after the Effective Date]

Or

A.3. Delivery of Title Information: [[**date**]/[**number**] days after the Effective Date]

Include the following if applicable.

A.4. Delivery of Survey: [[**date**]/[**number**] days after the Effective Date]

Select one of the following.

A.5. Delivery of written documents from lienholder(s) consenting to transfer of [**include if applicable:** and modifications to] Water Rights and agreement to release lien on Water Rights or land to which Water Rights are appurtenant, or from other adverse claims to Seller's title to Water Rights: [[**date**]/[**number**] days after the Effective Date]

Or

A.5. Delivery of Seller's Affidavit of No Liens or Adverse Claims to Water Rights or to Appurtenant Land: [[**date**]/[**number**] days after the Effective Date]

Continue with the following.

A.6. End of Inspection Period: [[**date**]/[**number**] days after receipt of the [Title Commitment/Title Information]] [**include if applicable:** and Survey]

A.7. Delivery of Water Rights Conveyance (Conditional) [**include if applicable:** with Vendor's Lien] and other documents necessary to accomplish application for transfer of Water Rights: [[**date**]/[**number**] days after the Effective Date]

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A.8. Filing of TCEQ Application: [**number**] days after Delivery of Title Conveyance of Water Rights (Conditional)

A.9. Delivery of Additional [Refundable/Nonrefundable] Earnest Money: [At the Conditional Closing in paragraph A.7./[[**date**]/[**number**] days after the Effective Date]]

> If there is more than one additional earnest money deposit, the parties should specify whether and the extent to which (1) each is refundable or nonrefundable, coordinating with section J. of this contract, and (2) to be applied to the purchase price under paragraph K.2.b.

A.10. Delivery of [Title Policy/Opinion of Counsel]: At Final Closing

A.11. Final Closing: [**number**] days after issuance of TCEQ Approval [Letter/Order] [and other water authority approvals] and receipt thereof by [Title Company/Escrow Agent]

B. Closing Documents

B.1. Conditional Closing Documents

B.1.a. At the Conditional Closing on the deadline stated in paragraph A.7., Seller will deliver the following items:

Water Rights Conveyance (Conditional) [**include if applicable:** with Vendor's Lien], to be delivered through [Title Company/Escrow Agent]

Documents necessary to accomplish application for transfer of Water Rights from Seller to Buyer, including documents necessary to request from applicable Water [Authority/Authorities] approval of any modifications to Permit/Certificate of Adjudication

IRS Nonforeign Person Affidavit

> Select one of the following.

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Written documents from lienholder(s) consenting to transfer of Water Rights and modifications to Permit/Certificate sought by Buyer from any Water [Authority/Authorities] and agreeing to release lien(s) on Water Rights and/or the land to which Water Rights are appurtenant, or from any other adverse claims to Seller's title to Water Rights on Final Closing

Or

Seller's Affidavit of No Liens or Adverse Claims to Water Rights or to Appurtenant Land

Continue with the following.

[Title Policy/Opinion of Counsel]

Evidence of Seller's authority to close this transaction

B.1.b. At the Conditional Closing on the deadline stated in paragraph A.7., Buyer will deliver the following items:

Additional [Refundable/Nonrefundable] Earnest Money deposit

Evidence of Buyer's authority to close this transaction

B.2. Final Closing Documents

B.2.a. At Final Closing, Seller will deliver the following items:

Conveyance of Water Rights (Unconditional) [**include if applicable:** with Vendor's Lien], to be delivered through [Title Company/Escrow Agent]

Include the following if applicable.

Transfer of Existing Water Allocations, if any, pertaining to Water Rights

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Include the following if applicable.

[Release of Lien on Water Rights from lienholder(s) holding a lien on Water Rights or the Appurtenant Land or from other adverse claims to Seller's title to Water Rights/Seller's Affidavit of No Liens or Adverse Claims, dated as of the date of Closing]

Continue with the following.

B.2.b. At Final Closing, Buyer will deliver the following items:

Balance of Purchase Price

Evidence of Buyer's authority to close this transaction

Seller-financing documents

Promissory Note

Deed of Trust

The documents listed in section B.1. are collectively known as the "Conditional Closing Documents." The documents listed in section B.2. are collectively known as the "Final Closing Documents." Unless otherwise agreed by the parties before Closing, the Water Rights Conveyance [**include if applicable:** , note, and water rights deed of trust (with security agreement, financing statement, and assignment of leases and rents)] will be prepared using the printed forms contained in the current edition of the *Texas Real Estate Forms Manual* (State Bar of Texas).

C. Exhibits

The following are attached to and are a part of this contract:

Exhibit A—Copy of Permit/Certificate of Adjudication and any amendments

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Exhibit B—Description of the Appurtenant Land

Exhibit C—Representations; Environmental Matters [; Severance of Water Rights]

Exhibit D—Seller's Records [**attach copies of annual water reports and water-master assessment payments if applicable**]

Exhibit E—Notices, Statements, and Certificates

[**Include if applicable:** Exhibit F—Seller Financing Addendum]

[**Include if applicable:** Exhibit G—Memorandum of Contract]

[**Include if applicable:** Exhibit H—Notice of Termination of Contract]

D. Purchase and Sale of Water Rights

The parties acknowledge that the essence of this transaction is that the TCEQ [and [**name of water** [**authority/authorities**]]] approve the change of ownership, [**include as applicable:** place of use/purpose of use/point of diversion] of the Water Rights. The parties therefore agree that subject to necessary proceedings before and approval of the TCEQ [and [**name of water** [**authority/authorities**]]], Seller agrees to sell and convey the Water Rights to Buyer and Buyer agrees to buy and pay Seller for the Water Rights. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

Include the following if applicable.

The parties further acknowledge that Buyer is purchasing the Water Rights of Seller as a right separate and apart from the Appurtenant Land and that no interest in such land is intended to be sold, transferred, or conveyed to Buyer.

Continue with the following.

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E. Interest on Earnest Money

Buyer may direct [Title Company/Escrow Agent] to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to [Title Company/Escrow Agent] and satisfying [Title Company/Escrow Agent]'s requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will become part of the Earnest Money.

F. Title [and Survey]

F.1. Opinion of Counsel. "Opinion of Counsel" means a written opinion of an attorney designated by [Buyer/Seller] that Seller has marketable title to the Water Rights.

Select one of the following.

F.2. Title Commitment; Title Policy. "Title Commitment" means a Commitment for Issuance of an Owner Policy of Title Insurance by Title Company, as agent for Underwriter, stating the condition of title to the Water Rights and any Appurtenant Land. The "effective date" stated in the Title Commitment must be after the Effective Date of this contract. "Title Policy" means an Owner Policy of Title Insurance issued by Title Company, as agent for Underwriter, in conformity with the last Title Commitment delivered to and approved by Buyer.

Or

F.2. Title Information. "Title Information" means an abstract of title prepared by a title insurance company or an abstract company licensed by the Texas State Board of Insurance, covering the period from the first conveyance of title to the Water Rights and any Appurtenant Land out of the sovereignty to the Effective Date, and containing complete and legible copies of all of the deeds, easements, liens, and other documents affecting title to the Water Rights and any Appurtenant Land.

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Continue with the following.

F.3. Delivery of Seller's Records; [Title Commitment/Title Information]; Consent to Transfer and Agreement to Release; Water Rights Conveyance (Conditional). Seller must deliver Seller's Records to Buyer by the deadline stated in paragraph A.2.; any [Title Commitment/Title Information] to Buyer by the deadline stated in paragraph A.3.; the [written documents from lienholder(s)/Seller's Affidavit of No Liens] described in paragraph A.5. by the deadline stated in paragraph A.5.; the Water Rights Conveyance (Conditional) by the deadline stated in paragraph A.7.; and the [Opinion of Counsel/Title Policy] by the deadline stated in paragraph A.10.

Include the following if applicable.

F.4. Survey. "Survey" means an on-the-ground, staked plat of survey and metes-and-bounds description of the Land, prepared by Surveyor or another surveyor satisfactory to Title Company, dated after the Effective Date, and certified to comply with the current standards and specifications as published by the Texas Society of Professional Surveyors for the Survey Category.

F.5. Delivery of Survey. [Seller must deliver to Buyer/Buyer must order for delivery] the Survey by the deadline stated in paragraph A.4.

Continue with the following.

G. Inspection Period

G.1. Title Search. "Title Search" means a search of appropriate records or reports stating the condition of the title to the Water Rights and to any Appurtenant Land.

G.2. Buyer's Right to Terminate. Buyer may conduct a Title Search during the Inspection Period at [Buyer/Seller]'s cost. Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period.

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G.3. Title Objections. Buyer has until the End of Inspection Period in paragraph A.6. above to review the [Title Commitment/Title Information] [**include if applicable:** , Survey,] and legible copies of the Title Documents, notify Seller of Buyer's objections to any of them, and request any additional information needed to evidence Seller's title to the Water Rights [**include if applicable:** and Appurtenant Land] ("Title Objections"). Buyer will be deemed to have approved all matters reflected by the [Title Commitment/Title Information] [**include if applicable:** , Survey,] and Title Documents to which Buyer has made no Title Objection by the end of the Inspection Period. The matters that Buyer either approves or is deemed to have approved are "Permitted Exceptions." If Buyer notifies Seller of any Title Objections, Seller has five days from receipt of Buyer's notice to notify Buyer whether Seller agrees to cure the Title Objections before Closing ("Cure Notice"). If Seller does not timely give its Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections before Closing, Buyer may, within five days after the deadline for the giving of Seller's Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed to close, subject to Seller's obligations to resolve the items listed in Schedule C of the [Title Commitment/Title Information], remove the liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date, and cure only the Title Objections that Seller has agreed to cure in the Cure Notice. At or before Closing, Seller must resolve the items that are listed in Schedule C of the [Title Commitment/Title Information], remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date of this contract, and cure the Title Objections that Seller has agreed to cure.

H. Representations and Warranties

The parties' representations stated in Exhibit C are true and correct as of the Effective Date and must be true and correct on the Closing Date. Seller will promptly notify Buyer if Seller becomes aware that any of the representations are not true or correct.

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I. Water Rights Conveyance (Conditional); Application for Approval; Cooperation; Condition of Water Rights until Final Closing; Memorandum/No Recording of Contract

I.1. Conditional Conveyance. By the deadline stated in paragraph A.7., Seller will execute and deliver to Buyer (a) a Water Rights Conveyance (in form and substance acceptable to Buyer and the TCEQ and containing warranty of title) and (b) such other applications or documents as may be required to transfer the Water Rights, including all documents required to pursue governmental approval proceedings; provided, however, that Seller's conveyance of the Water Rights shall be deemed conditional until the Final Closing Date (i.e., such time as the TCEQ has issued an Amendment to Certificate of Adjudication No. [**number**] or other appropriate order or orders approving the transfer of water rights [**include if applicable:** and the approval of any other Water [Authority/Authorities]], and Buyer has paid the balance of the Purchase Price).

I.2. Application for TCEQ Approval; Additional Earnest Money. Seller hereby authorizes Buyer to file an application with the TCEQ and all other required governmental and Water Authorities for approval of the transfer of ownership [**include if applicable:** and [**include as applicable:** change of place/purpose of use/point of diversion], as designated by Buyer] for the Water Rights (the "Governmental Proceedings"). Buyer must file the application(s) for such Governmental Proceedings by the deadline stated in paragraph A.8. [Buyer/Seller] will bear the expenses of the Application(s), including the expenses of any public hearings or proceedings before the TCEQ and all other required Water Authorities, and any required filing and recording fees; provided, however, that Buyer will bear any expenses incurred by Buyer to place Buyer in a position to accept the transfer of the Water Rights. Buyer will initiate and pursue the Governmental Proceedings, and Seller will cooperate with Buyer to procure approval of the transfer of Water Rights by the deadline stated in paragraph A.9., provided, however, that failure to procure governmental approval or delay in Govern-

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mental Proceedings beyond the deadline stated in paragraph A.9. not attributable to the conduct of either of the parties to this contract will not be grounds for termination of this contract.

I.3. Maintenance and Use. Until closing, Seller will (a) maintain the Water Rights as they exist on the Effective Date, except to the extent otherwise required by the TCEQ or any governmental or water rights authority or order of a court of competent jurisdiction; (b) use the Water Rights in the same manner as they were used on the Effective Date; and (c) comply with all permit conditions and applicable contracts and governmental regulations affecting the Water Rights. Until the end of the Inspection Period, Seller will not enter into, amend, or terminate any contract that affects the Water Rights other than in the ordinary course of using the Water Rights and will promptly give notice to Buyer of each new, amended, or terminated contract, including a copy of the contract, in sufficient time so that Buyer may consider the new information before the end of the Inspection Period. If Seller's notice is given within three days before the end of the Inspection Period, the Inspection Period will be extended for three days. After the end of the Inspection Period, Buyer may terminate this contract if Seller enters into, amends, or terminates any contract that affects the Water Rights without first obtaining Buyer's written consent.

I.4. Condemnation. Seller will notify Buyer promptly after Seller receives notice that any part of the Water Rights has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer's Intended Use of Water Rights by giving notice to Seller within fifteen days after receipt of Seller's notice to Buyer (or before Final Closing if Seller's notice is received less than fifteen days before Final Closing). The condemnation will be deemed to materially affect Buyer's Intended Use of Water Rights if [**specify reason, e.g.,** the condemnation would result in Buyer's not being able to divert more than [**number**] acre-feet of water; would have an adverse effect on quality or availability of water]. If Buyer does not terminate this contract, (a) Buyer and Seller will each have the right to

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appear and defend their respective interests in the Water Rights in the condemnation proceedings, (b) any award in condemnation will be assigned to Buyer to the extent necessary to compensate Buyer for the loss of or reduction in the Water Rights, and (c) if the taking occurs before Closing, the description of the Water Rights will be revised to delete the portion taken.

I.5. Claims; Hearings. Seller will notify Buyer promptly after Seller receives notice of any claim or administrative hearing that is threatened, filed, or initiated before Closing that affects the Water Rights.

I.6. Memorandum of Contract; Termination of Contract; No Recording of Contract. At the request of Buyer, Seller will execute a memorandum of this contract, in a mutually acceptable form, to be recorded in the real property records of [**county**] County, Texas. At the time the memorandum is signed, Buyer and Seller will also sign a termination of contract in recordable form ("Termination of Contract") and deposit it into escrow with [Title Company/Escrow Agent]. The parties authorize [Title Company/Escrow Agent] to record the Termination of Contract as provided in section J. below. Neither Buyer nor Seller may file this contract in the real property records of any county. If either party records this contract, the other party may terminate this contract and record a notice of termination.

J. Conditions of Contract Termination

> If there is more than one additional earnest money deposit, the parties should specify which deposits are refundable and which are nonrefundable.

J.1. Termination on Failure to Obtain TCEQ Order of Approval. If, through no fault of Seller or Buyer, the TCEQ does not issue (a) an amendment to the Certificate of Adjudication or other permit for the Water Rights or (b) its other final approval [letter/order] of the transfer of Water Rights to Buyer as provided herein, then [Title Company/Escrow Agent] will return (a) to Seller the Title Conveyance of Water Rights and (b) to Buyer the [Earnest Money/Additional Earnest Money], and the parties will cancel all portions of the transaction

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set forth in this contract by appropriate legal means. In such event, neither party will have any further obligation to the other, and the parties agree to sign such instruments and take such actions as are required to place the parties in the position each was in with respect to the Water Rights before entering into this contract. [Title Company/Escrow Agent] will record the Termination of Contract on receipt of Seller's authorization to return the Earnest Money.

J.2. Disposition of Earnest Money after Other Termination

J.2.a. To Buyer. If Buyer terminates this contract in accordance with any of Buyer's rights to terminate, then unless Seller delivers notice of Seller's objection to [Title Company/Escrow Agent]'s release of the Earnest Money to Buyer within five days after Buyer delivers Buyer's termination notice to Seller and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Seller, to deliver the Earnest Money to Buyer. [Title Company/Escrow Agent] will record the Termination of Contract on receipt of Seller's authorization to return the Earnest Money.

J.2.b. To Seller. If Seller terminates this contract in accordance with any of Seller's rights to terminate, then unless Buyer delivers notice of Buyer's objection to [Title Company/Escrow Agent]'s release of the Earnest Money to Seller within five days after Seller delivers Seller's termination notice to Buyer and [Title Company/Escrow Agent], [Title Company/Escrow Agent] is authorized, without any further authorization from Buyer, to pay and deliver the Earnest Money to Seller. [Title Company/Escrow Agent] will record the Termination of Contract on receipt of Buyer's authorization to pay the Earnest Money.

J.3. Duties after Termination. If this contract is terminated, Buyer will promptly return to Seller all documents relating to the Water Rights that Seller has delivered to Buyer and all copies that Buyer has made of the documents. After return of the documents and copies, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract.

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K. Final Closing

K.1. Date of Final Closing. Within the number of days stated in paragraph A.11. following (a) issuance of TCEQ and/or other final Water Authority approval order(s) and (b) notice thereof to Buyer, Buyer will deliver to [Title Company/Escrow Agent] the balance of the Purchase Price and any additional expenses attributable to Buyer under this section of this contract.

K.2. Final Closing. This transaction will close at [Title Company/Escrow Agent]'s offices at the Final Closing. At Closing, the following will occur:

K.2.a. Final Closing Documents. The parties will execute and deliver the Final Closing Documents.

K.2.b. Payment of Purchase Price. Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to [Title Company/Escrow Agent] in funds acceptable to [Title Company/Escrow Agent]. The [Earnest Money/Additional Earnest Money] will be applied to the Purchase Price.

K.2.c. Disbursement of Funds; Recording; Copies. [Title Company/Escrow Agent] will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the deed and the other Final Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties' written instructions.

K.2.d. Delivery of Originals. Seller will deliver to Buyer the originals of Seller's Records.

K.3. Transaction Costs

K.3.a. Seller's Costs. Seller will pay (i) one-half of the escrow fee charged by [Title Company/Escrow Agent]; (ii) the costs to prepare the Title Conveyance to Water Rights; (iii)

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the costs to obtain, deliver, and record releases of all liens to be released at Closing and of [obtaining documents from lienholders consenting to the transfer or modification of Water Rights or other adverse claims to Seller's title to Water Rights/Seller's Affidavit of No Liens or Adverse Claims to Water Rights or to Appurtenant Land]; (iv) the costs to deliver copies of the instruments described in paragraph A.2.; [and] (v) Seller's attorney's fees and expenses [**include as applicable:** ; (vi) the basic charge for the Title Policy/Title Information; (vii) the charge for the Opinion of Counsel; (viii) the charge for proceedings before the TCEQ and/or other Water Authority, including the expenses of any public hearings or proceedings before the TCEQ, and required filing and recording fees; (ix) the charge for the Survey [[; and] **include any additional charges**]].

K.3.b. Buyer's Costs. Buyer will pay (i) one-half of the escrow fee charged by [Title Company/Escrow Agent]; (ii) the costs to obtain, deliver, and record all documents other than those to be recorded at Seller's expense; (iii) the costs to obtain financing of the Purchase Price, including the incremental premium costs of the mortgagee's title policies and endorsements and deletions required by Buyer's lender; (iv) the costs incurred for Buyer to place itself in a position to accept the transfer of the Water Rights; [and] (v) Buyer's attorney's fees and expenses [**include as applicable:** ; (vi) the basic charge for the Title Policy; (vii) the charge for the Opinion of Counsel; (viii) the charge for proceedings before the TCEQ and/or other Water Authority, including the expenses of any public hearings or proceedings before the TCEQ, and required filing and recording fees; (ix) the charge for the Survey [[; and] **include any additional charges**]].

K.3.c. Postclosing Adjustments. If errors in the prorations made at closing are identified within ninety days after Closing, Seller and Buyer will make postclosing adjustments to correct the errors within fifteen days of receipt of notice of the errors.

K.3.d. Brokers' Commissions. Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney's fees, and court and other costs

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arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker's or finder's fee or commission because of this transaction or this contract, whether the claimant is disclosed to the indemnitee or not. At Closing, each party will provide the other party with a release of broker's or appraiser's liens from all brokers or appraisers for which each party was responsible.

Include the following if applicable.

K.4. Issuance of Title Policy. Seller will cause Title Company to issue the Title Policy to Buyer at Final Closing.

Continue with the following.

L. Default and Remedies

L.1. Seller's Default. If Seller fails to perform any of its obligations under this contract, or if any of Seller's representations is not true and correct as of the Effective Date or on the Final Closing ("Seller's Default"), Buyer may elect either of the following as its sole and exclusive remedy:

L.1.a. Termination; Liquidated Damages. Buyer may terminate this contract by giving notice to Seller on or before the Final Closing and have the Earnest Money, less the Independent Consideration as described above, returned to Buyer. Unless Seller's Default relates to the untruth or incorrectness of Seller's representations for reasons not reasonably within Seller's control, if Seller's Default occurs after Buyer has incurred costs to investigate the Water Rights after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer's actual out-of-pocket expenses incurred to investigate the Water Rights after the Effective Date ("Buyer's Expenses") or the amount of Buyer's Liquidated Damages, within ten days after Seller's receipt of an invoice from Buyer stating the amount of Buyer's Expenses accompanied by reasonable evidence of Buyer's Expenses.

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L.1.b. Specific Performance. Unless Seller's Default relates to (i) the untruth or incorrectness of Seller's representations for reasons not reasonably within Seller's control, (ii) a defect in Seller's title to the Water Rights, or (iii) the failure of the TCEQ or other water rights authority to approve the transfer of the Water Rights (unless such failure is due to the acts of Seller), Buyer may enforce specific performance of Seller's obligations under this contract, but any such action must be initiated, if at all, within ninety days after the breach or alleged breach of this contract. If title to the Water Rights is awarded to Buyer, the conveyance will be subject to the matters stated in any Title Commitment.

L.2. Buyer's Default. If Buyer fails to perform any of its obligations under this contract ("Buyer's Default"), Seller may terminate this contract by giving notice to Buyer on or before the Final Closing and have the Earnest Money paid to Seller. If Buyer's Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller's actual out-of-pocket expenses incurred to perform its obligations under this contract ("Seller's Expenses") or the amount of Seller's Additional Liquidated Damages, within ten days after Buyer's receipt of an invoice from Seller stating the amount of Seller's Expenses accompanied by reasonable evidence of Seller's Expenses. The foregoing constitute Seller's sole and exclusive remedies for a default by Buyer before closing.

L.3. Liquidated Damages. The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that the Earnest Money and the amounts provided above are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

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L.4. Attorney's Fees. If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

M. Miscellaneous Provisions

M.1. Notices. Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday; and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or national holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or national holiday. Any address for notice may be changed by not less than ten days' prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

M.2. Entire Agreement. This contract, its exhibits, and any documents delivered at Closing are the entire agreement of the parties concerning the sale of the Water Rights. There are no representations, warranties, agreements, or promises between the parties pertaining to the Water Rights or the sale of the Water Rights, and neither party is relying on any statements or representations of any agent of the other party, that are not in those documents.

M.3. Amendment. This contract may be amended only by an instrument in writing signed by the parties.

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Select one of the following.

M.4. Prohibition of Assignment. Buyer may not assign this contract or any of Buyer's rights under it without Seller's prior written consent, and any attempted assignment is void.

Or

M.4. Assignment. Buyer may assign this contract and Buyer's rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void. No such assignment will relieve Buyer of its obligations under this contract, and Buyer and the assignee will be jointly and severally liable for the performance of such obligations after any such assignment.

Continue with the following.

M.5. Survival. The obligations of this contract that cannot be performed before termination of this contract or before Closing survive termination of this contract or Closing, and the legal doctrine of merger does not apply to these matters. If there is any conflict between the Final Closing Documents and this contract, the Final Closing Documents control.

M.6. Choice of Law; Venue. This contract is to be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the County for Performance.

M.7. Waiver of Default. It is not a waiver of default if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

M.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this contract.

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M.9. Severability. If a provision of this contract is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this contract, and this contract is to be construed as if the unenforceable provision is not a part of the contract.

M.10. Ambiguities Not to Be Construed against Party Who Drafted Contract. The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this contract.

M.11. No Special Relationship. The parties' relationship is an ordinary commercial relationship, and they do not intend to create the relationship of principal and agent, partnership, joint venture, or any other special relationship.

M.12. Counterparts. If this contract is executed in multiple counterparts, all counterparts taken together constitute this contract. Copies of signatures to this contract are effective as original signatures.

M.13. Confidentiality. The parties will keep confidential this contract, this transaction, and all information learned in the course of this transaction, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Buyer to investigate the Water Rights or either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

M.14. Binding Effect. This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

Include the following only if the buyer has agreed to waive its rights under the DTPA.

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M.15. Waiver of Consumer Rights. BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 *ET SEQ.* OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

Continue with the following.

_____

[Name and title of seller]
Date:

_____

[Name and title of buyer]
Date:

[Title Company/Escrow Agent] acknowledges receipt of Earnest Money in the amount of $_____ and a copy of this contract executed by both Buyer and Seller.

[Name of title company/escrow agent]
By:_____
Name:
Title:
Date:

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Exhibit A

Copies of Permit/Certificate of Adjudication No.

Attach all permits and certificates of adjudication including numbers and all amendments that are the subject of this sale.

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Exhibit B

Description of the Appurtenant Land

Include legal description of the land to which water rights are appurtenant or attach field notes.

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Exhibit C

Representations; Environmental Matters [; Severance of Water Rights]

A. Seller's Representations to Buyer

Seller represents to Buyer that the following are true and correct as of the Effective Date and will be true and correct on the Final Closing:

> If the seller is an individual or is acting in a representative capacity, some of the items should be modified.

A.1. Authority. Seller is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to convey the Water Rights to Buyer. This contract is, and all documents required by this contract to be executed and delivered to Buyer at Closing will be, duly authorized, executed, and delivered by Seller.

A.2. Litigation. Seller has not received written notice and has no actual knowledge of any litigation pending or threatened against Seller that might affect the Water Rights or Seller's ability to perform its obligations under this contract [**include if applicable:** , except: [**specify**]].

A.3. Violation of Laws. Seller has not received written notice of violation of any law, ordinance, regulation, or requirements affecting the Water Rights or Seller's use of the Water Rights [**include if applicable:** , except: [**specify**]].

A.4. Licenses, Permits, and Approvals. Seller has not received written notice that any license, permit, or approval necessary to use the Water Rights in the manner in which they are currently used has expired or will not be renewed on expiration or that any material condition will be imposed in order to obtain their renewal [**include if applicable:** , except: [**specify**]].

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A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Seller has not received written notice of any condemnation, zoning, or land-use proceedings affecting the Water Rights or any written inquiries or notices by any governmental authority or third party with respect to the presence of hazardous materials affecting the Water Rights [**include if applicable:** , except: [**specify**]].

A.6. No Other Obligation to Sell Water Rights or Restriction against Selling Water Rights. Except for granting a security interest in the Water Rights, Seller has not obligated itself to sell the Water Rights to any party other than Buyer. Seller's performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound.

A.7. No Liens. On the Final Closing, the Water Rights will be free and clear of all liens and encumbrances of any nature not arising by, through, or under Buyer except the Permitted Exceptions or liens to which Buyer has given its consent.

A.8. Good Title. Seller has good and indefeasible fee simple title to the Water Rights, free and clear of all mortgages, liens, licenses, encumbrances, leases, tenancies, security interests, covenants, conditions, restrictions, rights-of-way, easements, judgments, and other matters affecting title [**include if applicable:** , except: [**specify**]].

A.9. No Bills or Claims. There will be no unpaid bills or claims in connection with any repair or work performed or material furnished or otherwise relating to the Water Rights for the benefit of Seller as of the date of Closing, and all bills attributable to or affecting the Water Rights will be paid by Seller in full before Closing.

A.10. No Adverse Matters. To Seller's knowledge, there is no (a) change contemplated in any applicable laws, ordinances, or restrictions, including the rules of the Water Authority; (b) judicial or administrative action threatened or pending against the Water Rights or Seller; (c) action [**include if applicable:** by landowners adjacent to the Appurtenant Land]

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pending or threatened against the Water Rights or Seller; or (d) natural or artificial conditions relating to the Water Rights [**include if applicable:** or relating to the Appurtenant Land] that would have a material adverse effect on the Water Rights [**include if applicable:** and Appurtenant Land].

A.11. Compliance with Laws. To Seller's knowledge, Seller has at all times complied with and operated in compliance with all applicable federal, state, and local laws, regulations, and ordinances regarding the Water Rights [**include if applicable:** and the Appurtenant Land], including rules of any applicable Water Authority. Seller will promptly notify Buyer of any noncompliance notice received by Seller.

A.12. No Other Representation. Except as stated above or in the notices, statements, and certificates set forth in Exhibit E, Seller makes no representation with respect to the Water Rights.

Include the following if applicable.

A.13. No Warranty. Seller has made no warranty other than the warranty of title in connection with this contract.

Include the following if applicable.

A.14. Severance of Water Rights. The Water Rights that Seller agrees to convey herein are appurtenant to land in [**county**] County, Texas, and those Water Rights have not heretofore been severed from the land.

Continue with the following.

B. "As Is, Where Is"

THIS CONTRACT IS AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS OR

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EXPRESS OR IMPLIED WARRANTIES, EXCEPT THOSE IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

SELLER DISCLAIMS ALL WARRANTIES AND REPRESENTATIONS REGARDING THE QUANTITY OR QUALITY OF THE WATER AVAILABLE PURSUANT TO THE WATER RIGHTS OR ITS RELIABILITY FOR ANY PARTICULAR USE OR PURPOSE.

BUYER IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS. BUYER IS NOT RELYING ON ANY INFORMATION REGARDING THE WATER RIGHTS OR PERMIT/CERTIFICATE PROVIDED BY ANY PERSON OTHER THAN BUYER'S OWN INSPECTION AND THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

C. Environmental Matters

AFTER CLOSING, BUYER RELEASES SELLER FROM LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY (1) UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE; OR (2) ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY. [**Include if applicable: THIS RELEASE APPLIES EVEN WHEN THE ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY RESULT FROM SELLER'S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER'S REPRESENTATIVE.**]

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The provisions of this section C. regarding the Water Rights will be included in the Title Conveyance of Water Rights with appropriate modification of terms as the context requires.

D. Buyer's Representations to Seller

Buyer represents to Seller that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date:

> If the buyer is an individual or is acting in a representative capacity, some of the items should be modified.

D.1. Authority. Buyer is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this contract. This contract is binding on Buyer. This contract is, and all documents required by this contract to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Buyer.

> Include other representations from the buyer to the seller as needed.

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Exhibit D

Seller's Records

To the extent that Seller has possession of the following items pertaining to the Water Rights, Seller will deliver or make the items or copies of them available to Buyer by the deadline stated in paragraph A.8.:

Governmental

governmental licenses, certificates, permits, and approvals, specifically including Seller's Permit or Certificate of Adjudication to the Water Rights

environmental reports

records of regulatory proceedings or violations

annual water use reports filed with TCEQ, and its predecessor agencies related to the Water Rights

Watermaster reports, if any, related to the Water Rights

other: [**specify**]

Financial

books and records for the Water Rights

other: [**specify**]

Leases

Leases

renewal options

security deposit

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current tenant or landlord defaults

estoppel letters and/or subordination agreements

other: [**specify**]

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Exhibit E

Notices, Statements, and Certificates

Certain notices must be contained in the contract and others must be provided as separate notices. Please refer to the statutory requirements for each notice.

The notices, statements, and certificates (arranged by their application to particular transactions) that are listed below are [**include as applicable:** included in the sales contract/ [and] attached for delivery to Buyer], and Buyer acknowledges receipt of the notices, statements, and certificates by executing this contract:

Include one or more of the following paragraphs as applicable and modify section headers and paragraph numbers as appropriate.

A. Consumer Notices

Notice of Cancellation. Notice concerning the purchaser's three-day right of rescission under a contract to purchase real property if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business; (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property, as described in chapter 601 of the Texas Business and Commerce Code.

If applicable, attach form 4-4 in this manual to the end of this exhibit E.

And/Or

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B. Residential Transaction Notices

B.1. Seller's Disclosure of Property Condition. Seller's disclosure of the condition of residential property, described in section 5.008 of the Texas Property Code.

If applicable, attach the full text of Tex. Prop. Code § 5.008, with all relevant information filled in, to the end of this exhibit E.

And/Or

B.2. Notice of Membership in Property Owners Association. Notice concerning the sale of single-family residential property that is subject to membership in a property owners association, described in section 5.012 of the Texas Property Code.

If applicable, attach form 23-8 to the end of this exhibit E.

And/Or

B.3. Seller's Disclosure of Location of Conditions under Surface of Unimproved Real Property. Seller's disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.013 of the Texas Property Code. A seller of unimproved property to be used for residential purposes shall provide the purchaser written notice disclosing the location of any transportation pipeline to the best of the seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known by the seller, the seller shall indicate that fact in the notice. A seller is not required to give this notice if (a) the seller is obligated under the terms of the contract to furnish a title insurance commitment to the buyer before closing and (b) the buyer is entitled to terminate the contract if the buyer's objections to title as permitted by the contract are not cured by the seller before closing.

No form is provided, because the sales contract portion of this form 16-18 satisfies the provisions for exemption from disclosure.

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And/Or

B.4. Notice of Obligation to Pay Public Improvement District Assessment. Seller's disclosure that a single-family residential property is located within a public improvement district, described in section 5.014 of the Texas Property Code.

If applicable, attach form 4-6 to the end of this exhibit E.

And/Or

B.5. Residential Contracts for Deed. Notice regarding the sale of property used or to be used as the purchaser's residence if the contract does not provide for delivery of a deed from the seller to the purchaser within 180 days after the final execution of the contract.

See Tex. Prop. Code §§ 5.069–.074.

And/Or

B.6. Notice Regarding Insulation to Buyer of New Home. Notice concerning insulation to be installed in a new home, described in section 460.16 of title 16 of the Code of Federal Regulations.

If applicable, attach form 4-7 to the end of this exhibit E.

And/Or

B.7. Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. Lead-based paint warning statement, described in section 745.100 *et seq.* of title 40 of the Code of Federal Regulations.

If applicable, attach form 4-8 to the end of this exhibit E.

And/Or

B.8. Asbestos Disclosure Notice. Notice concerning asbestos, described in sections 1910.1001 and 1926.1101 of title 29 of the Code of Federal Regulations.

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If applicable, attach form 4-9 to the end of this exhibit E.

And/Or

B.9. Notice Regarding Sale Subject to a Recorded Lien. Notice to the purchaser and each lienholder required under Texas Property Code section 5.016 that property being sold will be conveyed subject to a lien.

If applicable, attach form 4-10 to the end of this exhibit E.

And/Or

C. Condominium Transaction Notices

C.1. Acknowledgment of Receipt of Condominium Documents. Condominium declaration, bylaws, and association rules, described in section 82.156 of the Texas Property Code.

If applicable, attach form 24-8 to the end of this exhibit E.

And/Or

C.2. Condominium Resale Certificate. Resale certificate from the condominium owners association or waiver of resale certificate, described in section 82.157 of the Texas Property Code.

If applicable, attach condominium resale certificate promulgated by the Texas Real Estate Commission, available at **www.trec.texas.gov/forms/condominium-resale-certificate**, or form 24-7 (waiver of condominium resale certificate) to the end of this exhibit E.

And/Or

D. All Real Property Transaction Notices

D.1. Storage Tanks Disclosure Provider. Notice concerning underground storage tanks, described in section 334.9 of title 30 of the Texas Administrative Code.

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If applicable, attach form 4-11 to the end of this exhibit E.

And/Or

D.2. Notice to Purchaser Regarding Restrictive Covenants. Notice of deed restrictions, described in section 212.155 of the Texas Local Government Code.

If applicable, attach form 4-12 to the end of this exhibit E.

And/Or

D.3. Notice to Purchaser Regarding Coastal Area Property. Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code.

If applicable, attach form 4-13 to the end of this exhibit E.

And/Or

D.4. Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway. Notice concerning public easements to the public beach, described in section 61.025 of the Texas Natural Resources Code.

If applicable, attach form 4-14 to the end of this exhibit E.

And/Or

D.5. Notice Regarding Possible Liability for Additional Taxes. Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code.

If applicable, attach form 4-15 to the end of this exhibit E.

And/Or

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D.6. Notice Regarding Possible Annexation. Notice concerning the sale of property located outside the limits of a municipality that may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality, described in section 5.011 of the Texas Property Code.

If applicable, attach form 4-16 to the end of this exhibit E.

And/Or

D.7. Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider. Notice for property in a certificated service area of a utility service provider, described in section 13.257 of the Texas Water Code.

If applicable, attach form 4-17 to the end of this exhibit E.

And/Or

D.8. Utility District Notice. Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in section 49.452 of the Texas Water Code, with the form of notice to be used being dependent on whether the property (a) is located in whole or in part within the extraterritorial jurisdiction of one or more home-rule municipalities but is not located within the corporate boundaries of a municipality, (b) is located in whole or in part within the corporate boundaries of a municipality, or (c) is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities.

If applicable, attach form 4-18 to the end of this exhibit E.

And/Or

D.9. Notice to Purchaser of Property Located in Certain Annexed Water Districts. Notice required by section 54.016(h)(4)(A) of the Texas Water Code when property being sold is in a water or sanitary sewer district that entered a contract with a city with a population

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of 1.18 million or less under which the city is permitted to set rates in the district after annexation that are different from rates charged other residents of the city.

If applicable, attach form 4-19 to the end of this exhibit E.

And/Or

D.10. Notice to Purchaser that Property Is Located within the Area of the Alignment of a Transportation Project. Notice required under Texas Local Government Code section 232.0033 that all or part of the subdivision in which the property being sold is located is within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to a future transportation corridor identified in a contract between the Texas Department of Transportation and a county under Texas Transportation Code section 201.619.

If applicable, attach form 4-20 to the end of this exhibit E.

And/Or

D.11. Certificates of Mold Remediation. Notice pursuant to section 1958.154 of the Texas Occupations Code, titled "Certificate of Mold Remediation; Duty of Property Owner," requiring a property owner who sells property that has been issued a certificate of mold remediation pursuant to this section to deliver copies to the purchaser of each certificate of mold remediation issued for the property within the preceding five years.

And/Or

D.12. Notice of Water Level Fluctuations. Notice to purchasers of residential or commercial property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Texas Water Code chapter 11, that has storage capacity of at least 5,000 acre-feet at the impoundment's normal level, provided pursuant to Texas Property Code section 5.019.

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If applicable, attach form 4-21 to the end of this exhibit E.

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Exhibit F

Seller Financing Addendum

A. Promissory Note. The promissory note ("Note") will be payable by Buyer ("Maker") to the order of Seller ("Payee") at the place designated by Payee. The Note may be prepaid in whole or in part at any time without penalty, premium, or restriction of any kind. Any prepayments are to be applied to the payment of the installments of principal last maturing, and interest will immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in the contract. The Note will be payable as follows:

Select one of the following.

In one payment due [**number**] days after the date of the Note with interest payable [at maturity/monthly/quarterly/annually].

Or

In [**number**] installments of $[**amount**] each [including interest/plus interest] beginning [**number**] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [**date**], when the entire balance of the Note will be due and payable.

Or

Interest only in [**number**] installments for the first [**number**] year[s] and thereafter in [**number**] installments of $[**amount**] each [including interest/plus interest] beginning [**number**] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [**date**], when the entire balance of the Note will be due and payable.

Or

Other: [**specify**].

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Continue with the following.

B. Deed of Trust. The deed of trust ("Deed of Trust") securing the Note will provide for the following:

Select one of the following.

B.1. Assumption without Consent. The Water Rights may be sold, transferred, or conveyed without the consent of Payee, provided any subsequent buyer or transferee assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Water Rights.

Or

B.1. Assumption with Consent. The Water Rights may be sold, transferred, or conveyed provided that (a) any subsequent buyer assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments and (b) Maker or the subsequent buyer obtains prior written consent to such a sale from Payee. Consent will be based on the subsequent buyer's credit history, with no change in interest rate or terms, and may not be unreasonably withheld, conditioned, or delayed. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. If all or any part of the Water Rights is sold, conveyed, leased for a period longer than three years, leased with an option to purchase, otherwise sold (including by contract for deed), or otherwise transferred or conveyed without prior written consent of Payee, Payee may, at Payee's sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Any deed under threat or order of condemnation, any conveyance solely between makers, and

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the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Water Rights. [Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Water Rights./The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Water Rights, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Water Rights.]

Or

B.1. Prohibition against Assumption. If all or any part of the Water Rights is sold, transferred, or conveyed without the prior written consent of Payee, Payee may, at Payee's sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Payee has no obligation to consent to any such sale or conveyance of the Water Rights, and Payee is entitled to condition any consent on a change in the interest rate that will thereafter apply to the Note and any other change in the terms of the Note or Deed of Trust that Payee in Payee's sole discretion deems appropriate. A lease for a period longer than three years, a lease with an option to purchase, or a contract for deed will be deemed to be a sale, transfer, or conveyance of the Water Rights for purposes of this provision. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Water Rights. The creation of a subordinate lien without the consent of Payee will be construed as a sale or conveyance of the Water Rights, but any subsequent sale under a subordinate lien to which Payee has consented will not be construed as a sale or conveyance of the Water Rights.

Continue with the following.

B.2. Cross-Default. Any act or occurrence that would constitute a default under the terms of any lien superior to the lien securing the Note will constitute a default under the Deed of Trust securing the Note.

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C. Recourse Provisions. The Note and Deed of Trust are subject to the following provisions:

Select one of the following.

Full Recourse. Maker will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Maker in the Deed of Trust.

Or

No Recourse. Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. The sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker.

Or

Partial Recourse. Except as set forth below, Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. Except as set forth below, the sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker. Maker will have full recourse liability for any loss or damage actually suffered or incurred by Payee or other holder of the Note by reason of—

1. taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the Water Rights that accrue before foreclosure;

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2. all rents, issues, profits, and income derived from the Water Rights after a default occurs and not expended for debt service or operating expenses of the Water Rights before foreclosure;

3. tenant security deposits for leases of the Water Rights not forfeited by or refunded to the tenants;

4. any condemnation or insurance proceeds not paid or applied as required in the Deed of Trust;

5. damages resulting from fraud or misrepresentation by Maker;

6. damages resulting from breach of any warranty of title by Maker;

7. interest on the Note from the date of default through foreclosure, payment, or settlement of the debt;

8. all interest on the Note during any bankruptcy proceeding of Maker and all reasonable attorney's fees and expenses incurred as a result of Maker's bankruptcy; and

9. all attorney's fees and expenses incurred by Payee to collect any of the foregoing amounts.

Continue with the following.

_____
Buyer/Maker

_____
Seller/Payee

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Exhibit G

Memorandum of Contract

Attach a memorandum of contract if applicable. See form 16-16 in this chapter.

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Exhibit H

Notice of Termination of Contract

Attach a notice of termination of contract if applicable. See form 16-17 in this chapter.

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Form 16-19

Surface Water Rights Conveyance—Conditional

Permit/Certificate of Adjudication No[s].

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

> See form 5-6 in this manual for consideration clauses.

Water Rights: [**include appropriate description[s], which may be found in the subject permit[s], and certificate[s] of adjudication. It is advisable to attach a copy or copies of the applicable permit[s] or certificate[s] of adjudication as an exhibit.**]

> Include the following if the water rights are within the Rio Grande and are allocated on an account basis.

Grantor's Current Year Water Allocation: The amount of water allocated to Grantor by the Rio Grande Watermaster for the year beginning January 1, [**year**], and ending December 31, [**year**], as more fully described in the TCEQ Rio Grande Water Division Monthly Report statements for the applicable period. The Grantor's Water Rights being conveyed

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to Grantee include [all/[**describe portion**]] of the Grantor's Current Year Water Allocation.

Continue with the following.

Severed Appurtenant Property (property from which surface water rights are severed in this conveyance upon satisfaction of Condition): [**include legal description or state "None" as applicable**]

A description of the land to which the water rights are appurtenant and from which they are being severed in the conveyance assists title examination of the land and any appurtenant water rights. With respect to irrigation rights involving a change in the place of use, the water rights will become appurtenant to other land; however, that other land is not to be described in this conditional conveyance to avoid confusion and is unnecessary if the TCEQ does not approve the transaction or the change in place of use.

Reservations from Conveyance: [**state "None" or describe any reservations from conveyance in this instrument; see form 5-7 for examples**]

Exceptions to Conveyance and Warranty: [**state "None" or describe any exceptions to conveyance and warranty in this instrument; see form 5-8 for examples**]

Condition: Approval by the Texas Commission on Environmental Quality (TCEQ) [**include if applicable:** and [**other water** [**authority/authorities**]] of the change of [**include as applicable:** [ownership/place of use/purpose of use/point of diversion] of the Water Rights]].

Include the following if water rights are irrigation rights appurtenant to land and the land is not also being conveyed by the grantor.

Grantor does hereby expressly sever the Water Rights here conveyed from the Severed Appurtenant Property on satisfaction of the Condition.

Continue with the following.

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Subject to the Condition, Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Water Rights, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Water Rights to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from and Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13. If appropriate, include additional clauses like those suggested in form 5-9.

Include the following if applicable.

The parties agree that once the TCEQ [**include if applicable:** and [**other water [authority/authorities]**]] approve[s] the transfer, and Grantee pays any remaining consideration for the transfer, in accordance with the terms of the contract between Grantor and Grantee, this conveyance will become absolute. Grantor hereby authorizes the Texas Commission on Environmental Quality, or its successor, and any such other governmental body or authority that has jurisdiction over the Water Rights ("Water Authority") to make such changes in the records as are necessary to accomplish the conveyance and transfer of the Water Rights. Grantor agrees to execute such other instruments as shall be necessary and required by the TCEQ and other Water Authority.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of grantor]

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If the deed imposes contractual obligations on the grantee, include the following signature line.

_____

[**Name of grantee**]

Include acknowledgments.

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Form 16-20

Surface Water Rights Conveyance—Unconditional

Permit/Certificate of Adjudication No[s].

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

> See form 5-6 in this manual for consideration clauses.

Water Rights: [**include appropriate description[s], which may be found in the subject permit[s], and certificate[s] of adjudication. It is advisable to attach a copy or copies of the applicable permit[s] or certificate[s] of adjudication as an exhibit.**]

> Include the following if the water rights are within the Rio Grande and are allocated on an account basis.

Grantor's Current Year Water Allocation: The amount of water allocated to Grantor by the Rio Grande Watermaster for the year beginning January 1, [**year**], and ending December 31, [**year**], as more fully described in the TCEQ Rio Grande Water Division Monthly Report statements for the applicable period. The Grantor's Water Rights being sold and

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conveyed to Grantee include [all/[**describe portion**]] of the Grantor's Current Year Water Allocation.

Continue with the following.

Severed Property (property from which surface water rights are severed in this conveyance): [**include legal description or state "None" as applicable**]

A description of the land to which the water rights are appurtenant and from which they are being severed in the conveyance assists title examination of the land and any appurtenant water rights.

Include the following if the TCEQ has approved the transfer and an amendment changing the place of use with respect to irrigation water rights.

Appurtenant Property (property to which Water Rights attach in this conveyance): [**include legal description**]

Continue with the following.

Reservations from Conveyance: [**state "None" or describe any reservations from conveyance in this instrument; see form 5-7 for examples**]

Exceptions to Conveyance and Warranty: [**state "None" or describe any exceptions to conveyance and warranty in this instrument; see form 5-8 for examples**]

Include the following if water rights are irrigation rights appurtenant to land and the land to which the water rights are appurtenant prior to the conveyance is not also being conveyed to the grantee.

Grantor does hereby expressly sever the Water Rights here conveyed from the Severed Appurtenant Property.

Continue with the following.

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Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Water Rights, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Water Rights to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from and Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13. If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

_____

[**Name of grantor**]

If the deed imposes contractual obligations on the grantee, include the following signature line.

_____

[**Name of grantee**]

Include acknowledgments.

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Form 16-21

Deed of Trust and Security Agreement

[Water Rights]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Terms

Date:

Grantor:

> If the deed of trust is to be filed as a financing statement and if the grantor is an organization, the deed of trust should also indicate the type of organization, the jurisdiction of the organization, and an organizational identification number.

Grantor's Mailing Address:

Trustee[s]:

Trustee's Mailing Address[es]:

Lender:

Lender's Mailing Address:

Obligation

Note

Date:

Original principal amount:

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Borrower:

Lender:

Maturity date:

> If there is more than one note, repeat above information for each additional note and change the word *Note* to *Notes* in all applicable instances.

Other Debt: [**include optional clauses from form 8-6 in this manual or describe other debt**]

Property: [**include description[s] of each applicable category of property**]

> For construction loans, include clause 8-9-12 immediately following the real property description.

1. Water Rights: [**include appropriate description[s] (same as in the security agreement, form 16-22), which may be found in the subject permit[s], certificate[s] of adjudication, deed[s], easement[s], or other document[s] of conveyance**].

2. Permits and Certificates of Adjudication ("Permits/Certificates" whether one or more): [**describe, e.g.,** All Permits and Certificates of Adjudication pertaining to the Water Rights, now existing or hereafter acquired, including those identified below, and all amendments, replacements, and modifications thereto].

3. The following equipment, fixtures, and personal property used in connection with the Water Rights: [**describe**].

4. All easements and other rights appurtenant to, or used in connection with, the Water Rights, whether now existing or hereafter acquired [**include if applicable:** , including that Easement Agreement for Groundwater Rights dated [**date**], executed by [**name**] as grantor and Grantor as Grantee, recorded under Document No. [**number**] in the Official Public Records of [**county**] County, Texas].

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5. All agreements for the sale of water derived from the Water Rights, whether now existing or hereafter executed, and the proceeds thereof.

6. All agreements for the lease of any portion of the Water Rights, whether now existing or hereafter executed, and all rents and proceeds thereof.

7. [**Describe other property as applicable.**]

Include the following if applicable.

Appurtenant Land Conveyed to Trustee:

Or

Surface Estate/Place of Appropriation/Diversion:

And/Or

Surface Estate/Place of Use:

Continue with the following.

Grantor's Intended [Purpose of Use] [and] [Point of Diversion] of Water Rights:

Water Authority: [**include as applicable:** The Texas Commission on Environmental Quality (TCEQ) [and/or [**any groundwater authority, watermaster, or conservation district, or other agency or governmental bodies or authorities having jurisdiction over the administration of the water rights covered**]]].

Prior Lien: [**include recording information**]

If there is more than one prior lien, repeat above information for each additional prior lien and change the words *Prior Lien* to *Prior Liens* in all applicable instances.

Other Exceptions to Conveyance and Warranty:

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A. Granting Clause

For value received and to secure payment of the Obligation, Grantor conveys the Property to Trustee, in trust [**include if applicable:** ; provided, however, that the conveyance of the Water Rights is separate and apart from the Surface Estate, and no right in the Surface Estate is granted, except as expressly provided above and described as Appurtenant Land]. Grantor warrants and agrees to defend the title to the Property, subject to the [**include if applicable:** Prior Lien and] Other Exceptions to Conveyance and Warranty. On payment of the Obligation and all other amounts secured by this deed of trust, this deed of trust will have no further effect, and Lender will release it at Grantor's expense. In addition to creating a deed-of-trust lien on all the real and other property described above, Grantor also grants to Lender a security interest in all of the above-described property pursuant to and to the extent permitted by the Texas Uniform Commercial Code.

B. Grantor's Obligations

Grantor agrees to—

B.1. keep the Property in good repair and condition, and in accordance with all applicable laws, rules and regulations, and the terms of this agreement;

B.2. pay all taxes, fees, and assessments on the Property before delinquency, not authorize a taxing entity to transfer its tax lien on the Property to anyone other than Lender, and not request a deferral of the collection of taxes pursuant to section 33.06 of the Texas Tax Code;

B.3. defend title to the Property subject to the [**include if applicable:** Prior Liens and] Other Exceptions to Conveyance and Warranty, preserve the lien's priority as it is established in this deed of trust, and take all action necessary to protect or preserve Grantor's and Lender's rights and interests in the Water Rights and under the Permits/Certificates;

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B.4. maintain all insurance coverages with respect to the Property, revenues generated by the Property, and operations on the Property that Lender reasonably requires ("Required Insurance Coverages"), issued by insurers and written on policy forms acceptable to Lender, and deliver evidence of the Required Insurance Coverages in a form acceptable to Lender at least ten days before the expiration of the Required Insurance Coverages;

B.5. obey all laws, ordinances, and restrictive covenants applicable to the Property;

B.6. keep any buildings occupied as required by the Required Insurance Coverages;

B.7. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments;

B.8. notify Lender of any change of address or if Grantor has obtained any new easement rights for use in connection with the Water Rights;

B.9. timely pay all permit fees, use fees, assessments, taxes, or other charges levied or assessed by any Water Authority, and maintain all Permits/Certificates or other rights covered by this deed of trust in accordance with the terms of this deed of trust and in good standing with the issuing Water Authority;

B.10. comply with all rules and regulations of any applicable Water Authority, and immediately notify Lender of any threatened or actual enforcement action against Grantor or the Property by any applicable Water Authority;

B.11. obtain Lender's written consent before seeking to modify or convert any agreement, including any Permits/Certificates issued by any applicable Water Authority, relating to the Property;

B.12. immediately notify Lender of any change in any permit or certificate issued by any Water Authority for the Property and of any proposed amendment, conversion, or other

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change to the permit or certificate [**include if applicable:** and immediately record the permit or certificate, as amended, in the real property records of the applicable county or counties]; and

B.13. provide and maintain with the Water Authority written instructions, in form approved by Lender, notifying the Water Authority of Lender's rights and interests in the Water Rights and the Permits/Certificates, and prohibiting the Water Authority, without the prior written authorization of Lender, from (a) approving or documenting a conveyance of all or any portion of the Water Rights or (b) approving a request or application by Grantor or any other person to transfer, amend, or terminate the Permits/Certificates as it or they pertain to the Water Rights.

C. Lender's Rights

C.1. Lender or Lender's mortgage servicer may appoint in writing one or more substitute trustees, succeeding to all rights and responsibilities of Trustee.

C.2. If the proceeds of the Obligation are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

C.3. Lender may apply any proceeds received under the insurance policies covering the Property either to reduce the Obligation or to repair or replace damaged or destroyed improvements covered by the policy.

C.4. Notwithstanding the terms of the Note to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor with respect to the Obligation or this deed of trust may, at Lender's discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender with respect to the Obligation, to be applied to late charges, principal, or interest in the order Lender in its discretion determines.

C.5. If Grantor fails to perform any of Grantor's obligations, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including

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attorney's fees, plus interest on those amounts from the dates of payment at the rate stated in the Note for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.

C.6. **COLLATERAL PROTECTION INSURANCE NOTICE**

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

(i) keep the collateral insured against damage in the amount the Lender specifies;

(ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and

(iii) name the Lender as the person to be paid under the policy in the event of a loss;

(B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor's expense.

C.7. If there is a default on the Obligation or if Grantor fails to perform any of Grantor's obligations and the default continues after any required notice of the default and the time allowed to cure, Lender may—

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a. declare the unpaid principal balance and earned interest on the Obligation immediately due;

b. direct Trustee to foreclose this lien, in which case Lender or Lender's agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and

c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Obligation.

C.8. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

C.9. Grantor authorizes Lender to file financing statements under the Uniform Commercial Code describing the Property. This deed of trust constitutes a fixture filing as to the Property.

D. Trustee's Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

D.1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

D.2. sell and convey all or part of the Property "AS IS" to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

D.3. from the proceeds of the sale, pay, in this order—

a. expenses of foreclosure, including a reasonable commission to Trustee;

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b. to Lender, the full amount of principal, interest, attorney's fees, and other charges due and unpaid, including all attorney's fees and expenses attendant to (i) any proceedings before any applicable Water Authority to seek the approval of that Water Authority for the necessary changes in ownership, diversion point, place of use, and/or purpose of use of the Water Rights and (ii) the conveyance of the Water Rights;

c. any amounts required by law to be paid before payment to Grantor; and

d. to Grantor, any balance; and

D.4. be indemnified, held harmless, and defended by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney's fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

E. Grantor's Authorization

Grantor agrees that Lender is authorized, but is not obligated, to perform one or more of the following:

E.1. To sever the Property, including the Water Rights, into separate groups or parcels [**include if applicable:** , to sever the Water Rights from the [Appurtenant Land/Surface Estate/easements]], and to foreclose or convey the Property in lieu of foreclosure in one or more separate or combined transactions.

E.2. To seek the approval of the Water Authority for a change in ownership, diversion point, place of use, or purpose of use of the Water Rights, and to transfer any existing unused water allotments that apply or pertain to the Water Rights in connection with a foreclosure or conveyance in lieu of foreclosure.

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Include the following if applicable.

E.3. To file any application, institute any proceedings, and to perform such other acts or actions on behalf of Grantor, and in Grantor's name, as Lender may determine to be necessary to protect or preserve the Property, including the value of the Water Rights and the rights provided by the Permits/Certificates and Grantor's or Lender's interest therein. Grantor hereby appoints Lender as Grantor's attorney-in-fact, to perform the acts set forth above. This appointment as attorney-in-fact is coupled with an interest, is irrevocable, and shall survive Grantor's disability, foreclosure of this deed of trust, and conveyance of the Property in lieu of foreclosure.

Continue w th the following.

F. General Provisions

F.1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor does not, Grantor will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

F.2. Recitals in any trustee's deed conveying the Property will be presumed to be true.

F.3. Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

F.4. This lien will remain superior to liens later created even if the time of payment of all or part of the Obligation is extended or part of the Property is released.

F.5. If any portion of the Obligation cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion.

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F.6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney's fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Obligation. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

F.7. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

F.8. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

If a due-on-sale clause is desired, select one of the following.

F.9. If Grantor transfers any part of the Property without Lender's prior written consent, Lender may declare the Obligation immediately payable and invoke any remedies provided in this deed of trust for default.

Or

F.9. Grantor may not sell, transfer, or otherwise dispose of any Property, whether voluntarily or by operation of law, without the prior written consent of Lender. If granted,

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consent may be conditioned on (a) the grantee's integrity, reputation, character, creditworthiness, and management ability being satisfactory to Lender; and (b) the grantee's executing, before such sale, transfer, or other disposition, a written assumption agreement containing any terms Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Grantor may not cause or permit any Property to be encumbered by any liens, security interests, or encumbrances other than the liens securing the Obligation and the liens securing ad valorem taxes not yet due and payable without the prior written consent of Lender. If granted, consent may be conditioned upon Grantor's executing, before granting such lien, a written modification agreement containing any terms Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, an approval fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Grantor may not grant any lien, security interest, or other encumbrance (a "Subordinate Instrument") covering the Property that is subordinate to the liens created by this deed of trust without the prior written consent of Lender. If granted, consent may be conditioned upon the Subordinate Instrument's containing express covenants to the effect that—

a. the Subordinate Instrument is unconditionally subordinate to this deed of trust;

b. if any action is instituted to foreclose or otherwise enforce the Subordinate Instrument, no action may be taken that would terminate any occupancy or tenancy without the prior written consent of Lender, and that consent, if granted, may be conditioned in any manner Lender determines;

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c. rents, if collected by or for the holder of the Subordinate Instrument, will be applied first to the payment of the Obligation then due and to expenses incurred in the ownership, operation, and maintenance of the Property in any order Lender may determine, before being applied to any indebtedness secured by the Subordinate Instrument;

d. written notice of default under the Subordinate Instrument and written notice of the commencement of any action to foreclose or otherwise enforce the Subordinate Instrument must be given to Lender concurrently with or immediately after the occurrence of any such default or commencement; and

e. in the event of the bankruptcy of Grantor, all amounts due on or with respect to the Obligation and this deed of trust will be payable in full before any payments on the indebtedness secured by the Subordinate Instrument.

Grantor may not cause or permit any of the following events to occur without the prior written consent of Lender: if Grantor is (a) a corporation, the termination of the corporation or the sale, pledge, encumbrance, or assignment of any shares of its stock; (b) a limited liability company, the termination of the company or the sale, pledge, encumbrance, or assignment of any of its membership interests; (c) a general partnership or joint venture, the termination of the partnership or venture or the sale, pledge, encumbrance, or assignment of any of its partnership or joint venture interests, or the withdrawal from or admission into it of any general partner or joint venturer; or (d) a limited partnership, (i) the termination of the partnership, (ii) the sale, pledge, encumbrance, or assignment of any of its general partnership interests, or the withdrawal from or admission into it of any general partner, (iii) the sale, pledge, encumbrance, or assignment of a controlling portion of its limited partnership interests, or (iv) the withdrawal from or admission into it of any controlling limited partner or partners. If granted, consent may be conditioned on (a) the integrity, reputation, character, creditworthiness, and management ability of the person succeeding to the ownership interest in Grantor (or security

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interest in such ownership) being satisfactory to Lender; and (b) the execution, before such event, by the person succeeding to the interest of Grantor in the Property or ownership interest in Grantor (or security interest in such ownership) of a written modification or assumption agreement containing such terms as Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Continue with the following.

F.10. When the context requires, singular nouns and pronouns include the plural.

F.11. The term *Note* includes all extensions, modifications, and renewals of the Note and all amounts secured by this deed of trust.

F.12. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

F.13. If Grantor and Borrower are not the same person, the term *Grantor* includes Borrower.

F.14. Grantor and each surety, endorser, and guarantor of the Obligation waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

F.15. Grantor agrees to pay reasonable attorney's fees, trustee's fees, and court and other costs of enforcing Lender's rights under this deed of trust if an attorney is retained for its enforcement.

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F.16. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

F.17. The term *Lender* includes any mortgage servicer for Lender.

F.18. Grantor represents that this deed of trust and the Note are given for the following purposes: [**list specific purposes**].

Include the following if applicable.

F.19. The Note is secured by this deed of trust [[,/and] a Security Agreement/[and/, and] [**include form 8-3 vendor's lien language, if applicable**]]. This deed of trust does not waive the provisions of the Security Agreement [**include if applicable:** and the vendor's lien], and the liens and the rights created are cumulative. Lender may elect to foreclose under one or more liens without waiving any of the other lien(s).

Continue with the following.

_____

[**Name of grantor**]

Include acknowledgment.

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Form 16-22

Security Agreement
[Water Rights]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Debtor:

Debtor's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Classification of Collateral: [**include as applicable:** [Inventory/Equipment/Goods/Fixtures/ General Intangibles]]

Collateral: All of Debtor's interest in the following property and all supporting obligations and proceeds of such property:

1. Water Rights: [**include appropriate description[s] (same as in the deed of trust, form 16-21), which may be found in the subject permit[s], certificate[s] of adjudication, deed[s], easement[s], or other document[s] of conveyance**].

2. Permits and Certificates of Adjudication ("Permits/Certificates" whether one or more): [**describe, e.g.,** All Permits and Certificates of Adjudication pertaining to the Water Rights, now existing or hereafter acquired, including those identified below, and all amendments, replacements, and modifications thereto].

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3. [**Include as applicable:** [Goods/Equipment/Fixtures/Inventory]]

4. All agreements for the sale of water derived from the Water Rights, whether now existing or hereafter executed, and the proceeds thereof.

5. All agreements for the lease of any portion of the Water Rights, whether now existing or hereafter executed, and all rents and proceeds thereof.

Water Authority: [**include as applicable:** The Texas Commission on Environmental Quality (TCEQ) [and [**any groundwater authority, watermaster, or conservation district, or other agency or governmental bodies or authorities having jurisdiction over the administration of the water rights covered**]]].

Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Include either or both of the following if applicable.

Other Debt/Future Advances: The security interest also secures all other present and future debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other Obligation[s]:

Continue with the following.

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A. Debtor's Representations Concerning Debtor and Locations:

A.1. [**Include if applicable:** Description of Land to Which Water Rights Are [or Are to Become] Appurtenant ("Appurtenant Land"): [**include legal description of land**].]

A.2. [**Include if applicable:** Debtor's Intended [Place of Use/Purpose of Use/Point of Diversion] of Water Rights: [**specify**].]

A.3. [**Include if applicable:** [Debtor's place of business/Debtor's chief executive office] is located at [**address, city, state**].]

A.4. [**Include if the debtor is an individual:** Debtor's residence is located at [**address, city, state**].]

A.4. [**Include if the debtor is a corporation, limited partnership, or limited liability company:** Debtor's state of organization is [Texas/[**state**]], and Debtor's name, as shown in its public organic record, as amended, is exactly as set forth above.]

A.5. Debtor's records concerning the Collateral are located at [**address, city, state**].

A.6. Debtor has [caused the original of the Permits or Certificates to be delivered to Secured Party/recorded the Permits or Certificates in the real property records of all applicable counties].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file financing statements describing the Collateral.

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C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [**include if the secured party has prefiled a financing statement or otherwise has a financing statement on file:** except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, lien, security interest, or encumbrance except liens for taxes not yet due.

C.3. All information about Debtor's financial condition is or will be accurate when provided to Secured Party.

C.4. All fees, taxes, and other charges levied or assessed against the Collateral have been properly paid, and none are delinquent or due and owing.

C.5. The Collateral is not the subject of any enforcement action by any Water Authority or other governmental entity.

Include the following if applicable if the debtor is an individual.

C.6. The Obligation was not incurred primarily for personal, family, or household purposes.

And/Or

C.7. The Collateral was not acquired and will not be held primarily for personal, family, or household purposes.

Continue with the following.

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D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party's interest; pay all fees, taxes, and other charges imposed on the Collateral, and provide Secured Party with proper evidence thereof; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; keep the Collateral in Debtor's possession and ownership except as otherwise provided in this agreement; and protect the Collateral against waste, normal usage and normal wear and tear excepted.

D.2. Pay all of Secured Party's expenses, including reasonable attorney's fees [**include for a loan transaction subject to Texas Finance Code section 342.502:** assessed by a court], incurred to (a) obtain, preserve, perfect, defend, and enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; and (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral.

D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral; (b) in Debtor's Mailing Address; (c) in the location of any Collateral; (d) in any other representation or warranty in this agreement; (e) in the permit or certificate issued by any Water Authority for the Collateral, or any proposed adjustment, modification, amendment, or other change to the permit or certificate; (f) that may affect this security interest; and (g) of any change in Debtor's name and any location set forth above.

D.5. Use the Collateral primarily according to the stated classification.

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D.6. Maintain accurate records of the Collateral at the address set forth above, furnish Secured Party any requested information related to the Collateral, and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. File with any applicable Water Authority all required reports and provide Secured Party with a true and correct copy of all such reports.

D.8. On Secured Party's demand, hold payments, including instruments, items, and money received as proceeds of the Collateral, separate and in an express trust for Secured Party and deposit all such payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

D.9. Inform Secured Party immediately of any claim made in regard to any Collateral.

E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral except in the ordinary course of Debtor's business.

E.2. Allow the Collateral to become the subject of any enforcement action by any Water Authority or any other governmental authority.

Select one of the following.

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

E.3. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

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Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

E.3. Change the state in which Debtor's place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an individual.

E.3. Change Debtor's name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Continue with the following.

E.4. Amend or convert any agreement, permit, or certificate related to the Collateral without the prior written consent of Secured Party.

F. Insurance and Risk of Loss

F.1. Debtor will insure the Collateral in accordance with Secured Party's reasonable requirements regarding choice of carrier, risks insured against, and amount of coverage. Policies must be written in favor of Debtor, be endorsed to name Secured Party as an additional insured or as otherwise directed in writing by Secured Party, and provide that Secured Party will receive at least ten days' notice before cancellation. Debtor must provide copies of the policies or evidence of insurance to Secured Party.

F.2. **COLLATERAL PROTECTION INSURANCE NOTICE**

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Secured Party hereby notifies the Debtor as follows:

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(A) the Debtor is required to:

(i) keep the collateral insured against damage in the amount the Secured Party specifies;

(ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and

(iii) name the Secured Party as the person to be paid under the policy in the event of a loss;

(B) the Debtor must, if required by the Secured Party, deliver to the Secured Party a copy of the policy and proof of the payment of premiums; and

(C) if the Debtor fails to meet any requirement listed in Paragraph (A) or (B), the Secured Party may obtain collateral protection insurance on behalf of the Debtor at the Debtor's expense.

F.3. Debtor assumes all risk of loss to the Collateral.

F.4. Debtor appoints Secured Party as attorney-in-fact to collect any returned unearned premiums and proceeds of any insurance on the Collateral and to endorse and deliver to Secured Party any payment from such insurance made payable to Debtor. Debtor's appointment of Secured Party as Debtor's agent is coupled with an interest and if Debtor is an individual will survive any disability of Debtor.

G. Default and Remedies

G.1. A default exists if—

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a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;

b. any warranty, covenant, or representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;

c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;

d. any Collateral is assigned for the benefit of creditors;

e. a bankruptcy or insolvency proceeding is commenced by Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;

f. a bankruptcy or insolvency proceeding is commenced against Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Debtor; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor;

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h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition; or

i. Debtor receives notice from any applicable Water Authority of the potential of an enforcement action by that Water Authority related to the Collateral, Debtor's use of the Collateral, or a violation of any rule or regulation of the Water Authority and that matter is not cured within thirty days after the notice.

G.2. If a default exists, Secured Party may—

a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party's or Debtor's name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;

b. take possession of any Collateral not already in Secured Party's possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;

c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law;

d. exercise any rights and remedies granted by law or this agreement; and

e. cause the Collateral to be transferred to Secured Party's name with any appropriate Water Authority. Debtor appoints Secured Party as Debtor's attorney-in-fact to file any application, institute any proceedings, and per-

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form such other acts or actions on behalf of Debtor, and in Debtor's name, as Secured Party may determine to be necessary to protect or preserve the Collateral and Lender's interest therein, and to seek the approval of that Water Authority for the necessary changes in ownership, diversion point, place of use, and/or purpose of use of the Collateral. This appointment is coupled with an interest, is irrevocable, and survives Debtor's disability or foreclosure under this security agreement.

G.3. Foreclosure of this security interest by suit does not limit Secured Party's remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party's rights and remedies include all those granted by law and those specified in this agreement. The debt is secured by a deed of trust [**include if applicable:** and [**include form 8-3 vendor's lien language**]]. This security agreement does not waive the provisions of the deed of trust [**include if applicable:** and the vendor's lien], and the liens and the rights created are cumulative. Secured Party may elect to foreclose under one or more liens without waiving any of the other lien(s).

G.4. Secured Party's delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party's rights to subsequently exercise those remedies or rights. Secured Party's waiver of any default does not waive any other default by Debtor. Secured Party's waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

G.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

G.6. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or

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waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party's rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.

G.7. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.8. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.9. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

G.10. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

G.11. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

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G.12. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

H. General

H.1. Secured Party may at any time—

a. take control of proceeds of insurance on the Collateral and reduce any part of the Obligation accordingly or permit Debtor to use the funds to repair or replace the Collateral and

b. purchase single-interest insurance coverage that will protect only Secured Party if Debtor fails to maintain insurance, and premiums for the insurance will become part of the Obligation.

H.2. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor's Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

H.3. This security interest will attach to an after-acquired commercial tort claim only to the extent permitted by law.

H.4. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

H.5. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party's delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If

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such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations, warranties, and obligations are joint and several as to each Debtor.

H.6. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.7. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.8. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [**include if applicable in a consumer transaction:** , and has been signed by Debtor in,] the county of Secured Party's Mailing Address.

H.9. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.10. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.11. When the context requires, singular nouns and pronouns include the plural.

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H.12. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

_____

[Name of debtor]

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Form 16-23

Memorandum of Groundwater Loan

[For Use with Edwards Aquifer Authority]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Maker:

Maker's Mailing Address:

Payee:

Payee's Mailing Address:

Date of Loan:

Loan Term:

Real Property:

Groundwater Rights: Legal title to the Groundwater beneath the following Real Property

[**include description from deed**]

Groundwater Permit: [**include copies of permit[s] issued by the groundwater authority**]

Groundwater District: [**include the name and mailing address of the local groundwater district[s] with jurisdiction over the groundwater rights**]

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Maker:

By:_____
Printed Name:

Payee:

By:_____
Printed Name:
Title:

Include acknowledgments.

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Form 16-24

Notice of Lender's Interest in Water Rights and Permit

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Borrower:

Borrower's Mailing Address:

Lender:

Lender's Mailing Address and Contact Information:

Loan officer:

Phone:

E-mail:

Date of Loan:

Loan No.:

[Real Property:]

Water Rights, including any Permit[s] now existing or hereafter issued:

All persons dealing with the Water Rights or the Permit[s] issued in connection with the Water Rights are hereby notified of Lender's interest in the Water Rights and Permit[s].

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Lender has made a loan to Borrower secured by a lien and a security interest in Borrower's Water Rights and Permit[s]. Under the terms of the loan documents—

1. If Borrower defaults on the loan, Lender has the right to foreclose on its security interest in the Water Rights and to sell or acquire the Water Rights.

2. Lender's prior written consent is required for a sale or conveyance of any interest in the Water Rights and assignment of all or any portion of the Permit[s].

3. Lender's prior written consent is required for the issuance of [a] Permit[s] for the Water Rights and Lender must sign the application for issuance of [a] Permit[s].

4. Lender's prior written consent is required for a modification of the Water Rights or the Permit[s] and Lender must sign the application for modification of the Water Rights or the Permit[s].

If a Release of Lender's security interest in the Water Rights and Permit[s] does not appear in these records, then any person dealing with the Water Rights or the Permit[s] should assume that Lender still has a lien and security interest in the Water Rights and the Permit[s], even if Borrower has conveyed its interest in the Water Rights or assigned or modified the Permit[s]. You may contact Lender to determine whether the security interest has been released.

Borrower:

By:_____
Printed Name:

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Lender:

By:_____

Printed Name:

Title:

Include acknowledgments.

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Form 16-25

Permittee's Instruction Letter to Water Authority

[**Date**]

[**Name and address of water authority**]

Re: Lender's Consent Required for a Transfer, Termination, or Modification of Permit No. [**number**]

[**Salutation**]

I am the owner of the water rights described in Permit No. [**number**] (the "Permit") and the holder of the Permit. I have obtained a loan from [**name**] ("Lender") in the original principal amount of $[**amount**], which is secured by a [first-lien] deed of trust and security interest in the water rights and Permit. Under these loan documents, as long as the loan is outstanding, Lender's consent is required for a transfer, termination, or modification of the water rights and Permit.

You are hereby directed not to authorize or approve a transfer, termination, or modification of the Permit unless the [**name of water authority**] has received the written consent of Lender to the transfer or modification or a copy of a written release of the lien and security interest. The consent may be evidenced by the signature of Lender on the application for transfer, termination, or modification submitted to you or by separate written authorization signed by Lender. Alternatively, no consent will be required if you receive a copy of a release or partial release of the lien and security interest in the water rights and Permit signed by Lender.

Questions regarding this matter should be directed to Lender at the following address:

[**Name of lender**]

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[**Contact person**]

[**Address**]

Re: [**loan number**]

Phone:

E-mail:

Please include a copy of this letter with your file and records on the water rights and Permit.

Thank you for your cooperation.

Sincerely,

_____

[**Name of permittee**]

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Form 16-26

[Name of district] Groundwater Conservation District Application of [name of applicant] for Transfer of Ownership of Wells and Operating [and Transport] Permits Owned by [name of permittee]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Pursuant to rule[s] [**number[s]**] of the [**name of district**] Groundwater Conservation District ("District") as amended, [**name of applicant**] ("Applicant"), as New Owner, and [**name of permittee**] ("Permittee"), as Current Owner, file this Application to Transfer the Ownership of Permittee's Permits for Nonexempt Wells described herein and, in support thereof, provide the following information.

A. Ownership of Wells

Applicant would provide the following information as required by District rule [**number**] for the transfer of the ownership of [**number**] nonexempt wells in [**county**] County, Texas, from Permittee as Current Owner to Applicant as New Owner.

The [**number**] wells are authorized by the following Operating Permits granted by the District to Permittee for nonexempt wells approved on [**date of board approval**] and issued on [**issuance date[s] on permits**] (the "Operating Permits") and assigned District well numbers [**authority's assigned well numbers**]. A copy of each of the Operating Permits is attached to this document in Exhibit A.

Applicant and Permittee have a contract for the sale and purchase of the [Groundwater and] associated Operating Permits sought to be transferred pursuant to this Application and more fully described in sections B. and C. below. That sale and purchase includes the existing

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[**number**] wells described above. A copy of the assignment and bill of sale for conveyance of the wells to Applicant to be executed and delivered at Closing is attached to this document in Exhibit B. Closing of the contract is contingent on the District's approval of this Application.

B. Operating Permits

Applicant would provide the following information as required by District rule [**number**] for the transfer of the following [**number**] Operating Permits for nonexempt wells assigned District well numbers [**authority's assigned well numbers**]. A copy of each Operating Permit is attached to this document in Exhibit A.

*B.1. District Rule [**number**]*

B.1.a. Name, Address, and Telephone Number of Applicant

Name: [**name of applicant**] [**include if applicant is a business:** , attn: [**name of contact person**], its [**title of contact person**]]

Address:

Telephone number:

B.1.b. Name, Address, and Telephone Number of Current Permittee

Name: [**name of permittee**]

Address:

Telephone number:

B.1.c. Copy of Assignment Transferring Operating Permits to Proposed Transferee

A copy of the written assignment transferring ownership of the Operating Permits from Permittee to Applicant is attached as Exhibit C.

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*B.1.d. Transfer Application Fee, If Established under District Rule [**number**]*

Pursuant to the District fee schedule contemplated by District rule [**number**], and after confirming with the District general manager, the District is not currently charging a transfer application fee pursuant to the adopted District rules.

*B.2. District Rule [**number**]*

Applicant would state that pursuant to District rule [**number**], Applicant has never had a permit issued by the District and therefore has never been out of compliance with the terms and conditions of any other District permits issued to Applicant. Applicant would also state that it has complied with the terms and conditions of the District rules and chapter 36 of the Texas Water Code. Applicant has never had any enforcement action imposed by the District.

Applicant would further state pursuant to District rule [**number**] that it has the financial and managerial capabilities necessary to comply with the terms and conditions of the Operating [and Transport] Permits to be transferred.

Applicant further states that upon transfer of the Operating [and Transport] Permits, District permit numbers [**authority's assigned permit numbers**] will fully comply with the terms and conditions of the Operating [and Transport] Permits, the rules of the District, its enabling legislation, and chapter 36 of the Texas Water Code.

Applicant affirms that it has been and remains in compliance with the District's rules and the terms and conditions of its Operating [and Transport] Permits and that it has paid current all fees due and owing to the District and filed all applicable reports.

Include the following if applicable.

C. Transport Permits

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Applicant would provide the following information as required by District rule [**number**] for the transfer of the following [**number**] Transport Permits for nonexempt wells approved on [**date**] and issued on [**issuance date[s] on permits**] (the "Transport Permits") assigned District well numbers [**authority's assigned well numbers**]. A copy of each Transport Permit is attached to this document in Exhibit D.

A copy of the assignment transferring the Transport Permits from Applicant to Permittee is attached as Exhibit C.

Pursuant to District rule [**number**], Applicant would request that the Transport Permits be processed with the application for the transfer of Operating Permits as discussed above.

Continue with the following.

D. Requested Action by [name of district]

Applicant and Permittee represent that the information provided in this Application is true and correct to the best of their knowledge and therefore respectfully request that the District approve the transfer and the ownership of the wells and the Operating [and Transport] Permits currently held by Permittee to Applicant, subject to the delivery of the executed conveyancing documents to the District's general manager.

[**Name of permittee**]

By: _____
[**Name and title**]

[**Name of applicant**]

By: _____
[**Name and title**]

Include acknowledgments.

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Exhibit A

Operating Permits Currently Owned by [name of permittee] to Be Transferred to [name of applicant]

Attach copies of the operating permits.

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Exhibit B

Assignment and Bill of Sale from [name of permittee] to [name of applicant] Dated [date]

Attach copies of the assignment and bill of sale for the conveyance of the ownership of the wells.

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Exhibit C

Assignment of Operating [and Transport] Permits from [name of permittee] to [name of applicant] Dated [date]

Attach a copy of the assignment transferring the ownership of the operating permits and, if applicable, the transport permits.

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Exhibit D

Transport Permits Currently Owned by [name of permittee] to Be Transferred to [name of applicant]

Attach copies of the transport permits.

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Chapter 17

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Chapter 17

Risk Allocation: Indemnity, Waiver, and Insurance

§ 17.1 Risk Allocation Methods and Definitions

Indemnity: An indemnity is a promise to safeguard and hold another party harmless against a liability. An indemnity creates a potential cause of action for the indemnitee against the indemnitor. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

Waiver: A waiver is an agreement not to hold another party responsible for a liability. A waiver operates to bar any right of action on the released matter. *Hart v. Traders & General Insurance Co.*, 189 S.W.2d 493, 494 (Tex. 1945). Waivers are sometimes referred to as "releases."

Insurance: Insurance is a contract under which a company in the business of insuring against losses undertakes for a specified period of time to defend a party against, and compensate the party for, loss arising from a specified risk in consideration for the payment of a premium by the insured party.

Transfers of Risk: One strategy employed by a party in a transaction to minimize exposure to losses is to transfer identified risks to one or more of the following parties:

1. the party on the other side of the transaction through the use of contractual indemnities and waivers (and if the damages or injuries are of the type covered by the indemnitor's commercial general liability insurance policy and the indemnity is an insured contract, as the term is defined in the indemnitor's commercial general liability insurance policy, the risks may also be transferred to the general liability carrier of the indemnitor to the extent of coverage);
2. a third party through a guaranty of payment or performance;
3. an insurance company or corporate surety by purchasing insurance or bonds (provided the risks are insurable or bondable); or
4. an insurance company or corporate surety by becoming a loss payee, additional insured, or beneficiary, as applicable, under an insurance policy or a bond purchased by another party (provided the risks are insurable or bondable).

§ 17.2 Indemnities and Waivers

§ 17.2:1 Types of Indemnities and Waivers

Insurance professionals sometimes describe indemnities as being "limited," "intermediate," or "broad."

1. A limited indemnity clause imposes liability on the indemnitor only to the extent of the indemnitor's fault or negligence and is the most favorable type of indemnity clause for an indemnitor.
2. Under an intermediate indemnity clause, the indemnitor assumes all liability except for the sole negligence of the indemnitee.

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3. A broad-form indemnity clause imposes the entire risk of loss on the indemnitor, including the sole negligence of the indemnitee, and is the most favorable type of indemnity clause for an indemnitee.

§ 17.2:2 Drafting Considerations for Indemnities and Waivers

1. Does the party giving the indemnity or waiver have the authority or capacity to enter into the indemnity or waiver? (See section 17.2:3 below.)
2. What is the creditworthiness of the indemnitor? Is a guaranty, a surety bond, or insurance necessary?
3. Should persons other than the contracting parties (for example, shareholders, directors, officers, employees, contractors, or subcontractors) benefit from the indemnity or waiver?
4. Will liabilities arising out of the acts or omissions of persons other than the party giving the indemnity or waiver (for example, employees, agents, and contractors) be subject to the indemnity or waiver?
5. Is the recovery against the party giving the indemnity or waiver limited as to amount, ability to seek a deficiency judgment, or source of funds to pay damages?
6. What risks are covered by the indemnity or waiver?
7. Is the indemnity or waiver consistent with insurance coverages carried by the parties, both as to amounts and risks insured? To what degree are the indemnified risks covered by the indemnitee's available insurance? To what degree is the amount of indemnified risk covered by the indemnitee's available insurance?
8. Is the obligation to defend and the entire cost of defense included in the indemnity? If so, will the beneficiary of the indemnity be entitled to separate counsel of its choosing?
9. Are there any types of damages (for example, punitive or consequential) that are excluded?
10. Are there any limitations as to the time period the indemnity or waiver will be in effect or the time period for making a claim under the indemnity or waiver?
11. Do any anti-indemnity statutes apply? (See section 17.2:4 below.)
12. Is compliance with the fair notice doctrine necessary? (See section 17.2:5 below.)

§ 17.2:3 Indemnities by Cities and Counties Prohibited

The Texas Constitution states that no debt for any purpose may be incurred by any city or county unless provision is made at the time of creating the debt for levying and collecting a sufficient tax to repay the debt. *See* Tex. Const. art. XI, §§ 5, 7. Because an indemnity is by its nature uncertain as to the timing and amount of the liability that could be incurred, an indemnity by a city or county is invalid. *See T. & N.O.R.R. Co. v. Galveston County*, 169 S.W.2d 713 (Tex. 1943).

§ 17.2:4 Anti-Indemnity Laws

With some exceptions, Texas Insurance Code chapter 151 prohibits broad-form and intermediate indemnities in construction contracts and requirements in a construction contract for insurance policies or endorsements that cover broad-form or intermediate indemnities. Under

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Tex. Ins. Code § 151.102, an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. Under Tex. Ins. Code § 151.104, a provision in a construction contract that requires the purchase of additional insured coverage or any coverage endorsement or provision within an insurance policy providing additional insured coverage is void and unenforceable to the extent that it requires coverage that is prohibited under Tex. Ins. Code § 151.102.

The definition of a "construction contract" contained in Tex. Ins. Code § 151.001(5) is extremely broad, including any "contract, subcontract, or agreement . . . made by an owner . . . for the design, construction, alteration, renovation, remodeling, repair, or maintenance of . . . a building, structure, appurtenance, or other improvement to or on . . . real property." Whether the definition covers a lease that contemplates leasehold improvements or contains provisions regarding repairs, maintenance, or alterations is, at best, unclear.

Among the exceptions under Insurance Code chapter 151 are the following:

1. There is a broad exception for any provision in a construction contract that requires a party to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (that is, so-called third-party-over actions). Tex. Ins. Code § 151.103.
2. Indemnity provisions contained in loan and financing documents other than construction contracts to which the contractor and owner's lender are parties. Tex. Ins. Code § 151.105(3).
3. An indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).

Texas law also prohibits certain indemnities by a contractor with respect to an architect's negligence and certain indemnities by an architect with respect to an owner's negligence. *See* Tex. Civ. Prac. & Rem. Code § 130.002.

§ 17.2:5 Fair Notice Doctrine

Even if no anti-indemnity statute applies, when an indemnity, release, or waiver provision seeks to shift the risk of one party's future negligence or other fault to the other party, Texas imposes a fair notice requirement before enforcing that agreement. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). The fair notice requirements are set out as the express negligence doctrine and the conspicuousness requirement. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004). The fair notice requirement is a rule of contract interpretation and is therefore determinable as a matter of law. *Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813, 814 (Tex. 1994).

Express Negligence Rule: If the parties to a contract want to indemnify one of the parties against its own negligence, the parties must express their intent in specific terms within the four corners of the contract. *Ethyl Corp. v. Dan-*

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iel Construction Co., 725 S.W.2d 705, 707–08 (Tex. 1987). This same rule applies to releases. *Dresser Industries, Inc.*, 853 S.W.2d 505. There is no specific required language to use to comply with the express negligence doctrine in Texas, other than use of the terms *negligence* or *fault*, but a good example to follow states: "TENANT WILL RELEASE, DEFEND, AND INDEMNIFY LANDLORD [AND ANY OTHER INDEMNITEES] FROM ANY CLAIM OR LOSS EVEN THOUGH CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT), STRICT LIABILITY, OR OTHER LEGAL FAULT OF LANDLORD [OR ANY OTHER INDEMNITEES]." Whether a release or indemnity for gross negligence is enforceable is unclear, but any release or indemnity intended to apply to gross negligence may need to specifically mention gross negligence to meet the express negligence test. *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915 (Tex. App.—Dallas 2013, no pet.).

Conspicuousness Rule: The indemnity, release, or waiver provision indemnifying or releasing a party from its own negligence must be conspicuous (for example, a separate indemnity and waiver provision in contrasting, capitalized, or colored type with a clear and informative heading). *Dresser Industries, Inc.*, 853 S.W.2d at 510–11.

Extensions of Fair Notice Doctrine: The fair notice doctrine has also been held to apply to indemnities or waivers—for strict liability (*Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 890 S.W.2d 455, 459 (Tex. 1994)) and of a third party by a subscribing employer notwithstanding the exclusive recovery (or one action) rule under the Workers' Compensation Act (*Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990)).

§ 17.3 Overview of Insurance Policies

§ 17.3:1 Categories of Insurance

Property Policies: Property insurance is "first party" insurance that compensates the named insured for property that has been lost, damaged, or destroyed. Examples of property insurance policies are commercial property, builder's risk, terrorism, and business income insurance. (See section 17.4 below.)

Liability Policies: Liability insurance is "third party" insurance that compensates a third party injured by the actions or omissions of an insured. Examples of liability insurance are commercial general, business auto, workers' compensation, liquor liability, and pollution insurance. (See section 17.5 below.)

Package Coverage Policies: Package coverage policies cover both property risks and liability risks. An example of a package coverage insurance policy is homeowner's insurance. (See section 17.4:4 below.)

§ 17.3:2 Lines of Insurance

Personal lines of insurance are for individuals and families—for example, homeowner's insurance and renter's insurance. Commercial lines of insurance cover businesses—for example, commercial property insurance, commercial general liability insurance, and business owner's policies.

§ 17.3:3 Policy Forms

Insurance Services Office, Inc., commonly known in the insurance industry as ISO, drafts insurance forms that are used either verbatim or with modifications in all fifty states. (The National Board of Fire Underwriters, the organization to which many real estate documents still refer, merged with the American Insurance

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Association in 1966 and ceased to exist as a separate entity. In 1971 the American Insurance Association merged with twenty-nine other ratings agencies to create ISO.) Although ISO forms are dominant, other forms in the marketplace may be (1) "manuscripted," that is, drafted by an insurance company (and which may be similar to or less broad than the ISO equivalent); (2) promulgated by the Texas Department of Insurance (for example, the Homeowner's A, B, and C coverages); or (3) drafted by a competitor of ISO (for example, the American Association of Insurance Services).

Another set of property insurance forms, known as inland marine forms or floaters, evolved to insure property being transported by canal barges and later railroads and trucks. Today, inland marine is used primarily for "property which is mobile by nature and for which there is no fixed situs; and . . . instruments of communication or transportation such as bridges, tunnels, piers or television antennas" (State of New York Insurance Department, Circular Letter No. 22 (2000), August 11, 2000). In addition, inland marine forms are used in the construction area and for specialized coverages such as jewelry and computer data. Inland marine forms are generally manuscripted.

§ 17.4 Property Insurance

§ 17.4:1 Terminology and Structure

Commercial property insurance is the property insurance form used in most commercial settings. The phrase *fire and extended coverage insurance* was the name of a named-peril property insurance policy that is no longer available, and the phrase *casualty insurance* is incorrect if used to describe property insurance. Unlike commercial liability insurance and residential insurance, there is no standard commercial property policy form. Each commercial property insurer has its own policy form. To some extent, commercial property insurers may employ property insurance policy language provided by ISO.

An ISO commercial property insurance policy is not a single form. Rather, an ISO commercial property insurance policy is made up of six different forms:

1. Common policy conditions (ISO Form IL 00 17)—describes the conditions applicable to all insurance policies.
2. Commercial property conditions (ISO Form CP 10 90)—describes the conditions applicable only to commercial property policies.
3. ISO Form CP 00 10, entitled "Building and Personal Property Coverage Form"—describes the property being covered.
4. Declarations and schedules provide specifics such as the name of the insured, location of property, and coverage amounts.
5. A causes of loss form (ISO Forms CP 10 10, CP 10 20, or CP 10 30)—determines whether the policy will be a named peril policy or an all risks policy (see section 17.4:2 below).
6. Any necessary coverage forms or endorsements describing additional property covered, additional limits, and optional coverages (see sections 17.4:3 and 17.4:5 below).

As a general rule, commercial property insurance is used to cover completed buildings, and builder's risk insurance is used to cover buildings under construction or, in some cases, under extensive renovation. No bright line exists as to when builder's risk insurance should be used rather than commercial property insurance. Builder's risk policies have several important advantages over commercial property policies with respect to coverage for buildings under

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construction, such as coverage for property stored offsite and property in transit.

§ 17.4:2 Forms of Commercial Property Policies

Historically, property insurance was written on either a named-peril basis, which insured against property damage arising from causes of loss expressly enumerated in the policy, or an all-risks basis, which insured against property damage arising from all causes of loss except those that were expressly excluded by the policy. The insurance industry has now abandoned use of the words *risk* and *peril* and instead uses the term *cause of loss*.

Basic and Broad (Named-Peril) Forms: Two named-peril commercial property insurance policies are currently available: causes of loss—basic form and causes of loss—broad form. The basic form (ISO Form CP 10 10) covers the following causes of loss: fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicle collision, riot or civil commotion, vandalism, sprinkler leakage, sinkhole collapse, and volcanic action. The broad form (ISO Form CP 10 20) covers all the causes of loss covered by the basic form plus falling objects; weight of snow, ice, or sleet; water damage from leaking appliances; and collapse from specified causes.

Special (All-Risks) Form: The correct terminology for commercial property insurance currently written on an all-risks basis is causes of loss—special form (ISO Form CP 10 30), which was formerly known as "all-risk."

Leased Property: The ISO commercial property policy insures a commercial tenant's use interest in leasehold improvements and betterments. The ISO Building and Personal Property Coverage Form (ISO Form CP 00 10) states that it provides coverage for business personal property including "[y]our use interest as tenant in improvements and betterments" and defines "improvements and betterments" as "fixtures, alterations, installations or additions: (a) [m]ade a part of the building or structure you occupy but do not own; and (b) [y]ou acquired or made at your expense but cannot legally remove." If insurance coverage is desired for building standard improvements or improvements made by a previous tenant, coverage is to be by ISO Form CP 14 01 09 17 (entitled "Scheduled Building Property Tenant's Policy") and ISO Form CP 14 02 09 17 (entitled "Unscheduled Building Property Tenant's Policy").

See "Loss Payee and Mortgagee Clauses" in section 17.4:3 below for a discussion of a commercial landlord's interest as a loss payee by endorsement to a property policy maintained by a tenant insuring a building owned by the landlord (ISO Form CP 12 18 06 07) and section 17.6:5 for a discussion of a commercial landlord's interest as an additional insured on a property policy maintained by a tenant insuring the building (ISO Form CP 12 19 06 07).

§ 17.4:3 Specialized Coverages

Separate property policies or endorsements are available to fill the gaps created under standard forms of commercial property insurance policies.

Equipment Breakdown: Equipment breakdown (formerly boiler and machinery) coverage (for example, ISO Endorsement Form BM 00 20) insures against property losses caused by the explosion of pressure vessels and sudden and accidental, mechanical or electrical breakdown of covered machinery. Coverage for the resulting loss of business income may be added.

Builder's Risk: Because of the higher likelihood of property loss during construction, a specialized form of property insurance called builder's risk is used during the construction of a building in lieu of commercial property insurance.

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Although ISO has promulgated a builder's risk form (ISO Form CP 00 20), most builder's risk policies are written on manuscripted inland marine forms. ISO builder's risk insurance forms are available on a basic, broad, or special causes of loss basis, but the inland marine forms that are more commonly used may, depending on the insurer, have broader or narrower coverage than their ISO counterparts. Among the causes of loss that may not be covered by a builder's risk policy without endorsement are collapse resulting from design error and damage resulting from freezing, flood, and earthquake.

Builder's risk property insurance is available in nonreporting (commonly known as "completed value") or reporting forms. Under a completed value form, coverage is automatically increased as construction occurs. A reporting form will not cover the increased value until the increase is reported to the insurance carrier, usually on a monthly basis.

A builder's risk policy can cover most of the property used in or incidental to the construction even if the property is stored off-site or in transit, but may not cover the following unless the policy is specifically endorsed: landscaping, temporary structures such as scaffolding, construction trailers, site work, underground structures such as footings, equipment used to construct the building, and business income.

Many extensions of coverage are available under builder's risk insurance policies. Because builder's risk policies forms are generally manuscripted, these extensions may be included within the basic coverage of some policies but must be added by endorsement to other policies. Most extensions or endorsements have a "sublimit," which is less than the full policy limit but the maximum amount recoverable with respect to the extension or endorsement. The following are some of the extensions of coverage or endorsements that are available for builder's risk policies:

1. Contract penalties—covers contractual penalties to the insured's customers incurred as a result of a delay of completion date.
2. Collapse—covers damage or loss from collapse of the structure caused by certain causes of loss, generally including defective materials and faulty design, plans, or workmanship (but not the cost of correcting the defective workmanship or faultily designed work).
3. Debris removal—covers the cost of removing debris resulting from a covered cause of loss in excess of the limit of proceeds for debris removal contained in basic coverage. Many builder's risk policies cover this risk but with a sublimit. In such cases, the sublimit can be increased by endorsement.
4. Expediting expense—covers additional expenses necessarily incurred to complete construction on schedule after the occurrence of a covered cause of loss.
5. Pollutant cleanup—covers the cost of removing pollutants released by a covered cause of loss.
6. Preservation of property—covers the cost of removing covered property from the premises to preserve the property from loss after a covered cause of loss has occurred.
7. Soft costs (sometimes called "extra expenses")—covers necessary expenses incurred as a result of a delay of completion date, such as interest on the construction loan, real estate taxes, architectural and engineering supervisory costs, costs to renegotiate leases, brokerage commissions, and legal and accounting costs

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(*caveat:* coverage varies from policy to policy).

8. Testing—covers damage or loss from testing of boilers or other pressure vessels, air-conditioning systems, and mechanical or electrical machines or devices.

9. Loss of rents—covers the loss of rents caused by the delay of completion.

Because builder's risk property policies typically cease coverage if any portion of the structure is occupied for purposes other than testing, a phased project may require an endorsement to permit a certain level of occupancy.

Business Income: Business income coverage (ISO Endorsement Form CP 00 32) insures against loss of earnings resulting from the insured's inability to operate a business after the occurrence of a covered cause of loss. This type of coverage was formerly known as "business interruption" insurance. Business income and extra expense coverage (ISO Endorsement Form CP 00 30) also insure against extraordinary additional expenses resulting from the insured's inability to operate a business after the occurrence of a covered cause of loss. If desired, business extra expense coverage can be obtained by itself.

Rental value coverage insures against loss of rents (including abatement of rentals under leases) resulting from the insured's inability to operate a building after the occurrence of a covered cause of loss. Rental value coverage is available under both business income endorsement forms (ISO Forms CP 00 30 and CP 00 32) but is not included unless specified in the declaration to the policy.

All of the ISO commercial property causes of loss forms (ISO Forms CP 10 10, CP 10 20, and CP 10 30) exclude coverage for business income loss caused by "the failure of power or other utility services . . . if the failure occurs outside of a covered building." ISO Form CP 15 45, entitled "Off-Premises Services—Time Element," is an endorsement to a business income coverage form (with or without extra expense coverage) that provides coverage for the loss of income arising from off-premises utility service disruption.

ISO Form CP 15 08, entitled "Business Income from Dependent Properties—Broad Form," is an endorsement to a business income coverage form (with or without extra expense coverage) that provides coverage for loss of income (and extra expenses incurred, if applicable) because of damage to another company's facility. For example, a San Antonio–based automobile manufacturer depends on parts from an automobile parts facility located in Beaumont. If the Beaumont plant were damaged and rendered inoperable by a hurricane, the San Antonio manufacturer would incur losses even though the automobile manufacturer's plant is unharmed.

Crime (or Fidelity): This coverage protects the insured against loss of property (generally money, securities, and inventory) resulting from the types of crime enumerated in the policy. Among the crimes for which crime insurance is available are computer fraud, social engineering fraud, employee dishonesty, embezzlement, extortion, forgery, premises theft, premises burglary, safe burglary, wire transfer fraud, counterfeiting, and off-premises robbery.

Earth Movement or Earthquake: Earth movement or earthquake coverage insures against property losses caused by earth movement, including earthquake shocks and volcanic eruptions. Earth movement coverage is broader than earthquake coverage. Earthquake coverage, for instance, does not cover mudslides.

Flood: Flood coverage insures against property losses caused by rising waters, backup of storm sewers, and storm surges. Flood coverage is necessary because all three of the ISO com-

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mercial property insurance causes of loss forms (ISO Forms CP 10 10, CP 10 20, and CP 10 30) expressly exclude coverage for floods and many other types of water damage.

The National Flood Insurance Act of 1968 (42 U.S.C. §§ 4001–4131) (NFIP) created a program to make available flood insurance for property owners in flood-prone areas. Regulations implementing the NFIP are found at 44 C.F.R. pts. 59–78. *See also* Tex. Loc. Gov't Code § 240.901 (participation in federal flood insurance program); Tex. Water Code §§ 16.311–.324 (Flood Control and Insurance Act). The Flood Disaster Protection Act of 1973 mandated that federally regulated lending institutions could not "make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified . . . as an area having special flood hazards and in which flood insurance has been made available" under the NFIP without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. 42 U.S.C. § 4012a(b)(1).

NFIP insurance has several drawbacks:

1. The maximum coverage limits are $500,000 for a building and $500,000 for contents.
2. The policy pays only direct physical loss by or from flood and does not pay indirect damages such as loss of income.
3. In most cases, NFIP insurance pays only actual cash value, not replacement cost.
4. Coverage is not available without a thirty-day wait, except when obtaining new financing.

The NFIP must be extended by Congress from time to time. As of the publication date of this edition, the NFIP has been extended until September 30, 2021.

See section 17.4:5 below.

Private flood insurance coverage is also available. Coverage under a commercial property policy can be expanded with ISO Endorsement Form CP 10 65. Form CP 10 65 also has several drawbacks:

1. The endorsement does not cover underground water flows or seepage.
2. The endorsement excludes coverage for flooding within a wait period of seventy-two hours after the inception date of the endorsement, damage to land (including excavations, grading, filling, or backfilling), removal of mud and earth deposited by flooding, and loss or damage caused by sewer backup or overflow unless the backup or overflow occurs within seventy-two hours after the flood recedes.
3. A commercial property policy endorsed for flood coverage usually contains a very high deductible with respect to properties located in a special flood hazard area shown on flood insurance rate maps produced by the Federal Emergency Management Agency.
4. A commercial property insurance policy endorsed for flood coverage for flooding usually contains a sublimit with respect to the amount of coverage available for flood damage (a sublimit limits the amount of coverage available to cover a specific type of loss to an amount smaller than the policy limit).

Glass: Before 2000, coverage was excluded or limited in commercial property insurance policies for damage to plate glass. Glass coverage was obtained through so-called "plate glass insurance," issued as a separate coverage form. The exclusions and limitations were removed

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from ISO forms CP 10 10, CP 10 20, and CP 10 30 in 2000.

Loss Payee and Mortgagee Clauses: A loss payee is a party named in a loss payee endorsement. A loss payee clause is referred to as an open clause if the loss payee under the loss payable clause has no independent right to enforce the policy but is simply a recipient of payments when the insured becomes entitled to collect under the policy. The drawback of an open clause is that the action or inaction of the insured can defeat the right of a loss payee to collect (for example, the insured may make a misrepresentation, fail to pay premiums, or fail to report a loss timely). On the other hand, a closed clause creates a separate contract between the insurer and the loss payee or mortgagee and contains language to the effect that the act or neglect of the insured will not invalidate the policy. A closed loss payee clause is also referred to as a mortgagee clause. It provides special protections to the mortgage holder that generally include payment for covered loss that will be made to the mortgage holder, not to the insured or to the insured and the mortgagee; coverage applies for the benefit of the mortgagee even if the insured's claim is denied because of the insured's acts, subject to a couple of basic requirements. The mortgagee will receive written notice of policy cancellation by the insurer.

Standard mortgage holder protection for buildings or structures only (but not the business personal property) is built into the current ISO Building and Personal Property Coverage Form (ISO Form CP 00 10).

The current edition of ISO Endorsement Form CP 12 18, entitled "Loss Payable Provisions," uses four different descriptions to describe the loss payee: "Loss Payable," "Lender Loss Payable," "Contract of Sale," and "Building Owner Loss Payable." It is critical for a mortgagee to pick the right category. If "Loss Payable" is chosen in the schedule to the endorsement, the provision becomes an open clause, and the interest of the loss payee is protected only if the named insured chooses to enforce the protection. However, if "Lender Loss Payable" is chosen in the schedule, the provision becomes a closed clause and protects a lender loss payee the same way as a mortgage holder is protected by the standard mortgagee clause in the building and personal property coverage form, with an important difference: under ISO Endorsement Form CP 12 18, the mortgagee protection applies to both the building and the business personal property associated with the building.

Form CP 12 18 may also be used by a landlord to create a "Building Owner Loss Payable" and establish privity between the landlord and the tenant's property carrier with respect to insurance proceeds payable because of the loss of the landlord's property.

Signs: This coverage (ISO Form CM 00 28) insures against damage to signs resulting from windstorm, vandalism, or vehicle damage.

Terrorism: Terrorism insurance protects the insured against losses arising from terrorist activities that are excluded from commercial property policies.

Until 2002, damage or loss from terrorism was not expressly excluded by ISO's commercial property insurance policy forms. Following the attacks of September 11, 2001, ISO introduced several exclusions for losses caused by terrorism. In November 2002, the federal government enacted the Terrorism Risk Insurance Act of 2002 (TRIA) requiring all U.S. commercial property insurers to offer coverage for losses caused by international terrorism and creating a reinsurance program for this coverage with a total annual limit of $100 billion. TRIA was extended in 2005 and reauthorized in 2015, in a modified form, through December 31, 2020. In December 2019, TRIA was reauthorized through December 2027. As originally enacted,

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TRIA applied to violent acts causing damage in excess of $5 million in the United States (or aircraft or U.S.-flagged vessels), committed by a party acting on behalf of a foreign person or interest, and certified as terrorism by the secretary of the U.S. Treasury. The 2007 reauthorization deleted the requirement that an act of terrorism be committed by someone acting on behalf of a foreign person or interest to be certified as an act of terrorism. However, the insurer is not required under TRIA to provide terrorism coverage if the insured rejects the coverage in writing or if the insured does not pay the premium for the terrorism coverage. TRIA does not set the premiums for terrorism coverage. *See* 15 U.S.C. § 6701 note (Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, as amended by Terrorism Risk Insurance Extension Act of 2005, Pub. L. No. 109-144, 119 Stat. 2660, the Terrorism Risk Insurance Program Reauthorization Act of 2007, Pub. L. No. 110-160, 121 Stat. 1839, and the Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, 129 Stat. 3). *See also* 31 C.F.R. pt. 50.

§ 17.4:4 Residential or Farm Property Insurance

Homeowner's Insurance: Homeowner's insurance is available to the owner of an owner-occupied dwelling. Homeowner's insurance is a package coverage insurance policy covering both property claims, such as loss of or injury to the dwelling and to the insured's personal property, and some personal liability claims. A homeowner's insurance policy also covers some living expenses incurred as a result of temporary displacement because of damage to a dwelling. See **https://www.tdi.texas.gov/pubs/consumer/cb025.html** for an explanation of homeowner's insurance coverage, enhancements, and exclusions.

Most homeowner's policies may be written on forms generated by the Texas Department of Insurance (TDI) (HO-A, HO-B, and HO-C) or forms generated by ISO (HO 00 02, HO 00 03, and HO 00 05). There are also numerous unregulated company-specific forms. See **https://www.tdi.texas.gov/orders/co020741.html** for a discussion of the state-approved homeowner's forms in Texas.

The property coverage under homeowner's insurance policies varies as follows:

1. TDI Form HO-A and ISO Form HO 00 02—named-cause of loss basis (see section 17.4:2 above) for both the dwelling and its contents;

2. TDI Form HO-B and ISO Form HO 00 03—risk of direct physical loss basis (see section 17.4:2 above) for the dwelling and a named-peril basis for its contents; and

3. TDI Form HO-C and ISO Form HO 00 05—all-risks basis for both the dwelling and its contents.

The amount collected for loss of or injury varies as follows under the various forms:

1. TDI Form HO-A—actual cash value (see section 17.4:5 below) for both the dwelling and its contents;

2. ISO Form HO 00 05—replacement cost (see section 17.4:5 below) for both the dwelling and its contents; and

3. TDI Forms HO-B and HO-C and ISO Forms HO 00 02 and HO 00 03—replacement cost for the dwelling and actual cash value for its contents. (All four forms can be endorsed to cover replacement cost for the contents.)

Condominium Insurance: A condominium has two sets of insurance, one covering the condominium association and another covering the individual unit owners.

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The condominium association's insurance requirements are set forth in Tex. Prop. Code § 82.111. Tex. Prop. Code § 82.111(a) requires that the condominium association maintain separate commercial property and commercial general liability policies. A commonly used condominium association property coverage form, ISO Form CP 00 17, entitled "Condominium Association Coverage Form," is nearly identical to its commercial property insurance coverage counterpart, ISO Form CP 00 10, except that the definition of business personal property is limited to the personal property owned by the association or indivisibly by all unit owners and other property for which the association is responsible under the declaration. Tex. Prop. Code § 82.111(d) also requires that the unit owners be named as insureds under the association's policies, that the association's insurers waive subrogation as to the unit owners, and that the association's policies are primary to a unit owner's policies if there is duplicate coverage.

Individual unit owners purchase the equivalent of homeowners coverage for their individual units known as "condominium unit owners" policies. Like homeowners insurance, unit owners insurance is a package coverage insurance policy covering both property claims with respect to the unit interior and the insured's personal property and liability claims. Unit owners policies may be written on TDI forms HO-B-CON and HO-C-CON and ISO Form HO 00 06.

The property coverage under unit owners insurance policies varies as follows:

1. TDI Form HO-B-CON and ISO Form HO 00 06—named-cause of loss basis (see section 17.4:2 above) for both the unit interior and its contents (all risks coverage is available for both dwelling and contents under ISO Form HO 00 06 by endorsement); and
2. TDI Form HO-C-CON—all-risks basis for both the unit interior and its contents.

The amount collected for loss of or injury varies as follows under the various forms:

1. TDI Form HO-C-CON—replacement cost (see section 17.4:5 below) for both the dwelling and its contents; and
2. TDI Form HO-B-CON and ISO Form HO 00 06—replacement cost for the dwelling and actual cash value for its contents. (Both forms can be endorsed to cover replacement cost for the contents.)

Tenant's Insurance: Tenant homeowner's insurance (commonly known as tenant's or renter's insurance) is available to tenants of residential property. Tenant's insurance is a package coverage insurance policy that covers the property insurance causes of loss of injury to or loss of the tenant's personal property and the liability insurance cause of loss of bodily injury to third parties. The property portion of tenant's insurance is available in either a named-cause of loss version called broad form or, for a higher premium, an all-risks version called comprehensive form (see section 17.4:2 above). The amount collected for property loss under tenant's insurance is limited to actual cash value, unless the insured has purchased an endorsement increasing coverage to replacement cost (see section 17.4:5 below). The risks of injury to or loss of the dwelling, unit, or apartment are generally covered by the landlord's property insurance policy on the dwelling, but tenant's insurance may cover some damage to the dwelling, unit, or apartment caused by the tenant if the tenant is liable for the damage under the lease. Tenant's insurance also covers some living expenses incurred as a result of temporary displacement from the dwelling, unit, or apartment because of damage.

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Farm and Ranch Insurance: Farm owner's (sometimes called farmowner's) insurance is available to individuals who own and occupy property meeting the definition of a farm or ranch and who do not elect to be insured by a farm mutual insurance company (in Texas, farm mutual insurance companies cannot write liability insurance). Farm owner's insurance is a package coverage insurance policy that covers the property insurance causes of loss of injury to or loss of farm dwellings, outbuildings, and personal property and the liability insurance causes of loss of bodily injury to third parties.

If a farmer or rancher is not an individual or is purchasing his property insurance from a farm mutual company, the farmer or rancher must purchase separate property and liability insurance policies. In a farm or ranch context, the equivalent of a commercial property insurance policy is typically called a farm and ranch insurance policy, and the equivalent of a general liability insurance policy is typically called a farm liability policy. In some situations liability insurance is provided through a commercial general liability policy properly endorsed to cover farm or ranch operations.

Farm or ranch operations can be covered by personal lines or commercial lines of insurance depending on the magnitude of the farming operation. Typically, an insurance company will set a threshold of gross income from farm or ranch activities or number of acres farmed or number of cattle grazed to differentiate between a personal line farm policy and a commercial line farm policy.

Caveat: The activities of a farm tenant may impact the size of the operation for insurance purposes. Assume, for example, a gentleman farmer (typically, a person with a country home and a few horses or other farm animals) whose level of farming or ranching activity does not rise to a commercial level insures the property in question under a homeowner's insurance policy, a personal lines coverage. The gentleman farmer then leases out surplus acreage to a farmer whose level of activity on the leased property is attributed to the gentleman farmer for insurance purposes. When a claim is made against both the owner and tenant because of an injury arising out of the operation of the tenant, the owner may discover that he is not covered because personal lines policies exclude from coverage losses arising out of operations covered under commercial lines policies.

§ 17.4:5 Amount of Proceeds

The discussion in this section covers terminology used in commercial property and business owner's policies. These concepts may vary under homeowner's or farm and ranch policies.

Actual Cash Value: Actual cash value means an amount equal to the difference between the cost of replacing property with property of like kind and quality at the time of loss and the amount of physical (not book) depreciation of the property. Unless a commercial property policy is properly endorsed, the insured is entitled only to actual cash value. Actual cash value will be paid whether or not the property is replaced or restored.

Replacement Cost: Replacement cost is the cost of repairing or replacing insured property at the time of the occurrence of the loss, without reduction for loss of value through depreciation. Replacement cost will not be paid until the property is replaced or restored with property of like kind.

Agreed Value: Agreed value is an agreed valuation method that can be used with either actual cash value or replacement cost. The named insured and insurance company agree to the amount of the actual cash value or replacement cost for the insured property (less the applicable deductible) before the policy is written. Agreed value is desirable because it elimi-

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nates coinsurance. An agreed value endorsement usually requires annual agreement between the insurer and named insured.

Coinsurance: Coinsurance is a method by which an insurance company penalizes its insured for underinsuring below a minimum percentage of the replacement cost of a property at the time of loss (usually 80 percent if the policy is written for a single property and 90 percent if the policy covers more than one property). If coinsurance applies, the insurer will pay only an amount (subject to the policy limit and less any applicable deductible or self-insured retention) equal to the product obtained by multiplying the amount of the loss by a fraction having as its numerator the amount of coverage the insured actually carried and as its denominator the minimum amount of coverage the insured should have carried.

Ordinance or Law Coverage: The valuation methods discussed above focus on the cost of replacing the existing structure without consideration to changes in laws or codes. Additional coverage under the Standard Building and Personal Coverage Form (ISO Form CP 00 10) is available up to the lesser of $10,000 or 5 percent of the value of the damaged building as of the time of the loss. Larger amounts can be covered by an ordinance or law coverage endorsement (ISO Endorsement Form CP 04 05).

Debris Removal: The commercial property insurance policy limit includes debris removal costs resulting from a covered loss, but the recovery is limited to 25 percent of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available by the current edition of the ISO commercial property policy for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit or (2) the cost of debris removal exceeds 25 percent of the sum of the paid loss plus deductible. Higher limits for debris removal are strongly recommended and can be purchased by adding ISO Endorsement Form CP 04 15, entitled "Debris Removal Additional Limit of Insurance."

§ 17.5 Liability Insurance

§ 17.5:1 Claims-Made vs. Occurrence-Basis Liability Policies

Claims-Made: In theory, a claims-made liability policy covers any claim actually made during the policy term, regardless of when the injury or damage that gave rise to the claim occurred, but in reality the claims-made policy probably excludes claims arising from injuries or damages that occurred before the inception of the policy term (known as prior acts). For an additional premium, a claims-made policy can sometimes be modified to cover prior acts. Unless renewed on a similar form with retroactive coverage or with a coverage extension known as extended reporting period or tail coverage, all coverage ends when the claims-made policy expires. Defense is frequently included within the policy limits of claims-made policies and reduces the amount available to compensate an injured party for a loss. Claims-made policies are usually manuscripted.

Occurrence-Basis: An occurrence-basis liability policy covers claims for injuries or damages caused by an occurrence, but only if the injury or damage actually occurs during the policy period, regardless of when the claim is made (subject, of course, to statutes of limitation applicable to the claim). ISO Form CG 00 01 defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Defense is provided as an additional benefit under ISO occurrence-basis commercial general liability forms and does not reduce the limits available to pay for a loss, except for the defense of indemnitees if certain conditions are not met.

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§ 17.5:2 Standard Form of General Liability Policies

Comprehensive General Liability: "Comprehensive general liability insurance" is, in fact, much less comprehensive in coverage than "commercial general liability insurance," has not been widely used since 1986, and should not be specified in real estate or other transaction documents.

Commercial General Liability: Commercial general liability insurance is the prevalent form of liability insurance in a commercial real estate context and has three coverages:

1. Coverage A—bodily injury (including death, disease, and illness) and physical injury to tangible property (including loss of use).
2. Coverage B—personal and advertising injury (including false arrest, detention or imprisonment, malicious prosecution, wrongful eviction or entry, slander, or libel, publication violating a person's right of privacy, using another's advertising idea, and copyright infringement).
3. Coverage C—medical payments.

Limits: The standard ISO commercial general liability policy form contains six policy limits: (1) each occurrence limit, (2) general aggregate limit, (3) products-completed operations aggregate limit, (4) personal and advertising injury limit, (5) damage to premises rented limit (formerly "fire damage limit"), and (6) medical expense limit.

A general aggregate limit is the maximum amount that a commercial liability insurance company will pay for all losses incurred during any one policy period except for bodily injury and property damage covered by the products-completed operations aggregate. ISO Form CG 25 04, entitled "Designated Location(s) General Aggregate Limit," an endorsement to a commercial general liability policy covering multiple properties, applies the general aggregate limit separately to each location but only with respect to bodily injury, property damage, and medical expenses. ISO Form CG 25 03, entitled "Designated Construction Project(s) General Aggregate Limit," an endorsement to a contractor's commercial general liability policy covering multiple projects, applies the general aggregate limit separately to each project but only with respect to bodily injury, property damage, and medical expenses.

Contractual Liability: Several exclusions apply to Coverage A and Coverage B under a commercial general liability insurance policy: willful misconduct, liquor liability, workers' compensation, employer's liability, pollution, aircraft, auto or watercraft, mobile equipment, war, damage to property, damage to product, damage to impaired property not physically injured, recall of products, and work or property, subject to the exception for damage to premises rented. However, the exclusion most often referenced in a real estate transaction is contractual liability.

The term *contractual liability* in the insurance context generally refers to claims that arise out of liability for the actions of others, rather than out of the actions of an insured, that has been contractually assumed by the insured. Coverage A excludes liability assumed under contracts but has an exception to this exclusion for liability assumed in a contract or agreement that is an insured contract. The definition of "insured contract" includes most indemnities that cover the tort liability of another party; however, a contractual assumption of another person's contractual liability is not covered under the typical definition of "insured contract." If, for example, a contractor agrees to indemnify the owner for its potential tort liability to an injured employee, the contractor would have insurance coverage for its indemnity obligation; if, however, the

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contractor agreed to indemnify the owner for the owner's contractual indemnity to the owner's representative, the contractor's indemnity might be enforceable but would not be covered under the contractor's standard commercial general liability policy. In addition, the insured contract exception cannot expand the scope of the commercial general liability policy beyond the coverage provided or the limits of liability that have been purchased. If, for example, the policy excludes coverage for property damage and bodily injury caused by pollutants, an indemnity for property damage and bodily injury caused by pollutants will not be covered by the policy even if the indemnity is contained in an insured contract. Coverage B of the ISO form of commercial general liability policy also contains an exclusion for liability assumed in contracts but does not contain the insured contract exception. Coverage is typically available by the addition of ISO Form CG 22 74, entitled "Limited Contractual Liability Coverage for Personal or Advertising Injury," or, in some cases, by the deletion of the contractual liability exclusion.

§ 17.5:3 Business Auto

Business auto insurance (ISO Form CA 00 01) is a form of insurance covering liability arising out of the operation of automobiles by the insured and the ownership, maintenance, or use of mobile equipment subject to compulsory insurance or financial responsibility laws or other motor vehicle insurance laws. Landlords and mortgagees may require business auto insurance to cover potential liability arising from vehicular accidents occurring in project parking lots (commercial general liability policies expressly exclude coverage for injuries and damages arising from the operation of autos) and from the loading or unloading of goods from vehicles not being performed by certain types of mobile equipment such as forklifts.

§ 17.5:4 Workers' Compensation Insurance

Workers' compensation insurance is a statutory program that imposes strict liability on employers for injuries to employees occurring while the employees are acting in the scope of employment but limits the exposure of employers to a schedule of maximum recoveries. Tex. Lab. Code ch. 406. Landlords and lenders may wish to require tenants and borrowers to carry workers' compensation insurance to reduce the possibility that the tenant or borrower suffers an economically disastrous judgment because of an employee injury. If an employee of a tenant receives an award from a workers' compensation policy in a situation in which the landlord is also negligent, the employee is less likely to sue the landlord.

§ 17.5:5 Employer's Liability Insurance

Employer's liability insurance supplements workers' compensation insurance by covering an employee for bodily injury occurring while in the scope of his or her employment if the injury is not covered by workers' compensation insurance. Unlike workers' compensation, the injured party must prove that the employer owed a duty to the injured party, that the employer breached the duty, and that the breach was the proximate cause of the injury. Employer's liability policies have defined each occurrence and aggregate limits, and these limits may be expanded by an umbrella or excess liability policy.

§ 17.5:6 Liquor Liability Insurance

Liquor liability insurance covers liability for bodily injury or property damage arising from (1) causing or contributing to the intoxication of any person, (2) furnishing alcoholic beverages to a person under the legal drinking age or under the influence of alcohol, or (3) violating any law relating to the sale, gift, distribution, or use of

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alcoholic beverages. Coverage applies only if the insured is involved in (1) manufacturing, selling, or distributing alcoholic beverages; (2) serving or furnishing alcoholic beverages for a charge; or (3) serving or furnishing alcoholic beverages for no charge, if a license is required for such activity. Insurance is available on an occurrence basis (ISO Form CG 00 33), on a claims-made basis (ISO Form CG 00 34), and on an aggregate per location basis (ISO Form CG 25 14).

§ 17.5:7 Innkeeper's Liability

Innkeeper's liability insurance protects motel and hotel operators from liability arising from the safekeeping of the property of guests.

§ 17.5:8 Garage Liability

Garage liability insurance (ISO Form CA 00 05) protects garage and parking lot operators from liability arising from garage operations, automobile physical damage, and uninsured or underinsured motorists. Ten different levels of coverage are generally available, ranging from the broad category of "any auto" to the narrow category of "specifically described autos." Garagekeeper's liability insurance protects garage operators against only direct damage or legal liability for damage to vehicles in the care, custody, or control of the garage operator (for example, if the named insured provides valet service). Although garagekeeper's liability insurance is available as separate coverage, garage liability insurance is broader coverage and includes garagekeeper's coverage.

§ 17.5:9 Umbrella or Excess Liability

Both umbrella and excess liability policies provide additional protection against catastrophic liability claims by increasing the policy limits of primary coverages.

Excess Liability: An excess liability policy relies on the primary policy for the insuring agreement and exclusions and provides coverage only in excess of the scheduled primary liability policies. The coverage is usually not broader than the primary policies.

Umbrella: An umbrella liability policy has its own insuring agreement and exclusions and usually serves three functions: (1) providing additional limits of liability over limits provided by the primary liability policies, (2) providing "drop down" coverage (that is, the umbrella coverage becomes primary) if the limits of the primary policy are exhausted, and (3) affording coverage for claims not covered by primary policies (to the extent not excluded by the umbrella liability policy). Because both an umbrella policy and the primary policy have their own insuring sections, differences may arise between coverages, especially if the two policies have been issued by different companies. To ensure that no gap in coverage is created, the umbrella liability policy should contain an affirmative statement that the umbrella policy follows the form of the primary policy or at least provides coverage that is no less broad than the underlying policy. Use of labels to identify a policy as an excess liability policy or an umbrella policy is problematic in today's insurance market. Most policies identified as an umbrella policy are really a form of excess liability policy, and there are few policies that are purely an excess policy.

Primary Liability: Both umbrella and excess liability policies contain a schedule of the primary liability policies over which umbrella or excess liability coverage is to be provided. This schedule may require that the primary coverage limits be unimpaired on inception of the umbrella or excess liability coverage, in which case the umbrella or excess liability coverage policies and their primary policies may need to have the same inception date.

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§ 17.5:10 Hunting Lease Liability

An individual may be able to purchase an endorsement under the individual's homeowner's insurance policy extending personal liability coverage to a hunting lease. The availability and cost of this type of endorsement may vary with different insurance carriers. Although most forms of homeowner's insurance currently do not exclude bodily injuries caused by firearms, an individual should confirm that his homeowner's insurance policy does not contain an exclusion for hunting accidents before seeking to extend coverage to the premises under a hunting lease. An individual should also consider whether the personal liability limits under his homeowner's insurance policy are adequate to cover a hunting accident.

Hunting lease insurance, which covers hunting accidents, is also available from specialized insurance carriers, often through organizations such as hunting clubs and the National Rifle Association.

If the tenant under a hunting lease is a business entity, the tenant will probably be unable to extend its commercial liability policy to cover hunting accidents at the hunting lease and will need to purchase a hunting lease insurance policy.

§ 17.6 Additional Insured Status and Forms

§ 17.6:1 Usage

An additional insured is a party that is provided coverage as an insured under a policy by an additional insured endorsement. (Note that the correct terminology is "additional insured," not "additional named insured.") Except as discussed in sections 17.6:4 through 17.6:7 below, the status of additional insured is always used with reference to liability policies. An additional insured party is not responsible for payment of the policy premium, but a small administrative charge may be required to issue the endorsement. The policy premium is not adjusted for an additional insured's loss history.

With some exceptions, most notably coverage for bodily injury or death of an employee, Texas law prohibits a requirement in a construction contract for an additional insured endorsement covering a broad-form or intermediate indemnity. See section 17.2:4 above.

§ 17.6:2 Coverage

Many real estate attorneys believe that if a person or entity is an additional insured under the liability insurance of another person, the additional insured is afforded all the benefits of the other person's insurance policy; but in reality, protection is provided to the additional insured party only to the extent stipulated in the additional insured endorsement. Numerous additional insured endorsement forms exist for different situations with varying degrees of coverage. Many additional insured endorsements explicitly or by implication exclude coverage for the sole or contributory negligence of the additional insured and limit or deny coverage to specific types of operations or locations.

§ 17.6:3 Additional Insured Endorsement Forms

Additional insured endorsement forms contain a granting clause stating that the party listed or described in the endorsement is to be included as an insured under the policy followed by restrictions introduced by the phrase *but only with respect to*. Granting clauses in additional insured endorsements do not typically cover partners, employees, agents, and other parties related to the party named as additional insured unless language to that effect is added or a contractual requirement to that effect is picked up by the wording of the endorsement. Although ISO publishes more than thirty different addi-

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tional insured endorsement forms, individual insurance companies are increasingly using manuscripted forms that differ greatly in coverages and clarity. Hence, the type of additional insured endorsement required must be stipulated by ISO designation (including title, form number, and edition date) or, at a minimum, described in terms of the desired coverage.

The additional insured endorsements discussed below are standard forms promulgated by ISO. Note that the words *you* and *your* used in the forms quoted below refer to the named insured, not the additional insured.

In 2004, the ISO 20 10 additional insured form was amended to exclude coverage for the additional insured's sole negligence by adding a requirement that the claim be caused "in whole or in part" by the acts or omissions of the named insured. This change arguably eliminated from coverage liability attributable to the additional insured's sole negligence.

Then, in April 2013, the additional insured endorsement forms entitled "Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization" (ISO Form CG 20 10 04 13) and "Additional Insured—Managers or Lessors of Premises" (ISO Form CG 20 11 04 13), as well as several others, were amended to add three significant additional limitations. First, coverage is restricted to the extent permitted by law. While the apparent intent was to incorporate statutes such as Tex. Ins. Code § 151.104, voiding a contractual provision requiring an additional insured endorsement to the extent that the provision requires coverage for an indemnity prohibited under Tex. Ins. Code § 151.102, the prohibition, if applicable, would presumably apply without this language. Second, coverage cannot be broader than the coverage required by the provision contained in the underlying contract, which is often limited to the indemnity obligations assumed by the named insured. Here, the intent is to prevent coverage from exceeding what is required by the contract, so it is important for the contract to properly describe the scope of coverage required. Third, the dollar amount of coverage under the additional insured endorsement is limited to the lesser of the policy limit or the dollar limit of coverage required by the underlying contract. For this reason, insurance provisions in contracts often state that the policy limits set forth in the contract are minimum coverages and are not intended to limit the total amount the party should carry. However, note some manuscript endorsements may include endorsements that limit coverage to the lesser of the policy limit or the "minimum" limits of coverage required by the underlying contract. The party seeking additional insured coverage should specify in the contract that the limits of insurance are just minimums and should specifically require that additional insured status be provided to the full limits of any liability policies. In any event, named insureds may wish to avoid restrictive additional insured endorsements, because the named insured's contractual obligation to provide additional insured coverage may be broader than the scope of the coverage of the available additional insured endorsement. On the other hand, the named insured may not want to provide additional insured coverage for risks that are assumed by or are the obligation of the additional insured. If so, both the contract and the policy should limit the additional insured coverage to the risks contractually assumed by the named insured.

In late 2019, ISO amended many of its additional insured endorsement forms, including the CG 20 10 and the CG 20 11. The changes made to these additional insured endorsement forms are not material to an understanding of the three limitations introduced in 2013. The following provisions from ISO endorsement CG 20 10 04 13 and CG 20 11 04 13 illustrate the three limitations introduced in 2013 (the first and second by paragraphs 1 and 2 below and the third by paragraph C below):

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However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

...

C. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

ISO Form CG 20 10 04 13.

Owners, Lessees, or Contractors: The additional insured endorsement form entitled "Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization" (ISO Form CG 20 10 04 13, quoted in part below) is commonly used in construction situations. The named insured (the "you" and "your" referenced in the endorsement) provides additional insured coverage to the person or persons identified in the endorsement's schedule, for instance an owner, a lessee, or a general contractor (or other person upstream of the named insured). The endorsement has three drawbacks: (1) it covers only the named insured's ongoing operations—that is, the additional insured is not covered for bodily injury or property damage occurring after completion or abandonment of the work; (2) it excludes from coverage injuries or damage caused by the sole negligence (but not the contributory negligence) of the additional insured, since the endorsement requires that the injury or damage be partially or totally caused by the named insured; and (3) it substitutes the word *caused* for the phrase *arising out of* used in editions before 2004 in order to eliminate coverage for losses or injuries occurring because of contractors' operations but not necessarily because of contractors' actions.

A. Section II—Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused in whole or in part by:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

ISO Form CG 20 10 04 13; ISO Form CG 20 10 12 19.

Coverage for completed operations can be obtained by using ISO Form CG 20 10 in tandem with ISO Form CG 20 37 12 19 entitled

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"Additional Insured—Owners, Lessees, or Contractors—Completed Operations."

Managers or Lessors of Premises: The additional insured endorsement form entitled "Additional Insured—Managers or Lessors of Premises" (ISO Form CG 20 11 04 13, quoted in part below) is commonly used in lease situations and does not exclude the sole or contributory negligence of the additional insured. Coverage is tied to the lease's definition of "premises." Thus, if a lease defines "premises" in a way that excludes adjacent driveways or corridors, the landlord may not be an additional insured with respect to bodily injuries and property damage occurring in loading areas serving the premises.

> **A. Section II—Who Is An Insured** is amended to include as an insured the person(s) or organization(s) shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:
>
> This insurance does not apply to:
>
> 1. Any "occurrence" which takes place after you cease to be a tenant in that premises.
> 2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

ISO Form CG 20 11 04 13. A major change by ISO to this endorsement was made effective December 2019. The coverage trigger in paragraph A was revised to read as follows:

> **A. Section II—Who Is An Insured** is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by you or those acting on your behalf in connection with the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions . . . .

ISO Form CG 20 11 12 19. ISO eliminated the "arising out of" language previously included in the CG 20 11. The CG 20 11 is now in line with the revisions made in 2004 to the CG 20 10 additional insured endorsement form to limit the coverage trigger for additional insured protection to liability "caused, in whole or in part, by" the named insured and by those acting on its behalf. Arguably, this change eliminates additional insured protection for the landlord and managers for their sole negligence.

§ 17.6:4 Additional Insured as Its Interest May Appear

The beneficiary of a property insurance policy must have an "insurable interest" in the insured property, that is, a lawful, substantial, and enforceable interest in the safety or preservation of the subject matter of the insurance. Examples of parties having insurable interests in a building are the owner and the mortgagee. The owner is the named insured under a property policy, and a lender's interest would be protected with a lender loss payable or other mortgagee clause endorsement. In the context of builder's risk policies the terminology "additional insureds as their interests may appear" has often been used to attempt to protect parties other than the named insured and mortgagee. If the owner of a building under construction procured a builder's risk policy, the owner would be the named insured and the contractor and subcontractors would be named as additional insureds as their

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interests may appear. In theory, if the building were destroyed before completion, the contractor and subcontractors would be entitled to the portion of the insurance proceeds attributable to the portion of the completed construction for which the contractor and subcontractors had not been paid at the time the destruction occurred, and the insurance company would not be able to sue its "insureds" to recover its loss. However, the phrase has led to confusion in litigation and to unintended consequences. Risk managers now advise against the use of "additional insureds as their interests may appear" in builder's risk policies and suggest instead that (1) all parties be named as insureds under the builder's risk policy, without reference to the phrase "additional insureds as their interests may appear"; (2) mutual waivers of subrogation be included in the construction contracts and subcontracts; and (3) the parties confirm that the policy permits the waivers of subrogation. If there are coverages that are not intended to benefit all parties (such as a third-party liability extension that is not intended to benefit the contractor), that issue may need to be addressed in the policy and the applicable contracts.

§ 17.6:5 Additional Insured Status for Landlords in Property Proceeds

ISO Form CP 12 19, entitled "Additional Insured—Building Owner," provides that the building owner identified in the endorsement is a "Named Insured" with respect to the coverage provided under the tenant's property policy "for physical loss or damage to the building(s) described in the Schedule" to the endorsement.

§ 17.6:6 Additional Insured Status for Landlords in Rental Value

ISO Form CP 15 03, entitled "Business Income—Landlord as Additional Insured (Rental Value)," names the landlord as an additional insured with respect to that portion of proceeds payable under a business income endorsement representing the amount of rent payable under the lease. The remainder of the business income proceeds are payable to the tenant, that is, the named insured. In addition, the insurer commits to provide advance notice in writing of cancellation to the additional insured. This endorsement is especially useful in an absolutely net lease transaction.

§ 17.6:7 Requirement that Coverage Be Primary and Noncontributory

If a party that is named as additional insured expects such coverage to be primary and noncontributory to the additional insured's existing insurance coverage, the policy providing additional insured coverage must be endorsed to that effect. All policies have "other insurance" clauses that govern how overlapping insurance policies are required to share coverage. Some such clauses say a particular policy will be excess to any other policy, while some "other insurance" clauses provide for sharing duplicate coverage pro rata. When the issue arises because the named insured has two policies that provide overlapping coverage, these "other insurance" clauses make sense—the named insured is covered in any event, and the loss is shared by the overlapping insurers in accordance with the policy provisions. However, if a party has its own insurance but also requires that it be an additional insured on another party's policy, it could be argued that the "other insurance" clauses should not apply and that the coverage obtained from the counterparty's policy should be primary. In the absence of an endorsement, however, this may not be the result; the courts may split coverage between a party's own insurance and its coverage as an additional insured. In addition, if the "other insurance" clause is a strong excess clause, the additional insured coverage might be rendered completely inapplicable depending on the amount of the claim and the limits of the respective policies. This result

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can be avoided by contractually requiring that coverage provided to the additional insured shall be primary and noncontributory to any other policy providing coverage to any additional insured, at least to the extent of the risks and liabilities assumed by the counterparty. ISO Form CG 20 01 04 13 is an example of such an endorsement, stating:

> This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:
>
> **(1)** The additional insured is a Named Insured under such other insurance; and
>
> **(2)** You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

ISO Form CG 20 01 04 13.

However, the above endorsement applies only to policies in which the additional insured is a named insured, and the additional insured and the counterparty will both want to determine the existence of any such restrictions and whether any such restrictions are acceptable to them.

§ 17.7 Waivers of Subrogation

§ 17.7:1 Application

An insurance company is subrogated to the rights of its insured against third parties to the extent of a loss paid by the insurance company. However, the parties to a business transaction may prefer not to endanger their business relationship with potentially expensive, stressful, and time-consuming litigation conducted by an insurance company in the name of one party against the other party. Hence, each insured may require its insurance company to waive its right of subrogation to the insured's rights against the other party. If the named insured does not want to waive subrogation for risks that it did not intend, the contract can limit the scope of the waiver to the risks assumed by the named insured.

§ 17.7:2 Components of Waiver of Subrogation

A waiver of subrogation provision should have two components: a covenant by the insured to obtain the waiver of subrogation from its insurer and a release by the insured with respect to the liability that is covered by the insurance policy for which the waiver is sought. The purpose of the release is to protect the beneficiary of the waiver if the party agreeing to obtain the waiver fails to purchase insurance or if the loss exceeds the scope or limit of the insurance policy.

A waiver of subrogation should also state affirmatively which party is to be responsible for any deductible or self-insured retention under the policy in question.

§ 17.7:3 Availability

The current ISO edition of "Commercial Property Conditions" form (ISO Form CP 00 90) used in conjunction with an ISO commercial property insurance policy contains the following waiver of subrogation:

> If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing *after loss* to impair them. *But you may waive your rights against another party in writing:*

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1. *Prior to a loss* to your Covered Property or Covered Income.

2. *After a loss* to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:

   a. Someone insured by this insurance;

   b. A business firm:

      (1) Owned or controlled by you; or

      (2) That owns or controls you; or

   c. Your tenant.

This will not restrict your insurance.

ISO Form CP 00 90 07 88 (emphasis added).

The ISO form of commercial general liability policy (ISO Form CG 00 01) states "The insured must do nothing after loss to impair" the insurance company's right of recovery. Most insurance professionals believe that the implication of the language is that a waiver of subrogation given by the named insured before the occurrence is permissible.

Waivers of subrogation are also available for workers' compensation, employer's liability, and builder's risk policies but are not provided absent a request.

§ 17.7:4 Fair Notice Doctrine Compliance

A provision that requires one party to release the liability of the other party even if the other party is negligent must comply with the fair notice doctrine under Texas law. See section 17.2:5 above. However, a provision requiring the insurer to waive subrogation has never been held to be subject to the fair notice doctrine.

§ 17.8 Deductible vs. Self-Insured Retention

Both a deductible and a self-insured retention (SIR) require the insured to pay the first dollars of a loss. However, the potential that a third-party claimant will not be compensated under a liability policy with an SIR is substantially greater than that under a policy with a deductible. When a deductible exists under a liability policy, the insurance company keeps control of the adjustment process, defends the insured, typically pays the claim to the third party, and thereafter charges the insured for the deductible. If an SIR exists, the insured controls the adjustment process to the extent of its SIR (unless the insured has contracted with a third party to administer the process) and the liability insurer has no duty to defend the insured or pay the claim to the third party until the SIR is exhausted.

§ 17.9 Quality of Insurance

A.M. Best's analysis of property and casualty insurance companies is generally the standard cited in real estate transaction documents. Best assigns a "Financial Strength Rating" to insurance carriers. If a company is below Best's minimum asset threshold or if sufficient information is not available or is not submitted or if the insurer so requests, Best may elect not to assign a Financial Strength Rating to an insurance company. Reports are available from the A.M. Best website (**www.ambest.com**) at no cost.

The components of a Best's financial strength rating are the following:

1. *Rating*—A company is assigned one of sixteen "Best's Ratings." Each rating is composed of a letter (A to D) with or without plus or minus signs. A++ is the highest rating and D is the lowest.

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2. *Financial Size Category*—A rated company is also assigned one of fifteen Financial Size Categories on the basis of its capital, surplus, and conditional reserve funds from which losses are paid. The Financial Size categories are referred to as "Classes" and described with capital roman numerals. Class I (up to $1 million) is the smallest and Class XV ($2 billion or more) is the largest.

3. *Outlook*—An Outlook indicates the potential future direction of the company's rating over a designated period of twelve to thirty-six months. Outlooks can be "positive," "negative," or "stable."

Property and casualty insurance companies that are not rated are designated "NR-1" through "NR-5" based on the reason for which Best did not rate the company.

The desired quality of insurance companies should be specified with a combination of both Best's Rating and Financial Size Category. Most mortgagees require a minimum Best's financial strength rating of "A" (Excellent) and a financial size category of "Class X" ($500 million to $750 million).

§ 17.10 Evidencing the Existence of Coverage

The most common method for evidencing the existence of insurance coverage is to obtain a certificate of liability insurance or evidence of personal or commercial property insurance issued by an insurance broker. The standard forms of certificates of liability insurance and evidence of property insurance are published by the Association for Cooperative Operations Research and Development (ACORD), an insurance industry trade association.

§ 17.10:1 ACORD 25 "Certificate of Liability Insurance"

The 2016 edition of the ACORD 25 certificate (form 17-1 in this chapter) combines all disclaimers contained in previous editions into two disclaimers located at the top of the certificate:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.
>
> IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

The disclaimers address several matters:

1. The certificate is issued as a matter of information only.

2. The certificate confers no rights on the certificate holder.

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3. The certificate does not create a contract between the certificate holder and the insurer or the insurance broker.
4. The certificate does not amend, extend, or alter the coverage afforded by the enumerated policies.
5. If the certificate contains a statement that an insurance policy has been endorsed to include an additional insured or to include a waiver of subrogation, but the endorsements were not, in fact, issued, the holder of the certificate has no rights against the insurer or broker.

An ACORD 25 certificate is expressly made subject to "all the terms, exclusions and conditions" of the policies listed therein, notwithstanding any requirement in any contract pursuant to which the certificate was issued. The certificate holder is also made aware that the policy limits shown in the certificate may have been reduced by paid claims.

An ACORD 25 certificate requires the issuing company to deliver notice only in the event of cancellation of the policies before the expiration date "in accordance with the policy provisions."

The ACORD 25 certificate is designed to be used with liability policies. To use the form for property policies, information must be inserted into the "DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES" space, which appears below the workers' compensation blank.

§ 17.10:2 ACORD 28 "Evidence of Commercial Property Insurance"

The 2016 edition of the ACORD 28 certificate (form 17-2 in this chapter) summarizes and states coverage under a commercial lines property policy (for example, a commercial property policy) to a mortgagee, additional insured, or loss payee and is designed to comply with the requirements of current lending practices. ACORD 25 and 28 have similar disclaimers. (See section 17.10:1 above for a discussion of the disclaimers.) ACORD 28 requires the issuing company to deliver notice only in the event of cancellation of the policies before the expiration date "in accordance with the policy provisions."

§ 17.10:3 Practical Considerations

According to risk managers, the vast majority of certificates of insurance are incorrectly completed. Hence, the forms should be reviewed for accuracy.

Insurance certificates are subject to fraud. A red flag is a certificate that is provided directly from the party that is supposedly insured rather than a third-party insurance agent. The recipient of a certificate may wish to consider (1) contacting the issuing insurance agency to confirm its existence, (2) contacting the insurance carrier to confirm the existence of the coverage, and (3) requiring copies of all endorsements dealing with additional insureds, loss payees, mortgagees, and waivers of subrogation.

§ 17.10:4 Alteration, Modification, Disclaimers, and Notice

Texas has joined a large number of states that have enacted laws to prevent modification of the provisions of ACORD forms. Tex. Ins. Code § 1811.052(b) provides that "[a] person may not execute, issue, or require the issuance of a certificate of insurance for risks located in this state, unless the certificate of insurance form has been filed with and approved by the [Texas Department of Insurance]." Under Tex. Ins. Code § 1811.103, a standard certificate of insurance form promulgated by ACORD or ISO is deemed approved when filed with the Texas Department of Insurance, unless the standard form violates certain parameters contained in Tex. Ins. Code

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§ 1811.102. The effect of approval of a certificate form by the Department is that a certificate confirms only that the referenced policy has been issued. Any certificate in violation of Texas Insurance Code chapter 1811 "is void and has no effect." Tex. Ins. Code § 1811.156.

Tex. Ins. Code § 1811.053 prohibits any alteration or modification of a certificate of insurance form approved the Texas Department of Insurance unless the alteration or modification is approved by the Department. In addition, Tex. Ins. Code § 1811.051 forbids an agent from issuing a certificate of insurance that alters, amends, or extends the coverage or terms and conditions provided by the referenced insurance policy. "A certificate of insurance may not contain a reference to a legal or insurance requirement contained in a contract other than the underlying contract of insurance, including a contract for construction or services." Tex. Ins. Code § 1811.154.

In the parameters for an acceptable form, Tex. Ins. Code § 1811.101 adopts many of the disclaimers contained in ACORD forms: "for information purposes only"; the certificate "does not confer any rights or obligations other than the rights and obligations conveyed by the policy"; the certificate does not convey a contractual right to a certificate holder; and "the terms of the policy control over the terms of the certificate."

Tex. Ins. Code § 1811.155(b) prohibits any alteration in a certificate of the notice provisions of a referenced insurance policy. Under Tex. Ins. Code § 1811.155(a), a certificate can require notice to a person only if the person is named in the policy or endorsement and the policy or endorsement (or law) requires notice to be provided.

§ 17.11 Examples of Insurance Requirements

Forms contained in chapters 8 (Deeds of Trust), 10 (Ancillary Loan Documents), 19 (Commercial Construction Contract Documents), and 25 (Leases) in this manual include insurance requirements and provisions that offer examples of the principles discussed in this chapter.

§ 17.12 Additional Resources

Almy, John. "Protective Safeguards Endorsements." In *Advanced Real Estate Law Course, 2019*. Austin: State Bar of Texas, 2019.

Brady, Timothy J. and Jeffrey L. Brady. "Properly Insuring Your Communities Do's and Don'ts." In *Handling Your First (or Next) POA Client: Basics of Representing Condominium and Homeowners Associations, 2019*. Austin: State Bar of Texas, 2019.

Comiskey, Charles E. "Insurance Gaps: In the Eye of the Beholder." In *Advanced Real Estate Law Course, 2014*. Austin: State Bar of Texas, 2014.

Johnston, Aaron, Jr. "Insurance and Indemnity in Real Estate Transactions (Drafting Insurance Requirements for Leases/Developments/Whatever)." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.

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Mark A. Senn. New York: Aspen Publishers, 2013.

Locke, William H., Jr. "Drafting Indemnities (and Their Relationship to Insurance)." In *Advanced Real Estate Drafting Course, 2017.* Austin: State Bar of Texas, 2017.

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Locke, William H., Jr., and Charles E. Comiskey. "11 Things You Wish You Had Known About Commercial Project Insurance." In *Advanced Real Estate Law Course, 2013.* Austin: State Bar of Texas, 2013.

Locke, William H., Jr., Charles Comiskey, and Elizabeth A. Lowe. "Insurance for Real Estate Lawyers." In *Advanced Real Estate Law Course, 2015.* Austin: State Bar of Texas, 2015.

Malecki, Donald S., and Jack P. Gibson. *The Additional Insured Book.* 7th ed. Dallas: International Risk Management Institute, Inc., 2013. Online edition.

McLaurin, Jason C. "An Overview of Business Interruption Insurance." In *Advanced Insurance Law Course, 2018.* Austin: State Bar of Texas, 2018.

Melendi, Stephen A. "Priority of Coverage or: Who Picks Up the Tab at the End of the Night." In *Advanced Insurance Law Course, 2017.* Austin: State Bar of Texas, 2017.

Nettles, Larry W. "Environmental Indemnity and Liability Allocation Agreements—Evaluating and Negotiating About the Risks." In *Advanced Real Estate Drafting Course, 2010.* Austin: State Bar of Texas, 2010.

Robinson, Linda G., and Jack P. Gibson. *Commercial Property Insurance.* Dallas: International Risk Management Institute, Inc., 2009. Online edition.

Woodward, W. Jeffrey, Richard J. Scislowski, Maureen C. McLendon, and Jack P. Gibson. *Commercial Liability Insurance.* Dallas: International Risk Management Institute, Inc., 2010. Online edition.

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Form 17-1

ACORD 25
Certificate of Liability Insurance

ACORD®

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER	CONTACT NAME:
	PHONE (A/C, No, Ext): FAX (A/C, No):
	E-MAIL ADDRESS:
	INSURER(S) AFFORDING COVERAGE — NAIC #
INSURED	INSURER A :
	INSURER B :
	INSURER C :
	INSURER D :
	INSURER E :
	INSURER F :

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
	COMMERCIAL GENERAL LIABILITY						EACH OCCURRENCE	$
	☐ CLAIMS-MADE ☐ OCCUR						DAMAGE TO RENTED PREMISES (Ea occurrence)	$
							MED EXP (Any one person)	$
	GEN'L AGGREGATE LIMIT APPLIES PER:						PERSONAL & ADV INJURY	$
	☐ POLICY ☐ PRO-JECT ☐ LOC						GENERAL AGGREGATE	$
	OTHER:						PRODUCTS - COMP/OP AGG	$
								$
	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident)	$
	☐ ANY AUTO						BODILY INJURY (Per person)	$
	☐ OWNED AUTOS ONLY ☐ SCHEDULED AUTOS						BODILY INJURY (Per accident)	$
	☐ HIRED AUTOS ONLY ☐ NON-OWNED AUTOS ONLY						PROPERTY DAMAGE (Per accident)	$
								$
	☐ UMBRELLA LIAB ☐ OCCUR						EACH OCCURRENCE	$
	☐ EXCESS LIAB ☐ CLAIMS-MADE						AGGREGATE	$
	☐ DED ☐ RETENTION $							$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y / N						☐ PER STATUTE ☐ OTH-ER	
	ANYPROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? ☐ N / A (Mandatory in NH)						E.L. EACH ACCIDENT	$
	If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. DISEASE - EA EMPLOYEE	$
							E.L. DISEASE - POLICY LIMIT	$

SPECIMEN

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

CERTIFICATE HOLDER	CANCELLATION
	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.
	AUTHORIZED REPRESENTATIVE

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Form 17-2

ACORD 28
Evidence of Commercial Property Insurance

ACORD®

EVIDENCE OF COMMERCIAL PROPERTY INSURANCE

DATE (MM/DD/YYYY)

THIS EVIDENCE OF COMMERCIAL PROPERTY INSURANCE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE ADDITIONAL INTEREST NAMED BELOW. THIS EVIDENCE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS EVIDENCE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE ADDITIONAL INTEREST.

PRODUCER NAME, CONTACT PERSON AND ADDRESS / PHONE (A/C, No, Ext):	COMPANY NAME AND ADDRESS / NAIC NO:
FAX (A/C, No): / E-MAIL ADDRESS:	IF MULTIPLE COMPANIES, COMPLETE SEPARATE FORM FOR EACH
CODE: / SUB CODE:	POLICY TYPE
AGENCY CUSTOMER ID #:	
NAMED INSURED AND ADDRESS	LOAN NUMBER / POLICY NUMBER
	EFFECTIVE DATE / EXPIRATION DATE / ☐ CONTINUED UNTIL TERMINATED IF CHECKED
ADDITIONAL NAMED INSURED(S)	THIS REPLACES PRIOR EVIDENCE DATED:

PROPERTY INFORMATION (ACORD 101 may be attached if more space is required) ☐ BUILDING OR ☐ BUSINESS PERSONAL PROPERTY

LOCATION / DESCRIPTION

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS EVIDENCE OF PROPERTY INSURANCE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

COVERAGE INFORMATION PERILS INSURED ☐ BASIC ☐ BROAD ☐ SPECIAL ☐

COMMERCIAL PROPERTY COVERAGE AMOUNT OF INSURANCE: $ DED:

	YES	NO	N/A	
☐ BUSINESS INCOME ☐ RENTAL VALUE				If YES, LIMIT: / Actual Loss Sustained; # of months:
BLANKET COVERAGE				If YES, indicate value(s) reported on property identified above: $
TERRORISM COVERAGE				Attach Disclosure Notice / DEC
IS THERE A TERRORISM-SPECIFIC EXCLUSION?				
IS DOMESTIC TERRORISM EXCLUDED?				
LIMITED FUNGUS COVERAGE				If YES, LIMIT: DED:
FUNGUS EXCLUSION (If "YES", specify organization's form used)				
REPLACEMENT COST				
AGREED VALUE				
COINSURANCE				If YES, %
EQUIPMENT BREAKDOWN (If Applicable)				If YES, LIMIT: DED:
ORDINANCE OR LAW - Coverage for loss to undamaged portion of bldg				If YES, LIMIT: DED:
- Demolition Costs				If YES, LIMIT: DED:
- Incr. Cost of Construction				If YES, LIMIT: DED:
EARTH MOVEMENT (If Applicable)				If YES, LIMIT: DED:
FLOOD (If Applicable)				If YES, LIMIT: DED:
WIND / HAIL INCL ☐ YES ☐ NO Subject to Different Provisions:				If YES, LIMIT: DED:
NAMED STORM INCL ☐ YES ☐ NO Subject to Different Provisions:				If YES, LIMIT: DED:
PERMISSION TO WAIVE SUBROGATION IN FAVOR OF MORTGAGE HOLDER PRIOR TO LOSS				

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

ADDITIONAL INTEREST

☐ CONTRACT OF SALE ☐ MORTGAGEE	☐ LENDER'S LOSS PAYABLE	☐ LOSS PAYEE	LENDER SERVICING AGENT NAME AND ADDRESS
NAME AND ADDRESS			AUTHORIZED REPRESENTATIVE

SPECIMEN

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Form 17-3

ACORD 45
Additional Interest Schedule

AGENCY CUSTOMER ID: _____

ACORD®

ADDITIONAL INTEREST SCHEDULE

DATE (MM/DD/YYYY)

AGENCY	CARRIER	NAIC CODE
POLICY NUMBER	EFFECTIVE DATE	NAMED INSURED(S)

ADDITIONAL INTEREST (Not all fields apply to all scenarios - provide only the necessary data)

INTEREST
- ADDITIONAL INSURED / BREACH OF WARRANTY
- CO-OWNER
- EMPLOYEE AS LESSOR / LEASEBACK
- OWNER
- LENDER'S LOSS PAYABLE
- LIENHOLDER
- LOSS PAYEE
- MORTGAGEE
- OWNER
- REGISTRANT
- TRUSTEE

NAME AND ADDRESS RANK: ____ EVIDENCE: CERTIFICATE POLICY SEND BILL

REFERENCE / LOAN #:
LIEN AMOUNT:
INTEREST END DATE:
PHONE (A/C, No, Ext):
E-MAIL ADDRESS:
REASON FOR INTEREST:

INTEREST IN ITEM NUMBER

LOCATION:	BUILDING:
VEHICLE:	BOAT:
AIRPORT:	AIRCRAFT:
SCHED #:	ITEM:
ITEM CLASS:	
ITEM DESCRIPTION	

INTEREST
- ADDITIONAL INSURED / BREACH OF WARRANTY
- CO-OWNER
- EMPLOYEE AS LESSOR / LEASEBACK
- OWNER
- LENDER'S LOSS PAYABLE
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REFERENCE / LOAN #:
LIEN AMOUNT:
INTEREST END DATE:
PHONE (A/C, No, Ext):
E-MAIL ADDRESS:
REASON FOR INTEREST:

INTEREST IN ITEM NUMBER

LOCATION:	BUILDING:
VEHICLE:	BOAT:
AIRPORT:	AIRCRAFT:
SCHED #:	ITEM:
ITEM CLASS:	
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PHONE (A/C, No, Ext):
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REASON FOR INTEREST:

INTEREST IN ITEM NUMBER

LOCATION:	BUILDING:
VEHICLE:	BOAT:
AIRPORT:	AIRCRAFT:
SCHED #:	ITEM:
ITEM CLASS:	
ITEM DESCRIPTION	

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REASON FOR INTEREST:

INTEREST IN ITEM NUMBER

LOCATION:	BUILDING:
VEHICLE:	BOAT:
AIRPORT:	AIRCRAFT:
SCHED #:	ITEM:
ITEM CLASS:	
ITEM DESCRIPTION	

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REFERENCE / LOAN #:
LIEN AMOUNT:
INTEREST END DATE:
PHONE (A/C, No, Ext):
E-MAIL ADDRESS:
REASON FOR INTEREST:

INTEREST IN ITEM NUMBER

LOCATION:	BUILDING:
VEHICLE:	BOAT:
AIRPORT:	AIRCRAFT:
SCHED #:	ITEM:
ITEM CLASS:	
ITEM DESCRIPTION	

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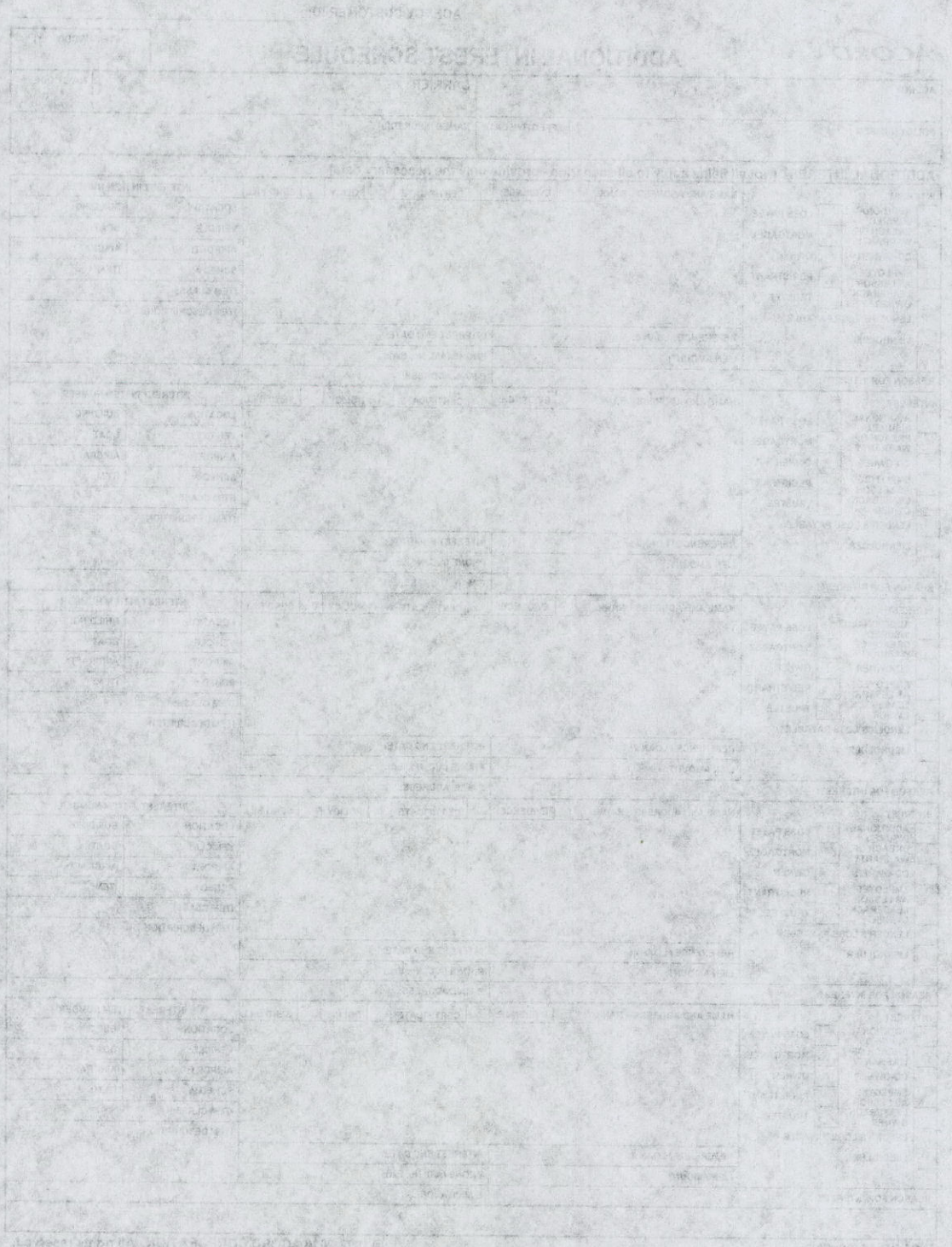

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Chapter 18

Residential Construction Contract Documents

§ 18.1 General Considerations

The principal functions of a residential construction contract are to establish the terms of the construction agreement, such as price, description of the project, commencement and completion dates, warranties, and allocation of responsibilities, and to create a system for building, approving, and paying for the construction.

The Texas Constitution provides several consumer protection provisions relating to construction on homestead property. For a lien for the construction of improvements to be created against homestead property there must be a written contract. For remodeling or renovations the constitution requires a written application for extension of credit be submitted by the homeowners at least five days before executing the contract, unless the work is acknowledged to be necessary for the immediate repair of conditions that materially affect the health or safety of the residents of the homestead. In addition to this five-day application period, the owner has a three-day right of rescission following execution of the contract. For renovation or repair projects, the contract must also be executed at the office of the third-party lender extending credit for the work and material, the office of an attorney at law, or a title company office. Tex. Const. art. XVI, § 50(a)(5). See chapter 20 in this manual for a detailed discussion of these requirements. Forms 20-6 and 20-7 are closing certificates used to confirm compliance with these requirements.

This chapter contains a residential construction contract (form 18-4). Designed as a basic form, the contract specifies construction costs, a description of the property on which the new improvements are to be situated, a description of the plans and specifications for the project, and a completion date for the work.

Each transaction should be examined to determine if additional provisions are necessary. If form 18-4 is used to document a transaction in which the construction costs are financed, a comprehensive review of chapter 20 in this manual is needed. The attorney may also wish to consider including additional provisions, which are beyond the scope of this chapter, relating to such matters as work delays, responsibility for soil condition and design, loan commitment requirements, late charges, and delay damages.

§ 18.2 Cautions

§ 18.2:1 Construction Trust Fund Statute

The Texas Construction Trust Fund Act (Texas Property Code sections 162.001–.033) states that contractors agreeing to do more than $5,000 worth of work must put the owner's funds for each such job in a "construction account" at a financial institution. Tex. Prop. Code § 162.006. The general contractor becomes a trustee for the funds received from the owner for the benefit of the subcontractors and suppliers on the project. Tex. Prop. Code § 162.003. The builder's profit on a cost-plus contract is not considered a trust fund. Tex. Prop. Code § 162.001(c). Misuse of trust funds of $500 or more with intent to defraud is a third-degree felony. Failure to establish or maintain a construction account in violation of sections 162.006 or 162.007 is a class A misdemeanor. Making a false affidavit that the contractor has paid the project bills is a class A

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misdemeanor with a possible penalty of up to one year in jail, a $4,000 fine, or both, and personal liability for loss or damage resulting from a false statement. Tex. Prop. Code §§ 53.085(d), (e), 162.032.

The attorney should also be familiar with the law of involuntary mechanic's liens. See chapter 21 in this manual.

§ 18.2:2 Texas Residential Construction Liability Act

The Texas Residential Construction Liability Act (RCLA), Texas Property Code chapter 27, controls key aspects of residential construction regarding defect claims. Analysis of the provisions of the RCLA is beyond the scope of this manual, although an overview of the RCLA is included below because of its applicability to certain requirements in residential construction contract documents.

RCLA Applicability and Notice: The RCLA applies to construction defect disputes involving a residence, which the RCLA defines as "the real property and improvements for a single-family house, duplex, triplex, or quadruplex or a unit and the common elements in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system." Tex. Prop. Code § 27.001(7).

Notices Required in Contract: Contracts for home or residential construction must contain the statutory notices prescribed by the RCLA. The notice is included in form 18-4 in this chapter.

Dispute Resolution Requirements: Residential construction defect disputes are addressed by the RCLA. The RCLA requires owner claimants to complete several conditions precedent before filing suit or arbitration based on most residential construction defect claims. Certain limited types of claims are exempt from the RCLA dispute resolution process, including claims solely for personal injury, wrongful death, or property damage; cases of builder wrongful abandonment of the project; real estate fraud claims under chapter 27 of the Texas Business and Commerce Code; and violations of the Trust Fund Act (Property Code chapter 162). Tex. Prop. Code § 27.002.

The dispute process includes several steps, including advance notice to builders, opportunity for builder inspection of the claimed defects, disclosure to the builder of expert reports, and builder offers to repair. Tex. Prop. Code § 27.004.

§ 18.2:3 Construction Anti-Indemnity Statute

Chapter 151 of the Texas Insurance Code prohibits an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. Tex. Ins. Code §§ 151.102–.103. A provision in a construction contract that requires the purchase of additional insured coverage is void to the extent that it requires coverage that is prohibited under subchapter C of chapter 151. This subchapter does not apply to an indemnity provision in a construction contract, or an agreement collateral to or affecting a construction contract, pertaining to a single-family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).

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§ 18.3 Precommencement

§ 18.3:1 Homestead and Mechanic's Liens

Texas homesteads are exempt from forced sale except for the enforcement of purchase-money liens, property tax liens, an owelty of partition, the refinancing of a federal tax lien, mechanic's and materialman's liens, "home equity" or second-lien financing, a reverse mortgage, and the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property. A contract for new improvements or improvements to an existing home that create a mechanic's and materialman's lien against the homestead must be in writing, made before material is furnished or labor performed, signed by both husband and wife if the homestead is a family one, and compliant with other conditions provided in the Texas Constitution. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 53.254. The contract must also contain the notice required by Tex. Prop. Code § 41.007. The residential construction contract, used alone, does not create a mechanic's lien. For a more complete discussion of lien and financing issues, see chapter 20 in this manual.

§ 18.3:2 Contract Price

Three basic price structures are used in construction contracts.

Lump sum or *stipulated sum* is the simplest type of contract price. The contractor reviews the plans and specifications for the project and contractually agrees on a fixed price for the work. Unless the parties agree to change this stipulated amount, this will be the amount paid by the owner.

A *unit price* contract establishes a price for a given unit of work (for example, $13 per square yard of asphalt paving).

A *cost-plus* arrangement establishes the price to the owner based on the actual cost of the work plus a certain percentage of profit for the contractor. In cost-plus, guaranteed-maximum construction contracts the contractor guarantees that the cost to the owner will not exceed a maximum price.

§ 18.3:3 Cautions

Commencement of construction before the contract is executed invalidates a mechanic's lien on a homestead. Tex. Prop. Code § 53.254(b).

Giving owners an allowance is standard practice in residential construction. Both parties should take care to ensure products chosen by the owners are within the amount allowed by the contract. For instance, if an allowance provides for $1,000 for a refrigerator and an owner selects a refrigerator that costs $1,300, the owner has exceeded the allowed amount and owes the contractor an additional $300. If the owner decides to use a previously purchased refrigerator, the contractor owes the owner a credit of $1,000. Careful documentation of amounts spent can prevent future disputes.

Changes to the scope of a project should be documented through the use of a change order, form 18-6 in this chapter. Whether a contractual mechanic's lien extends to such changes depends on the agreement of the parties as expressed in the original construction contract.

Without an agreement to the contrary, there is no contractual lien for partial performance on a homestead. The contract must be substantially performed. *Fidelity Savings & Loan Ass'n v. Baldwin*, 416 S.W.2d 482, 483 (Tex. App.—Beaumont 1967, writ ref'd n.r.e.).

Sales taxes are the responsibility of the owner unless the contract provides for a lump-sum price, in which case the cost is the responsibility of the contractor as the consumer. Tex. Tax Code

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§ 151.056. If the contractor manufactures or produces and also places ready-mix concrete into the property, the concrete must be separately billed, with tax on the materials paid by the owner. Tex. Tax Code § 151.056(g).

Workers' compensation laws apply to employer-employee relationships but not to independent contractors. Tex. Lab. Code §§ 406.121–.123.

The Texas Home Solicitations Transaction Act may apply if the consumer's obligation is entered into at a location other than the contractor's place of business. If the Act applies, additional notices are required. Tex. Bus. & Com. Code §§ 601.002, 601.051–.053. The statutory notice of cancellation is included in the residential construction contract (form 18-4 in this chapter).

In unincorporated areas of certain counties, a builder's failure to provide the notice indicating all inspections of a new residential construction of a single-family house or duplex showed compliance with applicable building code standards constitutes a criminal offense. The builder has an affirmative defense if the builder's failure to submit the notice is the result of the failure of the person who performed the inspection to provide appropriate documentation to the builder to submit to the county. Tex. Loc. Gov't Code §§ 233.154–.155.

§ 18.3:4 Owner Liability to Mechanic's Lien Claimants and Owner Retainage

The perfection of involuntary mechanic's liens is covered in chapter 21 in this manual. Before contracting for residential construction, owners should become familiar with their potential liability for mechanic's liens. Owner liability for properly noticed and filed subcontractor and supplier mechanic's liens is the sum of two amounts described in Tex. Prop. Code § 53.084. First, an owner is liable for the 10 percent statutory retainage owners are required to withhold from payments to the original contractor on every construction project. Tex. Prop. Code §§ 53.101–.103; *Page v. Structural Wood Components*, 102 S.W.3d 720 (Tex. 2003). In addition, an owner is liable for "fund trapping," which means "trapping" or withholding remaining contract funds otherwise owed to the original contractor. This is required when the owner receives a mechanic's lien notice letter containing language telling the owner to withhold payment from the contractor for the claim amount. Tex. Prop. Code § 53.056(b), (d). If an owner receives a lien notice letter containing the required fund-trap warning and fails to withhold payment from the contractor, the owner is personally liable and the owner's property is subject to a lien for amounts paid after receipt of the notice. This fund-trapping liability is in addition to the owner's liability for the 10 percent statutory retainage. Consequently, to protect the owner in case involuntary mechanic's liens are asserted, the owner must do two things: (1) retain 10 percent of the adjusted original contract price throughout the duration of the project and for the time after completion provided for lien claimants to file mechanic's liens and (2) withhold the proper amount of undisbursed funds ("trapped funds") from the contractor if lien notices are received from subcontractors or suppliers. Tex. Prop. Code §§ 53.081, 53.084, 53.101. If an owner fails to withhold the statutory retainage, the owner is nevertheless liable for the amount that should have been withheld. Tex. Prop. Code § 53.103(a).

Time for Withholding Statutory 10 Percent Retainage: Owners, to protect themselves from mechanic's lien claimant liability, should withhold payment of statutory retainage for at least the time allowed for claimants to file lien affidavits. Tex. Prop. Code § 53.057. This period of time is discussed in chapter 21 in this manual. However, an outline of the applicable time limits is provided below.

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The retainage provisions affecting first- and second-tier claimants were amended by the 2011 Texas legislature. Owners must withhold retainage until the earliest of the following:

1. The lien filing date provided by Tex. Prop. Code § 53.052, which is the fifteenth day of the third month following the last month of work or delivery by the claimant. (See the chart at section 21.9:2 in this manual.)

2. The fortieth day after the date stated in the affidavit of completion for the original contract, but only if the owner sent the claimant notice of the affidavit. This affidavit of completion is provided for in Tex. Prop. Code § 53.106, which allows, but does not require, the owner to file such an affidavit stating the date of final completion for the project. See form 18-7. Notice of filing and a copy of the affidavit must be sent to claimants making a written request for one or to claimants who have sent out owner lien notices. However, regardless of whether a claimant makes a request for such affidavit or sends a lien notice, if the affidavit is not sent to a claimant, then the forty-day deadline described in this section does not apply to that claimant. The affidavit is prima facie evidence of the actual final completion date for the project if it is sent to claimants as required.

3. The thirtieth day after the day the owner sends written notice to the claimant demanding that the claimant file its mechanic's lien affidavit. The notice must contain a legal description of the project property and the owner's name and address, and it must specify that the lien affidavit must be filed within thirty days of the date the notice was sent. The "demand to file a lien" section of the Texas Property Code, Tex. Prop. Code § 53.057(g), provides that this notice is effective only for the amount of contractual retainage earned by the claimant as of the day notice was sent.

Owner Failure to Withhold 10 Percent Retainage: If the owner fails to withhold statutory retainage, then the claimants are entitled to perfect their claims by notice and affidavit within the longer deadlines described above (i.e., the fifteenth day of the third month following the last month of work or delivery). No thirty-day or forty-day deadlines, under Tex. Prop. Code § 53.057(f), are applicable if the owner fails to withhold the statutory retainage.

Summary of Owner Retainage Withholding Period on Residential Projects: In summary, for residential projects, owners are liable to hold retainage for the longer lien-filing period provided by Tex. Prop. Code § 53.052, meaning the fifteenth day of the third month following the last month of work or delivery completing the project. See the chart at section 21.9:2 in this manual. If an owner wants to shorten this time, he must send one of the applicable notices described above: either filing and sending an affidavit of completion (form 18-7) or sending notice to claimants demanding that they file their lien affidavits. Because the effect of the thirty-day notice to file lien is limited to the accrued amount of the claimant's retainage, this notice is of limited use. Therefore, residential owners should consider the affidavit of completion process if they want to shorten the retainage withholding period. Owners are cautioned that only those suppliers and subcontractors who are sent the affidavit of completion are subject to the forty-day deadline. A second-tier supplier-claimant, delivering material at the end of the project and not known to the owner, will not receive an affidavit of completion, and therefore that claimant's lien will not be cut off by the forty-day deadline.

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§ 18.3:5 Other Considerations

Both property and liability insurance should be obtained by the contractor to insure the project, and the cost should be factored into the contract price.

Water and electricity should be provided to the lot line by the owner. If not, the contract should allocate the additional cost of obtaining service.

A survey should be performed before the commencement of construction, at the owner's cost.

The Federal Trade Commission requires insulation installers and new home sellers to supply information on the efficacy of the home insulation products they sell. *See* 16 C.F.R. pt. 460. The residential construction contract, form 18-4 in this chapter, includes a section for providing the required insulation disclosure data.

Independent contractor status of the contractor reduces the risk of owner liability. *Exxon Corp. v. Quinn*, 726 S.W.2d 17, 19–20 (Tex. 1987). To help preserve the contractor's independent contractor status, the owner's control over the performance of the work should be limited.

Responsibility for the foundation is one of the most important risk allocation issues in a construction contract. Usually, the party who has the most control over the design of the foundation bears the responsibility for its performance.

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001–.002.

§ 18.4 Commencement

Commencement of construction is required under the residential construction contract, form 18-4 in this chapter, to begin within thirty days from the contract date. The inception date of a statutory mechanic's lien is the date that construction begins or materials are first delivered. Tex. Prop. Code § 53.124. This date may be established by filing an affidavit of commencement, form 18-5.

§ 18.5 Postcommencement

In the residential construction contract, form 18-4 in this chapter, delays caused by unforeseen circumstances extend the completion date. Delays caused by either party can be made the subject of monetary penalties. The price of the project may be adjusted for concealed conditions.

The contractor agrees to clean up the property following completion. The owner walk-through is intended to produce a "punch list" of items the owner wants completed or corrected by the contractor. Acceptance of work occurs only after inspection and approval by the owner. Evidence of completion must be provided by the contractor to the owner. Substantial completion occurs when a certificate of occupancy is issued. If no certificate of occupancy is required, substantial completion occurs when all improvements are sufficiently complete, in accordance with the construction contract documents, so that the owner may use or occupy the improvements for the intended purpose. If the owner moves into the improvements, the improvements will be deemed to be substantially complete.

Change orders occur only on agreement by the owner and the contractor. This agreement may be documented by form 18-6.

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§ 18.6 Warranties

Alternative express warranty provisions are included in form 18-4 in this chapter, in paragraph E.1.e. Texas law implies a warranty of "good and workmanlike" construction, which can be disclaimed. Also, a warranty of "habitability" is implied, which cannot be disclaimed. *See Centex Homes v. Buecher*, 95 S.W.3d 266, 275 (Tex. 2002); *Gonzales v. Southwest Olshan Foundation Repair Co.*, 400 S.W.3d 52, 56 (Tex. 2013); *Melody Home Manufacturing v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983); *but see PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*, 146 S.W.3d 79, 88 n.37 (Tex. 2004) (recognizing implied overruling by *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649–50 (Tex. 1996)). In *Centex Homes*, the Texas Supreme Court held that—

> the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance, or quality of the desired construction. We further hold that the warranty of habitability may not be disclaimed generally. This latter implied warranty, however, only extends to defects that render the property so defective that it is unsuitable for its intended use as a home.

Centex Homes, 95 S.W.3d at 274–75.

One of the alternative express warranties provided in form 18-4 refers to the Texas Residential Construction Commission (TRCC) warranties. These TRCC warranties provide detailed quality standards for residential construction. Although the TRCC was abolished effective September 1, 2009, the warranty standards previously developed by the TRCC may still be incorporated by reference. The TRCC warranties are available online at **www.texasinspector.com/files/TRCC-Standards-of-Performance.pdf**.

§ 18.7 Instructions for Completing Forms

§ 18.7:1 Contractor's Disclosure Statement for Residential Construction Contracts

Form 18-1 in this chapter is mandated by the Texas Property Code. This statement must be delivered to the owner before the execution of the construction contract. Tex. Prop. Code § 53.255.

§ 18.7:2 Contractor's List of Subcontractors and Suppliers

Before beginning work on a project the original contractor must furnish to the owner a written list with the name, address, and telephone number of each subcontractor and supplier that the general contractor intends to use. See form 18-2 in this chapter. This list must be updated within fifteen days of the addition or deletion of a subcontractor or supplier unless the owner signs a written waiver of the right to an updated list. Tex. Prop. Code § 53.256(a). Specific language for the written waiver is given in Tex. Prop. Code § 53.256(d). To use the first alternative for payment of project retainage, described in form 18-4, paragraph 3.f. of exhibit A, the contractor must list all subcontractors and suppliers of any tier involved with the project, timely update this list, and furnish a final updated list on or before the date of final completion. See also the optional paragraph C.1.c. in form 18-4. The owner should recognize that if this alternative is selected and an affidavit of completion is not sent to a claimant for any reason, including that the owner was not made aware of the claimant, then the owner will be liable to that claimant for the claimant's share of statutory retainage even

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though the owner may have already paid the retainage.

§ 18.7:3 Contractor's Disbursement Disclosure for Residential Construction

As a prerequisite to obtaining an advance of funds in a residential construction project, the general contractor is required to provide the owner with a signed statement listing the bills paid and to be paid. See form 18-3 in this chapter. If the lender is funding an advance directly to the contractor and not through the owner, that lender must provide the owner a lender's disbursement statement and the contractor's disbursement statement used to apply for the advance. Tex. Prop. Code § 53.258.

§ 18.7:4 Residential Construction Contract

Form 18-4 in this chapter is a contract for the construction of a residence without an architect. The contract assumes a project in which the ultimate homeowner holds title to the land before the commencement of construction. Under the contract, the construction process and the duties and obligations of the parties are divided into distinct preconstruction, construction, and post-construction stages. The principal functions of the contract are to establish the terms of the construction agreement, such as price, description of the project, commencement and completion dates, allocation of responsibilities, and so forth, and to create a system for building, approving, and paying for the construction.

§ 18.7:5 Affidavit of Commencement

The owner and the original contractor may jointly execute and file an affidavit of commencement with the county clerk of the county in which the land is located. Tex. Prop. Code § 53.124(c). See form 18-5 in this chapter. An affidavit of commencement is prima facie evidence of the date of the commencement of construction and fixes the date of inception of the involuntary mechanic's liens filed relating to the construction. Tex. Prop. Code § 53.124(d).

The affidavit should be executed and recorded within thirty days after the date of actual commencement of construction or delivery of materials. Tex. Prop. Code § 53.124(c). The owner and the original contractor should not execute this affidavit at the closing of the construction loan lest a delay in recording cause the affidavit to reflect a commencement date before the recording date. The owner and the contractor should execute and record the affidavit promptly after the construction loan documents have been filed and construction has actually commenced.

§ 18.7:6 Change Order

Form 18-6 in this chapter documents amendments to the residential construction contract that may change the plans and specifications, adjust the contract amount, or alter the completion date.

§ 18.7:7 Affidavit of Completion

The owner may file an affidavit of completion with the county clerk of the county in which the property is located. See form 18-7 in this chapter. Completion is defined not as "substantial completion" as used in the contract but as "the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty work or replacement or repair of the work performed under the contract." Tex. Prop. Code § 53.001(15). An affidavit of completion meeting the requirements of section 53.106 constitutes prima facie evidence of the date of completion. Tex. Prop. Code § 53.106(d).

The affidavit should be filed on or before the tenth day after the completion of the work. If the

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affidavit is filed following the tenth day after the date of completion, the date of completion is presumed to be the date of actual filing. Tex. Prop. Code § 53.106(d).

The owner must send a copy, by certified mail, return receipt requested, or registered mail, to the original contractor not later than the date the affidavit is filed and to each claimant who has sent the owner a notice of lien liability not later than the date the affidavit is filed or the tenth day after the date the owner receives notice. Tex. Prop. Code § 53.106(b). The owner must also furnish a copy of the affidavit to any person who furnished materials or labor for the construction and requests a copy. The affidavit must be furnished not later than the tenth day after the date the request is received or ten days after the date the affidavit is filed, whichever is later. Tex. Prop. Code § 53.106(c).

§ 18.7:8 Lien Waiver

Forms 18-8 through 18-11 in this chapter are statutory forms required for lien and bond claim waivers to document final or interim acknowledgment of payments. The forms must be used verbatim, in lieu of any other form of lien release associated with construction payments. However, if a mechanic's lien affidavit has already been filed in the real estate records, the form of release does not have to conform to forms 18-8 through 18-11. Tex. Prop. Code §§ 53.281–.287. Blanket advance releases of all mechanic's lien rights of the contractor should be enforceable, if expressly stated in the residential construction contract and if the contract is executed before commencement of any work. Tex. Prop. Code § 53.282(a)(3).

§ 18.7:9 Bills-Paid Affidavit

The contractor, on request by the owner and as a condition of payment to the contractor, must provide the owner an affidavit stating that all of the contractor's subcontractors, laborers, and materialmen have been paid or identifying those not paid. See form 18-12 in this chapter. The affidavit may include representations regarding bills to be paid with the funds received and indemnity provisions. Tex. Prop. Code § 53.085.

A bills-paid affidavit must be signed by the general contractor as a condition for final payment. Tex. Prop. Code § 53.259.

There are significant penalties, both civil and criminal, for the making of false affidavits. The penalties may include a $4,000 fine, confinement in jail for a period not to exceed one year, or both, and personal liability of the person signing the affidavit for any loss or damage resulting from the false statement. Tex. Prop. Code §§ 53.085(d), (e), 53.259(c), (d).

§ 18.8 Additional Resources

Beyer, Gerry W. *Real Property.* 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.

Bush, Robert L. Russell, James W. Rudnicki, and Kathryn L. Koons. "Drafting Issues in Residential Construction Contracts." In *Residential Real Estate Construction Law Course, 2008*. Austin: State Bar of Texas, 2008.

Conoly, David Z. "New Home Construction Warranties: After the Sunset of the Texas Residential Construction Commission." In *Advanced Real Estate Drafting Course, 2011*. Austin: State Bar of Texas, 2011.

McQuality, Mark S. "Texas Residential Construction Claims: It Was Time for Change." In *Advanced Consumer and Commercial Law Course, 2009*. Austin: State Bar of Texas, 2009.

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St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Texas Residential Construction Commission. "Limited Statutory Warranty and Building and Performance Standards," effective June 1, 2005.

Walthall, Thomas J., Jr., and R. Wes Johnson. "Construction Contract Clauses & Retainage and Contingent Payment." In *Advanced Real Estate Drafting Course, 2009*. Austin: State Bar of Texas, 2009.

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Form 18-1

The language of this disclosure is based on Tex. Prop. Code § 53.255(b). The disclosure must be substantially similar to the statutory language.

Contractor's Disclosure Statement for Residential Construction

Basic Information

Date:

Owner:

Contractor:

Property:

[Lender:]

Know Your Rights and Responsibilities under the Law. You are about to enter into a transaction to build a new home or remodel existing residential property. Texas law requires your contractor to provide you with this brief overview of some of your rights, responsibilities, and risks in this transaction.

Conveyance to Contractor Not Required. Your contractor may not require you to convey your real property to your contractor as a condition to the agreement for the construction of improvements on your property.

Know Your Contractor. Before you enter into your agreement for the construction of improvements to your property, make sure that you have investigated your contractor. Obtain and verify references from other people who have used the contractor for the type and size of construction project on your property.

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Get It in Writing. Make sure that you have a written agreement with your contractor that includes (1) a description of the work the contractor is to perform; (2) the required or estimated time for completion of the work; (3) the cost of the work or how the cost will be determined; and (4) the procedure and method of payment, including provisions for statutory retainage and conditions for final payment. If your contractor made a promise, warranty, or representation to you concerning the work the contractor is to perform, make sure that promise, warranty, or representation is specified in the written agreement. An oral promise that is not included in the written agreement may not be enforceable under Texas law.

Read Before You Sign. Do not sign any document before you have read and understood it. NEVER SIGN A DOCUMENT THAT INCLUDES AN UNTRUE STATEMENT. Take your time in reviewing documents. If you borrow money from a lender to pay for the improvements, you are entitled to have the loan closing documents furnished to you for review at least one business day before the closing. Do not waive this requirement unless a bona fide emergency or another good cause exists, and make sure you understand the documents before you sign them. If you fail to comply with the terms of the documents, you could lose your property. You are entitled to have your own attorney review any documents. If you have any question about the meaning of a document, consult an attorney.

Get a List of Subcontractors and Suppliers. Before construction commences, your contractor is required to provide you with a list of the subcontractors and suppliers the contractor intends to use on your project. Your contractor is required to supply updated information on any subcontractors and suppliers added after the list is provided. Your contractor is not required to supply this information if you sign a written waiver of your rights to receive this information.

Monitor the Work. Lenders and governmental authorities may inspect the work in progress from time to time for their own purposes. These inspections are not intended as quality control inspections. Quality control is a matter for you and your contractor. To ensure that

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your home is being constructed in accordance with your wishes and specifications, you should inspect the work yourself or have your own independent inspector review the work in progress.

Monitor Payments. If you use a lender, your lender is required to provide you with a periodic statement showing the money disbursed by the lender from the proceeds of your loan. Each time your contractor requests payment from you or your lender for work performed, your contractor is also required to furnish you with a disbursement statement that lists the name and address of each subcontractor or supplier that the contractor intends to pay from the requested funds. Review these statements and make sure that the money is being properly disbursed.

Claims by Subcontractors and Suppliers. Under Texas law, if a subcontractor or supplier who furnishes labor or materials for the construction of improvements on your property is not paid, you may become liable and your property may be subject to a lien for the unpaid amount, even if you have not contracted directly with the subcontractor or supplier. To avoid liability, you should take the following actions:

1. If you receive a written notice from a subcontractor or supplier, you should withhold payment from your contractor for the amount of the claim stated in the notice until the dispute between your contractor and the subcontractor or supplier is resolved. If your lender is disbursing money directly to your contractor, you should immediately provide a copy of the notice to your lender and instruct the lender to withhold payment in the amount of the claim stated in the notice. If you continue to pay the contractor after receiving the written notice without withholding the amount of the claim, you may be liable and your property may be subject to a lien for the amount you failed to withhold.

2. During construction and for thirty days after final completion, termination, or abandonment of the contract by the contractor, you should withhold or cause your lender to

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withhold 10 percent of the amount of payments made for the work performed by your contractor. This is sometimes referred to as "statutory retainage." If you choose not to withhold the 10 percent for at least thirty days after final completion, termination, or abandonment of the contract by the contractor and if a valid claim is timely made by a claimant and your contractor fails to pay the claim, you may be personally liable and your property may be subject to a lien up to the amount that you failed to withhold.

If a claim is not paid within a certain time period, the claimant is required to file a mechanic's lien affidavit in the real property records in the county in which the property is located. A mechanic's lien affidavit is not a lien on your property, but the filing of the affidavit could result in a court imposing a lien on your property if the claimant is successful in litigation to enforce the lien claim.

Some Claims May Not Be Valid. When you receive a written notice of a claim or when a mechanic's lien affidavit is filed on your property, you should know your legal rights and responsibilities regarding the claim. Not all claims are valid. A notice of a claim by a subcontractor or supplier is required to be sent, and the mechanic's lien affidavit is required to be filed, within strict time periods. The notice and the affidavit must contain certain information. All claimants may not fully comply with the legal requirements to collect on a claim. If you have paid the contractor in full before receiving a notice of a claim and have fully complied with the law regarding statutory retainage, you may not be liable for that claim. Accordingly, you should consult your attorney when you receive a written notice of a claim to determine the true extent of your liability or potential liability for that claim.

Obtain a Lien Release and a Bills-Paid Affidavit. When you receive a notice of claim, do not release withheld funds without obtaining a signed and notarized release of lien and claim from the claimant. You can also reduce the risk of having a claim filed by a subcontractor or supplier by requiring as a condition of each payment made by you or your lender that your contractor furnish you with an affidavit stating that all bills have been paid. Under

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Texas law, on final completion of the work and before final payment, the contractor is required to furnish you with an affidavit stating that all bills have been paid. If the contractor discloses any unpaid bill in the affidavit, you should withhold payment in the amount of the unpaid bill until you receive a waiver of lien or release from that subcontractor or supplier.

Obtain Title Insurance Protection. You may be able to obtain a title insurance policy to insure that the title to your property and the existing improvements on your property are free from liens claimed by subcontractors and suppliers. If your policy is issued before the improvements are completed and covers the value of the improvements to be completed, you should obtain, on the completion of the improvements and as a condition of your final payment, a "completion of improvements" policy endorsement. This endorsement will protect your property from liens claimed by subcontractors and suppliers that may arise from the date the original title policy is issued to the date of the endorsement.

I have received a copy of this contractor's disclosure statement for residential construction.

I have also received a copy of the attached contractor's list of subcontractors and suppliers.

_____

[Name of owner]

Attach list of subcontractors and suppliers. See form 18-2 in this chapter.

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Form 18-2

The prescribed language in the "Notice" paragraph of this form must appear in a minimum of ten-point bold-faced type. The list may be given either with form 18-1 in this chapter or before the commencement of construction. This list must be updated and provided to the owner not later than the fifteenth day after a subcontractor or supplier is added or deleted unless the owner has signed a written waiver of the right to receive updates. Tex. Prop. Code § 53.256.

Contractor's List of Subcontractors and Suppliers

Basic Information

Date:

Owner:

Contractor:

Property:

[Lender:]

NOTICE: THIS LIST OF SUBCONTRACTORS AND SUPPLIERS MAY NOT BE A FINAL LISTING. UNLESS YOU SIGN A WAIVER OF YOUR RIGHT TO RECEIVE UPDATED INFORMATION, THE CONTRACTOR IS REQUIRED BY LAW TO SUPPLY UPDATED INFORMATION, AS THE INFORMATION BECOMES AVAILABLE, FOR EACH SUBCONTRACTOR OR SUPPLIER USED IN THE WORK PERFORMED ON YOUR RESIDENCE.

Name of subcontractor or supplier:

Address:

Telephone number:

Repeat above information as needed.

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If this list was not delivered with form 18-1, include the following.

I have received a copy of this list of subcontractors and suppliers.

_____

[**Name of owner**]

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Form 18-3

Contractor's Disbursement Disclosure for Residential Construction (Consumer-Owned)

Basic Information

Date:

Owner:

Property:

Project: [**include description**]

Contractor:

[Lender:]

The following information is required to be provided under section 53.258 of the Texas Property Code in connection with this payment request for construction on the Property. This statement will be furnished by depositing the statement in the United States mail, first class, postage paid, and properly addressed to Owner or by hand delivering the statement to Owner before Contractor receives the requested funds.

A. Bills Paid. The following is a list of bills or expenses for labor or materials used on the Project that have been paid and for which Contractor is requesting payment:

Name and address of subcontractor or supplier:

Description of bill or expense paid:

Amount paid:

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Repeat above information as needed.

B. Bills to Be Paid. The following is a list of bills or expenses relating to labor or materials used on the Project that will be paid from the funds requested. This list contains the name and address of each person who subcontracted directly with Contractor and whom Contractor intends to pay from the requested funds.

Name and address of payee:

Description of bill or expense to be paid:

Amount to be paid:

Repeat above information as needed.

_____

[Name of contractor]

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Form 18-4

Residential Construction Contract

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Property

Address:

Legal description:

Project Description:

A. Construction Terms

A.1. Allowance Items:

Flooring: $[amount] [retailer]

Light fixtures: $[amount] [retailer]

Wall coverings: $[amount] [retailer]

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Appliances: $[**amount**] [**retailer**]

Plumbing fixtures: $[**amount**] [**retailer**]

Other: $[**amount**] [**retailer**]

A.2. Contract Sum:

A residential construction contract may include more than one method of calculating the contract sum. Select one or more of the following as applicable. Attach exhibit A (payment schedule) if applicable.

Stipulated sum: [**dollars**] DOLLARS ($[**amount**])

And/Or

Unit price: [**dollars**] DOLLARS ($[**amount**]) per [**unit of work, e.g.,** square yard of asphalt paving]

And/Or

Cost-plus basis: costs plus [**percent**] percent ([**percent**]%) of "costs" as defined in Exhibit [**exhibit letter/number**] [**include if applicable:** but not to exceed a guaranteed maximum of [**dollars**] DOLLARS ($[**amount**])].

Continue with the following.

A.3. F.T.C. Insulation Disclosure Data: The following data reflect characteristics of insulation according to data from the manufacturer:

Ceilings:	Type:	Thickness:	R-Value:
Exterior walls:	Type:	Thickness:	R-Value:
Other:	Type:	Thickness:	R-Value:

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All stated R-values are based on information provided by the manufacturer of this insulation.

B. Definitions

B.1. "Commencement Date" means the date on which the building permit is issued for Contractor to construct the Improvements.

B.2. "Completion Date" means the date of Substantial Completion and notice to Owner, but not later than [**date**], unless extended by the terms of the Contract Documents, force majeure delays, or other delays not within Contractor's control.

B.3. "Concealed Conditions" means preexisting physical conditions situated below the surface of the ground, or concealed or unknown conditions in an existing structure, at variance with the conditions indicated in the Contract Documents or differing materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract Documents.

B.4. "Contract Documents" means this residential construction contract, the Plans, warranty documents, and any other documents governing the Work (collectively, the "Contract").

B.5. "Improvements" means the improvements to be constructed on the Property according to the Plans, including [**describe, e.g.,** a single-family residence].

B.6. "Payment Deadline" means 2:00 P.M. on the third business day after Contractor's request for payment is received by [Owner/Owner's lender/[**specify**]].

B.7. "Plans" means all design plans and specifications for the Improvements (dated and initialed by Owner and Contractor).

B.8. "Scope of Work" means the Work covered by the Contract Documents.

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B.9. "Substantial Completion" or "Substantially Complete" means the stage when a certificate of occupancy is issued, or if no certificate is required, when all Improvements are sufficiently complete, in accordance with the Contract Documents, so that Owner may use or occupy the Improvements for the intended purpose. If Owner moves into the Improvements, the Improvements will be deemed to be substantially complete.

B.10. The "Work" means the physical activities, materials, and equipment relating to the construction of the Improvements.

C. Precommencement Matters

C.1. Contractor agrees to—

a. Provide Owner a copy of the Builder's Risk Insurance Policy for the Property with a coverage amount equal to or greater than the Contract Sum.

b. Obtain Contractor's risk insurance coverage for casualty loss and public liability in reasonable amounts, to protect Contractor and Owner.

Include the following if applicable. The list of subcontractors and suppliers is required for early release of retainage, as described in the first alternative within paragraph 3.f. of exhibit A.

c. Provide Owner with a written list of all subcontractors and suppliers of any tier furnishing labor, material, equipment, or other improvements for the project. The list will include each subcontractor's or supplier's name, address, and telephone number and will be updated within fifteen days of any addition or deletion of a subcontractor or supplier. A final list will be provided to Owner on or before final completion of the project.

d. If Contractor provides the Plans, Contractor will deliver to Owner two copies of the Plans. Contractor hereby assigns to Owner the right to use the

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Plans for the purpose of completing the Improvements if Contractor fails to do so in accordance with the terms of the Contract Documents.

C.2. Owner agrees to—

a. Furnish to Contractor reasonable proof acceptable to Contractor that Owner has the ability to pay to Contractor the full Contract Sum.

b. Provide water and electricity to the property line.

C.3. The following are stipulated:

a. *Change Orders*

i. Contractor is under no duty to make any changes in the Plans requested by Owner until a change order is signed by Contractor and Owner.

ii. Owner and Contractor must sign a written change order. An e-mail exchange between Owner and Contractor in which the changes are discussed and acknowledged by the parties will also satisfy this requirement.

iii. When Contractor receives a written request for any change from Owner, Contractor will present Owner with a proposal for the changes including any additional price, markup, and extensions to the projected Completion Date.

iv. Upon Owner's acceptance, the change order will become an amendment to the Contract Documents, and the terms of the change order shall control if any conflict exists between it and the Contract Docu-

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ments. A signature or e-mail affirmation from any one Owner is sufficient to bind all Owners.

v. Failure of Owner to approve Contractor's proposal for changes within five days after receipt shall constitute a rejection of the proposal. Owner shall pay for all agreed-upon change orders to the extent they increase the Contract Sum to Contractor in cash within five business days after Owner's acceptance of the proposal.

vi. Contractor will not be obligated to proceed with any Work until all amounts have been paid pursuant to a change order. Contractor has no obligation to stop Work while change orders are being negotiated.

b. *Plans*. If Owner furnishes the Plans, Owner warrants the sufficiency of the Plans and Contractor may reasonably rely on the accuracy of the Plans. Contractor disclaims all liability for any errors or omissions in Plans furnished by Owner. Contractor is prohibited from using the Plans on any other property. If Contractor furnishes the Plans, Contractor warrants the Plans are in substantial compliance with all applicable laws [**include if applicable:** and any other standards adopted by the parties]. Plans and any supplements to the Plans prepared by Contractor will be the property of Contractor and may not be used by Owner on any other property. Owner agrees that as long as construction of the Improvements is in compliance with the Contract Documents, minor deviations will be accepted.

c. *Consumer Products*. "Consumer Products," as defined by the Federal Trade Commission, are excluded from Contractor's warranty only to the extent individual manufacturers' warranties are passed through Contractor and assigned to Owner, with a copy received by Owner. Contractor assigns

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and passes through to Owner the manufacturers' warranties on all appliances and equipment. In the case of passed-through and received manufacturers' warranties on Consumer Products, Owner's recourse is directly to the manufacturer, and Contractor will have no responsibility for them, except for problems relating to Contractor's installation and hookup of the items.

d. *Consult Your Attorney.* This is intended to be a legally binding contract. READ IT CAREFULLY. If you do not understand the effect of any part of the Contract Documents, consult your attorney BEFORE signing.

e. *F.T.C. Insulation Disclosure.* The F.T.C. Insulation Disclosure Data are provided in accordance with the Federal Trade Commission regulation at 16 C.F.R. pt. 460.

D. After Completion of Precommencement Matters

D.1. Contractor agrees to—

a. Obtain a building permit and commence the Work within thirty days after Owner has completed all of Owner's obligations under the Precommencement Matters and file an affidavit of commencement in the real property records of the county in which the Property is located.

b. Comply with all regulations and restrictions imposed by local, state, and federal agencies.

c. Diligently prosecute the Work to completion and substantially complete the Work according to the Plans by the Completion Date.

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d. Pay all valid bills and charges to Contractor for material or labor relating to the Improvements.

e. Keep the Property free from claims of liens for labor or material arising directly through Contractor, except that Contractor may reasonably dispute any claim.

f. Include in the Improvements insulation with the characteristics set forth above in the F.T.C. Insulation Disclosure Data.

D.2. Contractor agrees not to delay the work.

D.3. Owner agrees to—

a. Pay to Contractor the Contract Sum, disbursed according to the [Contract terms/payment schedule], no later than the Payment Deadline.

b. Promptly pay to the seller of the Allowance Items all charges in excess of the allowances.

c. Make selection of Allowance Items within ten days after receipt of notice from Contractor; otherwise, Contractor may make the selections or extend the time for Owner to make the selections, in which case Owner will pay any charges related to the delay and Contractor is entitled to extend the Completion Date.

d. Deliver to Contractor, within three business days of Contractor's draw request, written notice of Work not accepted, with specific reasons and reasonable requirements stated for causing the Work to be accepted.

D.4. Owner agrees not to—

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a. Communicate directly with laborers about the Work.

b. Delay or interfere with the progress of the Work.

D.5. Contractor and Owner agree that—

a. If Owner, at any time before or during the progress of the Work, wants any modifications made to the Plans ("Changed Work"), Owner will request in writing that Contractor undertake the Changed Work. If Contractor agrees to do the Changed Work, Contractor may submit to Owner an estimate of the cost of the Changed Work and an extension of the Completion Date to reflect the additional time required for completing it. If a preapproved written change order is not obtained, Contractor may submit to Owner the notice of change order and extension of time in writing, and the failure of Owner to make written objection within ten days of the notice is conclusively deemed approval by Owner. The Contract Sum and the Completion Date will automatically adjust to incorporate any change orders.

b. Should Contractor encounter Concealed Conditions, the Contract Sum will be equitably adjusted by change order on claim by either party made within twenty days after notice by Contractor to Owner of the Concealed Conditions.

c. Contractor occupies the status of an independent contractor, as that term is defined in the construction industry.

d. Unless otherwise specifically provided, reference to any equipment, material, article, or patented process by trade name, make, or catalog number is regarded as establishing a standard of quality and is not construed as limiting competition. Contractor may, at Contractor's option, use any equip-

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ment, material, article, or patented process that is substantially equal to that named.

e. Contractor has the right to subcontract any part or all of the Work.

E. After Substantial Completion

E.1. Contractor agrees to—

a. Remove debris and surplus materials occasioned by the Work.

b. Notify Owner on Substantial Completion of the Work and file an affidavit of completion in the real property records of the county in which the Property is located.

c. Deliver possession of the Improvements to Owner on the day following the later of Substantial Completion or final payment to Contractor of the Contract Sum.

d. Release the Work and Property from all claims, including claims of subcontractors and materialmen, on receipt of final payment.

Select one of the following. Use the second paragraph to reference the Texas Residential Construction Commission warranty standards.

e. Contractor warrants its labor and materials against construction defects and warrants that its construction services have been performed in a good and workmanlike manner and that the materials are adequate for their intended purposes. These warranties extend for a period of one year after substantial completion. Owner must give notice of the defect within this one-year warranty period, and contractor has up to six months to correct the defect. The

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giving of this express warranty is not intended to, and does not, negate implied warranties.

Or

e. Contractor warrants that its performance of work on the project meets the residential construction warranties adopted by the Texas Residential Construction Commission. The warranties will extend for the following periods after substantial completion:

i. one year for workmanship and materials;

ii. two years for plumbing, electrical, heating, and air-conditioning delivery systems; and

iii. ten years for major structural components of the Improvements.

THESE EXPRESS WARRANTIES ARE GIVEN IN LIEU OF THE IMPLIED WARRANTY OF GOOD AND WORKMANLIKE CONSTRUCTION, WHICH IS DISCLAIMED.

Continue with the following.

E.2. Owner agrees to—

a. Pay to Contractor the final payment of the Contract Sum, including all amounts due under the Contract Documents, according to Exhibit A.

b. Sign and file for record within five days after Substantial Completion a notice of substantial completion and acceptance.

E.3. Owner and Contractor agree that Owner's acceptance of possession will be conclusively presumed to constitute Owner's acceptance of the Improvements as Substantially Complete and inhabitable.

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F. Default and Termination

F.1. Building Permit. If a building permit has not been issued within ten business days of completion of all Precommencement Matters, Owner may terminate this Contract by written notice within ten business days and recover out-of-pocket costs from Contractor; otherwise, Owner must give Contractor ten days' written notice and opportunity to cure before terminating this Contract.

F.2. Precommencement Matters. If the Precommencement Matters have not been completed within thirty days from the Contract Date, Owner or Contractor may unilaterally terminate this Contract by written notice within forty days from the Contract Date, in which case this Contract will terminate, and the performing party is entitled to recover reasonable out-of-pocket costs from the nonperforming party.

F.3. Owner's Default. Each of the following constitutes a material breach of this Contract by Owner: (a) failing to fully and timely perform any covenant of Owner under this Contract; (b) making any representation to Contractor found to be materially false, misleading, or erroneous; and (c) substantially breaching any of Owner's obligations under this Contract.

F.4. Contractor's Default. Each of the following constitutes a material breach of this Contract by Contractor: (a) delaying the Work such that the progress of the Substantial Completion of the Improvements falls more than thirty days behind the time shown for completion of the Work; (b) failing to fully and timely perform any covenant of Contractor under this Contract; (c) making any representation to Owner found to be materially false, misleading, or erroneous; and (d) substantially breaching any of Contractor's obligations under this Contract or required by applicable law.

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F.5. Remedies. If one party defaults, and the default is not cured within ten days of written notice specifically describing the default, this Contract may be terminated by written notice from the nondefaulting party to the defaulting party.

Include the following if desired, modifying if needed to reflect the appropriate price structure.

In the event of such termination, the following formula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:

a. *Damages to Contractor.* If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days of written notice from Contractor, an amount equal to all amounts due and owing at the time of the termination, including payment for Changed Work, plus [**percent**] percent of the remaining Contract Sum to compensate Contractor for the lost profit and for the difficulty and burden of locating other work for the Contractor's subcontractors to prevent hardship on them and the loss of loyalty resulting from such hardship.

b. *Damages to Owner.* If termination resulted from an act of default of Contractor, damages recoverable by Owner from Contractor will be in accordance with Texas Property Code chapter 27 (the Residential Construction Liability Act), if applicable. If the Residential Construction Liability Act does not apply, Contractor will pay to Owner, in addition to actual damages, consequential damages, which are liquidated in an amount equal to two months' interest on Owner's interim construction loan (based on the assumption, whether true or not, that there exists such a loan and that it is fully disbursed and in an amount equal to the Contract Sum) to compensate Owner for the time and expense associated with obtaining

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another contractor to complete the Work. It is agreed by the parties that this liquidated amount is a reasonable estimate of the consequential damages actually incurred by Owner. Payment by Contractor will be delivered to Owner on the earlier of (i) payment of all amounts due to Contractor, with a right of offset to Owner for unpaid damages under this section; (ii) completion of construction of the Improvements; or (iii) the expiration of thirty days from written notice from Owner.

Continue with the following.

G. Miscellaneous Provisions

G.1. Agreement of Parties. The Contract Documents, including any of their exhibits and attachments, are the entire agreement of the parties. There are no representations, agreements, or promises between the parties, and neither party is relying on any statements or representations of any agent of the other party, that are not in those documents.

G.2. Amendment of Contract. This Contract may be amended only by an instrument in writing signed by the parties.

G.3. Attorney's Fees. If either party retains an attorney to enforce this Contract, the party prevailing in litigation is entitled to recover reasonable attorney's fees, court and other costs, and related expenses.

G.4. Binding Effect. This Contract binds, benefits, and may be enforced by the parties and their respective representatives, successors in interest, and, if permitted, their assigns.

G.5. Counterparts. If this Contract is executed in multiple counterparts, all counterparts taken together will constitute this Contract.

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G.6. Choice of Law. This contract is to be construed under the laws of the state of Texas, without regard to choice-of-laws in any jurisdiction.

G.7. Venue. Venue is in the county or counties in which the Property is located.

G.8. Notices. Any notice required or permitted under this Contract must be in writing. Any notice required by this Contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

G.9. Time. Time is of the essence. Unless otherwise specified, all references to days mean calendar days. Business days exclude all Saturdays, Sundays, and national holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or national holiday, that obligation is performable on the next business day.

G.10. Real Estate Broker's Fees. There are no contracts with any real estate broker or other party in connection with this Contract to whom any fees are due and payable unless specified in a separate commission agreement between the real estate broker and the party responsible for paying the commission.

G.11. When the context requires, singular nouns and pronouns include the plural.

> Include the following if the contract calls for renovation or repair of existing homestead improvements and a lien for financing the improvements is contemplated. See section 20.1:1 in this manual.

G.12. Repair or Renovation Construction. If the Scope of Work includes repair or renovation of existing improvements, the following provisions apply. Contractor and Owner

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certify and represent that they are aware of and have complied with the following legal rights and obligations:

a. *Rescission.* Owner may rescind this contract (and any other proposals, contracts, or agreements with Contractor regarding the repair or renovation of existing improvements) without penalty or charge within three days after the execution of the contract by all parties. See the "Notice of Cancellation" form below.

b. *Place of Signing Contract.* Owner acknowledges that this contract was signed at one of the following offices and not elsewhere: (i) the office of a third-party lender making an extension of credit for the Work and material to be furnished; (ii) the office of an attorney at law; or (iii) the office of a title company.

c. *Five-Day Waiting Period.* This contract and any other contract signed in connection with the repair and renovation Work mentioned in this contract have not been executed by Owner or Owner's spouse before the fifth day after Owner made written application for an extension of credit for the Work and material contemplated.

Include the following if applicable.

G.13. Special Provisions. **[Specify.]**

G.14. Notices

The following notice is required by Tex. Prop. Code § 41.007. This notice must appear in a minimum of ten-point bold-faced type or equivalent "next to" the owner's signature line. Tex. Prop. Code § 41.007(a).

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IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your Improvements. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

The following notice is required by Tex. Prop. Code § 27.007.

RESIDENTIAL CONSTRUCTION LIABILITY ACT (RCLA) NOTICE

This contract is subject to Chapter 27 of the Texas Property Code. The provisions of that chapter may affect your right to recover damages arising from a construction defect. If you have a complaint concerning a construction defect and that defect has not been corrected as may be required by law or by contract, you must provide the notice required by Chapter 27 of the Texas Property Code to the contractor by certified mail, return receipt requested, not later than the 60th day before the date you file suit to recover damages in a court of law or initiate arbitration. The notice must refer to Chapter 27 of the Texas Property Code and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code.

YOU, THE OWNER, MAY CANCEL THIS TRANSACTION AT ANY TIME BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

_____

[Name of owner]

If the owner is married, both spouses must sign the contract.

_____

[Name of contractor]

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If the notice of the owner's right to cancel is included, attach completed duplicate copies of the following notice of cancellation.

The notice of right to cancel, if required, must appear "in immediate proximity to" the owner's signature in a minimum of ten-point bold-faced type. Tex. Bus. & Com. Code § 601.052; 16 C.F.R. § 429.1(a).

A notice concerning the purchaser's three-day right of rescission under a contract to purchase real property must be given if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business; (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property, as described in Tex. Bus. & Com. Code ch. 601.

The notice of cancellation form must be easily detachable from the contract to which it is attached, must be in the same language as the contract, and must contain the following information and statements. Tex. Bus. & Com. Code § 601.053.

Notice of Cancellation

[Date]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE MERCHANT OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL YOU MUST MAKE AVAILABLE TO THE MERCHANT AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH

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THE INSTRUCTIONS OF THE MERCHANT REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE MERCHANT'S EXPENSE AND RISK.

IF YOU DO NOT AGREE TO RETURN THE GOODS TO THE MERCHANT OR IF THE MERCHANT DOES NOT PICK THEM UP WITHIN TWENTY DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of merchant], AT [address of merchant's place of business] NOT LATER THAN MIDNIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION.

Dated: _____.

_____

[Name of purchaser]

Include any attachments.

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Exhibit A

Payment Schedule

The Contract Sum will be paid by Owner to Contractor as follows:

1. *Retainage.* Ten percent of all draws, including 10 percent of all change orders or other modifications to the contract price, will be withheld by Owner to be paid at the time of the Retainage Draw described below.

2. *Precommencement.* Owner has deposited with Contractor the sum of $[**amount**], which will be credited to Owner on the [initial/final/[**describe other**]] draw.

Select one of the following.

3. *Interim Draws.* Owner will pay to Contractor the following portions of the Contract Sum according to the following schedule:

a. Draw No. 1 for $[**amount**]: After foundation poured

b. Draw No. 2 for $[**amount**]: Roof work begins

c. Draw No. 3 for $[**amount**]: Interior trim work begins

d. Draw No. 4 for $[**amount**]: Interior painting begins

e. Draw No. 5 for $[**amount**]: Substantial Completion

f. Retainage Draw for remaining unpaid 10 percent withheld from each draw, change order, or other modification to the contract price: [**select one of the following:** If Contractor has complied with paragraph C.1.c. under "Precommencement Matters" by timely providing Owner with the updated written list of subcontractors and suppliers of any tier and Contractor has verified the list

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as accurate as of final completion, Owner will prepare, file, and send an affidavit of completion within ten days of the date of project final completion. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic's liens have been filed by that time./Retainage will be paid to Contractor on the last business day of the third month following the month of final completion of the project, provided no unreleased mechanic's liens have been filed by that time.]

g. Other Draws: In addition to the draws provided for above, Contractor will also make the following draws on the Contract Sum:

$[**amount**] for [**specify**]

$[**amount**] for [**specify**]

$[**amount**] for [**specify**]

Or

3. *Interim Draws*. Owner will pay to Contractor the following portions of the Contract Sum according to the following schedule: [**describe schedule for interim draws, including retainage draw**].

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Exhibit B

Allowance Schedule

Allowance Item	Budgeted Cost

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Form 18-5

Affidavit of Commencement

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Property: [**include legal description**]

Improvements:

Affiants, [**name of owner**] and [**name of contractor**], on oath swear that the following statements are true and within the personal knowledge of Affiants:

1. *Commencement of Construction.* Construction of the Improvements commenced on [**date**].

Include the following if applicable.

2. *Delivery of Materials.* Materials to be used in constructing the Improvements were first delivered to the Property on [**date**].

3. *Representations.* Affiant, [**name of contractor**], makes these representations individually and on behalf of Contractor.

Continue with the following.

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_____

[Name of owner]

SUBSCRIBED AND SWORN TO before me on _____ by **[name of affiant]**.

_____

Notary Public, State of Texas

_____

[Name of contractor]

SUBSCRIBED AND SWORN TO before me on _____ by **[name of affiant]**.

_____

Notary Public, State of Texas

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Form 18-6

Change Order

Basic Information

Date:

Change Order Number:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Property and Improvements: The Improvements described in the Residential Construction Contract ("Contract") (incorporated by reference) between Owner and Contractor for [**specify**].

Changes to Contract:

1. *Change to Plans and Specifications*

In accordance with the Contract terms, the following changes ("Changed Work") are approved: [**specify**].

2. *Contract Sum Adjustment*

Original contract sum: [**specify**]

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[**Include if applicable:** Prior change orders number 1 through number [**number**]:

[**specify**]]

This change order: [**specify**]

Revised contract sum: [**specify**]

3. *Completion Date Adjustment*

Original completion date: [**date**]

[**Include if applicable:** Previous time changes number 1 through number [**number**]:

[**days**]]

This time change: [**days**]

Revised completion date: [**date**]

4. *Contract Amendment.* For the same consideration that supports the Contract, Owner and Contractor agree to amend the Contract as described in the Changes to Contract. The Contract as amended remains in full force and effect.

5. When the context requires, singular nouns and pronouns include the plural.

_____

[**Name of owner**]

_____

[**Name of contractor**]

If the owner is married, both spouses must sign any written agreement regarding estimates for changed work.

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Form 18-7

Owner Affidavit of Completion

Basic Information

Date:

Owner:

Owner's Mailing Address:

Original Contractor:

Original Contractor's Mailing Address:

Property: [**include legal description**]

Improvements:

Completion Date: [**date**]

Affiant, [**name of affiant**], on oath swears that the following statements are true and within the personal knowledge of Affiant:

1. *Date of Completion.* The Improvements to the Property were completed on the Completion Date. For purposes of this affidavit, "completion" means the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty or repair work.

2. *Claims against Retained Funds.* NO SUBCONTRACTOR OR OTHER LIEN CLAIMANT MAY HAVE A LIEN ON RETAINED FUNDS UNLESS THE CLAIMANT FILES AN AFFIDAVIT

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CLAIMING A LIEN NO LATER THAN THE FORTIETH DAY AFTER THE WORK UNDER THE ORIGINAL CONTRACT IS COMPLETED.

3. *Statement as to Other Notices.* Owner states that Owner has received a written request to receive a copy of an affidavit of completion from the following persons who have furnished labor or materials for the Property and from no other persons:

Persons requesting copy of affidavit of completion: [**list**].

_____

[**Name of owner**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Form 18-8

This form is based on the form found in Tex. Prop. Code § 53.284(b). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Partial Release During Construction

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] of check**], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] as indicated in the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

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The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

_____

Date

[Company name]

By _____

[Name and title]

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Form 18-9

This form is based on the form found in Tex. Prop. Code § 53.284(c). If a contractor (or other potential lien claimant) is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must read as follows. The form must include the notice at the top of the document.

Unconditional Partial Release During Construction

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid and has received a progress payment in the sum of $[**amount**] for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**]. The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above-referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] as indicated in

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the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

_____

Date

[Company name]

By _____

[Name and title]

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Form 18-10

This form is based on the form found in Tex. Prop. Code § 53.284(d). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce the payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Final Release

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] of check**], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**].

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-

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men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

_____
Date

[Company name]

By _____
[Name and title]

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Form 18-11

This form is based on the form found in Tex. Prop. Code § 53.284(e). If a contractor (or other potential lien claimant) is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a final payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the final payment, the waiver and release must read as follows. The form must include the notice at the top of the document.

Unconditional Release on Final Payment

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**]. The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

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_____

Date

[Company name]

By _____

[Name and title]

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Form 18-12

This form may be used as written by an original contractor to fulfill the requirements of Tex. Prop. Code §§ 53.085, 53.258, 53.259; the wording may be modified if the affidavit is made for a subcontractor or supplier under Tex. Prop. Code § 53.085.

[Final] Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address:

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

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2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Contractor has paid each of Contractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

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Continue with the following.

_____

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

_____

Notary Public, State of Texas

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Chapter 19

Commercial Construction Contract Documents

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Form 19-1 Commercial Construction Contract [Guaranteed Maximum Price] 452

Form 19-2 Commercial Construction Contract [Stipulated Sum] 527

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Chapter 19

Commercial Construction Contract Documents

Note: The State Bar of Texas Real Estate Forms Committee is grateful to Charles Comiskey, senior vice president of Brady Chapman Holland & Associates, Inc., an insurance brokerage firm with offices in Houston, Texas, and president of RiskTech, Inc., a risk management consulting firm in Houston, Texas, for his assistance in preparing exhibit D to forms 19-1 and 19-2 in this chapter.

§ 19.1 Nature of Contract

Form 19-1 and 19-2 in this chapter are intended to be used for commercial construction projects that are designed by an architect with participation by the architect's engineering consultant(s). The term *Architect/Engineer* as used in the contract designates the design professional for the project.

§ 19.2 Architect and Engineering Services

The statutes applicable to architects and engineers govern the types of design and professional services that may be provided by each. Some professional services may be performed by either an architect or an engineer, including the preparation of site plans and the depiction of building systems. *See, e.g.*, Tex. Occ. Code §§ 1001.0031(d), (e), 1051.0016(b), (c). Certain plans and specifications may be prepared only by a licensed architect or a licensed engineer. *See* Tex. Occ. Code §§ 1001.0031(c), 1051.703. Some projects may be designed by persons who are not licensed architects or engineers. *See, e.g.*, Tex. Occ. Code §§ 1051.606, 1001.056–.057.

§ 19.3 Role of Architect/Engineer

The commercial construction contract (forms 19-1 and 19-2 in this chapter) designates the Architect/Engineer (A/E) as the owner's representative and anticipates that the A/E will provide design services before construction and contract administration services during the construction phase. As part of the contract administration services, the A/E will, among other duties, carry out the following: give the notice to proceed, approve payment applications from the contractor, respond to submittals and requests for clarification, review the contractor's construction schedule, determine whether delay is excused, approve or make reasonable objection to proposed subcontractors, review the contractor's draw requests for payment, determine whether the project is substantially complete, prepare the list of correction items required (punch list) for final completion, determine whether to recommend the owner's final payment, and receive information and documents on behalf of the owner, such as lien releases and affidavits of bills paid. The A/E is designated in the contract as the initial decision maker for claims made by the owner or the contractor.

The contract administration services specified in the contract are typical of those in industry-standard forms, such as American Institute of Architects construction contracts. However, the A/E is not a party to the construction contract. Therefore, the terms of the architect's contract should be made consistent with the A/E provisions in forms 19-1 and 19-2. Alternatively, the architect's contract can be drafted to incorporate the provisions of forms 19-1 and 19-2 by reference in describing the A/E's obligations.

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§ 19.4 Contract Price

§ 19.4:1 Guaranteed Maximum Price

Form 19-1 provides for its contract price to be the sum of the actual cost of the work, plus the contractor's fee, but not to exceed a stated guaranteed maximum price (GMP). Section F. of the contract specifies the types of construction costs that are reimbursable as the cost of the work. Paragraph F.5. requires the contractor to provide a schedule of values for the owner's approval. The approved schedule of values will be used to determine progress payments, as provided in section J. The contract price, allowances, contractor's contingency, owner's contingency, and the amount of liquidated damages, if required by the owner, are to be set out in exhibit C of the contract.

§ 19.4:2 Stipulated Sum

Form 19-2 provides for its contract price to be a fixed price (the stipulated sum). As with form 19-1, this form of construction contract sets out in section F. the types of construction costs that are included within the stipulated sum. This is done to illustrate the type of construction costs included, for example, demolition costs, to permit the parties to confirm the scope of the work. Paragraph F.4. requires the contractor to provide a schedule of values for the components of the work. The schedule of values will be useful for the A/E and owner to confirm the progress of construction and in approving progress payments. Exhibit C of form 19-2 sets out the contract price and permits the parties to establish allowances and liquidated damages for unexcused construction delay.

§ 19.5 Retainage

The contract provides for 10 percent retainage to be withheld in accordance with the provisions of chapter 53 of the Texas Property Code.

§ 19.6 Payment and Performance Bonds

The owner may require the contractor to provide payment and performance bonds by designating the requirement on exhibit D of the contract.

§ 19.7 Risk Management

§ 19.7:1 Insurance

The insurance requirements for the owner; contractor; and, if applicable, subcontractors are to be set out in exhibit D, which contains sample insurance requirements. See the discussion of types of insurance and their use in construction projects in chapter 17 in this manual.

§ 19.7:2 Indemnity

The contracts contain at section R. two indemnities: the first is for claims other than employee claims, which is a "limited-form indemnity," and the second is for employee claims, which is a "broad-form indemnity" as limited by chapter 151 of the Texas Insurance Code. See the discussion of these concepts in chapter 17 in this manual.

§ 19.8 Default and Remedies

Sections M. and N. contain the default and remedies provisions. Paragraph N.7. also includes a waiver of consequential damages as an optional provision. Before selecting the liquidated damages option or determining the liquidated damages amount, the practitioner should consider the enforceability of such clauses. *See Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991); *Garden Ridge, L.P. v. Advance International, Inc.*, 403 S.W.3d 432, 440 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). In *Garden Ridge, L.P.*, the court described the test set out in *Phillips* as follows:

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> "The test for determining whether a provision is valid and enforceable as liquidated damages is (1) if the damages for the prospective breach of the contract are difficult to measure; and (2) the stipulated damages are a reasonable estimate of actual damages." *Chan v. Montebello Dev. Co.*, No. 14-06-00936-CV, 2008 WL 2986379, at *3 (Tex. App.—Houston [14th Dist.] July 31, 2008, pet. denied) (citing *Phillips*, 820 S.W.2d at 788). Further, we stated:
>
> > In order to meet this burden, the party asserting the defense is required to prove the amount of the other parties' actual damages, if any, to show that the liquidated damages are not an approximation of the stipulated sum. If the liquidated damages are shown to be disproportionate to the actual damages, then the liquidated damages must be declared a penalty. . . .
>
> *Id.* at *3–4 (citations omitted).

Garden Ridge, L.P., 403 S.W.3d at 440.

Also, liquidated damages must be in lieu of and not coupled with or in addition to actual damages. A contract provision that "fixes liquidated damages without excluding additional liability for actual damages is not a reasonable forecast of just compensation and therefore a penalty." *Phillips*, 820 S.W.2d at 789.

Paragraph J.10. authorizes the owner to withhold payment based on conditions that could result in loss or damages to the owner as long as the conditions remain uncured. The practitioner should consult the provisions of chapter 28 of the Texas Property Code, requiring prompt payment to contractors and subcontractors.

§ 19.9 Warranties

The contractor's warranties are set out in section P. In addition to the customary one-year warranty against defects in labor and materials, section P. expressly provides a ten-year warranty on structural components, including the foundation.

§ 19.10 Choice of Law and Venue

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001–.002.

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Form 19-1

Commercial Construction Contract

[Guaranteed Maximum Price]

Basic Information

Effective Date:

Owner:

Address:

Phone:

E-mail:

Architect/Engineer ("Owner Rep"):

Address:

Phone:

E-mail:

Contractor:

Contractor's Representative for Project:

Address:

Phone:

E-mail:

Lender:

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Address:

Phone:

E-mail:

Project: [**include general description of improvements to be constructed**]

Project Site: [**state physical address of site and attach legal description as identified in exhibit A**]

Contract Price: [**the sum of the costs of construction, contractor's contingency, owner's contingency, and contractor's fee as identified in exhibit C**]

Guaranteed Maximum Price:

Substantial Completion Date:

Insurance and Bond Requirements: [**see exhibit D**]

Plans: [**specifications and drawings as identified in exhibit B**]

Owner and Contractor agree to the following terms and conditions.

A. Definitions

A.1. "Allowance" means a dollar amount specified to be used for portions of the Work that have not been fully defined in the Plans or where a range of options is available for Owner's selection.

A.2. "Applicable Law" means all federal, state, and local laws, rules, and regulations applicable to the Project, the Work, or the Contractor, as indicated by the context.

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A.3. "Bid" means a response to a request for bids. The term includes proposals submitted in response to a request for proposals.

A.4. "Business Day" means a day other than a Saturday, Sunday, or national holiday. As used in this Contract, the term "days" means calendar days. All periods are measured in calendar days unless business days are specified.

A.5. "Change Order" means a description of changes in the Work, and any increase or decrease in the Guaranteed Maximum Price and extension or reduction of Contract Time resulting from such changes, that has been signed by Owner and Contractor.

A.6. "Claim" means a demand or assertion by one of the parties seeking, as a matter of right, payment of money or other relief with respect to the terms of the Construction Documents, and also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Construction Documents.

A.7. "Commencement Date" means the date on which a written notice to proceed is delivered by Owner Rep to Contractor.

A.8. "Concealed Conditions" means physical conditions in existence on the Effective Date located beneath the surface of the ground, or concealed or unknown conditions in an existing structure, that are at variance with the conditions indicated in the Construction Documents or are substantially different from those conditions shown in the Construction Documents and that Contractor could not have discovered by the exercise of reasonable diligence.

A.9. "Conditions to Final Payment" means the conditions required by this Contract that must be satisfied by Contractor or waived by Owner in writing for Owner to be obligated to make the Final Payment to Contractor.

A.10. "Construction Documents" mean the documents identified in paragraph B.1.

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A.11. "Contractor's Contingency" means the amount identified in Exhibit C that is for Contractor's exclusive use in connection with unanticipated increases to the Costs of Construction. The Contractor's Contingency is not intended to be used to cover increases to the Costs of Construction due to changes in the Scope of Work resulting from errors in the Owner Information or changes to the Scope of Work requested by Owner.

A.12. "Contract Time" means the period provided in this Contract for reaching Substantial Completion, and, if specified, the period for achieving Final Completion.

A.13. "Cost Savings" means the amount equal to the Guaranteed Maximum Price less the total amount paid by Owner to Contractor under this Contract. It does not include savings that result from Owner's failure to use all of the Owner's Contingency or to fully use an Allowance or trade discounts, or from Owner's decisions during construction to use less costly materials than called for in the Plans and Specifications, or to reduce the Scope of Work.

A.14. "Drawings" means the graphic and pictorial portions of the Construction Documents showing the design, location, and dimensions of the Work.

A.15. "Excused Delay" means a delay in Contractor's performance under the terms of this Contract due to acts of God, strikes, lockouts, labor shortages, labor restrictions by any governmental authority, civil riot, floods, abnormal adverse weather conditions that exceed [**number**] days, unavoidable casualties, or any cause beyond the control of Contractor, a Subcontractor, or a Supplier of any tier, that could not have been avoided using reasonable diligence. "Excused Delay" does not include delay resulting from negligence, default, or any condition not constituting an Excused Delay.

A.16. "Final Completion" means all the Work required by the Plans has been completed, all punch list items from the Substantial Completion review have been completed, and all Conditions to Final Payment have been satisfied.

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A.17. "Governmental Approvals" means all approvals required by governmental entities with jurisdiction over the Property or Improvements for the Project to be used for its intended purpose, including, if applicable, a Certificate of Occupancy.

A.18. "Improvements" means the buildings, structures, landscaping, and other improvements to be constructed on the Property by Contractor according to the Construction Documents.

A.19. "Liquidated Damages" means an estimate of the amount of damages, as shown on Exhibit C, that Owner is likely to incur as a result of the failure of the Project to be Substantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay.

A.20. "Major Subcontractor" or "Major Sub-subcontractor" or "Major Supplier" means a Subcontractor, Sub-subcontractor, or Supplier whose contract price exceeds 10 percent of the Costs of Construction, or other amount agreed on by Owner and Contractor.

A.21. "Owner Information" means the survey of the Property or Project Site, reports from Owner's consultants, Property restrictions, and other information provided by Owner with its request for Bids for the use of bidders in preparing their Bids. The term does not include Plans and Specifications.

A.22. "Owner's Contingency" means the amount identified in Exhibit C that is for Owner's exclusive use in connection with the Project. The Owner's Contingency may be used by Owner to cover increases in the Costs of Construction resulting from errors in the Owner Information and changes in the Scope of Work.

A.23. "Plans" means the Drawings and Specifications approved by Owner and Contractor identified in Exhibit B and any amendments made after the Effective Date.

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A.24. "Project Site" means the area(s) within the Property where the Improvements will be constructed.

A.25. "Property" means the real property described in Exhibit A.

A.26. "Retainage" means Owner's statutory 10 percent retainage required under chapter 53 of the Texas Property Code.

A.27. Scope of Work" means the Work covered by the Construction Documents.

A.28. "Specifications" means a detailed description of the building components and materials and installation requirements prepared by the Architect/Engineer for the Project.

A.29. "Subcontractor" means a person who contracts directly with Contractor to perform a portion of the Work for the Project.

A.30. "Substantial Completion" or "Substantially Complete" means that the Improvements have reached the stage at which they are usable for the purposes intended, all Governmental Approvals have been obtained, and only minor or cosmetic Work remains to be completed.

A.31. "Sub-subcontractor" means a person who contracts directly with a Subcontractor or Sub-subcontractor to perform a portion of the Work for the Project.

A.32. "Supplier" means a person who contracts with Owner, Contractor, a Subcontractor, or a Sub-subcontractor to furnish materials or equipment for the Project.

A.33. "Warranty Documents" means the written warranties on equipment, materials, labor, or the Work provided by Contractor, a Subcontractor, or a Supplier of any tier or a manufacturer.

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A.34. "Work" means the labor, coordination, management, materials, equipment, and other materials and services required to construct the Project.

Terms not defined in this Contract or in the other Construction Documents have the meanings ascribed to them by common usage.

B. Construction Documents

B.1. Construction Documents. This Commercial Construction Contract between Owner and Contractor consists of the following Construction Documents:

Drawings:

Specifications:

Addenda to this Contract:

Change Orders:

Warranty Documents:

Approved Construction Schedule:

This Contract and its Exhibits:

Owner's Request for Bids/Proposals:

Contractor's Bid/Proposal and Bid Qualifications and Exclusions:

B.2. Resolving Ambiguity or Conflict in Construction Documents. If there is an ambiguity or conflict, the Construction Documents are to control in the following order: (1) Change Orders, (2) Addenda, (3) this Contract, (4) Drawings, (5) Specifications, (6) Schedule, (7) Warranty Documents, (8) Owner's Request for bids/Proposals, and then (9) Contractor's Bid/Proposal and Bid Qualifications and Exclusions.

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C. The Work

C.1. Scope of Work. Contractor will furnish all Work necessary to construct the Project as stated in, or reasonably inferable from, the Construction Documents.

C.2. Interpretation of Construction Documents by Owner Rep. Owner Rep will reasonably interpret the Construction Documents in accordance with the intention of the parties as expressed in the Construction Documents. Owner Rep will take into consideration industry and trade custom and usage only in the case of ambiguity in or conflict between the Construction Documents. Contractor will follow Owner Rep's interpretation. Contractor may make a Claim if Contractor disputes the interpretation.

C.3. Conditions Reviewed by Contractor. Contractor represents to Owner that it has made an inspection of the Property and the conditions existing at and in the vicinity of the Project Site, has determined normal weather conditions for the Project Site, has reviewed the Construction Documents and the Owner Information, and agrees to construct the Project for the Contract Price and within the Contract Time. Time is of the essence of this Contract.

C.4. Field Confirmations. Before proceeding with the Work, Contractor will field check and verify all dimensions, grades, lines, levels, or other conditions or limitations at the Property to avoid construction or drainage errors.

C.5. Reporting Discovered Nonconformity. Contractor has reported to Owner Rep all errors or omissions detected in the Plans and Owner Information before the Effective Date and will promptly report to Owner Rep any errors or omissions detected in the Owner Information after the Effective Date. Adjustments in the Contract Time and Contract Price may be made by Change Order resulting from errors or omissions that were detected and timely reported to Owner Rep.

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C.6. Reporting Concealed Conditions. Contractor will promptly notify Owner Rep if Contractor encounters Concealed Conditions. Contractor will provide Owner with an estimate of any additional costs and impact to the Construction Schedule resulting from the Concealed Conditions. Contractor and Owner will execute a Change Order for any agreed-on changes to the Work.

D. Contractor Obligations. Contractor agrees to perform its obligations under the Construction Documents, including the following:

D.1. Work. Perform the Work in a good and workmanlike manner, free from defects in labor and materials, and in accordance with the Construction Documents and Applicable Law.

D.2. Schedules and Bonds. Provide Owner Rep with the following within ten days after the Effective Date and before the commencement of the Work:

a. *Construction Schedule.* Construction Schedule as described in paragraph G.1.

b. *Schedule of Values.* Schedule of Values as described in paragraph F.5.

c. *Bonds.* Performance and payment bonds and insurance required under Exhibit D.

D.3. Cooperation. Cooperate with any contractor or supplier engaged by Owner to perform Work at the Project Site to minimize delay and disruption to the Project.

D.4. Subcontract Compliance. Comply with the terms of its subcontracts.

D.5. Subcontractor Payments. Pay Subcontractors and Suppliers within seven days after receipt from Owner of payment for their Work.

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D.6. Subcontractor List. Provide and periodically update a list of Subcontractors as described in paragraph H.5.

D.7. Reporting Errors and Omissions. Promptly report errors or omissions in the Plans and Owner Information to Owner Rep.

D.8. As-Built Drawings. Maintain as-built drawings at the Project Site as described in subparagraph J.6.c.xii.

E. Owner Obligations. Owner agrees to perform its obligations under the Construction Documents, including the following:

E.1. Access. Provide Contractor with timely access to the Project Site.

E.2. Utility Connections. Provide utility connections necessary for the Work to the Property line, unless utility extension is part of the Work.

E.3. Supervision of Owner Rep. Require Owner Rep to respond to submissions, including shop drawings, Draw Requests, and requests for clarification, in a timely manner so as not to cause undue delay to the Project.

E.4. Timely Decisions. Make decisions on Allowances, changes, selections, and other decisions in a timely manner so as not to cause undue delay.

E.5. Timely Payments. Make timely payments of amounts owed to Contractor in accordance with section J.

E.6. Cooperation. Require third-party contractors and vendors performing Work at the Project Site to cooperate with Contractor and to be liable for damages caused to Contractor's Work.

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F. Contract Price

F.1. Determination. The Contract Price is the sum of the (a) Costs of Construction, (b) Contractor's Contingency, (c) Owner's Contingency, and (d) Contractor's Fee, provided that the Contract Price shall not exceed the Guaranteed Maximum Price. The Contract Price includes the Allowances shown on Exhibit C. The Guaranteed Maximum Price may be changed only by Change Order.

F.2. Costs of Construction. The Costs of Construction include the following actual costs:

a. *Subcontract Prices.* The price of approved subcontracts.

b. *Contractor's Labor.* The cost of Contractor's direct labor for performance of the Work, whether on-site or at fabrication shops off-site assembling or manufacturing materials to be installed on the Project. The wages paid must not be materially higher than the standard paid for similar work by other contractors in the location of the Project.

c. *Contractor's Supervision.* Contractor's superintendent, Project management, and administrative staff on-site devoting full time and attention to managing the Project. Off-site Project managers' costs will be paid upon written agreement with Owner based on their time devoted to the Project.

d. *Fringe Benefits.* The cost of standard labor fringe benefits for Contractor's Labor and Contractor's Supervision for on-site personnel. Fringe Benefits means costs for Contractor's Labor and Contractor's Supervision for on-site personnel in addition to wages for the employer's required contributions for employment taxes, insurance, and other employer labor cost required by applicable labor agreement or by law. Fringe Benefits also includes employer

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contributions for qualified retirement plans, health insurance, and paid leave, provided such costs are standard in the industry and are based on wages or salaries included in the Costs of Construction. However, the Costs of Construction will not include employee profit sharing or bonuses (except qualified retirement plans).

e. *Materials/Equipment.* Materials and equipment installed as a part of the Project as specified in the Construction Documents, including freight for delivery to the Project, a reasonable standard allowance for waste, and sales or use taxes paid by Contractor unless Owner has furnished Contractor with a certificate of exemption from the payment of such taxes. Unreturned excess materials are owned by Owner.

f. *Construction Equipment Costs.* Costs for machinery, equipment, tools, and temporary structures and outbuildings on the Project. These costs will be at standard rental rates for the location of the Project, whether owned by or rented by Contractor.

g. *Demolition and Site Clearing.* The cost of clearing the site and demolition and removal of existing structures and vegetation required for performance of the Work.

h. *Site Office.* Office supplies, copy charges, delivery charges, and other reasonable direct costs of maintaining a job site office.

i. *Bonds and Insurance Premiums.* The percentage of Contractor's insurance premiums allocated to this Project for the insurance required in this Contract and the cost of providing any required payment and performance bonds.

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j. *Building Permit.* Fees for the building permit, licenses, and inspections by governmental authorities required for the Work.

k. *Royalties/Licenses.* Costs of use of designs, products, or processes required by the Construction Documents as part of the Work.

l. *General Conditions.* Reasonable job site costs incurred in performing the Work, including costs such as for utilities not paid by Owner, a job site trailer if needed due to the scope of construction, temporary restrooms used at the site, on-site security, construction fencing, and site cleanup ("General Conditions").

F.3. Exclusions. Costs not included in paragraph F.2., including those specifically listed below, are excluded from the Costs of Construction:

a. *Certain Personnel.* Contractor management and other employees or personnel not located full-time on the Project site, unless Owner's advance written approval is obtained.

b. *Principal Office.* Contractor's principal office overhead.

c. *General Overhead.* Contractor's general overhead including costs of borrowing.

d. *Costs over GMP.* Costs and expenses of any kind that, when added to the rest of the Costs of Construction and Contractor's Fee would be in excess of the Guaranteed Maximum Price, as adjusted by Change Order.

e. *Correction Costs.* Costs to correct Work to bring it into conformance with the Construction Documents.

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F.4. Discounts. Owner will be notified if material or equipment price discounts are available for advance cash payments. If so notified, and if Owner advances the funds for such purchases, Owner is entitled to the associated discount.

F.5. Schedule of Values. Contractor will prepare a Schedule of Values. The Schedule of Values must be approved in writing by Owner Rep before commencement. The Schedule of Values will apportion the Guaranteed Maximum Price between each constituent element of the Work.

F.6. Entitlement to Savings. Upon Final Payment by Owner to Contractor and provided Contractor is not in default of this Contract, Owner shall pay Contractor the percentage of Cost Savings, if any, shown on Exhibit C, provided that Owner retains the right to withhold payment for any outstanding Claims related to the Project in an amount reasonably determined by Owner to protect Owner from liability.

F.7. Allowances. Contractor shall include in the Contract Price the Allowances shown in Exhibit C. Items covered by Allowances shall be supplied for such amounts and by such persons or entities as Owner may direct, but Contractor is not required to employ persons or entities to whom Contractor has reasonable objection. Unless otherwise provided in the Construction Documents, the following guidelines apply:

a. *Materials and Equipment Less Discounts.* Allowances shall cover the cost to Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts.

b. *Unloading and Handling Costs.* Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated Allowances amounts shall be included in the Costs of Construction but not in the Allowances.

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c. *Change Orders.* Whenever costs are more than or less than Allowances, the Guaranteed Maximum Price shall be modified by Change Order. The amount of the Change Order shall reflect the difference between actual costs and the Allowances.

d. *Prompt Selection by Owner.* Owner shall select materials and equipment under an Allowance with reasonable promptness.

G. Contract Time

G.1. Construction Schedule. Contractor will promptly prepare and submit to Owner Rep for approval a Construction Schedule, using the critical path method, detailing how Substantial Completion will be achieved by the Substantial Completion Date. Contractor will periodically revise and resubmit the Construction Schedule to Owner Rep upon change orders, Excused Delays, or other events that cause the critical path or the Substantial Completion Date to change.

G.2. Risk of Loss before Final Completion. If the Work is damaged or destroyed before its final completion, Contractor will bear the risk of loss and will diligently proceed with restoration or replacement and completion of the Work.

G.3. Acceleration of Work. If there is a delay in the Work that is not an Excused Delay, and in the determination of Owner Rep the Work will not reach Substantial Completion by the Substantial Completion Date, Owner Rep may direct Contractor to accelerate the Work at no cost to Owner by means of overtime, additional crews, additional shifts, or resequencing of the Work to achieve Substantial Completion by the Substantial Completion Date.

G.4. Owner Suspension or Delay in Work Commencement. Owner may, with or without cause, by written directive, require Contractor to suspend or delay commencement of the Work in whole or in part for a length of time as desired by Owner. The Guaranteed Maxi-

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mum Price and Contract Time are to be equitably adjusted for increases in the Costs of Construction and for the time caused by such delay or suspension under this paragraph. However, no such equitable adjustment shall be made if Owner has the right to order delay or suspension of the Work under another provision of the Construction Documents or if an Unexcused Delay by Contractor would have caused such suspension or delay.

H. Subcontracts

H.1. Subcontracting. Contractor may subcontract all or any part of the Work.

H.2. Terms. Subcontracts with Subcontractors and Suppliers must meet the following requirements:

a. *Writing.* Be in writing.

b. *Assumption of Obligations.* Require the Subcontractor to assume toward Contractor all of the obligations and responsibilities that Contractor owes to Owner under the Construction Documents.

c. *Consistent with Contract.* Be consistent with the terms of this Contract.

d. *Terms of Contract Applicable to Subcontractors.* Require compliance with the terms of this Contract applicable to Subcontractors, including requirements for insurance and lien waivers.

e. *Contingent Assignment to Owner.* Require that the Subcontractor provide a copy of the subcontract to Owner if Contractor's right to perform under this Contract has been terminated.

f. *Subcontracts Assignable to Owner and Contractor's Surety.* Be assignable to Owner or to Contractor's surety for the Project on the same terms.

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g. *Subcontractor's Obligations Not Assignable.* Prohibit assignment of the Subcontractor's obligations.

H.3. Delivery of Pertinent Portion of Construction Documents. Contractor will provide each Subcontractor with a copy of the Construction Documents, or a copy of the portions to which Subcontractor will be bound, before entering into subcontracts.

H.4. Owner's Review of Subcontractors and Subcontractors' Bids. Owner may require Contractor to provide Bids from Major Subcontractors, Major Sub-subcontractors, and Major Suppliers. Owner, Owner Rep, and Contractor will review the Bids and agree on selection. Contractor will not use a subcontractor or supplier to whom Owner has a reasonable objection. Contractor will not be required to enter into a subcontract or other agreement if Contractor reasonably objects to use of such subcontractor or supplier. If Owner requires Contractor to use a specific subcontractor or supplier instead of the subcontractor or supplier recommended by Contractor who has submitted a lower Bid, the Guaranteed Maximum Price will be increased by the additional amount of the Bid from Owner's required subcontractor or supplier.

H.5. Directory. Contractor will provide Owner Rep with a written list of all its Subcontractors and Suppliers, and the Major Sub-subcontractors and Major Suppliers of any tier, with the address and telephone number of each. An updated list will be provided to Owner Rep within fifteen days after any change. A final list will be provided to Owner Rep on or before the date of Final Completion of the Project.

H.6. Owner's Objection to Any Subcontractor. Contractor will not use any Subcontractor to whom Owner or Owner Rep has a reasonable objection. If the replacement of the Subcontractor due to Owner's objection results in an increase in cost over the Contractor's anticipated total Costs of Construction, reasonable adjustment to the Guaranteed Maximum Price will be made by Change Order.

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H.7. Owner May Confirm Payments to Subcontractors and Sub-subcontractors. Owner has the right to contact any Subcontractor or Sub-subcontractor to obtain information on payments made by Contractor under the subcontract and to obtain lien waivers and bills-paid affidavits.

I. Contingent Assignment of Subcontracts

I.1. Events Triggering Assignment. Each subcontract is assigned by Contractor to Owner and the surety under a performance bond provided by Contractor, contingent on the occurrence of all of the following:

a. *Contractor Default.* Contractor is in default under the Construction Documents.

b. *Termination of Contractor.* Owner has terminated Contractor under this Contract pursuant to paragraph N.3. or section O.

c. *Assumption of Subcontract.* Owner has notified Contractor and the Subcontractor in writing that it assumes the subcontract or that it has made demand on the surety and the surety has so notified the Subcontractor.

I.2. Contacting Subcontractors and Suppliers. Owner and the surety have the right to contact any Subcontractor or Supplier to obtain a copy of the subcontract, to determine if Contractor is in default under the Subcontract, and to confirm or negotiate the terms for assumption.

I.3. Results of Assumption. Assumption by Owner results in the following:

a. *Equitable Adjustment of Subcontract Price.* If the Work has been suspended for more than thirty days, the Subcontract price will be equitably

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adjusted for increases in cost caused by the suspension; contractor will be liable for the additional Costs of Construction.

b. *Replacement Contractor.* Owner may assign a subcontract that it has assumed to a replacement contractor but will remain liable for the obligations under the subcontract.

c. *Continued Liability of Contractor.* Contractor will remain liable to Owner and the Subcontractor or Supplier for any unpaid amounts due to the Subcontractor or Supplier, and for any increases in the Costs of Construction described in paragraph F.2., even if the increase does not result in the total Contract Price exceeding the Guaranteed Maximum Price.

J. Payment

J.1. Progress Draws and Final Payment. The Contract Price is payable through Progress Draws and Final Payment as described in this section. Owner will have the right to withhold Retainage from each Progress Draw. Retainage due to Contractor will be included in the Final Payment.

J.2. Progress Payments. On or before the twenty-fifth day of each month after the commencement of Construction (the "Draw Date"), Contractor will assemble and present to Owner Rep a Draw Request for payment for conforming Work performed since the previous Draw Date. The amount of each Draw will be computed as follows, in the following order of operations:

a. *Assigned Percentage of Completion.* For each item in the Schedule of Values ("Scheduled Value Item") the Contractor will assign a percentage for the conforming Work accomplished through the Draw Date.

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b. *Draw Individual Scheduled Amount.* Multiply each item on the Schedule of Values by its assigned percentage of completion ("Draw Individual Scheduled Value Amount").

c. *Costs of Construction for Each Scheduled Value Item.* Determine the Costs of Construction for the Draw period, separate such Costs of Construction by Scheduled Value Item, and calculate the subtotal of the Costs of Construction for each Scheduled Value Item.

d. *Lesser Of.* Compare each Draw Individual Scheduled Value Amount with the assembled Costs of Construction for each item in the Schedule of Values and include the lesser of the two figures in the amount of the Draw Request.

e. *Sum of Lesser Amounts.* The total Draw will be the sum of the lesser of the two figures for each Scheduled Value.

f. *Contractor's Fee.* Calculate Contractor's Fee earned through the Draw Date by multiplying the Contractor's Fee percentage by the total calculated in subparagraph e. above.

g. *Deduct Retainage.* Deduct Retainage from the sum of subparagraphs e. and f. above.

h. *Deduct Previous Payments to Contractor.* Deduct payments previously made to Contractor.

i. *Deduct Paid by Owner to Contractor's Suppliers and Subcontractors.* Deduct amounts paid by Owner to Contractor's suppliers or subcontractors.

j. *Deduct Amounts Authorized to Be Withheld.* Deduct amounts that Owner Rep has determined to withhold as provided in paragraph J.10.

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J.3. Supporting Documents. Each Progress Draw Request must include the following supporting documents:

a. *Records.* The receipts, invoices, delivery tickets, subcontractor draws, and other documentation reasonably required by Owner Rep substantiating the Costs of Construction for the Draw Period for which payment is sought.

b. *Contractor's Bills-Paid Affidavit.* Bills-Paid Affidavit by Contractor in the form attached as Exhibit E.

c. *Subcontractors' Bills-Paid Affidavits.* Bills-Paid Affidavit by each Subcontractor in the form attached as Exhibit F.

d. *Contractor's Conditional Partial Release.* Contractor's Conditional Partial Release in the form attached as Exhibit G.

e. *Contractor's Unconditional Partial Release.* Contractor's Unconditional Partial Release in the form attached as Exhibit H.

f. *Subcontractors' Conditional Partial Releases.* Subcontractor's Conditional Partial Release from each Subcontractor to be paid from the Draw in the form attached as Exhibit G.

g. *Subcontractors' Unconditional Partial Releases.* Subcontractor's Unconditional Partial Release from each Subcontractor for which Contractor received payment as a part of the prior month's Progress Draw in the form attached as Exhibit H.

J.4. Payment of Undisputed Items. Owner Rep will review the Draw Request and advise Owner whether to pay it in full or in part. Contractor will promptly provide any additional documentation reasonably requested and answer any questions on the Draw Request.

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Owner Rep will promptly notify Contractor of any disputed items in the Draw Request. Owner will have thirty days after the later of (a) the Draw Date or (b) the date that Owner Rep received the Draw Request and required documentation, to pay undisputed items. Undisputed items not paid when due will bear interest until paid at the rate specified in the Texas Prompt Payment Act, Texas Property Code chapter 28.

J.5. Claims for Payment Disputes. Either party may make a Claim in connection with a payment dispute.

J.6. Final Payment. Final payment will be made according to the following job inspection and closeout process, and is subject to the conditions precedent to final payment, as follows:

a. *Substantial Completion; Final Completion.* When Contractor determines that the Work has progressed to the point of reaching Substantial Completion, Contractor will give written notice to Owner Rep, and Owner Rep will promptly inspect the Work. If Owner Rep determines that the Work is Substantially Complete, Owner Rep will issue a certificate of substantial completion and prepare a punch list for Work that needs to be completed along with an agreed-on time for completion. If Owner Rep determines that the Work is not acceptable or is not Substantially Complete, Owner Rep will prepare a written list of Work that needs to be remedied or completed to achieve Substantial Completion. Contractor shall perform the Work to achieve Final Completion of the Work, including completion of all punch list items, within thirty days after receipt of Owner Rep's list or within an agreed-on period for completion. Owner Rep will determine the dates for Substantial and Final Completion.

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b. *Final Draw.* Upon Owner Rep's written acknowledgement that the punch list has been completed, Contractor will submit a Final Draw Request. The amount of the final draw ("Final Payment") will be the balance of the Contract Price, after deducting amounts paid by Owner to Suppliers, Subcontractors, and Sub-subcontractors, amounts for unreleased mechanic's liens, amounts withheld by Owner pursuant to paragraph J.10., and previous payments to Contractor.

c. *Conditions Precedent to Final Payment.* The following are Conditions Precedent to Final Payment:

i. *Final Draw Request.* Receipt and approval by Owner, upon recommendation of Owner Rep, of a Final Draw Request.

ii. *List of Subcontractors and Suppliers.* Receipt by Owner Rep of Contractor's final and accurate list of Subcontractors and Suppliers in compliance with paragraph H.5.

iii. *Conditional Final Releases.* Executed and acknowledged Conditional Final Releases from Contractor and all Subcontractors, in the form attached as Exhibit I. The amounts contained in these Releases must match amounts stated as owed in the Final Bills-Paid Affidavits.

iv. *Final Bills-Paid Affidavits.* Executed and acknowledged Final Bills-Paid Affidavits from Contractor, Subcontractors, and Suppliers, in the forms attached as Exhibits J and K.

v. *Subcontractors' Unconditional Partial and Final Releases.* Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Subcontractors who have been previously paid.

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vi. *Suppliers' and Sub-subcontactors' Unconditional Partial and Final Releases for Amounts Previously Paid.* Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Suppliers and Sub-subcontractors of all tiers who have been previously paid.

vii. *Suppliers' and Sub-subcontactors' Conditional Final Releases for Amounts Not Previously Paid.* Conditional Final Releases from all Subcontractors, Sub-subcontractors, and Suppliers of all tiers who have not been previously paid, in the form attached as Exhibit I.

viii. *Release of All Filed Mechanic's Liens.* Receipt by Owner Rep of executed, acknowledged releases of all filed mechanic's liens against the Project, or Contractor will provide satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code.

ix. *Bond to Pay Claims.* If a Subcontractor or Supplier of any tier refuses to provide a Conditional or Unconditional Release for the applicable amount stated in the Bills-Paid Affidavits, or if there is otherwise a dispute about payment, satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

x. *Subcontractors', Sub-subcontractors', and Suppliers' Conditional Final Releases.* Conditional Final Releases from each Subcontractor, Sub-subcontractor, or Supplier from whom Owner has received a notification of nonpayment or the right to assert a claim, unless Contractor has provided Owner with satisfactory evidence that Contractor has bonded

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around such a lien claim pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

xi. *Warranty Documents.* Contractor has assigned and delivered to Owner all required warranty documents required that have been assigned to Owner.

xii. *As-Built Drawings.* As-built drawings have been delivered to Owner Rep.

xiii. *Owner Manuals and Training Completed.* All Owner Manuals and keys have been delivered to Owner Rep, and Project control/security and other systems checkout and training contemplated by the Construction Documents has been performed.

J.7. Date of Final Payment. The Final Payment, including release of all Retainage payable to Contractor, is due within fifty days after the Conditions Precedent to Final Payment have been satisfied or waived by Owner in writing.

J.8. Filing Affidavit of Final Completion. Owner will file in the real property records of each county in which the Project is located and provide notice to Contractor of its Affidavit of Final Completion within three Business Days after both of the following have occurred: (a) the Conditions Precedent to Final Payment have been met, and (b) Owner Rep has received Contractor's Final Draw Request.

J.9. Resolution of Lien Claims. Any notice of lien claims or lien affidavits filed after notice and recordation of the Owner Affidavit will be resolved by Contractor and Owner

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Rep in accordance with one of the methods described in subparagraph J.6.c.viii., ix., or x. above, at Owner's sole discretion.

J.10. Withholding Payment. Owner has the right to withhold from payments otherwise due to Contractor amounts deemed reasonably necessary, on advice from Owner Rep, to protect Owner from damage or liability due to any of the following:

a. *Defects.* Uncorrected defective work.

b. *Overruns.* Reasonable evidence that the Contract Price will exceed the Guaranteed Maximum Price before Final Completion.

c. *Injuries or Property Damages.* Claims of injury or property damage to Owner, a third party, or another contractor.

d. *Delays.* Reasonable evidence that Substantial Completion will not be reached according to the Construction Schedule, as revised.

e. *Work Defaults.* Repeated failure by Contractor to perform the Work according to the Construction Documents.

f. *Mechanic's Liens.* Mechanic's liens filed or noticed on the Project not removed by Contractor's furnishing a bond acceptable to Owner pursuant to chapter 53 of the Texas Property Code or other Contractor arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

When the basis for withholding has been resolved, Owner will promptly pay to Contractor any amounts not needed to protect Owner from damage or liability.

J.11. Owner Payment to Subcontractors. Owner will promptly notify Contractor if Owner receives a notice of nonpayment from a Subcontractor or Supplier of any tier. If Con-

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tractor does not provide Owner Rep with an Unconditional Release for the amount owed, or satisfactory evidence that Contractor has bonded around the claim within fifteen days after notification, Owner may make payment by joint check to Contractor and the claimant, unless a payment bond has been provided for the Project.

J.12. Acceptance of Final Payment. Final Payment will be deemed accepted by Contractor when the check has been deposited or wire transfer received. Acceptance of Final Payment by Contractor constitutes a waiver of all claims by Contractor not previously received in writing by Owner Rep.

K. Change Orders and Required Changes

K.1. Guaranteed Maximum Price and Contract Time. Owner, without invalidating the Contract, may order changes in the Work. All changes will be made by written Change Order, signed by Owner and Contractor, that states the adjustment in the Guaranteed Maximum Price and the Contract Time.

K.2. Contractor to Proceed. If Owner and Contractor cannot agree on the adjustment to the Guaranteed Maximum Price, Owner may require Contractor to proceed with the Work by written Required Change signed by Owner. The Guaranteed Maximum Price will be adjusted on a time and materials basis.

L. Claims

L.1. Contractor's Claims. Contractor's Claims for extensions of time or changes to the Guaranteed Maximum Price must be submitted to Owner Rep in writing within seven days after the date when the events giving rise to the Claim occurred. Within fourteen days after the submission of such Claim, Contractor will furnish Owner Rep with Contractor's calculations of additional time needed to complete the Work and, if applicable, the anticipated increase to the Costs of Construction and documentation supporting Contractor's Claim. Con-

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tractor will furnish additional information in support of such Claims as reasonably required by Owner or Owner Rep. Contractor will proceed with the Work during the pendency of any such Claims.

L.2. Material Breaches. Notwithstanding anything to the contrary in the Construction Documents, Contractor agrees that it will not attempt in any way to recover or pursue a Claim for delay if Contractor or a Subcontractor, Sub-subcontractor, or Supplier to Contractor has, before the claimed Delay, materially breached any contractual duty or obligation in the Construction Documents, or any duty or obligation at common law or created by statute, to the extent such breach causes, affects, or otherwise contributes to such delay, and such breach remains uncured at the time a Claim accrues.

L.3. Owner Claims. Owner agrees to notify Contractor of any Claim, including Claims for Unexcused Delay and defects in the Work, within five Business Days after Owner becomes aware of the basis for the Claim.

L.4. Initial Decision Maker Process. All Claims arising under this Contract will be first submitted to Owner Rep as the Initial Decision Maker. Owner Rep's decision is a condition precedent to proceeding with mediation, as provided for in paragraph L.5. Owner Rep will issue a decision within thirty days after receiving the Claim and supporting documentation. Owner Rep may extend the initial decision deadline for up to an additional thirty days in order to receive supporting documentation and data and replies from the opposing party. If Owner Rep is unable to render a decision within the allotted period, or if either party is dissatisfied with the decision, either party may request mediation.

L.5. Mediation. If the dispute is not resolved by the decision of the Initial Decision Maker, either party may request mediation of the dispute using a neutral mediator to be agreed on by the parties. Contractor will continue to perform the Work during the pendency of mediation.

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L.6. Litigation. If a resolution is not reached through mediation, either party may pursue litigation.

M. Material Breach

M.1. Owner's Default. Each of the following constitutes a material breach of this Contract by Owner:

a. *Time Defaults.* Failure to timely render or otherwise furnish responses, decisions, or selections according to the Construction Documents.

b. *Payment Defaults.* Failure to comply with Owner's payment obligations under the Construction Documents.

c. *Substantial Breach.* Substantial breach of any of Owner's obligations under this Contract.

M.2. Contractor's Default. Each of the following constitutes a material breach of this Contract by Contractor:

a. *Work Commencement Default.* Failure by Contractor to commence the Work in accordance with the provisions of this Contract.

b. *Work Prosecution Default.* Failure by Contractor to prosecute the Work to completion in a diligent, efficient, timely, workmanlike, skillful, and careful manner and in strict accordance with the provisions of the Contract.

c. *Time Defaults.* Failure by Contractor to use an adequate number of qualified personnel or adequate amount of equipment to complete the Work without causing Unexcused Delay.

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d. *Performance Defaults.* Contractor's persistent failure to perform any of its material obligations under the Contract.

e. *Payment Defaults.* Contractor's persistent failure to make prompt payments when due to its Subcontractors and Suppliers, unless Contractor has a bona fide dispute with any such Subcontractor or Supplier.

f. *Bankrupt.* Contractor creates any situation or state of facts that would authorize or permit an involuntary petition in bankruptcy to be filed against Contractor.

g. *Breach of Timely Completion.* Contractor has not met, or in Owner Rep's and Owner's reasonable opinion, based on the schedules required by the Construction Documents, will not meet the dates of Substantial Completion set forth in the Construction Documents.

N. Remedies

N.1. Owner Remedies

a. *Owner's Right to Suspend Work.* If Contractor fails, after notice to correct Work that is defective or not in conformance with the requirements of the Construction Documents, or repeatedly fails to perform the Work in accordance with the Construction Documents, Owner or Owner Rep may issue a written notice to Contractor to suspend the Work, in whole or part, until Contractor cures the reasons for issuance of the suspension notice. Owner's right in this section does not create a duty by Owner to suspend work for the benefit of Contractor or Subcontractors of any tier.

b. *Owner Cure.* If Contractor is in default and does not within ten Business Days after receipt of Owner's or Owner Rep's written notice to commence

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and continue diligent, continuous effort to correct the default, Owner may cure such default and withhold payment from Contractor for the reasonable cost and expenses incurred for Owner's cure. If insufficient amounts remain to be paid to Contractor, Contractor must pay Owner the reasonable costs and expenses to cure in excess of the remaining funds to be paid to Contractor.

N.2. Contractor Remedies. Contractor will give written notice to Owner or Owner Rep if Owner is in material breach of Owner obligations under the Construction Documents. The notice will state the specific items of Owner default and notify Owner that Owner must cure the items within ten Business Days of receipt of the notice or Contractor may suspend Work until Owner's material breach is cured or corrected. Contractor may terminate the Contract in accordance with paragraph N.3. if suspension of the Work by Contractor under this section continues without Owner cure for thirty or more days.

N.3. Termination. If one party defaults and the default is not cured by exercise of the remedies specified in paragraph N.1. or N.2., upon an additional ten Business Days' prior written notice specifically describing the default, and provided the defaulting party has not commenced diligent, good-faith, continuous, and effective action to cure the default within the ten-day period, this Contract may be terminated by an additional written notice from the nondefaulting party to the defaulting party. If there is such a termination, the following formula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:

a. *Damages to Contractor.* If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days after written notice from Contractor, an amount equal to all amounts due and owing for the Work performed in accordance with the Construction Documents at the time of the termination, plus 10 percent of the remaining Guaranteed Maximum Price to compensate Contractor for the lost profit.

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b. *Damages to Owner.* If termination resulted from an act of default of Contractor, Owner may do any of the following:

i. *Take Over Work.* Use all materials, equipment, tools, and construction equipment owned by Contractor and occupy the Project site.

ii. *Accept Subcontracts and Supplier Agreements.* Accept assignment of Subcontracts and assume, in Owner's sole discretions, any agreements with Suppliers and Sub-subcontractors.

iii. *Costs to Complete.* Finish the Work as expeditiously as reasonably possible provided the costs for completion and correction of the Work are reasonable and necessary. If requested, Owner will furnish Contractor a statement of costs in correcting and completing the Work, along with reasonable documentation of such costs. If Owner terminates according to this paragraph, no further payments will be due Contractor until final completion is reached. If, at that time, Owner's costs to complete and correct the Work exceed the unpaid balance of the Guaranteed Maximum Price, Contractor will pay the difference to Owner upon written demand.

iv. *Liquidated Damages.* Assess liquidated damages if Substantial Completion has not been achieved as provided in Exhibit C.

c. *Recourse to Performance Bond.* Upon the occurrence of a Contractor default, Owner may make demand on the surety to perform its obligations under a Performance Bond provided for the Project.

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N.4. Damages for Contractor's Unexcused Delay. If the Work is not Substantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay, Owner may assess liquidated damages as provided in Exhibit C.

N.5. Excused Delay. If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, and no monetary damage or other compensation is due Contractor for such delay.

N.6. Damages for Owner's Delay. If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, unless the delay is due to acts of Owner constituting unreasonable interference with Contractor's ability to perform the Work that continues after notice of the interference is given by Contractor. The exercise by Owner of any right provided by this Contract, including suspension of Work, does not constitute unreasonable interference with Contractor's ability to perform the Work. Contractor will be entitled to the General Conditions and other direct Costs of Construction described in paragraph F.2. for each day of delay due to Owner's interference.

N.7. Waiver of Consequential Damages. Except as provided in this section N., Owner and Contractor each waive the right to recover consequential damages in a suit or action brought against the other arising out of a default under the Construction Documents, regardless of whether the claim for recovery is based in contract or tort.

O. Owner's Right to Terminate for Convenience. Owner has the right to terminate this Contract for Owner's convenience by giving Contractor thirty days' prior written notice

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of termination. Upon such termination, Contractor will be entitled to payment as described in subparagraph N.3.a.

P. Warranties

P.1. Express Warranty. Contractor warrants to Owner that labor, materials, and equipment furnished under the Contract will be new and of high quality and will be free from defects and that all Work will be performed in a good and workmanlike manner and will conform to the Construction Documents. Work will be considered defective if it does not conform to the Construction Documents.

P.2. Ten-Year Structural Component Warranty. Contractor additionally expressly warrants all structural components of the Project, including the foundation, for ten years following Substantial Completion.

P.3. One-Year Callback and Correction of Work. For a period of one year following Substantial Completion, Contractor will repair or replace any defective Work at no charge if Owner provides written notice to Contractor of a warranty claim during the one-year warranty period.

P.4. Assignment of Third-Party Warranties. Contractor hereby assigns all equipment, roofing, and other vendor warranties to Owner and will deliver all manuals, books, instructions, and warranty policy documentation to Owner as part of the Conditions to Final Payment.

P.5. Cumulative of Other Warranties and Remedies. The warranties set forth in this section P. are cumulative of, and in addition to, all other warranties or remedies available at law or by this Contract and can be assigned by Owner.

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Q. Safety

Q.1. Construction Means, Methods, Techniques, Sequences, and Procedures. Owner will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences, or procedures used or for safety precautions and programs in connection with the Work, since these are solely Contractor's responsibility.

Q.2. Compliance with Applicable Laws. Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury, or loss.

Q.3. Remedy Contractor-Caused Property Damage. Contractor shall promptly remedy damage and loss to property at the site, or off-site, if caused in whole or in part by Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them or by anyone for whose acts they may be liable and for which Contractor is responsible.

Q.4. Reasonable Precautions and Reasonable Protection. As between Contractor and Owner, Contractor shall be responsible for all safety at the Project Site, including safety of personnel, material, and the Work. Contractor shall be responsible for providing any security necessary to prevent damage or loss to materials, equipment, the Improvements, and other property in the vicinity of the Project until Final Completion.

R. Indemnity

R.1. Claims Other than Employee Claims. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, CONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS LENDER, OWNER, OWNER'S MEMBERS, MANAGERS, PARTNERS, AFFILIATED COMPANIES OF OWNER, AND ANY PARTNER, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, AND AGENTS (COLLECTIVELY, THE "INDEMNITEES") FROM ALL CLAIMS, SUITS, ACTIONS, PROCEEDINGS, DAMAGES, LOSSES, AND EXPENSES WHATSOEVER, INCLUDING ATTORNEY'S

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FEES, CONNECTED WITH PERFORMANCE OF THIS CONTRACT OR THE CONSTRUCTION CONTEMPLATED BY THIS CONTRACT TO THE EXTENT CAUSED BY THE BREACH OF CONTRACT, NEGLIGENCE, OR OTHER ACT OR OMISSION OF CONTRACTOR, ITS SUBCONTRACTORS, SUB-SUBCONTRACTORS OF ANY TIER, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE.

Include the following employee claims indemnity paragraph if applicable.

R.2. Employee Claims. IN ADDITION, REGARDING CLAIMS FOR THE BODILY INJURY OR DEATH OF AN EMPLOYEE OF CONTRACTOR, ITS AGENT(S), OR ITS SUBCONTRACTORS OF ANY TIER (HEREINAFTER REFERRED TO AS "EMPLOYEE CLAIM" OR "EMPLOYEE CLAIMS"), CONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS INDEMNITEES FROM ALL SUCH EMPLOYEE CLAIMS, SUITS, ACTIONS, PROCEEDINGS, DAMAGES, LOSSES, AND EXPENSES WHATSOEVER CONNECTED WITH PERFORMANCE OF THIS CONTRACT, INCLUDING SUCH EMPLOYEE CLAIMS, DAMAGES, LOSSES, OR EXPENSES ACTUALLY OR ALLEGEDLY ARISING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF INDEMNITEES. IT IS THE EXPRESSED INTENT OF CONTRACTOR AND OWNER THAT IN THE CASE OF AN EMPLOYEE CLAIM, THE INDEMNITY PROVIDED FOR IN THIS SECTION IS AN INDEMNITY EXTENDED BY CONTRACTOR TO INDEMNIFY AND PROTECT INDEMNITEES FROM THE CONSEQUENCES OF INDEMNITEES' OWN NEGLIGENCE WHETHER OR NOT THAT NEGLIGENCE IS THE SOLE OR CONTRIBUTING CAUSE OF THE RESULTANT EMPLOYEE CLAIMS. CONTRACTOR FURTHER AGREES IN THIS CONNECTION TO DEFEND AT ITS OWN EXPENSE INDEMNITEES FROM ANY CLAIMS OR LITIGATION IN CONNECTION WITH ANY SUCH EMPLOYEE CLAIMS.

Continue with the following.

[*R.2./R.3.*] *Limitations.* In claims against any person or entity indemnified under this section by an employee of Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obliga-

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tion under this agreement shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Contractor or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

S. Miscellaneous

S.1. Effect of Invalid Provision. Should any clause in this Contract be found invalid by a court of law, the remainder of the Contract shall not be affected thereby, and all other provisions of this Contract shall remain valid and enforceable.

S.2. Entire Agreement; Modification. The Construction Documents contain the entire agreement between the parties for the construction of the Project and cannot be modified except by written Change Order or modification.

S.3. Nonassignment. This Contract shall not be assigned by Contractor without the written consent of Owner. This limitation shall not apply to Contractor's right to retain Subcontractors for the prosecution of portions of the Work in the normal course of its construction business.

S.4. Execution of Other Documents; Further Action. Each party shall, on demand, execute or obtain such other documents or instruments and corrective filings or instruments and use all commercially reasonable efforts to do or cause such other things as may be reasonably necessary or desirable to effect the provisions and purposes of this Contract.

S.5. Fees and Expenses of Actions. If any litigation (an "Action") is commenced, including an Action for declaratory relief, to enforce or interpret the terms of this Contract, or any document or instrument executed in connection with or pursuant to this Contract, or involving any controversy or Claim between or among the parties to this Contract, whether sounding in contract, tort, or statute, whether through arbitration, probate, bankruptcy, receivership, or other judicial or administrative proceeding, the prevailing party in such Action (the

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"Prevailing Party") shall be entitled to recover reasonable attorney's fees, paralegal costs, expert witness and consulting expert fees and costs, and other expenses, costs, and necessary disbursements incurred by the Prevailing Party in the investigation, preparation, pursuit, or defense of any claim asserted by any party in such Action in addition to any other relief to which the Prevailing Party may be otherwise entitled, at law or hereunder, in the amount determined by the fact finder(s) or the court.

S.6. Gender and Number. Unless otherwise required by context, the genders shall include each other and the singular shall include the plural and the plural the singular.

S.7. Headings. Headings, tables of contents, captions, titles, and marginal notations are for convenience only and shall not limit or restrict the interpretation or construction of the passage(s) to which such headings, tables of contents, captions, titles, and notations may relate.

S.8. Notices. Any notice to be given or to be served on any party hereto, in connection with this instrument, must be in writing and may be given in person or by courier, overnight delivery service, e-mail, or certified or registered mail. Such notice shall be deemed to have been given and received when actually received, in the case of hand delivery, overnight delivery service, or express mail; when a certified or registered letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail; and, if given by e-mail, when received by the party to whom it is addressed. Notice shall be given to Owner, Owner Rep, and Contractor at the addresses set forth at the beginning of this Contract. Any party hereto may at any time by giving five days' written notice to the other party hereto designate any other address, phone number, or e-mail address in substitution of the address, phone number, or e-mail address set forth at the beginning of this Contract to which such notice shall be given. Owner Rep must be copied on any notice given to Owner.

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S.9. Schedules, Addenda, Exhibits, and Attachments. All schedules, addenda, exhibits, and attachments and other documents or items identified as being attached hereto (the "Exhibits") shall be a part of this Contract for all purposes. Exhibits may be changed from time to time as the parties may agree. When Exhibits are changed, they shall be redrafted in accordance with agreed changes, dated as of the effective date of such changes, and signed by the parties. Copies of changed Exhibits shall be furnished to each party, and such changed Exhibits shall become a part of this Contract for all purposes. An Exhibit that has been changed shall cease to be a part of this Contract, and the most recently dated Exhibit, signed by all parties, shall govern.

S.10. Third-Party Beneficiaries; None Created. Nothing express or implied in this Contract is intended to confer, nor shall anything herein confer, on any person other than the parties hereto and the respective successors or assigns of the parties hereto, any rights, remedies, obligations, or liabilities whatsoever.

S.11. Waiver. No waiver of any term of this Contract shall be valid unless it is in writing and signed by both parties. The failure of any party at any time or times to require performance of any provision hereof shall in no manner affect the right to enforce the provision. No waiver by any party of any condition contained in this Contract, or of the breach of any term, provision, representation, warranty, or covenant contained in this Contract, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or as a waiver of any other condition or of the breach of any other term, provision, representation, warranty, or covenant.

S.12. Lender Cooperation. Contractor agrees to cooperate, and cause its Subcontractors to cooperate, with the reasonable requirements of any Lender that Owner may elect to obtain financing from, including the requirement that Contractor subordinate, and cause its Subcontractors to subordinate, any lien they may have by statute against the Property to the lien of the Lender.

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S.13. Independent Contractor. Contractor occupies the status of an independent contractor, as that term is defined in the construction industry.

_____

[Name of owner]

_____

[Name of contractor]

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Exhibit A

Project Site Legal Description

Attach project site legal description.

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Exhibit B

Plans and Specifications

1. Specifications:

List the specifications or refer to an exhibit attached to this contract.

Section	Title	Date	Pages

2. Drawings:

List the drawings or refer to an exhibit attached to this contract.

Number	Title	Date

3. Addenda including Supplemental Conditions, if any:

Number	Date	Pages

Addenda relating to bidding/proposal requirements are not part of the Construction Documents unless the bidding/proposal documents are also listed as Construction Documents in paragraph B.1. of this Contract.

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Exhibit C

Contract Price; Guaranteed Maximum Price; Allocation of Savings; Liquidated Damages

The Contract Price for the Project is the sum of the following amounts:

Costs of Construction, including—

Allowance for [**specify**]	$[**amount**]
Allowance for [**specify**]	$[**amount**]
Contractor's Contingency:	$[**amount**]
Owner's Contingency:	$[**amount**]
Contractor's Fee:	$[**amount**]
Total Contract Price:	$[**amount**]

Total Contract Price not to exceed $[**amount**], the Guaranteed Maximum Price

Cost Savings (as defined in section A.) shall be allocated between Owner and Contractor as follows:

Owner: [**percent**]%

Contractor: [**percent**]%

Check if applicable:

☐ Liquidated Damages

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Owner has the right to assess Liquidated Damages in the amount of $[**amount**] per day for each day after the Substantial Completion Date that Substantial Completion has not been achieved due to Contractor's Unexcused Delay. Owner has the right to withhold Liquidated Damages from the amounts due to Contractor. Owner and Contractor stipulate that the damages for the prospective breach of the Contract are difficult to measure and the Liquidated Damages amount is a reasonable estimate of actual damages.

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Exhibit D

Insurance and Bond Requirements

Exhibit - Bond and Insurance Requirements

This Exhibit (the "**Insurance Specifications**") is attached as an Exhibit as part of the Agreement. In the event of conflict between any of the following Insurance Specifications with any provision in the Agreement, these Insurance Specifications control, amend and supplement the conflicting provision.

A. Specifications, Coverages, Limits & Other Requirements

No.	Specifications	Coverages, Limits and Other Requirements		
A. LIABILITY INSURANCE				
§ 1.	**Commercial General Liability.** To the extent permitted by law, Contractor is to maintain commercial general liability ("**CGL**") insurance and, if necessary, commercial umbrella/excess insurance (see **Spec. 4** below), issued on an occurrence basis meeting at least the following specifications.			
§ 1.1	**Minimum Limits**	The limits of coverage shall not be less than the following amounts:		
		a.	$__,000,000	Per Occurrence
		b.	$__,000,000	General Aggregate
		c.	$__,000,000	Products and Completed Operations Aggregate
		d.	$__,000,000	Personal and Advertising Injury
§ 1.2	**General Aggregate**	The General Aggregate shall apply separately to this Project.		
§ 1.3	**Post-Completion Coverage**	Contractor agrees to maintain Products-Completed Operations coverage with respect to the Work performed under the Agreement in identical coverage, form and amount, including required endorsements, for the full term of the Statute of Repose following Date of Substantial Completion of the Work. Contractor shall provide written representation to Owner stating Work completion date.		
§ 1.4	**Form**	This insurance is to be issued on an ISO CG 00 01 and shall coverage liability arising from premises, ongoing and completed operations, hire of Subcontractors (independent contractors coverage), and incidental design liability arising from the contractor's construction means and methods.		
§ 1.5	**Insured Contracts**	Coverage shall include but not be limited to liability assumed by Contractor under the Agreement to which this Exhibit is attached, including the tort liability of another assumed in a business contract, and shall include unmodified Separation of Insureds coverage.		
§ 1.6	**Additional Insureds**	Additional insured status shall be provided in favor of Owner Parties and such other personas as are designed by Owner to Contractor to be additional insureds on a combination of ISO forms CG 20 10 10 01 and CG 20 37 10 01.		
§ 1.7	**Primary and Noncontributory**	This insurance shall be endorsed to provide primary and noncontributing liability coverage by ISO CG 20 01 04 13. It is the specific intent of the parties to the Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Owner Parties, with Owner Parties' insurance being excess, secondary and noncontributing.		
§ 1.8	**Waiver of Subrogation**	This insurance is to be endorsed with an ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds.		
§ 1.9	**Electronic Data**	This insurance is to include an Electronic Data Liability Endorsement ISO CG 04 37 with coverage to the full limits of the policy.		
§ 1.10	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to Owner required for cancellation or material change.		

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§ 1.11	**Personal Injury Contractual Liability**	The personal injury contractual liability exclusion shall be deleted.	
§ 1.13	**Certificate of Insurance**	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Contractor to Owner as Certificate Holder at the following address: _____.	
§ 1.12	**Prohibitions**	The following exclusions/limitations or their equivalents are **not** permitted:	
		a.	Contractual Liability Limitation ISO CG 21 39.
		b.	Amendment of Insured Contract Definition ISO CG 24 26.
		c.	Limitation of Coverage to Designated Premises or Project ISO CG 21 44.
		d.	Exclusion-Damage to Work Performed by Subcontractors On Your Behalf ISO CG 22 94 or CG 22 95.
		e.	Exclusion-Explosion, Collapse and Underground Property Damage Hazard ISO CG 21 42 or CG 21 43.
		f.	Any classification limitation.
		g.	Any construction defect completed operations exclusion.
		h.	Any endorsement modifying the employer's liability exclusion or deleting the exception to it.
		i.	Any endorsement modifying or deleting explosion, collapse or underground coverage.
		j.	Any habitational or residential exclusion.
		k.	Any insured vs. insured exclusion except named insured vs. named insured.
		l.	Any punitive, exemplary or multiplied damages exclusion.
		m.	Any subsidence exclusion.
§ 2.	**Business Auto Liability**. Contractor is to maintain business auto insurance meeting at least the following specifications.		
§ 2.1	**Minimum Limits**	The limits of liability shall be no less than $ __,000,000 per accident.	
§ 2.2	**Form**	This insurance is to be issued on the current edition of the ISO CA 00 01	
§ 2.3	**Scope**	This insurance is to coverage damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use of any auto, including owned, hired and non-owned autos.	
§ 2.4	**Additional Insureds**	Additional insured status shall be provided in favor of Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds, on ISO CA 20 48 10 13.	
§ 2.5	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor on ISO CA 04 44 10 13.	

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§ 3.	**Workers' Compensation and Employer's Liability.** Contractor is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.			
§ 3.1	**Workers' Compensation Limits**	The minimum limits of this insurance shall be no less than the statutory limits.		
§ 3.2	**Employer's Liability Limits**	The minimum limits of this insurance shall be no less than $__,000,000 each accident and disease.		
§ 3.3	**Territory**	The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.		
§ 3.4	**Scope**	This insurance is to cover liability arising out the Contractor's employment of workers and anyone for whom the contractor may be liability for workers' compensation claims. Worker's compensation insurance is required and no "alternative" form of insurance is permitted.		
§ 3.5	**Prohibitions**	Employees leased through a Professional Employment Organization ("**PEO**") are not permitted.		
§ 3.6	**Stop Gap**	Stop Gap coverage must be provided if Work is to be performed in a monopolistic state, listing the state in which Work is to be performed.		
§ 3.7	**USL&H**	United States Longshoremen and Harborworkers ("**USL&H**") coverage must be provided where such exposure exists listing the state in which Work is to be performed.		
§ 3.8	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor, on form WC 42 03 04.		
§ 4.	**Excess Liability.** To the extent permitted by law, if any of the required coverages are to be maintained by and through excess liability insurance, Contractor is to maintain excess liability insurance meeting at least the following specifications.			
§ 4.1	**Scope**	This insurance shall be excess over and be no less broad than all coverages and conditions described above. The policy limits required herein may be provided by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident by less than the amount required herein.		
§ 4.2	**Concurrency**	Such coverage shall have the same inception date as the commercial general liability and employer's liability coverages.		
§ 4.3	**Primary**	This insurance shall be primary and non-contributing liability coverage. It is the specific intent of the parties to the Agreement that all insurance held by the Owner Parties shall be excess, secondary and non-contributory.		
§ 4.4	**Drop Down Coverage**	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits.		
§ 4.5	**Defense Costs**	This insurance is to include a duty to defend any insured.		
§ 4.6	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor.		
§ 4.7	**Notice**	This insurance shall be endorsed to provide a 30 days' notice of cancellation to Owner.		
§ 5.	**Professional Liability.** Contractor is to maintain Professional Liability insurance meeting at least the following specifications.			
§ 5.1	**Minimum Limits**	Limits of coverage shall be no less than:		
		a.	$ __,000,000	Each Loss
		b.	$ __,000,000	Annual Aggregate
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate.		

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§ 5.2	**Scope**	Such insurance shall cover all services rendered by the Contractor and its Subcontractors under the Agreement, including but not limited to design or design/build services.			
§ 5.3	**Retroactive Date**	Any retroactive date must be effective prior to beginning of services for the Owner.			
§ 5.4	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:			
		a.	Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors;		
		b.	Habitational or residential operations;		
		c.	Mold or microbial matter and fungus or biological substance; or		
		d.	Punitive, exemplary or multiplied damages.		
		A professional liability endorsement to a general liability policy is not acceptable.			
§ 5.5	**Term**	Policies written on a claims-made basis shall be maintained for at least __ years beyond termination of the Agreement. The purchase of an extended discovery period or an extended reporting period on a claims-made policy will not be sufficient to meet the terms of this provision.			
§ 5.6	**Waiver of Subrogation**	Contractor shall cause this insurance to be endorsed to waive all rights of subrogation in favor of Owner Parties.			
§ 5.7	**Notice**	This insurance shall be endorsed to provide a 30 days' notice of cancellation to Owner.			
§ 6.	**Pollution Liability**. Contractor is to maintain Contractor's Pollution Liability insurance meeting at least the following specifications.				
§ 6.1	**Minimum Limits**	Limits of coverage shall be no less than:			
		a.	$,000,000	Each Loss	
		b.	$,000,000	Annual Aggregate	
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate.			
§ 6.2	**Scope**	The policy must provide coverage for:			
		a.	The full scope of the named insured's operations (on-going and completed) as described within the scope of work for the Agreement.		
		b.	Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall.		
		c.	Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations.		
		d.	Diminution of value and natural resources damages;		
		e.	Contractual liability.		
		f.	Claims arising from owned and non-owned disposal sites utilized in the performance of the Agreement.		

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		Coverage extensions to the General Liability insurance policy without a separate insurance agreement for Contractors Pollution Liability insurance will not fulfill this requirement	
§ 6.3	**Additional Insured and Primary and Noncontributory**	The policy must insure contractual liability, name Owner Parties as additional insureds and such other personas as are designed by Owner to Contractor to be additional insureds, and be primary and noncontributory to all coverage available to the additional insureds.	
§ 6.4	**Retroactive Date**	If coverage is provided on a claims made basis, coverage will at least be retroactive to the earlier of the date of the Agreement or the commencement of contractor services relation to the Work.	
§ 6.5	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Insured vs. insured actions. However, exclusion for claims made between insured within the same economic family are acceptable.
		b.	Impaired property that has not been physically injured.
		c.	Materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval.
		d.	Property damage to the work performed by the contractor.
		e.	Faulty workmanship as it relates to clean up costs.
		f.	Punitive, exemplary or multiplied damages.
		g.	Work performed by Subcontractors.
		h.	Contractual liability incurred as a result of an injury to an employee of the insured.
§ 6.6	**Term**	Completed operations coverage shall be maintained for a minimum of __ years after the completion of Work. (The extended reporting period on a claims-made based policy does not fulfill this requirement). Contractor's pollution liability insurance policies insuring a specific job shall have completed operations coverage for at least the duration of the Work plus __ years.	
§ 7.	**Subcontractor's Insurance.**		
§ 7.1	**Coverage**	Contractor shall cause each first tier subcontractor employed by Contractor to purchase and maintain insurance of the types listed above; provided, however, Employers Liability Limits on such subcontractors are not to be less than $500,000 each Accident or Disease, and such subcontractors' excess policy limit shall be no less than $1,000,000.	
§ 7.2	**Additional Insureds**	This insurance is to be endorsed with an ISO CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing the Owner Parties and such other persons as are designated by Owner to Contractor, as additional insureds.	
§ 7.3	**Waiver of Subrogation**	This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties, and such other persons as are designated by Owner to Contractor, as additional insureds.	
§ 7.4	**Evidence of Insurance**	Contractor shall provide Owner certificates of insurance as to each subcontractor performing Work prior to the subcontractor's entry on the Property certified to Owner as Certificate Holder at the following address: _____.	
B.	**PROPERTY INSURANCE**		
§ 1.	**Builder's Risk.** Contractor is to maintain builder's risk insurance meeting at least the following specifications; but at Owner's option, Owner may in lieu of Contractor maintaining builder's risk insurance, Owner may obtain and maintain the builder's risk insurance. If		

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	Owner obtains the builder's risk insurance, the Contract Price is to be reduced by the amount of the premium and any Contractor markup cost that otherwise was included within the Contract Price.			
§ 1.1	**Amount**	Limits of coverage are to be the initial Contract Price as increased by amount of subsequent modification of the Contract Price. Coverage shall be provided in amount equal at all times to the full replacement value and cost of debris removal for any single occurrence.		
§ 1.2	**Covered Property**	Such insurance shall cover:		
		a.	All structures under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundations, footings, underground pipes and wiring, excavations, grading, backfilling or filling.	
		b.	All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.	
		c.	All property including materials and supplies on site for installation.	
		d.	All property including materials and supplies at other locations but intended for use at the site.	
		e.	All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.	
		f.	Other property for which an insured is liable regarding the project.	
§ 1.3	**Insureds**	Insureds shall include:		
		a.	Owner, Contractor, and all Loss Payees and Mortgagees as Named Insureds; and	
		b.	Subcontractors of all tiers.	
§ 1.4	**Deductibles**	Deductibles shall not exceed:		
		a.	All risks of direct damage, per Occurrence, except	$10,000
		b.	Delayed opening waiting period	5 days
		c.	Earthquake and earthquake sprinkler leakage, per Occurrence	$50,000
		d.	Flood, per Occurrence or excess of maximum available through National Flood Insurance Program	$50,000
§ 1.5	**Form**	Coverage shall be at least as broad as an unmodified ISO Special Causes of Loss form and shall include coverage for theft, collapse, flood and earthquake. All exclusions must be pre-approved by Owner. This insurance is to be written on a Completed Value, non-reporting form basis and shall be primary to any other insurance coverage available to the named insureds, with that other insurance being excess, secondary and noncontributing.		
§ 1.6	**Prohibition**	No protective safeguard warranty is permitted.		
§ 1.7	**Coverage and Minimum Sublimits**	Coverage		Minimum Sublimit

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		a.	Additional expenses due to delay in completion of project (where applicable)	$_____
		b.	Agreed Value	Included without sublimit
		c.	Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss	Included without sublimit
		d.	Debris removal additional limit	Included without sublimit
		e.	Earthquake and earthquake sprinkler leakage	$1,000,000
		f.	Flood, per Occurrence, excess of maximum available through National Flood Insurance Program	$1,000,000
		g.	Freezing	Included without sublimit
		h.	Mechanical breakdown including hot and cold testing (where applicable)	Included without sublimit
		i.	Occupancy pre-completion	Included
		j.	Ordinance or law	Included without sublimit
		k.	Pollutant clean-up and removal	$1,000,000
		l.	Preservation of property	Included without sublimit
		m.	Replacement cost	Included without sublimit
		n.	Theft	Included without sublimit
§ 1.8	**Occupancy**	The termination of coverage provision shall be endorsed to permit occupancy of the coverage property being constructed.		
§ 1.9	**Term and Termination**	This insurance shall be maintained in effect, unless otherwise provided for in the Agreement, until the earliest of the following dates:		
		a.	The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;	
		b.	The date of final payment, as provided for in the Agreement; or	
		c.	The date on which the insurable interests in the Covered Property of all insureds other than Contractor have ceased.	

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§ 1.10	**Waiver of Subrogation**	This insurance shall include a waiver of subrogation by insurer as to the insureds.
§ 1.11	**Notice**	This insurance shall be endorsed to provide 30 days' notice of cancellation to Owner.
§ 2.	**Contractor's Equipment.**	
§ 2.1	**Amount**	Contractor shall obtain and maintain property insurance on Contractor's equipment and personal property insured to 100% of its replacement cost. This insurance will have an equipment floater.
§ 2.2	**Waiver of Subrogation**	This insurance will be endorsed to waive subrogation in favor of Owner Parties.
C. BONDS		
§ 1.	**General**	Contractor is required to arrange and furnish separate performance and payment bonds, each for the full amount of the Guaranteed Maximum Price plus Contractor's Fee guaranteeing the faithful performance of all of the provision of the Agreement as well as payment to all persons for labor and material used in the performance of the Agreement. The bonds shall be executed by a surety company acceptable to Owner, on a form acceptable to Owner, and shall become a part of the Agreement. Owner may withhold payments on account until such time as said bonds have been furnished and accepted. No change, alteration or modification in the terms and conditions of the Agreement, or in the terms or manner of payment shall in any way exonerate or release, in whole or in part, any surety on any bond furnished on behalf of Contractor. The cost of the bonds is included in the Contract Price.
§ 2.	**Payment Bond**	The Payment Bond is to conform to the following requirements.
§ 2.1	**Form**	The Payment Bond is to be in statutory form. The AIA form is not acceptable.
§ 2.2	**Coverage**	The Payment Bond is to include coverage for consequential and delay damages due to Contractor's default.
§ 2.3	**Rating**	The issuer must be at least *a* Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas..
§ 2.4	**Term**	The Payment Bond is to be in effect for the period required by the Texas Property Code.
§ 2.5	**Multiple Obligees**	The Payment Bond is to name as additional obligees such persons as designated by the Owne, including its lender.
§ 2.6	**Recorded**	The Payment Bond and all required attachments (issuer's agent's power of attorney and memorandum of the Agreement) is to be recorded in the County's Official Public Records.
§ 3.	**Performance Bond**	The Performance Bond is to conform to the following requirements.
§ 3.1	**Form**	The Performance Bond is to be on the AIA form or equivalent. The Performance Bond is to cover Contractor's express warranty and obligations to correct defective Work arising under the Agreement.
§ 3.2	**Rating**	The issuer must be at least a Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas.
§ 3.3	**Extended Coverages**	The Performance Bond is to cover risk of contract penalties and delay damages.
§ 3.4	**Term**	The Performance Bond is to be in effect for a period of not less than one year following Final Completion.
§ 3.5	**Multiple Obligees**	The Performance Bond is to name as additional obligees such persons as designated by Owner including its lender.

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B. GENERAL INSURANCE REQUIREMENTS

1. **Definitions.** For purposes of this Exhibit:

a. Agreement. "**Agreement**" means the Commercial Construction Contract – Guaranteed Maximum Price executed by Owner and Contractor.

b. Owner Parties. "**Owner Parties**" means (a) _____ ("**Owner**"), (b) the project manager, (c) any lender whose loan is secured by a lien against the Property, (d) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, (e) any directors, officers, employees, or agents of such persons or entities, and (f) others as required by the Agreement.

c. Contractor. "**Contractor**" means _____ and Subcontractors of any tier.

d. ISO. "**ISO**" means Insurance Services Office.

2. **Policies.**

a. Insurer Qualifications. All insurance required to be maintained by Contractor must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in the State in which the Improvements are located.

b. No Waiver. Failure of Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Owner to identify a deficiency from evidence that is provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance. Commencement of Work without provision of the required certificate of insurance, evidence of insurance and/or required endorsements, or without compliance with any other provision of this Contract, shall not constitute a waiver by any Owner Party of any rights. The Owner shall have the right, but not the obligation, of prohibiting the Contractor or any Subcontractor from performing any Work until such certificate of insurance, evidence of insurance and/or required endorsements are received and approved by the Owner.

c. Delivery Deadlines. Contractor shall provide Owner within 10 days of Owner's request with certified copies of all insurance policies. Renewal policies, if necessary, shall be delivered to the Owner prior to the expiration of the previous policy.

d. Waiver of Subrogation. All policies maintained by Contractor, whether required herein or not, shall contain a waiver of subrogation in favor of the Owner Parties.

e. Notice. All policies maintained by Contractor shall provide for 30 days' prior written notice of cancellation to Owner.

f. Compliance With Laws. If any insurance requirements are deemed to violate any law, statute or ordinance, the insurance requirements shall be reformed to provide the maximum amount of protection to Owner as allowed under the law.

3. **Limits, Deductibles and Retentions.**

a. Coverage Limits. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one Occurrence or accident be less than the amount required herein.

b. Deductible and Retention Limits. No deductible or self-insured retention shall exceed $_____ without the prior written approval of the Owner, except as otherwise specified herein. All deductibles and retentions shall be paid by, assumed by, for the account of, and at the Contractor's sole risk. The Contractor shall not be reimbursed for same.

c. Policy Limits. "**Limits**" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Contractor or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to Owner and Owner the limits specified below as the minimum limits are increased to the greater limits.

d. Post Completion Coverage. With respect to the insurance to be maintained after final payment to Contractor, an additional certificate evidencing such coverage shall be provided to Owner with final application for payment if the prior certificate has expired, and thereafter upon renewal or replacement of such insurance until the expiration of the time period for which such insurance must be maintained.

e. Use of the Owner's Equipment. The Contractor, its agents, employees, Subcontractors or suppliers shall use the Owner's equipment only with express written permission of the Owner's designated representative and in accordance with the Owner's terms and condition for such use. If the Contractor or any of its agents, employees, Subcontractors or suppliers utilize any of the Owner's equipment for any purpose, including machinery, tools, scaffolding, hoists, lifts or similar items owned, leased or under the control of the Owner, the Contractor shall defend, indemnify and be liable to the Owner Parties for any and all loss or damage which may arise from such use.

4. **Forms.**

a. Approved Revisions and Substitutions. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Owner will have the right to require other equivalent forms.

b. Approved Forms. Any policy or endorsement forms other than a form specified in this Exhibit must be approved in advance by Owner.

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c. Compliance with Laws. If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to the Agreement, shall be reformed to provide the maximum amount of protection to the Owner Parties as allowed under the law.

5. Evidence of Insurance. Insurance must be evidenced as follows:

a. Form. Liability insurance: ACORD™ Form 25 Certificates of Liability Insurance for liability coverages. Property Insurance: ACORD™ Form 28 Evidence of Commercial Property Insurance for property coverages.

b. Delivery Deadlines. Evidence to be delivered to Owner prior to entry on the Property and thereafter at least 30 days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Owner's request for an updated certificate.

c. Certificate Requirements. Certificates must:

(1) Insured. State the insured's name and address.

(2) Insurer. State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.

(3) Additional Insured Status and Subrogation Waiver. Specify the additional insured status and waivers of subrogation as required by these specifications.

(4) Primary Status. State the primary and non-contributing status required herein.

(5) Deductibles and Self-Insured Retentions Stated. State the amounts of all deductibles and self-insured retentions.

(6) Copy of Endorsements and Policy Declaration Page. Be accompanied by certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.

(7) Notices. Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation and material change will be sent to the certificate holder.

(8) Certificate Holder. Be addressed to the Owner as the certificate holder and show Owner's correct address. A separate certificate is to be addressed and delivered to Owner's lender.

(9) Producer. State the producer of the certificate with correct address and phone number listed.

(10) Authorized Representative. Be executed by a duly authorized representative of the insurers.

d. Suspension. Owner shall have the right, but not the obligation, of suspending Contractor's services, without an increase in the sum payable by Owner to Contractor due to such suspension, until such certificates or other evidence that the required insurance has been placed in compliance with these requirements is received and approved by Owner.

6. Contractor Insurance Representations to Owner Parties.

a. Minimum Requirements. The insurance coverages required herein (1) represent Owner Parties' minimum requirements and are not to be construed to void or limit the Contractor's indemnity obligations as contained in the Agreement nor represent in any manner a determination of the insurance coverages the Contractor should or should not maintain for its own protection; and (2) are being, or have been, obtained by the Contractor in support of the Contractor's liability and indemnity obligations under this Contract. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Contractor, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of the Agreement.

b. Defaults. Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, the Agreement. If the Contractor shall fail to remedy such breach within five business days after notice by the Owner, the Contractor will be liable for any and all costs, liabilities, damages and penalties resulting to the Owner Parties from such breach, unless a written waiver of the specific insurance requirement is provided to the Contractor by the Owner. In the event of any failure by the Contractor to comply with the provisions of this Contract, the Owner may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to the Contractor, purchase such insurance, at the Contractor's expense, provided that the Owner shall have no obligation to do so and if the Owner shall do so, the Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

c. Survival. This Exhibit is an independent contract provision and shall survive the termination or expiration of the Agreement.

9. RELEASE AND WAIVER. TO THE EXTENT PERMITTED BY LAW, EACH OF CONTRACTOR AND OWNER (THE "**RELEASING PARTY**") RELEASES AND WAIVES ANY CLAIMS IT MAY HAVE AGAINST THE OTHER PARTY OR ITS PARTNERS, OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS (THE "**RELEASED PERSONS**") FOR BUSINESS INTERRUPTION OR DAMAGE TO PROPERTY SUSTAINED BY THE RELEASING PARTY AS THE RESULT OF ANY ACT OR OMISSION OF THE RELEASED PERSON IN ANY WAY CONNECTED WITH ANY LOSS COVERED BY INSURANCE, WHETHER REQUIRED HEREIN OR NOT, OR WHICH SHOULD HAVE BEEN COVERED BY INSURANCE REQUIRED HEREIN, INCLUDING THE DEDUCTIBLE AND UNINSURED

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PORTION THEREOF, MAINTAINED OR REQUIRED TO BE MAINTAINED BY THE RELEASING PARTY PURSUANT TO THE AGREEMENT. THE WAIVER OF CLAIMS CONTAINED IN THIS SECTION (A) WILL SURVIVE THE COMPLETION OF THE WORK OR THE TERMINATION OF THE AGREEMENT AND (B) WILL APPLY **EVEN IF THE LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PERSONS** BUT WILL NOT APPLY TO THE EXTENT A LOSS OF DAMAGE IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PERSONS.

10. Insurance Requirements of Contractor's Subcontractors.

a. Coverage. Insurance similar to that required of the Contractor shall be provided by all Subcontractors (or provided by the Contractor on behalf of Subcontractors) to cover operations performed under any subcontract agreement. The Contractor shall be held responsible for any modification in these insurance requirements as they apply to Subcontractors. The Contractor shall maintain certificates of insurance from all Subcontractors containing provisions similar to those listed herein (modified to recognize that the certificate is from Subcontractor) enumerating, among other things, the waivers of subrogation, additional Insured status, and primary liability as required herein, and make them available to the Owner upon request.

b. ALLOCATION OF RISK. THE CONTRACTOR IS FULLY RESPONSIBLE FOR LOSS AND DAMAGE TO ITS PROPERTY ON THE SITE, INCLUDING TOOLS AND EQUIPMENT, AND SHALL TAKE NECESSARY PRECAUTIONS TO PREVENT DAMAGE TO OR VANDALISM, THEFT, BURGLARY, PILFERAGE AND UNEXPLAINED DISAPPEARANCE OF PROPERTY. ANY INSURANCE COVERING THE CONTRACTOR'S OR ITS SUBCONTRACTOR'S PROPERTY SHALL BE THE CONTRACTOR'S AND ITS SUBCONTRACTOR'S SOLE AND COMPLETE MEANS OR RECOVERY FOR ANY SUCH LOSS. TO THE EXTENT ANY LOSS IS NOT COVERED BY SAID INSURANCE OR SUBJECT TO ANY DEDUCTIBLE OR CO-INSURANCE, THE CONTRACTOR SHALL NOT BE REIMBURSED FOR SAME. SHOULD THE CONTRACTOR OR ITS SUBCONTRACTORS CHOOSE TO SELF-INSURE THIS RISK, IT IS EXPRESSLY AGREED THAT THE CONTRACTOR HEREBY WAIVES, AND SHALL CAUSE ITS SUBCONTRACTORS TO WAIVE, ANY CLAIM FOR DAMAGE OR LOSS TO SAID PROPERTY IN FAVOR OF THE OWNER PARTIES.

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Exhibit E

Contractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address:

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

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3. Contractor has paid each of Contractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

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_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Exhibit F

Subcontractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Subcontractor:

Subcontractor's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to subcontractor**]

Affiant's Mailing Address:

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Subcontractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Subcontractor.

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2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

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Subcontractor agrees to indemnify and hold Owner and Contractor harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Exhibit G

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(b). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Partial Release During Construction

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] of check**], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] as indicated in the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

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The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

_____
Date

[Company name]

By _____
[Name and title]

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Exhibit H

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(c). If a contractor (or other potential lien claimant) is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Partial Release During Construction

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid and has received a progress payment in the sum of $[**amount**] for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**]. The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above-referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] as indicated in

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the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

_____

Date

[Company name]

By _____

[Name and title]

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Exhibit I

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(d). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Final Release

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] of check**], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**].

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-

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men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

_____
Date

[Company name]

By _____
[Name and title]

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Exhibit J

This form may be used as written by an original contractor to fulfill the requirements of Tex. Prop. Code §§ 53.085, 53.258, 53.259.

Contractor [Final] Bills-Paid Affidavit

Date:

Owner:

Owner's Mailing Address: [**include county**]

Contractor:

Contractor's Mailing Address: [**include county**]

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address: [**include county**]

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

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3. Contractor has paid each of Contractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

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_____

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Exhibit K

This form may be used as written by a subcontractor or supplier under Tex. Prop. Code § 53.085.

Subcontractor [Final] Bills-Paid Affidavit

Date:

Owner:

Owner's Mailing Address: [**include county**]

Subcontractor:

Subcontractor's Mailing Address: [**include county**]

Contractor:

Contractor's Mailing Address: [**include county**]

Affiant: [**include relationship to subcontractor**]

Affiant's Mailing Address: [**include county**]

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Subcontractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Subcontractor.

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2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor's suppliers and sub-subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all sub-subcontractors, suppliers, laborers, and materialmen and amounts owed to each. If there are no unpaid sub-subcontractors, suppiers, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

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Subcontractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Exhibit L

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(e). If a contractor (or other potential lien claimant) is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a final payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the final payment, the waiver and release must read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Release on Final Payment

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**]. The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

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_____
Date

[Company name]

By _____
[Name and title]

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Form 19-2

Commercial Construction Contract

[Stipulated Sum]

Basic Information

Effective Date:

Owner:

Address:

Phone:

E-mail:

Architect/Engineer ("Owner Rep"):

Address:

Phone:

E-mail:

Contractor:

Contractor's Representative for Project:

Address:

Phone:

E-mail:

Lender:

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Address:

Phone:

E-mail:

Project: [**include general description of improvements to be constructed**]

Project Site: [**state physical address of site and attach legal description as identified in exhibit A**]

Contract Price:

Substantial Completion Date:

Insurance and Bond Requirements: [**see exhibit D**]

Plans: [**specifications and drawings as identified in exhibit B**]

Owner and Contractor agree to the following terms and conditions.

A. Definitions

A.1. "Allowance" means a dollar amount specified to be used for portions of the Work that have not been fully defined in the Plans or where a range of options is available for Owner's selection.

A.2. "Applicable Law" means all federal, state, and local laws, rules, and regulations applicable to the Project, the Work, or the Contractor, as indicated by the context.

A.3. "Bid" means a response to a request for bids. The term includes proposals submitted in response to a request for proposals.

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A.4. "Business Day" means a day other than a Saturday, Sunday, or national holiday. As used in this Contract, the term "days" means calendar days. All periods are measured in calendar days unless business days are specified.

A.5. "Change Order" means a description of changes in the Work, and any increase or decrease in the Contract Price and extension or reduction of Contract Time resulting from such changes, that has been signed by Owner and Contractor.

A.6. "Claim" means a demand or assertion by one of the parties seeking, as a matter of right, payment of money or other relief with respect to the terms of the Construction Documents, and also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Construction Documents.

A.7. "Commencement Date" means the date on which a written notice to proceed is delivered by Owner Rep to Contractor.

A.8. "Concealed Conditions" means physical conditions in existence on the Effective Date located beneath the surface of the ground, or concealed or unknown conditions in an existing structure, that are at variance with the conditions indicated in the Construction Documents or are substantially different from those conditions shown in the Construction Documents and that Contractor could not have discovered by the exercise of reasonable diligence.

A.9. "Conditions to Final Payment" means the conditions required by this Contract that must be satisfied by Contractor or waived by Owner in writing for Owner to be obligated to make the Final Payment to Contractor.

A.10. "Construction Documents" mean the documents identified in paragraph B.1.

A.11. "Contractor's Contingency" means the amount identified in Exhibit C that is for Contractor's exclusive use in connection with unanticipated increases to the Costs of Construction. The Contractor's Contingency is not intended to be used to cover increases to the

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Costs of Construction due to changes in the Scope of Work resulting from errors in the Owner Information or changes to the Scope of Work.

A.12. "Contract Time" means the period provided in this Contract for reaching Substantial Completion, and, if specified, the period for achieving Final Completion.

A.13. "Drawings" means the graphic and pictorial portions of the Construction Documents showing the design, location, and dimensions of the Work.

A.14. "Excused Delay" means a delay in Contractor's performance under the terms of this Contract due to acts of God, strikes, lockouts, labor shortages, labor restrictions by any governmental authority, civil riot, floods, abnormal adverse weather conditions that exceed [**number**] days, unavoidable casualties, or any cause beyond the control of Contractor, a Subcontractor, or a Supplier of any tier, that could not have been avoided using reasonable diligence. "Excused Delay" does not include delay resulting from negligence, default, or any condition not constituting an Excused Delay.

A.15. "Final Completion" means all the Work required by the Plans has been completed, all punch list items from the Substantial Completion review have been completed, and all Conditions to Final Payment have been satisfied.

A.16. "Governmental Approvals" means all approvals required by governmental entities with jurisdiction over the Property or Improvements for the Project to be used for its intended purpose, including, if applicable, a Certificate of Occupancy.

A.17. "Improvements" means the buildings, structures, landscaping, and other improvements to be constructed on the Property by Contractor according to the Construction Documents.

A.18. "Liquidated Damages" means an estimate of the amount of damages, as shown on Exhibit C, that Owner is likely to incur as a result of the failure of the Project to be Sub-

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stantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay.

A.19. "Major Subcontractor" or "Major Sub-subcontractor" or "Major Supplier" means a Subcontractor, Sub-subcontractor, or Supplier whose contract price exceeds 10 percent of the Costs of Construction, or other amount agreed on by Owner and Contractor.

A.20. "Owner Information" means the survey of the Property or Project Site, reports from Owner's consultants, Property restrictions, and other information provided by Owner with its request for Bids for the use of bidders in preparing their Bids. The term does not include Plans and Specifications.

A.21. "Owner's Contingency" means the amount identified in Exhibit C that is for Owner's exclusive use in connection with the Project. The Owner's Contingency may be used by Owner to cover increases in the Costs of Construction resulting from errors in the Owner Information and changes in the Scope of Work.

A.22. "Plans" means the Drawings and Specifications approved by Owner and Contractor identified in Exhibit B and any amendments made after the Effective Date.

A.23. "Project Site" means the area(s) within the Property where the Improvements will be constructed.

A.24. "Property" means the real property described in Exhibit A.

A.25. "Retainage" means Owner's statutory 10 percent retainage required under chapter 53 of the Texas Property Code.

A.26. Scope of Work" means the Work covered by the Construction Documents.

A.27. "Specifications" means a detailed description of the building components and materials and installation requirements prepared by the Architect/Engineer for the Project.

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A.28. "Subcontractor" means a person who contracts directly with Contractor to perform a portion of the Work for the Project.

A.29. "Substantial Completion" or "Substantially Complete" means that the Improvements have reached the stage at which they are usable for the purposes intended, all Governmental Approvals have been obtained, and only minor or cosmetic Work remains to be completed.

A.30. "Sub-subcontractor" means a person who contracts directly with a Subcontractor or Sub-subcontractor to perform a portion of the Work for the Project.

A.31. "Supplier" means a person who contracts with Owner, Contractor, a Subcontractor, or a Sub-subcontractor to furnish materials or equipment for the Project.

A.32. "Warranty Documents" means the written warranties on equipment, materials, labor, or the Work provided by Contractor, a Subcontractor, or a Supplier of any tier or a manufacturer.

A.33. "Work" means the labor, coordination, management, materials, equipment, and other materials and services required to construct the Project.

Terms not defined in this Contract or in the other Construction Documents have the meanings ascribed to them by common usage.

B. Construction Documents

B.1. Construction Documents. This Commercial Construction Contract between Owner and Contractor consists of the following Construction Documents:

Drawings:

Specifications:

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Addenda to this Contract:

Change Orders:

Warranty Documents:

Approved Construction Schedule:

This Contract and its Exhibits:

Owner's Request for Bids/Proposals:

Contractor's Bid/Proposal and Bid Qualifications and Exclusions:

B.2. Resolving Ambiguity or Conflict in Construction Documents. If there is an ambiguity or conflict, the Construction Documents are to control in the following order: (1) Change Orders, (2) Addenda, (3) this Contract, (4) Drawings, (5) Specifications, (6) Schedule, and then (7) Warranty Documents.

C. The Work

C.1. Scope of Work. Contractor will furnish all Work necessary to construct the Project as stated in, or reasonably inferable from, the Construction Documents.

C.2. Interpretation of Construction Documents by Owner Rep. Owner Rep will reasonably interpret the Construction Documents in accordance with the intention of the parties as expressed in the Construction Documents. Owner Rep will take into consideration industry and trade custom and usage only in the case of ambiguity in or conflict between the Construction Documents. Contractor will follow Owner Rep's interpretation. Contractor may make a Claim if Contractor disputes the interpretation.

C.3. Conditions Reviewed by Contractor. Contractor represents to Owner that it has made an inspection of the Property and the conditions existing at and in the vicinity of the

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Project Site, has determined normal weather conditions for the Project Site, has reviewed the Construction Documents and the Owner Information, and agrees to construct the Project for the Contract Price and within the Contract Time. Time is of the essence of this Contract.

C.4. Field Confirmations. Before proceeding with the Work, Contractor will field check and verify all dimensions, grades, lines, levels, or other conditions or limitations at the Property to avoid construction or drainage errors.

C.5. Reporting Discovered Nonconformity. Contractor has reported to Owner Rep all errors or omissions detected in the Plans and Owner Information before the Effective Date and will promptly report to Owner Rep any errors or omissions detected in the Owner Information after the Effective Date. Adjustments in the Contract Time and Contract Price may be made by Change Order resulting from errors or omissions that were detected and timely reported to Owner Rep.

C.6. Reporting Concealed Conditions. Contractor will promptly notify Owner Rep if Contractor encounters Concealed Conditions. Contractor will provide Owner with an estimate of any additional costs and impact to the Construction Schedule resulting from the Concealed Conditions. Contractor and Owner will execute a Change Order for any agreed-on changes to the Work.

D. Contractor Obligations. Contractor agrees to perform its obligations under the Construction Documents, including the following:

D.1. Work. Perform the Work in a good and workmanlike manner, free from defects in labor and materials, and in accordance with the Construction Documents and Applicable Law.

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D.2. Schedules and Bonds. Provide Owner Rep with the following within ten days after the Effective Date and before the commencement of the Work:

a. *Construction Schedule.* Construction Schedule as described in paragraph G.1.

b. *Schedule of Values.* Schedule of Values as described in paragraph F.4.

c. *Bonds.* Performance and payment bonds and insurance required under Exhibit D.

D.3. Cooperation. Cooperate with any contractor or supplier engaged by Owner to perform Work at the Project Site to minimize delay and disruption to the Project.

D.4. Subcontract Compliance. Comply with the terms of its subcontracts.

D.5. Subcontractor Payments. Pay Subcontractors and Suppliers within seven days after receipt from Owner of payment for their Work.

D.6. Subcontractor List. Provide and periodically update a list of Subcontractors as described in paragraph H.5.

D.7. Reporting Errors and Omissions. Promptly report errors or omissions in the Plans and Owner Information to Owner Rep.

D.8. As-Built Drawings. Maintain as-built drawings at the Project Site as described in subparagraph J.6.c.xii.

E. Owner Obligations. Owner agrees to perform its obligations under the Construction Documents, including the following:

E.1. Access. Provide Contractor with timely access to the Project Site.

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E.2. Utility Connections. Provide utility connections necessary for the Work to the Property line, unless utility extension is part of the Work.

E.3. Supervision of Owner Rep. Require Owner Rep to respond to submissions, including shop drawings, Draw Requests, and requests for clarification, in a timely manner so as not to cause undue delay to the Project.

E.4. Timely Decisions. Make decisions on Allowances, changes, selections, and other decisions in a timely manner so as not to cause undue delay.

E.5. Timely Payments. Make timely payments of amounts owed to Contractor in accordance with section J.

E.6. Cooperation. Require third-party contractors and vendors performing Work at the Project Site to cooperate with Contractor and to be liable for damages caused to Contractor's Work.

F. Contract Price

F.1. Determination. The Contract Price is shown on Exhibit C. The Contract Price includes the Allowances shown on Exhibit C.

F.2. Included in Contract Price. The Contract Price includes all costs of the Work ("Costs of Construction") including but not limited to the following:

a. *Subcontract Prices.* The price of all subcontracts.

b. *Contractor's Labor.* The cost of Contractor's direct labor for performance of the Work, whether on-site or at fabrication shops off-site assembling or manufacturing materials to be installed on the Project.

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c. *Contractor's Supervision.* Contractor's superintendent, Project management, and administrative staff on-site devoting full time and attention to managing the Project. Off-site Project managers' costs will be paid upon written agreement with Owner based on their time devoted to the Project.

d. *Fringe Benefits.* The cost of standard labor fringe benefits for Contractor's Labor and Contractor's Supervision for on-site personnel. Fringe Benefits means costs for Contractor's Labor and Contractor's Supervision for on-site personnel in addition to wages for the employer's required contributions for employment taxes, insurance, and other employer labor cost required by applicable labor agreement or by law. Fringe Benefits also includes employer contributions for qualified retirement plans, health insurance, and paid leave.

e. *Materials/Equipment.* Materials and equipment installed as a part of the Project as specified in the Construction Documents, including freight for delivery to the Project, an allowance for waste, and sales or use taxes paid by Contractor unless Owner has furnished Contractor with a certificate of exemption from the payment of such taxes. Unreturned excess materials are owned by Owner.

f. *Construction Equipment Costs.* Costs for machinery, equipment, tools, and temporary structures and outbuildings on the Project.

g. *Demolition and Site Clearing.* The cost of clearing the site and demolition and removal of existing structures and vegetation required for performance of the Work.

h. *Site Office.* Office supplies, copy charges, delivery charges, and other direct costs of maintaining a job site office.

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i. *Bonds and Insurance Premiums.* The percentage of Contractor's insurance premiums allocated to this Project for the insurance required in this Contract and the cost of providing any required payment and performance bonds.

j. *Building Permit.* Fees for the building permit, licenses, and inspections by governmental authorities required for the Work.

k. *Royalties/Licenses.* Costs of use of designs, products, or processes required by the Construction Documents as part of the Work.

l. *General Conditions.* Job site costs incurred in performing the Work, including costs such as for utilities not paid by Owner, a job site trailer if needed due to the scope of construction, temporary restrooms used at the site, on-site security, construction fencing, and site cleanup ("General Conditions").

F.3. Discounts. Owner will be notified if material or equipment price discounts are available for advance cash payments. If so notified, and if Owner advances the funds for such purchases, Owner is entitled to the associated discount.

F.4. Schedule of Values. Contractor will prepare a Schedule of Values. The Schedule of Values must be approved in writing by Owner Rep before commencement. The Schedule of Values will apportion the Contract Price between each constituent element of the Work.

F.5. Allowances. Contractor shall include in the Contract Price the Allowances shown in Exhibit C. Items covered by Allowances shall be supplied for such amounts and by such persons or entities as Owner may direct, but Contractor is not required to employ persons or entities to whom Contractor has reasonable objection. Unless otherwise provided in the Construction Documents, the following guidelines apply:

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a. *Materials and Equipment Less Discounts.* Allowances shall cover the cost to Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts.

b. *Unloading and Handling Costs.* Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other direct expenses contemplated for stated Allowances items.

c. *Change Orders.* Whenever costs are more than or less than Allowances, the Contract Price shall be modified by Change Order. The amount of the Change Order shall reflect the difference between actual costs and the Allowances.

d. *Prompt Selection by Owner.* Owner shall select materials and equipment under an Allowance with reasonable promptness.

G. Contract Time

G.1. Construction Schedule. Contractor will promptly prepare and submit to Owner Rep for approval a Construction Schedule, using the critical path method, detailing how Substantial Completion will be achieved by the Substantial Completion Date. Contractor will periodically revise and resubmit the Construction Schedule to Owner Rep upon change orders, Excused Delays, or other events that cause the critical path or the Substantial Completion Date to change.

G.2. Risk of Loss before Final Completion. If the Work is damaged or destroyed before its final completion, Contractor will bear the risk of loss and will diligently proceed with restoration or replacement and completion of the Work.

G.3. Acceleration of Work. If there is a delay in the Work that is not an Excused Delay, and in the determination of Owner Rep the Work will not reach Substantial Comple-

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tion by the Substantial Completion Date, Owner Rep may direct Contractor to accelerate the Work at no cost to Owner by means of overtime, additional crews, additional shifts, or resequencing of the Work to achieve Substantial Completion by the Substantial Completion Date.

G.4. Owner Suspension or Delay in Work Commencement. Owner may, with or without cause, by written directive, require Contractor to suspend or delay commencement of the Work in whole or in part for a length of time as desired by Owner. The Contract Price and Contract Time are to be equitably adjusted for increases in the Costs of Construction and for the time caused by such delay or suspension under this paragraph. However, no such equitable adjustment shall be made if Owner has the right to order delay or suspension of the Work under another provision of the Construction Documents or if an Unexcused Delay by Contractor would have caused such suspension or delay.

H. Subcontracts

H.1. Subcontracting. Contractor may subcontract all or any part of the Work.

H.2. Terms. Subcontracts with Subcontractors and Suppliers must meet the following requirements:

a. *Writing.* Be in writing.

b. *Assumption of Obligations.* Require the Subcontractor to assume toward Contractor all of the obligations and responsibilities that Contractor owes to Owner under the Construction Documents.

c. *Consistent with Contract.* Be consistent with the terms of this Contract.

d. *Terms of Contract Applicable to Subcontractors.* Require compliance with the terms of this Contract applicable to Subcontractors, including requirements for insurance and lien waivers.

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e. *Contingent Assignment to Owner.* Require that the Subcontractor provide a copy of the subcontract to Owner if Contractor's right to perform under this Contract has been terminated.

f. *Subcontracts Assignable to Owner and Contractor's Surety.* Be assignable to Owner or to Contractor's surety for the Project on the same terms.

g. *Subcontractor's Obligations Not Assignable.* Prohibit assignment of the Subcontractor's obligations.

H.3. Delivery of Pertinent Portion of Construction Documents. Contractor will provide each Subcontractor with a copy of the Construction Documents, or a copy of the portions to which Subcontractor will be bound, before entering into subcontracts.

H.4. Owner's Review of Subcontractors and Subcontractors' Bids. Owner may require Contractor to provide Bids from Major Subcontractors, Major Sub-subcontractors, and Major Suppliers. Owner, Owner Rep, and Contractor will review the Bids and agree on selection. Contractor will not use a subcontractor or supplier to whom Owner has a reasonable objection. Contractor will not be required to enter into a subcontract or other agreement if Contractor reasonably objects to use of such subcontractor or supplier. If Owner requires Contractor to use a specific subcontractor or supplier instead of the subcontractor or supplier recommended by Contractor who has submitted a lower Bid, the Contract Price will be increased by the additional amount of the Bid from Owner's required subcontractor or supplier.

H.5. Directory. Contractor will provide Owner Rep with a written list of all its Subcontractors and Suppliers, and the Major Sub-subcontractors and Major Suppliers of any tier, with the address and telephone number of each. An updated list will be provided to Owner Rep within fifteen days after any change. A final list will be provided to Owner Rep on or before the date of Final Completion of the Project.

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H.6. Owner's Objection to Any Subcontractor. Contractor will not use any Subcontractor to whom Owner or Owner Rep has a reasonable objection. If the replacement of the Subcontractor due to Owner's objection results in an increase in cost over the Contractor's anticipated total Costs of Construction, reasonable adjustment to the Contract Price will be made by Change Order.

H.7. Owner May Confirm Payments to Subcontractors and Sub-subcontractors. Owner has the right to contact any Subcontractor or Sub-subcontractor to obtain information on payments made by Contractor under the subcontract and to obtain lien waivers and bills-paid affidavits.

I. Contingent Assignment of Subcontracts

I.1. Events Triggering Assignment. Each subcontract is assigned by Contractor to Owner and the surety under a performance bond provided by Contractor, contingent on the occurrence of all of the following:

a. *Contractor Default.* Contractor is in default under the Construction Documents.

b. *Termination of Contractor.* Owner has terminated Contractor under this Contract pursuant to paragraph N.3. or section O.

c. *Assumption of Subcontract.* Owner has notified Contractor and the Subcontractor in writing that it assumes the subcontract or that it has made demand on the surety and the surety has so notified the Subcontractor.

I.2. Contacting Subcontractors and Suppliers. Owner and the surety have the right to contact any Subcontractor or Supplier to obtain a copy of the subcontract, to determine if Contractor is in default under the Subcontract, and to confirm or negotiate the terms for assumption.

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I.3. Results of Assumption. Assumption by Owner results in the following:

a. *Equitable Adjustment of Subcontract Price.* If the Work has been suspended for more than thirty days, the Subcontract price will be equitably adjusted for increases in cost caused by the suspension; contractor will be liable for the additional Costs of Construction.

b. *Replacement Contractor.* Owner may assign a subcontract that it has assumed to a replacement contractor but will remain liable for the obligations under the subcontract.

c. *Continued Liability of Contractor.* Contractor will remain liable to Owner and the Subcontractor or Supplier for any unpaid amounts due to the Subcontractor or Supplier, and for any increases in the Costs of Construction described in paragraph F.2.

J. Payment

J.1. Progress Draws and Final Payment. The Contract Price is payable through Progress Draws and Final Payment as described in this section. Owner will have the right to withhold Retainage from each Progress Draw. Retainage due to Contractor will be included in the Final Payment.

J.2. Progress Payments. On or before the twenty-fifth day of each month after the commencement of Construction (the "Draw Date"), Contractor will assemble and present to Owner Rep a Draw Request for payment for conforming Work performed since the previous Draw Date. The amount of each Draw will be computed as follows, in the following order of operations:

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a. *Assigned Percentage of Completion.* For each item in the Schedule of Values ("Scheduled Value Item") the Contractor will assign a percentage for the conforming Work accomplished through the Draw Date.

b. *Draw Individual Scheduled Amount.* Multiply each item on the Schedule of Values by its assigned percentage of completion ("Draw Individual Scheduled Value Amount").

c. *Costs of Construction for Each Scheduled Value Item.* Determine the Costs of Construction for the Draw period, separate such Costs of Construction by Scheduled Value Item, and calculate the subtotal of the Costs of Construction for each Scheduled Value Item.

d. *Lesser Of.* Compare each Draw Individual Scheduled Value Amount with the assembled Costs of Construction for each item in the Schedule of Values and include the lesser of the two figures in the amount of the Draw Request.

e. *Sum of Lesser Amounts.* The total Draw will be the sum of the lesser of the two figures for each Scheduled Value.

f. *Deduct Retainage.* Deduct Retainage from the total calculated in subparagraph e. above.

g. *Deduct Previous Payments to Contractor.* Deduct payments previously made by Owner to Contractor.

h. *Deduct Paid by Owner to Contractor's Suppliers and Subcontractors.* Deduct amounts paid by Owner to Contractor's suppliers or subcontractors.

i. *Deduct Amounts Authorized to Be Withheld.* Deduct amounts that Owner Rep has determined to withhold as provided in paragraph J.10.

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J.3. Supporting Documents. Each Progress Draw Request must include the following supporting documents:

a. *Records.* The receipts, invoices, delivery tickets, subcontractor draws, and other documentation reasonably required by Owner Rep substantiating the Costs of Construction for the Draw Period for which payment is sought.

b. *Contractor's Bills-Paid Affidavit.* Bills-Paid Affidavit by Contractor in the form attached as Exhibit E.

c. *Subcontractors' Bills-Paid Affidavits.* Bills-Paid Affidavit by each Subcontractor in the form attached as Exhibit F.

d. *Contractor's Conditional Partial Release.* Contractor's Conditional Partial Release in the form attached as Exhibit G.

e. *Contractor's Unconditional Partial Release.* Contractor's Unconditional Partial Release in the form attached as Exhibit H.

f. *Subcontractors' Conditional Partial Releases.* Subcontractor's Conditional Partial Release from each Subcontractor to be paid from the Draw in the form attached as Exhibit G.

g. *Subcontractors' Unconditional Partial Releases.* Subcontractor's Unconditional Partial Release from each Subcontractor for which Contractor received payment as a part of the prior month's Progress Draw in the form attached as Exhibit H.

J.4. Payment of Undisputed Items. Owner Rep will review the Draw Request and advise Owner whether to pay it in full or in part. Contractor will promptly provide any additional documentation reasonably requested and answer any questions on the Draw Request.

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Owner Rep will promptly notify Contractor of any disputed items in the Draw Request. Owner will have thirty days after the later of (a) the Draw Date or (b) the date that Owner Rep received the Draw Request and required documentation, to pay undisputed items. Undisputed items not paid when due will bear interest until paid at the rate specified in the Texas Prompt Payment Act, Texas Property Code chapter 28.

J.5. Claims for Payment Disputes. Either party may make a Claim in connection with a payment dispute.

J.6. Final Payment. Final payment will be made according to the following job inspection and closeout process, and is subject to the conditions precedent to final payment, as follows:

a. *Substantial Completion; Final Completion.* When Contractor determines that the Work has progressed to the point of reaching Substantial Completion, Contractor will give written notice to Owner Rep, and Owner Rep will promptly inspect the Work. If Owner Rep determines that the Work is Substantially Complete, Owner Rep will issue a certificate of substantial completion and prepare a punch list for Work that needs to be completed along with an agreed-on time for completion. If Owner Rep determines that the Work is not acceptable or is not Substantially Complete, Owner Rep will prepare a written list of Work that needs to be remedied or completed to achieve Substantial Completion. Contractor shall perform the Work to achieve Final Completion of the Work, including completion of all punch list items, within thirty days after receipt of Owner Rep's list or within an agreed-on period for completion. Owner Rep will determine the dates for Substantial and Final Completion.

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b. *Final Draw.* Upon Owner Rep's written acknowledgement that the punch list has been completed, Contractor will submit a Final Draw Request. The amount of the final draw ("Final Payment") will be the balance of the Contract Price, after deducting amounts paid by Owner to Suppliers, Subcontractors, and Sub-subcontractors, amounts for unreleased mechanic's liens, amounts withheld by Owner pursuant to paragraph J.10., and previous payments to Contractor.

c. *Conditions Precedent to Final Payment.* The following are Conditions Precedent to Final Payment:

i. *Final Draw Request.* Receipt and approval by Owner, upon recommendation of Owner Rep, of a Final Draw Request.

ii. *List of Subcontractors and Suppliers.* Receipt by Owner Rep of Contractor's final and accurate list of Subcontractors and Suppliers in compliance with paragraph H.5.

iii. *Conditional Final Releases.* Executed and acknowledged Conditional Final Releases from Contractor and all Subcontractors, in the form attached as Exhibit I. The amounts contained in these Releases must match amounts stated as owed in the Final Bills-Paid Affidavits.

iv. *Final Bills-Paid Affidavits.* Executed and acknowledged Final Bills-Paid Affidavits from Contractor, Subcontractors, and Suppliers, in the forms attached as Exhibits J and K.

v. *Subcontractors' Unconditional Partial and Final Releases.* Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Subcontractors who have been previously paid.

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vi. *Suppliers' and Sub-subcontactors' Unconditional Partial and Final Releases for Amounts Previously Paid.* Unconditional Partial Releases (Exhibit H) and Unconditional Final Releases (Exhibit L) from Suppliers and Sub-subcontractors of all tiers who have been previously paid.

vii. *Suppliers' and Sub-subcontactors' Conditional Final Releases for Amounts Not Previously Paid.* Conditional Final Releases from all Subcontractors, Sub-subcontractors, and Suppliers of all tiers who have not been previously paid, in the form attached as Exhibit I.

viii. *Release of All Filed Mechanic's Liens.* Receipt by Owner Rep of executed, acknowledged releases of all filed mechanic's liens against the Project, or Contractor will provide satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code.

ix. *Bond to Pay Claims.* If a Subcontractor or Supplier of any tier refuses to provide a Conditional or Unconditional Release for the applicable amount stated in the Bills-Paid Affidavits, or if there is otherwise a dispute about payment, satisfactory evidence that Contractor has bonded around such lien claims pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

x. *Subcontractors', Sub-subcontractors', and Suppliers' Conditional Final Releases.* Conditional Final Releases from each Subcontractor, Sub-subcontractor, or Supplier from whom Owner has received a notification of nonpayment or the right to assert a claim, unless Contractor has provided Owner with satisfactory evidence that Contractor has bonded

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around such a lien claim pursuant to chapter 53 of the Texas Property Code or has provided other arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

xi. *Warranty Documents.* Contractor has assigned and delivered to Owner all required warranty documents required that have been assigned to Owner.

xii. *As-Built Drawings.* As-built drawings have been delivered to Owner Rep.

xiii. *Owner Manuals and Training Completed.* All Owner Manuals and keys have been delivered to Owner Rep, and Project control/security and other systems checkout and training contemplated by the Construction Documents has been performed.

J.7. Date of Final Payment. The Final Payment, including release of all Retainage payable to Contractor, is due within fifty days after the Conditions Precedent to Final Payment have been satisfied or waived by Owner in writing.

J.8. Filing Affidavit of Final Completion. Owner will file in the real property records of each county in which the Project is located and provide notice to Contractor of its Affidavit of Final Completion within three Business Days after both of the following have occurred: (a) the Conditions Precedent to Final Payment have been met, and (b) Owner Rep has received Contractor's Final Draw Request.

J.9. Resolution of Lien Claims. Any notice of lien claims or lien affidavits filed after notice and recordation of the Owner Affidavit will be resolved by Contractor and Owner

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Rep in accordance with one of the methods described in subparagraph J.6.c.viii., ix., or x. above, at Owner's sole discretion.

J.10. Withholding Payment. Owner has the right to withhold from payments otherwise due to Contractor amounts deemed reasonably necessary, on advice from Owner Rep, to protect Owner from damage or liability due to any of the following:

a. *Defects.* Uncorrected defective work.

b. *Overruns.* Reasonable evidence that the cost to complete will exceed the balance of the Contract Price.

c. *Injuries or Property Damages.* Claims of injury or property damage to Owner, a third party, or another contractor.

d. *Delays.* Reasonable evidence that Substantial Completion will not be reached according to the Construction Schedule, as revised.

e. *Work Defaults.* Repeated failure by Contractor to perform the Work according to the Construction Documents.

f. *Mechanic's Liens.* Mechanic's liens filed or noticed on the Project not removed by Contractor's furnishing a bond acceptable to Owner pursuant to chapter 53 of the Texas Property Code or other Contractor arrangements accepted by Owner in writing as sufficient to secure indemnity from such lien or claim.

When the basis for withholding has been resolved, Owner will promptly pay to Contractor any amounts not needed to protect Owner from damage or liability.

J.11. Owner Payment to Subcontractors. Owner will promptly notify Contractor if Owner receives a notice of nonpayment from a Subcontractor or Supplier of any tier. If Con-

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tractor does not provide Owner Rep with an Unconditional Release for the amount owed, or satisfactory evidence that Contractor has bonded around the claim within fifteen days after notification, Owner may make payment by joint check to Contractor and the claimant, unless a payment bond has been provided for the Project.

J.12. Acceptance of Final Payment. Final Payment will be deemed accepted by Contractor when the check has been deposited or wire transfer received. Acceptance of Final Payment by Contractor constitutes a waiver of all claims by Contractor not previously received in writing by Owner Rep.

K. Change Orders and Required Changes

K.1. Contract Price and Contract Time. Owner, without invalidating the Contract, may order changes in the Work. All changes will be made by written Change Order, signed by Owner and Contractor, that states the adjustment in the Contract Price and the Contract Time.

K.2. Contractor to Proceed. If Owner and Contractor cannot agree on the adjustment to the Contract Price, Owner may require Contractor to proceed with the Work by written Required Change signed by Owner. The Contract Price will be adjusted on a time and materials basis.

L. Claims

L.1. Contractor's Claims. Contractor's Claims for extensions of time or changes to the Contract Price must be submitted to Owner Rep in writing within seven days after the date when the events giving rise to the Claim occurred. Within fourteen days after the submission of such Claim, Contractor will furnish Owner Rep with Contractor's calculations of additional time needed to complete the Work and, if applicable, the anticipated increase to the Costs of Construction and documentation supporting Contractor's Claim. Contractor will fur-

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nish additional information in support of such Claims as reasonably required by Owner or Owner Rep. Contractor will proceed with the Work during the pendency of any such Claims.

L.2. Material Breaches. Notwithstanding anything to the contrary in the Construction Documents, Contractor agrees that it will not attempt in any way to recover or pursue a Claim for delay if Contractor or a Subcontractor, Sub-subcontractor, or Supplier to Contractor has, before the claimed Delay, materially breached any contractual duty or obligation in the Construction Documents, or any duty or obligation at common law or created by statute, to the extent such breach causes, affects, or otherwise contributes to such delay, and such breach remains uncured at the time a Claim accrues.

L.3. Owner Claims. Owner agrees to notify Contractor of any Claim, including Claims for Unexcused Delay and defects in the Work, within five Business Days after Owner becomes aware of the basis for the Claim.

L.4. Initial Decision Maker Process. All Claims arising under this Contract will be first submitted to Owner Rep as the Initial Decision Maker. Owner Rep's decision is a condition precedent to proceeding with mediation, as provided for in paragraph L.5. Owner Rep will issue a decision within thirty days after receiving the Claim and supporting documentation. Owner Rep may extend the initial decision deadline for up to an additional thirty days in order to receive supporting documentation and data and replies from the opposing party. If Owner Rep is unable to render a decision within the allotted period, or if either party is dissatisfied with the decision, either party may request mediation.

L.5. Mediation. If the dispute is not resolved by the decision of the Initial Decision Maker, either party may request mediation of the dispute using a neutral mediator to be agreed on by the parties. Contractor will continue to perform the Work during the pendency of mediation.

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L.6. Litigation. If a resolution is not reached through mediation, either party may pursue litigation.

M. Material Breach

M.1. Owner's Default. Each of the following constitutes a material breach of this Contract by Owner:

a. *Time Defaults.* Failure to timely render or otherwise furnish responses, decisions, or selections according to the Construction Documents.

b. *Payment Defaults.* Failure to comply with Owner's payment obligations under the Construction Documents.

c. *Substantial Breach.* Substantial breach of any of Owner's obligations under this Contract.

M.2. Contractor's Default. Each of the following constitutes a material breach of this Contract by Contractor:

a. *Work Commencement Default.* Failure by Contractor to commence the Work in accordance with the provisions of this Contract.

b. *Work Prosecution Default.* Failure by Contractor to prosecute the Work to completion in a diligent, efficient, timely, workmanlike, skillful, and careful manner and in strict accordance with the provisions of the Contract.

c. *Time Defaults.* Failure by Contractor to use an adequate number of qualified personnel or adequate amount of equipment to complete the Work without causing Unexcused Delay.

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d. *Performance Defaults.* Contractor's persistent failure to perform any of its material obligations under the Contract.

e. *Payment Defaults.* Contractor's persistent failure to make prompt payments when due to its Subcontractors and Suppliers, unless Contractor has a bona fide dispute with any such Subcontractor or Supplier.

f. *Bankrupt.* Contractor creates any situation or state of facts that would authorize or permit an involuntary petition in bankruptcy to be filed against Contractor.

g. *Breach of Timely Completion.* Contractor has not met, or in Owner Rep's and Owner's reasonable opinion, based on the schedules required by the Construction Documents, will not meet the dates of Substantial Completion set forth in the Construction Documents.

N. Remedies

N.1. Owner Remedies

a. *Owner's Right to Suspend Work.* If Contractor fails, after notice to correct Work that is defective or not in conformance with the requirements of the Construction Documents, or repeatedly fails to perform the Work in accordance with the Construction Documents, Owner or Owner Rep may issue a written notice to Contractor to suspend the Work, in whole or part, until Contractor cures the reasons for issuance of the suspension notice. Owner's right in this section does not create a duty by Owner to suspend work for the benefit of Contractor or Subcontractors of any tier.

b. *Owner Cure.* If Contractor is in default and does not within ten Business Days after receipt of Owner's or Owner Rep's written notice to commence

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and continue diligent, continuous effort to correct the default, Owner may cure such default and withhold payment from Contractor for the reasonable cost and expenses incurred for Owner's cure. If insufficient amounts remain to be paid to Contractor, Contractor must pay Owner the reasonable costs and expenses to cure in excess of the remaining funds to be paid to Contractor.

N.2. Contractor Remedies. Contractor will give written notice to Owner or Owner Rep if Owner is in material breach of Owner obligations under the Construction Documents. The notice will state the specific items of Owner default and notify Owner that Owner must cure the items within ten Business Days of receipt of the notice or Contractor may suspend Work until Owner's material breach is cured or corrected. Contractor may terminate the Contract in accordance with paragraph N.3. if suspension of the Work by Contractor under this section continues without Owner cure for thirty or more days.

N.3. Termination. If one party defaults and the default is not cured by exercise of the remedies specified in paragraph N.1. or N.2., upon an additional ten Business Days' prior written notice specifically describing the default, and provided the defaulting party has not commenced diligent, good-faith, continuous, and effective action to cure the default within the ten-day period, this Contract may be terminated by an additional written notice from the nondefaulting party to the defaulting party. If there is such a termination, the following formula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:

a. *Damages to Contractor.* If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days after written notice from Contractor, an amount equal to all amounts due and owing for the Work performed in accordance with the Construction Documents at the time of the termination, plus 10 percent of the remaining Contract Price to compensate Contractor for the lost profit.

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b. *Damages to Owner.* If termination resulted from an act of default of Contractor, Owner may do any of the following:

i. *Take Over Work.* Use all materials, equipment, tools, and construction equipment owned by Contractor and occupy the Project site.

ii. *Accept Subcontracts and Supplier Agreements.* Accept assignment of Subcontracts and assume, in Owner's sole discretions, any agreements with Suppliers and Sub-subcontractors.

iii. *Costs to Complete.* Finish the Work as expeditiously as reasonably possible provided the costs for completion and correction of the Work are reasonable and necessary. If requested, Owner will furnish Contractor a statement of costs in correcting and completing the Work, along with reasonable documentation of such costs. If Owner terminates according to this paragraph, no further payments will be due Contractor until final completion is reached. If, at that time, Owner's costs to complete and correct the Work exceed the unpaid balance of the Contract Price, Contractor will pay the difference to Owner upon written demand.

iv. *Liquidated Damages.* Assess liquidated damages if Substantial Completion has not been achieved as provided in Exhibit C.

c. *Recourse to Performance Bond.* Upon the occurrence of a Contractor default, Owner may make demand on the surety to perform its obligations under a Performance Bond provided for the Project.

N.4. Damages for Contractor's Unexcused Delay. If the Work is not Substantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay, Owner may assess liquidated damages as provided in Exhibit C.

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N.5. Excused Delay. If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, and no monetary damage or other compensation is due Contractor for such delay.

N.6. Damages for Owner's Delay. If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, unless the delay is due to acts of Owner constituting unreasonable interference with Contractor's ability to perform the Work that continues after notice of the interference is given by Contractor. The exercise by Owner of any right provided by this Contract, including suspension of Work, does not constitute unreasonable interference with Contractor's ability to perform the Work. Contractor will be entitled to the General Conditions and other direct Costs of Construction described in paragraph F.2. for each day of delay due to Owner's interference.

Include the following if applicable.

N.7. Waiver of Consequential Damages. Except as provided in this section N., Owner and Contractor each waive the right to recover consequential damages in a suit or action brought against the other arising out of a default under the Construction Documents, regardless of whether the claim for recovery is based in contract or tort.

Continue with the following.

O. Owner's Right to Terminate for Convenience. Owner has the right to terminate this Contract for Owner's convenience by giving Contractor thirty days' prior written notice of termination. Upon such termination, Contractor will be entitled to payment as described in subparagraph N.3.a.

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P. Warranties

P.1. Express Warranty. Contractor warrants to Owner that labor, materials, and equipment furnished under the Contract will be new and of high quality and will be free from defects and that all Work will be performed in a good and workmanlike manner and will conform to the Construction Documents. Work will be considered defective if it does not conform to the Construction Documents.

P.2. Ten-Year Structural Component Warranty. Contractor additionally expressly warrants all structural components of the Project, including the foundation, for ten years following Substantial Completion.

P.3. One-Year Callback and Correction of Work. For a period of one year following Substantial Completion, Contractor will repair or replace any defective Work at no charge if Owner provides written notice to Contractor of a warranty claim during the one-year period. Nothing contained in this paragraph P.3. shall be construed to establish a period of limitations for other obligations Contractor has under the Construction Documents. Establishment of the one-year period for correction of Work relates only to the specific obligation of Contractor to correct the Work and has no relationship to the time within which the obligation to comply with the Construction Documents may be sought to be enforced nor to the time within which proceedings may be commenced to establish Contractor's liability for Contractor's obligations other than specifically to correct the Work.

P.4. Assignment of Third-Party Warranties. Contractor hereby assigns all equipment, roofing, and other vendor warranties to Owner and will deliver all manuals, books, instructions, and warranty policy documentation to Owner as part of the Conditions to Final Payment.

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P.5. Cumulative of Other Warranties and Remedies. The warranties set forth in this section P. are cumulative of, and in addition to, all other warranties or remedies available at law or by this Contract, including implied warranties, and can be assigned by Owner.

Q. Safety

Q.1. Construction Means, Methods, Techniques, Sequences, and Procedures. Owner will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences, or procedures used or for safety precautions and programs in connection with the Work, since these are solely Contractor's responsibility.

Q.2. Compliance with Applicable Laws. Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury, or loss.

Q.3. Remedy Contractor-Caused Property Damage. Contractor shall promptly remedy damage and loss to property at the site, or off-site, if caused in whole or in part by Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them or by anyone for whose acts they may be liable and for which Contractor is responsible.

Q.4. Reasonable Precautions and Reasonable Protection. As between Contractor and Owner, Contractor shall be responsible for all safety at the Project Site, including safety of personnel, material, and the Work. Contractor shall be responsible for providing any security necessary to prevent damage or loss to materials, equipment, the Improvements, and other property in the vicinity of the Project until Final Completion.

R. Indemnity

R.1. Claims Other than Employee Claims. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, CONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS LENDER, OWNER, OWNER'S MEMBERS, MANAGERS, PARTNERS, AFFILIATED COMPANIES OF OWNER,

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AND ANY PARTNER, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, AND AGENTS (COLLECTIVELY, THE "INDEMNITEES") FROM ALL CLAIMS, SUITS, ACTIONS, PROCEEDINGS, DAMAGES, LOSSES, AND EXPENSES WHATSOEVER, INCLUDING ATTORNEY'S FEES, CONNECTED WITH PERFORMANCE OF THIS CONTRACT OR THE CONSTRUCTION CONTEMPLATED BY THIS CONTRACT TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE BREACH OF CONTRACT, NEGLIGENCE, OR OTHER ACT OR OMISSION OF CONTRACTOR, ITS SUBCONTRACTORS, SUB-SUBCONTRACTORS OF ANY TIER, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE, BUT NOT TO THE EXTENT CAUSED IN WHOLE OR IN PART BY THE ACT OR OMISSION, INCLUDING NEGLIGENCE, OF AN INDEMNITEE.

Include the following employee claims indemnity paragraph if applicable.

R.2. Employee Claims. IN ADDITION, REGARDING CLAIMS FOR THE BODILY INJURY OR DEATH OF AN EMPLOYEE OF CONTRACTOR, ITS AGENT(S), OR ITS SUBCONTRACTORS OF ANY TIER (HEREINAFTER REFERRED TO AS "EMPLOYEE CLAIM" OR "EMPLOYEE CLAIMS"), CONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS INDEMNITEES FROM ALL SUCH EMPLOYEE CLAIMS, SUITS, ACTIONS, PROCEEDINGS, DAMAGES, LOSSES, AND EXPENSES WHATSOEVER CONNECTED WITH PERFORMANCE OF THIS CONTRACT, INCLUDING SUCH EMPLOYEE CLAIMS, DAMAGES, LOSSES, OR EXPENSES ACTUALLY OR ALLEGEDLY ARISING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF INDEMNITEES. IT IS THE EXPRESSED INTENT OF CONTRACTOR AND OWNER THAT IN THE CASE OF AN EMPLOYEE CLAIM, THE INDEMNITY PROVIDED FOR IN THIS SECTION IS AN INDEMNITY EXTENDED BY CONTRACTOR TO INDEMNIFY AND PROTECT INDEMNITEES FROM THE CONSEQUENCES OF INDEMNITEES' OWN NEGLIGENCE WHETHER OR NOT THAT NEGLIGENCE IS THE SOLE OR CONTRIBUTING CAUSE OF THE RESULTANT EMPLOYEE CLAIMS. CONTRACTOR FURTHER AGREES IN THIS CONNECTION TO DEFEND AT ITS OWN EXPENSE INDEMNITEES FROM ANY CLAIMS OR LITIGATION IN CONNECTION WITH ANY SUCH EMPLOYEE CLAIMS.

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Continue with the following.

[*R.2./R.3.*] *Limitations.* In claims against any person or entity indemnified under this section by an employee of Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this agreement shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Contractor or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts. The indemnity in this section R. survives the completion of the Work or termination of this Contract. It is the intent of the parties to this Contract not to violate the provisions of chapter 151 of the Texas Insurance Code. In the event the provisions of this Contract violate the provisions of chapter 151 of the Texas Insurance Code, this Contract is revised to limit this Contract to comply with chapter 151 of the Texas Insurance Code.

S. Insurance and Bonds

S.1. Contractor's Insurance and Bonds. Contractor shall purchase and maintain insurance and bonds of the types and limits, containing the endorsements, and in compliance with the terms and conditions as specified for Contractor to obtain, maintain, and comply with in Exhibit D (Insurance and Bond Requirements) of this Contract or elsewhere in the Construction Documents.

S.2. Owner's Insurance. Owner shall purchase and maintain insurance and bonds of the types and limits, containing the endorsements, and subject to the terms and conditions as specified for Owner to obtain, maintain, and comply with in Exhibit D (Insurance and Bond Requirements) of this Contract or elsewhere in the Construction Documents.

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T. Miscellaneous

T.1. Effect of Invalid Provision. Should any clause in this Contract be found invalid by a court of law, the remainder of the Contract shall not be affected thereby, and all other provisions of this Contract shall remain valid and enforceable.

T.2. Entire Agreement; Modification. The Construction Documents contain the entire agreement between the parties for the construction of the Project and cannot be modified except by written Change Order or modification.

T.3. Nonassignment. This Contract shall not be assigned by Contractor without the written consent of Owner. This limitation shall not apply to Contractor's right to retain Subcontractors for the prosecution of portions of the Work in the normal course of its construction business.

T.4. Execution of Other Documents; Further Action. Each party shall, on demand, execute or obtain such other documents or instruments and corrective filings or instruments and use all commercially reasonable efforts to do or cause such other things as may be reasonably necessary or desirable to effect the provisions and purposes of this Contract.

T.5. Fees and Expenses of Actions. If any litigation (an "Action") is commenced, including an Action for declaratory relief, to enforce or interpret the terms of this Contract, or any document or instrument executed in connection with or pursuant to this Contract, or involving any controversy or Claim between or among the parties to this Contract, whether sounding in contract, tort, or statute, whether through arbitration, probate, bankruptcy, receivership, or other judicial or administrative proceeding, the prevailing party in such Action (the "Prevailing Party") shall be entitled to recover reasonable attorney's fees, paralegal costs, expert witness and consulting expert fees and costs, and other expenses, costs, and necessary disbursements incurred by the Prevailing Party in the investigation, preparation, pursuit, or defense of any claim asserted by any party in such Action in addition to any other relief to

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which the Prevailing Party may be otherwise entitled, at law or hereunder, in the amount determined by the fact finder(s) or the court.

T.6. Gender and Number. Unless otherwise required by context, the genders shall include each other and the singular shall include the plural and the plural the singular.

T.7. Headings. Headings, tables of contents, captions, titles, and marginal notations are for convenience only and shall not limit or restrict the interpretation or construction of the passage(s) to which such headings, tables of contents, captions, titles, and notations may relate.

T.8. Notices. Any notice to be given or to be served on any party hereto, in connection with this instrument, must be in writing and may be given in person or by courier, overnight delivery service, e-mail, or certified or registered mail. Such notice shall be deemed to have been given and received when actually received, in the case of hand delivery, overnight delivery service, or express mail; when a certified or registered letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail; and, if given by e-mail, when received by the party to whom it is addressed. Notice shall be given to Owner, Owner Rep, and Contractor at the addresses set forth at the beginning of this Contract. Any party hereto may at any time by giving five days' written notice to the other party hereto designate any other address, phone number, or e-mail address in substitution of the address, phone number, or e-mail address set forth at the beginning of this Contract to which such notice shall be given. Owner Rep must be copied on any notice given to Owner.

T.9. Schedules, Addenda, Exhibits, and Attachments. All schedules, addenda, exhibits, and attachments and other documents or items identified as being attached hereto (the "Exhibits") shall be a part of this Contract for all purposes. Exhibits may be changed from time to time as the parties may agree. When Exhibits are changed, they shall be redrafted in accordance with agreed changes, dated as of the effective date of such changes, and signed by

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the parties. Copies of changed Exhibits shall be furnished to each party, and such changed Exhibits shall become a part of this Contract for all purposes. An Exhibit that has been changed shall cease to be a part of this Contract, and the most recently dated Exhibit, signed by all parties, shall govern.

T.10. Third-Party Beneficiaries; None Created. Nothing express or implied in this Contract is intended to confer, nor shall anything herein confer, on any person other than the parties hereto and the respective successors or assigns of the parties hereto, any rights, remedies, obligations, or liabilities whatsoever.

T.11. Waiver. No waiver of any term of this Contract shall be valid unless it is in writing and signed by both parties. The failure of any party at any time or times to require performance of any provision hereof shall in no manner affect the right to enforce the provision. No waiver by any party of any condition contained in this Contract, or of the breach of any term, provision, representation, warranty, or covenant contained in this Contract, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or as a waiver of any other condition or of the breach of any other term, provision, representation, warranty, or covenant.

T.12. Lender Cooperation. Contractor agrees to cooperate, and cause its Subcontractors to cooperate, with the reasonable requirements of any Lender that Owner may elect to obtain financing from, including the requirement that Contractor subordinate, and cause its Subcontractors to subordinate, any lien they may have by statute against the Property to the lien of the Lender.

T.13. Independent Contractor. Contractor occupies the status of an independent contractor, as that term is defined in the construction industry.

_____

[Name of owner]

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_____

[Name of contractor]

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Exhibit A

Project Site Legal Description

Attach project site legal description.

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Exhibit B

Plans and Specifications

1. Specifications:

List the specifications or refer to an exhibit attached to this contract.

Section	Title	Date	Pages

2. Drawings:

List the drawings or refer to an exhibit attached to this contract.

Number	Title	Date

3. Addenda including Supplemental Conditions, if any:

Number	Date	Pages

Addenda relating to bidding/proposal requirements are not part of the Construction Documents unless the bidding/proposal documents are also listed as Construction Documents in paragraph B.1. of this Contract.

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Exhibit C

Contract Price; Liquidated Damages

The Contract Price for the Project is $[**amount**].

The Contract Price includes the following Allowances:

Allowance for [**specify**]	$[**amount**]
Allowance for [**specify**]	$[**amount**]

Check if applicable:

☐ Liquidated Damages

Owner has the right to assess Liquidated Damages in the amount of $[**amount**] per day for each day after the Substantial Completion Date that Substantial Completion has not been achieved due to Contractor's Unexcused Delay. Owner has the right to withhold Liquidated Damages from the amounts due to Contractor. Owner and Contractor stipulate that the damages for the prospective breach of the Contract are difficult to measure and the Liquidated Damages amount is a reasonable estimate of actual damages.

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Exhibit D

Insurance and Bond Requirements

Exhibit - Bond and Insurance Requirements

This Exhibit (the "**Insurance Specifications**") is attached as an Exhibit as part of the Agreement. In the event of conflict between any of the following Insurance Specifications with any provision in the Agreement, these Insurance Specifications control, amend and supplement the conflicting provision.

A. Specifications, Coverages, Limits & Other Requirements

No.	Specifications	Coverages, Limits and Other Requirements		
A. LIABILITY INSURANCE				
§ 1.	**Commercial General Liability.** To the extent permitted by law, Contractor is to maintain commercial general liability ("**CGL**") insurance and, if necessary, commercial umbrella/excess insurance (see **Spec. 4** below), issued on an occurrence basis meeting at least the following specifications.			
§ 1.1	**Minimum Limits**	The limits of coverage shall not be less than the following amounts:		
		a.	$__,000,000	Per Occurrence
		b.	$__,000,000	General Aggregate
		c.	$__,000,000	Products and Completed Operations Aggregate
		d.	$__,000,000	Personal and Advertising Injury
§ 1.2	**General Aggregate**	The General Aggregate shall apply separately to this Project.		
§ 1.3	**Post-Completion Coverage**	Contractor agrees to maintain Products-Completed Operations coverage with respect to the Work performed under the Agreement in identical coverage, form and amount, including required endorsements, for the full term of the Statute of Repose following Date of Substantial Completion of the Work. Contractor shall provide written representation to Owner stating Work completion date.		
§ 1.4	**Form**	This insurance is to be issued on an ISO CG 00 01 and shall coverage liability arising from premises, ongoing and completed operations, hire of Subcontractors (independent contractors coverage), and incidental design liability arising from the contractor's construction means and methods.		
§ 1.5	**Insured Contracts**	Coverage shall include but not be limited to liability assumed by Contractor under the Agreement to which this Exhibit is attached, including the tort liability of another assumed in a business contract, and shall include unmodified Separation of Insureds coverage.		
§ 1.6	**Additional Insureds**	Additional insured status shall be provided in favor of Owner Parties and such other personas as are designed by Owner to Contractor to be additional insureds on a combination of ISO forms CG 20 10 10 01 and CG 20 37 10 01.		
§ 1.7	**Primary and Noncontributory**	This insurance shall be endorsed to provide primary and noncontributing liability coverage by ISO CG 20 01 04 13. It is the specific intent of the parties to the Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Owner Parties, with Owner Parties' insurance being excess, secondary and noncontributing.		
§ 1.8	**Waiver of Subrogation**	This insurance is to be endorsed with an ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds.		
§ 1.9	**Electronic Data**	This insurance is to include an Electronic Data Liability Endorsement ISO CG 04 37 with coverage to the full limits of the policy.		
§ 1.10	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to Owner required for cancellation or material change.		

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§ 1.11	**Personal Injury Contractual Liability**	The personal injury contractual liability exclusion shall be deleted.	
§ 1.13	**Certificate of Insurance**	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Contractor to Owner as Certificate Holder at the following address: _____.	
§ 1.12	**Prohibitions**	The following exclusions/limitations or their equivalents are **not** permitted:	
		a.	Contractual Liability Limitation ISO CG 21 39.
		b.	Amendment of Insured Contract Definition ISO CG 24 26.
		c.	Limitation of Coverage to Designated Premises or Project ISO CG 21 44.
		d.	Exclusion-Damage to Work Performed by Subcontractors On Your Behalf ISO CG 22 94 or CG 22 95.
		e.	Exclusion-Explosion, Collapse and Underground Property Damage Hazard ISO CG 21 42 or CG 21 43.
		f.	Any classification limitation.
		g.	Any construction defect completed operations exclusion.
		h.	Any endorsement modifying the employer's liability exclusion or deleting the exception to it.
		i.	Any endorsement modifying or deleting explosion, collapse or underground coverage.
		j.	Any habitational or residential exclusion.
		k.	Any insured vs. insured exclusion except named insured vs. named insured.
		l.	Any punitive, exemplary or multiplied damages exclusion.
		m.	Any subsidence exclusion.
§ 2.	**Business Auto Liability.** Contractor is to maintain business auto insurance meeting at least the following specifications.		
§ 2.1	**Minimum Limits**	The limits of liability shall be no less than $ __,000,000 per accident.	
§ 2.2	**Form**	This insurance is to be issued on the current edition of the ISO CA 00 01	
§ 2.3	**Scope**	This insurance is to coverage damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use of any auto, including owned, hired and non-owned autos.	
§ 2.4	**Additional Insureds**	Additional insured status shall be provided in favor of Owner Parties and such other persons as are designated by Owner to Contractor as additional insureds, on ISO CA 20 48 10 13.	
§ 2.5	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor on ISO CA 04 44 10 13.	

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§ 3.	**Workers' Compensation and Employer's Liability.** Contractor is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.			
§ 3.1	**Workers' Compensation Limits**	The minimum limits of this insurance shall be no less than the statutory limits.		
§ 3.2	**Employer's Liability Limits**	The minimum limits of this insurance shall be no less than $__,000,000 each accident and disease.		
§ 3.3	**Territory**	The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.		
§ 3.4	**Scope**	This insurance is to cover liability arising out the Contractor's employment of workers and anyone for whom the contractor may be liability for workers' compensation claims. Worker's compensation insurance is required and no "alternative" form of insurance is permitted.		
§ 3.5	**Prohibitions**	Employees leased through a Professional Employment Organization ("**PEO**") are not permitted.		
§ 3.6	**Stop Gap**	Stop Gap coverage must be provided if Work is to be performed in a monopolistic state, listing the state in which Work is to be performed.		
§ 3.7	**USL&H**	United States Longshoremen and Harborworkers ("**USL&H**") coverage must be provided where such exposure exists listing the state in which Work is to be performed.		
§ 3.8	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor, on form WC 42 03 04.		
§ 4.	**Excess Liability.** To the extent permitted by law, if any of the required coverages are to be maintained by and through excess liability insurance, Contractor is to maintain excess liability insurance meeting at least the following specifications.			
§ 4.1	**Scope**	This insurance shall be excess over and be no less broad than all coverages and conditions described above. The policy limits required herein may be provided by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident by less than the amount required herein.		
§ 4.2	**Concurrency**	Such coverage shall have the same inception date as the commercial general liability and employer's liability coverages.		
§ 4.3	**Primary**	This insurance shall be primary and non-contributing liability coverage. It is the specific intent of the parties to the Agreement that all insurance held by the Owner Parties shall be excess, secondary and non-contributory.		
§ 4.4	**Drop Down Coverage**	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits.		
§ 4.5	**Defense Costs**	This insurance is to include a duty to defend any insured.		
§ 4.6	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties and such other persons as are designated by Owner to Contractor.		
§ 4.7	**Notice**	This insurance shall be endorsed to provide a 30 days' notice of cancellation to Owner.		
§ 5.	**Professional Liability.** Contractor is to maintain Professional Liability insurance meeting at least the following specifications.			
§ 5.1	**Minimum Limits**	Limits of coverage shall be no less than:		
		a.	$ __,000,000	Each Loss
		b.	$ __,000,000	Annual Aggregate
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate.		

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§ 5.2	**Scope**	Such insurance shall cover all services rendered by the Contractor and its Subcontractors under the Agreement, including but not limited to design or design/build services.		
§ 5.3	**Retroactive Date**	Any retroactive date must be effective prior to beginning of services for the Owner.		
§ 5.4	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:		
		a.	Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors;	
		b.	Habitational or residential operations;	
		c.	Mold or microbial matter and fungus or biological substance; or	
		d.	Punitive, exemplary or multiplied damages.	
		A professional liability endorsement to a general liability policy is not acceptable.		
§ 5.5	**Term**	Policies written on a claims-made basis shall be maintained for at least __ years beyond termination of the Agreement. The purchase of an extended discovery period or an extended reporting period on a claims-made policy will not be sufficient to meet the terms of this provision.		
§ 5.6	**Waiver of Subrogation**	Contractor shall cause this insurance to be endorsed to waive all rights of subrogation in favor of Owner Parties.		
§ 5.7	**Notice**	This insurance shall be endorsed to provide a 30 days' notice of cancellation to Owner.		
§ 6.	**Pollution Liability**. Contractor is to maintain Contractor's Pollution Liability insurance meeting at least the following specifications.			
§ 6.1	**Minimum Limits**	Limits of coverage shall be no less than:		
		a.	$,000,000	Each Loss
		b.	$,000,000	Annual Aggregate
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $__,000,000 Each Loss and Annual Aggregate.		
§ 6.2	**Scope**	The policy must provide coverage for:		
		a.	The full scope of the named insured's operations (on-going and completed) as described within the scope of work for the Agreement.	
		b.	Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall.	
		c.	Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations.	
		d.	Diminution of value and natural resources damages;	
		e.	Contractual liability.	
		f.	Claims arising from owned and non-owned disposal sites utilized in the performance of the Agreement.	

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		Coverage extensions to the General Liability insurance policy without a separate insurance agreement for Contractors Pollution Liability insurance will not fulfill this requirement	
§ 6.3	**Additional Insured and Primary and Noncontributory**	The policy must insure contractual liability, name Owner Parties as additional insureds and such other personas as are designed by Owner to Contractor to be additional insureds, and be primary and noncontributory to all coverage available to the additional insureds.	
§ 6.4	**Retroactive Date**	If coverage is provided on a claims made basis, coverage will at least be retroactive to the earlier of the date of the Agreement or the commencement of contractor services relation to the Work.	
§ 6.5	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Insured vs. insured actions. However, exclusion for claims made between insured within the same economic family are acceptable.
		b.	Impaired property that has not been physically injured.
		c.	Materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval.
		d.	Property damage to the work performed by the contractor.
		e.	Faulty workmanship as it relates to clean up costs.
		f.	Punitive, exemplary or multiplied damages.
		g.	Work performed by Subcontractors.
		h.	Contractual liability incurred as a result of an injury to an employee of the insured.
§ 6.6	**Term**	Completed operations coverage shall be maintained for a minimum of __ years after the completion of Work. (The extended reporting period on a claims-made based policy does not fulfill this requirement). Contractor's pollution liability insurance policies insuring a specific job shall have completed operations coverage for at least the duration of the Work plus __ years.	
§ 7.	**Subcontractor's Insurance.**		
§ 7.1	**Coverage**	Contractor shall cause each first tier subcontractor employed by Contractor to purchase and maintain insurance of the types listed above; provided, however, Employers Liability Limits on such subcontractors are not to be less than $500,000 each Accident or Disease, and such subcontractors' excess policy limit shall be no less than $1,000,000.	
§ 7.2	**Additional Insureds**	This insurance is to be endorsed with an ISO CG 20 10 07 04, or equivalent form, Additional Insured Endorsement listing the Owner Parties and such other persons as are designated by Owner to Contractor, as additional insureds.	
§ 7.3	**Waiver of Subrogation**	This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement, or equivalent, to include a waiver of subrogation by insurer as to the Owner Parties, and such other persons as are designated by Owner to Contractor, as additional insureds.	
§ 7.4	**Evidence of Insurance**	Contractor shall provide Owner certificates of insurance as to each subcontractor performing Work prior to the subcontractor's entry on the Property certified to Owner as Certificate Holder at the following address: _____.	
B.	**PROPERTY INSURANCE**		
§ 1.	**Builder's Risk.** Contractor is to maintain builder's risk insurance meeting at least the following specifications; but at Owner's option, Owner may in lieu of Contractor maintaining builder's risk insurance, Owner may obtain and maintain the builder's risk insurance. If		

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	Owner obtains the builder's risk insurance, the Contract Price is to be reduced by the amount of the premium and any Contractor markup cost that otherwise was included within the Contract Price.				
§ 1.1	**Amount**	Limits of coverage are to be the initial Contract Price as increased by amount of subsequent modification of the Contract Price. Coverage shall be provided in amount equal at all times to the full replacement value and cost of debris removal for any single occurrence.			
§ 1.2	**Covered Property**	Such insurance shall cover:			
		a.	All structures under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundations, footings, underground pipes and wiring, excavations, grading, backfilling or filling.		
		b.	All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.		
		c.	All property including materials and supplies on site for installation.		
		d.	All property including materials and supplies at other locations but intended for use at the site.		
		e.	All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.		
		f.	Other property for which an insured is liable regarding the project.		
§ 1.3	**Insureds**	Insureds shall include:			
		a.	Owner, Contractor, and all Loss Payees and Mortgagees as Named Insureds; and		
		b.	Subcontractors of all tiers.		
§ 1.4	**Deductibles**	Deductibles shall not exceed:			
		a.	All risks of direct damage, per Occurrence, except	$10,000	
		b.	Delayed opening waiting period	5 days	
		c.	Earthquake and earthquake sprinkler leakage, per Occurrence	$50,000	
		d.	Flood, per Occurrence or excess of maximum available through National Flood Insurance Program	$50,000	
§ 1.5	**Form**	Coverage shall be at least as broad as an unmodified ISO Special Causes of Loss form and shall include coverage for theft, collapse, flood and earthquake. All exclusions must be pre-approved by Owner. This insurance is to be written on a Completed Value, non-reporting form basis and shall be primary to any other insurance coverage available to the named insureds, with that other insurance being excess, secondary and noncontributing.			
§ 1.6	**Prohibition**	No protective safeguard warranty is permitted.			
§ 1.7	**Coverage and Minimum Sublimits**	Coverage		Minimum Sublimit	

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		a.	Additional expenses due to delay in completion of project (where applicable)	$_____
		b.	Agreed Value	Included without sublimit
		c.	Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss	Included without sublimit
		d.	Debris removal additional limit	Included without sublimit
		e.	Earthquake and earthquake sprinkler leakage	$1,000,000
		f.	Flood, per Occurrence, excess of maximum available through National Flood Insurance Program	$1,000,000
		g.	Freezing	Included without sublimit
		h.	Mechanical breakdown including hot and cold testing (where applicable)	Included without sublimit
		i.	Occupancy pre-completion	Included
		j.	Ordinance or law	Included without sublimit
		k.	Pollutant clean-up and removal	$1,000,000
		l.	Preservation of property	Included without sublimit
		m.	Replacement cost	Included without sublimit
		n.	Theft	Included without sublimit
§ 1.8	**Occupancy**	The termination of coverage provision shall be endorsed to permit occupancy of the coverage property being constructed.		
§ 1.9	**Term and Termination**	This insurance shall be maintained in effect, unless otherwise provided for in the Agreement, until the earliest of the following dates:		
		a.	The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;	
		b.	The date of final payment, as provided for in the Agreement; or	
		c.	The date on which the insurable interests in the Covered Property of all insureds other than Contractor have ceased.	

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§ 1.10	**Waiver of Subrogation**	This insurance shall include a waiver of subrogation by insurer as to the insureds.
§ 1.11	**Notice**	This insurance shall be endorsed to provide 30 days' notice of cancellation to Owner.
§ 2.	**Contractor's Equipment.**	
§ 2.1	**Amount**	Contractor shall obtain and maintain property insurance on Contractor's equipment and personal property insured to 100% of its replacement cost. This insurance will have an equipment floater.
§ 2.2	**Waiver of Subrogation**	This insurance will be endorsed to waive subrogation in favor of Owner Parties.
C. BONDS		
§ 1.	**General**	Contractor is required to arrange and furnish separate performance and payment bonds, each for the full amount of the Guaranteed Maximum Price plus Contractor's Fee guaranteeing the faithful performance of all of the provision of the Agreement as well as payment to all persons for labor and material used in the performance of the Agreement. The bonds shall be executed by a surety company acceptable to Owner, on a form acceptable to Owner, and shall become a part of the Agreement. Owner may withhold payments on account until such time as said bonds have been furnished and accepted. No change, alteration or modification in the terms and conditions of the Agreement, or in the terms or manner of payment shall in any way exonerate or release, in whole or in part, any surety on any bond furnished on behalf of Contractor. The cost of the bonds is included in the Contract Price.
§ 2.	**Payment Bond**	The Payment Bond is to conform to the following requirements.
§ 2.1	**Form**	The Payment Bond is to be in statutory form. The AIA form is not acceptable.
§ 2.2	**Coverage**	The Payment Bond is to include coverage for consequential and delay damages due to Contractor's default.
§ 2.3	**Rating**	The issuer must be at least *a* Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas..
§ 2.4	**Term**	The Payment Bond is to be in effect for the period required by the Texas Property Code.
§ 2.5	**Multiple Obligees**	The Payment Bond is to name as additional obligees such persons as designated by the Owne, including its lender.
§ 2.6	**Recorded**	The Payment Bond and all required attachments (issuer's agent's power of attorney and memorandum of the Agreement) is to be recorded in the County's Official Public Records.
§ 3.	**Performance Bond**	The Performance Bond is to conform to the following requirements.
§ 3.1	**Form**	The Performance Bond is to be on the AIA form or equivalent. The Performance Bond is to cover Contractor's express warranty and obligations to correct defective Work arising under the Agreement.
§ 3.2	**Rating**	The issuer must be at least a Best's Key Rating Guide A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list) and duly licensed and authorized to issue surety bonds in Texas.
§ 3.3	**Extended Coverages**	The Performance Bond is to cover risk of contract penalties and delay damages.
§ 3.4	**Term**	The Performance Bond is to be in effect for a period of not less than one year following Final Completion.
§ 3.5	**Multiple Obligees**	The Performance Bond is to name as additional obligees such persons as designated by Owner including its lender.

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B. GENERAL INSURANCE REQUIREMENTS

1. **Definitions.** For purposes of this Exhibit:

a. Agreement. "**Agreement**" means the Commercial Construction Contract – Guaranteed Maximum Price executed by Owner and Contractor.

b. Owner Parties. "**Owner Parties**" means (a) _____ ("**Owner**"), (b) the project manager, (c) any lender whose loan is secured by a lien against the Property, (d) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, (e) any directors, officers, employees, or agents of such persons or entities, and (f) others as required by the Agreement.

c. Contractor. "**Contractor**" means _____ and Subcontractors of any tier.

d. ISO. "**ISO**" means Insurance Services Office.

2. **Policies.**

a. Insurer Qualifications. All insurance required to be maintained by Contractor must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in the State in which the Improvements are located.

b. No Waiver. Failure of Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Owner to identify a deficiency from evidence that is provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance. Commencement of Work without provision of the required certificate of insurance, evidence of insurance and/or required endorsements, or without compliance with any other provision of this Contract, shall not constitute a waiver by any Owner Party of any rights. The Owner shall have the right, but not the obligation, of prohibiting the Contractor or any Subcontractor from performing any Work until such certificate of insurance, evidence of insurance and/or required endorsements are received and approved by the Owner.

c. Delivery Deadlines. Contractor shall provide Owner within 10 days of Owner's request with certified copies of all insurance policies. Renewal policies, if necessary, shall be delivered to the Owner prior to the expiration of the previous policy.

d. Waiver of Subrogation. All policies maintained by Contractor, whether required herein or not, shall contain a waiver of subrogation in favor of the Owner Parties.

e. Notice. All policies maintained by Contractor shall provide for 30 days' prior written notice of cancellation to Owner.

f. Compliance With Laws. If any insurance requirements are deemed to violate any law, statute or ordinance, the insurance requirements shall be reformed to provide the maximum amount of protection to Owner as allowed under the law.

3. **Limits, Deductibles and Retentions.**

a. Coverage Limits. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one Occurrence or accident be less than the amount required herein.

b. Deductible and Retention Limits. No deductible or self-insured retention shall exceed $_____ without the prior written approval of the Owner, except as otherwise specified herein. All deductibles and retentions shall be paid by, assumed by, for the account of, and at the Contractor's sole risk. The Contractor shall not be reimbursed for same.

c. Policy Limits. "**Limits**" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Contractor or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to Owner and Owner the limits specified below as the minimum limits are increased to the greater limits.

d. Post Completion Coverage. With respect to the insurance to be maintained after final payment to Contractor, an additional certificate evidencing such coverage shall be provided to Owner with final application for payment if the prior certificate has expired, and thereafter upon renewal or replacement of such insurance until the expiration of the time period for which such insurance must be maintained.

e. Use of the Owner's Equipment. The Contractor, its agents, employees, Subcontractors or suppliers shall use the Owner's equipment only with express written permission of the Owner's designated representative and in accordance with the Owner's terms and condition for such use. If the Contractor or any of its agents, employees, Subcontractors or suppliers utilize any of the Owner's equipment for any purpose, including machinery, tools, scaffolding, hoists, lifts or similar items owned, leased or under the control of the Owner, the Contractor shall defend, indemnify and be liable to the Owner Parties for any and all loss or damage which may arise from such use.

4. **Forms.**

a. Approved Revisions and Substitutions. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Owner will have the right to require other equivalent forms.

b. Approved Forms. Any policy or endorsement forms other than a form specified in this Exhibit must be approved in advance by Owner.

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c. Compliance with Laws. If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to the Agreement, shall be reformed to provide the maximum amount of protection to the Owner Parties as allowed under the law.

5. Evidence of Insurance. Insurance must be evidenced as follows:

a. Form. Liability insurance: ACORD™ Form 25 Certificates of Liability Insurance for liability coverages. Property Insurance: ACORD™ Form 28 Evidence of Commercial Property Insurance for property coverages.

b. Delivery Deadlines. Evidence to be delivered to Owner prior to entry on the Property and thereafter at least 30 days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Owner's request for an updated certificate.

c. Certificate Requirements. Certificates must:

(1) Insured. State the insured's name and address.

(2) Insurer. State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.

(3) Additional Insured Status and Subrogation Waiver. Specify the additional insured status and waivers of subrogation as required by these specifications.

(4) Primary Status. State the primary and non-contributing status required herein.

(5) Deductibles and Self-Insured Retentions Stated. State the amounts of all deductibles and self-insured retentions.

(6) Copy of Endorsements and Policy Declaration Page. Be accompanied by certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.

(7) Notices. Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation and material change will be sent to the certificate holder.

(8) Certificate Holder. Be addressed to the Owner as the certificate holder and show Owner's correct address. A separate certificate is to be addressed and delivered to Owner's lender.

(9) Producer. State the producer of the certificate with correct address and phone number listed.

(10) Authorized Representative. Be executed by a duly authorized representative of the insurers.

d. Suspension. Owner shall have the right, but not the obligation, of suspending Contractor's services, without an increase in the sum payable by Owner to Contractor due to such suspension, until such certificates or other evidence that the required insurance has been placed in compliance with these requirements is received and approved by Owner.

6. Contractor Insurance Representations to Owner Parties.

a. Minimum Requirements. The insurance coverages required herein (1) represent Owner Parties' minimum requirements and are not to be construed to void or limit the Contractor's indemnity obligations as contained in the Agreement nor represent in any manner a determination of the insurance coverages the Contractor should or should not maintain for its own protection; and (2) are being, or have been, obtained by the Contractor in support of the Contractor's liability and indemnity obligations under this Contract. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Contractor, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of the Agreement.

b. Defaults. Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, the Agreement. If the Contractor shall fail to remedy such breach within five business days after notice by the Owner, the Contractor will be liable for any and all costs, liabilities, damages and penalties resulting to the Owner Parties from such breach, unless a written waiver of the specific insurance requirement is provided to the Contractor by the Owner. In the event of any failure by the Contractor to comply with the provisions of this Contract, the Owner may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to the Contractor, purchase such insurance, at the Contractor's expense, provided that the Owner shall have no obligation to do so and if the Owner shall do so, the Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

c. Survival. This Exhibit is an independent contract provision and shall survive the termination or expiration of the Agreement.

9. RELEASE AND WAIVER. TO THE EXTENT PERMITTED BY LAW, EACH OF CONTRACTOR AND OWNER (THE "**RELEASING PARTY**") RELEASES AND WAIVES ANY CLAIMS IT MAY HAVE AGAINST THE OTHER PARTY OR ITS PARTNERS, OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS (THE "**RELEASED PERSONS**") FOR BUSINESS INTERRUPTION OR DAMAGE TO PROPERTY SUSTAINED BY THE RELEASING PARTY AS THE RESULT OF ANY ACT OR OMISSION OF THE RELEASED PERSON IN ANY WAY CONNECTED WITH ANY LOSS COVERED BY INSURANCE, WHETHER REQUIRED HEREIN OR NOT, OR WHICH SHOULD HAVE BEEN COVERED BY INSURANCE REQUIRED HEREIN, INCLUDING THE DEDUCTIBLE AND UNINSURED

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PORTION THEREOF, MAINTAINED OR REQUIRED TO BE MAINTAINED BY THE RELEASING PARTY PURSUANT TO THE AGREEMENT. THE WAIVER OF CLAIMS CONTAINED IN THIS SECTION (A) WILL SURVIVE THE COMPLETION OF THE WORK OR THE TERMINATION OF THE AGREEMENT AND (B) WILL APPLY **EVEN IF THE LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PERSONS** BUT WILL NOT APPLY TO THE EXTENT A LOSS OF DAMAGE IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PERSONS.

10. Insurance Requirements of Contractor's Subcontractors.

a. Coverage. Insurance similar to that required of the Contractor shall be provided by all Subcontractors (or provided by the Contractor on behalf of Subcontractors) to cover operations performed under any subcontract agreement. The Contractor shall be held responsible for any modification in these insurance requirements as they apply to Subcontractors. The Contractor shall maintain certificates of insurance from all Subcontractors containing provisions similar to those listed herein (modified to recognize that the certificate is from Subcontractor) enumerating, among other things, the waivers of subrogation, additional Insured status, and primary liability as required herein, and make them available to the Owner upon request.

b. ALLOCATION OF RISK. THE CONTRACTOR IS FULLY RESPONSIBLE FOR LOSS AND DAMAGE TO ITS PROPERTY ON THE SITE, INCLUDING TOOLS AND EQUIPMENT, AND SHALL TAKE NECESSARY PRECAUTIONS TO PREVENT DAMAGE TO OR VANDALISM, THEFT, BURGLARY, PILFERAGE AND UNEXPLAINED DISAPPEARANCE OF PROPERTY. ANY INSURANCE COVERING THE CONTRACTOR'S OR ITS SUBCONTRACTOR'S PROPERTY SHALL BE THE CONTRACTOR'S AND ITS SUBCONTRACTOR'S SOLE AND COMPLETE MEANS OR RECOVERY FOR ANY SUCH LOSS. TO THE EXTENT ANY LOSS IS NOT COVERED BY SAID INSURANCE OR SUBJECT TO ANY DEDUCTIBLE OR CO-INSURANCE, THE CONTRACTOR SHALL NOT BE REIMBURSED FOR SAME. SHOULD THE CONTRACTOR OR ITS SUBCONTRACTORS CHOOSE TO SELF-INSURE THIS RISK, IT IS EXPRESSLY AGREED THAT THE CONTRACTOR HEREBY WAIVES, AND SHALL CAUSE ITS SUBCONTRACTORS TO WAIVE, ANY CLAIM FOR DAMAGE OR LOSS TO SAID PROPERTY IN FAVOR OF THE OWNER PARTIES.

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Exhibit E

Contractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address:

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

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3. Contractor has paid each of Contractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

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_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Exhibit F

Subcontractor Bills-Paid Affidavit

Basic Information

Date:

Owner:

Owner's Mailing Address:

Subcontractor:

Subcontractor's Mailing Address:

Contractor:

Contractor's Mailing Address:

Affiant: [**include relationship to subcontractor**]

Affiant's Mailing Address:

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Subcontractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Subcontractor.

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2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

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Subcontractor agrees to indemnify and hold Owner and Contractor harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Exhibit G

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(b). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Partial Release During Construction

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] of check**], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] as indicated in the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

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The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

_____

Date

[Company name]

By _____

[Name and title]

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Exhibit H

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(c). If a contractor (or other potential lien claimant) is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Partial Release During Construction

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid and has received a progress payment in the sum of $[**amount**] for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**]. The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above-referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] as indicated in

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the attached statement[s] or progress payment request[s], except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project in regard to the attached statement[s] or progress payment request[s].

_____
Date

[**Company name**]

By _____
[**Name and title**]

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Exhibit I

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(d). If a contractor (or other potential lien claimant) is required to execute a waiver and release in exchange for or to induce payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must read as follows.

Conditional Final Release

Project:

Job No.:

On receipt by the signer of this document of a check from [**name of maker of check**] in the sum of $[**amount**] payable to [**name[s] of payee[s] of check**], and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**].

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**].

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-

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men, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

_____

Date

[Company name]

By _____

[Name and title]

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Exhibit J

This form may be used as written by an original contractor to fulfill the requirements of Tex. Prop. Code §§ 53.085, 53.258, 53.259.

Contractor [Final] Bills-Paid Affidavit

Date:

Owner:

Owner's Mailing Address: [**include county**]

Contractor:

Contractor's Mailing Address: [**include county**]

Affiant: [**include relationship to contractor**]

Affiant's Mailing Address: [**include county**]

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Contractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Contractor.

2. Affiant understands that Owner has required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

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3. Contractor has paid each of Contractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Contractor warrants and represents that the following specified bills or classes of bills will be paid by Contractor from the funds paid to Contractor by Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

Contractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

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_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Exhibit K

This form may be used as written by a subcontractor or supplier under Tex. Prop. Code § 53.085.

Subcontractor [Final] Bills-Paid Affidavit

Date:

Owner:

Owner's Mailing Address: [**include county**]

Subcontractor:

Subcontractor's Mailing Address: [**include county**]

Contractor:

Contractor's Mailing Address: [**include county**]

Affiant: [**include relationship to subcontractor**]

Affiant's Mailing Address: [**include county**]

Property: [**include legal description**]

Improvements:

Affiant swears individually and on behalf of Subcontractor that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Subcontractor.

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2. Affiant understands that Owner and Contractor have required this affidavit as a condition of payment for labor or materials used in construction of the Improvements.

3. Subcontractor has paid each of Subcontractor's suppliers and sub-subcontractors, laborers, and materialmen in full for all labor and materials provided to Owner or Contractor or to Subcontractor for construction of the Improvements, excepting only the amounts owed to the persons identified below:

List all sub-subcontractors, suppliers, laborers, and materialmen and amounts owed to each. If there are no unpaid sub-subcontractors, suppiers, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Include the following if applicable.

Subcontractor warrants and represents that the following specified bills or classes of bills will be paid by Subcontractor from the funds paid to Subcontractor by Contractor or Owner in reliance on this affidavit:

Name of payee or description of class:

Amount:

Repeat above information as needed.

Include the following if applicable.

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Subcontractor agrees to indemnify and hold Owner harmless from any loss or expense resulting from false or incorrect information in this affidavit.

Continue with the following.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Exhibit L

This waiver and release is based on the form found in Tex. Prop. Code § 53.284(e). If a contractor (or other potential lien claimant) is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a final payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the final payment, the waiver and release must read as follows. The waiver and release must include the notice at the top of the document.

Unconditional Release on Final Payment

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Project:

Job No.:

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to [**name of person with whom signer contracted**] on the property of [**name of owner**] located at [**specify location**] to the following extent: [**specify job description**]. The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common-law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above-referenced project up to the date of this waiver and release.

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_____

Date

[Company name]

By _____

[Name and title]

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Chapter 20

Contractual Mechanic's Lien Documents

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Chapter 20

Contractual Mechanic's Lien Documents

§ 20.1 General Considerations

§ 20.1:1 Use of Forms

This chapter outlines common transactions for the creation and documentation of mechanic's liens on homesteads.

The Texas Constitution distinguishes between "work and material used in constructing new improvements" and "work and material used to repair or renovate existing improvements" on homestead property. Several requirements are added if the contractor or lender is obtaining a lien for repair or renovation of a homestead. *See* Tex. Const. art. XVI, § 50(a)(5)(A)–(D). This chapter contains forms suggested for use in new construction projects and for repair or renovation construction. The forms include a mechanic's lien contract (form 20-1), a mechanic's lien note (form 20-2), and closing certificates (forms 20-6 and 20-7), which confirm owner compliance with the homestead requirements for transactions involving new construction or renovation or repair of existing homesteads.

Section 20.6 below suggests other forms that may be necessary in various transactions, and chapter 12 in this manual discusses truth-in-lending notices and disclosure statements, which are required in several kinds of transactions. Chapter 18 contains a residential construction contract form. The forms and procedures contained in chapter 18 must be reviewed to ensure compliance with the terms of the residential construction contract, the loan disclosure requirements, and the closing procedure requirements of sections 53.255 through 53.260 of the Texas Property Code, although failure to follow these requirements for residential contracts might not invalidate the lien securing the residential construction loan. *See* Tex. Prop. Code §§ 53.255(c), 53.256(c), 53.257(c), 53.258(e). The residential construction contract (form 18-4) should be referenced in the mechanic's lien contract (form 20-1). The residential construction contract addresses many construction contract terms not addressed by the mechanic's lien contract.

The forms in this chapter are designed to function interdependently to create and document liens arising from the credit financing of building a home located on homestead property. The choice of which forms to use and which optional provisions to include in the forms for a given transaction depends on several factors, such as which party is extending credit, who owns the property, whether the project is for construction of a new residence or is for renovation or repair of an existing homestead, and whether the lien is primary or subordinate. The mechanic's lien note, form 20-2, should not be used without the supporting documents suggested in this chapter.

If the construction loan does not affect homestead property, attorneys usually use the deed of trust (see chapter 8) and note (see chapter 6) instead of the mechanic's lien documents.

If the mechanic's lien contract is used for new improvements to a homestead, the property owner may not be able to refinance any payments made to the contractor or any amount owed to the contractor (other than with a home equity loan) if construction begins before appropriate documentation is executed, acknowledged, and filed. If the owner intends to finance

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or refinance any part of the consideration, the appropriate documents and procedures prescribed in this chapter must be implemented before construction begins. Tex. Const. art. XVI, § 50(a)(5); Tex. Prop. Code § 53.254.

Caution: Only fixed-rate, simple interest may be charged in transactions using these forms. Mechanic's lien transactions face the cumulative and complex restrictions imposed by federal and state consumer protection laws, Texas homestead laws, and the Texas Finance Code. See sections 20.1:2 and 20.1:3 below. For this reason, transactions documented by the forms in this chapter must not use add-on interest or variable interest rates, either of which would require significant revision of the documents.

§ 20.1:2 Homestead Considerations

The Texas homestead exemption generally does not preclude a contractual lien for improvements from attaching to the homestead. However, contractors, laborers, and materialmen must create such a lien in strict compliance with constitutional, statutory, and regulatory formalities. *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 807 (Tex. App.—Austin 2004, pet. denied).

Source of Requirements for Contractual Liens for Improvements: The basic requirements for all contractual liens for improvements to the homestead are found at Tex. Const. art. XVI, § 50(a)(5). These constitutional requirements are in certain cases supplemented by additional requirements found at Tex. Prop. Code §§ 41.001, 53.254. Additionally, the Texas Finance Commission has issued regulations interpreting these constitutional and statutory formalities found at 7 Tex. Admin. Code ch. 152.

The formalities necessary for a valid contractual lien for improvements against the homestead are different depending on whether the contract is for new improvements or for repairs or renovations to existing improvements. Tex. Const. art. XVI, § 50(a)(5). Additionally, statutory requirements differ depending on whether the property improved is a business or residential homestead. *See* Tex. Prop. Code § 53.251(a). Practitioners must be attentive to these variables when drafting a contractual lien for improvements made to the homestead.

Contract in Writing: All contractual liens for improvements to the homestead must be created by a contract in writing between the general contractor and the homestead owner. Tex. Const. art. XVI, § 50(a)(5). The contract must create direct privity between the contractor and the homestead owner. Tex. Att'y Gen. Op. No. JC-0386 (2001). The contract must be bona fide. A sham contract under which the putative contractor receives no consideration or performs no services will not create a valid lien against the homestead. *See In re Jeter*, 48 B.R. 404, 408 (Bankr. N.D. Tex. 1985).

Contract Must Set Forth Terms of Agreement: A contractual lien for improvements to a residential homestead must set forth the terms of the agreement between the owner and the contractor. This requirement is not applicable to improvements made to a business homestead. Tex. Prop. Code §§ 41.001(b)(3), 53.254(a). The written contract between the owner and the contractor must at a minimum recite (1) the principal amount of the loan, (2) the interest rate, (3) the date that the final payment is due, (4) a description of the property, (5) a general description of the materials to be supplied or labor performed, and (6) that a lien is granted to secure payment. *In re Burnett*, 120 B.R. 839, 841–42 (Bankr. N.D. Tex. 1990). The contract need only provide the general nature of the improvements. It is not necessary that the contract contain a detailed itemized statement of the work performed or materials furnished. *Gomez v. Riddle*, 334 S.W.2d 197, 200 (Tex. App.—San Antonio 1960, no writ).

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Contract Must Be Executed before Commencement of Work: A contractual lien for improvements to a homestead must be executed before the contractor furnishes any materials or performs any labor. Tex. Prop. Code §§ 41.001(b)(3), 53.254(b).

Contract Must Be Executed by Both Spouses: Generally, in the case of a family homestead, a contractual lien for improvements must be executed by both spouses in the manner required for the sale or conveyance of the homestead. Tex. Const. art. XVI, § 50(a)(5)(A); Tex. Prop. Code §§ 41.001(b)(3), 53.254(c). This joinder requirement apparently does not apply to new improvements made to a business homestead. *See Spradlin v. Jim Walter Homes*, 34 S.W.3d 578, 580–81 (Tex. 2000). *See also* Tex. Prop. Code §§ 41.001(b)(3), 53.251(a), 53.254(c).

Required Five-Day Waiting Period: If the extension of credit is to secure the repair or renovation of existing improvements to the homestead, whether with a contractor or third-party lender, the owner must complete a credit application for the extension of credit, and a five-day waiting period must expire between the date that the homeowner makes application for the extension of credit and the date that the contractual lien is executed. Any lien instrument executed before the expiration of the five-day waiting period is invalid. Tex. Const. art. XVI, § 50(a)(5)(B). To count the five days, the day after the application for the extension of credit is made is day one. If the fifth calendar day falls on a Sunday or a federal legal public holiday, the contractual lien may not be executed until the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 152.9.

The five-day waiting period is not required if the work or materials are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health and safety of the owner or person residing in the homestead and the owner acknowledges this exigency in writing. Tex. Const. art. XVI, § 50(a)(5)(B). This written acknowledgment must at a minimum (1) describe the conditions of the homestead property, (2) describe how the conditions of the homestead property affect the health and safety of the owner or person residing in the homestead, and (3) state that the owner is waiving the five-day waiting period required by Tex. Const. art. XVI, § 50(a)(5)(B). Printed forms for this purpose are prohibited. 7 Tex. Admin. Code § 152.13.

Required Preclosing Disclosures: When the owner obtains third-party financing for the construction of improvements to a residential homestead, the lender must deliver to the owner all documentation relating to the closing of the loan not later than one business day before the date of the closing. If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation or modify previously provided documentation on the date of closing. Tex. Prop. Code § 53.257(a).

In addition, the lender must deliver to the owner before the date of closing the extensive statutory disclosure specified at Tex. Prop. Code § 53.255. If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the required statutory disclosure at closing. The lender must retain a signed and dated copy of this disclosure with the closing documents for the loan. Tex. Prop. Code § 53.257(b).

A failure by the lender or contractor to provide these disclosures does not invalidate the lien. Tex. Prop. Code §§ 53.255(c), 53.257(c).

Right of Rescission: A contract for work or materials for repairs or renovations to existing homestead improvements must provide that the contract may be rescinded by the owner or the owner's spouse without penalty within three cal-

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endar days after execution of the contract by the parties. Tex. Const. art. XVI, § 50(a)(5)(C). To count the three days, the day after the contract is executed is day one. If the third calendar day falls on a Sunday or a federal legal public holiday, the right of rescission is extended to the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 152.11.

The three-day right of rescission is not required if the work or materials are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health and safety of the owner or person residing in the homestead and the owner of the homestead acknowledges this exigency in writing. Tex. Const. art. XVI, § 50(a)(5)(C). This written acknowledgment and waiver must at a minimum (1) describe the conditions of the homestead property, (2) describe how the condition of the homestead property affects the health and safety of the owner or person residing in the homestead, and (3) state that the owner is waiving the three-day right of rescission. Printed forms for this purpose are prohibited. 7 Tex. Admin. Code § 152.13.

Restriction on Place of Closing: A contractual lien for improvements to repair or renovate existing improvements on the homestead must be executed in the offices of a third-party lender making the extension of credit, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D). There is no exception to this requirement for exigent circumstances as with the five-day waiting period or right of rescission.

Required Disclosures: A contract for improving an existing residential homestead must contain the following conspicuous disclosure next to the owner's signature line:

> IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

Failure to include the notice constitutes an actionable violation of the Texas Deceptive Trade Practices Act. Tex. Prop. Code § 41.007.

§ 20.1:3 Usury Laws and Regulations

The usury statutes and regulations that apply to a loan vary with the type of loan and lender. Regardless of the structure of the transaction, the creditor must comply with the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f.

Third-Party Lenders and First Liens: State usury law has been preempted by federal statute for first liens on residential real property. This preemption eliminates the rate ceiling for this type of loan for most creditors, including all federally insured financial institutions and other creditors that make or invest in residential real property loans aggregating more than $1 million per year. 12 U.S.C. §§ 1735f–7, 1735f–7a; *Seiter v. Veytia*, 756 S.W.2d 303 (Tex. 1988). *See also* Tex. Fin. Code § 302.103 (late charges are interest for purpose of federal preemption). Other third-party lenders may rely on Code section 302.001 as the usury law.

Texas usury law is located primarily in title 4 of the Texas Finance Code. The maximum legal interest rate, except as otherwise fixed by law, is set at 10 percent. Tex. Fin. Code § 302.001. Floating interest rate ceilings for written contracts are established by chapter 303 of the Code. Tex. Fin. Code ch. 303.

Contractor–Creditors and First Liens: A contractor–creditor may be limited to Code section 302.001 as the applicable usury law for a complete structure.

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§ 20.1:4 Other Consumer Protection Laws

Federal Disclosure Laws and Regulations: Federal consumer credit laws require disclosures designed to allow informed decision making. The most important of these are the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and Federal Reserve Board Regulation Z, 12 C.F.R. pt. 226, both of which require certain creditors to disclose loan terms and rights of rescission to potential borrowers. See chapter 12 in this manual for forms and further discussion.

Other federal consumer protection laws that might affect mechanic's lien transactions include—

1. The Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617, and Housing and Urban Development Regulation X, 24 C.F.R. pt. 3500, both of which apply primarily to closings for purchases of residential property designed for occupancy by one to four families involving federally related mortgage loans.

2. The Federal Trade Commission anti-holder-in-due-course rule, 16 C.F.R. pt. 433. A prescribed notice must be included in the instrument evidencing the debt if the contractor either (a) receives the proceeds of a loan made to the owner by a third-party creditor for the acquisition of goods or services by sale or lease and either refers customers to the third-party creditor or is affiliated with the third-party creditor by common control, contract, or business arrangement; or (b) extends credit to the owner in connection with a "credit sale" under the Truth in Lending Act or Regulation Z. 16 C.F.R. §§ 433.1(d), (e), (i), 433.2.

   The contractor and the third-party creditor have a referral relationship if the contractor cooperates with the third-party creditor to channel customers to the third-party creditor on a continuing basis. A referral relationship may arise from a pattern of cooperative activity directly related to the arranging of financing. To fall within the rule, the contractor and the third-party creditor must be engaged in cooperative or concerted activity conducted to channel consumers to the third-party creditor, and this conduct must occur on a continuing basis. Once a referral relationship is established, the instruments evidencing debts owed to the third-party creditor arising out of referrals from the contractor must include the prescribed notice. However, a referral relationship does not include situations in which the contractor merely suggests credit sources to its customers or sends its customers to a third-party creditor without the express or implied agreement of the creditor or without any concerted or cooperative activity between the contractor and the creditor.

   The contractor and the third-party creditor may be affiliated by common control. For example, common control exists if two companies are owned by a holding company or by substantially the same individuals or if one is a subsidiary of the other. The contractor and the third-party creditor may also be affiliated by a contract or business arrangement, which includes any agreement (oral or written), understanding, procedure, course of dealing, or arrangement between the contractor and the creditor to engage in cooperative or concerted activity in connection with the contractor's sale to customers or the financing thereof. However, the creditor can issue checks

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payable jointly to the contractor and the owner, and the creditor can cooperate with the contractor to perfect the mechanic's lien without creating an affiliation by contract or other arrangement under the FTC rule.

If the contractor and the third-party creditor are not affiliated by common control or by a contract or business arrangement and if the contractor does not refer customers to the third-party creditor, FTC notices are not required and may be deleted from the forms. Federal Trade Commission Statement of Enforcement Policy, 41 Fed. Reg. 34,594 (1976).

3. Right of Rescission. The contractor may need to comply with the Federal Trade Commission rule on cooling-off periods for door-to-door sales. Exceptions exist if the agreement is entered into at the contractor's place of business or under prior negotiations during a visit by the owner to the contractor's fixed, permanent business establishment, at which the contractor's services are offered for sale on a continual basis. 16 C.F.R. pt. 429.

4. The Federal Trade Commission rule on credit practices, 16 C.F.R. pt. 444.

Texas Consumer Protection Law: The Texas Constitution provides several consumer protection provisions related to construction on homestead property. These requirements are described in this chapter specifically in section 20.1:2 above. Forms 20-6 and 20-7 in this chapter are certificates of closing used to confirm compliance with these requirements.

Texas Consumer Protection Laws for Home Solicitations: The Texas Home Solicitations Transaction Act may apply if the consumer's obligation is entered into at a location other than the contractor's place of business. If the Act applies, additional notices are required. Tex. Bus. & Com. Code ch. 601. See the notice of cancellation attached to the mechanic's lien contract (form 20-1).

Texas Finance Code Chapter 343—Home Loan Requirements: In addition to the foregoing, the transactions described in this chapter may be subject to the disclosure and other requirements of chapter 343 of the Texas Finance Code. See sections 10.14 through 10.14:3 in this manual.

Confidentiality Notice: Instruments, meaning "a deed, deed of trust, or any other record recorded by a county clerk related to real property, including a mineral lease, a mechanic's lien, and the release of a mechanic's lien," transferring an interest in real property to or from an individual must include the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Texas Mechanic's Lien Claims: The perfection of involuntary mechanic's liens is covered in chapter 21 in this manual. Before contracting for residential construction, owners should become familiar with their potential liability for mechanic's liens. Mechanic's lien liability and related procedures are outlined for owners in section 18.3:4.

§ 20.2 Procedures for Various Fact Situations

This section describes typical construction projects on homesteads. Procedures are given for new construction and for repair or renovation construction projects.

§ 20.2:1 First Lien to Third-Party Lender to Secure Interim and Permanent Financing

The owner has title to the real property on which the contractor is building a home or repairing or

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renovating an existing home, and the third-party lender obtains a first lien to secure both interim and permanent construction financing. See section 20.2:2 below for the procedure to be followed if the third-party lender is not providing interim construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties' rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic's lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic's lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. *See* Tex. Prop. Code §§ 53.255, 53.256. Also, a third-party lender is required to give the disclosure in form 18-1 under section 53.257(a) of the Texas Property Code and must deliver all documentation related to the loan not later than one business day before the date of the closing. Tex. Prop. Code § 53.257.

3. The contractor, the owner, and the owner's spouse sign the mechanic's lien contract. For repair or renovation construction, this contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D).

4. A certificate of closing is signed. Form 20-6 in this chapter is for new construction projects, and form 20-7 is for repair or renovation projects.

5. The owner executes the mechanic's lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

   Because the mechanic's lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

   The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) The FTC anti-holder-in-due-course notice should be included in the mechanic's lien note payable to the third-party creditor and may also be included in the mechanic's lien contract and the mechanic's lien note payable to the contractor. If no referral relationship or affiliation exists, the notice may be deleted from these documents.

6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). In addition, for renovation or repair construction, a three-day right to rescind following execution of the mechanic's

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lien contract by all parties is required unless the project is for immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the foregoing rights of cancellation or rescission are not exercised. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner's election *not* to rescind the contract.

7. The contractor endorses the mechanic's lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

8. The third-party lender renews and extends the mechanic's lien note by having the owner execute a note payable to the third-party lender; it bears interest and is payable as agreed between the owner and the third-party lender.

   Only fixed-rate, simple interest may be charged in transactions using the forms in this chapter. If fixed interest rates are used, the adjustable-rate mortgage regulations do not apply. These forms are not designed for use with loans subject to the adjustable-rate mortgage regulations and must be significantly revised if used for that purpose.

9. The third-party lender extends the lien with the deed of trust executed by the owner, naming the trustee chosen by the third-party lender. The deed of trust is filed with the county clerk of the county in which the property is located. See chapter 8.

10. The third-party lender is a truth-in-lending creditor and must give the owner a truth-in-lending (loan) disclosure form and a right-of-rescission form. *See* 12 C.F.R. § 226.23. See chapter 12 for forms and further discussion.

11. Construction begins. The affidavit of commencement is executed (see form 18-5). Normally, the third-party lender then advances funds in stages as the construction is completed, according to terms of the mechanic's lien contract and any incorporated residential construction contract. In some cases the lender will require its own construction loan agreement providing interim payments or draws. The owner pays interest to the third-party lender only on amounts advanced during construction and normally begins making payments on the principal of the renewal note only after completion of the construction.

    A disbursement disclosure may be found at form 18-3. See section 18.7:3 for discussion of the balance of the construction process, including descriptions of change orders, affidavits of completion, and the all-bills-paid affidavits.

12. On final completion, the contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

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§ 20.2:2 First Lien to Contractor; No Interim Financing; Permanent Financing by Third-Party Lender

The owner has title to the real property on which the contractor is building a home or repairing or renovating an existing home, and the third-party lender obtains a first lien to secure permanent financing. The third-party lender is not providing interim construction financing. See section 20.2:1 above for the procedure to be followed if the third-party lender also provides interim construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties' rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic's lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic's lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. *See* Tex. Prop. Code §§ 53.255, 53.256.

3. The contractor, the owner, and the owner's spouse sign the mechanic's lien contract. For repair or renovation construction, this contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D).

4. A certificate of closing is signed. Form 20-6 is for new construction projects, and form 20-7 is for repair or renovation projects.

5. The owner executes the mechanic's lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

   Because the mechanic's lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

   The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. The FTC anti-holder-in-due-course notice should be retained in the mechanic's lien note if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) Otherwise the notice may be deleted.

6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). In addition, for renovation or repair construction, a three-day right to rescind following execution of the mechanic's lien contract by all parties is required unless the project is for immediate repairs to conditions on the homestead

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property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the foregoing rights of cancellation or rescission are not exercised. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner's election *not* to rescind the contract.

7. Construction begins and the affidavit of commencement (form 18-5) is executed. Construction must then be completed before the next step in this procedure.

8. The contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

9. The contractor endorses the mechanic's lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

10. The third-party lender renews and extends the mechanic's lien note by having the owner execute another note payable to the third-party lender; it bears interest and is payable as agreed between the owner and the third-party lender.

§ 20.2:3 Second Lien to Third-Party Lender to Secure Interim and Permanent Financing

The owner has title to the real property on which the contractor is building a home or repairing or renovating an existing home, and the third-party lender obtains a second lien to secure both interim and permanent construction financing.

Along with the forms suggested below, other forms used to document the construction process and establish the parties' rights may be found in chapter 18 in this manual. Chapter 18 also offers suggestions for completing those forms.

Following are the steps to create and document the mechanic's lien.

1. For repair or renovation construction projects, all the owners (both spouses) must sign a written application for extension of credit at least five days before signing the mechanic's lien contract. Tex. Const. art. XVI, § 50(a)(5)(B).

2. The contractor delivers the required disclosure statement (form 18-1) and the list of subcontractors and suppliers (form 18-2) to the owners. *See* Tex. Prop. Code §§ 53.255, 53.256. Also, a third-party lender is required to give the disclosure in form 18-1 under section 53.257(a) of the Texas Property Code and must deliver all documentation related to the loan not later than one business day before the date of the closing. Tex. Prop. Code § 53.257.

3. The contractor, the owner, and the owner's spouse sign the mechanic's lien contract. See form 20-1 in this chapter. Additional clauses 20-5-9, 20-5-10, and 20-5-11 are added to the mechanic's lien contract as part of the general provisions, section F. If a resi-

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dential construction contract is to be executed, see form 18-4. If the project is for repair or renovation of an existing homestead, the contract must be signed only at the offices of the third-party lender, a lawyer, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D).

4. A certificate of closing is signed. Form 20-6 is for new construction projects, and form 20-7 is for repair or renovation projects.

5. The owner executes the mechanic's lien note payable to the contractor; the note should bear no interest and be payable in a single payment on completion of construction. The contractor thus is not a creditor under the federal Truth in Lending Act because no finance charge is involved and the obligation is payable in four or fewer installments. 15 U.S.C. § 1602(f).

   Under Texas homestead laws, when the contractor and the owner sign the mechanic's lien contract and the owner executes the mechanic's lien note payable to the contractor, an obligation is established in favor of the contractor and is secured by a mechanic's lien. Tex. Prop. Code § 53.254.

   Because the mechanic's lien note payable to the contractor bears no interest and is payable in a single installment, there is no retail installment transaction under Texas Finance Code chapter 345, and that chapter does not apply. Tex. Fin. Code § 345.001(7).

   The contractor must comply with the FTC anti-holder-in-due-course rule if the contractor has a referral relationship or affiliation with the third-party lender. 16 C.F.R. pt. 433. (See section 20.1:4 above for additional discussion.) The FTC anti-holder-in-due-course notice should be included in the mechanic's lien note payable to the third-party creditor and may also be included in the mechanic's lien contract and the mechanic's lien note payable to the contractor. If no referral relationship or affiliation exists, the notice may be deleted from these documents.

6. The contractor gives the required notices under the FTC rule on cooling-off periods for door-to-door sales (unless an exception exists). For renovation or repair construction projects, a three-day right to rescind following execution of the mechanic's lien contract by all parties is required unless the project is for immediate repair to conditions on the homestead property that materially affect the health or safety of the owner and the owner of the homestead acknowledges such in writing. Tex. Const. art. XVI, § 50(a)(5)(C). The contractor then waits to be sure the right of cancellation is not exercised and otherwise complies with the rule, unless an exception exists and the FTC rule does not apply. See section 20.1:4. The owner executes the election regarding right of rescission (form 20-8) and checks the box indicating the owner's election *not* to rescind the contract.

7. The contractor endorses the mechanic's lien note to the third-party lender and assigns the lien with a transfer of lien, which is filed with the county clerk of the county in which the property is located. See section 10.1 and form 10-1.

8. The third-party lender renews and extends the mechanic's lien note by having the owner execute a note payable to the third-party lender; it bears

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interest and is payable as agreed between the owner and the third-party lender. Only fixed-rate, simple interest may be charged in transactions using the forms in this chapter. If fixed interest rates are used, the adjustable-rate mortgage regulations do not apply. These forms are not designed for use with loans subject to the adjustable-rate mortgage regulations and must be significantly revised if used for that purpose.

9. The third-party lender extends the lien with the deed of trust executed by the owner, naming the trustee chosen by the third-party lender. The deed of trust is filed with the county clerk of the county in which the property is located. See chapter 8.

10. The third-party lender may be a truth-in-lending creditor and may be required to give the owner the truth-in-lending (loan) disclosure form. *See* 12 C.F.R. § 226.23. See chapter 12 for forms and further discussion.

11. Construction begins. The affidavit of commencement is executed (see form 18-5). Ordinarily, the third-party lender then advances funds in stages as the construction is completed, according to terms of the mechanic's lien contract and any incorporated residential construction contract. In some cases the lender will require its own construction loan agreement providing interim payments or draws. The owner pays interest to the third-party lender only on amounts advanced during construction and usually begins making payments on the principal of the renewal note only after completion of the construction.

    During construction additional forms are used. A disbursement disclosure may be found at form 18-3. See section 18.7:3 for discussion. Other forms used during construction are change-order forms, affidavits of completion, and all-bills-paid affidavits. These forms are included in chapter 18.

12. On final completion, the contractor executes the affidavit of completion and indemnity (form 20-3), and the owner executes the affidavit of acceptance (form 20-4). The owner has the option of executing and filing the affidavit of completion (form 18-7) (see sections 18.3:4 and 18.7:7).

Precautions for Subordinate Mechanic's Lien Contracts: Subordinate lien financing involves a number of considerations for all the parties involved: the borrower, the prior lender, and the subordinate lender. The borrower should ascertain that the creation of a subordinate lien will not be a default under the prior deed of trust, as subordinate encumbrances are expressly prohibited in many deeds of trust. The prior lender may have concerns about the ability of the borrower to service both the superior and subordinate lien debts. If the borrower should default on the subordinate lien debt and the subordinate lender should foreclose, the borrower, although still liable on the debt, will no longer be the owner of the property, and the incentive to repay the senior loan will obviously be diminished.

The party at greatest risk in subordinate lien financing transactions is the subordinate lender. Foreclosure of a superior lien extinguishes all subordinate liens. *See Exchange Savings & Loan Ass'n v. Monocrete Proprietary, Ltd.*, 629 S.W.2d 34 (Tex. 1982). In Texas, unlike many other jurisdictions, a subordinate lienholder is not entitled by law to notice of default on the prior lien debt or notice of foreclosure proceedings. The subordinate lienholder is likewise not entitled to share in the foreclosure proceeds, unless there is an excess after payment of costs

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and expenses in connection with the foreclosure and satisfaction of the prior lien debt. The subordinate lienholder may therefore want to obtain the prior lienholder's agreement to provide notice of any default by the borrower under the first-lien note and deed of trust and the opportunity to cure such default or require the borrower to provide continuing proof that payments on the prior lien debt have been made.

A subordinate lien transaction may be subject to chapter 342 of the Texas Finance Code if the property is a dwelling designed for occupancy by four or fewer families and the interest rate exceeds 10 percent per year. Tex. Fin. Code §§ 342.001(4), 342.005. Chapter 342 applies to a secondary mortgage loan made by a person in the business of making, arranging, or negotiating those types of loans. Tex. Fin. Code § 342.005. The chapter does not apply to a secondary mortgage loan made by a seller of property to secure all or part of the unpaid purchase price. Tex. Fin. Code § 342.006. If a lender is in the business of making, arranging, or negotiating secondary mortgage loans, the lender must obtain a license from the Office of Consumer Credit Commissioner (OCCC) unless the lender is a bank, savings bank, savings and loan association, credit union, or a residential mortgage loan originator licensed under chapter 156. Tex. Fin. Code §§ 124.005, 339.004, 341.103–.104, 342.051. Unless exempt under section 180.003, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a secondary mortgage loan subject to chapter 342 must be individually licensed under chapter 342, be enrolled with the Nationwide Mortgage Licensing System and Registry as required by section 180.052, and comply with other applicable requirements of the Texas Secure and Fair Enforcement of Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180. Chapter 342 loans are highly specialized and regulated, and thus if a subordinate lien transaction is subject to chapter 342, the attorney must carefully review the chapter to make sure all requirements have been met. Texas Finance Code section 341.502 provides that "[a] contract for a loan under Chapter 342, a retail installment transaction under Chapter 348, or a home equity loan regulated by the Office of Consumer Credit Commissioner must be . . . written in plain language designed to be easily understood by the average consumer . . . ." Tex. Fin. Code § 341.502(a). The Finance Commission of Texas is authorized to adopt model contracts for loans subject to that section. A lender may not use a contract other than a model contract unless the lender has submitted the contract to the OCCC for its approval. If the OCCC issues an order disapproving a submitted contract, the lender may not use the contract after the order takes effect. Tex. Fin. Code § 341.502. Plain-language model contracts and related rules for chapter 342, subchapter G, second-lien home improvement contracts are codified at 7 Tex. Admin. Code §§ 90.601–.604.

The attorney general of Texas has determined that section 341.502(a) is applicable only to those loan transactions for which the consumer credit commissioner is the appointed regulating official and has no application to loan transactions subject to the regulatory authority of the banking commissioner, the savings and mortgage lending commissioner, the credit union commissioner, and federal regulatory officials. Tex. Att'y Gen. Op. No. JC-0513 (2002).

Banks, savings and loan associations, and credit unions accordingly are not required to comply with the section 341.502 "plain language" contract requirements or to obtain a license to engage in the business of making subordinate lien loans subject to chapter 342. Tex. Fin. Code § 342.051(c)(1). These institutional lenders nevertheless are thought to be subject to other substantive law provisions of chapter 342, including, for example, the limitations of that chapter on the collection of authorized fees and charges, as enforced by the policies of their

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respective regulatory agencies. *See* Tex. Fin. Code §§ 342.308, 342.502.

Before using the forms in this chapter for a loan subject to chapter 342 of the Texas Finance Code, the attorney should determine whether the lender is subject to the plain-language model contract provisions of Code section 341.502. The forms in this chapter have not been submitted to or approved by the OCCC.

If the attorney decides that the forms contained in this chapter may nevertheless be used for a loan regulated by chapter 342, the forms still must be modified to comply with the requirements of that chapter. For example, the secondary mortgage loan documents for a loan made by a licensed lender must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. See clause 8-9-24. Neither the mechanic's lien contract forms nor the note forms in this manual contain that information. The attorney should include that information in both the mechanic's lien contract form and the note form when documenting a secondary mortgage loan if the lender has a license from the OCCC. Additionally, if a subordinate lien transaction is subject to chapter 342, the printed language in the mechanic's lien contract must be modified slightly. In paragraph B.6., the phrase "in a form acceptable to Contractor or its transferees" must be struck so that the obligation reads "maintain at Owner's sole cost and expense insurance policies containing the following coverages . . . ." This change is necessary because Finance Code sections 342.404 through 342.405 and 342.413 prohibit a lender from approving the selection of insurance. *See* Tex. Fin. Code §§ 342.404, 342.405, 342.413. Also, Finance Code section 342.404 provides that when insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like the one in clause 20-5-9, which may be added to the mechanic's lien contract as a numbered paragraph under "General Provisions." Tex. Fin. Code § 342.404.

The same chapter imposes other requirements if the lender sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. *See* Tex. Fin. Code § 342.405.

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply with this section, the attorney's fee provisions in the note, form 6-1, and the mechanic's lien contract should be modified if used in transactions subject to chapter 342 of the Finance Code. *See* Tex. Fin. Code § 342.307. In the note, the third paragraph, concerning attorney's fees, should be replaced with clause 6-6-15. See section 6.2:7.

An institutional third-party lender may be required to provide the borrower a truth-in-lending disclosure (loan) form. An example of this form is included in chapter 12.

It is essential that a subordinate deed of trust contain terms and provisions identifying the prior lien and obligating the borrower to keep the prior note and deed of trust current and not in default. Clauses 20-5-10 and 20-5-11 may be used for this purpose. The parties may wish to attempt to obtain an estoppel letter or intercreditor agreement from the prior lienholder. An example of such an instrument may be found at form 10-10.

§ 20.3 Cautions

§ 20.3:1 No Variable Interest Rate Loans

The forms in this chapter are designed for use with loans charging simple interest rates only; they must be carefully revised for use with adjustable-rate mortgages. Variable rates, balloon payments, and variable payment schedules

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require truth-in-lending disclosures and additional disclosures under the Texas Credit Title and Texas Finance Code.

The mechanic's lien note, form 20-2 in this chapter, makes no provision for credit life insurance.

See section 20.7 below for suggestions if one spouse will not become liable on the debt secured by the mechanic's lien contract.

§ 20.3:2 No Out-of-State Venue or Choice of Law

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001–.002.

§ 20.3:3 Prompt Payment Act

Texas Property Code chapter 28 provides that an owner has thirty-five days from the date the owner receives a written request for payment from a contractor to pay the invoiced amount (less the retainage required by law) if the work covered was properly performed or materials delivered are suitably stored. Tex. Prop. Code § 28.002. Unpaid bills earn interest at the rate of 1.5 percent per month. Tex. Prop. Code § 28.004. Exceptions to this requirement are—

1. if there is a good-faith dispute about the amount owed (including a good-faith dispute about whether the work was done properly), no more than 110 percent of the amount in dispute may be withheld, Tex. Prop. Code § 28.003; or
2. if the lender does not fund the owner for a reason that is not the fault of the owner. *See* Tex. Prop. Code § 28.008.

§ 20.3:4 Construction Trust Fund Statute

Texas Property Code section 162.001 is generally referred to as the "Construction Trust Fund Statute." This statute, among other provisions, states that loan receipts are trust funds if they are borrowed by an owner for the purpose of improving specific real property in Texas and are secured in whole or in part by a lien on the property. Tex. Prop. Code § 162.001(b). The owner is designated as a trustee of loan funds the owner receives. Tex. Prop. Code § 162.002. As trustee, the owner is obligated to the "beneficiaries" of the construction trust funds, including the contractor, subcontractors, mechanics, and laborers on the project. Tex. Prop. Code § 162.003(a). The owner is also a beneficiary. Tex. Prop. Code § 162.003(b). A trustee who intentionally, knowingly, or with intent to defraud directly or indirectly diverts construction trust funds without first paying the current and past-due obligations on the project has misapplied the trust funds. Tex. Prop. Code § 162.031. Criminal penalties apply to such diversion. *See* Tex. Prop. Code § 162.032. Also, diversion constitutes the basis for a civil action against the trustee. *See Tacon Mechanical Contractors v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

§ 20.3:5 Texas Finance Code Chapter 343

A residential construction loan may be subject to the home loan disclosure and other requirements of chapter 343 of the Texas Finance Code. See sections 10.14 through 10.14:3 in this manual.

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§ 20.4 Instructions for Completing Forms

§ 20.4:1 Generally

Chapter 3 of this manual offers useful information about designations of parties, property descriptions, and other matters generally related to completing the forms.

§ 20.4:2 Mechanic's Lien Contract

The mechanic's lien contract, form 20-1 in this chapter, closely resembles the deed of trust; reference to chapter 8 in this manual may be useful for completing the contract. For remarks about prior liens, see section 8.2:4. For discussion about other exceptions to conveyance and warranty, see section 5.2:7.

The mechanic's lien contract must be executed before the construction begins and must be filed with the county clerk of the county in which the property is located. Tex. Prop. Code § 53.254. In case of repair or renovation construction the contract must contain, and the parties must comply with, optional section G. See Tex. Const. art. XVI, § 50(a)(5)(A)–(D), and the explanation at section 20.1:1 above. Also in this case, the owners must be provided the election regarding right of rescission (see form 20-8).

The residential construction contract provides details about description of the work, schedules for completion, changes, termination of the contractor, and other matters. See form 18-4 for applicable clauses.

A force majeure and "time is of the essence" clause may be included in the additional provisions following paragraph F.13. of the mechanic's lien contract form. An example of such a clause appears as clause 20-5-2.

The contract contains the anti-holder-in-due-course notice required by the Federal Trade Commission for consumer credit contracts made in connection with the sale or lease of goods or services to consumers for personal, family, or household use. *See* 16 C.F.R. pt. 433. For transactions not covered by this FTC regulation, the notice may be deleted.

The contract contains the right-of-cancellation notice required by Tex. Bus. & Com. Code ch. 601 and 16 C.F.R. § 429.1. For transactions not covered by those provisions, the notice may be deleted. Section G. of the contract contains the right of rescission required by Tex. Const. art. XVI, § 50(a)(5)(C), applicable to repair or renovation construction. These notices and cancellation forms may be deleted if an exception exists or if the sections are not applicable.

RCLA Notice Required: The notice statement required by the Texas Residential Construction Liability Act (RCLA, Tex. Prop. Code ch. 27) is included at the end of the contract, above the owner signatures. *See* Tex. Prop. Code § 27.007.

The RCLA notice is required in addition to the Tex. Prop. Code § 41.007 notice.

§ 20.4:3 Mechanic's Lien Note

The mechanic's lien note, form 20-2 in this chapter, is similar to the note discussed in chapter 6, which suggests payment clauses and other clauses that may also be appropriate for this note.

The mechanic's lien note should not be used alone. Interdependent uses of the forms are suggested in section 20.2 above.

Payment clauses should be drafted in accordance with the provision for statutory retainage contained in the mechanic's lien contract in paragraph D.4.:

> Notwithstanding anything to the contrary in this contract, during progress

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of the Construction, Owner may retain the amounts required by sections 53.101 and 53.081 of the Texas Property Code. Retainage will be withheld until the last business day of the third month after the month of final completion of the project, unless otherwise provided in the residential construction contract between the parties.

The mechanic's lien note contains the anti-holder-in-due-course notice required by the Federal Trade Commission for consumer credit contracts made in connection with the sale or lease of goods or services to consumers for personal, family, or household use. *See* 16 C.F.R. pt. 433. For transactions not covered by this FTC regulation, the notice may be deleted. The notice appears on the last page of the mechanic's lien note immediately preceding the signature line.

Often the note is drafted to become due on completion of construction. Alternatively, the parties may prefer to specify that partial payments are due on completion of distinct phases of construction. Installment payments may cause the Truth in Lending Act to apply. See chapter 12. Examples of both types of payment clauses appear in form 20-5.

§ 20.5 Additional Clauses

The mechanic's lien contract, form 20-1 in this chapter, may include additional clauses concerning contract price. See form 20-5 for examples of these clauses.

If payment is based on costs, the attorney should include a carefully drafted definition of costs in the contract.

For transactions subject to chapter 345 of the Texas Finance Code, the "cost-plus" clauses (20-5-6 and 20-5-7) are not appropriate. See section 20.1:3 above.

If payment will be based on the cost of labor and material plus a fixed fee, not to exceed a certain amount, use clause 20-5-6. If payment will be based on the cost of labor and material plus a percentage of the cost, not to exceed a certain amount, use clause 20-5-7.

If the contractor's profit is calculated by fixed fee or percentage and the parties do not wish to limit the total cost, the examples suggested in clauses 20-5-6 and 20-5-7 could be modified by omitting the sentence limiting total contract price. However, this practice is discouraged because a contract that does not limit total costs to a certain amount arguably may not create a valid lien against a homestead, because it might not satisfy the constitutional requirement for a complete precommencement contract that includes the price.

§ 20.6 Additional Documents

Chapter 12 in this manual contains documents that may be required for mechanic's lien transactions in accordance with the Truth in Lending Act and its accompanying regulations. Chapter 12 also offers suggestions for completing those forms.

In mechanic's lien transactions the owner and the contractor should either execute a detailed construction contract like form 18-4 in this manual, describing plans and specifications for the construction, or include those details in the mechanic's lien contract. The American Institute of Architects' standard form is also commonly used for this purpose if a separate contract is desired. Any separate contract used for this purpose should be incorporated by reference in the mechanic's lien contract.

Other forms used to document the construction process and establish the parties' rights may be found in chapter 18. Chapter 18 also offers suggestions for completing those forms.

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If the mechanic's lien is subordinate to a prior lien, the lender ordinarily requires as a condition of the loan that the holder of the prior lien sign a third-party estoppel agreement. An example of this agreement appears as form 10-10.

If a cosigner, guarantor, or the like is not the spouse of the loan applicant and will not benefit from the credit transaction, federal regulations require creditors to provide a specified notice for consumer credit transactions other than the purchase of real property. The notice, which must be given as a separate statement to each cosigner, guarantor, or the like, may be found at form 6-7.

The transaction described in section 20.2:2 above suggests the use of an affidavit of completion of construction and indemnity as part of the procedure. A model for this purpose is provided as form 20-3 in this chapter and is accompanied with a form for the owner's affidavit of acceptance of the construction, form 20-4.

§ 20.7 Required Signatures

If the spouse of the owner of record of the homestead subject to the mechanic's lien will not become liable on the underlying debt, the transaction must be structured accordingly. To avoid becoming liable on the debt, the spouse may execute only the lien instrument (mechanic's lien contract or deed of trust), not the mechanic's lien note.

If a homestead is the separate property of one spouse, both spouses must sign and acknowledge the mechanic's lien contract to create a valid mechanic's lien, but only the spouse liable on the debt need sign the note. In this case, a clause like clause 20-5-8 in this chapter should be added to the general provisions section of the mechanic's lien contract.

Although creditors often prefer that both spouses sign the note, regulations accompanying the Equal Credit Opportunity Act generally prohibit creditors from requiring an applicant's spouse to cosign or guarantee a note if the applicant is creditworthy. 12 C.F.R. § 202.7(d). Even if not liable on the debt secured by the lien on the property, a spouse may sign the instrument creating the lien if state law requires the signatures of both spouses; this compliance with state law does not violate the Equal Credit Opportunity Act.

A creditor may request a cosigner, guarantor, or the like on an extension of credit if the applicant does not meet the creditor's creditworthiness standard for individual credit. However, the creditor may not specify that the applicant's spouse be the cosigner or guarantor. Under some conditions creditors must provide cosigners a notice warning them of their liabilities. See section 6.5:2 and form 6-7.

§ 20.8 Foreclosure

Foreclosure of the voluntary contract lien granted in a mechanic's lien contract is similar to foreclosure under a deed of trust. See chapter 14 in this manual for foreclosure instruments that may be adapted for use in foreclosing a mechanic's lien.

§ 20.9 Additional Resources

Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.

Melamed, Richard. "Mechanic's Liens on Homesteads." In *Advanced Real Estate Drafting Course, 2005*. Austin: State Bar of Texas, 2005.

Myers, Thomas W. "Mechanic's Liens: What's in Your Tool Box?" In *Advanced Real Estate Law Course, 2007*. Austin: State Bar of Texas, 2007.

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St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Walthall, Thomas J., Jr. "Annotated Mechanic's Liens." In *Real Estate Law Boot Camp, 2008*. Austin: State Bar of Texas, 2008.

———. "Texas Mechanic's Liens and Construction Payment Issues." In *Advanced Real Estate Law Course, 2008*. Austin: State Bar of Texas, 2008.

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Form 20-1

Mechanic's Lien Contract

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Basic Information

Date:

Owner:

Owner's Mailing Address:

Contractor:

Contractor's Mailing Address:

Trustee:

Trustee's Mailing Address:

Property

Address:

Legal description:

Exceptions to Conveyance and Warranty:

Construction: [**see clause 20-5-1 in this chapter**]

Completion Date:

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Consideration

Cash:

Note

Date:

Amount:

Maker:

Payee:

Maturity date:

[Terms of payment:]

For the Consideration, Contractor agrees to furnish the materials and labor and to complete the Construction on the Property on or before the Completion Date in a good and workmanlike manner according to the [residential construction contract between/plans and specifications agreed on by] Owner and Contractor, incorporated herein by reference.

To secure payment of the Note, Owner grants to Contractor a mechanic's, artisan's, and materialman's lien on the Property and on all improvements and fixtures on the Property at any time.

To enforce the lien and to further secure payment of the Note, Owner conveys the Property to Trustee in trust. Owner warrants and agrees to defend the title to the Property subject to the Other Exceptions to Conveyance and Warranty. If Owner performs all the covenants and pays the Note according to its terms, this conveyance will have no further effect, and at Owner's expense Contractor will execute a release of the liens created by this contract.

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A. Owner's Representations and Rights

Owner makes the following representations and has the following rights:

A.1. Owner owns the Property in fee simple, subject only to the Exceptions to Conveyance and Warranty.

A.2. If Owner and Contractor agree in writing to alter plans for the Construction, on completion of the Construction Owner will pay for all extra work done and material furnished as a result of the alterations, and that amount will be a part of the Consideration and the debt secured by this contract.

A.3. If Owner receives notice of or may become liable for a lien or claim for labor or materials furnished to Contractor and primarily chargeable to Contractor, Owner may retain from payments on the Note an amount sufficient to completely indemnify Owner against the lien or claim.

A.4. Notwithstanding anything to the contrary in this contract, during progress of the Construction, Owner may retain the amounts required by sections 53.101 and 53.081 of the Texas Property Code. Retainage will be withheld until the last business day of the third month after the month of final completion of the project, unless otherwise provided in the residential construction contract between the parties.

A.5. If a loss occurs before the Construction is completed and delivered to Owner, Owner may use any insurance proceeds to restore the destroyed or damaged property without affecting the lien created in this contract.

A.6. OWNER MAY FURNISH THE INSURANCE REQUIRED OF OWNER BY THIS CONTRACT EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY OWNER OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

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B. Owner's Obligations

[**Include if applicable:** In addition to the obligations of Owner in the residential construction contract,] Owner agrees to—

B.1. pay all taxes and assessments on the Property when due, not authorize a taxing entity to transfer its tax lien on the Property to anyone other than Contractor, and not request a deferral of the collection of taxes pursuant to section 33.06 of the Texas Tax Code;

B.2. preserve the lien's priority as it is established in this contract;

B.3. if this is not a first lien, pay all prior lien notes that Owner is liable to pay and abide by all prior lien instruments;

B.4. if this contract is for improvements to the Property, keep the Property other than those improvements in good repair and condition during the Construction and keep all of the Property in good repair and condition after the Construction is completed;

B.5. if this contract is for new construction, keep the Property in good repair and condition after the Construction is completed;

B.6. except to the extent that Contractor is required to insure the Construction during its progress, maintain at Owner's sole cost and expense, and in a form acceptable to Contractor or its transferees, insurance policies containing the following coverages issued by an insurance company or companies authorized to engage in the insurance business in Texas with a financial rating acceptable to Contractor or its transferees:

a. property insurance covering all improvements located on the Property in an amount equal to their full replacement cost or such lesser amount as Lender may agree, containing a standard mortgagee clause, provided that

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the amounts of coverage comply with all coinsurance requirements of the policy;

b. flood insurance, if the Property is located in a flood hazard area; and

c. any other insurance coverages that may be reasonably required by Contractor or its transferees;

B.7. comply at all times with the requirements of the 80 percent coinsurance clause;

B.8. deliver the insurance policy to Contractor within ten days of the date of the contract and deliver renewals to Contractor at least fifteen days before expiration;

B.9. obey all laws, ordinances, and restrictive covenants applicable to the Property; and

B.10. keep any buildings occupied as required by the insurance policy.

C. Contractor's Obligations

Include the following if applicable.

In addition to Contractor's obligations in the residential construction contract, Contractor agrees that—

Continue with the following.

C.1. Until the Construction is completed and delivered to Owner, Contractor will insure the Construction and all related materials against loss or damage from all perils included in "causes of loss—special" forms in an amount equal to the Consideration. The policy will be payable to the parties to this contract according to their respective interests. If Contractor does not provide this insurance, Contractor will bear any loss to the Construction and materials.

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C.2. Contractor will neither make nor charge for any alterations in the Construction described in the plans and specifications unless Contractor and Owner agree otherwise in writing. Any alterations made without a written agreement will be considered performed under the original contract at no additional charge.

C.3. Contractor will pay all costs of the Construction, including labor, materials, and subcontractors, and will furnish Owner receipts for and releases from these costs.

C.4. If any other lien claims are filed, Contractor will pay for their removal or else provide a statutory bond.

D. Contractor's Rights

Include the following if applicable.

In addition to Contractor's rights in the residential construction contract, Contractor has the following rights:

Continue with the following.

D.1. Contractor may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.

D.2. After completion of the Construction, Contractor may apply any proceeds received under the insurance policy either to reduce the Note or to repair or replace damaged or destroyed improvements covered by the policy.

D.3. If Owner fails to perform any of Owner's obligations other than providing insurance, Contractor may perform those obligations and be reimbursed by Owner on demand for any amounts so paid, including attorney's fees, plus interest on those amounts from the dates of payment at the rate stated in the Note for matured, unpaid amounts. Any amounts to be reimbursed will be secured by this contract.

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D.4. If Owner is required to furnish insurance and fails to do so, Contractor may procure it and add the premium advanced by Contractor to the amount due under the Note and may charge interest on the amount added from the time of its addition until it is paid, at a rate not exceeding the rate that the Note would produce over its full term if each scheduled payment were paid on the date due.

D.5. If Owner defaults in any payment on the Note or if this lien is foreclosed, Owner will reimburse Contractor for reasonable fees paid to an attorney who is not an employee of Contractor and court and other costs for collection of payments or foreclosure of the lien. The amount to be reimbursed will be secured by this contract.

D.6. If a default exists or Owner fails to perform any of Owner's obligations and the default continues after Contractor gives Owner written notice of the default and a twenty-day period in which to cure the default (or longer if required by law or by written agreement), Contractor may—

a. declare the unpaid principal balance and earned interest on the Note immediately due;

b. request Trustee to foreclose this lien, in which case Contractor or Contractor's agent will give notice of the foreclosure sale as provided by the Texas Property Code as then in effect; and

c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Note.

Notice of default is deemed given when deposited with the United States Postal Service (certified mail, return receipt requested), addressed to Owner at Owner's Mailing Address or to Owner's last address as shown in the records of the holder of the debt.

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E. Trustee's Duties

If requested by Contractor to foreclose this lien, Trustee will—

E.1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

E.2. sell and convey all or part of the Property "AS IS" to the highest bidder for cash with a general warranty binding Owner, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

E.3. from proceeds of the sale, pay, in this order:

a. expenses of foreclosure, including a reasonable commission to Trustee;

b. to Contractor, the full amount of principal, interest, attorney's fees, and other charges due and unpaid;

c. any amounts required by law to be paid before payment to Owner; and

d. to Owner, any balance; and

E.4. be indemnified by Contractor against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this contract, which includes all court and other costs, including attorney's fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

F. General Provisions

F.1. [If Contractor is terminated according to the residential construction contract due to Contractor's default/If the Construction is not completed as agreed between Owner and Contractor], the amount of the Consideration subject to Contractor's lien will be reduced by

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the amount reasonably necessary to complete the Construction as agreed. If Contractor is not the holder of the Note, the holder may complete the Construction, and the lien created in this contract will inure to the benefit of the holder.

F.2. This contract is executed, acknowledged, and delivered before any labor has been performed or any material has been delivered to the Property for the Construction. This contract is entered into by all Owners with the consent of each Owner's spouse, as evidenced by the signatures below.

F.3. If any of the Property is sold under this contract, Owner will immediately surrender possession to the purchaser. If Owner does not, Owner will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

F.4. Recitals in any trustee's deed conveying the Property will be presumed to be true.

F.5. The lien created in this contract will remain superior to liens later created even if the time of payment of all or part of the Note is extended or part of the Property is released.

F.6. If any portion of the Note cannot be lawfully secured by this contract, payments will be applied first to discharge that portion.

F.7. Owner assigns to Contractor all amounts payable to or received by Owner from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney's fees and court and other costs, Contractor will either release any remaining amounts to Owner or apply them to reduce the Note. Owner will immediately give Contractor notice of any actual or threatened proceedings for condemnation of all or part of the Property.

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F.8. Proceeding under this contract, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

F.9. Interest on the debt secured by this contract will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be automatically credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

F.10. When the context requires, singular nouns and pronouns include the plural.

F.11. The term *Note* includes all amounts secured by this contract.

F.12. Contractor includes Contractor's assignees or transferees. This contract binds, benefits, and may be enforced by the successors in interest of all parties.

F.13. If Owner and Maker are not the same person, the term *Owner* includes Maker.

If additional clauses like those suggested in form 20-5 are used, they should appear here as numbered paragraphs following paragraph F.13.

Include the following if the contract calls for renovation or repair of existing homestead improvements. See section 20.1:1 in this chapter.

G. Repair or Renovation Construction

If the work of this contract includes repair or renovation of existing improvements, the following provisions apply. Contractor and Owner certify and represent that they are aware of and have complied with the following legal rights and obligations:

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G.1. Rescission. Owner may rescind this contract (and any other proposals, contracts, or agreements with Contractor regarding the repair or renovation of existing improvements) without penalty or charge within three days after the execution of the contract by all parties. See the "Notice of Cancellation" below.

G.2. Place of Signing Contract. Owner acknowledges that this contract was signed at one of the following offices and not elsewhere: (a) the office of a third-party lender making an extension of credit for the work and material to be furnished; (b) the office of an attorney at law; or (c) the office of a title company.

G.3. Five-Day Waiting Period. This mechanic's lien contract and any other contract signed in connection with the repair and renovation work mentioned in this contract have not been executed by Owner or Owner's spouse before the fifth day after Owner made written application for an extension of credit for the work and material contemplated.

Include the following if applicable. This notice, if required, must appear in a minimum of ten-point bold-faced type. 16 C.F.R. § 433.2.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Continue with the following.

The following notice is required by Tex. Prop. Code § 41.007.

This notice must appear in a minimum of ten-point bold-faced type or equivalent "next to" the owner's signature line. Tex. Prop. Code § 41.007(a).

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IMPORTANT NOTICE: YOU AND YOUR CONTRACTOR ARE RESPONSIBLE FOR MEETING THE TERMS AND CONDITIONS OF THIS CONTRACT. IF YOU SIGN THIS CONTRACT AND YOU FAIL TO MEET THE TERMS AND CONDITIONS OF THIS CONTRACT, YOU MAY LOSE YOUR LEGAL OWNERSHIP RIGHTS IN YOUR HOME. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

The following notice is required by Tex. Prop. Code § 27.007.

RESIDENTIAL CONSTRUCTION LIABILITY ACT (RCLA) NOTICE

This contract is subject to Chapter 27 of the Texas Property Code. The provisions of that chapter may affect your right to recover damages arising from the performance of this contract. If you have a complaint concerning a construction defect arising from the performance of this contract and that defect has not been corrected through normal warranty service, you must provide the notice required by Chapter 27 of the Texas Property Code to the contractor by certified mail, return receipt requested, not later than the 60th day before the date you file suit to recover damages in a court of law or initiate arbitration. The notice must refer to Chapter 27 of the Texas Property Code and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code.

_____

[Name of owner]

Include the following if applicable.

YOU, THE OWNER, MAY CANCEL THIS TRANSACTION AT ANY TIME BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

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Continue with the following.

_____

[Name of contractor]

Include acknowledgments for the owner and the contractor.

If the notice of the owner's right to cancel is included, attach completed duplicate copies of the following notice of cancellation.

The notice of right to cancel, if required, must appear "in immediate proximity to" the owner's signature in a minimum of ten-point bold-faced type. Tex. Bus. & Com. Code § 601.052; 16 C.F.R. § 429.1(a).

A notice concerning the purchaser's three-day right of rescission under a contract to purchase real property must be given if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business; (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business; and (3) the consideration payable under the purchase contract exceeds $100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property, as described in Tex. Bus. & Com. Code ch. 601.

The notice of cancellation form must be easily detachable from the contract to which it is attached, must be in the same language as the contract, and must contain the following information and statements. Tex. Bus. & Com. Code § 601.053.

Notice of Cancellation

[Date]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE MERCHANT OF YOUR

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CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL YOU MUST MAKE AVAILABLE TO THE MERCHANT AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE MERCHANT REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE MERCHANT'S EXPENSE AND RISK.

IF YOU DO NOT AGREE TO RETURN THE GOODS TO THE MERCHANT OR IF THE MERCHANT DOES NOT PICK THEM UP WITHIN TWENTY DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of merchant], AT [address of merchant's place of business] NOT LATER THAN MIDNIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION.

Dated: _____.

_____

[Name of purchaser]

Include any attachments.

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Form 20-2

Mechanic's Lien Note

Basic Information

Date:

Maker:

Maker's Mailing Address:

Payee:

Payee's Mailing Address:

Place for Payment:

Principal Amount:

Annual Interest Rate on Unpaid Principal from Date of Funding:

Annual Interest Rate on Matured, Unpaid Amounts:

Terms of Payment (principal and interest): [**insert applicable clause from form 20-5 in this chapter**]

Security for Payment

Liens created in mechanic's lien contract between Maker and Payee

Date:

Trustee:

Contractor:

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Property: [**include legal description**]

Include the following if applicable.

Deed of trust renewing liens

Date:

Grantor:

Beneficiary:

Trustee:

Continue with the following.

This note incorporates and is subject to the mechanic's lien contract.

Promise to Pay

Maker promises to pay to the order of Payee the Principal Amount plus interest at the Annual Interest Rate. This note is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the final scheduled payment date. If any amount is not paid either when due under the Terms of Payment or on acceleration of maturity, Maker promises to pay the unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

Default and Remedies

If Maker defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note, Payee may declare the unpaid principal balance and earned interest on the note immediately due. Maker and each surety, endorser, and guarantor waive all demand for payment, presentation for payment, notice of intention to

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accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

Prepayment

Maker may at any time make full or partial prepayments on the principal without paying any penalty, in addition to making regularly scheduled payments. Unless Payee agrees otherwise in writing, the making of partial prepayments will not alter the dates or amounts of regularly scheduled payments. Payee may require that any partial prepayments be in the same amount as regularly scheduled payments.

Attorney's Fees

If any party retains an attorney to enforce this note, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

Usury Savings

Interest on the debt evidenced by this note will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited to the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

Other Clauses

Each Maker is responsible for all obligations represented by this note.

When the context requires, singular nouns and pronouns include the plural.

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If additional clauses like those suggested in form 20-5 are used, they should appear here or on additional sheets attached to the form.

Include the following if applicable. This notice, if required, must appear in a minimum of ten-point bold-faced type. 16 C.F.R. § 433.2.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Continue with the following.

_____

[Name of maker]

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Form 20-3

Affidavit of Completion and Indemnity

Basic Information

Date:

Mechanic's Lien Contract

Date:

Owner:

Contractor:

Trustee:

Property (including improvements): [**include legal description**]

Completion Date: [**date**]

Affiant:

Third-Party Lender:

Title Insurance Providers:

Affidavit of Completion

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. Contractor is a [Texas corporation/Texas general partnership/Texas limited partnership/sole proprietorship/[**specify other entity**]].

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2. Affiant is [the president/an authorized partner/a general partner/the sole proprietor/[**describe other representative capacity**]] of Contractor and is authorized to make this affidavit on behalf of Contractor.

3. The construction required by the Mechanic's Lien Contract has been completed in accordance with the requirements of the Mechanic's Lien Contract [**include if applicable:** and the residential construction contract between Owner and Contractor referred to in the Mechanic's Lien Contract].

4. Contractor has paid each of Contractor's subcontractors, laborers, and materialmen in full for all labor and materials provided to Contractor for the construction of improvements on the Property, excepting only the amounts owed to the persons identified below:

List all subcontractors, laborers, and materialmen and amounts owed to each. If there are no unpaid subcontractors, laborers, or materialmen, state "None."

Name:

Address:

Telephone number:

Amount owed:

Repeat above information as needed.

Continue with the following.

5. This affidavit is made to induce Owner to accept the construction as completed, to induce Third-Party Lender to fund a loan to Owner to pay Contractor all or part of the consideration in the Mechanic's Lien Contract, and to induce Title Insurance Providers to issue mortgagee [**include if applicable:** and owner] title insurance [policy/policies] without mechanic's lien exceptions.

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_____

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

_____

Notary Public, State of Texas

Indemnity

For valuable consideration, including Owner's acceptance of the construction as completed, Third-Party Lender's funding of Owner's loan to pay Contractor all or part of the consideration in the Mechanic's Lien Contract, and Title Insurance Providers's issuing of title insurance [policy/policies], Contractor warrants to those parties the truth of this affidavit of completion and agrees to indemnify, defend, and hold Owner, Third-Party Lender, and Title Insurance Providers harmless from all losses, damages, judgments, and expenses, including attorney's fees and court and other costs, that any or all of them suffer, incur, or pay because any part of this affidavit of completion is not true or completely correct.

_____

[Name of contractor]

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Form 20-4

Affidavit of Acceptance

Basic Information

Date:

Mechanic's Lien Contract

Date:

Owner:

Contractor:

Trustee:

Property (including improvements): [**include legal description**]

Third-Party Lender:

Owner on oath swears that the following statements are true and are within the personal knowledge of Owner:

1. Relying on facts now known to Owner and on Contractor's affidavit of completion and indemnity, Owner has accepted the construction required by the Mechanic's Lien Contract as complete.

2. This affidavit is made to induce Third-Party Lender to fund a loan to Owner to pay Contractor all or part of the consideration in the Mechanic's Lien Contract.

3. This affidavit is solely for the benefit of Third-Party Lender, and it does not waive or release any of Owner's rights or remedies against Contractor.

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_____

[**Name of owner**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Form 20-5

Additional Clauses for Contractual Mechanic's Liens

Construction Clause for Mechanic's Lien Contract

Clause 20-5-1

Project as described in [residential construction contract between/plans and specifications agreed on by] Owner and Contractor.

Force Majeure

Clause 20-5-2

Use this clause under "General Provisions."

Time is of the essence in the completion and delivery of the Construction. If the Construction is delayed by matters that are beyond the reasonable control of Contractor and that Contractor is unable to prevent or overcome by the exercise of reasonable diligence, the Completion Date will be extended one day for each day the Construction is so delayed, up to a maximum of thirty additional days, provided Contractor notifies Owner of the delay in writing within seven days after its occurrence.

Alternative Payment Terms for Mechanic's Lien Note

Clause 20-5-3

This note, less the retainage required by statute, is payable on completion of the construction as provided in the mechanic's lien contract of even date. Completion of construction is determined by [**specify**]. The retainage, plus interest, is payable as follows: [Contractor must first provide Owner with

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a written list of all subcontractors and suppliers of any tier who have furnished labor, material, equipment, or other improvements for the Project, including each subcontractor and supplier's name, address, and telephone number, updated and verified by Contractor as accurate as of the date of final completion of the Project, as a condition precedent to Owner action under this section. On receipt of the list, Owner will prepare, file, and send an affidavit of completion within ten days of the date of final completion of the Project. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic's liens have been filed by that time/On the last business day of the third month after the month of final completion and acceptance of the construction].

Or

Clause 20-5-4

This note is payable in the following installments during progress of the construction as provided in the mechanic's lien contract [**include if applicable:** and residential construction contract] of even date:

1. $[**amount**], less retainage required by statute, on completion of foundation, slab, and preliminary rough plumbing;

2. $[**amount**], less retainage required by statute, on completion of rough framing;

3. $[**amount**], less retainage required by statute, on completion of roof and remainder of rough plumbing;

4. $[**amount**], less retainage required by statute, on completion and acceptance of all construction; and

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5. retainage required by statute, which will be paid as follows: [Contractor must first provide Owner with a written list of all subcontractors and suppliers of any tier who have furnished labor, material, equipment, or other improvements for the Project, including each subcontractor and supplier's name, address, and telephone number, updated and verified by Contractor as accurate as of the date of final completion of the Project, as a condition precedent to Owner action under this section. On receipt of the list, Owner will prepare, file, and send an affidavit of completion within ten days of the date of final completion of the Project. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic's liens have been filed by that time/On the last business day of the third month after the month of final completion and acceptance of the construction].

Or

Clause 20-5-5

This note is payable in the following installments during progress of the construction as provided in the mechanic's lien contract [**include if applicable:** and residential construction contract] of even date:

1. $[**amount**] on [**date**];

2. $[**amount**] on [**date**];

3. at the end of each two-week period after [**date**], an amount equal to 50 percent of the cost of all labor provided and material in place on the Property at that time, as estimated by [Contractor/the architect], and not already paid for by Owner, until the total amount paid is $[**amount**];

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4. the balance, plus interest, less retainage required by statute, on or before [**date**], or on completion of the construction, whichever is later; and

5. retainage required by statute, which will be paid as follows: [Contractor must first provide Owner with a written list of all subcontractors and suppliers of any tier who have furnished labor, material, equipment, or other improvements for the Project, including each subcontractor and supplier's name, address, and telephone number, updated and verified by Contractor as accurate as of the date of final completion of the Project, as a condition precedent to Owner action under this section. On receipt of the list, Owner will prepare, file, and send an affidavit of completion within ten days of the date of final completion of the Project. Retainage will then be released to Contractor the fiftieth day after the date of final completion as stated in the affidavit, provided no unreleased mechanic's liens have been filed by that time/On the last business day of the third month after the month of final completion and acceptance of the construction].

Cost Plus Fixed Fee, Not to Exceed a Certain Amount

Clause 20-5-6

This clause may be placed under "Terms of Payment" or at the end of the mechanic's lien contract before the notices.

Owner will pay Contractor the actual cost of all labor and materials furnished by Contractor and used in the Construction, plus a fixed fee of $[**amount**]. The total contract price, however, will not exceed $[**amount not to exceed that of the mechanic's lien note**]. Contractor will keep an accurate record of the labor and material costs, including all original invoices and receipted bills, and on request will give Owner an accurate, documented accounting of these costs.

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Cost Plus Percentage, Not to Exceed a Certain Amount

Clause 20-5-7

This clause may be placed under "Terms of Payment" or at the end of the mechanic's lien contract before the notices.

Owner will pay Contractor the actual cost of all labor and materials furnished by Contractor and used in the Construction, plus [**percent**] percent of the actual cost of all labor and materials furnished by Contractor and used in the Construction. The total contract price, however, will not exceed $[**amount not to exceed that of the mechanic's lien note**]. Contractor will keep an accurate record of the labor and material costs, including all original invoices and receipted bills, and on request will give Owner an accurate, documented accounting of these costs.

Liability Disclaimer

Clause 20-5-8

If one spouse will not be liable on the debt, the following clause should be inserted in the mechanic's lien contract before the signature lines.

[**Name of spouse not liable on the debt**] is signing this instrument solely to create a lien on the property, and [he/she] is not personally liable on the debt.

For Use with Subordinate/Second Lien Mechanic's Lien Contract

Insert in mechanic's lien contract, form 20-1, section F.

Clause 20-5-9

OWNER MAY FURNISH ANY INSURANCE REQUIRED BY THIS MECHANIC'S LIEN CONTRACT EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED

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BY OWNER OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

Clause 20-5-10

The lien created by this mechanic's lien contract will be subordinate to the lien securing payment of the note, and any renewals, extensions, and modifications thereof, in the original principal amount of [**amount**] DOLLARS ($[**amount**]), dated [**date**], executed by [**name**], payable to the order of [**name**], and more fully described in a deed of trust recorded in [**recording data**] of the real property records of [**county**] County, Texas. If default occurs in payment of any part of principal or interest of that $[**amount**] note or in observance of any covenants of the deed of trust securing it, the entire debt secured by this mechanic's lien contract will immediately become payable at the option of Contractor or its transferees.

Clause 20-5-11

If Owner fails to pay any part of principal or interest secured by a prior lien or liens on the Property when it becomes payable or defaults on any prior lien instrument, the entire debt secured by this mechanic's lien contract will immediately become payable at the option of Contractor or its transferees.

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Form 20-6

New Home Closing Certificate

Basic Information

Owner[s]:

Contractor:

Closing Date:

Credit Account:

Credit Amount:

Property: [**address**]

1. [I am/We are] the only Owner[s] of the Property.

2. [I/We] have received all of the documents related to the closing of the loan for the new home construction by Contractor on the Property at least one business day before the Closing Date.

3. [I/We] received the residential construction contract disclosure statement at least one business day before the Closing Date.

4. As of this date, none of the improvements contracted for by Owner[s] are located on the Property and no construction has commenced, nor have any materials or supplies been delivered to the Property to be used in the construction of the improvements by Owner[s].

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5. [I am/We are] signing this certificate at the same time as [I am/we are] signing the mechanic's lien contract and mechanic's lien note and documents related to construction of the new home by Contractor on the Property.

_____

Owner

Repeat signature line as needed.

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Form 20-7

Home Improvement Closing Certificate

Basic Information

Owner[s]:

Contractor:

Closing Date:

Property: [**address**]

1. [I am/We are] the only Owner[s] of the Property.

2. [I/We] have made written application for an extension of credit for construction of improvements to the Property. The amount of the loan is intended to be used for the purpose indicated in the mechanic's lien contract of even date between [me/us] and Contractor.

3. [I/We] have not executed any contract for work or materials with the Contractor before the fifth day after the above-mentioned application for an extension of credit or before today's closing.

> The closing must occur at the office of the lender, an attorney at law, or a title company.

4. This transaction is being closed at the following office: [**name and address**].

5. At closing, [I/we] received two copies of the notice of right to cancel. [I/We] understand that [I/we] can cancel or rescind this contract and any other contract for the contemplated construction at any time within three days after the signing of the contract by all parties, without penalty or charge of any kind whatever.

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6. [I/We] received the residential construction contract disclosure statement at least one business day before the Closing Date.

7. [I/We] have received all of the documents related to the closing of the loan for the construction of improvements by Contractor on the Property at least one business day before the Closing Date.

8. As of this date, none of the improvements to be constructed are now located on the Property and no construction has commenced, nor have any materials or supplies been delivered to the Property to be used in the construction of the improvements to the Property.

9. [I am/We are] signing this certificate at the same time as [I am/we are] signing the mechanic's lien contract and mechanic's lien note and documents related to construction of the improvements by Contractor on the Property.

_____
Owner

Repeat signature line as needed.

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Form 20-8

Election Regarding Right of Rescission

Basic Information

Date:

Borrower:

[Borrower's Spouse:]

Borrower's Mailing Address:

[Borrower's Spouse's Mailing Address:]

Contractor:

Contractor's Mailing Address:

Mechanic's Lien Contract

Date:

Amount:

Property: [**address**]

In accordance with section 50(a)(5)(C), article XVI, of the Texas Constitution, Borrower [and Borrower's Spouse] provide[s] Contractor with the following notice regarding the Mechanic's Lien Contract and any other related contract between Borrower and Contractor for improvements to the Property:

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☐ I have elected not to rescind the Mechanic's Lien Contract (or any other related contract with the Contractor for improvements to the Property). I acknowledge that more than three days have expired from the date that the Mechanic's Lien Contract (and any other related contract with the Contractor for improvements to the Property) was signed by all the parties.

☐ I have elected to rescind the Mechanic's Lien Contract (and all related contracts with the Contractor for improvements to the Property). This notice is given within three days from the date that the Mechanic's Lien Contract (and related contracts with the Contractor for improvements to the Property) was made.

_____

[Name of borrower]

Include the following if applicable.

_____

[Name of borrower's spouse]

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Chapter 21

Involuntary Mechanic's Lien Documents

§ 21.1 Texas Constitutional Lien

§ 21.1:1 Generally

This chapter discusses primarily statutory mechanic's liens and provides related forms based on Tex. Prop. Code ch. 53. The Texas Constitution provides a separate constitutional lien in addition to the statutory mechanic's lien provided in the Texas Property Code. Tex. Const. art. XVI, § 37.

The constitutional lien requires no special notice to owners. It is considered self-enacting and arises solely from the claimant's performance of the work. Two important features of constitutional liens should be noted: first, they arise only in favor of "original contractors" (persons with contracts directly with the owner of the property interest improved), and second, bona fide purchasers or lienholders without notice of the constitutional lien claim do not take subject to it.

Even though the constitutional lien is considered self-enacting, as a practical matter the claimant must take some action to put the world on notice of the lien claim before an intervening sale or other encumbrance of the property. Such notice might be given either by filing an affidavit claiming the lien in the real property records in the county in which the property is located or by filing suit and lis pendens notice. *See* Tex. Prop. Code § 12.007.

The forms presented in this chapter are for documenting statutory rather than constitutional lien claims. Form 21-4, however, could be adapted for use in filing notice of a constitutional claim. For the constitutional lien affidavit, a phrase may be included in paragraph 8. of the form specifically referring to the constitutional lien, Tex. Const. art. XVI, § 37. Paragraph 6. can also be changed to reflect the fact that the claimant is the original contractor (for example, "Claimant is also the original contractor on the above-referenced project"). No special form of notice is required; the claimant is merely placing constructive notice of the constitutional lien claim in the real property records by filing the affidavit. Of course, as a practical matter, the claimant should send a copy of the filed affidavit or lis pendens to the owner.

§ 21.1:2 Homestead Considerations

Necessity for Written Contract to Improve Homestead: No involuntary mechanic's lien may attach to homestead property unless the homestead owner and the contractor sign a qualifying written contract for the improvements. This requirement applies to both constitutional and statutory mechanic's liens. The qualifying written contract for the improvements must satisfy certain constitutional and statutory requirements. Tex. Const. art. XVI, § 50(a)(5); Tex. Prop. Code §§ 41.001, 53.254; *Cavazos v. Munoz*, 305 B.R. 661 (S.D. Tex. 2004). The required elements of a qualifying contract to improve the homestead are discussed in section 20.1:2 in this manual.

While the underlying written contract for the improvements is a prerequisite to the existence of an involuntary mechanic's lien against the homestead, it is not the source of the lien. Rather, the lien arises from the performance of work by the claimant and (in the case of a statutory lien) the satisfaction of certain requirements necessary to perfect the lien.

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Subcontractors do not have to sign the written contract to improve the homestead. Its lien qualifying effects vicariously inure to the benefit of all subcontractors and materialmen who furnish labor or materials through the original contractor. Tex. Prop. Code § 53.254(d).

Required Admonitions for Statutory Mechanic's Liens against Homestead: As a general rule, a statutory mechanic's lien against the homestead may be perfected in the same manner prescribed for all such liens. However, in addition to the general requirements of chapter 53 of the Property Code, there are special admonitions required to be given by the lien claimant to the homestead owner that are unique to involuntary mechanic's liens against the homestead. For a discussion of these special admonitions refer to section 21.5:1 below.

§ 21.2 General Considerations for Statutory Liens

Texas courts consistently have followed two interpretive principles in evaluating the validity of involuntary mechanic's lien claims. First, the mechanic's lien statutes are to be liberally interpreted for the purposes intended, to provide lien claimants security for their labor and materials furnished on construction of improvements on real property. *First National Bank v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974). Second, however, the time deadlines for sending required notices and filing the mechanic's lien affidavit are critical. Missing the notice deadline or mechanic's lien filing deadline is fatal to the mechanic's lien in almost every instance. *See First National Bank v. Sledge*, 653 S.W.2d 283 (Tex. 1983).

Residential Construction: If a construction project is on residential property, the claimant must comply with the provisions of Tex. Prop. Code ch. 53, subch. K, in addition to the other statutory requirements. The portions of subchapter K that relate to involuntary liens are discussed or cited in the following sections of these practice notes. Residential projects are defined for purposes of the mechanic's lien statute as construction or repair of a single-family house, duplex, triplex, quadruplex, or unit in a multi-unit structure used for residential purposes that is owned by one or more adult persons and is used or intended to be used as a dwelling by one or more of its owners. Tex. Prop. Code § 53.001(8), (9), (10).

§ 21.3 Construction Project Participants

To understand the rights and time deadlines for notice according to the statute, the attorney must first understand how the claimant fits into the chain of parties on the project: owner, original contractor, subcontractor, and supplier. Notice requirements fall into three basic categories based on the definitions of participants on a construction project.

§ 21.3:1 Original Contractor

An original contractor is a person or entity contracting with the owner of the interest in the real estate being improved—either directly or through an agent for the owner. An original contractor creates a statutory lien against the property by filing a lien affidavit with the county clerk of the county in which the property is located and sending a copy of the affidavit to the owner of the property. Original contractors have no notice requirements other than sending a copy of the affidavit claiming the mechanic's lien to the owner. *See* Tex. Prop. Code § 53.052. As discussed in section 21.1 above, original contractors also have a constitutional lien.

§ 21.3:2 First-Tier Subcontractors and Suppliers

First-tier subcontractors or suppliers have a subcontract, purchase order, or other agreement directly with the original contractor. In addition

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to filing a lien affidavit, they must provide notice of unpaid claims to the owner to create mechanic's lien rights. This notice authorizes the owner to withhold payment from the contractor to pay the claims. A copy of the notice of unpaid claims must be sent by certified mail to the original contractor. Tex. Prop. Code §§ 53.056, 53.081, 53.252. This statutory procedure is referred to as the trapping of funds.

§ 21.3:3 Second-Tier and Lower-Tier Subcontractors and Suppliers

Second-tier and lower-tier subcontractors or suppliers have subcontracts or agreements with a first-tier, second-tier, or lower-tier subcontractor. In other words, they have no contract with the original contractor. Therefore, they are required to give notice to the original contractor in addition to sending the same notice described in section 21.3:2 above to the owner as a prerequisite to perfecting a valid mechanic's lien. Tex. Prop. Code §§ 53.056(b), 53.252(b).

Although the notice requirements differ, the mechanic's lien rights to trapped funds and retainage are the same for second-tier and lower-tier subcontractors as for first-tier subcontractors and suppliers. In this chapter all second- and lower-tier subcontractor and supplier claimants will be referred to as "second-tier" claimants.

§ 21.4 Owner Liability for Mechanic's Lien Claims

§ 21.4:1 Original Contractors

Owners are liable for the amount of the mechanic's lien perfected by original contractors. Disputes may exist about the underlying merits of claims for the amount of indebtedness owed to the original contractor. However, owners are liable to pay the face amount of original contractor perfected mechanic's lien claims, if the amount is owed.

§ 21.4:2 Derivative Claimants: First- and Second-Tier Claims, Statutory Retainage, and Fund Trapping

The owner's liability to both first- and second-tier subcontractor or supplier lien claimants is the sum of two amounts described in Tex. Prop. Code § 53.084. First, an owner is liable for the mandatory 10 percent statutory retainage that owners are required to withhold from the original contractor on every nonbonded construction job. Tex. Prop. Code §§ 53.101–.103; *Page v. Structural Wood Components*, 102 S.W.3d 720, 722 (Tex. 2003). In addition, an owner is liable for "fund trapping," which means "trapping" or withholding remaining contract funds otherwise owed to the original contractor once the owner receives a mechanic's lien notice letter (Tex. Prop. Code § 53.056(b), (d)) containing language telling the owner to withhold payment from the contractor for the claim amount. If an owner receives a lien notice letter containing the required fund-trap warning but fails to withhold payment from the contractor, the owner is personally liable and his property subject to a lien for such amounts paid out in spite of receipt of such notice. This fund trapping liability is in addition to the owner's liability for the 10 percent statutory retainage.

Aiken v. State, 36 S.W.3d 131 (Tex. App.—Austin 2000, no pet.), provides a good example of owner liability for fund trapping and retainage. *Aiken* involved criminal prosecution of a contractor on a residential construction project. The contractor was accused of taking a bank loan advance for the construction and misapplying the funds by not using them to pay project bills due on the job. This is ordinarily a violation of chapter 162 of the Texas Property Code (the Texas Construction Trust Funds Act). However, in this case, the prosecution chose to pursue a conviction under Texas Penal Code section 32.45, misapplication of fiduciary property. One of the elements of this offense is to prove that

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the defendant dealt with property of the victim in a manner that involves substantial risk of loss to the owners. In this case, because the owners had withheld 10 percent retainage, the court determined that the owners suffered no substantial risk of loss. Their liability was limited to the 10 percent retainage since no funds had been trapped by lien claimants, as described above. The case provides a good example of how owner liability is calculated.

To summarize, owners have to withhold or "trap" funds they otherwise owe the contractor on receipt of a proper lien notice letter. In addition, owners must withhold 10 percent retainage from the original contractor throughout the duration of the project. If owners fail to trap funds or retain the 10 percent retainage throughout the course of the job, they are nevertheless liable for such amounts they should have withheld.

§ 21.5 Instructions for Completing Forms

§ 21.5:1 Affidavit Claiming Lien

Original contractors and first- and second-tier subcontractors and suppliers create a statutory mechanic's lien against property by filing a lien affidavit with the county clerk of the county in which the property is located and sending a copy of the affidavit to the owner of the property.

It is best to have the affidavit claiming mechanic's and materialman's lien, form 21-4 in this chapter, executed by a claimant with knowledge of the amount due on the account, the work performed, and the particular project involved. The mechanic's lien affidavit is invalid unless it contains a jurat. *Sugarland Business Center, Ltd. v. Norman*, 624 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1981, no writ).

Paragraph 4. of form 21-4 must state the type of labor performed and materials furnished.

The legal description of the property, sufficient to distinguish it from other tracts in the area, is required in paragraph 7. of form 21-4. The lien applies to the original tract at the time construction commenced. Subsequent conveyances of parts of the property, even if conveyed before the filing of the lien affidavit, are still subject to the lien. *See Valdez v. Diamond Shamrock Refining & Marketing Co.*, 842 S.W.2d 273 (Tex. 1992).

The notice at the top of form 21-4 states "NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN." This notice is required to assert a mechanic's lien against homestead property and must appear at the top of the page in a minimum of ten-point boldfaced type or equivalent. Tex. Prop. Code § 53.254(f).

Also, for first- and second-tier claimants (other than original contractors), the lien affidavit must contain a statement as to each month in which material was delivered or work performed (paragraph 4.) and a description of the date and method of giving required notice to the owner (paragraph 10.). Tex. Prop. Code § 53.054(a)(3), (a)(8).

A copy of the lien affidavit must be sent to the original contractor and the owner within five days of filing the affidavit. Tex. Prop. Code § 53.055. Form 21-5 is a cover letter for this purpose. Failure to send the lien affidavit within the time prescribed has been held fatal to the validity of the lien. *Cabintree, Inc. v. Schneider*, 728 S.W.2d 395 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd); *but see Arias v. Brookstone, L.P.*, 265 S.W.3d 459 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (declining to follow dicta from *Cabintree* that notice must be given after the lien affidavit has been filed).

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§ 21.5:2 Notice to Original Contractor by Second-Tier Claimant

Form 21-1 in this chapter must be sent by certified mail to the original contractor and is self-explanatory. Copies of statements or billings should be attached.

§ 21.5:3 Notice of Unpaid Claim to Owner and Original Contractor

All derivative claimants, first-tier and second-tier, must send a written notice of unpaid claim to the owner and original contractor. Form 21-2 in this chapter is meant to satisfy this notice requirement. It contains language prescribed by Tex. Prop. Code §§ 53.056(d), 53.252(c), advising the owner that a failure to withhold payment from the contractor may result in the owner becoming personally liable and the property subjected to a lien. This language is required to trap funds on the project pursuant to Tex. Prop. Code § 53.081(b).

Form 21-2 includes a reference to the Texas Construction Trust Fund Act, Tex. Prop. Code §§ 162.001–.033. This statute states that all recipients of payment under a construction contract in Texas (including an owner who receives construction loan funds secured by a deed of trust on real property and the contractor who receives a construction draw) become trustees of the funds and must see to it that the funds received are used to pay actual expenses directly related to the job. Tex. Prop. Code §§ 162.002, 162.031(b). Diversion of funds to other jobs or expenses not directly related to the project on which the funds were received is a violation of the statute and, in some circumstances, is a crime. Tex. Prop. Code §§ 162.031(a), 162.032.

§ 21.5:4 Notice of Unpaid Claim—Homestead Property

Form 21-3 in this chapter is a statutory disclosure and warning that must be included verbatim in any notice of unpaid claim given on homestead property against which a contractor, subcontractor, supplier, or other claimant wishes to assert a mechanic's lien. Tex. Prop. Code § 53.254(g).

§ 21.5:5 Special Notices

Specially Fabricated Materials: The notice regarding specially fabricated materials, form 21-6 in this chapter, is to be sent by the fifteenth day of the second month after the claimant receives and accepts an order for a specially fabricated material. Tex. Prop. Code §§ 53.058, 53.253.

This notice must be sent by certified mail, return receipt requested, to the owner or reputed owner and also to the original contractor, unless the claimant's subcontract is with the original contractor. Tex. Prop. Code §§ 53.058(b), (d), 53.253(c), (e).

Sending this notice allows the claimant to later perfect a mechanic's lien by filing an affidavit at the applicable time, even if the claimant has not yet delivered the specially fabricated materials. Tex. Prop. Code §§ 53.058, 53.253. Taking advantage of this procedure has the potential of allowing the lien claimant to retain specially fabricated materials while still asserting a mechanic's lien claim.

Different or additional notices may be required if the specially fabricated materials have (or should have) already been delivered. *See* Tex. Prop. Code §§ 53.058(e), 53.253(b).

Contractual Retainage: Contractual retainage is the right expressed in a subcontract or other agreement to withhold, from progress payments otherwise due, a percentage of money due

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a first- or second-tier claimant pending completion of the work, final payment released on the project, or other later date. Retainage provisions in Texas Property Code chapter 53 were amended by the 2011 legislature. For projects on which the original contract was executed before September 1, 2011, form 21-7, notice of agreement providing for retainage, must be sent by the claimant by registered or certified mail to the last known business or residence address of the owner, reputed owner, or original contractor to later perfect a lien claim for retainage on the project, if the claimant has entered into an agreement that provides for retainage. Tex. Prop. Code § 53.057. Form 21-8 is the notice of retainage agreement applicable to projects for which the original contract was executed on or after September 1, 2011. Tex. Prop. Code § 53.057(c). Form 21-8 need not be sent by registered or certified mail.

§ 21.5:6 Requests for Information

Tex. Prop. Code § 53.159 provides that the various participants in the construction project (owner, contractor, subcontractor, and supplier) may request information of each other. Forms 21-9 through 21-12 in this chapter are letters that indicate the information that may be requested. Failure to provide information requested in accordance with the statute triggers liability for the reasonable and necessary costs of obtaining the information elsewhere. Tex. Prop. Code § 53.159(f). Also, a subcontractor who does not timely receive the notice of the date of execution of the original contract for the project is not required to file a mechanic's lien by the early retainage deadlines, but instead may file by the later dates specified by Tex. Prop. Code § 53.052. See the discussion in section 21.8:2 below.

§ 21.5:7 Release Required of Claimant

Once a claim is paid or otherwise satisfied, a mechanic's lien claimant must furnish a release in recordable form to the person paying the claim. The release of mechanic's and materialman's lien, form 21-13 in this chapter, must be furnished by the claimant within ten days of receipt of a written request. *See* Tex. Prop. Code § 53.152.

If the claim is only partially paid, a partial release of lien, form 21-14, may be used to preserve the lien securing the balance owed.

§ 21.6 Time Limits for Contractual Retainage Claims

A first- or second-tier claimant has two alternative methods for sending lien notices covering the claimant's contractual retainage claim. The claimant may send the notices, which are due each month, by the deadlines provided by Texas Property Code sections 53.056 or 53.252. (See section 21.7 below.) Alternatively, the claimant may send a simplified, one-time notice for contractual retainage agreement, given according to Tex. Prop. Code § 53.057. See forms 21-7 and 21-8 in this chapter. The claimant who gives the retainage notice by the Tex. Prop. Code § 53.057 deadline does not have to give other retainage notices, except notice of the filing of the mechanic's lien affidavit. Tex. Prop. Code § 53.057(e). Note, however, that a claim consisting in part of retainage and in part of other billings on a job must comply not only with the retainage notice deadlines but also with the other applicable notice time limits as set out in section 21.7 below. Tex. Prop. Code §§ 53.056, 53.257.

The following deadlines are for contractual retainage notices. These apply to both residential and nonresidential projects. Because the retainage provisions in Texas Property Code

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chapter 53 were amended by the 2011 Texas legislature, two sets of deadlines are provided, the application of which depends on the date of execution of the original contract between the original contractor and owner.

Original Contract Executed before September 1, 2011: Notice to the original contractor and to the owner by second-tier and lower-tier claimants (subcontractors or suppliers with no contract with the original contractor) must be given not later than the fifteenth day of the second month following the first month of delivery or work. Tex. Prop. Code § 53.057(b).

Notice to the owner by first-tier claimants (subcontractors or suppliers with contracts directly with the original contractor) must also be given not later than the fifteenth day of the second month following the first month of delivery or work. Tex. Prop. Code § 53.057(b).

Original Contract Executed on or after September 1, 2011: Notice to the original contractor and to the owner by second-tier and lower-tier claimants (subcontractors or suppliers with no contract with the original contractor) must be given by the earlier of—

1. the thirtieth day after the claimant's agreement (i.e., the subcontract work or delivery of material) is completed, terminated, or abandoned; or

2. the thirtieth day after the date the owner's or original contractor's agreement is terminated or abandoned.

Tex. Prop. Code § 53.057(b–1).

Notice to the owner by first-tier claimants (subcontractors or suppliers with subcontracts or other agreements directly with the original contractor) must also be given by the earlier of the deadlines stated above for second-tier claimants. Tex. Prop. Code § 53.057(b)–(d).

§ 21.7 Time Limits for Notices of Claims Other than for Contractual Retainage

§ 21.7:1 Nonresidential Projects

Second-Tier Claimants—Original Contractor Notice: Notice to the original contractor by second-tier and lower-tier claimants must be given not later than the fifteenth day of the second month following each month of delivery or work. Tex. Prop. Code § 53.056(b). See the chart at section 21.9:1 below.

First- and Second-Tier Claimants—Owner Notice: Notice to the owner and to the original contractor of all derivative claims must also be given not later than the fifteenth day of the third month following each month of delivery or work. Tex. Prop. Code § 53.056(b). See the chart at section 21.9:1 below.

§ 21.7:2 Residential Projects

First- and Second-Tier Claimants—Owner and Original Contractor Notice: Notice to the owner and to the original contractor of all derivative claims must be given not later than the fifteenth day of the second month following each month of delivery or work. Tex. Prop. Code § 53.252. See the chart at section 21.9:2 below.

§ 21.8 Deadlines for Filing Lien Affidavit

In addition to sending the notices by the times described above, the claimant must file a lien affidavit in the real property records of the county in which the property is located.

§ 21.8:1 Accrual of Indebtedness

The deadline for filing the lien affidavit depends on several factors, including the date the claimant's "indebtedness accrues."

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A claimant's "indebtedness accrues" by the earliest of the following:

1. For original contractors, the earlier of (a) the last day of the month of receipt by the owner or contractor of a written declaration by the other party that the original contract has been terminated or (b) the last day of the month in which the project was completed or abandoned. Tex. Prop. Code § 53.053(b).

2. For a first- or second-tier claimant, the last day of the last month in which that claimant's labor was performed or material furnished. Tex. Prop. Code § 53.053(c).

3. For a claimant furnishing specially fabricated material, the last day of the last month in which (a) the material was furnished; (b) the material would have been furnished; or (c) the owner, contractor, or subcontractor breached or terminated the contract or subcontract with the claimant. Tex. Prop. Code § 53.053(d).

4. For claims for unpaid contractual retainage, the earliest of the last day of the month in which the whole project is completed, finally settled, terminated, or abandoned. Tex. Prop. Code § 53.053(e).

§ 21.8:2 Original Contractor Lien Affidavit Filing Deadlines

The original contractor lien affidavit filing deadline for residential projects is the fifteenth day of the third calendar month after the "indebtedness accrues." Tex. Prop. Code § 53.052.

For nonresidential projects, the deadline is the fifteenth day of the fourth calendar month after the "indebtedness accrues." Tex. Prop. Code § 53.052.

§ 21.8:3 First- and Second-Tier Claimant Lien Affidavit Filing Deadlines

To obtain an enforceable lien claim and also claim a share of the owner's required 10 percent statutory retainage, first- and second-tier subcontractor and supplier lien claimants must file their lien affidavits by the earlier of the deadlines indicated in sections 21.8:4 and 21.8:5 below. Because the retainage provisions affecting first- and second-tier claimants were amended by the 2011 Texas legislature, two sets of deadlines are provided, application of which depends on the date of execution of the original contract between the original contractor and owner.

§ 21.8:4 Original Contract Executed before September 1, 2011

First- and second-tier subcontractor and supplier lien claimants' lien affidavit filing deadlines are determined as follows:

1. For residential projects, by the fifteenth day of the third calendar month after the "indebtedness accrues." Tex. Prop. Code § 53.052. See the chart at section 21.9:2 below.

2. For nonresidential projects, by the fifteenth day of the fourth calendar month after the "indebtedness accrues." Tex. Prop. Code § 53.052. See the chart at section 21.9:1 below.

However, if the deadline provided for in Tex. Prop. Code § 53.103 occurs earlier than the deadlines above, the claimant must file by the earlier date to share in the owner's 10 percent statutory retainage. *See* Tex. Prop. Code § 53.103. This thirty-day deadline applies to both residential and nonresidential projects.

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Note that for determining "final completion," warranty work does not count to extend time limits.

§ 21.8:5 Original Contract Executed on or after September 1, 2011

A claimant may rely on the deadlines described in section 21.8:4 above, based on the pre-2011 version of the statute. Alternatively, a claimant may choose instead to file by the earliest of the following four deadlines for projects in which the original contract was executed on or after September 1, 2011:

1. The normal lien-filing date provided by Tex. Prop. Code § 53.052, which is (a) the fifteenth day of the fourth month following the last month of work or delivery by the claimant for nonresidential projects or (b) the fifteenth day of the third month following the last month of work or delivery by the claimant for residential projects. (See the charts at sections 21.9:1 and 21.9:2 below.)

2. The fortieth day after the date stated in the affidavit of completion for the original contract, if the owner sent the claimant notice of the affidavit. This affidavit of completion is provided for in Tex. Prop. Code § 53.106, which allows, but does not require, the owner to file such an affidavit stating the date of final completion for the project. See form 18-7 in this manual. Notice of filing and a copy of the affidavit must be sent to claimants making a written request for them or to claimants who have sent out owner lien notices. However, regardless of whether a claimant makes a request for such an affidavit or sends a lien notice, if the affidavit is not sent to a claimant, then the forty-day deadline provided in this section does not apply to that claimant. The affidavit is prima facie evidence of the actual final completion date for the project if it is sent to claimants as required.

3. For nonresidential projects only, the fortieth day after the date of termination or abandonment of the original contract if notice of termination or abandonment was sent by the owner to the claimant as required by Tex. Prop. Code § 53.107. The notice of termination or abandonment is required to be sent to each claimant who requests notice in writing or who sends the owner a lien notice. However, regardless of whether a claimant makes a request for a notice of termination or abandonment or sends a lien notice, if that notice is not sent to a claimant, then the forty-day deadline provided in this section does not apply. See form 21-15. This deadline option is not applicable to residential projects. Tex. Prop. Code § 53.107(e).

4. The thirtieth day after the day the owner sends written notice to the claimant demanding that the claimant file its mechanic's lien affidavit. The notice must contain a legal description of the project property, the owner's name and address, and it must specify that the lien affidavit must be filed within thirty days of when the notice was sent. Tex. Prop. Code § 53.057(g).

Interestingly, this fourth alternative provides that the notice is effective only for the amount of contractual retainage earned by the claimant as of the day this owner notice was sent. Therefore, Tex. Prop. Code § 53.057(g) indicates that claimants who fail to file within thirty days of the owner demand may have only their contractual retainage impacted.

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§ 21.8:6 Owner Notice of Termination or Abandonment by Contractor—Nonresidential Projects

For nonresidential projects only, a notice of termination or abandonment is required of the owners. The notice must be sent not later than the tenth day after the date the original contract is terminated or the original contractor abandons the project. Tex. Prop. Code § 53.107.

The owner must send this notice to every claimant who has either provided the owner with notice of a lien claim or sent a request to the owner for notice of termination or abandonment. Tex. Prop. Code §§ 53.103, 53.107. A notice of termination or abandonment by owner is included as form 21-15 in this chapter.

If the owner fails to give the notice of termination or abandonment, the claimant will not be subject to the early retainage filing deadlines described in sections 21.8:4 or 21.8:5 (3) above. Tex. Prop. Code §§ 53.103, 53.107.

§ 21.8:7 Owner Failure to Withhold 10 Percent Retainage

If the owner fails to withhold statutory retainage, then the claimants are entitled to perfect their claims by notice and affidavit either by the longer deadlines described in sections 21.8:4 and 21.8:5 (1) above (the fifteenth day of the third month (residential) or the fifteenth day of the fourth month (nonresidential) following the last month of work/delivery). No thirty-day or forty-day deadlines under Tex. Prop. Code § 53.057(f) are applicable if the owner fails to withhold the statutory retainage.

§ 21.9 Timetables Outlining Deadlines

Caution: The following tables outline only the timetables for various deadlines; the attorney must have a clear understanding of the statutes to properly apply the tables.

If the retainage deadline, provided for in Tex. Prop. Code § 53.103, is earlier than the lien affidavit deadlines provided for by Texas Property Code sections 53.056 and 53.252, the affidavit must be filed by that earlier deadline.

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§ 21.9:1 Nonresidential Projects (Tex. Prop. Code § 53.056)[1]

Month of activity	Deadline for notice to original contractor by 2nd-tier & lower claimants	Deadline for notice to owner/original contractor by 1st-tier, 2nd-tier & lower claimants	Deadline for filing lien affidavit by all claimants[1]
January	March 15	April 15	May 15
February	April 15	May 15	June 15
March	May 15	June 15	July 15
April	June 15	July 15	August 15
May	July 15	August 15	September 15
June	August 15	September 15	October 15
July	September 15	October 15	November 15
August	October 15	November 15	December 15
September	November 15	December 15	January 15
October	December 15	January 15	February 15
November	January 15	February 15	March 15
December	February 15	March 15	April 15

§ 21.9:2 Residential Projects (Tex. Prop. Code § 53.252)

Month of activity	Deadline for notice to owner & original contractor by 1st-tier, 2nd-tier & lower claimants	Deadline for filing lien affidavit by all claimants[1]
January	March 15	April 15
February	April 15	May 15
March	May 15	June 15
April	June 15	July 15
May	July 15	August 15
June	August 15	September 15
July	September 15	October 15
August	October 15	November 15
September	November 15	December 15
October	December 15	January 15
November	January 15	February 15
December	February 15	March 15

1. These deadlines are based on the last calendar month in which the claimant delivered labor or material. Determine the affidavit filing date by finding the last month in which the claimant furnished labor or delivered material in the "Month of activity" column. The affidavit must be filed by the thirtieth day after completion of the entire project, if earlier than the date specified by this column.

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§ 21.10 Texas Prompt Payment Statute

Chapter 28 of the Texas Property Code provides that for private work, as contrasted with public works projects, the owner has thirty-five days from the date of receipt from a contractor of a written request for payment to pay the invoiced amount—less retainage required by law—for work properly performed or materials specially fabricated or suitably stored. Tex. Prop. Code § 28.002(a). Once the contractor receives payment, he must pay his subcontractors or suppliers their proportionate share of the draw not more than seven days later. Tex. Prop. Code § 28.002(b). A subcontractor who receives payment must in turn pay his subcontractors or suppliers their proportionate share not later than seven days thereafter. Tex. Prop. Code § 28.002(c). Unpaid bills earn interest at the rate of 1.5 percent per month. Interest stops accruing on the date of receipt of payment, the date payment is mailed, or the date a judgment is rendered in a suit filed under this statute, whichever occurs first. Tex. Prop. Code § 28.004. Recovery of attorney's fees in a suit to collect the interest is also allowed. Any attempt to waive this section is void. Tex. Prop. Code §§ 28.005–.006.

If a good-faith dispute exists concerning the amount owed on a residential job (construction of a single-family residence, duplex, triplex, or quadruplex), the owner, contractor, or subcontractor disputing the payment may withhold no more than 110 percent of the difference between the amounts claimed due. Tex. Prop. Code § 28.003(a).

If a good-faith dispute exists on projects not involving construction of a single-family residence, duplex, triplex, or quadruplex, no more than 100 percent of the amount in dispute may be withheld. Tex. Prop. Code § 28.003(b).

If the construction lender's late release of funds is the reason for the delay in payment, the owner is protected because the payment required of the owner pursuant to Tex. Prop. Code § 28.002(a) changes from the thirty-fifth day after the date the owner receives the payment request to the fifth day after the date the owner receives loan proceeds, if a construction loan exists and the owner has timely and properly requested disbursement but the lender failed to disburse in time to meet the thirty-five-day deadline. Tex. Prop. Code § 28.008.

Right to Suspend Work: Section 28.009 of the Texas Property Code provides a statutory right of the contractor or subcontractor to suspend work on private commercial projects if he has not been paid in accordance with this statute. Subpart (e) of section 28.009 provides that this part does not apply to a contract for the construction of improvements to a detached single-family residence, duplex, triplex, or quadruplex. Tex. Prop. Code § 28.009(e).

Work cannot be suspended until the tenth day after the claimant gives written notice to the owner or contractor, as applicable, stating that payment has not been received and stating the intent of the contractor or subcontractor to suspend performance. If a construction loan exists, the lender must also be given this notice of intent to suspend work. The claimant is not required to perform further work until the amount due is paid, plus costs of demobilization and remobilization. The claimant is not responsible for damages due to suspension of work if the claimant was not notified in writing before suspension either that payment has been made or that a good-faith dispute about payment exists. However, a notice of good-faith dispute must include a list of specific reasons for nonpayment. If one of the reasons for nonpayment is alleged defective or incomplete work, the claimant must be given a reasonable opportunity to cure the listed items or offer a deduction of a reasonable amount to compensate for the listed items that cannot be promptly cured. Tex. Prop. Code § 28.009.

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§ 21.11 Additional Resources

Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.

Flores, J. Paulo. "Mechanic's Liens—How to Deal with Invalid Liens." In *Residential Real Estate Construction Law Course, 2007*. Austin: State Bar of Texas, 2007.

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Walthall, Thomas J., Jr. "Mechanic's Lien 'Removables': Representing the Contractor in Default Situations." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

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Form 21-1

Notice to Original Contractor by Second-Tier Claimant

[**Date**]

[**Name and address of original contractor**]

Re: Claims of [**name of claimant**] ("Claimant") for unpaid billings totaling $[**amount**] ("Claim Amount"); [**specify**] construction project ("Project")

[**Salutation**]

This is to provide you with the required notice, in accordance with section 53.056 of the Texas Property Code, that Claimant is owed the Claim Amount for its billings to [**name of customer**] for [labor/materials/labor and materials] furnished on the Project. Claimant's [labor/materials/labor and materials] are generally described as [**description of work and/or materials furnished**].

Enclosed are copies of Claimant's unpaid statements or billings. Please contact me regarding this notice. Thank you for your attention to this matter.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 21-2

Notice of Claim to Owner and Original Contractor

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Claims of [**name of claimant**] ("Claimant") for unpaid billings totaling $[**amount**] ("Claim Amount"); [**specify**] construction project ("Project")

[**Salutation**]

This is to provide you with notice that Claimant is owed the Claim Amount for its past-due and unpaid billings for [labor/materials/labor and materials] furnished on the Project. Claimant furnished [**description of work and/or materials furnished**] for the Project under Claimant's agreement with [**name of customer**].

This notice is sent in compliance with the Texas Property Code's mechanic's lien provisions. Accordingly, we must notify you that if the Claim Amount remains unpaid, the owner of the premises may be personally liable, and the owner's property may be subjected to a lien unless the owner withholds payment from the contractor for payment of the claim or the claim is otherwise paid or settled.

Also, further notice is given that all of the Claim Amount has accrued and is past due. Accordingly, demand for payment of the claim in the Claim Amount is hereby made.

Enclosed are copies of the statements or billings that constitute this claim.

This also constitutes notice pursuant to section 162.001 *et seq.* of the Texas Property Code (the Trust Fund Act) that Claimant has a priority interest in the construction funds for this project in your possession now or released to you in the future. The Trust Fund Act states

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that project owners and contractors are trustees of the construction funds they receive. Such funds must be used to pay for the labor and materials on the Project and cannot be used for other purposes. The owner and contractor are deemed to be trustees of the Project funds for the benefit of unpaid subcontractors and suppliers, including Claimant, to see that payment is made. Consequently, you are directed to set aside such construction funds to cover the Claim Amount. Diversion of construction trust funds constitutes violation of the Trust Fund Act.

Please contact me immediately regarding this notice.

Sincerely yours,

_____

[Name of attorney]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

Attach the notice at form 21-3 in this chapter if the lien is against homestead property.

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Form 21-3

To fix a lien on homestead, the following statement must be included in or attached to form 21-2 in this chapter, the notice required to be given to the owner under Tex. Prop. Code § 53.252. Tex. Prop. Code § 53.254. The language is derived from the statute, and the practitioner must be careful not to alter the prescribed language.

Notice to Owner Regarding Liens against Homestead Property

If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:

1. after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or

2. during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

If you have complied with the law regarding the 10 percent retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim.

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Form 21-4

If the lien relates to a homestead, the affidavit must contain the notice preceding the title of this form. The language of the notice is prescribed by Tex. Prop. Code § 53.254(f) and must appear at the top of the page in a minimum of ten-point bold-faced type or equivalent.

NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN.

Affidavit Claiming Mechanic's and Materialman's Lien

Affiant, [**name of affiant**], on oath swears that the following statements are true and are within the personal knowledge of Affiant:

My name is [**name of affiant**]. I am the [claimant/[**title**] of [**name of claimant**]] ("Claimant"). This affidavit is made to perfect a mechanic's and materialman's lien against the real property described below:

1. Claimant has an unpaid claim in the amount of $[**amount**] ("Claim Amount") for [labor/materials/labor and materials] furnished on the construction of improvements generally known as the [**specify**] construction project. The Claim Amount is, within my personal knowledge, just and true, the same is due and unpaid, and all just and lawful offsets, payments, and credits have been allowed. The Claim Amount is for [labor/materials/labor and materials] furnished and described below, on which a systematic record has been kept.

2. The name and last known address of the owner or reputed owner ("Owner") of the real property and improvements on which this claim is made are [**name and address**].

3. The Claim Amount represents the unpaid contract price due Claimant, or, in the alternative, is the reasonable value of the unpaid portion of Claimant's [labor/materials/labor and materials] furnished, which are described below.

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4. Claimant's [labor/materials/labor and materials] furnished for construction of improvements on the real property described below [is/are] generally described as [**describe, e.g.,** specially fabricated and installed plumbing, heating, ventilating, and air-conditioning duct work, equipment, and allied systems]. Payment of the Claim Amount is requested for work performed or materials furnished during each of the following months: [**specify months**].

5. Claimant furnished the above-described [labor/materials/labor and materials] under a [subcontract/contract/purchase order] with [**name of customer**], whose last known address is [**address**].

6. The name and last known address of the original contractor on the above-referenced project are [**name and address**].

7. The legal description of the real property improved by Claimant's above-described [labor/materials/labor and materials] is [**legal description**]. That real property and improvements on it are sought to be charged with Claimant's lien.

8. Claimant claims a mechanic's and materialman's lien on the above-described real property and improvements thereon to secure payment of its Claim Amount in accordance with the Texas Property Code.

9. Claimant's physical address is [**address**]. Claimant's mailing address is [**address**].

10. Claimant's notice[s] of mechanic's lien [was/were] sent to Owner by United States certified mail, return receipt requested, on the following date[s]: [**specify date[s]**].

11. In compliance with the Texas Property Code, Claimant is sending one copy of this affidavit to Owner at its last known address and also one copy to the above-referenced original contractor at its last known address.

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_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Form 21-5

Copies of the lien affidavit must be sent within five days of filing the lien affidavit. Tex. Prop. Code § 53.055(a).

Cover Letter Sending Copy of Lien Affidavit

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: Claim of [**name of claimant**] ("Claimant"); mechanic's and materialman's lien

[**Salutation**]

Enclosed is a copy of Claimant's affidavit claiming a mechanic's and materialman's lien ("Affidavit").

In accordance with the Texas Property Code, we notify you again that if the claim described in the Affidavit remains unpaid, the owner of the property described may be liable, unless the owner withholds payment from the contractor for the amount of the claim or it is otherwise settled or paid.

Claimant was forced to proceed with securing its lien rights because Claimant has not received payment from any source on the claim set forth in the Affidavit.

Include the fcllowing if applicable.

Previous written demand by Claimant for payment of this claim was made on [**date**]. No notice of dispute regarding this claim was submitted. Therefore demand for payment of the claim amount is hereby made in accordance with section 53.083 of the Texas Property Code.

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Continue with the following.

Please contact me on receipt of this letter so that we may discuss a prompt resolution of this matter.

Sincerely yours,

_____

[**Name of attorney**]

Enc.

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

Attach a copy of the lien affidavit (form 21-4 in this chapter). For residential construction on a homestead, also attach the notice at form 21-3.

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Form 21-6

This notice must be sent to the owner by the fifteenth day of the second month following the claimant's receipt and acceptance of an order for the specially fabricated material. The original contractor must also be sent notice if the indebtedness was incurred by a person other than the original contractor. Tex. Prop. Code §§ 53.058, 53.253.

Notice Regarding Specially Fabricated Material[s]

[**Date**]

[**Name and address of owner**]
[**Name and address of original contractor**]

Re: [**specify**] construction project ("Project")

[**Salutation**]

[**Name of claimant**] ("Claimant") has received and accepted an order from [**name of customer**] for specially fabricated [**description**] to be delivered to your Project after [they are/it is] made. The price of the specially fabricated order is $[**amount**]. This notice is sent to you in compliance with the mandatory provisions of Texas law regarding receipt of orders for specially fabricated materials. This is not intended as a comment in any way on Claimant's customer, [**name of customer**], but is merely sent in compliance with the state law.

Claimant is pleased to be a participant in this Project and looks forward to working with [**name of customer**] toward the Project's successful conclusion.

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Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

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Form 21-7

This notice is for use on projects in which the original contract was executed before September 1, 2011. This notice must be sent to the owner by the fifteenth day of the second month following the first delivery of materials or performance of labor by the claimant. The original contractor also must be sent notice if the claimant's contract is not with the original contractor. Tex. Prop. Code § 53.057.

Notice of Agreement Providing for Retainage

[Date]

[Name and address of owner]
[Name and address of original contractor]

Re: Notice for Contractual Retainage Claim—**[describe in detail the name and location of the construction project]** ("Project")

[Salutation]

[Name of claimant] ("Claimant") is pleased to have been selected as a [subcontractor/ supplier] for the Project. Claimant's contract with **[name]** provides that [10/**[specify other percentage]**] percent of the contract price may be withheld as retainage. Claimant therefore respectfully submits its notice of contractual retainage agreement. This notice is required by section 53.057 of the Texas Property Code.

The general nature of the agreement is as follows: [**specify, e.g.,** 10 percent of contract price as adjusted by the change orders].

The date or dates when retainage is payable are as follows: [**specify, e.g.,** thirty days after final completion of our portion of the work on the Project].

We believe the total amount to be retained under our contract will be $[**amount**]. Also [**percent**] percent of increases to Claimant's contract by change order(s) will be subject to retainage.

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This notice is not in any way to be considered a negative comment regarding Claimant's customer, [**name of customer**], and Claimant looks forward to working toward a successful completion of your Project.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

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Form 21-8

This notice is for use on projects in which the original contract was executed on or after September 1, 2011. This notice must be sent to the owner by the thirtieth day after the claimant's agreement providing for retainage is completed, terminated, or abandoned. Certified mail is no longer required for this notice. *See* Tex. Prop. Code § 53.057(b).

Notice of Retainage Agreement

[Date]

[Name and address of owner]

Include the following if the claimant's contract is not with the original contractor.

[Name and address of original contractor]

Continue with the following.

Re: Notice of Contractual Retainage; [**name**] construction project located at [**address**] ("Project")

[Salutation]

This letter is to give you notice that [**name of claimant**] is a [subcontractor/supplier] on the Project and that a requirement for retainage exists in its agreement with [**other party to claimant's agreement**] for the Project.

The complete name and address of [**name of claimant**] is [**name and address of claimant**].

[**Name of claimant**]'s agreement for the Project is with [**name and address of other party to claimant's agreement**].

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Sincerely yours,

_____

[Name of attorney]

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Form 21-9

Request for Information to Owner

[Date]

[Name and address of owner]

Re: Request for information on [specify] construction project ("Project")

[Salutation]

[Name of claimant] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as owner of the Project, furnish to us the following information within ten days of your receipt of this request. This information is required by sections 53.106, 53.107, and 53.159 of the Texas Property Code:

1. a sufficient legal description of the real property being improved;

2. whether there is a surety bond and, if so, the name and last known address of the surety and a copy of the bond;

3. whether there are any prior recorded liens or security interests on the Project property being improved and, if so, the name and address of the person or entity having the lien or security interest;

4. the date on which the original contract for the project was executed;

5. whether there is an affidavit of commencement or affidavit of completion filed, and, if so, a copy of each affidavit; and

6. notice of original contractor termination or abandonment.

Thank you for your cooperation and prompt attention.

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Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 21-10

Request for Information to Original Contractor

[**Date**]

[**Name and address of original contractor**]

Re: Request for information on [**specify**] construction project ("Project")

[**Salutation**]

[**Name of claimant**] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as original contractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of the person to whom you furnished labor and materials for the Project;

2. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond; and

3. the date on which the original contract for the project was executed.

Thank you for your cooperation and prompt attention.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 21-11

Request for Information to Subcontractor

[Date]

[Name and address of subcontractor]

Re: Request for information on [specify] construction project ("Project")

[Salutation]

[Name of claimant] has furnished [labor/materials/labor and materials] for the Project under your subcontract on the Project. This is to respectfully request that you, as a subcontractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of each person from whom you purchased labor or materials for the Project, other than the materials that were furnished from your inventory;

2. the name and last known address of each person to whom you furnished labor and materials for the Project; and

3. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond.

Thank you for your cooperation and prompt attention.

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Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 21-12

Request for Copy of Affidavit of Completion

[**Date**]

[**Name and address of owner**]

Re: Request for copy of affidavit of completion on [**specify**] construction project ("Project")

[**Salutation**]

This is to respectfully request, on behalf of [**name of claimant**], a copy of the affidavit of completion, if any, on the Project. This request is made in accordance with the provisions of section 53.106 of the Texas Property Code. The claimant has furnished labor or material or both for the Project.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 21-13

Release of Mechanic's and Materialman's Lien

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Basic Information

Date:

Claimant:

Property:

Claimant has on or about [**date**] attempted to assert a mechanic's and materialman's lien on the Property [**include if applicable:** by affidavit filed in [**recording data**] of the real property records of [**county**] County, Texas].

The owner of the Property, [**name of owner**], has reached an agreement with Claimant for the release of the lien against the Property.

Claimant hereby releases the Property from the mechanic's and materialman's lien in consideration of good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

_____

[**Name of claimant**]

Include acknowledgment.

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Form 21-14

Partial Release of Mechanic's and Materialman's Lien

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Basic Information

Date:

Claimant:

Property:

Project: [**describe project**]

Claimant filed its affidavit claiming a mechanic's and materialman's lien on the Property on [**date**].

The lien was asserted by Claimant for its [labor/materials/labor and materials] generally described as [**describe, e.g.**, specially fabricated and installed plumbing, heating, ventilating, and air-conditioning duct work, equipment, and allied systems] furnished for the Project located on the Property.

The described [labor/materials/labor and materials] were furnished by Claimant for construction of the Project under [a contract/an agreement] with [**name of original contractor**], as original contractor for the Project.

An agreement has been reached for a partial release of the lien claim against the Property.

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Claimant hereby releases $[**amount**] of its mechanic's and materialman's lien against the Property but specifically preserves the balance of its lien in the amount of $[**amount**].

_____

[**Name of claimant**]

Include acknowledgment.

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Form 21-15

Notice of Termination of Work or Abandonment of Performance by Original Contractor or Owner

Basic Information

Date of Notice: [**date**]

Project: [**describe improvements**]

Owner: [**name and address**]

Original Contractor: [**name and address**]

Legal Description of Project: [**sufficient for identification of the project real property**]

Date of Termination or Abandonment: [**date**]

This constitutes formal notice that the original contract on the project has been terminated or performance under the contract has been abandoned.

A MECHANIC'S LIEN CLAIMANT MAY NOT HAVE A LIEN ON RETAINED FUNDS FOR THE PROJECT UNLESS THE CLAIMANT FILES AN AFFIDAVIT CLAIMING A LIEN NOT LATER THAN THE FORTIETH DAY AFTER THE DATE OF THE TERMINATION OR ABANDONMENT.

_____

[**Name of owner**]

By:_____

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Printed Name

_____

Title

_____

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Chapter 23

Restrictive Covenants and Property Owners Associations

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Chapter 23

Restrictive Covenants and Property Owners Associations

§ 23.1 General Considerations

§ 23.1:1 Restrictive Covenants

"Restrictive covenant" means "any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative." Tex. Prop. Code § 202.001(4). A restrictive covenant is a private way to regulate or control the use of real property by contract. This type of regulation and control is based on the fundamental "right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal." *Curlee v. Walker*, 244 S.W. 497, 498 (1922). Restrictive covenants are subject to general common-law rules of contracts. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998).

Under common law, restrictive covenants can be adopted as part of a general plan for the development of a tract of land to make it more attractive for residential or commercial purposes by reason of the covenants imposed on each of the separate lots sold. The development plan that includes restrictive covenants forms an inducement to each purchaser to buy a lot in the development, and it may be assumed that the purchaser pays an enhanced price for the property purchased. The development plan, including restrictive covenants, enters into and becomes a part of the consideration for the purchase of a lot. The purchaser of a lot submits to a burden on his own land because a like burden imposed on his neighbor's lot will be beneficial to both lots. The covenant or agreement between the original owner and each purchaser is therefore mutual. *Curlee*, 244 S.W. at 498.

The most common reason for imposing restrictive covenants on property is to enhance the value of the property as part of a development scheme. For example, by subdividing property on the edge of a town that is zoned for agriculture into separate smaller lots, and by imposing restrictive covenants so the purchasers of the lots know how the use of nearby lots will be restricted, the value of the property as a whole will be substantially enhanced. A development project subject to restrictive covenants can be for residential use only, commercial use only, or a combination of the two. The forms in this chapter are for residential projects only.

Based on the common-law rules and the statutory definitions, restrictive covenants can be imposed or applied to property in a variety of ways. One of the most common ways to impose restrictive covenants on property is for the owner of the land to file with the county clerk a document known as a declaration, which describes the restrictive covenants to which the property is subject. A declaration regarding property is similar to the declaration of a living trust. Both documents declare that certain described property will be owned by the owner subject to the described covenants.

The filing of the declaration on real property with the county clerk is constructive notice to the public that the property described in the declaration is subject to the restrictive covenants stated. Once a declaration of restrictive covenants is filed regarding the described property, the covenants are continuing obligations for the use of the property from that time forward, through each sale of the property, until canceled or modified by the owner. These ongoing restrictions on the use of land are called "cove-

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nants running with the land." Purchasers are charged with notice of the terms of deeds that form an essential link in their chain of ownership and with knowledge of the provisions and contents of other recorded instruments. *Cooksey v. Sinder*, 682 S.W.2d 252, 253 (Tex. 1984).

A restrictive covenant is a contract subject to the same rules of construction and interpretation as any other contract. *Davis v. Canyon Creek Estates Homeowners Ass'n*, 350 S.W.3d 301, 313 (Tex. App.—San Antonio 2011, pet. denied). Once restrictive covenants are imposed on a property, they are contractual obligations among all future owners of subdivided parts of the property. An owner's noncompliance with a restrictive covenant is a breach of contract as to all the other owners of lots subdivided from the same property to which the declaration applies. Therefore, each owner has a right to enforce the restrictive covenants in a development or subdivision by filing suit against an owner who violates a restrictive covenant. *Anderson v. New Property Owners' Ass'n of Newport*, 122 S.W.3d 378, 384 (Tex. App.—Texarkana 2003, pet. denied). However, placing the burden on individual owners for the enforcement of restrictive covenants, while generally allowed by common law and by the terms of declarations, is not usually practical.

§ 23.1:2 Declarations and Other Dedicatory Instruments

"Dedicatory instrument" means—

> each document governing the establishment, maintenance, or operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to:
>
> (A) restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association;
>
> (B) properly adopted rules and regulations of the property owners' association; or
>
> (C) all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

Tex. Prop. Code § 202.001(1).

To be effective, a dedicatory instrument—whether from a property owners association or an original declarant—must be filed in the real property records of each county in which the property to which the dedicatory instruments relate is located. Tex. Prop. Code § 202.006. This requirement covers bylaws or similar instruments governing the administration or operation of a property owners association, properly adopted rules and regulations of the property owners association, and all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

A provision for amendment of a declaration cannot require a vote of more than 67 percent of the total votes of members of the property owners association entitled to vote on the proposed amendment. Tex. Prop. Code § 209.0041. If the declaration contains a lower percentage, the percentage in the declaration controls. Tex. Prop. Code § 209.0041. If the declaration is silent as to voting rights for an amendment, the declaration may be amended by a vote of owners owning 67 percent of the lots subject to the declaration. Tex. Prop. Code § 209.0041. Section 209.0041 prevails over any conflicting provisions in title 11 of the Texas Property Code. See, however, Property Code section 201.006

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concerning the requirements for a petition to amend restrictions, with significantly different requirements. Tex. Prop. Code § 201.006.

§ 23.1:3 Limitations of Covenants and Restrictions

The Telecommunications Act of 1996 protects the rights of property owners to use satellite dishes. *See* 47 U.S.C. §§ 151–341. With a few exceptions, any homeowner may install a satellite dish of a size of one meter or smaller in diameter. While property owners associations may encourage that dishes be placed as inconspicuously as possible, the dish must be allowed to be placed where it may receive a usable signal. Additionally, many property owners associations have restrictive covenants prohibiting a homeowner from installing an OTA (Over-the-Air) rooftop antenna. These restrictions are not enforceable, except in some instances. For example, the antenna may be installed at any location unless it imposes on common property. Also, the antenna must be of a design to receive local, not long-distance, signals and must not extend any higher than twelve feet above the top roofline of the home, unless an exception is granted by the property owners association due to extenuating terrestrial interference. See the Federal Communications Commission Rule, available at **www.fcc.gov/media/over-air-reception-devices-rule**.

Federal and state fair housing acts will limit certain types of residential restrictions concerning age and occupancy limitations. See section 2.97 in this manual.

With some exceptions noted in the statute, a provision in a dedicatory instrument is void and unenforceable if it prohibits or restricts a property owner from (1) implementing measures promoting solid-waste composting of vegetation, including grass clippings, leaves, or brush, or leaving grass clippings uncollected on grass; (2) installing rain barrels or a rainwater harvesting system; (3) implementing efficient irrigation systems, including underground drip or other drip systems; or (4) using drought-resistant landscaping or water-conserving natural turf. Tex. Prop. Code § 202.007.

A property owners association is limited on how it can enforce restrictions of political signs in a subdivision. Tex. Prop. Code § 202.009.

With certain exceptions listed in the statute, a provision in a dedicatory instrument that prohibits or restricts a property owner from installing a solar energy device is void. Tex. Prop. Code § 202.010.

With certain specified exceptions, a property owners association is prohibited from adopting or enforcing a restrictive covenant limiting the display of the American flag beyond those limitations to time, place, and manner necessary to protect a substantial interest of the association. Freedom to Display the American Flag Act of 2005, Pub. L. No. 109-243, 120 Stat. 572 (2006) (found at 4 U.S.C. § 5 note). Tex. Prop. Code § 202.012 limits a property owners association's ability to prohibit or regulate flagpoles and flag displays.

Restrictions requiring wood shingle roofs are void. Tex. Prop. Code § 5.025. A property owners association may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner who is otherwise authorized to install shingles on the roof of the owner's property from installing shingles that meet the specifications listed in the statute. Tex. Prop. Code § 202.011.

With specified exceptions, a property owners association may not enforce or adopt a restrictive covenant that prohibits a property owner or resident from displaying or affixing on the entry to the owner's or resident's dwelling one or more religious items, the display of which is motivated by the owner's or resident's sincere religious belief. Tex. Prop. Code § 202.018.

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A property owners association is limited on the extent to which it can adopt and enforce restrictions on standby electric generators. Tex. Prop. Code § 202.019.

A property owners association is prevented from including or enforcing a provision in a dedicatory instrument that limits a person from lawfully possessing, transporting, or storing a firearm, any part of a firearm, or firearm ammunition, or from lawfully discharging a firearm. Tex. Prop. Code § 202.020.

A property owners association is prevented from restricting a minor from the occasional sale of lemonade or other nonalcoholic beverages. Tex. Prop. Code § 202.020.

§ 23.2 Property Owners Association

A property owners association, which is composed of all owners of lots in a subdivision or development, enforces restrictive covenants on behalf of the association and all the owners who are in compliance. A property owners association means—

> an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development.

Tex. Prop. Code § 202.001(2).

The practitioner should consider using a nonprofit association, which is an unincorporated organization. The members and management of a nonprofit association are shielded from personal liability under Tex. Bus. Orgs. Code § 252.006. A nonprofit association requires no certificate of formation or periodic reports. Failure of a corporation to file periodic reports (every four years in the case of a nonprofit; annually in the case of a for-profit) with the secretary of state may result in the forfeiture of the corporation's existence.

Property owners associations are regulated by federal, state, and local law, and they are subject to federal income taxation. They do not qualify as charitable organizations under Internal Revenue Code section 501(c)(3). Associations may qualify for special tax treatment under 26 U.S.C. § 528. All entities organized in Texas must comply with the Texas Business Organizations Code. *See* Tex. Bus. Orgs. Code ch. 402. Texas Property Code chapter 202 applies to all restrictive covenants and property owners associations. Chapter 209 of the Property Code applies to all residential property owners associations subject to a declaration that authorizes the property owners association to collect regular or special assessments on all or a majority of the property in the subdivision. Certain provisions of these chapters do not apply to a property owners association that is subject to Texas Government Code chapter 552. *See* Tex. Gov't Code § 552.0036. Property Code chapter 209 does not apply to condominiums governed by chapter 82 of the Property Code. *See* Tex. Prop. Code § 209.003(d).

Certain chapters of the Property Code have specific requirements not applicable generally to property owners associations in counties having defined characteristics. To determine if these specific requirements apply, see chapters 201, 203, 204, 205, 206, 208, 210, 211, 212 and 215 of the Property Code.

The Texas Residential Property Owners Protection Act is chapter 209 of the Property Code. It applies to residential subdivisions (other than condominiums governed by Tex. Prop. Code ch. 82) that are subject to restrictive covenants authorizing a property owners association to

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collect regular or special assessments and requiring mandatory membership in the association. Tex. Prop. Code § 209.003. In addition, the Property Code affords certain rights to property owners associations in cities or counties that meet various specified minimum population requirements to amend, extend, or supplement deed restrictions and to establish assessment lien mechanisms. Tex. Prop. Code chs. 201, 204–206.

A property owners association must record a management certificate in each county in which any portion of the residential subdivision is located and must record an amended management certificate within thirty days of the amendment. Tex. Prop. Code § 209.004. See form 23-7 in this chapter. All property owners associations must record a current management certificate on or before January 1, 2014, or rerecord the current management certificate if the previous recording was done before September 1, 2013. This requirement is to facilitate the county clerks' indexing of management certificates, which, before September 1, 2013, did not have a clear, statutorily mandated system. Tex. Prop. Code § 209.004(a–1). Thus, a property owners association should record or rerecord its current management certificates even if it missed the January 1, 2014, deadline. If either the property owners association has, or its management company maintains on behalf of the association, a publicly accessible website, then the dedicatory instruments related to the subdivision and the association must be posted on that website. Tex. Prop. Code § 207.006.

Despite any contrary provision in a dedicatory instrument or in other laws not specifically applicable to a property owners association, a property owners association must make the books and records of the association, including financial records, open to and reasonably available for examination and copying by an owner or a person designated in a writing signed by the owner as the owner's agent, attorney, or certified public accountant. Tex. Prop. Code § 209.005(a), (c).

The procedure for an owner to examine and copy an association's records is set out in Tex. Prop. Code § 209.005. In addition, the property owners association must adopt a records production and copying policy that prescribes the costs the association will charge for the compilation, production, and reproduction of requested records. That policy must be recorded in the real property records. The association cannot assess any charges if they are not recorded. Tex. Prop. Code § 209.005(i). See form 23-12 for an example of a records production and copying policy.

A property owners association composed of more than fourteen lots must also adopt and comply with a document retention policy meeting certain defined requirements. Tex. Prop. Code § 209.005(m). The documentation retention policy must be recorded as a dedicatory instrument. Tex. Prop. Code § 209.005(i).

§ 23.2:1 Governance of Property Owners Associations

The governance of property owners associations, including meetings and voting procedures for members, is subject to common-law rules, the terms of the dedicatory instruments, the Texas Business Organizations Code, and the Texas Property Code.

Mandatory, statutory provisions about members voting apply to property owners associations and supersede contrary provisions in a dedicatory instrument. *See* Tex. Prop. Code §§ 209.0057–.0059, 209.00592–.00594.

The board of directors of a property owners association must call an annual meeting of the members. If a board does not call an annual meeting of the association members, any owner may demand that a meeting of the association members be called not later than the thirtieth

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day after the date of the owner's demand. *See* Tex. Prop. Code § 209.014.

Mandatory, statutory provisions for board of director qualifications and meetings apply to property owners associations and supersede contrary provisions in a dedicatory instrument. *See* Tex. Prop. Code §§ 209.0051, 209.00591. Regular and special board meetings must be open to owners, subject to the right of the board to adjourn a board meeting and reconvene in closed executive session to consider certain specified matters. Written minutes of the meetings must be kept and made available to owners. Members must be given notice of the date, hour, place, and general subject of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session. *See* Tex. Prop. Code § 209.0051.

There are mandatory and permissive statutory provisions for how a property owners association gives notice to owners and the content of the notice. These provisions vary depending on factors such as type and location of meetings, action taken or to be taken with or without a meeting, voting methods, use of electronic communication, and size of the association. *See, e.g.*, Tex. Prop. Code §§ 209.0042, 209.0051, 209.0056, 209.00593, 209.006.

§ 23.2:2 Enforcement of Covenants and Rules and Collection of Assessments

Before a property owners association may suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail with certain required information. Tex. Prop. Code § 209.006. A reasonable time for the owner to cure a violation must be given if the violation is curable and does not materially affect the health or safety of an ordinary resident. Tex. Prop. Code § 209.006. The statute contains examples of curable and uncurable violations.

A property owners association may not hold an owner liable for fees of a collection agent retained by the property owners association unless the association first provides written notice with required information to the owner by certified mail. Tex. Prop. Code § 209.0064. A property owners association may collect from an owner reimbursement of reasonable attorney's fees and other reasonable costs incurred relating to collecting amounts due to the association for enforcing restrictions or the bylaws or rules of the association only if the owner is provided a written notice that attorney's fees and costs will be charged to the owner if the delinquency or violation continues after a date certain. Tex. Prop. Code § 209.008.

A property owners association composed of more than fourteen lots must adopt reasonable guidelines to establish an alternative payment schedule by which an owner may make partial payments to the property owners association for delinquent regular or special assessments or any other amount owed to the association without accruing additional monetary penalties. The guidelines must allow at least three months to pay the assessment. The guidelines are not considered a dedicatory instrument but must be recorded in the real property records. Tex. Prop. Code § 209.0062.

A property owners association whose dedicatory instruments grant a right to foreclose on assessment liens is deemed to have any power of sale required to exercise the foreclosure right under Tex. Prop. Code § 209.0092. The Texas Residential Property Owners Protection Act regulates the foreclosure of an assessment lien and provides a right of redemption after foreclosure.

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See Tex. Prop. Code §§ 209.009–.011. Generally, judicial foreclosure of an owner's lot is required, and nonjudicial foreclosure is not allowed, unless the owner waives the right to require a judicial foreclosure after default. Tex. Prop. Code § 209.0092. A judicial foreclosure required by Tex. Prop. Code § 209.0092 must be conducted according to Texas Rules of Civil Procedure 735 and 736. Tex. Prop. Code § 209.0092(b). *See* Tex. R. Civ. P. 735, 736.

A property owners association may not conduct a nonjudicial foreclosure or commence a judicial foreclosure action related to the association's assessment lien on an owner's lot unless the association provides written notice to any holder of an inferior or subordinate deed-of-trust lien of record on the lot of (1) the total amount of the delinquency giving rise to the foreclosure and (2) the lienholder's opportunity to cure the delinquency before the sixty-first day after the receipt of the notice. The notice must be sent by certified mail to the address for the inferior or subordinate lienholder shown in the deed records relating to the lot. Tex. Prop. Code § 209.0091.

Not later than the thirtieth day after a judicial or nonjudicial foreclosure sale of an owner's lot, a property owners association must send to the lot owner, each lienholder of record according to the most recently filed deed of trust, and any transferee or assignee of that deed of trust, a written notice stating the date and time the sale occurred and informing them of the right of the lot owner and lienholder to redeem the lot under section 209.011 of the Texas Property Code. Tex. Prop. Code § 209.010–.011. See form 23-19 in this chapter for an example of a notice.

Not later than the thirtieth day after the property owners association sends notice under Tex. Prop. Code § 209.010, the association must record an affidavit under Tex. Prop. Code § 209.010(c) in the real property records where the property is located, stating the date on which notice was sent and containing a legal description of the lot foreclosed. See form 23-18 for an example of an affidavit. If the lot owner or lienholder sends a written request to redeem the property before the expiration of the redemption period, the redemption period is extended until the tenth day after the date the association and any third-party purchaser at the foreclosure provides written notice to the redeeming party of the amounts that must be paid to redeem the property. Tex. Prop. Code § 209.011(m).

If the redemption period (including any extensions) expires without redemption of the property, the association or third-party foreclosure purchaser must record an affidavit in the real property records in which the property is located, stating that the lot owner or lienholder did not redeem the property. Tex. Prop. Code § 209.011(n). See form 23-20 for an example of an affidavit.

§ 23.2:3 Resale Certificates

Texas Property Code chapter 207 applies to residential subdivisions with a property owners association that is entitled to levy regular or special assessments. Tex. Prop. Code §§ 207.001(6), 207.002. Within ten business days after a written request, a residential property owners association is required to deliver a resale certificate to the requesting owner, title company, purchaser, or their respective agents. The resale certificate must be prepared no earlier than the sixtieth day before it is delivered and must include specific information about the property and the subdivision as a whole. Tex. Prop. Code § 207.003. See form 23-10 in this chapter for an example of a resale certificate. The property owners association may require evidence of the requester's authority to order a resale certificate and payment of a fee for having provided the resale certificate. Tex. Prop. Code § 207.003.

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§ 23.3 Instructions for Completing Declaration of Restrictive Covenants and Other Dedicatory Instruments

§ 23.3:1 General Information

See chapter 3 in this manual for general information about designations of parties, addresses, property descriptions, and execution and acknowledgment of documents.

§ 23.3:2 Scope of Declaration of Restrictive Covenants

Form 23-1 in this chapter is drafted for use with a single-family residential subdivision whose owners are members of a property owners association, and form 23-2 is drafted for use with a residential subdivision that does not include a property owners association.

§ 23.3:3 Use and Activities

The use and activities in section C. of forms 23-1 (the declaration of restrictive covenants for a subdivision with a property owners association) and 23-2 (the declaration for a subdivision without a property owners association) in this chapter should be tailored to address a declarant's desired permitted use of the property and prohibited activities, or those that a declarant wants to regulate on the property. The forms list as examples various activities typically prohibited in subdivisions restricted to residential use.

A declaration usually restricts the types of buildings that can be constructed on a lot in the subdivision. Such restrictions can include the size, construction materials, location on the lot, and so forth. The declaration also usually restricts how the lot owner can use the buildings and the lot. The drafter must be specific with the restrictions for buildings and use. For example, restricting buildings to only single-family residences does not limit a building to use by only a single family. Nor does restricting single-family residence buildings to use for only residence purposes limit a building to use by only a single family. *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274 (Tex. 2018).

Unless the declaration prohibits rental of units, condominium owners associations or managers may encounter enforcement problems when an owner rents the property to a third party. Insertion of provisions such as the following in the declaration or the association's rules can minimize these enforcement problems:

- requiring that owners provide tenants with the declaration and rules;
- requiring owners to use rental agreements that impose on tenants the obligation to comply with the dedicatory instruments, with consequences for tenants' violation of the declaration or rules;
- making owners responsible for any fines or other consequences if tenants violate the declaration or rules; and
- requiring owners to give the association or management information about rentals, including contact information for tenants and copies of the rental agreements (form 23-21 in this chapter can be used for this purpose).

Some declarations prohibit short-term rentals because of the unique problems they pose. "Short-term rental" means the rental of all or part of a residential property for less than thirty consecutive days. Tex. Tax Code §§ 156.001(b), 156.101. Short-term rentals are subject to sales and hotel taxes and, often, additional local ordinances. Promulgating association rules that require owners to comply with all applicable laws, with fines or other consequences in the event the owners do not comply, can provide an association with an enforcement tool in those situations.

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§ 23.3:4 Construction and Maintenance Standards

The construction and maintenance standards in section D. of forms 23-1 and 23-2 in this chapter should be tailored to address a declarant's desired construction and maintenance standards for the property. In addition, several construction options need to be selected by a declarant in section D. of both declarations, such as maximum height restrictions, minimum floor area, time to complete repairs or for rebuilding of improvements, and time to complete installation of landscaping.

§ 23.3:5 Association

Section E. of form 23-1 in this chapter includes a property owners association that has two classes of membership. Class A members are all property owners except the declarant, and each Class A member has one vote. The declarant is designated a Class B member with special voting rights as specified in the bylaws of the association. Paragraph E.3.b. of form 23-1 allows a declarant to select the date on which Class B member rights are to be converted to Class A member rights.

§ 23.3:6 Architectural Control Committee

Section F. of form 23-1 in this chapter includes an architectural control committee (ACC) established to assist the association in ensuring that permitted improvements and landscaping conform to the dedicatory instruments. A declarant must select the number of members comprising the ACC and the number of days that a property owner or the ACC has to act on various matters brought before the ACC.

§ 23.3:7 Assessments

Section G. of form 23-1 in this chapter authorizes the association to impose and collect regular and special assessments, and a lien is created on each owner's property to secure an owner's payment of the assessments. The amount of the initial regular assessment, the timing for payment of regular assessments, and the manner in which the owners approve special assessments all need to be completed in this section.

§ 23.3:8 Remedial Rights

If a declarant desires to impose a late charge or interest on delinquent assessments, the amount and interest rate should be completed in section H. of form 23-1 in this chapter.

§ 23.3:9 Dedication or Conveyance of Common Areas

Paragraph I.1.d. of form 23-1 in this chapter requires a declarant to select the number of votes necessary to dedicate or convey common areas owned by the association.

§ 23.3:10 Term of Declaration

Paragraph J. of form 23-1 in this chapter and paragraph E. of form 23-2 both allow a developer to select the period of time the restrictive covenants will remain in effect and, if the restrictive covenants terminate on a specific date, how the property owners may continue the restrictive covenants.

§ 23.3:11 Annexation of Additional Property

Paragraph J. of form 23-1 in this chapter and paragraph E. of form 23-2 both allow for annexation of additional property into the declaration. A declarant needs to determine the percentage of owners needed to annex additional property into the declaration.

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§ 23.3:12 Bylaws

Form 23-4 in this chapter is a set of bylaws for the property owners association. The bylaws can be adapted to either an unincorporated association or a corporation. If the property owners association is an unincorporated nonprofit association, consult chapter 252 of the Texas Business Organizations Code. For a nonprofit corporation, consult chapter 22 of the Business Organizations Code.

§ 23.3:13 Rules

Form 23-5 in this chapter is a form that can be used in promulgating rules for the property owners association and the use of any common areas. The rules and penalties for violation (to be inserted in sections A. and B. of the form), promulgated by the association, will be unique to each subdivision. The enforcement provisions (contained in section C. of the form) are based on the requirements in section 209.006 of the Texas Property Code.

§ 23.4 Management Agreement

A person who performs residential property management services for a single-family residential property must be licensed as a broker. Tex. Occ. Code ch. 1101. Among the many acts that can make one a "broker" for purposes of the Occupations Code, and thus require the person to be licensed, is "control[ling] the acceptance or deposit of rent from a resident of a single-family residential real property unit," in expectation of receiving a commission or other valuable consideration. Tex. Occ. Code § 1101.002(1)(A)(x). Control means the authority to either (1) pay for services related to management of the property out of the rent collected, (2) determine where to deposit the rent, or (3) sign checks or withdraw money from a trust account. 22 Tex. Admin. Code § 535.4(h). 22 Tex. Admin. Code § 535.4(i) states that in addition to other types of property, a condominium unit or townhome is a single-family residential real property unit for purposes of 22 Tex. Admin. Code § 535.4(h). An association that hires an unlicensed manager to assist in managing the association's affairs can use form 23-22 in this chapter to prohibit activities for which a broker's license is required.

§ 23.5 Additional Resources

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Form 23-1

This form is provided as an example only. The attorney should tailor the provisions of the form to address the specific standards of the association.

Declaration of Restrictive Covenants of the [name of subdivision] Subdivision

[with Property Owners Association]

Basic Information

Date:

Declarant:

Declarant's Address:

Property Owners Association: [**name**], a Texas nonprofit [corporation/association]

Property Owners Association's Address:

Property:

Definitions

"ACC" means the Architectural Control Committee established in this Declaration.

"Assessment" means any amount due to the Property Owners Association by an Owner or levied against an Owner by the Property Owners Association under this Declaration.

"Board" means the Board of Directors of the Property Owners Association.

"Bylaws" means the Bylaws of the Property Owners Association adopted by the Board.

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"Common Area" means all property within the Subdivision not designated as a Lot on the Plat and that has not been accepted for maintenance by the applicable governmental body. Declarant will convey the Common Area to the Property Owners Association.

"Covenants" means the covenants, conditions, and restrictions contained in this Declaration.

"Declarant" means [**name**], [a/an] [individual/[Texas/[**state of formation**]] limited partnership/corporation/limited liability company] and any successor that acquires all unimproved Lots owned by Declarant for the purpose of development and is named as successor in a recorded document.

"Dedicatory Instruments" means this Declaration and the [certificate of formation,] Bylaws, rules of the Property Owners Association, and standards of the ACC, as amended.

"Easements" means Easements within the Property for utilities, drainage, and other purposes as shown on the Plat or of record.

"Lot" means each tract of land designated as a lot on the Plat, excluding lots that are part of the Common Area.

"Member" means Owner.

"Owner" means every record Owner of a fee interest in a Lot.

"Plat" means the Plat of the Property recorded in [**recording data**] of the real property records of [**county**] County, Texas, and any replat of or amendment to the Plat made in accordance with this Declaration.

"Renting" means granting the right to occupy and use a Residence or Structure in exchange for consideration.

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"Residence" means a detached building designed for and used as a dwelling by a Single Family and constructed on one or more Lots.

"Short Term Renting" means granting the right to occupy and use a Residence or Structure in exchange for consideration for a period of time less than [**number**] days.

"Single Family" means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Residence.

"Structure" means any improvement on a Lot (other than a Residence), including a sidewalk, driveway, fence, wall, tennis court, swimming pool, outbuilding, or recreational equipment.

"Subdivision" means the Property covered by the Plat and any additional property made subject to this Declaration.

"Vehicle" means any automobile, truck, motorcycle, boat, trailer, or other wheeled conveyance, whether self-propelled or towed.

Clauses and Covenants

A. Imposition of Covenants

1. Declarant imposes the Covenants on the Subdivision. All Owners and other occupants of the Lots by their acceptance of their deeds, leases, or occupancy of any Lot agree that the Subdivision is subject to the Covenants.

2. The Covenants are necessary and desirable to establish a uniform plan for the development and use of the Subdivision for the benefit of all Owners. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Lot.

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3. Each Owner and occupant of a Lot agrees to comply with the Dedicatory Instruments and agrees that failure to comply may subject him to a fine, an action for amounts due to the Property Owners Association, damages, or injunctive relief.

B. Plat and Easements

1. The Plat, Easements, and all matters shown of record affecting the Property are part of this Declaration and are incorporated by reference.

2. An Owner may use that portion of a Lot lying in an Easement for any purpose that does not interfere with the purpose of the Easement or damage any facilities. Owners do not own any utility facilities located in an Easement.

3. Neither Declarant nor any Easement holder is liable for damage to landscaping or a Structure in an Easement.

4. Declarant and each Easement holder may install, maintain, and connect facilities in the Easements.

C. Use and Activities

1. *Permitted Use.* A Lot may be used only for an approved Residence and approved Structures for Single Family residential use [**include to permit Short Term Renting:** , including Short Term Renting in compliance with applicable law].

2. *Prohibited Activities.* Prohibited activities are—

a. any activity that is otherwise prohibited by the Dedicatory Instruments;

b. any illegal activity;

c. any nuisance, noxious, or offensive activity;

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d. any dumping of rubbish;

e. any storage of—

i. building materials except during the construction or renovation of a Residence or a Structure;

ii. vehicles, except vehicles in a garage or Structure or operable automobiles on a driveway; or

iii. unsightly objects unless completely shielded by a Structure;

f. any exploration for or extraction of minerals;

g. any keeping or raising of animals, livestock, or poultry, except for common domesticated household pets, such as dogs and cats, not to exceed [**number**] confined to a fenced yard or within the Residence;

h. any commercial or professional activity except reasonable home office use;

i. the Renting of a portion of a Residence or Structure;

j. the drying of clothes in a manner that is visible from any street;

k. the display of any sign except—

i. one not more than five square feet, advertising the Lot for sale or rent or advertising a garage or yard sale; and

ii. political signage not prohibited by law or the Dedicatory Instruments;

l. installing a mobile home, manufactured home, manufactured housing, motor home, or house trailer on a Lot;

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m. moving a previously constructed house onto a Lot;

n. interfering with a drainage pattern without ACC approval;

o. hunting and shooting;

p. occupying a Structure that does not comply with the construction standards of a Residence; and

q. [**insert any additional restrictions, e.g.,** Short Term Renting; allowing a renter, guest, or other person who is a registered sex offender to reside at the Property; using the Property in a timeshare program; any income-producing activity.]

D. Construction and Maintenance Standards

1. *Lots*

a. *Consolidation of Lots.* An Owner of adjoining Lots, with ACC approval, may consolidate those Lots into one site for the construction of a Residence.

b. *Subdivision Prohibited.* No Lot may be further subdivided.

c. *Easements.* No easement in a Lot may be granted without ACC approval.

d. *Maintenance.* Each Owner must keep the Lot, all landscaping, the Residence, and all Structures in a neat, well-maintained, and attractive condition.

2. *Residences and Structures*

a. *Aesthetic Compatibility.* All Residences and Structures must be aesthetically compatible with the Subdivision, as determined by the ACC.

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b. *Maximum Height.* The maximum height of a Residence is [**number**] [feet above grade/stories].

c. *Required Area.* The total area of a Residence, exclusive of porches, garages, or carports, must be at least [**number**] square feet.

d. *Location on Lot.* No Residence or Structure may be located in violation of the setback lines shown on the Plat. Each Residence must face the front Lot line. All Structures must be located behind the front wall of the Residence. All outbuildings, except garages, must not be visible from any street.

e. *Garages.* Each Residence must have at least a two-car garage accessed by a driveway. The garage may be a separate structure.

f. *Damaged or Destroyed Residences and Structures.* Any Residence or Structure that is damaged must be repaired within [**number**] days (or within a period approved by the ACC) and the Lot restored to a clean, orderly, and attractive condition. Any Residence or Structure that is damaged to the extent that repairs are not practicable must be demolished and removed within [**number**] days and the Lot restored to a clean and attractive condition.

g. *Fences, Walls, and Hedges.* No fence, wall, or hedge may be located forward of the front wall line of the Residence, except for trellises and decorative fences that are approved by the ACC.

h. *Traffic Sight Lines.* No landscaping that obstructs traffic sight lines may be placed on any Lot.

i. *Sidewalks.* When the Residence is constructed, the Lot must be improved with sidewalks connecting with the sidewalks on adjacent Lots.

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j. *Landscaping.* Landscaping must be installed within [**number**] days after occupancy. The minimum landscaping is specified in the standards of the ACC.

3. *Building Materials for Residences and Structures*

a. *Roofs.* Only [composition/tile/metal] roofs may be used on Residences and Structures, unless otherwise approved by the ACC. All roof stacks must be painted to match the roof color.

b. *Air Conditioning.* Window- or wall-type air conditioners may not be used in a Residence.

c. *Exterior Walls.* All Residences must have at least [**percent**] percent of their exterior walls, including exposed foundation, of stone or brick, minus windows and doors, unless otherwise approved by the ACC.

d. *Color Changes.* No change to the color of the exterior walls, trim, or roof of a Residence will be permitted, unless otherwise approved by the ACC.

e. *Driveways and Sidewalks.* All driveways and sidewalks must be surfaced with concrete, unless otherwise approved by the ACC. Driveways and sidewalks may not be surfaced with dirt, gravel, shell, or crushed rock.

f. *Lot Identification.* Lot address numbers and name identification must be aesthetically compatible with the Subdivision.

E. Property Owners Association

Select one of the following.

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1. *Establishment and Governance.* The Property Owners Association is established by filing its certificate of formation and is governed by the certificate, the Declaration, and the Bylaws. The Property Owners Association has the powers of a nonprofit corporation and a property owners association under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments.

Or

1. *Establishment and Governance.* The filing of this Declaration establishes the Property Owners Association as an unincorporated nonprofit association that is governed by this Declaration and the Bylaws. The Property Owners Association has the powers of an unincorporated nonprofit association and a property owners association for the Subdivision under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments.

Continue with the following.

2. *Rules.* The Board may adopt rules that do not conflict with law or the other Dedicatory Instruments. On request, Owners will be provided a copy of any rules.

3. *Membership and Voting Rights.* Every Owner is a Member of the Property Owners Association. Membership is appurtenant to and may not be separated from ownership of a Lot. The Property Owners Association has two classes of voting Members:

a. *Class A.* Class A Members are all Owners, other than Declarant. Class A Members have one vote per Lot. When more than one person is an Owner, each is a Class A Member, but only one vote may be cast for a Lot.

b. *Class B.* The Class B Member is Declarant and has the number of votes for each Lot owned specified in the Bylaws. The Class B Membership ceases and converts to Class A Membership on the earlier of—

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i. when the Class A Members' votes exceed the total of Class B Member's votes or

ii. [**date**].

F. ACC

1. *Establishment*

a. *Purpose.* The ACC is established as a committee of the Property Owners Association to assist the Property Owners Association in ensuring that all Residences, Structures, and landscaping within the Subdivision are aesthetically compatible and conform to the Dedicatory Instruments.

b. *Members.* The ACC consists of at least [**number**] persons appointed by the Board. The Board may remove or replace an ACC member at any time.

c. *Term.* ACC members serve until replaced by the Board or they resign.

d. *Standards.* Subject to Board approval, the ACC may adopt standards that do not conflict with the other Dedicatory Instruments to carry out its purpose. These standards are not effective unless recorded with the county clerk. On request, Owners will be provided a copy of any standards.

2. *Plan Review*

a. *Required Review by ACC.* No Residence or Structure may be erected on any Lot, or the exterior altered, unless plans, specifications, and any other documents requested by the ACC have been submitted to and approved by the ACC. The plans and specifications must show exterior design, height, building materials, color scheme, location of the Residence and Structures

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depicted horizontally and vertically, and the general plan of landscaping, all in the form and detail the ACC may require.

b. *Procedures*

i. *Complete Submission.* Within [**number**] days after the submission of plans and specifications by an Owner, the ACC must notify the submitting Owner of any other documents or information required by the ACC. In the absence of timely notice from the ACC requesting additional documents or other information, the submission is deemed complete.

ii. *Deemed Approval.* If the ACC fails to give notice of disapproval of the plans and specifications to the submitting Owner within [**number**] days after complete submission, the submitted plans and specifications are deemed approved.

c. *Appeal.* An Owner may appeal any action of the ACC to the Board. The appealing Owner must give written notice of the appeal to the Board, and if the appeal is by an Owner who is not the submitting Owner, the appealing Owner must also give written notice to the submitting Owner within [**number**] days after the ACC's action. The Board shall determine the appeal within [**number**] days after timely notice of appeal is given. The determination by the Board is final.

d. *Records.* The ACC will maintain written records of all requests submitted to it and of all actions taken. The Board will maintain written records of all appeals of ACC actions and all determinations made. Any Owner may inspect the records of the ACC and Board, but no Owner may inspect or copy the interior floor plan or security system design of any other Owner.

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e. *No Liability.* The Property Owners Association, the Board, the ACC, and their members will not be liable to any person submitting requests for approval or to any Owner by reason of any action, failure to act, approval, disapproval, or failure to approve or disapprove any request.

G. Assessments

1. *Authority.* The Property Owners Association may levy Assessments to promote the recreation, health, safety, and welfare of the residents in the Subdivision, to fund operating expenses of the Property Owners Association, and to improve and maintain the Common Areas.

2. *Personal Obligation.* An Assessment is a personal obligation of each Owner when the Assessment accrues.

3. *Creation of Lien.* Assessments are secured by a continuing vendor's lien on each Lot, which lien is reserved by Declarant and hereby assigned to the Property Owners Association. By acceptance of a deed to a Lot, each Owner grants the lien, together with the power of sale, to the Property Owners Association to secure Assessments.

4. *Commencement.* A Lot becomes subject to Assessments on conveyance of the Lot by Declarant.

5. *Regular Assessments*

a. *Rate.* Regular Assessments are levied annually by the Board to fund the anticipated operating and maintenance expenses of the Property Owners Association. Until changed by the Board, the Regular Assessment is $[**amount**] per [Lot/acre].

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b. *Changes to Regular Assessments.* Regular Assessments may be changed annually by the Board. Written notice of the Regular Assessment will be sent to every Owner at least thirty days before its effective date.

c. *Collections.* Regular Assessments will be collected [annually/semiannually/monthly] in advance, payable on the [first/tenth/[**other**]] day of the [month/year] and on [the same day of each succeeding [month/year]/the [first/tenth/[**other**]] day of [**month**] of each year].

6. *Special Assessments.* In addition to the Regular Assessments, the Board may levy Special Assessments for the purpose of funding the cost of any construction, reconstruction, repair, or replacement of any capital improvement on the Common Area or for any other purpose benefiting the Subdivision but requiring funds exceeding those available from the Regular Assessments. Special Assessments must be approved by the Members. Written notice of the terms of the Special Assessment will be sent to every Owner.

7. *Approval of Special Assessments.* Any Special Assessment must be approved by a [majority/two-thirds] vote at a meeting of the Members in accordance with the Bylaws.

8. *Fines.* The Board may levy a fine against an Owner for a violation of the Dedicatory Instruments as permitted by law.

9. *Subordination of Lien to Mortgages.* The lien granted and reserved to the Property Owners Association is subordinate to any lien granted by an Owner against a Lot not prohibited by the Texas Constitution. The foreclosure of a superior lien extinguishes the Property Owners Association's lien as to Assessments due before the foreclosure.

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10. *Delinquent Assessments.* Any Assessment not paid within [**number**] days after it is due is delinquent.

H. Remedial Rights

1. *Late Charges and Interest.* A late charge of [$[**amount**]/[**percent**] percent of the delinquent amount] is assessed for delinquent payments. Delinquent Assessments accrue interest at the rate of [**percent**] percent per year. The Board may change the late charge and the interest rate.

2. *Costs, Attorney's Fees, and Expenses.* If the Property Owners Association complies with all applicable notice requirements, an Owner is liable to the Property Owners Association for all costs and reasonable attorney's fees incurred by the Property Owners Association in collecting delinquent Assessments, foreclosing the Property Owners Association's lien, and enforcing the Dedicatory Instruments.

3. *Judicial Enforcement.* The Property Owners Association may bring an action against an Owner to collect delinquent Assessments, foreclose the Property Owners Association's lien, or enforce or enjoin a violation of the Dedicatory Instruments. An Owner may bring an action against another Owner to enforce or enjoin a violation of the Dedicatory Instruments.

4. *Remedy of Violations.* The Property Owners Association may levy a fine against an Owner for a violation of the Dedicatory Instruments.

5. *Suspension of Rights.* If an Owner violates the Dedicatory Instruments, the Property Owners Association may suspend the Owner's rights under the Dedicatory Instruments in accordance with law.

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6. *Damage to Property.* An Owner is liable to the Property Owners Association for damage to Common Areas caused by the Owner or the Owner's family, guests, agents, independent contractors, and invitees in accordance with law.

I. Common Area

1. *Common Area Easements.* Each Owner has an easement in and to the Common Area, subject to the right of the Property Owners Association to—

a. charge reasonable admission and other fees for the use of recreational facilities situated on the Common Area, and if an Owner does not pay these fees, the Owner may not use the recreational facilities;

b. suspend an Owner's rights to use a Common Area under the Dedicatory Instruments;

c. grant an easement approved by the Board over the Common Area for utility, drainage, or other purposes; and

d. dedicate or convey any of the Common Area for public purposes, on approval by a vote of [a majority/two-thirds] of the Members at a meeting in accordance with the Bylaws.

2. *Permitted Users.* An Owner's right to use and enjoy the Common Area extends to the Owner's family, guests, agents, and invitees, subject to the Dedicatory Instruments.

3. *Unauthorized Improvements in Common Area.* An Owner may not erect or alter any Structure on, or clear, landscape, or disturb, any Common Area except as approved by the Board.

J. General Provisions

Select one of the following.

1. *Term.* This Declaration runs with the land and is binding in perpetuity.

Or

1. *Term.* This Declaration runs with the land and is binding for a term of [**number**] years. The term may be extended for [successive terms of [**number**] years each by [**percent**] percent of the Members at a meeting in accordance with the Bylaws within [**number**] months before the end of a term/an initial term of [**number**] years]. [**Include if applicable:** Thereafter this Declaration automatically continues for successive terms of [**number**] years each, unless within [**number**] months before the end of a term [**percent**] percent of the Members at a meeting in accordance with the Bylaws elect not to extend the term.] An instrument reflecting the extension will be signed by the Property Owners Association and recorded.

Continue with the following.

2. *No Waiver.* Failure by the Property Owners Association or an Owner to enforce the Dedicatory Instruments is not a waiver.

3. *Corrections.* The Board may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

4. *Amendment.* This Declaration may be amended at any time by vote of [**percent (cannot exceed sixty-seven)**] percent of Owners entitled to vote on the amendment. An instru-

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ment containing the approved amendment will be signed by the Property Owners Association and recorded.

5. *Conflict.* This Declaration controls over the other Dedicatory Instruments.

6. *Severability.* If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.

7. *Notices.* All notices must be in writing and must be given as required or permitted by the Dedicatory Instruments or by law. Notice by mail is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed (a) to a Member, at the Member's last known address according to the Property Owners Association's records, and (b) to the Property Owners Association, the Board, the ACC, or a managing agent at the Property Owners Association's principal office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

8. *Annexation of Additional Property.* On written approval of the Board and not less than [**percent**] percent of the Members at a meeting in accordance with the Bylaws, the owner of any property who desires to subject the property to this Declaration may record an annexation agreement that will impose this Declaration and the Covenants on that property.

_____

[Name of declarant]

By _____

[Name and title]

Include acknowledgment.

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After recording, please return to:
[**name and address of declarant or attorney**]

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Form 23-2

Declaration of Restrictive Covenants of the [name of subdivision] Subdivision

[without Property Owners Association]

Basic Information

Date:

Declarant:

Declarant's Address:

Property:

Definitions

"Covenants" means the covenants, conditions, and restrictions contained in this Declaration.

"Declarant" means [**name**], [a/an] [individual/[Texas/[**state of formation**]] limited partnership/corporation/limited liability company] and any successor that acquires all unimproved Lots owned by Declarant for the purpose of development and is named as successor in a recorded document.

"Easements" means Easements within the Property for utilities, drainage, and other purposes as shown on the Plat or of record.

"Lot" means each tract of land designated as a lot on the Plat.

"Owner" means every record Owner of a fee interest in a Lot.

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"Plat" means the Plat of the Property recorded in [**recording data**] of the real property records of [**county**] County, Texas, and any replat of or amendment to the Plat made in accordance with this Declaration.

"Renting" means granting the right to occupy and use a Residence or Structure in exchange for the payment of money.

"Residence" means a detached building designed for and used as a dwelling by a Single Family and constructed on one or more Lots.

"Single Family" means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Residence.

"Structure" means any improvement on a Lot (other than a Residence), including a fence, wall, tennis court, swimming pool, outbuilding, or recreational equipment.

"Subdivision" means the Property covered by the Plat and any additional property made subject to this Declaration.

"Vehicle" means any automobile, truck, motorcycle, boat, trailer, or other wheeled conveyance, whether self-propelled or towed.

Clauses and Covenants

A. Imposition of Covenants

1. Declarant imposes the Covenants on the Subdivision. All Owners and other occupants of the Lots by their acceptance of their deeds, leases, or occupancy of any Lot agree that the Subdivision is subject to the Covenants.

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2. The Covenants are necessary and desirable to establish a uniform plan for the development and use of the Subdivision for the benefit of all Owners. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Lot.

3. Each Owner and occupant of a Lot agrees to comply with this Declaration and agrees that failure to comply may subject him to a fine, damages, or injunctive relief.

B. Plat and Easements

1. The Plat, Easements, and all matters shown of record affecting the Property are part of this Declaration and are incorporated by reference.

2. An Owner may use that portion of a Lot lying in an Easement for any purpose that does not interfere with the purpose of the Easement or damage any facilities. Owners do not own any utility facilities located in an Easement.

3. Neither Declarant nor any Easement holder is liable for damage to landscaping or a Structure in an Easement.

4. Declarant and each Easement holder may install, maintain, and connect facilities in the Easements.

C. Use and Activities

1. *Permitted Use.* A Lot may be used only for an approved Residence and approved Structures for use by a Single Family.

2. *Prohibited Activities.* Prohibited activities are—

a. any activity that is otherwise prohibited by this Declaration;

b. any illegal activity;

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c. any nuisance or noxious or offensive activity;

d. any dumping of rubbish;

e. any storage of—

i. building materials except during the construction or renovation of a Residence or a Structure;

ii. vehicles, except vehicles in a garage or Structure or operable automobiles on a driveway; or

iii. unsightly objects unless completely shielded by a Structure;

f. any exploration for or extraction of minerals;

g. any keeping or raising of animals, livestock, or poultry, except for common domesticated household pets, such as dogs and cats, not to exceed [**number**] confined to a fenced yard or within the Residence;

h. any commercial or professional activity except reasonable home office use;

i. the renting of a portion of a Residence or Structure;

j. the drying of clothes in a manner that is visible from any street;

k. the display of any sign except—

i. one not more than five square feet, advertising the Lot for sale or rent or advertising a garage or yard sale; and

ii. political signage not prohibited by law;

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l. installing a mobile home, manufactured home, manufactured housing, motor home, or house trailer on a Lot;

m. moving a previously constructed house onto a Lot;

n. interfering with a drainage pattern or the natural flow of surface water;

o. hunting and shooting;

p. occupying a Structure that does not comply with the construction standards of a Residence; and

q. [**insert any additional restrictions, e.g.,** renting a Residence or Structure for less than thirty consecutive days or allowing a renter, guest, or other person who is a registered sex offender to reside at the Property.]

D. Construction and Maintenance Standards

1. *Lots*

a. *Consolidation of Lots.* An Owner of adjoining Lots may consolidate those Lots into one site for the construction of a Residence.

b. *Subdivision Prohibited.* No Lot may be further subdivided.

c. *Easements.* No easement in a Lot may be granted.

d. *Maintenance.* Each Owner must keep the Lot, all landscaping, the Residence, and all Structures in a neat, well-maintained, and attractive condition.

2. *Residences and Structures*

a. *Aesthetic Compatibility.* All Residences, Structures, and Landscaping must be aesthetically compatible with the Subdivision.

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b. *Maximum Height.* The maximum height of a Residence is [**number**] [feet above grade/stories].

c. *Required Area.* The total area of a Residence, exclusive of porches, garages, or carports, must be at least [**number**] square feet.

d. *Location on Lot.* No Residence or Structure may be located in violation of the setback lines shown on the Plat. Each Residence must face the front Lot line. All Structures must be located behind the front wall of the Residence. All outbuildings, except garages, must not be visible from any street.

e. *Garages.* Each Residence must have at least a two-car garage accessed by a driveway. The garage may be a separate structure.

f. *Damaged or Destroyed Residences and Structures.* Any Residence or Structure that is damaged must be repaired within [**number**] days and the Lot restored to a clean, orderly, and attractive condition. Any Residence or Structure that is damaged to the extent that repairs are not practicable must be demolished and removed within [**number**] days and the Lot restored to a clean and attractive condition.

g. *Fences, Walls, and Hedges.* No fence, wall, or hedge may be located forward of the front wall line of the Residence, except for trellises and decorative fences.

h. *Antennas.* No antenna, satellite dish, or associated wires may be visible from the street or be located behind the back setback line of any Lot.

i. *Traffic Sight Lines.* No landscaping that obstructs traffic sight lines may be placed on any Lot.

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j. *Sidewalks.* When the Residence is constructed, the Lot must be improved with sidewalks connecting with the sidewalks on adjacent Lots.

k. *Landscaping.* Landscaping must be installed within [**number**] days after occupancy.

3. *Building Materials for Residences and Structures*

a. *Roofs.* Only [composition/tile/metal] may be used on Residences and Structures. All roof stacks must be painted to match the roof color.

b. *Air Conditioning.* Window- or wall-type air conditioners may not be used in a Residence.

c. *Exterior Walls.* All Residences must have at least [**percent**] percent of their exterior walls, including exposed foundation, of stone or brick, minus windows and doors.

d. *Driveways and Sidewalks.* All driveways and sidewalks must be surfaced with concrete or asphalt.

e. *Lot Identification.* Lot address numbers and name identification must be aesthetically compatible with the Subdivision.

E. General Provisions

Select one of the following.

1. *Term.* This Declaration runs with the land and is binding in perpetuity.

Or

1. *Term.* This Declaration runs with the land and is binding for a term of [**number**] years. The term may be extended for [successive terms of [**number**] years each by the affirma-

tive vote of [**percent**] percent of the Owners within [**number**] months before the end of a term/ an initial term of [**number**] years]. [**Include if applicable:** Thereafter this Declaration automatically continues for successive terms of [**number**] years each, unless within [**number**] months before the end of a term [**percent**] percent of the Owners vote not to extend the term.]

Continue with the following.

2. *No Waiver.* Failure by an Owner to enforce this Declaration is not a waiver.

3. *Corrections.* Declarant may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

4. *Amendment.* This Declaration may be amended at any time by the affirmative vote of [**percent**] percent of the Owners.

5. *Severability.* If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.

6. *Notices.* Any notice required or permitted by this Declaration must be given in writing by certified mail, return receipt requested. Unless otherwise required by law or this Declaration, actual notice, however delivered, is sufficient.

7. *Annexation of Additional Property.* On written approval of Declarant and not less than [**percent**] percent of the Owners, the owner of any property who desires to subject the property to this Declaration may record an annexation agreement that will impose this Declaration and the Covenants on that property.

8. *Presuit Mediation.* As a condition precedent to the commencement of a legal proceeding to enforce this Declaration, the Owners will mediate the dispute in good faith.

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Include the following if applicable.

9. *Association.* The Owners of [**percent**] of Lots in the Subdivision may authorize the formation of an association of Owners ("Association") by signing and acknowledging a statement containing (a) the proposed Association's name and type of entity and (b) the names and addresses of the initial directors. The Association will be governed by this Declaration, its Certificate of Formation, if any, and its bylaws and rules adopted by its board of directors (collectively, "Dedicatory Instruments").

If an Association is formed, every Owner will be a member and agrees to comply with the Dedicatory Instruments with the same consequences for failure to comply as are contained in this Declaration for failure to comply with it. Membership in the Association is appurtenant to and may not be separated from ownership of a Lot. If more than one person is an Owner of a Lot, only one vote may be cast for the Lot. The Association will have the powers of a Texas [nonprofit corporation/unincorporated nonprofit association] and a property owners association for the Subdivision under the Texas Business Organizations Code, the Texas Property Code, and the Dedicatory Instruments. The Association may levy assessments to pay the expenses of its formation; to promote the recreation, health, safety, and welfare of Owners in the Subdivision; to fund its operating expenses; and to improve and maintain any common areas. An assessment is a personal obligation of each Owner when the assessment accrues. Assessments are secured by a continuing vendor's lien on each Lot, and the lien is reserved by the Declarant and assigned to the Association. By acceptance of a deed to a Lot, each Owner grants a lien, together with the power of sale, to the Association to secure assessments. The lien granted and reserved to the Association is subordinate to any lien granted by an Owner against a Lot not prohibited by the Texas Constitution. The foreclosure of a superior lien extinguishes the Association's lien as to assessments due before the foreclosure. The bylaws or the rules of the Association establish when assessments are due, how assessment amounts may be changed, and the Association's rights to collect assessments. Regular assessments

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[will be equal for all Lots/will be based on the size of each Lot, rounded to the nearest one-tenth of an acre]. The bylaws and rules may also specify the Association's remedial rights to charge late fees for late payment of assessments; enforce compliance with the Dedicatory Instruments; and assess an Owner for attorney's fees and costs arising out of enforcement actions, foreclosure of the Association's lien, or suspension of an Owner's rights, including voting rights, for a delinquency in paying an assessment or other violations of the Dedicatory Instruments.

_____

[Name of declarant]

Include acknowledgment.

After recording, please return to:
[name and address of declarant or attorney]

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Form 23-3

Certificate of Formation of [name of corporation], a Texas Nonprofit Corporation

1. *Name.* The name of the corporation is [**name**].

2. *Type of Filing Entity.* The type of filing entity being formed is a nonprofit corporation.

3. *Purpose.* The purpose for which the filing entity is formed is to be the property owners association under the Declaration of Restrictive Covenants of the [**name**] subdivision.

4. *Period of Duration.* The period of duration of the filing entity is perpetual.

5. *Initial Registered Office.* The street address of the initial registered office of the filing entity and the name of its initial registered agent at that address are:

Name: [**name of registered agent**]

Address: [**address, city, state**]

6. *Organizer.* The name and address of the organizer for the filing entity are:

Name: [**name of organizer**]

Address: [**address, city, state**]

7. *Members.* The filing entity will be composed of Members.

8. *Initial Board of Directors.* The number of directors constituting the initial board of directors is [**number**], and their names and addresses are:

Name: [**name**]

Address: [**address, city, state**]

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Repeat as necessary.

9. *Meetings.* Any action that may be taken at a Members or board of directors meeting may be taken without a meeting by written consent setting forth the action taken signed by a sufficient number of Members or of the board of directors as would be necessary to take that action at a meeting.

Signed on [**date**].

_____

[**Name of organizer**]

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Form 23-4

Bylaws of [name of property owners association] [, Inc.]

Basic Information

Property Owners Association: [**name**], [established by the certificate of formation filed with the secretary of state of Texas on [**date**] under file number [**number**]/a Texas nonprofit association, which is an unincorporated organization].

Principal Office: [**address, city**], Texas. The Property Owners Association may have other offices.

Declaration: The Declaration of Restrictive Covenants of the [**name of subdivision**] Subdivision, recorded in the real property records of [**county**] County, Texas.

Definitions: Capitalized terms used but not defined herein have the meaning set forth in the Declaration.

Voting Members: Members entitled to vote or their proxies.

A. Members

A.1. Membership. Every Owner is a Member of the Property Owners Association. Membership is appurtenant to and may not be separated from ownership of a Lot. The Property Owners Association has two classes of voting Members:

A.1.a. Class A. Class A Members are all Owners, other than Declarant. Class A Members have one vote per Lot. When more than one person is an Owner, each is a Class A Member, but only one vote may be cast for a Lot.

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A.1.b. Class B. The Class B Member is Declarant and has [**number**] votes for each Lot owned. The Class B membership ceases and converts to Class A membership on the earlier of—

i. when the Class A Members' votes exceed the total of Class B Member's votes; or

ii. the date specified in the Declaration.

A.2. Place of Meeting. Members meetings will be held at the Property Owners Association's Principal Office or at another place designated by the Board.

A.3. Annual Meetings. The first Members meeting will be held within [**number**] months after the formation of the Property Owners Association. Subsequent regular annual Members meetings will be held on [**describe meeting date taking into consideration when dues are payable, e.g.,** the first Sunday in June].

A.4. Special Meetings. The president may call special meetings. The president must call a special meeting if directed by the Board or by a petition signed by [**percent**] percent of the Class A Voting Members.

A.5. Notice of Meetings, Election, and Vote. Written notice stating the place, day, and hour of each Members meeting, other than a reconvened meeting, must be given to each Member not less than ten nor more than sixty days before the meeting. For voting not at a meeting, notice must be given not later than the twentieth day before the latest day on which a ballot may be submitted to be counted. The special Members meeting notices must also state the meeting's purpose, and no business may be conducted except as stated in the notice. Notice to a Member must state the purpose of an association-wide election or vote and is deemed given when hand delivered or mailed. If mailed, notice is deemed given (whether

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actually received or not) when deposited with the United States Postal Service, postage pre-paid.

A.6. Waiver of Notice. A Member may, in writing, waive notice of a meeting. Attendance at a meeting is a waiver of notice of the meeting, unless the Member objects to lack of notice when the meeting is called to order.

A.7. Quorum. A majority of the Voting Members is a quorum. If a Members meeting cannot be held because a quorum is not present, either in person, by proxy, by absentee ballot, or by electronic ballot, a majority of the Voting Members who are present may adjourn the meeting. At the reconvened meeting, [**percent**] percent of the Voting Members is a quorum. If a quorum is not present, a majority of the Voting Members who are present may adjourn the meeting. At the second reconvened meeting, a majority of the Board is a quorum. Written notice of the place, date, and hour of each reconvened meeting must be given to each Member not more than [**number**] nor less than [**number**] days before the reconvened meeting.

A.8. Majority Vote. Voting by Members may be at a meeting or outside of a meeting. Voting must be as required by law. Votes representing more than 50 percent of the Voting Members present at a meeting at which a quorum is present are a majority vote.

A.9. Voting Methods. Voting Members may, at the option of the Board, vote in person, by proxy, by absentee ballot, by electronic ballot, or by any other process approved by the Board. A Member must be allowed to vote by absentee ballot or proxy, but the Board is not required to provide a Member with more than one voting method.

A.10. Conduct of Meetings. The president will preside over Members meetings. The secretary will keep minutes of the meetings and will record in a minutes book the votes of the members.

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B. Board

B.1. Governing Body; Composition. The affairs of the Property Owners Association are governed by the Board. Each director has one vote. The initial Board is composed of the directors appointed in the certificate of formation. Each director must be a Member or, in the case of an entity Member, a person designated in writing to the secretary.

B.2. Qualifications.

B.2.a. Member. Each director must be a Member or, in the case of an entity Member, a person designated in writing by either proxy or a resolution to the secretary of the Property Owners Association.

B.2.b. Felony or Crime Involving Moral Turpitude. If the Board is presented with written, documented evidence from a database or other record maintained by a governmental law enforcement authority that a director was convicted of a felony or crime involving moral turpitude not more than twenty years before the date the Board is presented with the evidence, that director is immediately ineligible to serve on the Board, automatically considered removed from the Board, and prohibited from future service on the Board.

Include the following if applicable. Section B.2.c. is mandatory for a property owners association with ten or more residences.

B.2.c. Cohabitation of Directors. A Member may not serve on the Board if the Member cohabits at the same primary residence with a director. This section does not apply during the Property Owners Association's development period to affect the eligibility to serve on the Board of:

i. a Member who cohabits with a developer or Declarant of the Subdivision; or

ii. the developer or Declarant.

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Continue with the following.

B.3. Number of Directors. The Board consists of not less than three nor more than [**number**] directors. Within those limits, the Board may change the number of directors. No decrease may shorten the term of a director.

B.4. Term of Office. The initial directors serve until the first annual meeting of Members.

Select one of the following.

The terms of directors will be staggered. At least one-third of the Board will be elected each year. The initial Board will determine the initial term, not to exceed three years, of each director. At the expiration of the initial term of a director, each successor will have a term of [**number**] years.

Or

Successor directors will have a term of one year.

Continue with the following.

Directors may serve consecutive terms.

B.5. Election. At the first annual meeting of Members, the Voting Members will elect directors to succeed the initial directors. At subsequent annual Members meetings, successors for each director whose term is expiring will be elected. Cumulative voting is prohibited. The candidate or candidates receiving the most votes will be elected. The directors elected by the Voting Members will hold office until their respective successors have been elected.

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B.6. Removal of Directors and Vacancies

B.6.a. Removal by Members. Any director may be removed, with or without cause, by a majority of the Voting Members. Any director whose removal is sought will be given notice of the proposed removal.

B.6.b. Removal by Board. Any director may be removed at a Board meeting if the director—

i. failed to attend [**number**] consecutive Board meetings; or

ii. failed to attend [**percent**] percent of Board meetings within one year.

B.6.c. Vacancies. A director's position becomes vacant if the director dies, becomes incapacitated, resigns, or is no longer a Member.

B.6.d. Successors. If a director is removed or a vacancy exists, a successor will be elected by the remaining directors for the remainder of the term.

B.7. Compensation. Directors will not receive compensation. A director may be reimbursed for expenses approved by the Board.

B.8. Powers. The Board has all powers necessary to administer the Property Owners Association's affairs.

B.9. Management. The Board may employ a managing agent. Declarant, or an affiliate of Declarant, may be the managing agent.

B.10. Accounts and Reports. Accounting and controls must conform to good accounting practices. Accounts will not be commingled with accounts of other persons. The following financial reports will be prepared at least annually:

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B.10.a. An income statement reflecting all income and expense activity for the preceding period.

B.10.b. A statement reflecting all cash receipts and disbursements for the preceding period.

B.10.c. A variance report reflecting the status of all accounts in an "actual" versus "approved" budget format.

B.10.d. A balance sheet as of the last day of the preceding period.

B.10.e. A delinquency report listing all Owners who are delinquent by more than [**number**] days in paying any Assessment and describing the status of any action to collect those delinquent Assessments.

B.11. Borrowing. The Board may borrow money to maintain, repair, or restore the Common Area without the approval of the Members. If approved in advance by the Members in the same manner as approving a Special Assessment, the Board may borrow money for any other purpose.

B.12. Rights of Association. With respect to the Common Area, and in accordance with the Declaration, the Property Owners Association will have the right to contract with any person for the performance of various duties and functions. Such agreements require the approval of the Board.

B.13. Enforcement Procedures

B.13.a. Notice. Before the Board may (i) suspend an Owner's right to use a Common Area, (ii) file a suit against an Owner other than a suit to collect any Assessment, (iii) foreclose the Property Owners Association's lien, (iv) charge an Owner for property damage, or (v) levy a fine for a violation of the Dedicatory Instruments, the Property Owners Associa-

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tion or its agent must give written notice to the Owner as required or permitted by law. The notice must describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the Property Owners Association from the Owner. The notice must also (i) inform the Owner that if the violation is curable and does not pose a threat to public health or safety, which means it could not materially affect the health or safety of an ordinary resident, the Owner is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the Owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; (ii) indicate that the Owner may request a hearing in accordance with Texas Property Code section 209.007 on or before the thirtieth day after the date the notice was mailed to the Owner; (iii) state that the Owner may have special rights if the Owner is serving on active military duty, and (iv) state the date by which the Owner must cure a curable violation that does not pose a threat to public health and safety.

B.13.b. Hearing. If the Owner is entitled to an opportunity to cure the violation, the Owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the Board or before the Board if the Board does not appoint a committee. If a hearing is to be held before a committee, the notice must state that the Owner has the right to appeal the committee's decision to the Board by written notice to the Board.

The Property Owners Association must hold a hearing under this section not later than the thirtieth day after the date the Board receives the Owner's request for a hearing and must notify the Owner of the date, time, and place of the hearing not later than the tenth day before the date of the hearing. The Board or the Owner may request a postponement, and, if requested, a postponement will be granted for a period of not more than ten days. Additional postponements may be granted by agreement of the parties. The Owner or the Property Owners Association may make an audio recording of the meeting.

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The hearing will be held in executive session affording the alleged violator a reasonable opportunity to be heard. Before any sanction hereunder becomes effective, proof of proper notice will be placed in the minutes of the meeting. Such proof will be deemed adequate if a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director, or agent who delivered the notice. The notice requirement will be satisfied if the alleged violator appears at the meeting. The minutes of the meeting will contain a written statement of the results of the hearing and the sanction, if any, imposed. The Board may, but will not be obligated to, suspend any proposed sanction if the violation is cured within a [**number**]-day period. Such suspension will not constitute a waiver of the right to sanction violations of the same or other provisions and rules by any person.

B.13.c. Appeal. Following hearing before a committee, if any, the violator will have the right to appeal the decision to the Board. To perfect this right, a written notice of appeal must be received by the managing agent, if any, president, or secretary within [**number**] days after the hearing date.

B.13.d. Changes in Law. The Board may change the enforcement procedures set out in this section to comply with changes in law.

C. Board Meetings

C.1. Meetings. Except as permitted by law, all regular and special meetings of the Board must be open to the Owners. Except for a meeting held by electronic or telephonic means, a Board meeting must be held in a county in which all or part of the property in the subdivision is located or in a county adjacent to that county. A Board meeting may be held by electronic or telephonic means, provided all Owners and Board Members have access to the communication at the meeting as required by law.

C.2. Notice. Owners and Board Members must be given notice of the date, hour, place, and general subject of a regular or special Board meeting, including a general descrip-

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tion of any matter to be brought up for deliberation in executive session. Notice must be given as required by law.

C.3. Waiver of Notice. The actions of the Board at any meeting are valid if (a) a quorum is present and (b) either proper notice of the meeting was given to each director or a written waiver of notice is given by any director who did not receive proper notice of the meeting. Proper notice of a meeting will be deemed given to any director who attends the meeting without protesting before or at its commencement about the lack of proper notice.

C.4. Quorum of Board. At all meetings, a majority of the Board will constitute a quorum, and the votes of a majority of the directors present at a meeting at which a quorum is present constitutes the decision of the Board. If the Board cannot act because a quorum is not present, a majority of the directors who are present may adjourn the meeting to a date not less than [**number**] nor more than [**number**] days from the date the original meeting was called. At the reconvened meeting, if a quorum is present, any business that may have been transacted at the meeting originally called may be transacted without further notice.

C.5. Conduct of Meetings. The president will preside at Board meetings. The secretary will keep minutes of the meetings and will record in a minute book the votes of the directors. The Board meeting will be conducted as required by law.

C.6. Proxies. Directors may vote by written proxy.

D. Officers

D.1. Officers. The officers of the Property Owners Association are a president, vice president, secretary, and treasurer, to be elected from the Members. The Board may appoint other officers having the authority and duties prescribed by the Board. Any two or more offices may be held by the same person, except the offices of president and secretary.

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D.2. Election, Term of Office, and Vacancies. Officers will be elected annually by the Board at the first meeting of the Board following each annual meeting of the Voting Members. A vacancy in any office may be filled by the Board for the unexpired portion of the term.

D.3. Removal. The Board may remove any officer whenever, in the Board's judgment, the interests of the Property Owners Association will be served thereby.

D.4. Powers and Duties. Officers have such powers and duties as are generally associated with their respective offices and as may be specifically conferred by the Board. The president is the chief executive officer of the Property Owners Association. The treasurer has primary responsibility for the preparation of the budget and financial reports and may delegate all or part of the preparation and notification duties to a finance committee, management agent, or both.

D.5. Resignation. Any officer may resign at any time by giving written notice to the Board, the president, or the secretary. Resignation takes effect on the date of the receipt of the notice or at any later time specified in the notice.

E. Committees

The Board may establish committees by resolution and authorize the committees to perform the duties described in the resolution.

F. Miscellaneous

F.1. Fiscal Year. The Board may establish the Property Owners Association's fiscal year by resolution. In the absence of a Board resolution determining otherwise, the Property Owners Association's fiscal year is a calendar year.

F.2. Rules for Meeting. The Board may adopt rules for the conduct of meetings of Members, Board, and committees.

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F.3. Conflict. The Declaration controls over these Bylaws.

F.4. Inspection of Books and Records

F.4.a. Inspection by Member. After a written request to the Property Owners Association, a Member may examine and copy, in person or by agent, any Property Owners Association books and records relevant to that purpose. The Board may establish rules concerning the (i) written request; (ii) hours, days of the week, and place; and (iii) payment of costs related to a Member's inspection and copying of books and records.

F.4.b. Inspection by Director. A director has the right, at any reasonable time, and at the Property Owners Association's expense, to (i) examine and copy the Property Owners Association's books and records at the Property Owners Association's Principal Office and (ii) inspect the Property Owners Association's properties.

F.5. Notices. Any notice required or permitted by the Dedicatory Instruments must be in writing. Notices regarding enforcement actions must be given as required or as permitted by law. All other notices may be given by regular mail. Notice by mail is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed to (a) a Member at the Member's last known address according to the Property Owners Association's records and (b) the Property Owners Association, the Board, or a managing agent at the Property Owners Association's Principal Office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

F.6. Amendment. These Bylaws may be amended at any time by the vote of [**percent**] percent of the Voting Members in the Property Owners Association. This provision will not be construed as limiting the Board's power to amend the enforcement procedures to comply with changes in law.

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[Name of association]

By _____
[Name and title]

Include acknowledgments.

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Form 23-5

Rules of [name of property owners association] [, Inc.]

Basic Information

Date:

Property Owners Association: [**name**], [established by the certificate of formation filed with the secretary of state of Texas on [**date**] under file number [**number**]/a Texas nonprofit association, which is an unincorporated organization].

Property Owners Association's Address:

Declaration: The Declaration of Restrictive Covenants of the [**name of subdivision**] Subdivision, [**include recording information**].

Definitions: Capitalized terms used but not defined in the Rules have the meaning set forth in the Declaration or Bylaws.

The Property Owners Association adopts these Rules, which will be enforceable on the recording of this document in the real property records of the [county/counties] in which the property described by the Declaration is located. On violation of these Rules, owners may be subject to Penalties for Violation.

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A. Rules

Insert the rules that the property owners association wants to adopt. Consider the following subject areas: use of common areas (including swimming pools and recreation facilities), architectural and building rules, parking of vehicles, pet control, nuisances, trash collection, etc.

B. Penalties for Violation

Insert penalties for violation by type of violation.

C. Enforcement Procedures

C.1. Notice. Before the Property Owners Association may (a) suspend an Owner's right to use a common area, (b) file a suit against an Owner other than a suit to collect a Regular Assessment or Special Assessment or foreclose under the Property Owners Association's lien, (c) charge an Owner for property damage, or (d) levy a fine for a violation of the restrictions or Bylaws or Rules of the Property Owners Association, the Property Owners Association or its agent must give written notice to the Owner by certified mail, return receipt requested. The notice must describe the violation or property damage that is the basis for the suspension action, charge, or fine and must state any amount due the Property Owners Association from the Owner. The notice also must inform the Owner that the Owner (a) is entitled to a reasonable period to cure the violation and avoid the fine or suspension, unless the Owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; (b) may request a hearing in accordance with Texas Property Code section 209.007 on or before the thirtieth day after the date the Owner receives the notice; and (c) may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act (50 U.S.C. §§ 3901–4043) if the Owner is serving on active military duty. If a hearing is to be held before a committee, the notice must state that the Owner has the right to appeal the committee's decision to the Board by written notice to the Board.

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C.2. Hearing. If the Owner is entitled to an opportunity to cure the violation, the Owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter at issue before a committee appointed by the Board or before the Board if the Board does not appoint a committee. The Property Owners Association must hold a hearing under this provision not later than the thirtieth day after the date the Board receives the Owner's request for a hearing and must notify the Owner of the date, time, and place of the hearing not later than the tenth day before the date of the hearing. The Board or the Owner may request a postponement, and, if requested, a postponement will be granted for a period of not more than ten days. Additional postponements may be granted by agreement of the parties. The Owner or the Property Owners Association may make an audio recording of the meeting. The hearing will be held in executive session, affording the alleged violator a reasonable opportunity to be heard. Before any sanction under these Rules becomes effective, proof of proper notice will be placed in the minutes of the meeting. Such proof will be deemed adequate if a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director, or agent who delivered the notice. The notice requirement will be satisfied if the alleged violator appears at the meeting. The minutes of the meeting will contain a written statement of the results of the hearing and the sanction imposed, if any. The Board may, but will not be obligated to, suspend any proposed sanction if the violation is cured within a [**number**]-day period. Such suspension will not constitute a waiver of the right to sanction violations of the same or other provisions and rules by any person.

C.3. Appeal. Following hearing before a committee, if any, the violator will have the right to appeal the decision to the Board. To perfect this right, a written notice of appeal must be received by the managing agent, president, or secretary within [**number**] days after the hearing date.

[Name of property owners association]

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By _____
[Name and title]

Include acknowledgment.

Form 23-6

Deed without Warranty

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date: [**date**]

Grantor: [**name of developer**]

Grantor's Mailing Address:

Grantee: [**name of association**], a [Texas nonprofit corporation/nonprofit association]

Grantee's Mailing Address:

Subdivision: [**name of subdivision**], a subdivision, according to the Plat recorded in [**recording data**] of the real property records of [**county**] County, Texas.

Declaration: The Declaration recorded in [**recording data**] of the real property records of [**county**] County, Texas.

Property (including any improvements): The Common Area defined in the Declaration.

Reservations from Conveyance:

> State "None" or, to create reservations of title, include the appropriate clauses from form 5-7 in this manual.

Exceptions to Conveyance:

> State "None" or, to create exceptions to conveyance, include the appropriate clauses from form 5-8.

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Grantor, subject to the Plat, the Declaration, the Reservations from Conveyance, and the Exceptions to Conveyance, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever, without express or implied warranty. All warranties that might arise by common law as well as the warranties in section 5.023 of the Texas Property Code (or its successor) are excluded.

This conveyance is made in connection with Grantor's development of the Subdivision pursuant to the Plat and Declaration as a ministerial task that fulfills a duty of Grantor under the Declaration.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

_____

[Name of grantee]

Include acknowledgments.

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Form 23-7

Management Certificate
(Texas Property Code Section 209.004)

Name of Subdivision:	[**name of subdivision**]
Subdivision Recording Data:	The plat of the Subdivision recorded in [**recording data**] of the real property records of [**county**] County, Texas
Declaration Recording Data:	The Declaration recorded in [**recording data**] of the real property records of [**county**] County, Texas
Name of Association:	[**name of association**]
Mailing Address of Association:	[**address, city, state**]
Name of Person Managing Association or Association's Designated Representative:	[**name of person managing association or association's designated representative**]
Mailing Address of Person Managing Association or Association's Designated Representative:	[**address, city, state**]

[**Include other information the association considers appropriate.**]

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_____

[Name of officer]
[Title]

Repeat as necessary.

Include acknowledgment(s).

Include the following if applicable.

The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [**name of association**]; that [**name**] is the duly elected and qualified [secretary/[**other officer**]] of [**name of association**]; that the signature above is [**name**]'s genuine signature; and that the foregoing certificate is true and correct.

_____

[Name of president]

Include acknowledgment.

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Form 23-8

Notice to Purchaser[s]

STATE OF TEXAS)

COUNTY OF)

The real property described below, which you are purchasing, is subject to deed restrictions recorded at [**recording data**] of the County [**title of records in which restrictions are recorded**] records. [**If restrictions have been amended or extended or if the property is subject to restrictions recorded at various places, identify each filing and be certain to include reference to subdivision and other map filings to the extent they include setback lines or other restrictions.**] THE RESTRICTIONS LIMIT YOUR USE OF THE PROPERTY. THE CITY OF HOUSTON IS AUTHORIZED BY STATUTE TO ENFORCE COMPLIANCE WITH CERTAIN DEED RESTRICTIONS. You are advised that, in the absence of a declaratory judgment that the referenced restrictions are no longer enforceable, the City of Houston may sue to enjoin a violation of such restrictions. ANY PROVISIONS THAT RESTRICT THE SALE, RENTAL, OR USE OF THE REAL PROPERTY ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN ARE UNENFORCEABLE; however, the inclusion of such provisions does not render the remainder of the deed restrictions invalid. The legal description and street address of the property you are acquiring are as follows: [**insert legal description or attach and refer to by designated exhibit; state property street address**].

_____

[**Name of seller**]
Date:

Include acknowledgment.

The undersigned admit[s] receipt of the foregoing notice at or prior to closing the purchase of property above described.

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_____

[**Name of purchaser**]
Date:

Include acknowledgment.

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Form 23-9

The language in this notice must be substantially similar to the language set out in Tex. Prop. Code § 5.012(a), and the second paragraph must be in bold print and underlined.

Notice of Membership in Property Owners Association Concerning the Property at [street address and name of residential community]

Property:

Property Owners Association:

As a purchaser of property in the residential community in which this Property is located, you are obligated to be a member of a Property Owners Association. Restrictive covenants governing the use and occupancy of the Property and all dedicatory instruments governing the establishment, maintenance, or operation of this residential community have been or will be recorded in the real property records of the county in which the Property is located. Copies of the restrictive covenants and dedicatory instruments may be obtained from the county clerk.

You are obligated to pay assessments to the Property Owners Association. The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your Property.

Section 207.003 of the Texas Property Code entitles an owner to receive copies of any document that governs the establishment, maintenance, or operation of a subdivision, including but not limited to restrictions, bylaws, rules and regulations, and a resale certificate from the Property Owners Association. A resale certificate contains information including but not limited to statements specifying the amount and frequency of regular assessments of the Property Owners Association and the style and cause number of lawsuits to which the Property

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Owners Association is a party, other than lawsuits relating to unpaid ad valorem taxes of an individual member of the Property Owners Association. These documents must be made available to you by the Property Owners Association or the Property Owners Association's agent on your request.

Date: _____

_____

[Name of purchaser]

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Form 23-10

Note: If a written request for an update to the resale certificate is received within 180 days after the date a resale certificate is issued, the property owners association shall deliver the updated information within seven business days to the party requesting the original resale certificate. Tex. Prop. Code § 207.003(f), (g).

Required Information [Issued on [date]] Applicable to the Property Including Resale Certificate
(Texas Property Code Section 207.003)

Date:	[**date**]
Property (including any common areas assigned to the Property):	[**address, city**], [**county**] County, Texas
Subdivision:	[**name and legal description**]
Property Owners Association:	[**name of association**]
Property Owners Association's address:	[**address, city, state**] [**telephone**] [**fax**]
Managing agent of Subdivision:	[**name of managing agent**]
Managing agent's address:	[**address, city, state**] [**telephone**] [**fax**]
Current regular assessment:	$[**amount**] per [**time period, e.g.,** month]

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Special assessment(s) due after the date of [this updated] resale certificate:	$[**amount**] payable as follows: [**specify time-frame for paying and purpose of special assessment[s]**]
Total amounts due and unpaid to Property Owners Association:	$[**amount**]
Capital expenditures approved by Property Owners Association for current fiscal year:	$[**amount**]
Reserves for capital expenditures:	$[**amount**]
Unsatisfied judgments against Property Owners Association:	$[**amount**]
Administrative transfer fee:	$[**amount**] payable to: [**specify**]
Other fees for change of ownership:	$[**amount**] to [**name**] for [**specify**]

There [are/are not any] suits pending against the Property Owners Association. [**Include if applicable:** The style and cause number of each pending suit are: [**describe any pending suits**].]

The Property Owners Association's board has [no] actual knowledge of conditions on the Property in violation of the restrictions applying to the Subdivision or the bylaws or rules of the Property Owners Association. [**Include if applicable:** Known violations are: [**list any known violations**].]

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The Property [is/is not] subject to a right of first refusal or other restraint contained in the restrictions or restrictive covenants that restricts the owner's right to transfer the owner's property.

The Property Owners Association [has/has not] received notice from any governmental authority regarding health or building code violations with respect to the Property or any common areas or common facilities owned or leased by the Property Owners Association. [**Include if applicable:** A summary or copy of each notice is attached.]

The restrictions on the Lot [do/do not] allow foreclosure of the Property Owners Association's lien on the Property for failure to pay assessments.

Required Attachments:

1. Restrictions
2. Rules
3. Bylaws
4. Articles of Incorporation/Certificate of Formation
5. Current Balance Sheet
6. Current Operating Budget
7. Certificate of Insurance Concerning Property and Liability Insurance for Common Areas and Facilities
8. Any Governmental Notices of Health or Housing Code Violations

Notice: This Subdivision information may change at any time.

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[Name of property owners association]

By _____

[Name and title]

[Mailing address]

[E-mail]

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Form 23-11

This form is used by a seller and a buyer to impose restrictions on the sold property and property retained by the seller.

Restrictive Covenant Agreement

Basic Information

Date:

Seller:

Seller's Mailing Address:

Buyer:

Buyer's Mailing Address:

Conveyed Property: [**Describe by metes and bounds or plat reference the property being conveyed by the seller to the buyer that will be subject to the restrictive covenants.**]

Retained Property: [**Describe by metes and bounds or plat reference the property being retained by the seller that will be subject to the restrictive covenants.**]

Development: [**Describe by metes and bounds or plat reference the subdivision of which the conveyed property and the retained property are a part.**]

Restricted Uses of the Conveyed Property: [**specify**]

Restricted Uses of the Retained Property: [**specify**]

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Consideration: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Seller.

Agreements

1. *Restrictions on Use of Conveyed Property.* No portion of the Conveyed Property may be used for the Restricted Uses of the Conveyed Property for the period beginning on the date of this agreement and ending on the earlier of the expiration of [**number**] years after that date or the cessation of the use of the Retained Property for any of the Restricted Uses of the Conveyed Property for a continuous period of not less than [**number**] consecutive days.

2. *Restrictions on Use of Retained Property.* No portion of the Retained Property may be used for the Restricted Uses of the Retained Property for the period beginning on the date of this agreement and ending on the earlier of the expiration of [**number**] years after that date or the cessation of the use of the Conveyed Property for any of the Restricted Uses of the Retained Property for a continuous period of not less than [**number**] consecutive days.

3. *Prohibited Uses.* The Conveyed Property and the Retained Property will not be used for any of the following prohibited uses for a period beginning on the date of this agreement and ending [**number**] years after that date: [**list prohibited uses**].

4. *Amendment and Termination.* This agreement may be amended or terminated in whole or in part from time to time, and at any time, by written instrument signed by the then owners of all of the Conveyed Property and the Retained Property and by the owners of 75 percent or more in surface area of the remaining portion of the Development and recorded in the real property records of [**county**] County, Texas; provided, however, that as long as Seller owns any portion of the Development any such instrument must be signed by Seller to be effective.

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5. *Covenants Running with the Land.* Without limiting the provisions of paragraph 4. above, the parties agree that the provisions of this agreement will be deemed to be covenants running with the land that are for the benefit of, and create burdens on, the respective portions of the Development described above.

6. *Binding Effect.* This agreement binds, benefits, and may be enforced by the successors in interest to the parties.

7. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules in any jurisdiction. Venue is in the county or counties in which the Development is located.

8. *Attorney's Fees.* If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation will be entitled to recover reasonable attorney's fees and court and other costs.

9. *Severability.* If a provision in this agreement is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this agreement, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement.

10. *Remedies Cumulative.* Except as otherwise provided herein, all rights, privileges, and remedies afforded the parties by this agreement will be deemed cumulative and not exclusive and the exercise of any remedy will not be deemed to be a waiver of any other right, remedy, or privilege provided for herein or available at law or in equity. It is expressly understood that a recovery in damages may not be an adequate remedy for a violation of the provisions of this agreement and that the granting of equitable remedies may, and probably will, be necessary.

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11. *Number and Gender.* The use of the singular will be deemed to mean the plural, the masculine to mean the feminine or neuter, and the neuter to mean the masculine or feminine when context requires.

12. *Captions.* Captions used in this agreement are for convenience only and will not be considered as a limitation on or an expansion of the terms of the agreement.

13. *Construction of Agreement.* The terms and provisions of this agreement are the result of negotiation between the parties, each of which has been represented by counsel of its selection, and neither of which has acted under duress or compulsion, legal, economic, or otherwise. Consequently, the terms and provisions of this agreement will be interpreted and construed in accordance with their usual and customary meanings, and the parties expressly waive and disclaim any rule of law or procedure interpreting or construing this agreement otherwise, including, without limitation, any rule of law to the effect that ambiguous or conflicting terms or provisions in this agreement must be interpreted or construed against the party whose attorney prepared this agreement or any draft hereof.

14. *Other Instruments.* The parties to this agreement covenant and agree that they will execute any further instruments and agreements necessary or convenient to carry out the purposes of this agreement, including, without limitation, amendments of this agreement reasonably requested by Seller in connection with the sale of any of the Retained Property to other parties, as long as such amendments do not materially and adversely affect the rights and obligations of Buyer and Buyer's heirs, successors, and assigns under this agreement.

15. *Entire Agreement.* This agreement and any exhibits are the entire agreement of the parties concerning the Conveyed Property, the Retained Property, the Development, the Restricted Uses of the Conveyed Property, and the Restricted Uses of the Retained Property. There are no representations, agreements, warranties, or promises, and neither party is relying

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on any statements or representations of any agent of the other party, that are not in this agreement and any exhibits.

16. *Notices.* Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

17. *No Third-Party Beneficiaries.* Nothing in this agreement, expressed or implied, is intended or may be construed to confer on any person or entity, other than the parties and their respective heirs, successors, and assigns, any right, remedy, or claim by reason of this agreement. This agreement is intended for the sole and exclusive benefit of the parties and their respective heirs, successors, and assigns as the owners of the Development or portions thereof.

18. *Time.* Time is of the essence with respect to each covenant, agreement, and obligation of the parties set forth in this agreement.

19. *Counterparts.* If this agreement is executed in multiple counterparts, all counterparts taken together will constitute this agreement.

_____

[Name of seller]

_____

[Name of buyer]

Include acknowledgments.

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Form 23-12

This form may be used to comply with the requirements of Tex. Prop. Code § 209.005.

Records Production and Copying Policy

Date:

Subdivision: [**insert legal description**]

Property Owners Association:

Charges: Charges for examining and copying Property Owners Association information are set out in Exhibit A.

Except for information deemed confidential by law or court order, the Property Owners Association will make its books and records open to and reasonably available for examination by an owner of property in the Subdivision or a person designated in a writing signed by the owner as the owner's agent, attorney, or certified public accountant, in accordance with Texas Property Code section 209.005. Owners are also entitled to obtain copies of information in the Property Owners Association's books and records on payment of the Charges for the copies. To the extent the Charges in this policy exceed the charges in section 70.3 of title 1 of the Texas Administrative Code, the amounts in section 70.3 of title 1 of the Texas Administrative Code govern.

Information not subject to inspection by owners includes but is not limited to—

1. any document that constitutes the work product of the Property Owners Association's attorney or that is privileged as an attorney-client communication;

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2. files and records of the Property Owners Association's attorney relating to the Property Owners Association, excluding invoices requested by an owner under Texas Property Code section 209.008(d); and

3. except to the extent the information is provided in the meeting minutes or as authorized by Texas Property Code section 209.005(*l*), (a) information that identifies the dedicatory instrument violation history of an individual owner; (b) an owner's personal financial information, including records of payment or nonpayment of amounts due the Property Owners Association; (c) an owner's contact information, other than the owner's address; and (d) information related to an employee of the Property Owners Association, including personnel files.

If a document in the Property Owners Association's attorney's files and records relating to the Property Owners Association would be subject to a request by an owner to inspect or copy Property Owners Association documents, the document will be produced by using the copy from the attorney's files and records if the Property Owners Association has not maintained a separate copy of the document.

Procedures for Inspecting Information or Obtaining Copies

1. An owner or the owner's agent must submit a written request for access or information by certified mail, with sufficient detail describing the Property Owners Association's books and records requested, to the mailing address of the Property Owners Association or authorized representative as reflected on the most current management certificate filed with the county clerk of [**county**] County, Texas.

2. The request must include enough description and detail about the information requested to enable the Property Owners Association to accurately identify and locate the information requested. Owners must cooperate with the Property Owners Association's reasonable efforts to clarify the type or amount of information requested.

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3. The request must contain an election either to inspect the books and records before obtaining copies or to have the Property Owners Association forward copies of the requested books and records and—

a. if an inspection is requested, the Property Owners Association, on or before the tenth business day after the date the Property Owners Association receives the request, will send written notice of dates during normal business hours that the owner may inspect the requested books and records to the extent those books and records are in the possession, custody, or control of the Property Owners Association; or

b. if copies of identified books and records are requested, the Property Owners Association will, to the extent those books and records are in the possession, custody, or control of the Property Owners Association, produce the requested books and records for the requesting party on or before the tenth business day after the date the Property Owners Association receives the request.

4. If the Property Owners Association is unable to produce the books or records requested that are in its possession or custody on or before the tenth business day after the date the Property Owners Association receives the request, the Property Owners Association must provide to the requestor written notice that—

a. informs the owner that the Property Owners Association is unable to produce the information on or before the tenth business day after the date the Property Owners Association received the request; and

b. states a date by which the information will be sent or made available for inspection to the requesting party that is not later than the fifteenth business day after the date notice under this subsection is given.

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5. If an inspection is requested or required, the inspection will take place at a mutually agreeable time during normal business hours, and the owner will identify the books and records for the Property Owners Association to copy and forward to the owner.

6. The Property Owners Association may produce copies of the requested information in paper copy, electronic, or other format reasonably available to the Property Owners Association.

7. Before starting work on an owner's request, the Property Owners Association must provide the owner with a written, itemized statement of estimated Charges for examining and copying records related to the owner's request, using amounts prescribed in this policy when the estimated Charges exceed $40. Owners may modify the request in response to the itemized statement.

8. Within ten business days of the date the Property Owners Association sent the estimate of Charges, the owner must respond in writing to the written estimate, or the request is considered automatically withdrawn. The response must state whether the owner (a) accepts the estimate per the request, (b) modifies the request, or (c) withdraws the request.

9. Owners are responsible for Charges related to the compilation, production, and reproduction of the requested information in the amounts stated in this policy. The Property Owners Association may require advance payment of the estimated Charges of compilation, production, and reproduction of the requested information.

10. If the estimated Charges are less or more than the actual Charges, the Property Owners Association must submit a final invoice to the owner on or before the thirtieth business day after the date the information is delivered. If the final invoice includes additional amounts due from the owner, the additional amounts, if not reimbursed to the Property Owners Association before the thirtieth business day after the date the invoice is sent to the owner, may be added to the owner's account as an assessment. If the estimated Charges exceeded the

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final invoice amount, the owner is entitled to a refund, and the refund will be issued to the owner not later than the thirtieth business day after the date the invoice is sent to the owner.

[**Name of property owners association**]

By _____

[**Name and title**]

Include acknowledgment.

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Exhibit A

Charges for Examining and Copying Property Owners Association Information

A. Labor Charge for Computer Programming

If a particular request requires the services of a computer programmer to execute an existing program or to create a new program so that requested information may be accessed and copied, the Property Owners Association will charge $28.50 an hour for the programmer's time spent on the request.

B. Labor Charge for Locating, Compiling, Manipulating, and Reproducing Data and Information

1. The charge for labor costs incurred in processing an owner's request for Property Owners Association information is $15.00 an hour. The labor charge will be calculated based on the actual time to locate, compile, manipulate, and reproduce the requested data and information.

2. A labor charge will not be billed in connection with complying with requests that are for fifty or fewer pages of paper records, unless the documents to be copied are located in (a) two or more separate buildings that are not physically connected with each other or (b) a remote storage facility.

3. A labor charge will not be billed for any time spent by an attorney, legal assistant, or any other person who reviews the requested information to determine whether it is confidential or privileged under Texas law.

4. When confidential or privileged information is mixed with public information in the same page, a labor charge may be recovered for time spent to redact, black out, or otherwise obscure the confidential or privileged information in order to comply with the owner's

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request. The Property Owners Association will not charge for redacting confidential or privileged information for requests of fifty or fewer pages unless the request also qualifies for a labor charge under section 552.261(a)(1) or 552.261(a)(2) of the Texas Government Code.

C. Overhead Charge

1. Whenever any labor charge is applicable to a request, the Property Owners Association may include in the Charges direct and indirect costs, in addition to the specific labor charge. This overhead charge would cover such costs as depreciation of capital assets, rent, maintenance and repair, utilities, and administrative overhead. If the Property Owners Association chooses to recover such costs, the overhead charge will be computed at 20 percent of the charge made to cover any labor costs associated with a particular request.

For example, if one hour of labor is used for a particular request, the formula would be as follows:

a. Labor charge for locating, compiling, and reproducing—$15.00 x .20 = $3.00.

b. Labor charge for computer programming—$28.50 x .20 = $5.70.

If a request requires a charge for one hour of labor for locating, compiling, and reproducing information ($15.00 per hour) and one hour of programming ($28.50 per hour), the combined overhead would be $15.00 + $28.50 = $43.50 x .20 = $8.70.

2. An overhead charge will not be made for requests for copies of fifty or fewer pages of standard paper records.

D. Microfiche and Microfilm Charge

If the Property Owners Association already has the requested information on microfiche or microfilm, the charge for a copy must not exceed the cost of reproducing the informa-

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tion on microfiche or microfilm or ten cents per page for standard size paper copies of the information on microfiche or microfilm, plus any applicable labor and overhead charge for more than fifty copies.

E. Remote Document Retrieval Charge

To the extent that the retrieval of documents stored on the Property Owners Association's property results in a charge to comply with a request, the Property Owners Association will charge the actual cost of the retrieval.

F. Copy Charges

1. The charge for standard paper copies reproduced by means of an office machine copier or a computer printer is ten cents per page or part of a page. Each side of a piece of paper on which information is recorded is counted as a single copy. A piece of paper that has information recorded on both sides is counted as two copies. Standard paper copy is a copy of Property Owners Association information that is a printed impression on one side of a piece of paper that measures up to eight and one-half by fourteen inches.

2. A "nonstandard" copy includes everything but a copy of a piece of paper measuring up to eight and one-half by fourteen inches. Microfiche, microfilm, diskettes, magnetic tapes, and CD-ROM are examples of nonstandard copies. The charges in this subsection are to cover the materials onto which information is copied and do not reflect any additional charges, including labor, that may be associated with a particular request. The charges for nonstandard copies are—

a. diskette—$1.00;

b. magnetic tape—actual cost;

c. data cartridge—actual cost;

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d. tape cartridge—actual cost;

e. rewritable CD (CD-RW)—$1.00;

f. nonrewritable CD (CD-R)—$1.00;

g. digital video disc (DVD)—$3.00;

h. JAZ drive—actual cost;

i. other electronic media—actual cost;

j. VHS video cassette—$2.50;

k. audio cassette—$1.00;

l. oversize paper copy (e.g., larger than eight and one-half by fourteen inches, greenbar, bluebar, not including maps and photographs using specialty paper)—$0.50; and

m. specialty paper (e.g., Mylar, blueprint, blueline, map, photographic)—actual cost.

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Form 23-13

This form may be used to comply with the requirements of Tex. Prop. Code § 209.0062. The minimum term for a payment plan is three months. The maximum term is eighteen months from the date of the owner's request for a payment plan.

Guidelines for Alternative Payment Plans

Date:

Property Owners Association:

Property Owners Association's Address:

Subdivision:

Payment Plan Guidelines: [**describe terms that will govern all payment plans**]

Administrative Fee: [**state amount of fee and how often it accrues**]

Annual Interest Rate:

The Property Owners Association establishes these guidelines to allow owners who are delinquent in payment of a debt to the Property Owners Association to pay the debt in partial payments to avoid monetary penalties. However, delinquency in payment of a debt [may/will] result in nonmonetary penalties, such as loss of privileges.

Payments under a payment plan will incur the Administrative Fee and interest at the Annual Interest Rate.

To be entitled to pay a debt under a payment plan, an owner who is delinquent on a debt must submit a written request to the Property Owners Association.

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Owners can make no more than [**number**] requests for a payment plan within a twelve-month period. The Property Owners Association is not required to enter into a payment plan agreement with an owner who failed to honor the terms of a previous payment plan agreement during the two years following the owner's default under the previous payment plan agreement.

[**Name of property owners association**]

By _____
[**Name and title**]

Include acknowledgment.

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Form 23-14

This form may be used to comply with the requirements of Tex. Prop. Code § 209.0062. The minimum term for a payment plan is three months. The maximum term is eighteen months from the date of the debtor's request for a payment plan.

Alternative Payment Plan Agreement

Date:

Debtor:

Debtor's Mailing Address:

Debt

Principal Amount of Debt:	[**describe the delinquent regular assessments, special assessments, and/or other amount owed to the property owners association**]
Annual Interest Rate:	
Annual Interest Rate on Matured, Unpaid Amounts:	
Administrative Fee:	[**state amount of fee and how often it accrues**]

Property Owners Association:

Place for Payment: [**mailing address of property owners association or other place for payment**]

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Maturity Date:

> The terms of payment must be consistent with the property owners association's recorded guidelines for alternative payment plans. See form 23-13 in this chapter.

Terms of Payment (principal and interest): [**insert clause from form 6-2**]

Debtor promises to pay to the Property Owners Association the Principal Amount of Debt plus interest at the Annual Interest Rate and the Administrative Fee. The Debt is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the Maturity Date. If any amount is not paid either when due under the Terms of Payment or on acceleration of maturity, Debtor promises to pay any unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

If Debtor defaults in the payment of this agreement, the Property Owners Association may declare the unpaid principal balance, earned interest, and any other amounts owed immediately due. Debtor and each surety, endorser, and guarantor waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

Debtor also promises to pay reasonable attorney's fees and court and other costs if this agreement is given to an attorney to collect or enforce. These expenses will bear interest from the date of advance at the Annual Interest Rate on Matured, Unpaid Amounts. Debtor will pay the Property Owners Association these expenses and interest on demand at the Place for Payment. These expenses and interest will become part of the Debt evidenced by this agreement.

Interest on the Debt will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in

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excess of that maximum amount will be credited on the Principal Amount of Debt or, if the Principal Amount of Debt has been paid, refunded. On any acceleration or required or permitted prepayment, any excess interest will be canceled automatically as of the acceleration or prepayment or, if the excess interest has already been paid, credited on the Principal Amount of Debt or, if the Principal Amount of Debt has been paid, refunded. This provision overrides any conflicting provisions in this agreement and all other instruments concerning the Debt.

Each Debtor is responsible for all obligations represented by this agreement.

When the context requires, singular nouns and pronouns include the plural.

_____

[Name of debtor]

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Form 23-15

This form may be used to comply with the requirements of Tex. Prop. Code § 209.0064. The notice should be sent to the owner by certified mail, return receipt requested.

Notice of Collection Agent Fees

Basic Information

Date:

Property Owners Association:

Property Owners Association's Address:

Property:

Owner: [**name and address**]

Delinquent Amounts: [**specify each delinquent amount by category and amount**]

Total Amount Required to Make Account Current:

You are delinquent in payment of the Delinquent Amounts.

To avoid having your account turned over to a collection agent you must, within thirty days of receipt of this notice, either (1) pay the Total Amount Required to Make Account Current or (2) sign and return to the Property Owners Association the enclosed alternative payment plan agreement.

If you fail to cure the delinquency, you will be charged for all fees that the Property Owners Association must pay its collection agent related to your account and for all reason-

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able attorney's fees and other reasonable costs incurred by the Property Owners Association relating to collecting amounts that you owe the Property Owners Association.

PLEASE CONTACT US FOR INITIAL VERIFICATION OF THE DEBT, AND WE WILL PROVIDE COPIES OF STATEMENTS OF YOUR ACCOUNT. UNLESS YOU DISPUTE THE VALIDITY OF THE ABOVE REFERENCED DEBT, OR ANY PORTION THEREOF, WITHIN THIRTY DAYS AFTER RECEIPT OF THIS NOTICE, THE DEBT WILL BE ASSUMED TO BE VALID. IF YOU DO NOTIFY US IN WRITING WITHIN THE THIRTY-DAY PERIOD THAT THE DEBT, OR ANY PORTION THEREOF, IS DISPUTED, WE WILL OBTAIN AN ADDITIONAL VERIFICATION OF THE DEBT AND WILL MAIL A COPY OF THAT ADDITIONAL VERIFICATION TO YOU. THE CURRENT CREDITOR IS THE ORIGINAL CREDITOR.

THIS THIRTY-DAY VERIFICATION PERIOD DOES *NOT* ALTER THE EARLIER STATED DEADLINES.

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT FOR THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY.

[Name of property owners association]

By _____
[Name and title]

Certified Mail No. **[number]**
Return Receipt Requested

Attach the alternative payment plan agreement. See form 23-14 in this chapter.

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Form 23-16

This form may be used to comply with the requirements of Tex. Prop. Code § 209.0091. This notice should be sent to all inferior or subordinate lienholders whose lien is evidenced by a deed of trust at the address for the lienholder shown in the deed records relating to the property. It should be sent to such lienholders by certified mail, return receipt requested.

Notice of Delinquency to Subordinate Lienholder

Basic Information

Date:

Property Owners Association:

Property Owners Association's Address:

Property:

Owner:

Owner's Address:

Delinquent Amount: [**specify each delinquent amount by category and amount**]

Total Amount Required to Cure Delinquency:

Subordinate Lienholder[s]: [**name[s] and address[es]**]

Notice

You are notified that the Owner is delinquent in payment of the Delinquent Amount.

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To avoid the Property Owners Association foreclosing its lien against the Property, you may, within sixty-one days of your receipt of this notice, pay the Property Owners Association the Total Amount Required to Cure Delinquency.

If the delinquency is not cured within sixty-one days of your receipt of this notice, the Property Owners Association has the right to foreclose on the Property.

[**Name of property owners association**]

By _____
[**Name and title**]

Certified Mail No. [**number**]
Return Receipt Requested

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Form 23-17

This form may be used to comply with the requirements of Tex. Prop. Code §§ 209.006, 209.008. The notice should be sent to the owner by certified mail, return receipt requested.

Notice of Enforcement Action and Attorney's Fees

Basic Information

Date:

Property Owners Association:

Property Owners Association's Address:

Property:

Amount Due to Property Owners Association:

Date By Which Violation or Delinquency Must Be Cured:

Owner:

Owner's Address:

"You" and "your" in this notice refers to Owner.

Notice

You are subject to enforcement action by the Property Owners Association for the following:

Select one or more of the following as applicable.

Violation of the declaration: [**specify**]

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Violation of the bylaws of the Property Owners Association: [**specify**]

Violation of the rules of the Property Owners Association: [**specify**]

Damage to Property Owners Association property: [**specify**]

Failure to pay the Property Owners Association: [**specify**]

[**Specify other reason for enforcement action.**]

Continue with the following.

You are entitled to a reasonable period from your receipt of this notice to cure the violation or delinquency and avoid enforcement action and attorney's fees.

On or before the thirtieth day after the date you receive this notice, you have the right to submit a written request to the Property Owners Association for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the Board of the Property Owners Association or before the Board if the Board does not appoint a committee. If a hearing is to be held before a committee, you have the right to appeal the committee's decision to the Board by written notice to the Board.

You may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act (50 U.S.C. §§ 501–596), if you are serving on active military duty.

If you do not request a hearing, then you must either (1) pay the Amount Due to Property Owners Association, cure the violation, or both, as applicable, by the Date By Which Violation or Delinquency Must Be Cured or (2) sign and deliver an Alternative Payment Plan Agreement, if applicable, to pay the delinquent amount in accordance with the Property Owners Association's Guidelines for Alternative Payment Plans, a copy of which is attached.

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However, you are not eligible to use an alternative payment plan if you failed to honor the terms of a previous Alternative Payment Plan Agreement within the last two years.

If you do not request a hearing and you (1) fail to cure the violation or delinquency by the Date By Which Violation or Delinquency Must Be Cured or (2) sign an Alternative Payment Plan Agreement, if eligible, and fail to pay the Amount Due to Property Owners Association pursuant to that plan, the Property Owners Association may—

1. suspend your right to use a common area;

2. file a suit against you;

3. charge you for property damage;

4. levy a fine for a violation of the declaration, bylaws, or rules of the Property Owners Association;

5. collect reimbursement of reasonable attorney's fees and other reasonable costs incurred by the Property Owners Association relating to collecting amounts, including damages, due the Property Owners Association or for enforcing restrictions in the declaration, bylaws, or rules of the Property Owners Association; and

6. take other enforcement action against you in accordance with the declaration, bylaws, and rules of the Property Owners Association and Texas law.

PLEASE CONTACT US FOR INITIAL VERIFICATION OF THE DEBT, AND WE WILL PROVIDE COPIES OF STATEMENTS OF YOUR ACCOUNT. UNLESS YOU DISPUTE THE VALIDITY OF THE ABOVE REFERENCED DEBT, OR ANY PORTION THEREOF, WITHIN THIRTY DAYS AFTER RECEIPT OF THIS NOTICE, THE DEBT WILL BE ASSUMED TO BE VALID. IF YOU DO NOTIFY US IN WRITING WITHIN THE THIRTY-DAY PERIOD THAT THE DEBT, OR ANY PORTION THEREOF, IS DISPUTED, WE WILL OBTAIN AN ADDITIONAL VERIFICATION OF THE DEBT AND WILL MAIL A COPY OF

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THAT ADDITIONAL VERIFICATION TO YOU. THE CURRENT CREDITOR IS THE ORIGINAL CREDITOR.

THIS THIRTY-DAY VERIFICATION PERIOD DOES *NOT* ALTER THE EARLIER STATED DEADLINES.

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT FOR THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY.

[**Name of property owners association**]

By _____
[**Name and title**]

Certified Mail No. [**number**]
Return Receipt Requested

Attach the guidelines for alternative payment plans. See form 23-13 in this chapter.

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Form 23-18

This form may be used to comply with the requirements of Tex. Prop. Code § 209.010(c). This affidavit must be recorded in the real property records of the county in which the property is located no later than the thirtieth day after the date the property owners association sent the notice required under Tex. Prop. Code § 209.010(a).

Affidavit of Mailing

Basic Information

Date:

Property Owners Association:

Property Owners Association's Address:

Property:

Date Property Owners Association Mailed Notice:

Affiant:

Statement

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made concerning the foreclosure of the lien held by the Property Owners Association on the Property.

2. Attached to this affidavit is a copy of the letter sent to—

   a. each former property owner obligated to pay the debt secured by the lien on the Property, at the former property owner's last known mailing address;

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b. each holder of a lien on the Property evidenced by the most recently filed deed of trust on the Property; and

c. each transferee/assignee of a deed of trust on the Property who provided the Property Owners Association with notice under section 209.010 of the Texas Property Code.

3. Each letter was sent by certified mail, return receipt requested, to the person designated on the letter on the date designated in the letter.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Attach copies of letters sent.

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Form 23-19

This form may be used to comply with the requirements of Tex. Prop. Code § 209.010. This notice must be sent no later than the thirtieth day after the foreclosure sale. It should be sent to the former property owner and to each lienholder by certified mail, return receipt requested. If a recorded instrument does not include an address for a lienholder, the property owners association has no duty to notify that lienholder. The notice should also be sent to each transferee or assignee of a lien who has provided the property owners association with notice of the transfer or assignment in accordance with Tex. Prop. Code § 209.010(b)(3).

Notice of Foreclosure Sale

[**Date**]

To: [**name and address of former property owner**]
[**name[s] and address[es] of lienholder[s]**]

Re: Foreclosure Sale

Property: [**include legal description**]

Date and Time:

Property Owners Association:

[Third Party Purchaser: [**name and address**]]

NOTICE

The Property Owners Association foreclosed the Property Owners Association's lien on the Property at the Date and Time indicated [**insert if applicable:** to the Third Party Purchaser]. You have the right to redeem the Property under section 209.011 of the Texas Property Code. You must redeem the Property within 180 days after the date of this notice. If you are a lienholder, you may not redeem the Property before ninety days after the date of this notice, and then only if the former property owner has not previously redeemed the Property.

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You may obtain an extension of the redemption period only as provided in section 209.011(m) of the Texas Property Code.

[**Name of property owners association**]

By _____
[**Name and title**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

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Form 23-20

This form may be used to comply with the requirements of Tex. Prop. Code § 209.011(n). This affidavit must be recorded in the real property records of the county in which the property is located. Tex. Prop. Code § 209.011(n).

Affidavit of Nonredemption

Basic Information

Date:

Property:

Property Owners Association:

Property Owners Association's Address:

Include if applicable.

Third Party Purchaser:

Third Party Purchaser's Address:

Continue with the following.

Former Property Owner:

Former Property Owner's Address:

Lienholder:

Lienholder's Address:

If there is more than one lienholder, repeat above information for each additional lienholder.

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Date of Foreclosure:

Affiant:

Statement

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the lien held by the Property Owners Association on the Property on the Date of Foreclosure.

2. Neither the Former Property Owner nor any Lienholder redeemed the Property during the redemption period or any extended redemption period.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Form 23-21

Owner Notification to Association of Rental Information

Date:

Property Owner:

Address:

Phone:

E-mail:

Repeat above information for each additional owner.

Address of Rented Property:

Owner's Rental Property Management Company:

Address:

Phone:

E-mail:

Tenant:

Phone:

Motor vehicle

Year, make, and model:

License plate number:

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Repeat above information for each additional tenant or vehicle.

Rental Agreement Commencement Date:

Rental Agreement Termination Date:

Attach copy of lease or rental agreement.

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Form 23-22

This form can be used for property owners association managers who are not licensed real estate brokers providing property management services under Texas Occupations Code chapter 1101.

Association Management Agreement

Basic Information

Date:

Property Owners Association:

Property Owners Association's Address:

Property Owners Association Manager:

Property Owners Association Manager's Address:

Subdivision/Condominium Complex:

Single-Family Residential Real Property: A single-family home or a unit in a condominium, cooperative, row home, or townhome. Single-Family Residential Real Property does not include a duplex, triplex, or fourplex unless the unit is owned as a condominium, cooperative, row home, or townhome.

A. Services

A.1. Property Owners Association Manager will provide the following association management services [on-site] for the Property Owners Association only as authorized by the Property Owners Association board of directors. The services include contracting and paying for maintenance, repair, replacement, and other services incidental to the management of the

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Property Owners Association and the common areas of the Subdivision/Condominium Complex as set forth in the governing documents for the Property Owners Association.

A.2. Unless Property Owners Association Manager is or becomes licensed as a broker under the Texas Occupations Code, Property Owners Association Manager—

A.2.a. will not engage in any activity for which a license is required under Texas Occupations Code, chapter 1101, and Texas Administrative Code rules promulgated by the Texas Real Estate Commission; and

A.2.b. will not control the acceptance or deposit of rent for Single-Family Residential Real Property located in the Subdivision/Condominium Complex. "Control the acceptance or deposit of rent" includes any one or more of the following activities:

i. use the rent to pay for services related to management of the property;

ii. determine where to deposit the rent; or

iii. sign checks or withdraw money from a trust account.

B. Term (Months)

Insert the term of the property owners association management agreement in months.

C. Compensation (Monthly)

Insert the monthly compensation for the property owners association manager.

Insert additional terms if applicable.

[Name of association]

By _____

[Name and title of association officer or agent]

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By _____

[**Name of association manager**], Property Owners Association Manager

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Chapter 24

Condominium Documents

§ 24.1 General Considerations

§ 24.1:1 Definition and Creation of a Condominium and Its Owners Association

A condominium is a form of real property ownership in which portions of the real property are designated for separate ownership or occupancy (the "units") and the remainder is designated for common ownership or occupancy solely by the owners of the units. Real property is a condominium only if one or more of the common elements (for use by all the unit owners) are directly owned in undivided interests by the unit owners. Real property is not a condominium if all of the common elements are owned by a legal entity separate from the unit owners, such as a corporation or property owners association, even if the separate legal entity is owned by the unit owners. Tex. Prop. Code § 82.003(a)(8).

Condominiums are established through filing, in the real property records of the county in which the property is located, a declaration imposing restrictive covenants on the property comprising the condominium regime. Tex. Prop. Code § 82.051. The declaration must contain statutorily prescribed information. Tex. Prop. Code § 82.055. The declaration defines the boundaries of the units and operates to subdivide the property into separate condominium units and common areas or elements. Tex. Prop. Code § 82.052. It is not uncommon for condominium developers to presell condominium units before construction of the condominium building and thus before the boundaries of the units are defined by an as-built survey. In 2013, the Texas legislature amended the definition in Tex. Prop. Code § 82.003(a)(11) to eliminate the word *recorded* with reference to the declaration but left section 82.051 (requiring recording to establish a condominium) unchanged.

The provisions of the declaration and bylaws are severable. *See* Tex. Prop. Code § 82.053. These bylaws are for a condominium owners association that will take over management of the condominium regime from the declarant. The declaration also typically includes rules affecting the property and owners in the condominium regime.

A condominium owners association for a condominium formed after January 1, 1994, must be a Texas corporation. Tex. Prop. Code § 82.101. These owners associations are typically nonprofit corporations, although section 82.101 allows them to be for-profit corporations. The Texas Business Organizations Code provides for the formation of both nonprofit and for-profit corporations. Form 24-3 in this chapter is a certificate of formation for a condominium owners association.

§ 24.1:2 Applicable Law

The Uniform Condominium Act, chapter 82 of the Texas Property Code, governs all condominiums with declarations recorded on or after January 1, 1994. The Act also applies to condominiums formed before that date if the owners vote to have chapter 82 apply or if a declaration or amendment of declaration recorded before January 1, 1994, states that chapter 82 will apply. *See* Tex. Prop. Code § 82.002(a). Portions of the Act apply to all condominiums; however, certain rights cannot be limited for owners of

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condominiums created before 1994. *See* Tex. Prop. Code § 82.002(b)–(d). Condominiums created before January 1, 1994, are otherwise governed by chapter 81 of the Property Code.

Property Code chapter 202, governing construction and enforcement of restrictive covenants, also applies to condominiums. Section 202.002(a) states that the chapter "applies to all restrictive covenants." "Restrictive covenant" is defined to mean any covenant, condition, or restriction in a dedicatory instrument, and a "dedicatory instrument" means all governing instruments of planned developments, explicitly including condominiums. *See* Tex. Prop. Code § 202.001(1), (4). "Dedicatory instrument" as it relates to condominiums is defined in Tex. Prop. Code § 82.003(a)(11–a), which does not specifically require recording. Under chapter 202, however, a dedicatory instrument has no effect until it is recorded in the public records. Tex. Prop. Code § 202.006(b). In many instances, the provisions of the statutes applicable to condominiums differ substantially from those that apply to noncondominium residential subdivisions. *See* Tex. Prop. Code § 209.003(d).

In addition to provisions in chapter 82 of the Property Code, the Texas Business Organizations Code governs the formation and operation of the condominium owners association. *See* Tex. Bus. Orgs. Code ch. 21 (for-profit corporations), ch. 22 (nonprofit corporations).

Condominium owners associations are subject to federal income taxation. They do not qualify as charitable organizations under Internal Revenue Code section 501(c)(3). Associations may qualify for special tax treatment under 26 U.S.C. § 528.

§ 24.1:3 Foreclosure of Assessment Lien

An assessment levied by a condominium owners association is a personal obligation of the unit owner and is also secured by a continuing lien on the unit, on rents, and on insurance proceeds relating to the unit. *See* Tex. Prop. Code § 82.113(a). For purposes of this section, "assessment" includes regular and special assessments, dues, fees, late fees, fines, collection costs, attorney's fees, "and any other amount due to the association by the unit owner or levied against the unit by the association . . . . " Tex. Prop. Code § 82.113(a). The lien for assessments is created by the recording of the declaration, and no other recordation of a lien or notice of lien is required. Tex. Prop. Code § 82.113(c). The association's lien for assessments has priority over other liens, except for liens for real property taxes or other governmental assessments, liens recorded before the declaration was recorded, first vendor's liens or first deed-of-trust liens recorded before the assessment becomes delinquent, and under certain circumstances, liens on improvements. *See* Tex. Prop. Code § 82.113(b).

By acquiring a unit, an owner grants the association a power of sale. That power of sale is exercised pursuant to Texas Property Code section 51.002 unless the declaration provides otherwise. Tex. Prop. Code § 82.113(d). The association may not foreclose a lien for assessments consisting only of fines. Tex. Prop. Code § 82.113(e). The association may not foreclose during a person's active military service or nine months thereafter without complying with Tex. Prop. Code § 51.015. A notice of foreclosure sale must include the military service language in Tex. Prop. Code § 51.002(i). The initial communication with the owner to collect delinquent assessments before exercising the right of foreclosure also should include language required under federal and state fair debt collection practices laws. A unit owner may not petition a court to set aside a sale solely because the price at foreclosure was insufficient to fully satisfy the owner's debt. The association may purchase the unit at foreclosure.

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The redemption rights of condominium owners are set out in Tex. Prop. Code § 82.113(g). The Texas Residential Property Owners Protection Act, chapter 209 of the Property Code, does not apply to condominiums. Tex. Prop. Code § 209.003(d). *See Duarte v. Disanti*, 292 S.W.3d 733, 736 (Tex. App.—Dallas 2009, no pet.) (it was "the legislature's clear intent to have different redemption rights for residential subdivisions than for condominiums").

At any time before a nonjudicial foreclosure sale, the unit owner may avoid foreclosure by paying "all amounts due the association." Tex. Prop. Code § 82.113(j). The association is not prohibited from taking a deed in lieu of foreclosure or from filing suit to recover a money judgment. Tex. Prop. Code § 82.113(i).

If an owner defaults on obligations to the association, the association may notify other lienholders of its intent to foreclose and must notify any holder of a recorded lien or a duly perfected mechanic's lien if the lienholder has given the association a written request of notification. Tex. Prop. Code § 82.113(h), (m). Foreclosure of a tax lien under chapter 32 of the Texas Tax Code does not discharge the association's lien for amounts due the association after the date of foreclosure of the tax lien. Tex. Prop. Code § 82.113(*l*).

§ 24.2 General Instructions for Completing Forms

For general information about completing the forms in this chapter, see chapter 3 in this manual. In most forms, the information that the attorney must provide is listed at the beginning of the form. Of course, the attorney may add other specific provisions and references to exhibits and riders at the end of the form.

For general information about designation of parties, addresses, property descriptions, and execution and acknowledgment of documents, see chapter 3.

§ 24.3 General Considerations for Declaration

The required contents for a condominium declaration are set out in Tex. Prop. Code § 82.055.

§ 24.3:1 Definitions

The definition of "assessment" used in the declaration, form 24-1 in this chapter, is based on that used in Tex. Prop. Code § 82.113(a).

The definition of "residential purposes" is derived from Tex. Prop. Code § 82.003(a)(21).

The definition of "common elements" is based on Tex. Prop. Code § 82.003(a)(5). In each condominium, there will likely be portions that should be designated as "limited common elements." The consequence of such a designation is important, not only to limit use of those elements but also to determine responsibility for their maintenance, repair, or replacement, and the costs thereof. The drafter should carefully review Texas Property Code sections 82.052, 82.058, 82.107, and 82.112(d) when determining which aspects of a condominium should be designated as limited common elements as opposed to common elements.

The declaration defines the plat as including the plans. Property Code section 82.003(a) makes a distinction between plan and plat as follows:

> (18) "Plan" means a dimensional drawing that is recordable in the real property records or the condominium plat records and that horizontally and vertically identifies or describes units and common elements that are contained in buildings.
>
> (19) "Plat" means a survey recordable in the real property records or

the condominium plat records and containing the information required by Section 82.059. As used in this chapter, "plat" does not have the same meaning as "plat" in Chapter 212 or 232, Local Government Code, or other statutes dealing with municipal or county regulation of property development.

Tex. Prop. Code § 82.003(a)(18), (a)(19).

§ 24.3:2 Restrictions on Use, Occupancy, or Alienation

Texas Property Code section 82.055(9) requires a declaration to set out any restrictions on use, occupancy, or alienation of the units. Section C. of the declaration, form 24-1 in this chapter, has examples of use and occupancy restrictions. Because changing the "use restrictions on a unit" in a declaration requires 100 percent of the votes in the association (Tex. Prop. Code § 82.067(e)), it will be difficult if not impossible to amend the use restrictions once the declarant loses control of the condominium regime. The use restrictions thus require careful consideration. Examples of restraints on alienation are provided in paragraph D.8. of form 24-1. The practitioner will need to consider what conditions or activities are to be prohibited. The nature and extent of the limitations will depend on the declarant's purpose and expectations for the condominium. In addition, lenders may require that restrictions be incorporated to protect their interests and the security of mortgages.

Certain restrictions are prohibited or regulated, including restrictions concerning firearms (Tex. Prop. Code § 202.020); rain barrels and xeriscaping (Tex. Prop. Code § 202.007); solar energy devices (Tex. Prop. Code § 202.010); roof shingles (Tex. Prop. Code § 202.011); flags and flagpoles (Tex. Prop. Code § 202.012); religious items (Tex. Prop. Code § 202.018); standby electric generators (Tex. Prop. Code § 202.019); and speed feedback signs (Tex. Transp. Code § 430.002). The owner or developer must determine whether and to what extent rentals are permitted. Allowing rentals in residential condominiums can adversely affect the ability of owners to obtain mortgages. Some lenders will not finance a condominium loan unless a certain percentage of units in the condominium regime are owner-occupied.

If the declarant wants to restrict or regulate rentals, restricting the units to "residential" use will not suffice. Rental of a property for residential use does not transform the use of the property into a business or commercial use. *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274 (Tex. 2018). Any prohibition against rentals must explicitly be stated in the declaration. *Tarr*, 556 S.W.3d at 291. The declarant may want to consider not placing rental restrictions in the section of the declaration titled "use restrictions," given the requirement for approval from "100 percent of the votes in the association" for a change in any "use restrictions." Tex. Prop. Code § 82.067(e). Careful consideration must also be given to the context in which the phrase "single family" appears in a declaration. The supreme court in *Tarr* determined that "single family" refers to a type of structure, not who can occupy the property. *Tarr*, 556 S.W.3d at 287. The declarant therefore may also want to define the term "single family" if used in the declaration.

Unless the declaration prohibits rental of units, condominium owners associations or managers may encounter enforcement problems when an owner rents the property to a third party. Insertion of provisions such as the following in the declaration or the association's rules can minimize these enforcement problems:

- requiring that owners provide tenants with the declaration and rules;
- requiring owners to use rental agreements that impose on tenants the obligation to comply with the dedicatory instruments,

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with consequences for tenants' violation of the declaration or rules;

- making owners responsible for any fines or other consequences if tenants violate the declaration or rules; and
- requiring owners to give the association or management information about rentals, including contact information for tenants and copies of the rental agreements (form 24-14 in this chapter can be used for this purpose).

Some declarations prohibit short-term rentals because of the unique problems they pose. "Short-term rental" means the rental of all or part of a residential property for less than thirty consecutive days. Tex. Tax Code §§ 156.001(b), 156.101. Short-term rentals are subject to sales and hotel taxes and, often, additional local ordinances. Promulgating association rules that require owners to comply with all applicable laws, with fines or other consequences in the event the owners do not comply, can provide an association with an enforcement tool in those situations.

§ 24.3:3 Units and Common Elements

Texas Property Code sections 82.052 and 82.055(4) allow the declaration to define the boundaries of a unit other than as set forth in paragraphs D.3. and D.4. of the declaration, form 24-1 in this chapter.

The declaration is required to contain a description of limited common elements other than those described in Texas Property Code section 82.052(2) and (4). Tex. Prop. Code § 82.055(6). Examples of limited common elements as set out in the statute include chutes, flues, ducts, wires, bearing walls, and other fixtures partially within and partially outside the designated boundaries of a unit and that serve only that unit. Tex. Prop. Code § 82.052(2). Items such as windows, exterior doors, shutters, awnings, window boxes, doorsteps, porches, balconies, and patios designed to serve a single unit but located outside the unit's boundaries are also limited common elements. Tex. Prop. Code § 82.052(4). The declaration must also contain a description of property that may be allocated subsequently as limited common elements. Tex. Prop. Code § 82.055(7).

§ 24.3:4 Assignment of Association Income

Unless a dedicatory instrument requires a vote of the association members to borrow money or to assign the association's right to future income or lien rights, Tex. Prop. Code § 82.102(f) gives the association's board of directors the power to borrow money and assign as collateral for the loan the association's right to future income and lien rights. If a vote of the members is required, (1) the board can provide for electronic voting, absentee ballot, proxy at a meeting, or written consent, and (2) at least 67 percent of all voting interests must vote in favor of the action, unless a dedicatory instrument provides for a lower threshold.

Form 24-12 in this chapter is a unanimous consent in lieu of a directors' meeting to approve a loan under Tex. Prop. Code § 82.102(f) after any required members' vote under section 82.102(g) has approved the loan. Chapter 6 in this manual contains forms and clauses for the promissory note. Form 24-13 is a security agreement and transfer of lien to secure the loan.

§ 24.3:5 Assessments and Late Charges

Texas Property Code section 82.112 provides that an expense for maintenance, repair, or replacement of a limited common element must be assessed as if it were a general common element expense except as otherwise provided by the declaration or Tex. Prop. Code § 82.107.

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Late charges are governed by Tex. Prop. Code §§ 82.102(a)(12), 82.112(c), 82.117(1). The creation of liens and foreclosure for failure to pay assessments is addressed in Tex. Prop. Code § 82.113. Form 24-15 in this chapter can be used for making an initial demand for payment of delinquent assessments before the association exercises its right to foreclose. That form includes the language required by the federal and state fair debt collection practices laws and the military service language required in the notice of foreclosure under Tex. Prop. Code § 51.002(i). Redemption rights for condominium owners after foreclosure of an association's lien for assessments are governed by Tex. Prop. Code § 82.113(g).

Among the powers granted to the association by the Uniform Condominium Act is the power to impose charges for use of the common elements. *See* Tex. Prop. Code § 82.102(a)(11). Paragraph H.2. of the declaration, form 24-1 in this chapter, concerns fees for use of specified common elements and is optional. The purpose of this section is to expressly authorize such charges and to provide a procedure to the association.

§ 24.3:6 Voting Rights

The declaration may provide for different allocations of votes on particular specified matters or class voting on specified issues; however, units may not constitute a class merely because they are owned by a declarant. Tex. Prop. Code § 82.057(c), (d).

The formulas used to establish the allocations of interests must be stated in the declaration. *See* Tex. Prop. Code §§ 82.055(8), (16), 82.057(a), (c). Attention should be given to section 82.057(c), which permits special provisions relating to voting rights.

If any unit is restricted exclusively to residential purposes, the approval of at least 80 percent of the members is required to terminate the condominium under section 82.068(a) of the Texas Property Code.

§ 24.3:7 Amendment of Declaration

Tex. Prop. Code § 82.055(11) requires the declaration to contain the method of its amendment. By statute an amendment to a declaration may be made—

1. by written ballot that states the exact wording or substance of the amendment and that specifies the date by which a ballot must be received to be counted;
2. at a meeting of the members of the association after written notice of the meeting has been delivered to an owner of each unit stating that a purpose of the meeting is to consider an amendment to the declaration; or
3. by any method permitted by the declaration.

Tex. Prop. Code § 82.067(a).

The drafter may merely reference the two specific methods described in Tex. Prop. Code § 82.067(a) or may include additional methods. Some thought should be given to taking advantage of technological advances in order to accommodate different sizes and types of anticipated membership populations. For example, written ballots might be submitted electronically, rather than only by mail.

§ 24.3:8 Development Rights

The right to create additional units is a development right. *See* Tex. Prop. Code § 82.003(a)(12)(B). The Uniform Condominium Act requires all condominium declarations to include a statement of the maximum number of units that the declarant reserves the right to cre-

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ate. *See* Tex. Prop. Code § 82.055(5). If any development right is to be reserved by the declarant, the declaration (form 24-1 in this chapter) will require substantial modification.

§ 24.3:9 Special Declarant Rights

Tex. Prop. Code § 82.055(14), (15) requires not only a description of development rights and other special declarant rights but also clear identification of the particular real property to which such rights apply and time limits within which such rights must be exercised. Unless special declarant rights are expressly reserved in the declaration, they do not arise under the Uniform Condominium Act. If development rights are reserved, the declaration (form 24-1 in this chapter) will require substantial modification. *See* Tex. Prop. Code §§ 82.003(a)(12), (a)(22), 82.055(14). Examples of special declarant rights include:

1. The right to complete or make improvements indicated on the plats and plans. *See* Tex. Prop. Code §§ 82.003(a)(22)(A), 82.059.
2. The right to maintain sales and other offices and models and condominium advertising signs on the condominium. *See* Tex. Prop. Code §§ 82.003(a)(22)(D), 82.065.
3. Rights of easement through the common elements for the discharge of declarant's obligations. *See* Tex. Prop. Code §§ 82.003(a)(22)(E), 82.066.
4. The right to appoint or remove officers or directors. *See* Tex. Prop. Code §§ 82.003(a)(22)(F), 82.103(c).

§ 24.4 General Considerations for Bylaws

Form 24-4 in this chapter is a proposed set of bylaws for a condominium owners association. The form can be modified consistent with applicable law, found primarily in the Texas Business Organizations Code and the Texas Property Code.

The Business Organizations Code provides that bylaws may contain provisions for the "regulation and management" of corporate affairs that are consistent with law and the corporation's certificate of formation. Tex. Bus. Orgs. Code § 21.057(b) (for-profit corporation), § 22.102(b) (nonprofit corporation).

Section 82.106 of the Property Code mandates that the bylaws contain specified provisions governing the "administration and operation of the condominium." It also provides for "other matters the association considers desirable, necessary or appropriate" subject to the declaration. Section 81.202 of the Property Code (applying to condominiums formed before January 1, 1994) states that the "bylaws of a condominium regime govern the administration of the buildings that comprise the regime." Thus, it is not unusual, particularly for associations formed before January 1, 1994, to see provisions in bylaws that go beyond corporate governance.

§ 24.5 General Considerations for Rules

Form 24-11 in this chapter can be used in promulgating rules for the condominium owners association and the use of any common areas. The rules and penalties for violation (to be inserted in sections A. and B. of the form) will be unique to each condominium regime. The enforcement provisions (contained in section C. of the form) are based on the requirements in section 82.102(d) of the Texas Property Code.

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§ 24.6 Additional Forms

§ 24.6:1 Condominium Information Statement

Before offering to the public the sale of any interest in a condominium, a declarant (as well as certain other persons in the business of selling real property) must prepare and provide a condominium information statement to prospective purchasers. Tex. Prop. Code § 82.152. The requirements for the condominium information statement are found in Tex. Prop. Code § 82.153. These include—

1. the name and principal address of the declarant and of the condominium;
2. a general description of the condominium that includes the types and maximum number of units;
3. the minimum and maximum number of additional units that may be included in the condominium;
4. a brief description of any development rights reserved by a declarant and of any conditions relating to those rights;
5. copies of the declaration, articles of incorporation, bylaws, any rules of the association and their amendments, and copies of leases and contracts, other than loan documents, required by the declarant to be signed by purchasers at closing;
6. a projected or pro forma budget for the association for the first fiscal year of the association that conforms to Texas Property Code section 82.153(a)(6) and (b);
7. a general description of each lien, lease, or encumbrance affecting title to the condominium after conveyance by the declarant;
8. a copy of each written warranty provided by the declarant;
9. a description of any unsatisfied judgments against the association and any pending suits to which the association is a party or that are material to the land title and construction of the condominium of which a declarant has actual knowledge;
10. a general description of the insurance coverage provided for the benefit of unit owners; and
11. current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium.

Form 24-2 in this chapter is based on the above requirements. Special disclosures are required for condominiums located in whole or in part in a municipality with a population of more than 1.9 million. *See* Tex. Prop. Code § 82.153(a)(12).

§ 24.6:2 Management Certificate

Texas Property Code section 82.116 requires a management certificate to be recorded in each county in which the condominium is located. If any changes in information occur, the association is required to file a new management certificate not later than thirty days after the date the association has notice of the change. *See* Tex. Prop. Code § 82.116(b). In addition, all condominium owners associations must record a current management certificate on or before January 1, 2014, or rerecord the current management certificate if the previous recording was done before September 1, 2013. This requirement is to facilitate the county clerks' indexing of management certificates, which, before September 1, 2013, did not have a clear, statutorily mandated system. Tex. Prop. Code § 82.116(a–1). Thus, a condominium owners association should record or rerecord its current

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management certificates even if it missed the January 1, 2014, deadline. Form 24-5 in this chapter, the management certificate, may be used to comply with these requirements.

§ 24.6:3 Resale Certificate and Acknowledgment of Receipt

A unit owner, other than a declarant, who intends to sell a unit must provide a purchaser with a current copy of the declaration, bylaws, any association rules, and a resale certificate. The resale certificate, required under chapter 82 of the Texas Property Code, must be prepared not earlier than three months before the date of delivery. The resale certificate must be issued by the association and contain the disclosures specified in Tex. Prop. Code § 82.157. The resale certificate and other provisions in chapter 207 of the Property Code do not apply to condominiums. Tex. Prop. Code § 207.002(b).

Form 24-6 in this chapter, the resale certificate, may be used to comply with the requirements of Tex. Prop. Code § 82.157.

If the seller fails to deliver to the purchaser copies of the declaration, bylaws, and association rules as required by Tex. Prop. Code § 82.157 before the purchaser executes the contract, or if the contract does not contain an underlined or bold-faced provision acknowledging the purchaser's receipt of those documents and recommending that the purchaser read the documents before executing the contract, the purchaser has the right to cancel the contract before the sixth day after the date the seller delivers those documents to the purchaser. *See* Tex. Prop. Code § 82.156. Form 24-8, the acknowledgment of receipt of condominium documents, may be used to document compliance with Tex. Prop. Code § 82.157 or may be modified to use as additional clauses in a sales contract.

§ 24.6:4 Record of Unit

An association is required to keep certain records, including information concerning each unit owner. The unit owner, within thirty days after acquiring an interest, must provide—

1. the unit owner's mailing address, telephone number, and driver's license number, if any;
2. the name and address of the holder of any lien against the unit and any loan number;
3. the name and telephone number of any person occupying the unit other than the unit owner; and
4. the name, address, and telephone number of any person managing the unit as agent of the unit owner.

Tex. Prop. Code § 82.114(e).

This information must be updated no later than thirty days after the date the owner has notice of any change in the required information. Tex. Prop. Code § 82.114(f). Form 24-10 in this chapter, the record of unit, may be used to comply with those requirements.

§ 24.6:5 Management Agreement

A person who performs residential property management services for a single-family residential property must be licensed as a broker. Tex. Occ. Code ch. 1101. Among the many acts that can make one a "broker" for purposes of the Occupations Code, and thus requiring the person to be licensed, is "control[ling] the acceptance or deposit of rent from a resident of a single-family residential real property unit," in expectation of receiving a commission or other valuable consideration. Tex. Occ. Code § 1101.002(1)(A)(x). Control means the authority to either (1) pay for services related to management of the property out of the rent collected, (2) determine where to deposit the rent, or (3)

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sign checks or withdraw money from a trust account. 22 Tex. Admin. Code § 535.4(h). Tex. Admin. Code § 535.4(i) states that in addition to other types of property, a condominium unit or townhome is a single-family residential real property unit for purposes of Tex. Admin. Code § 535.4(h). An association that hires an unlicensed manager to assist in managing the association's affairs can use form 24-16 in this chapter to prohibit activities for which a broker's license is required.

§ 24.7 Additional Resources

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Roles for Declarations, Rules and Bylaws." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

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Markel, Marc D. "The Standard of Care in Texas for Property Owners' Associations." In *Advanced Property Owners Association Law Course, 2018*. Austin: State Bar of Texas, 2018.

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Form 24-1

Declaration of [name of condominium], a Condominium

Basic Information

Date:

Declarant:

Declarant's Address:

Association: [**name**], a Texas [for-profit/nonprofit] corporation

Association's Address:

Property: [**include legal description**] [**include county**], including the following easements and licenses appurtenant to, included in, or to which the condominium is or may become subject [**include recording data for easements and licenses**]

Plat/Plan: [attached hereto as Exhibit [**exhibit number/letter**]/recorded at [**recording data**]]

[Reservations from Declaration:]

[Property Subject to Development Right of Withdrawal: [**include legal description**]]

Definitions

"Act" means chapter 82 of the Texas Property Code, as amended, and any successor law, known as the Texas Uniform Condominium Act.

"Assessment" means regular and special assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorney's fees, and any other amount due to the association by the Owner or levied against the Unit by the Association.

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"Board" means the Board of Directors of the Association.

"Bylaws" means the Bylaws of the Association adopted by the Board. The initial Bylaws are attached as Exhibit [**exhibit number/letter**].

"Certificate of Formation" means the Association's certificate of formation.

"Common Elements" means all portions of the Condominium other than the Units and includes both General and Limited Common Elements. The Common Elements are directly owned by the Condominium Unit Owners in undivided interests.

"Common Expenses" means expenditures made by or financial liabilities of the Association, together with any allocations to reserves.

"Condominium" means the Property covered by the Plat and any additional property that is subject to this Declaration.

"Covenants" means the covenants, conditions, and restrictions contained in this Declaration.

"Declarant" means the person or persons identified as Declarant in the Basic Information or who reserves or succeeds to any special declarant right.

"Declarant Control Period" means the period of time during which Declarant can appoint a majority of the Board members and officers as provided in paragraph E.2.

"Dedicatory Instruments" means this Declaration and the Certificate of Formation, Bylaws, and Rules, as amended.

"Development Rights" means a right or combination of rights reserved by the Declarant set forth in paragraph L.3.

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"General Common Elements" means common elements that are not Limited Common Elements.

"Limited Common Elements" means a portion of the Common Elements allocated by the Declaration or by the Act for the exclusive use of one or more but less than all of the Units, including [**include as applicable and consider expressly excluding any of the following items that are not intended as limited common elements:** shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and exterior doors and windows or other fixtures designed to serve one or more but less than all of the Units, but located outside the boundaries of the Unit(s)]. [**Include any additional building features that are to be characterized or expressly excluded as limited common elements.**]

"Member" means Owner.

"Owner" means every record Owner of a fee interest in a Unit.

"Plat" means the Plat and any plans for the Condominium [recorded in [**recording data**] of the real property records of [**county**] County, Texas/recorded with this Declaration as Exhibit [**exhibit number/letter**]] and any replat of or amendment to the Plat made in accordance with this Declaration.

"Residential Purposes" means recreational or dwelling purposes or both.

"Rules" means the Rules related to the Condominium adopted by the Board that do not conflict with law or the Dedicatory Instruments. On request, an Owner will be provided a copy of the Rules.

Include the following if applicable.

"Single Family" means a group of individuals related by blood, adoption, or marriage or a number of unrelated roommates not exceeding the number of bedrooms in a Unit.

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Continue with the following.

"Special Declarant Rights" means a right or combination of rights reserved by the Declarant set forth in paragraph L.1.

"Unit" means a physical portion of the Condominium designated for separate ownership, the boundaries of which are described by the Declaration.

Each capitalized term not otherwise defined in this Declaration has the meaning specified in the Act.

Clauses and Covenants

A. Imposition of and Agreement to the Covenants

A.1. Declarant imposes the Covenants on the Property and subjects the Property to a condominium form of ownership in accordance with the provisions of the Act [**include if applicable:** , subject to the Reservations from Declaration]. The Covenants run with the land and bind all Owners, occupants, and any other person holding an interest in a Unit.

A.2. All Owners and other occupants of the Units by their acceptance of their deeds, leases, or by occupancy of any Unit agree that the Condominium is subject to the Covenants. Each Owner, each occupant of a Unit, and the Association agree to comply with the Dedicatory Instruments and to be subject to an action arising out of or related to the Dedicatory Instruments for declaratory judgment, damages, or for injunctive relief.

B. Plat

B.1. The Plat is part of this Declaration and is incorporated by reference.

B.2. To the extent that a Unit or Common Element encroaches on another Unit or Common Element, a valid easement for the encroachment exists. The easement does not

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relieve an Owner of liability in case of willful misconduct or relieve Declarant or any other person of liability for failure to adhere to the Plat.

C. Regulated Activities

C.1. Permitted Purposes. A Unit [shall/shall not] be utilized [only] for Residential Purposes [by a Single Family]. [**Include if applicable:** A Unit shall be used only for [office/warehouse/industrial/other nonresidential] purposes.]

C.2. Prohibited Activities and Occupancy Restrictions. Subject to the Special Declarant Rights, the following use restrictions apply to all Units and to the Common Elements:

Select from the following as applicable.

a. any activity that is otherwise prohibited by the Dedicatory Instruments;

b. any illegal activity;

c. any nuisance, noxious, or offensive activity;

d. any dumping of trash or rubbish, except in approved locations and in an approved manner;

e. any storage of—

i. building materials except during the construction or renovation of a Unit or

ii. vehicles, except vehicles in a garage or operable automobiles on a driveway or in a parking space;

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f. any keeping or raising of animals, except for common domesticated household pets, such as dogs and cats, not to exceed [**number**] confined to the Unit;

g. any commercial or professional activity except reasonable home office activity;

h. the drying of clothes outside of a Unit;

i. the display of any sign except—

i. one not more than five square feet, advertising the Unit for sale or rent and

ii. political signage not prohibited by law or the Dedicatory Instruments;

Determine whether and to what extent rentals are permitted and draft appropriate prohibitions.

[j. the renting of a portion of a Unit;]

[j./k.] [**Insert any additional restrictions, e.g.,** renting a residence or structure for less than thirty consecutive days or allowing a renter, guest, or other person who is a registered sex offender to reside at the Property.]

D. Units

D.1. Number of Units. The number of Units in the Condominium is as shown on Exhibit [**exhibit number/letter**]. [**Include as applicable:** Declarant reserves no rights to create additional Units./Declarant reserves the right to create [**number**] additional Units as shown in section L./Declarant reserves the right to withdraw [**number**] Units as shown in section L.]

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D.2. Identification of Units. The identification number of each Unit is shown on Exhibit [**exhibit number/letter**] and on the Plat.

D.3. Unit Boundaries. The boundaries of each Unit are the walls, floors, and ceilings of the Unit. The boundaries of each Unit are located as shown on the Plat and are more particularly described in paragraph D.4.

D.4. Parts of Unit. A Unit includes all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting part of the finished surfaces that are a part of a Unit, and the spaces, interior partitions, and other fixtures and improvements within the boundaries of a Unit are a part of the Unit. A Unit also includes [**include any additional things that represent part of a unit**]. A Unit does not include any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture that is partially within and partially outside the designated boundaries of a Unit, of which the portion serving only that Unit is a Limited Common Element allocated solely to that Unit and of which the portion serving more than one Unit or the Common Elements is a part of the General Common Elements.

D.5. No Subdivision or Consolidation of Units. No Unit will be subdivided or consolidated with another Unit (unless approved by the Board).

D.6. No Structural Modification of Unit without Board Approval. No structural modifications or alterations will be made in a Unit unless plans, specifications, and any other documents requested by the Board are submitted to and approved by the Board in accordance with the Rules. The Association, the Board, and their members will not be liable to any person submitting requests for approval or to any Owner by reason of any action, failure to act, approval, disapproval, or failure to approve or disapprove any request. Any structural modification made to a Unit (a) without Board approval, (b) not in conformity with the Board approval, or (c) without the required permit from the applicable entity are unauthorized modi-

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fications. The Board may require the Owner to restore the Unit, at the Owner's expense, to the condition before the unauthorized modifications were made.

D.7. Maintenance. Each Unit will be maintained by its Owner.

Include D.8. if there are restrictions on alienation. The following are examples.

D.8. Restrictions on Transfer

A Unit may not be conveyed pursuant to a time-sharing arrangement.

A Unit may not be leased or rented for a term of less than [**number**] days.

All leases and rental agreements shall be in writing and subject to the reasonable requirements of the Board.

If an Owner receives an acceptable purchase offer for a Unit, the Owner must first offer to sell the Unit to the Association for the same price and terms as the offer received. The Owner will give the Board written notice of the price and terms of the offer received and the name and address of the person making such offer. If, within ten days from the date the Board receives the Owner's notice, the Board fails to give the Owner notice that the Association elects to purchase the Unit, the Owner may sell the Unit to the person(s) making the offer. In such case, the Board will certify in writing, duly acknowledged and in recordable form, that the Association has declined to purchase the Unit. The Board may waive the provisions of this paragraph for any Unit. Any mortgagee of any Unit that acquires title to a Unit is exempt from this "right of first refusal."

Continue with the following.

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E. Association

E.1. Establishment and Governance. The Association is established by filing its Certificate of Formation and is governed by the Dedicatory Instruments. The Association, acting through the Board, will administer and manage the Condominium in accordance with the Dedicatory Instruments. The Association has the powers (a) of a [for-profit/nonprofit] corporation under the Texas Business Organizations Code, (b) of a condominium association under the Act, and (c) stated in the Dedicatory Instruments, respectively as amended. All acts of the Association must be by and through the Board, except as otherwise provided by the Declaration or Bylaws or by law.

E.2. Declarant Control. Declarant has all the powers reserved in section 82.103(c) of the Act to appoint and remove officers and members of the Board until the 120th day after conveyance of 50 percent of the Units that may be created to Owners other than Declarant, at which time not less than one-third of the Board members must be elected by Owners other than Declarant. Not later than the 120th day after conveyance of 75 percent of the Units to Owners other than Declarant, the Declarant Control Period terminates, and all the Board and Association officers shall be elected by the Owners as provided in the Bylaws.

E.3. Membership and Voting Rights. Every Owner is a Member of the Association. Membership is appurtenant to and may not be separated from ownership of a Unit. On termination of the Declarant Control Period, the Members have the voting rights provided in the Bylaws.

E.4. Assignment of Future Income. The Association may assign its future income, including its rights to receive Common Expenses assessments, [in accordance with section 82.102 of the Act/only by the affirmative vote of Unit Owners of Units to which at least [**number**] of the votes in the Association are allocated].

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F. Assessments

F.1. Authority. The Association will charge Assessments as provided in the Act.

F.2. Personal Obligation. An Assessment is a personal obligation of each Owner when the Assessment accrues.

F.3. Creation of Lien. Assessments are secured by a continuing lien on each Unit as provided in section 82.113 of the Act. By acceptance of a deed to a Unit, each Owner grants the lien, together with the power of sale, to the Association to secure Assessments.

F.4. Commencement. A Unit becomes subject to Assessments as provided in the Act.

F.5. Regular Assessments

F.5.a. Rate. Regular assessments will be charged by the Board to fund the budgeted Common Expenses.

F.5.b. Changes to Regular Assessments. Regular assessments may be changed by the Board. Written notice of the regular assessment will be sent to every Owner at least thirty days before its effective date.

F.5.c. Collections. Regular assessments will be collected [annually/semiannually/monthly] in advance, payable on the [first/tenth/[**other**]] day of the [month/year] and on [the same day of each succeeding [month/year]/the [first/tenth/[**other**]] day of [**month**] of each year].

Include the following if applicable.

F.5.d. Expenses for Maintenance, Repair, or Replacement of Limited Common Elements. Expenses for the maintenance, repair, or replacement of a Limited Common Ele-

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ment shall be assessed to the Owner(s) whose Unit(s) benefit from the Limited Common Element.

Continue with the following.

F.6. Special Assessments. In addition to the regular assessments, the Board may charge special assessments for the purpose of funding the cost of any construction, reconstruction, repair, or replacement of any capital improvement on the Common Elements or for any other purpose benefiting the Condominium but requiring funds exceeding those available from the regular assessments. Written notice of the terms of the special assessment will be sent to every Owner. Any special assessment must be approved by a [majority/two-thirds] vote at a meeting of the Members in accordance with the Bylaws.

F.7. Subordination of Lien to Mortgages. The lien granted and reserved to the Association is subordinate to the liens described in section 82.113(b) of the Act.

F.8. Delinquent Assessments. Any Assessment not paid within [**number**] days after it is due is delinquent.

G. Remedial Rights

G.1. Late Charges and Interest. Owners will pay the Association a late charge of [$[**amount**]/[**percent**] percent of the delinquent amount] for Delinquent Assessments. Owners will pay the Association interest at the rate of [**percent**] percent per year on Delinquent Assessments from the delinquent date until the date paid. The Board may change the late charge and the interest rate; however, the interest rate may not exceed the maximum permitted by law.

G.2. Costs, Attorney's Fees, and Expenses. The prevailing party in any legal proceeding among the Association, an Owner, or an occupant of a Unit related to the Dedicatory Instruments is entitled to recover reasonable attorney's fees and all costs of such proceeding

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incurred by the prevailing party. A prevailing party is the party who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention.

G.3. Nonjudicial Foreclosure of Lien. The Association may foreclose the Association's lien against a Unit in accordance with section 82.113 of the Act.

G.4. Judicial Action. The Association may sue an Owner and an occupant of a Unit to enforce the Dedicatory Instruments for damages for breach of the Dedicatory Instruments, for injunctive relief regarding the Dedicatory Instruments, and to foreclose the Association's lien on a Unit. An Owner and an occupant of a Unit may sue the Association, any Owner, and any occupant of a Unit to enforce the Dedicatory Instruments, for injunctive relief regarding the Dedicatory Instruments, and for damages for breach of the Dedicatory Instruments.

G.5. Remedy of Violations. The Association may access an Owner's Unit to remedy a violation of the Dedicatory Instruments.

G.6. Suspension of Voting. An Owner delinquent in payment of any Assessment may not vote.

G.7. Suspension of Other Rights. If an Owner violates the Dedicatory Instruments, the Association may suspend the Owner's rights under the Dedicatory Instruments in accordance with law until the violation is cured.

G.8. Damage to Property or Violation of Dedicatory Instruments. An Owner is liable to the Association (a) for damage to Common Areas caused by the Owner or the Owner's family, guests, agents, independent contractors, and invitees ("Owner Affiliates"), and (b) for violations of the Dedicatory Instruments by the Owner or Owner Affiliates, in accordance with law.

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H. Limited Common Elements

H.1. Allocation of Reserved Limited Common Elements

H.1.a. Limited Common Elements are marked on the Plat and include [**include as applicable:** vehicle parking areas, storage areas, and others].

H.1.b. To the extent the Limited Common Elements are not allocated to a Unit by the Declaration, Declarant reserves the right to allocate the Limited Common Elements for the exclusive use of one or more Units (i) by making the allocation in a recorded instrument, (ii) in the deed to the Unit(s) to which the Limited Common Element is ancillary, or (iii) by recording an appropriate amendment to this Declaration.

> The following paragraph is optional. Unless the declaration contains a similar provision, a reallocation of limited common elements can be undertaken only by an amendment to the declaration.

H.2. Allocation of Specified Common Elements. The Board may designate parts of the Common Elements from time to time for use by less than all of the Owners or by nonowners for specified periods of time or by only those persons paying fees or satisfying other reasonable conditions for use as may be established by the Board. Any such designation by the Board shall not be a sale or disposition of such portions of the Common Elements.

I. Allocated Interests

I.1. Allocated Interests. The Owners' respective undivided interest in the Common Elements, the Owners' respective Common Expense liability, and the Owners' respective votes in the Association allocated to each Unit are set forth in Exhibit [**exhibit number/letter**].

I.2. Determination of Allocated Interests. The interests allocated to each Unit have been calculated as follows:

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a. the undivided interest in Common Elements, on the basis of [**include the method of calculation used**];

b. the percentage of liability for Common Expenses, on the basis of [**include the method of calculation used**]; and

c. the number of votes in the Association, on the basis of [**include the method of calculation used**].

J. Amendment of Declaration

The Declaration may be amended by consent of Owners to which at least [67 percent of the votes (or higher for residential condominiums)/[**smaller percentage**] percent of the votes (if all units are restricted to nonresidential use)] in the Association are allocated—

1. by written ballot that states the exact wording or substance of the amendment and that specifies the date by which a ballot must be received to be counted;

2. at a meeting of the Members of the Association after written notice of the meeting has been delivered to an Owner of each Unit stating that a purpose of the meeting is to consider an amendment to the Declaration;

3. by unanimous written consent of the Owners; or

4. [**other method**].

K. Reconstruction after Loss

On a casualty to any portion of the Condominium for which insurance is required, the Association must promptly repair or replace that portion unless (1) the Condominium is terminated, (2) repair or replacement would be illegal under any state or local health or safety statute or ordinance, or (3) at least 80 percent of the Owners, including each Owner of a Unit or

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assigned Limited Common Element that will not be rebuilt or repaired, vote to not rebuild. Each unit owner may vote (in person or by proxy at a meeting; electronically or by written ballot in the absence of a meeting) regardless of whether the owner's unit or limited common element has been damaged or destroyed. Costs will be assessed and paid as provided in section 82.111 of the Act. [**Specify alternative provisions if desired and if all units are restricted to nonresidential use, as the provisions of section 82.111 of the Act may then be varied or waived.**]

L. Special Declarant Rights and Development Rights

L.1. Special Declarant Rights. The Declarant reserves the following Special Declarant Rights:

a. The right to complete or make improvements indicated on the Plats and Plans.

b. The right to maintain sales offices, management offices, leasing offices, and models in Units or on the Common Elements, but only [**include limits in number, size, location, and relocation**].

c. The right to maintain signs on the Condominium to advertise the Condominium.

d. The right to use, and to permit others to use, easements through the Common Elements as may be reasonably necessary for the purpose of discharging the Declarant's obligations under the Act and this Declaration.

e. The right to appoint or remove any officer of the Association or any director under paragraph E.2. or section 82.003(a)(22)(F) or 82.103(c) of the Act.

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L.2. Limitations on Special Declarant Rights. Unless sooner terminated by a recorded instrument signed by the Declarant, any Special Declarant Right may be exercised by the Declarant [until [**date**]/for the period of time specified in the Act].

> If development rights are reserved, this form will require substantial modification. *See* Tex. Prop. Code §§ 82.003(a)(12), 82.003(a)(22)(B), 82.055(14).

L.3. Development Rights. The Declarant reserves the following development rights: [**specify rights reserved**].

M. General Provisions

M.1. Term. The Condominium may be terminated—

a. by a taking of all of the Units by condemnation; or

> Select one of the following.

b. by the approval of 100 percent of the votes in the Association and each holder of a deed of trust or vendor's lien on a Unit.

> Or
>
> **Caution:** The number may not be less than 80 percent if any unit in the condominium regime is residential.

b. by the approval of at least [**percent**] percent of the Members of the Association and each holder of a deed of trust or vendor's lien on a Unit.

M.2. No Waiver. Failure by the Association or an Owner to enforce the Dedicatory Instruments is not a waiver.

M.3. Corrections. The Board may correct typographical or grammatical errors, ambiguities, or inconsistencies contained in this Declaration, provided that any correction must not impair or affect a vested property right of any Owner.

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M.4. Conflict. This Declaration controls over the other Dedicatory Instruments.

M.5. Severability. If a provision of this Declaration is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Declaration, and this Declaration is to be construed as if the unenforceable provision is not a part of the Declaration.

M.6. Notices. Any notice required or permitted by the Dedicatory Instruments must be in writing. To the extent required by law, notices regarding remedial rights must be given by certified mail, return receipt requested. All other notices may be given by regular mail. Notice is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed to a Member at the Member's last known address according to the Association's records and the Association, the Board, or a managing agent at the Association's principal office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

_____

[Name of declarant]

Include acknowledgment.

After recording, please return to:
[name and address of declarant or attorney]

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Form 24-2

Condominium Information Statement
[name of condominium], a Condominium

[Tex. Prop. Code § 82.153]

Date:

Declarant:

Declarant's Address:

Condominium's Address:

Association:

Association's Address:

A. Minimum and Maximum Number of Units

The Condominium contains [**number**] units. [No additional units may be added to the Condominium./A maximum of [**number**] additional units may be added to the Condominium.]

B. Development Rights

The Declarant [does not reserve any development rights/reserves the following development rights: [**list rights**]].

The development rights are [not subject to any conditions or limits/subject to the following conditions or limits: [**list limits**]].

C. Attachments

1. Attached are copies of the [**insert if declaration has not yet been recorded:** proposed] Condominium declaration and the Association's certificate of formation, bylaws, and

rules and amendments to any of them. Also attached are copies of leases and contracts, other than loan documents, that are required by the Declarant to be signed by purchasers at closing.

2. Attached are copies of the Association's projected or pro forma budget in compliance with Texas Property Code section 82.153(b) for the first fiscal year of the Association following the date of the first conveyance to a purchaser, identification of the person(s) who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors.

3. Attached is a general description of each lien, lease, or encumbrance on or affecting the title to the Condominium after conveyance by the Declarant.

4. Attached is a copy of each written warranty provided by the Declarant.

5. Attached is a description of any unsatisfied judgments against the Association and any pending suits to which the Association is a party or which are material to the land title and construction of the Condominium that are known by the Declarant.

6. Attached is a general description of the insurance coverage provided for the benefit of unit owners.

7. Attached are the current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the Condominium.

For a condominium located wholly or partly in a municipality with a population of more than 1.9 million, the condominium information statement must include the following information.

D. Service

A unit owner—

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1. as an alternative to personal service, may be served with process by the municipality or the municipality's agent for a judicial or administrative proceeding initiated by the municipality and directly related to the unit owner's property interest in the Condominium by serving the unit owner at the unit owner's last known address, according to the records of the appraisal district in which the Condominium is located, by any means permitted by rule 21a of the Texas Rules of Civil Procedure;

2. shall promptly notify the appraisal district in writing of a change in the unit owner's mailing address not later than the ninetieth day after the date the unit owner changes the address; and

3. may not offer proof in the judicial or administrative proceeding, or in a subsequent related proceeding, that otherwise proper service by mail of the notice was not received not later than three days after the date the notice was deposited in a post office or official depository under the care and custody of the United States Postal Service.

Continue with the following.

_____

[Name of declarant]

By _____

[Name and title]

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Form 24-3

Certificate of Formation of [name of corporation], a Texas [For-Profit/Nonprofit] Corporation

1. *Name.* The name of the corporation is [**name**].

2. *Type of Filing Entity.* The type of filing entity being formed is a [for-profit/nonprofit] corporation.

3. *Purpose.* The purpose for which the filing entity is formed is to be the property owners association under the Declaration of [**name of condominium**], a condominium.

4. *Period of Duration.* The period of duration of the filing entity is perpetual.

5. *Initial Registered Office.* The street address of the initial registered office of the filing entity and the name of its initial registered agent at that address are:

Name: [**name of registered agent**]

Address: [**address, city, state**]

6. *Organizer.* The name and address of the organizer for the filing entity are:

Name: [**name of organizer**]

Address: [**address, city, state**]

Include the following for nonprofit only.

7. *Members.* The filing entity will be composed of Members.

Continue with the following.

[7./8.] *Initial Board of Directors.* The number of directors constituting the initial board of directors is [**number**], and their names and addresses are:

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Name: [**name**]

Address: [**address, city, state**]

Repeat as necessary.

Signed on [**date**].

_____

[**Name of organizer**]

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Form 24-4

Bylaws of [name of association] [, Inc.]

Basic Information

Association: [**name**], established by the certificate of formation filed with the secretary of state of Texas on [**date**] under file number [**number**], a Texas [for-profit/non-profit] corporation.

Principal Office:

Declaration: The Declaration of [**name of condominium**], a condominium, [**include recording information**].

Definitions: Capitalized terms used but not defined in the Bylaws have the meaning set forth in the Declaration.

Voting Members: Members entitled to vote or their proxies. Any Member delinquent in payment of any Assessment is not a Voting Member.

A. Members and Members Meetings

A.1. Membership. Every Owner is a Member of the Association. Membership is appurtenant to and may not be separated from ownership of a Unit.

A.2. Place of Members Meetings. Members meetings will be held at the Association's principal office or at another place designated by the Board.

A.3. Annual Meetings. The first Members meeting will be held within [**number**] months after the formation of the Association. Subsequent regular annual Members meetings

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will be held on [**describe meeting date taking into consideration when dues are payable, e.g.,** the first Sunday in June].

A.4. Special Meetings. The president, a majority of the Board, or Owners having at least 20 percent of the votes of the Association may call special meetings.

A.5. Notice of Members Meetings.

A.5.a. Requirements. Except as provided in paragraph F.5., written notice stating the place, day, and hour of each Members meeting, other than a reconvened meeting, must be given to each Member not less than [**number (if the association is a nonprofit corporation, must be ten)**] nor more than [**number (if the association is a nonprofit corporation, must be sixty)**] days before the meeting. The special Members meeting notices must also state the meeting's purpose, and no business may be conducted except as stated in the notice. Notice to a Member is deemed given when hand delivered or mailed. If mailed, notice is deemed given (whether actually received or not) when deposited with the United States Postal Service, properly addressed, postage prepaid. Upon written request of a Member, the Association shall inform the Member of the time and place of the next regular or special meeting of the Association Members.

A.5.b. Meetings at which Amendments Considered. The Members cannot meet to adopt an amendment or other change to the Declaration, articles of incorporation, bylaws, or rules of the Association (the "Governing Documents") unless written notice is given to each Member, in a document showing the specific amendment or other change that would be made to the Governing Documents, after the twentieth day but before the tenth day preceding the meeting, by either (i) personal delivery as shown by a receipt signed by the Member, or (ii) deposit in the United States mail as shown on the postmark date.

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A.6. Waiver of Notice. A Member may, in writing, waive notice of a meeting. Attendance at a meeting is a waiver of notice of the meeting, unless the Member objects to lack of notice when the meeting is called to order.

> Unless the bylaws provide otherwise, a quorum is determined by Tex. Prop. Code § 82.109.

A.7. Quorum. Members holding [**percent (if the association is a nonprofit corporation, must be more than ten; if the association is a for-profit corporation, consult Tex. Bus. Orgs. Code § 21.358)**] percent of the votes in the Association, in person or by proxy, are a quorum. If a Members meeting cannot be held because a quorum is not present, a majority of the Voting Members who are present may adjourn the meeting. At the reconvened meeting, [**percent (if the association is a nonprofit corporation, must be more than ten; if the association is a for-profit corporation, consult Tex. Bus. Orgs. Code § 21.358)**] percent of the Voting Members is a quorum. If a quorum is not present, a majority of the Voting Members who are present may adjourn the meeting. At the second reconvened meeting, [**percent (if the association is a nonprofit corporation, must be more than ten; if the association is a for-profit corporation, consult Tex. Bus. Orgs. Code § 21.358)**] percent of the Voting Members is a quorum. Written notice of the place, date, and hour of each reconvened meeting must be given to each Member not more than [**number (if the association is a nonprofit corporation, must be sixty)**] nor less than [**number (if the association is a nonprofit corporation, must be ten)**] days before the reconvened meeting.

A.8. Majority Vote. Votes representing more than 50 percent of the votes at a meeting at which a quorum is present are a majority vote.

A.9. Proxies. Voting Members may vote by written proxy.

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A.10. Conduct of Meetings. The president will preside over Members meetings. The secretary will keep minutes of the meetings and will record Member action at the meeting in the minutes book.

B. Board

B.1. Governing Body; Composition. The affairs of the Association are governed by the Board. Each director has one vote. The initial Board is composed of the directors appointed in the certificate of formation. Each director must be a Member or, in the case of an entity Member, a person designated in writing to the secretary.

B.2. Number of Directors. The Board consists of not less than three nor more than [**number**] directors. Within those limits, the Board may change the number of directors. No decrease may shorten the term of a director.

B.3. Term of Office. The initial directors serve until the first annual meeting of Members.

Select one of the following.

The terms of directors will be staggered. At least one-third of the Board will be elected each year. The initial Board will determine the initial term, not to exceed three years, of each director. At the expiration of the initial term of a director, each successor will have a term of [**number**] years.

Or

Successor directors will have a term of one year.

Continue with the following.

Directors may serve consecutive terms.

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B.4. Election. Within 120 days after Declarant has conveyed 50 percent of the Units to Owners other than Declarant, the Members shall elect not less than one-third of the Board members at a meeting held for such purpose. Not later than the 120th day after conveyance of 75 percent of the Units to Owners other than Declarant, the Voting Members will elect the directors of the Association and its officers as herein provided. At subsequent annual Members meetings, successors for each director whose term is expiring will be elected. Cumulative voting is prohibited. The candidate or candidates receiving the most votes will be elected. The directors elected by the Voting Members will hold office until their respective successors have been elected.

B.5. Removal of Directors and Vacancies

B.5.a. Removal by Members. Any director may be removed, with or without cause, by a majority of the Voting Members. Any director whose removal is sought will be given notice of the proposed removal.

B.5.b. Removal by Board. Any director may be removed at a Board meeting if the director—

i. failed to attend [**number**] consecutive Board meetings;

ii. failed to attend [**percent**] percent of Board meetings within one year;

iii. is delinquent in the payment of any Assessment for more than [**number**] days; or

iv. is the subject of an enforcement action by the Association for violation of the Dedicatory Instruments.

B.5.c. Vacancies. A director's position becomes vacant if the director dies, becomes incapacitated, resigns, or is no longer a Member.

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B.5.d. Successors. If a director is removed or a vacancy exists, a successor will be elected by the remaining directors for the remainder of the term.

B.6. Compensation. Directors will not receive compensation. A director may be reimbursed for expenses approved by the Board.

B.7. Powers. The Board has all powers necessary to administer the Association's affairs.

B.8. Management. The Board may employ a managing agent and delegate specified powers of the Board to the managing agent. Declarant, or an affiliate of Declarant, may be the managing agent.

B.9. Accounts and Reports. Accounting must conform to good accounting practices. The Association shall obtain an annual audit of its records in accordance with section 82.114(c) of the Act. Accounts will not be commingled with accounts of other persons. The following financial reports will be prepared at least annually:

a. An income statement reflecting all income and expense activity for the preceding period.

b. A statement reflecting all cash receipts and disbursements for the preceding period.

c. A variance report reflecting the status of all accounts in an "actual" versus "approved" budget format.

d. A balance sheet as of the last day of the preceding period.

e. A delinquency report listing all Owners who are delinquent by more than **[number]** days in paying any Assessment and describing the status of any action to collect those delinquent Assessments.

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B.10. Borrowing. The Board may borrow money to maintain, repair, or restore the Common Elements without the approval of the Members. If approved in advance by the Members in the same manner as approving a Special Assessment, the Board may borrow money for any other purpose.

B.11. Rights of Association. With respect to the Common Elements, and in accordance with the Declaration, the Association will have the right to contract with any person for the performance of various duties and functions. Such agreements require the approval of the Board.

C. Board Meetings

C.1. Regular Meetings. Regular meetings of the Board will be held at such time and place as determined by the Board, but at least [**number**] such meeting[s] will be held during each fiscal year. Notice of the time and place of the meeting[s] will be given to directors not less than [**number**] days and not more than [**number**] days before the meeting[s]. Board meetings must be open to Members, subject to the right of the Board to adjourn a meeting of the Board and convene in executive session to consider actions involving personnel, pending litigation, contract negotiations, enforcement actions, matters involving the invasion of privacy of Members, or matters that are to remain confidential by request of the affected parties and agreement of the Board. The general nature of any business to be considered in executive session must first be announced at the open meeting.

C.2. Special Meetings. Special meetings will be held when called by written notice signed by the president or by any [**number**] directors. The notice will specify the time and place of the meeting and the matters to be covered at the meeting.

C.3. Subsequent Meetings. Upon written request of a Member, the Association shall inform the Member of the time and place of the next regular or special meeting of the Board.

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C.4. Meetings at which Amendments Considered. The Board cannot meet to adopt an amendment or other change to the Declaration, articles of incorporation, bylaws, or rules of the Association (the "Governing Documents") unless the Board gives written notice to each Member, in a document showing the specific amendment or other change that would be made to the Governing Documents, after the twentieth day but before the tenth day preceding the meeting, by either (a) personal delivery as shown by a receipt signed by the Member, or (b) deposit in the United States mail as shown on the postmark date.

C.5. Waiver of Notice. The actions of the Board at any meeting are valid if (a) a quorum is present and (b) either (i) proper notice of the meeting was given to each director and all Members who are entitled to notice of the meeting or (ii) a written waiver of notice is given by any director who did not receive proper notice of the meeting and all Members who are entitled to notice of the meeting. Proper notice of a meeting will be deemed given to any director or Member who attends the meeting without protesting before or at its commencement about the lack of proper notice.

C.6. Quorum of Board. At all meetings, a majority of the Board will constitute a quorum, and the votes of a majority of the directors present at a meeting at which a quorum is present constitutes the decision of the Board. If the Board cannot act because a quorum is not present, a majority of the directors who are present may adjourn the meeting to a date not less than [**number**] nor more than [**number**] days from the date the original meeting was called. At the reconvened meeting, if a quorum is present, any business that may have been transacted at the meeting originally called may be transacted without further notice.

C.7. Conduct of Meetings. The president will preside at Board meetings. The secretary will keep minutes of the meetings and will record in a minute book the votes of the directors.

Select one of the following.

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C.8. Action without Meeting. Unless the Association's certificate of formation or the Declaration provides otherwise, the Board may act by unanimous written consent of all the directors, without a meeting, if (a) the Board action does not involve voting on a fine, damage assessment, appeal from a denial of architectural control approval, or suspension of a right of a particular Association Member before the Member has an opportunity to attend a Board meeting to present the Member's position, including any defense on the issue; and (b) a record of the Board action is filed with the minutes of Board meetings.

Or

C.8. Action without Meeting. The Board may not act without a meeting.

Include if the association is a nonprofit corporation.

C.9. Proxies. Directors may vote by written proxy provided, however, that any director present through written proxy may not be counted towards a quorum.

Continue with the following.

D. Officers

D.1. Officers. The officers of the Association are a president, [vice president,] secretary, treasurer, and any other position designated by the Board. The officers have the authority and duties prescribed by the Board. Any two or more offices may be held by the same person, except the offices of president and secretary.

D.2. Election, Term of Office, and Vacancies. Officers will be elected annually by the Board at the first meeting of the Board following each annual meeting of the Voting Members. A vacancy in any office may be filled by the Board for the unexpired portion of the term.

D.3. Removal. The Board may remove any officer whenever, in the Board's judgment, the interests of the Association will be served thereby.

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D.4. Powers and Duties. Officers have such powers and duties as are generally associated with their respective offices and as may be specifically conferred by the Board. The president is the chief executive officer of the Association. The treasurer has primary responsibility for the preparation of the budget and financial reports and may delegate all or part of the preparation and notification duties to a finance committee, management agent, or both.

D.5. Resignation. Any officer may resign at any time by giving written notice to the Board, the president, or the secretary. Resignation takes effect on the date of the receipt of the notice or at any later time specified in the notice.

E. Committees

The Board may establish committees by resolution and authorize the committees to perform the duties described in the resolution.

F. Miscellaneous

F.1. Fiscal Year. The Board may establish the Association's fiscal year by resolution. In the absence of a Board resolution determining otherwise, the Association's fiscal year is a calendar year.

F.2. Rules for Meeting. The Board may adopt rules for the conduct of meetings of Members, Board, and committees.

F.3. Conflict. The Declaration controls over these Bylaws.

F.4. Examination of Books and Records

F.4.a. Examination by Member. After a written request to the Association, a Member may examine and copy, in person or by agent, any Association books and records relevant to that purpose. The Board may establish rules concerning the (i) form of the request;

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(ii) reasonable hours and days of the week for the inspection; and (iii) payment of costs related to a Member's inspection and copying of books and records.

F.4.b. Examination by Director. A director has the right, at any reasonable time and at the Association's expense, to examine and copy the Association's books and records at the Association's Principal Office and to inspect the Association's properties.

F.5. Notices. Any notice required or permitted by the Dedicatory Instruments must be in writing. Notices regarding enforcement actions must be given by certified mail, return receipt requested. All other notices may be given by regular mail. Notice is deemed delivered (whether actually received or not) when properly deposited with the United States Postal Service, addressed to a Member at the Member's last known address according to the Association's records and the Association, the Board, or a managing agent at the Association's Principal Office or another address designated in a notice to the Members. Unless otherwise required by law or the Dedicatory Instruments, actual notice, however delivered, is sufficient.

F.6. Amendment. These Bylaws may be amended only by [the vote of [**percent**] percent of the Voting Members in the Association/the vote of [**percent**] percent of the Members of the Board].

The officers who are authorized to prepare, execute, certify, and record amendments to the Declaration on behalf of the Association are as follows: [**specify officers**].

_____

[**Name of association**]

By:_____

[**Name and title**]

Include acknowledgment.

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Form 24-5

Management Certificate

[Tex. Prop. Code § 82.116]

Name of Condominium: [**name of condominium**]

Name of Property Owners Association: [**name of association**]

Condominium Location: [**street address, city, state**]

Plat [and Plan] Recording Data: The plat [and plan] of the condominium is recorded in [**recording data**] of the real property records of [**county**] County, Texas

Declaration Recording Data: The Declaration recorded in [**recording data**] of the real property records of [**county**] County, Texas

Mailing Address of Association: [**address, city, state**]

Include the following if applicable.

Name of Person Managing Association or Association's Designated Representative: [**name of person managing association or association's designated representative**]

Mailing Address of Person Managing Association or Association's Designated Representative: [**address, city, state**]

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Continue with the following.

[**Include other information the association considers appropriate.**]

_____

[**Name of officer**]
[**Title**]

Repeat as necessary.

The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [**name of association**], that [**name**] is the duly elected and qualified [secretary/[**other officer**]] of [**name of association**], that the signature above is [**name**]'s genuine signature, and that the foregoing certificate is true and correct.

_____

[**Name of president**]

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Form 24-6

Resale Certificate

[Tex. Prop. Code § 82.157]

Basic Information

Date:

Unit:

Condominium:

Association:

Association's Address:

Managing agent of Condominium:

Managing agent's Address:

Notice

The Unit [is/is not] subject to a right of first refusal or other restraint that restricts the Owner's right to transfer the Unit.

Current regular assessment: $[**amount**] per [**time period, e.g.,** month]

Unpaid regular assessments and special assessments attributable to the Unit: $[**amount**]

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Other unpaid fees or amounts payable to the Association by the Owner:	$[**amount**]
Capital expenditures approved by Association for current fiscal year:	$[**amount**]
Reserves for capital expenditures and any portions of the reserves dedicated for specified projects:	$[**amount**]
Unsatisfied judgments against Association:	[$[**amount**] **or state "none"**]
Nature of any pending suits against the Association:	There [are/are not any] suits pending against the Association. [**Include if applicable:** The style and cause number of each pending suit are [**describe any pending suits**].]
Insurance coverage provided for the benefit of Unit Owners:	[**describe insurance coverage**]
Transfer fee(s):	[**describe each fee in detail, including who it is payable to and the amount**]

The Board has [knowledge/no knowledge] that any alterations or improvements to the Unit or the limited common elements assigned to the Unit violate the Declaration, Bylaws, or Association Rules.

The Association [has/has not] received notice from any governmental authority regarding health or building code violations with respect to the Unit, the limited common elements

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assigned to the Unit, or any other portion of the Condominium. [**Include if applicable:** A summary or copy of each notice is attached.]

Include the following if applicable.

The remaining term of any leasehold estate that affects the condominium is [**description of remaining term**], and the provisions governing an extension or renewal of the lease are as follows: [**Describe provisions.**]

Continue with the following.

A copy of the following documents is attached:

1. Current Operating Budget
2. Current Balance Sheet
3. Declaration
4. Rules
5. Bylaws
6. Articles of Incorporation/Certificate of Formation

[**Name of association**]

By _____
[**Name and title**]

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Form 24-7

Pursuant to Tex. Prop. Code § 82.156, if the purchaser from a seller other than a declarant has not received a resale certificate before the purchaser executes the contract, the purchaser has the right to cancel the contract before the sixth day after the purchaser receives the resale certificate or executes a waiver pursuant to Tex. Prop. Code § 82.157, whichever occurs first. A copy of a condominium resale certificate promulgated by the Texas Real Estate Commission is available at **www.trec.texas.gov/forms/condominium-resale-certificate**.

Pursuant to Tex. Prop. Code § 82.157, a condominium association is required to furnish a resale certificate no later than the tenth day after the date of receiving a written request from the selling unit owner. If a condominium association fails to furnish the resale certificate within the ten-day period, the selling unit owner may deliver to the purchaser a sworn affidavit in lieu of the resale certificate and the seller and purchaser may agree in writing to waive the requirement of the seller delivering the resale certificate.

This form may be modified to use as additional clauses in the sales contract.

Waiver of Condominium Resale Certificate

Seller:

Buyer:

Contract Effective Date:

Condominium Association:

Description of Condominium:

Seller has advised Buyer that the Condominium Association has failed to issue a resale certificate within ten days after Seller's written request for the Condominium Association to issue the resale certificate. Seller has delivered to Buyer a sworn affidavit setting out the information required in the resale certificate. Seller and Buyer hereby waive the requirement for the Condominium Association to issue a resale certificate incident to sale of the [Property/Condominium described above].

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_____

[Name of seller]
Date:

_____

[Name of buyer]
Date:

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Form 24-8

Acknowledgment of Receipt of Condominium Documents

Seller:

Buyer:

Contract Effective Date:

Condominium Owners Association:

Description of Condominium:

Select one of the following.

Buyer has received copies of the declaration, bylaws, rules of the Condominium Owners Association, and the [Declarant's Condominium Information Statement/Resale Certificate]. Seller has recommended to Buyer that Buyer read these documents before executing the contract.

Or

Buyer has not received copies of the declaration, bylaws, rules of the Condominium Owners Association, and the [Declarant's Condominium Information Statement/Resale Certificate]. Seller will deliver these documents to Buyer within [**number**] days after the Contract Effective Date. Buyer has the right to cancel the contract before the sixth day after Buyer receives copies of these documents by delivering written notice of cancellation to Seller.

Continue with the following.

_____

[**Name of seller**]
Date:

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_____

[Name of buyer]

Date:

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Form 24-9

Certificate of Condominium Association's Waiver of Right of First Refusal

Basic Information

Date:

Association:

Condominium:

Address:

Recording Information under Which Right of First Refusal Arises: [**include volume and page number where right of first refusal can be found in declaration.**]

Include information in the contract of sale for which the association is waiving right of first refusal.

Contract of Sale

Seller:

Buyer:

Date:

Unit:

Waiver

The Association hereby certifies that—

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1. the Seller of the Condominium Unit has complied with the requirements that the Unit be first offered for sale to the Association; and

2. the Association has declined to purchase the Unit and hereby waives its right of first refusal to purchase the Unit under the Contract of Sale.

The Association reserves its Right of First Refusal regarding any future sales of the Unit or under terms other than as set forth in the Contract of Sale.

_____

[Name of association]

Include acknowledgment as necessary.

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Form 24-10

Record of Unit _____ of _____, a Condominium

Pursuant to Texas Property Code section 82.114(e), each owner of a condominium unit is required to provide the condominium association with the following information related to the unit:

1. Owner name(s) _____

2. Owner mailing address(es) _____

   _____

3. Owner telephone number(s) _____

4. Owner driver's license number(s), including state _____

5. Owner e-mail address(es) (Optional) _____

6. Lienholder name(s) _____

7. Lienholder address(es) _____

   _____

8. Loan number(s) _____

9. Name and telephone number of each person occupying the unit other than owner _____

   _____

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10. Name, address and telephone number of any person managing the unit as agent of owner _____

_____

_____

If you need more space to provide this information, please add the information on a blank sheet and attach it to this sheet.

Texas Property Code section 82.114(f) states, "A unit owner shall notify the association not later than the 30th day after the date the owner has notice of a change in any information required by Subsection (e), and shall provide the information on request by the association from time to time."

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Form 24-11

Rules of [name of condominium owners association] [, Inc.]

Date:

Association: [**name**], established by the certificate of formation filed with the secretary of state of Texas on [**date**] under file number [**number**].

Association's Address:

Declaration: The Declaration of [**name of condominium**], a condominium, [**include recording information**].

Definitions: Capitalized terms used but not defined in the Rules have the meaning set forth in the Declaration or Bylaws.

The Association adopts these Rules, which will be enforceable on the recording of this document in the real property records of the [county/counties] in which the property described by the Declaration is located. On violation of these Rules, owners may be subject to Penalties for Violation.

A. Rules

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Insert the rules that the association wants to adopt. Consider the following subject areas: use of common areas (including swimming pools and recreation facilities), architectural and building rules, parking of vehicles, pet control, nuisances, trash collection, etc. Review the Texas Property Code for prohibited rules (e.g., restrictions concerning rain barrels and xeriscaping (Tex. Prop. Code § 202.007(d)(6)); solar energy devices (Tex. Prop. Code § 202.010); roof shingles (Tex. Prop. Code § 202.011); flags and flagpoles (Tex. Prop. Code § 202.012); religious items (Tex. Prop. Code § 202.018); and speed feedback signs (Tex. Transp. Code § 430.002)).

B. Penalties for Violation

Insert penalties for violation by type of violation.

C. Enforcement Procedures

1. *Charges and Fines.* Before the Association may charge a Unit Owner for property damage or levy a fine for violation of the Declaration, Bylaws, or these Rules, the Association must give to the Unit Owner a written notice that (a) describes the violation or property damage; (b) states the amount of the proposed fine or damage charge; (c) states that not later than the thirtieth day after the date of the notice, the Unit Owner may request a hearing before the Board to contest the fine or damage charge; and (d) allows the Unit Owner a reasonable time, by a specified date, to cure the violation and avoid the fine unless the Unit Owner was given notice and a reasonable opportunity to cure a similar violation within the preceding twelve months.

2. *Notices.* The Association must give notice of a levied fine or damage charge to the Unit Owner not later than the thirtieth day after the date of levy.

Insert any additional procedures for enforcement of the rules, consistent with the foregoing.

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D. Amendments to Rules

No Rule can be amended unless the Association gives written notice to each Unit Owner in a document stating the specific amendment or other change that would be made to the Rule, after the twentieth day but before the tenth day preceding the meeting at which the Rule amendment is to be considered, by either (a) personal delivery as shown by a receipt signed by the Unit Owner, or (b) deposit in the United States mail as shown on the postmark date.

[Name of association]

By _____
[Name and title]

Include acknowledgment.

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Form 24-12

Unanimous Written Consent of Condominium Association Board of Directors for Approval of Secured Loan under Texas Property Code § 82.102(f)

Effective Date:

Condominium Association: [**name**], a Texas [for-profit/nonprofit] corporation

Lender:

Loan Amount:

Security Documents: Security Agreement
Transfer of Assessment Lien

Authorized Representative:

WHEREAS the board of directors of the Condominium Association has determined that it is in the best interest of the Association to borrow the Loan Amount from Lender (the "Loan"), and to secure the Loan with the Security Documents;

Include the following if applicable under Tex. Prop. Code § 82.102(g).

AND WHEREAS the Condominium dedicatory instruments require a vote of the members of the Condominium Association to borrow money or assign the Condominium Association's lien rights;

Continue with the following.

THEREFORE, the undersigned, being all the members of the board of directors of the Condominium Association, acting pursuant to the provisions of section 82.108(c)(2) of the

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Texas Property Code and section 6.201 of the Texas Business Organizations Code, adopt by consent the following resolutions:

RESOLVED, that [**include if applicable:** upon approval by [**select one of the following:** the number of the Condominium Association members required by the Condominium dedicatory instruments/67 percent of all voting interests], with members casting votes [**select one or more of the following:** electronically/by absentee ballot /in person or by proxy at a meeting called for the purpose of the vote/by written consent], the Condominium Association is authorized to borrow the Loan Amount from Lender and to sign a promissory note in the Loan Amount payable to the order of Lender (the "Note").

RESOLVED FURTHER, that to secure the payment of the Note, the Condominium Association is authorized to enter into and sign a Security Agreement and a Transfer of Assessment Lien on the individual condominium units (the "Lien") and any necessary modifications, extensions, increases, and renewals of the Note and Lien, as applicable.

RESOLVED FURTHER, that the Condominium Association is authorized to enter into any assignments, pledges, security agreements, and other documents and instruments concerning any personal property, or any interest therein, and [**include the following for condominiums for which the declaration was recorded after December 31, 1993, unless the condominium formed before January 1, 1994, has elected to be governed exclusively by Texas Property Code chapter 82 pursuant to section 82.002(a):** mortgages, deeds of trust, and other documents and instruments governing any real property, or any interest therein] owned by the Condominium Association that may be necessary or appropriate, or required by Lender, to evidence and secure the payment of the Note.

RESOLVED FURTHER, that the Authorized Representative is authorized to execute and deliver, on behalf of and in the name of the Association, the Note, the Security Documents, and any other agreements, documents, or instruments, and to take or cause to be taken

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any action necessary or appropriate in connection with the Note and the Security Documents or to accomplish the purposes of these resolutions, in the form and with the provisions the Authorized Representative may deem proper.

_____

[**Name of director**]
Date:

Repeat for each director. If the association is a nonprofit corporation, the consent must state the date of each director's signature. Tex. Bus. Orgs. Code § 22.220.

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Form 24-13

Security Agreement and Transfer of Lien (from Condominium Association)

[Tex. Prop. Code § 82.102(f)]

Basic Information

Date:

Borrower/Condominium Association:

Borrower/Condominium Association's Mailing Address:

Condominium Declaration: [**insert recording information, including amendments**]

Lender/Secured Party:

Lender/Secured Party's Mailing Address:

Collateral: All of Condominium Association's interest in the following personal property and all supporting obligations and proceeds of (1) Condominium Association's rights to future income, including the right to receive assessments from the owner(s) of the Condominium Units; and (2) Condominium Association's lien rights under Texas Property Code section 82.113 and the Condominium Declaration ("Lien Rights").

Property (including any improvements): Each of the individual Condominium Units and their appurtenant common elements (collectively a "Unit").

Note

Date:

Original principal amount:

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Maturity date:

Prior Lien(s): [**as stated in the condominium declaration and Texas Property Code section 82.113(b)**]

Unit Owners Assessment Obligations: [**as set forth in Texas Property Code sections 82.112 and 82.113 and the condominium declaration**]

Granting Clause; Transfer of Lien; Subordination of Payment Rights; Power of Attorney and Indemnification

To secure the Note and all renewals, modifications, and extensions of the Note, Condominium Association (1) grants to Secured Party a security interest in the Collateral and all its proceeds; (2) authorizes Secured Party to file a financing statement describing the Collateral; (3) assigns, transfers, and conveys to Secured Party all amounts due on the Unit Owners Assessment Obligations; and (4) warrants that the Lien Rights are valid against the Property in the priority indicated. Condominium Association expressly subordinates its right to payment from enforcement of Lien Rights to Lender's right to payment. If a default exists on the Note or any other agreement with Lender related to the Note, Condominium Association assigns to Lender the right to levy assessments against the owners of and the individual condominium Units in the Property to pay the Note.

Condominium Association indemnifies Lender from all claims made against or incurred by Lender from any action in connection with the Unit Owners Assessment Obligations or the Lien Rights documents.

A. Condominium Association Represents the Following:

A.1. Condominium Association's place of business is located at [**select one of the following:** the management office identified in Condominium Association's Management Cer-

tificate recorded in the county in which Condominium Association is located/[**address, city, state**]].

A.2. [**Select one of the following:** Condominium Association's state of organization is Texas/Condominium Association is an unincorporated association], and Condominium Association's name, as shown in any public organic record, as amended, is exactly as set forth above.

A.3. Condominium Association's records concerning the Collateral are located at [**select one of the following:** the management office identified in Condominium Association's Management Certificate recorded in the county in which Condominium Association is located/[**address, city, state**]].

A.4. No financing statement covering the Collateral is filed in any public office [**include if the secured party has prefiled a financing statement or otherwise has a financing statement on file:** except any financing statement in favor of Secured Party].

A.5. Condominium Association owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due and the Prior Liens.

A.6. All information about Condominium Association's financial condition is or will be accurate when provided to Secured Party.

A.7. If Texas Property Code section 82.102(g) applies to this transaction, the Note and pledge of Collateral have been approved in the manner set forth in Condominium Association's dedicatory instruments.

A.8. There are no defenses or offsets to the Unit Owners Assessment Obligations.

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A.9. The Unit Owners Assessment Obligations represents the valid, legally enforceable obligation of each Condominium Unit owner.

A.10. Secured Party is the holder of the Lien Rights and the sole party with power to appoint a person to exercise the power of sale under the Lien Rights or request such person to act. Any foreclosure action requested by Condominium Association is voidable at the election of Lender.

B. Condominium Association Agrees to—

B.1. Defend the Collateral against all claims adverse to Secured Party's interest; pay any taxes imposed on the Collateral; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; and keep the Collateral in Condominium Association's possession and ownership except as otherwise provided in this agreement.

B.2. Pay all Secured Party's expenses, including reasonable attorney's fees and legal expenses, incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose of, collect, or enforce the Collateral; or (c) collect or enforce the Note or Lien Rights. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Note is payable. These expenses and interest are part of the Note and are secured by this agreement.

B.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral.

B.4. Notify Secured Party immediately of (a) any delay in payment of any Unit Owners Assessment Obligation, (b) any event of default, and (c) any change (i) in the Collateral or claim made in regard to the Collateral, (ii) in Condominium Association's Name or

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Mailing Address, (iii) in the location of any Collateral, (iv) in any other representation or warranty in this agreement, or (v) that may affect this security interest.

B.5. Maintain accurate records of the Collateral at the address set forth above, furnish Secured Party any requested information related to the Collateral, and permit Secured Party to inspect and copy all records relating to the Collateral.

B.6. Cause the Unit owners to pay and perform all obligations related to the Unit Owners Assessment Obligations, and preserve (a) the liability of all obligors on the Collateral and (b) the priority of all security for the Collateral.

B.7. On Secured Party's demand, deposit and hold payments, including instruments, items, and money received as proceeds of the Collateral, separate and in an express trust for Secured Party and deposit all such payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

B.8. Levy assessments sufficient to pay the Note and all other Condominium Association obligations.

B.9. Apply all proceeds from the Unit Owners Assessment Obligations in excess of funds needed for usual and customary Condominium Association obligations to pay the Note, but if the proceeds exceed the amount due under the Note, Condominium Association may retain the excess.

C. Condominium Association Agrees Not to—

C.1. Sell, transfer, or encumber the Collateral.

C.2. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

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C.3. Modify any provision of the Condominium documents relating to the levy of assessments, Condominium Association's lien to secure payment of assessments, or the enforcement of Condominium Association's lien.

C.4. Forgive, extend, or modify the Unit Owners Assessment Obligations or grant releases of any part of the property securing the Unit Owners Assessment Obligations.

C.5. Modify any terms of the Unit Owners Assessment Obligations except as may be required by law.

D. Default and Remedies

D.1. A default exists if—

a. Condominium Association fails to timely pay or perform any obligation, covenant, or liability in any written agreement between Secured Party and Condominium Association related to the Note;

b. any representation in this agreement or in any other written agreement between Secured Party and Condominium Association is materially false when made;

c. a receiver is appointed for Condominium Association or any Collateral;

d. any Collateral is assigned for the benefit of creditors;

e. a bankruptcy or insolvency proceeding is commenced by Condominium Association [**include if applicable:** or any Unit Owner];

f. a bankruptcy or insolvency proceeding is commenced against Condominium Association [**include if applicable:** or Unit Owner(s) representing [**percent**] percent ownership interests in the common elements] and the

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proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;

g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Condominium Association [**include if applicable:** or Unit Owner(s) representing [**percent**] percent ownership interests in the common elements]; or

h. any Collateral or Condominium Unit is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

D.2. If a default exists, Secured Party may—

a. demand, collect, convert, redeem, settle, compromise, release, receipt for, realize on, sue for, foreclose on, and adjust any Collateral either in Secured Party's or Condominium Association's name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Note;

b. take possession and control of any Collateral not already in Secured Party's possession, without demand or legal process, and for that purpose Condominium Association grants Secured Party the right to enter any premises where the Collateral may be located;

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c. without taking possession, sell, lease, or otherwise dispose of the Collateral through or at any public or private sale in accordance with law;

d. exercise any rights and remedies granted by law or this agreement;

e. notify obligors on the Collateral to pay Secured Party directly and enforce Condominium Association's rights against such obligors;

f. as Condominium Association's agent, make any endorsements in Condominium Association's name and on Condominium Association's behalf; or

g. permit Condominium Association to use any Collateral to pay other Association obligations.

D.3. Foreclosure on any Collateral Lien Rights or of this security interest by suit does not limit Secured Party's remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party's rights and remedies include all those granted by law and those specified in this agreement.

D.4. Secured Party's delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party's rights to subsequently exercise those remedies or rights. Secured Party's waiver of any default does not waive any other default by Condominium Association. Secured Party's waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

D.5. Secured Party has no obligation to prepare the Collateral for sale.

D.6. At any time Secured Party may contact obligors on the Collateral directly to verify information furnished by Condominium Association.

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D.7. Secured Party has no obligation to collect the Collateral and is not liable for failure to collect the Collateral, for failure to preserve any rights pertaining to the Collateral, or for any act or omission on the part of Secured Party or Secured Party's officers, agents, or employees, except willful misconduct.

D.8. Secured Party has no obligation to satisfy the Note by attempting to collect the Note from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure the Note. If Secured Party attempts to collect the Note from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party's rights against Condominium Association. Condominium Association waives any right Condominium Association may have to require Secured Party to pursue any third person for the Note.

D.9. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

D.10. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

D.11. If Secured Party sells the Collateral on credit, Condominium Association will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Condominium Association will be credited with the proceeds of the sale.

D.12. If Secured Party purchases any Collateral foreclosed on or being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Note.

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D.13. Secured Party has no obligation to marshal any assets in favor of Condominium Association or against or in payment of the Note or any other obligation owed to Secured Party by Condominium Association or any other person.

D.14. If any foreclosure under Lien Rights occurs or any Collateral is sold after default, recitals in the deed, bill of sale, or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

D.15. Secured Party may elect not to collect the Unit Owners Assessment Obligations, but that election will not prejudice Secured Party's right to collect the Unit Owners Assessment Obligations subsequently. Secured Party will never be liable for failure to collect the Unit Owners Assessment Obligations but will be accountable for the Unit Owners Assessment Obligations received.

D.16. By exercising rights and remedies under this assignment, Secured Party does not waive the right to enforce the Note or any other agreement.

D.17. Secured Party's collection of the Unit Owners Assessment Obligations does not relieve Condominium Association of any obligations in the Note or any other agreement.

D.18. Secured Party may exercise its rights and remedies without taking possession of the Collateral or of any Unit after foreclosure.

E. General

E.1. Notice is reasonable if it is mailed, postage prepaid, to Condominium Association at Condominium Association's Mailing Address at least ten days before any public sale of any Collateral or ten days before the time when the Collateral may be otherwise disposed of without further notice to Condominium Association.

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E.2. This security interest will neither affect nor be affected by any other security for the Note. Neither extensions of the Note nor releases of the Collateral will affect the priority or validity of this security interest.

E.3. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Note and Secured Party's delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Condominium Association will render performance under this agreement to the assignee. Condominium Association waives and will not assert against any assignee any claims, defenses, or setoffs that Condominium Association could assert against Secured Party except defenses that cannot be waived.

E.4. This agreement may be amended only by an instrument in writing signed by Secured Party and Condominium Association.

E.5. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

E.6. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in Texas.

E.7. Interest on the Note secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Note or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Note or, if the principal of the Note has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Note.

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E.8. At Condominium Association's expense, upon payment of the Note and any other obligations to Secured Party, Secured Party will sign a release in recordable form.

E.9. Secured Party does not have or assume any obligations as a condominium association to any Unit owner or occupant of any Unit.

E.10. When the context requires, singular nouns and pronouns include the plural.

E.11. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

_____

[**Name of condominium association**]

By:_____

Printed Name: _____

Its Authorized Representative

Include acknowledgement.

Form 24-14

Owner Notification to Association of Rental Information

Date:

Property Owner:

Address:

Phone:

E-mail:

Repeat above information for each additional owner.

Address of Rented Property:

Owner's Rental Property Management Company:

Address:

Phone:

E-mail:

Tenant:

Phone:

Motor vehicle

Year, make, and model:

License plate number:

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Repeat above information for each additional tenant or vehicle.

Rental Agreement Commencement Date:

Rental Agreement Termination Date:

Attach copy of lease or rental agreement.

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Form 24-15

This notice should be sent to the owner in the manner required by the condominium governing documents.

Demand for Payment of Assessments

Basic Information

Date:

Condominium Owners Association:

Condominium Owners Association's Address:

Property:

Amount Currently Due to Condominium Owners Association:

Date by Which Assessment Delinquency Must Be Cured:

Additional Attorney's Fee If Amount Currently Due to Condominium Owners Association Is Not Paid by Date by Which Delinquency Must Be Cured:

Owner:

Owner's Address:

"You" and "your" in this notice refers to Owner.

Notice

The Condominium Owners Association has levied assessments against you and your unit that are secured by a continuing lien on the unit and on rents and insurance proceeds you

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receive relating to the unit. Under Texas Property Code section 82.113, the "assessments" secured by this lien and that you owe mean the following:

Select the following unless the declaration provides otherwise.

- _____ regular and special assessments
- _____ dues
- _____ fees
- _____ charges
- _____ interest
- _____ late fees
- _____ fines
- _____ collection costs
- _____ attorney's fees
- _____ other amount due to the Condominium Owners Association

Additional assessments continue to accrue. Please call our office to confirm the exact payoff amount when you are prepared to pay. Partial payments received will be applied toward the assessment debt but will not stop foreclosure proceedings or extend any deadlines. To stop foreclosure proceedings you must pay this debt in full.

[**Include the following if applicable:** THIS FIRM HAS BEEN RETAINED TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.]

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You have the right to bring a court action if you claim that you are not in default, or if you believe that you have any other defense to this demand for payment or to the foreclosure of the lien securing repayment of the above referenced assessment debt.

Continue with the following.

PLEASE CONTACT US FOR INITIAL VERIFICATION OF THE DEBT, AND WE WILL PROVIDE COPIES OF STATEMENTS OF YOUR ACCOUNT. UNLESS YOU DISPUTE THE VALIDITY OF THE ABOVE REFERENCED DEBT, OR ANY PORTION THEREOF, WITHIN THIRTY DAYS AFTER RECEIPT OF THIS NOTICE, THE DEBT WILL BE ASSUMED TO BE VALID. IF YOU DO NOTIFY US IN WRITING WITHIN THE THIRTY-DAY PERIOD THAT THE DEBT, OR ANY PORTION THEREOF, IS DISPUTED, WE WILL OBTAIN AN ADDITIONAL VERIFICATION OF THE DEBT AND WILL MAIL A COPY OF THAT ADDITIONAL VERIFICATION TO YOU. THE CURRENT CREDITOR IS THE ORIGINAL CREDITOR.

THIS THIRTY-DAY VERIFICATION PERIOD DOES *NOT* ALTER THE EARLIER STATED DEADLINES.

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT FOR THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY.

[Name of association or collecting attorney/ agent]

By _____

[Name and title]

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Form 24-16

This form can be used for condominium owners association managers who are not licensed real estate brokers providing property management services under Texas Occupations Code chapter 1101.

Association Management Agreement

Basic Information

Date:

Condominium Owners Association:

Condominium Owners Association's Address:

Condominium Owners Association Manager:

Condominium Owners Association Manager's Address:

Subdivision/Condominium Complex:

Single-Family Residential Real Property: A single-family home or a unit in a condominium, cooperative, row home, or townhome. Single-Family Residential Real Property does not include a duplex, triplex, or fourplex unless the unit is owned as a condominium, cooperative, row home, or townhome.

A. Services

A.1. Condominium Owners Association Manager will provide the following association management services [on-site] for the Condominium Owners Association only as authorized by the Condominium Owners Association board of directors. The services include contracting and paying for maintenance, repair, replacement, and other services incidental to the management of the Condominium Owners Association and the common areas of the Sub-

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division/Condominium Complex as set forth in the governing documents for the Condominium Owners Association.

A.2. Unless Condominium Owners Association Manager is or becomes licensed as a broker under the Texas Occupations Code, Condominium Owners Association Manager—

A.2.a. will not engage in any activity for which a license is required under Texas Occupations Code, chapter 1101, and Texas Administrative Code rules promulgated by the Texas Real Estate Commission; and

A.2.b. will not control the acceptance or deposit of rent for Single-Family Residential Real Property located in the Subdivision/Condominium Complex. "Control the acceptance or deposit of rent" includes any one or more of the following activities:

i. use the rent to pay for services related to management of the property;

ii. determine where to deposit the rent; or

iii. sign checks or withdraw money from a trust account.

B. Term (Months)

Insert the term of the condominium owners association management agreement in months.

C. Compensation (Monthly)

Insert the monthly compensation for the condominium owners association manager.

Insert additional terms if applicable.

[Name of association]

By _____

[Name and title of association officer or agent]

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By _____

[**Name of association manager**], Condominium Owners Association Manager

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Form 24-17

This form may be used to comply with the requirements of Tex. Prop. Code § 82.113(g). This affidavit must be recorded in the real property records of the county in which the property is located. *See* Tex. Prop. Code § 202.006.

Affidavit of Redemption

Basic Information

Date:

Property Address:

Property Legal Description:

Property Owners Association:

Property Owners Association's Address:

Include if applicable.

Third Party Purchaser:

Third Party Purchaser's Address:

Continue with the following.

Former Property Owner:

Former Property Owner's Address:

Lienholder:

Lienholder's Address:

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If there is more than one lienholder, repeat above information for each additional lienholder.

Redeeming Party:

Redeeming Party's Address:

Date of Redemption:

Date of Foreclosure:

Affiant:

Statement

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the lien held by the Property Owners Association on the Property on the Date of Foreclosure.

2. I am the [Former Property Owner/Lienholder].

3. I fully redeemed the Property on the Date of Redemption in compliance with section 82.113 of the Texas Property Code.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Chapter 25

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Chapter 25

Leases

§ 25.1 General Considerations

The basic lease form (form 25-1 in this chapter) contains the minimal terms necessary for a lease. Although the form could be used as written in appropriate circumstances, its primary purpose is as a drafting tool, a core lease from which to draft for the particular situation. This lease has been adapted for use in various circumstances. Form 25-5 is a residential lease form derived from the basic lease form but containing the necessary modifications to convert the basic lease into a residential lease. The basic lease has also been adapted for use as a retail lease (form 25-2), an office lease (form 25-3), an industrial lease (form 25-6), and a manufactured-home community lease (form 25-11).

§ 25.1:1 Definition of a Lease

A lease is a conveyance of real property for a designated period of time with a reversionary interest in the lessor. Over time, the newer concepts of contract law have crept into use with the older property law, and the lease has become a hybrid of a conveyance and a contract between the landlord and the tenant. The landlord-tenant relationship is governed by title 8 of the Texas Property Code as well as by other statutes and a large body of case law. Title 8 of the Texas Property Code is divided into four chapters: chapter 91 (Provisions Generally Applicable to Landlords and Tenants), chapter 92 (Residential Tenancies), chapter 93 (Commercial Tenancies), and chapter 94 (Manufactured Home Tenancies).

§ 25.1:2 Statute of Frauds

If the term of the lease is more than one year, the lease is unenforceable unless it is in writing and signed by the party to be charged with its covenants. Tex. Bus. & Com. Code § 26.01; Tex. Prop. Code § 5.021. Certain provisions of the Property Code require that the lease be signed by both parties for the lease to serve as an exception to the statutory provisions. *See, e.g.*, Tex. Prop. Code § 91.001(e)(1). An assignment of a lease that is subject to the statute of frauds must also comply with the statute of frauds. Other provisions of the Property Code may not be waived by the lease. *See, e.g.*, Tex. Prop. Code § 92.008(g). Manufactured-home community leases must be in writing and signed by both the landlord and the tenant. Tex. Prop. Code § 94.053(a).

§ 25.1:3 Caution: Property Description

As a general rule a lease that is subject to the statute of frauds must contain, within itself or by reference to some other existing writing, the means or data by which the premises to be leased may be identified with reasonable certainty. *Hebisen v. Nassau Development Co.*, 754 S.W.2d 345, 351 (Tex. App.—Houston [14th Dist.] 1988, writ denied), *overruled on other grounds by Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998). The rule for leases is derived from the general rule for sales and conveyance of real estate. *See, e.g., Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983); *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972). A manufactured-home community lease agreement must contain

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the address or number of the manufactured-home lot. Tex. Prop. Code § 94.053(c)(1).

If the lease agreement that is subject to the statute of frauds contains no adequate description of the leased premises, it is unenforceable. If the leased premises are identified only by a suite number or a diagram on an attached exhibit, such as a schematic of an undesignated floor of the building or project of which the leased premises are a part, the lease may be unenforceable. Sometimes the schematic of the undesignated floor shows a certain section by crosshatches, but if there is no metes-and-bounds or lot and block number from a plat description of the entire project there is no legal description of the leased premises. *See, e.g., River Road Neighborhood Ass'n v. South Texas Sports*, 720 S.W.2d 551 (Tex. App.—San Antonio 1986, writ dism'd); *Lubel v. J.H. Uptmore & Associates*, 680 S.W.2d 518 (Tex. App.—San Antonio 1984, no writ). There is an exception where a street address or a commonly known name may be a sufficient property description if there is no confusion. *Apex Financial Corp. v. Garza*, 155 S.W.3d 230, 237 (Tex. App.—Dallas 2004, pet. denied); *TLC Hospitality, LLC v. Pillar Income Asset Management, Inc.*, 570 S.W.3d 749, 767 (Tex. App.—Tyler 2018, pet. denied). The best practice is to use a lot and block number from a plat map or a metes-and-bounds description.

§ 25.1:4 Cautions: Risk Allocation

Indemnities and Waivers: The indemnity provisions of the multitenant building or project lease forms are designed to protect the respective parties from their own ordinary negligence (but not gross negligence or willful misconduct) on a geographic basis; that is, the tenant indemnifies the landlord for any damage or injury occurring within the premises, whether or not the ordinary negligence of the landlord is a cause of the damage or injury, and the landlord indemnifies the tenant for any damage or injury occurring within the common areas, whether or not the ordinary negligence of the tenant is a cause of the damage or injury. The waiver of subrogation provision contained in the multitenant building or project lease forms releases both parties from liability for property damage and loss of revenues up to the limits of the property insurance coverages required to be carried under the lease, notwithstanding the ordinary negligence of the party causing the property damage or loss of revenues. The indemnity and waiver provisions are designed to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

Insurance: It is critical that the parties consult with their insurance professionals to determine the exact insurance coverages to be included on the insurance addendum incorporated into the lease form or, if applicable, the separate insurance addendum (forms 25-35 and 25-36 in this chapter) and that the attorneys tailor the indemnity and casualty provisions in response to the actual insurance policies that will be carried by the parties.

Rebuilding Obligations: The restoration obligations of the parties after a casualty are tied to the description of "Tenant's Rebuilding Obligations" contained in the Basic Terms of the lease. The tenant is expected to restore those leasehold improvements described in "Tenant's Rebuilding Obligations" in addition to replacing its personal property (including inventory, furniture, trade fixtures, and equipment). Because the tenant should carry property insurance to cover its restoration obligations, a detailed description is imperative. See clauses 25-13-8, 25-13-9, and 25-13-10. The landlord's restoration obligations are defined in terms of the portions of the premises that the tenant is not required to rebuild.

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For example, the tenant may be receiving the space in shell condition and be responsible for the initial construction of all leasehold improvements. The parties may decide that the tenant will restore all of the leasehold improvements inside the shell if the premises are destroyed. At the other extreme, the tenant may be receiving the premises with existing leasehold improvements, and the parties may decide that the landlord should restore all leasehold improvements after a casualty. Obviously the possibilities are infinite and depend on the economic underpinnings of the transaction as well as the relative sophistication of the parties. However, the question must be asked at the outset of the transaction so that both parties are clear about the allocation of the risk for restoration and that adequate property insurance is obtained.

§ 25.1:5 Fair Credit Reporting Act

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x, applies to landlords who use consumer reports in screening prospective tenants. If the landlord takes adverse action based in whole or in part on a consumer report, the landlord is required to provide the prospective tenant with a notice of adverse action meeting the requirements of section 1681m of the Act. 15 U.S.C. § 1681m(a)(1). A consumer report includes a credit report from a credit bureau or from a tenant-screening service. *See* 15 U.S.C. § 1681(d). Adverse action includes a denial of the application or a requirement for a deposit, a higher deposit, or higher rent than would have been required of other tenants. *See* 15 U.S.C. § 1681(k).

Landlords who furnish information regarding a tenant to a credit reporting agency must comply with the duties set out in section 1681s–2 of the Act, including the duty to furnish correct information, to correct and update information, and to investigate disputed information. *See* 15 U.S.C. § 1681s–2.

§ 25.1:6 Condemnation

The lease forms in this chapter provide that a lease will terminate if, as a result of condemnation or conveyance in lieu thereof, the premises cannot be used for the purposes provided by the lease. They also provide that the tenant is not entitled to any proceeds from the condemnation except for relocation benefits or awards that are available to the tenant but that do not reduce the award or proceeds payable to the landlord. The federal government provides relocation benefits, moving expenses, and similar payments to persons relocated as a result of condemnation under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601–4655. The state of Texas and local governments are authorized to provide similar payments as part of the cost of acquisition of the real property. *See* Tex. Prop. Code § 21.046. Under Texas law, however, if a lease provides that the lease terminates on condemnation, the tenant is not entitled to any condemnation proceeds because the tenant no longer has a compensable leasehold interest. *Motiva Enterprises, LLC v. McCrabb*, 248 S.W.3d 211 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Consequently, it is possible that a condemnor could find that a tenant who is not a party to the condemnation proceeding is not eligible for relocation or other benefits or awards.

§ 25.2 General Instructions for Completing Forms

For information about completing the forms generally, see chapter 3 in this manual. In most forms, the information that the attorney must provide is listed at the beginning of the form. Of course the attorney may add other specific provisions and references to exhibits and riders at the end of the form.

For general information about designation of parties, see section 3.9. Information relevant to some conveyances, such as those involving

homestead property, is not relevant to a lease and need not be included with the party designations.

§ 25.3 General Considerations for Retail Lease

The retail lease, form 25-2 in this chapter, is an adaptation of the basic lease including provisions tailored to leasing retail space in a shopping center. The modifications deal with the specifics associated with a typical retail business operation, including provisions concerning trade name, description of the shopping center, payment of percentage rental, and pass-through of common area maintenance charges. To provide for payment of percentage rental, a definition of gross sales is added, as is a covenant for operating a business within the premises so as to maximize gross sales. The definition of "gross sales" used in this lease is basic, and the attorney should consider whether some amendment or amplification is appropriate for the situation at hand. Other specific provisions apply to the landlord and the tenant concerning various operational and maintenance issues. The attorney may desire to include more specific provisions dealing with such matters as parking and signage, which may be proper subjects for inclusion in the rules and regulations exhibit. In this lease, the percentage rent is due on the tenth of the month, rather than the first, to give the tenant time to close its books for the previous month and to compute percentage rent.

§ 25.4 General Considerations for Office Lease

The office lease, form 25-3 in this chapter, is an adaptation of the basic lease containing specific provisions tailored to a commercial office tenancy. The variations are provisions for passing through operating expenses, a fairly common practice in leasing office space; for parking rights; and for rights to use common areas. The lease is also more specific about the services required to be provided by the landlord, again with a view toward comporting with what is typical industry practice. Form 25-4 provides a rider for parking facilities.

§ 25.5 General Considerations for Residential Lease

The residential lease, form 25-5 in this chapter, is an adaptation of the basic lease tailored to a residential tenancy. The form is designed for simple residential tenancies such as a lease of a home or a townhouse unit. It is not particularly suited for use with a multifamily project with on-site management. It varies from the basic lease in providing specific provisions relating to residential occupancy, such as the landlord's duty to maintain the premises to comply with applicable law.

§ 25.5:1 Rent Payment by Check and Late Fee

If the landlord wants to require payment by check or other traceable means of payment, a residential lease must state so in writing. Tex. Prop. Code § 92.011(a). This clause appears as paragraph B.1.*l.* in the "Tenant's Obligations" section of the residential lease but may be omitted if the parties desire. See form 25-5 in this chapter. If the landlord collects a fee for late payment of rent, notice of the fee must be included in the lease and the fee must be reasonable. Tex. Prop. Code § 92.019.

§ 25.5:2 Right to Terminate Residential Leases in Certain Circumstances

Residential tenants have special statutory rights to terminate leases under certain circumstances. A tenant may terminate his rights and obligations under a residential lease, vacate the residence, and avoid liability for future rent (1) if the tenant or an occupant of the dwelling unit is a victim of family violence or (2) if the tenant is

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a victim of sexual assault or the parent or guardian of a victim of sexual assault, indecency with a child, sexual performance by a child, continual sexual abuse of a child, or any attempt to commit any of the foregoing offenses under section 21.02 of the Texas Penal Code. The Texas Property Code imposes specific prerequisites, documentation, and deadlines for a tenant to exercise these statutory rights of early termination. Tex. Prop. Code §§ 92.016, 92.0161. The Property Code requires specific language in the residential lease advising the tenant of these remedies. For circumstances involving family violence, the relevant statutorily provided lease provision reads, "Tenants may have special statutory rights to terminate the lease early in certain situations involving family violence or a military deployment or transfer." *See* Tex. Prop. Code § 92.017(g). For circumstances involving sexual violence, the relevant statutorily provided lease provision reads, "Tenants may have special statutory rights to terminate the lease early in certain situations involving sexual assault or sexual abuse." *See* Tex. Prop. Code § 92.0161(g). Paragraph D.22. of the residential lease, form 25-5 in this chapter, combines these two advisories. If the advisories are not in the residential lease, the tenant, if he follows the procedural requirements, may not only terminate the lease and avoid paying future rent, but will also not be liable for delinquent unpaid rent.

If a tenant who is the sole occupant of a dwelling dies before the expiration of the lease, a representative of the estate of the tenant may terminate the tenant's rights and obligations under the lease, vacate the residence, and avoid liability for future rent. Tex. Prop. Code § 92.0162.

A tenant who is a servicemember or dependent of a servicemember similarly may terminate a lease, vacate the dwelling, and avoid liability for future rent if the tenant enters the military service after executing a residential lease or, if the tenant was a servicemember at the time of execution, the tenant receives orders for a permanent change of station or deployment with a military unit for a period of ninety days or more. Tex. Prop. Code § 92.017(b). The relevant statutorily provided lease provision reads, "Tenants may have special statutory rights to terminate the lease early in certain situations involving family violence or military deployment or transfer." *See* Tex. Prop. Code § 92.017(g). Specific notice and delivery requirements are set forth in the statute. The right to terminate in the case of family violence may not be waived, but the right of a servicemember or a dependent may be waived in certain circumstances specified in the Property Code. Additionally, if the residential lease form does not contain a specific notice provision, the vacating tenant may also avoid liability for delinquent unpaid rent. Form 25-5 contains this provision.

Form 25-5 also contains the required provisions regarding landlord liabilities and tenant remedies for repair of conditions that materially affect the physical health and safety of an ordinary tenant as authorized by Property Code sections 92.056–.0563. Tex. Prop. Code § 92.056(g) requires a lease to "contain language in underlined or bold print that informs the tenant of the remedies available under this section [§ 92.056] and Section 92.0561." If these provisions or substantially equivalent language is not in the lease, the tenant who terminates a lease under these sections is released from all liability for any delinquent, unpaid rent owed to the landlord by the tenant on the effective date of the lease termination. *See* Tex. Prop. Code §§ 92.056, 92.0561.

§ 25.5:3 Caution: Residential Lease

Texas Property Code provisions and case law applicable to residential tenancies vary in significant ways from the law applicable to commercial tenancies. The attorney should carefully review chapter 92 of the Property Code. No attempt has been made to cover all aspects of or

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duties relating to a residential situation. For example, a residential landlord has a duty to install smoke alarms. *See* Tex. Prop. Code § 92.255. The liability of a guarantor of a residential lease is subject to certain limitations. *See* Tex. Prop. Code § 92.021. A residential landlord is subject to restrictions on the right to lock out a tenant for nonpayment of rent that are not applicable to the commercial landlord. *Compare* Tex. Prop. Code § 92.0081, *with* Tex. Prop. Code §§ 93.002–.003. Also, the law concerning interruptions of utilities in residential tenancies differs from that for commercial tenancies. *Compare* Tex. Prop. Code §§ 92.008, 92.0091, 92.301, *with* Tex. Prop. Code § 93.002.

§ 25.6 General Considerations for Industrial Lease

The industrial lease, form 25-6 in this chapter, is an adaptation of the basic lease including clauses necessary to convert the basic lease to an industrial lease. The industrial lease has more similarities to the retail lease than other lease forms minus, of course, percentage rental, covenant of continuous operations, and common area maintenance provisions. The main additions to the industrial lease deal with the tenant's obligation to pay for industrial waste introduced into the sanitary sewer system; to maintain dilution tanks, grease traps, and so forth; and to share in the joint maintenance of rail services, if any. Attorneys using the industrial lease as a drafting form might also consider using the asbestos disclosure notice, form 25-31, particularly if the building was constructed before 1981.

§ 25.7 General Considerations for Hunting, Agricultural, and Grazing Leases

The hunting lease, form 25-7 in this chapter, is an adaptation of the basic lease tailored for the use of agricultural land for hunting. There is a technical distinction between a hunting lease, which is a license or profit à prendre, and a lease that conveys an interest in real property. *See Digby v. Hatley*, 574 S.W.2d 186 (Tex. App.—San Antonio 1978, no writ). In most transactions this distinction is not significant, and the form uses the common term *lease* rather than draw attention to the distinction. This form applies to the surface only. If improvements on the premises are to be available for the tenant's use, additions must be made to describe and provide for that use.

The agricultural lease, form 25-8, is an adaptation of the basic lease for growing crops. The rent clause is different, and the obligations of the tenant and the landlord have been modified slightly to take into account this different use.

The grazing lease, form 25-9, is an adaptation of the basic lease for grazing. It differs only slightly from the basic lease.

The agricultural lease and the grazing lease both contain clauses granting a contractual landlord's lien in the tenant's crops and livestock located on the leased premises. Complete perfection of a security interest in farm products requires compliance with both article 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. See section 9.7:2 and accompanying forms in chapter 9 in this manual.

§ 25.7:1 Instructions for Completing Hunting Lease

A list of persons authorized to hunt on the premises should be contained in an exhibit to the hunting lease. This list may be specific (for example, "Bob Smith, Ed Jones") or more general (for example, "Martha Stuart and four guests" or "six guns").

§ 25.7:2 Caution: Hunting Lease

There are many laws that regulate the taking of game and the recreational use of land of which parties to hunting leases should be aware. As

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with the other forms in the manual, no attempt has been made to reiterate the duties imposed by statute and case law. In particular, the attorney should carefully review Texas Parks and Wildlife Code chapter 43, subchapter D, which governs hunting lease licenses. For a general discussion of this topic, see the articles cited in section 25.13 below. See also section 2.146 in this manual referring to chapter 75 of the Texas Civil Practice and Remedies Code.

§ 25.8 General Considerations for Manufactured-Home Community Lease

The manufactured-home community lease, form 25-11 in this chapter, is an adaptation of the basic lease tailored to a manufactured-home community tenancy. It varies from the basic lease by providing specific provisions necessitated by the enactment of Texas Property Code chapter 94. Chapter 94 governs the landlord-tenant relationship in manufactured-home communities in which four or more lots are offered for lease for the purpose of the tenant's placing on the landlord's property a manufactured home that is not owned by the landlord. Tex. Prop. Code § 94.002. *See also* Tex. Prop. Code § 94.001. This legislation regulates the form and content of the lease agreement (Tex. Prop. Code §§ 94.051–.057), security deposits (Tex. Prop. Code §§ 94.101–.109), the landlord's warranty of suitability and duty to maintain and repair (Tex. Prop. Code §§ 94.151–.162), and other aspects of the landlord-tenant relationship in manufactured-home community tenancies.

§ 25.8:1 Disclosures at Time of Application

At the time a landlord receives an application from a prospective tenant of a lot in a manufactured-home community, the landlord must provide a copy of the proposed lease, the rules of the manufactured-home community, and a separate statutory notice of the tenant's legal right to a six-month initial lease term and sixty days' notice of nonrenewal or, in the case of a change in land use of the manufactured-home community, 180 days' notice of nonrenewal. Tex. Prop. Code § 94.051. Form 25-12 in this chapter gives the statutorily required notice.

§ 25.8:2 Manufactured-Home Community Rules

Manufactured-home communities may adopt written rules, which are considered part of the lease agreement, establishing the policies and regulations of the manufactured-home community, including regulations relating to use, occupancy, quiet enjoyment, and health, safety, and welfare of tenants of the manufactured-home community. Tex. Prop. Code § 94.008.

§ 25.8:3 Cash Rent Payment

Unless the manufactured-home community lease requires payment of rent by check or other traceable means, a landlord must accept and give receipts for cash rental payments. Tex. Prop. Code § 94.007. A clause requiring payment of rent by traceable means appears as paragraph B.1.m. of the manufactured-home community lease (form 25-11 in this chapter) but may be omitted if the parties desire.

§ 25.8:4 Disclosure of Ownership and Management

The landlord must disclose the name and address of the record title holder of the leased lot in the manufactured-home community and the names and addresses of any off-site property managers. Tex. Prop. Code § 94.010(a). The disclosure may be contained in the lease agreement, in the rules, in a notice continuously posted in the community or the manager's office, or in writing, delivered within seven days of the landlord's receipt of a written request for the information. Tex. Prop. Code § 94.010(b).

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§ 25.8:5 Minimum Initial Lease Term

Manufactured-home community landlords are required to offer prospective tenants an initial lease term of at least six months, but the parties may agree to a shorter or longer initial lease term if requested by the tenant. Tex. Prop. Code § 94.052(a).

§ 25.8:6 Landlord's Notice to Vacate or Offer to Renew

Manufactured-home community landlords are required to provide a tenant with a notice to vacate the leased premises or an offer to renew the lease at least sixty days before the expiration of the lease. Tex. Prop. Code § 94.055(a). If the landlord offers to renew the lease, the renewal offer must notify the tenant of any changes in the current lease terms and include a statement notifying the tenant that the tenant's failure to timely reject the renewal offer will result in the automatic renewal of the lease as modified by the terms contained in the landlord's renewal offer beginning on the first day after the expiration of the current lease. Tex. Prop. Code § 94.055(b). To avoid the automatic renewal of the lease as modified by the terms contained in the renewal offer, the tenant *must* notify the landlord not later than the thirtieth day before the date the current lease term expires that the tenant rejects the landlord's renewal offer and intends to vacate the leased premises on expiration of the current lease term. Tex. Prop. Code § 94.055(c). This statutory provision is a noted departure from the well-established common-law principle that silence does not bind a party to a contract.

§ 25.8:7 Notice of Nonrenewal

Regardless of the term of a manufactured-home community lease, a landlord must give a tenant at least sixty days' prior written notice if the landlord is not going to renew the lease or, in the case of a change in land use, 180 days' notice of nonrenewal. Tex. Prop. Code §§ 94.051, 94.052(b).

§ 25.8:8 Landlord's Maintenance Obligations

A manufactured-home community landlord is required to maintain all common areas, utility lines not maintained by a public utility or political subdivision, roads, mailboxes, and garbage collection and to repair or remedy any condition materially affecting the physical health and safety of an ordinary tenant of the manufactured-home community. Tex. Prop. Code § 94.152. The landlord must make a diligent effort to repair or remedy such a condition after a written request specifying the condition to be repaired is given to the landlord by a tenant who is not delinquent in the payment of rent at the time the notice is given. Tex. Prop. Code § 94.153(b). A manufactured-home community landlord has no duty to maintain or repair a condition present in or on a tenant's manufactured home. Tex. Prop. Code § 94.153(a).

§ 25.8:9 Eviction Procedures

Unlike with other types of tenancies, a manufactured-home community landlord may prevent a tenant from entering the tenant's manufactured-home lot, evict a tenant, or require removal of the tenant's manufactured home from the lot only after obtaining a writ of possession. Tex. Prop. Code § 94.203(a). The writ of possession cannot issue before the expiration of thirty days after the date of the judgment granting possession if the tenant has paid the rent due for that thirty-day period. Tex. Prop. Code § 94.203(d).

§ 25.8:10 Caution: Manufactured-Home Community Lease

The Texas Property Code provisions applicable to manufactured-home community tenancies vary in significant ways from the law applicable

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to either residential or commercial tenancies. The attorney should carefully review chapter 94 of the Property Code because the rights, duties, and liabilities of the parties under chapter 94 cannot be waived. *See* Tex. Prop. Code § 94.003. No attempt has been made in this manual to cover all aspects of or duties relating to the landlord-tenant relationship in a manufactured-home community. Appropriate modifications are required if the attorney elects to use the manufactured-home community lease for transactions not governed by chapter 94.

§ 25.9 General Considerations for Commercial Lease

Commercial leases are considered by the legislature to be quite different from residential leases and manufactured-home community leases. Chapter 92 of the Texas Property Code contains the statutes concerned with residential leases, and chapter 94 contains the statutes concerned with manufactured-home community leases, whereas chapter 93 deals with commercial leases. Chapters 92 and 94 impart an air of legislative protectionism for the residential tenant, with numerous restrictions on the landlord; chapter 93 has a more laissez-faire policy and allows the parties to contract as they see fit. The drafter using the *Texas Real Estate Forms Manual* should be aware of these three Property Code chapters (as well as chapter 91, which deals with all tenancies) and should realize that the numerous legislative restrictions on a residential or manufactured-home community landlord do not apply to a commercial landlord.

§ 25.9:1 Broker Lien in Commercial Lease

The Broker's and Appraiser's Lien on Commercial Real Estate Act, chapter 62 of the Texas Property Code, gives brokers a lien by reason of the sale or lease of real property. Section 62.021 sets forth the prerequisites for a broker to acquire a lien. *See* Tex. Prop. Code § 62.021. Section 62.021 gives the broker a lien against the landlord's property for the commission on the lease if—

1. the broker earned the commission (pursuant to a written commission agreement (*see* Tex. Prop. Code § 62.003(4))), and
2. the broker recorded a notice of the lien (*see* Tex. Prop. Code § 62.024).

Tex. Prop. Code § 62.021(a). The commission agreement must disclose the right of the broker to claim a lien. Tex. Prop. Code § 62.021(e).

Section 62.022(b)(2) automatically waives the broker's lien in a commercial lease if the broker's commission agreement is included as a provision in the lease. Tex. Prop. Code § 62.022(b)(2). For this reason, the drafter may wish to include the real estate commission rider, form 25-32 in this chapter, as part of the lease. The drafter, however, should be careful to consider what effect renewal options might have on the real estate commission rider.

§ 25.9:2 Security Deposit in Commercial Lease

A landlord is liable for failure to return a tenant's security deposit within sixty days after the date the tenant surrenders possession of the premises and provides a forwarding address to the landlord or landlord's agent. Tex. Prop. Code § 93.005(a). If a landlord retains all or part of the security deposit, the landlord must provide the tenant with an itemized list of deductions. Tex. Prop. Code § 93.006(c). There is a presumption of bad faith on the part of the landlord if the security deposit is not returned to the tenant or if the landlord fails to provide the tenant with an itemized list of deductions on or before sixty days after the date the tenant surrenders possession. Tex. Prop. Code § 93.011(d). *See also* Tex. Prop. Code §§ 93.004–.011. The lease forms in this chapter have an agreement by

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the landlord to return the security deposit within sixty days.

§ 25.9:3 Assessment of Charges in Commercial Lease

Texas Property Code section 93.012 deals with assessment of charges by a commercial landlord against a commercial tenant. Section 93.012(a) reads as follows:

> A landlord may not assess a charge, excluding a charge for rent or physical damage to the leased premises, to a tenant unless the amount of the charge or the method by which the charge is to be computed is stated in the lease, an exhibit or attachment that is part of the lease, or an amendment to the lease.

Tex. Prop. Code § 93.012(a). Most commercial landlords assess charges against the tenant on a regular basis for things such as extra keys; overtime heating, ventilating, and air conditioning; proportionate utilities and taxes; proportionate common-area expenses; and estimated operating expenses. Because Tex. Prop. Code § 93.012 requires either the amount of the charge or the method by which the charge is to be computed to be stated in the lease, the drafter may wish to add language covering most of the expected expenses to be assessed and a statement that the charge to be assessed will be the landlord's actual cost. The lease forms in this chapter provide for assessment of charges to the tenant, but the method by which the charge is calculated is stated (for example, "Tenant's pro rata share" of utility charges, common-area maintenance, taxes and insurance, and so forth). However, commercial landlords who assess to tenants charges other than rent for which the amount or method of computation is not specified in the lease, should be aware of section 93.012 of the Property Code.

§ 25.10 Environmental Considerations for Leases

Attorneys drafting leases should be aware of environmental statutes dealing with hazardous materials and waste, such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9601–9675; the Resource Conservation Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 and the Land Disposal Program Flexibility Act of 1996, 42 U.S.C. §§ 6901–6992k; and the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692. These environmental statutes, along with similar state statutes, may impose cleanup costs at the termination of a lease term on the "owner" or "operator" (landlord or tenant) of the "facility" (leased premises).

Landlords must provide tenants of residential property constructed before 1978 with a "Lead Warning Statement." 42 U.S.C. §§ 4851b(27), 4852d. See section 2.149 in this manual. The disclosure form appears as form 25-30 in this chapter.

Federal law requires building and facility owners (landlords) to notify tenants of public and commercial buildings of the presence, location, and quantity of asbestos-containing materials or presumed asbestos-containing materials in tenant-occupied areas. This notice must be either in writing or in a personal communication before any demolition, construction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof. *See* 29 C.F.R. §§ 1910.1001, 1926.1101. See form 25-31 for the disclosure.

§ 25.11 Additional Clauses

Additional clauses that may be useful in lease transactions, such as arbitration, landlord's lien

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subordination, and expansion rights, appear in form 25-13 in this chapter.

§ 25.11:1 Subordination of Landlord's Lien

If the tenant's lender requires a first lien over the statutory landlord's lien found in chapter 54 of the Texas Property Code and the security interest granted in the lease, insert clause 25-13-1 in this chapter. Form 25-24 (landlord's lien waiver) also may be used for this purpose. Form 25-18 (subordination of landlord's lien) may be used to authorize removal of secured property in the event of tenant's default as borrower.

§ 25.11:2 Base Rent Adjustment

In a commercial lease, there is frequently a provision for adjusting the base rent. The landlord and tenant may agree to scheduled, specific, periodic increases or to adjustments based on the Consumer Price Index; in the latter case, the attorney may insert the inflation adjustment clause found at 25-13-2 in this chapter.

§ 25.11:3 Expansion Option

If the landlord wants to grant the tenant the right to lease additional space, insert clause 25-13-4 in this chapter and attach the expansion space rider at form 25-14.

§ 25.11:4 Extension Option

If the landlord wants to grant the tenant the right to extend the lease term, insert clause 25-13-5 in this chapter and attach the extension option rider at form 25-15.

§ 25.11:5 Tenant's Right to Protest Appraised Value

If a property owner does not file a valuation protest, a tenant who is contractually obligated to reimburse the owner for property taxes is entitled to pursue an administrative protest before the appraisal review board. Tex. Tax Code § 41.413(b). A property owner is required to send a tenant obligated to pay taxes a copy of any notice of the appraised value of the property not later than the tenth day after the property owner receives the notice. The requirement to provide notice of appraised value does not apply if the property owner and the tenant agree in the lease to waive the requirement or agree that the tenant will not protest the appraised value of the property. Tex. Tax Code § 41.413(d). A tenant contractually obligated to reimburse a landlord for taxes imposed on the property may also appeal an appraisal review board order determining a protest brought by the tenant. Tex. Tax Code § 42.015. The statutory language is fairly vague, but it seems apparent that any tenant who, pursuant to its lease, is obligated to reimburse a landlord for real property taxes is entitled to exercise these rights and in so doing may request the appraisal review board to issue subpoenas to the landlord to provide relevant information and documentation regarding value. This, in turn, may require the landlord to disclose information, such as the rent roll for the property, that the landlord may wish to keep confidential. In addition, multitenant situations could result in unwieldy protests. The landlord who wishes to avoid these possibilities should consider including in the lease a provision like clause 25-13-6 in this chapter.

§ 25.11:6 Margin Tax

Chapter 171 of the Tax Code applies the Texas "margin tax" to most businesses, including limited partnerships previously exempt from the franchise tax. General partnerships, sole proprietorships, and businesses that do not meet the annual revenue minimum continue to be exempt. Landlords and tenants might negotiate any of the following treatments of the margin tax: (1) an express carve-out of the margin tax from real property taxes (tenant position), (2) reliance on

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the landlord's general right to pass through the margin tax as a tax imposed in lieu of real property taxes (landlord position), or (3) the landlord's right to pass through the margin tax as a tax in lieu of real estate taxes, but limiting the pass-through amount based on a formula or a cap (compromise position).

§ 25.12 Additional Forms

Additional forms that may be useful in lease transactions, such as an assignment, guaranty, and tenant estoppel certificate, are found at forms 25-16 through 25-22 in this chapter.

§ 25.12:1 Subordination, Attornment, and Nondisturbance Agreement

If the landlord's lender requires a first or prior lien on the landlord's estate and a lease has been executed, use the subordination, attornment, and nondisturbance agreement at form 25-16 in this chapter to subordinate the lease but still protect the tenant's rights following a foreclosure.

§ 25.12:2 Tenant's Subordination to Deed-of-Trust Lien

A lender may require that an existing lease be subordinated to its new lien. Foreclosure of the lien will then extinguish the lease. Form 25-17 in this chapter may be used to subordinate the lease.

§ 25.12:3 Tenant's Acceptance Letter

If the landlord requires the tenant to acknowledge that the premises are satisfactory, especially if the lease requires any improvements as a condition to the beginning of the lease, use the tenant's acceptance letter at form 25-20 in this chapter. It is recommended that this form be used to establish the commencement date with certainty.

§ 25.12:4 Landlord's Lien Waiver

By using form 25-24 in this chapter, the owner of real property waives statutory and contractual landlord's liens on any of the lessee's personal property subject to the security interests of a third-party lender. Clause 25-13-1 also may be used for this purpose.

§ 25.12:5 Lockout Notice

The lockout notice, form 25-27 in this chapter, is to be posted at the premises. *See* Tex. Prop. Code § 93.002. It is for use with commercial leases only. Do not use it with residential leases, which are governed by Tex. Prop. Code § 92.0081.

§ 25.12:6 Notice of Change of Locks

Form 25-28 in this chapter is used if the lease does not contain language superseding Tex. Prop. Code § 93.002. The letter is to be given by the owner or property manager and is for use with commercial leases only. Do not use it for residential leases. *See* Tex. Prop. Code § 92.0081.

§ 25.12:7 Tenant Improvements Rider to Lease or Work Letter

Form 25-29 in this chapter may be used with the basic lease, the retail lease, the office lease, or the industrial lease if the parties wish to provide for construction of tenant improvements to the leased premises. The work letter provides a general outline for a description of the work and the allocation of responsibility for preparation of plans, performance of work, and payment of any allowances or other amounts by the landlord. The form also requires the contractor to maintain insurance and sets out the effect of construction delays on the commencement date of the lease.

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§ 25.12:8 Lead-Based Paint Hazards Disclosure

Form 25-30 in this chapter is based on the sample disclosure format for target housing rentals and leases issued by the Environmental Protection Agency and the Department of Housing and Urban Development. *See* 61 Fed. Reg. 9074 (1996); *see also* 40 C.F.R. § 745.113. The rule does not require the use of any specific format as long as all the required elements are included in the disclosure. See section 2.149 in this manual for additional information.

§ 25.12:9 Asbestos Disclosure

Form 25-31 in this chapter is for disclosure of asbestos-containing material or presumed asbestos-containing material by commercial building or facility owners. The Occupational Safety and Health Administration rules require commercial building or facility owners to notify tenants of the presence of asbestos-containing materials or, if the building was constructed before 1981, of presumed asbestos-containing materials. *See* 29 C.F.R. §§ 1910.1001, 1926.1011. The rules do not require the use of any specific format.

§ 25.12:10 Modification of Lease

The modification of lease, form 25-33 in this chapter, is used to document changes to the lease during the lease term.

§ 25.12:11 Termination of Lease

The termination of lease, form 25-34 in this chapter, is used if the parties agree to terminate the lease before the end of the lease term.

§ 25.13 Additional Resources

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———. "Eviction Jurisdictional Wars: District Courts and Justice Courts on 'Jurisdiction' v. 'Title.'" In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

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Burton, Bob, and Preston A. Patten. "Leasehold Condominiums." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Cipione, Susan Mills, and Thomas M. Whelan. "Written Materials for Mock Negotiations of Lease." In *Advanced Real Estate Law*

Course, 2015. Austin: State Bar of Texas, 2015.

Darowski, Adam S. "Drafting and Negotiating Pro-Landlord and Pro-Tenant Provisions." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

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Dysart, Sara E. "Tenant Estoppel Certificate and SNDA from a Tenant's Perspective." In *Advanced Real Estate Drafting Course, 2017*. Austin: State Bar of Texas, 2017.

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McFarland, Charles B. "Condemnation Clauses in Commercial Leases." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

Newsome, Kent. "Eight Things in a Lease that Matter." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Rouse, J. Patrick. "Cell Tower Leases from the Landlord Perspective." In *Advanced Real Estate Drafting Course, 2020*. Austin: State Bar of Texas, 2020.

Tabb, Harriet Anne. "Short, but Not Sweet: The Landlord's Subordination Agreement." In *Advanced Real Estate Strategies Course, 2018*. Austin: State Bar of Texas, 2018.

———. "*Who* is Going to Do *What* by *When*: The Lawyer's Role in Drafting Construction Agreements for Commercial Leases." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.

Taylor, Consuella Simmons. "SNDAs and Estoppels." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.

———. "Tips for Drafting Retail Leases." In *Advanced Real Estate Drafting Course, 2018*. Austin: State Bar of Texas, 2018.

Tomek, David W. and Reed A. Standly. "Important Whys, Whens, and Hows in the Use of Letters of Intent for Leasing and for Sales, Along with Illustrative Cases." In *Advanced Real Estate Law Course, 2018*. Austin: State Bar of Texas, 2018.

Weiner, David J. "Drafting Tips for Build-to-Suit Leases." In *Advanced Real Estate Drafting Course, 2017*. Austin: State Bar of Texas, 2017.

Whelan, Thomas M. "Texas Annotated Office Lease." In *Advanced Real Estate Drafting Course, 2017*. Austin: State Bar of Texas, 2017.

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Form 25-1

Lease
[Basic]

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

[**Include if applicable:** Guarantors: [**see guaranty agreement at form 25-22 in this chapter**]]

[**Include if applicable:** Guarantors' Addresses:]

Premises

Approximate square feet:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):

Commencement Date:

Termination Date:

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Base Rent (monthly):

Tenant's Pro Rata Share: [**percent**] percent ([**percent**]%)

Security Deposit:

Permitted Use:

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [**see section 25.1:4**]

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Essential Services" means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.

A.3. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.4. "Lienholder" means the holder of a deed of trust covering the Premises.

A.5. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

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B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant's use, maintenance of the condition, and occupancy of the Premises and Tenant's use of any common areas and (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.g. Pay Tenant's Pro Rata Share of any utility services provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

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B.1.k. Allow Landlord to file a financing statement perfecting the security interest created by this lease.

B.1.l. Vacate the Premises on the last day of the Term.

B.1.m. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.**

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Permit any waste.

B.2.d. Use the Premises in any way that would increase insurance premiums or void insurance on the Premises.

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B.2.e. Change Landlord's lock system.

B.2.f. Alter the Premises.

B.2.g. Allow a lien to be placed on the Premises.

B.2.h. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Premises.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, and (iii) structural soundness of the exterior walls, excluding windows and doors.

C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

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D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE PREMISES, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE**

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RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

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D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease. Tenant may not terminate under this paragraph while in arrears for Rent.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

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D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this lease in the future.

Select one of the following.

D.13. Mitigation. Landlord has mitigated the loss of rent if Landlord, within thirty days after Tenant's loss of possession, (a) places a "For Lease" sign at the Premises, (b) places the Premises on Landlord's inventory of properties for lease, (c) makes Landlord's inventory available to area brokers on a monthly basis, (d) advertises the Premises for lease in a suitable trade journal in the county in which the Premises are located, and (e) shows the Premises to prospective tenants who request to see it.

Or

D.13. Landlord's Recovery of Rent and/or Damages for Tenant's Default

D.13.a. If Tenant is in arrears on the payment of Rent and Landlord has terminated Tenant's possession, Landlord may sue Tenant for Rent as it accrues and periodically take judgments without prejudice to sue for Rent that may accrue in the future. Landlord has a duty

to mitigate Rent as follows: within thirty days of Landlord taking possession, (i) place a "For Lease" sign at the Premises, (ii) place the leased Premises on Landlord's inventory of available space, (iii) make Landlord's inventory available to area brokers on a monthly basis, (iv) advertise the Premises for lease in a suitable trade journal or newspaper in the county where the Premises are located at least once per month, and (v) show the Premises to prospective tenants who request to see it. Landlord is only under a duty to show the Premises as built and for the remainder of the Term of the lease. If Landlord has made these mitigation efforts, Landlord and Tenant agree that Landlord has made objectively reasonable efforts to mitigate the loss of Rent as a result of the default of Tenant.

D.13.b. If Tenant has anticipatorily breached the lease and Landlord has terminated the lease, Landlord may sue Tenant for damages for Rent that may accrue for the remainder of the Term of the lease. The measure of damages is the difference between the Rent for the remainder of the Term and the fair market value of the Premises discounted to its present value. Nothing in this section shall prevent Landlord from suing for Rent as it accrues under D.13.a. above and suing for damages for Rent that will accrue through the end of the lease Term under this section.

Continue with the following.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

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D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease [**include if applicable:** and its exhibits, addenda, and riders] [is/are] the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE [include if applicable: AND ANY EXHIBITS, ADDENDA, AND RIDERS].**

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the ear-

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lier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach exhibits, addenda, or riders or include additional clauses or lists as deemed necessary, e.g., the insurance addendum at form 25-36 or 25-37 in this chapter or clauses from form 25-13.

_____

[Name of landlord]

_____

[Name of tenant]

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Form 25-2

Retail Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Tenant's Trade Name:

[**Include if applicable:** Guarantors: [**see guaranty agreement at form 25-22 in this chapter**]]

[**Include if applicable:** Guarantors' Addresses:]

Premises

Approximate square feet:

Name of Shopping Center:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):

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Commencement Date:

Termination Date:

Base Rent (monthly):

Percentage Rent: The excess of [**percent**] percent ([**percent**]%) of monthly Gross Sales over Base Rent

Tenant's Pro Rata Share: [**percent**] percent ([**percent**]%)

Initial Monthly CAM Charge:

Initial Monthly Tax and Insurance Charge:

Security Deposit:

Permitted Use:

Operating Hours

Weekdays: _____ to _____

Saturdays: _____ to _____

Sundays: _____ to _____

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [**see section 25.1:4**]

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A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "CAM Charge" means the reasonable cost of ownership, operation, and maintenance of the Common Areas.

A.3. "Common Areas" means all facilities and areas of the Shopping Center that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Shopping Center, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

A.4. "Essential Services" means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.

A.5. "Gross Sales" means the entire amount of the sales price, whether for cash or otherwise, of all sales of merchandise (including [Internet sales and] gift and merchandise certificates), services, and all other receipts of all business conducted in or from the Premises. Each sale on installment or credit will be treated as a sale for the full price in the month during which the sale was made, irrespective of when Tenant receives payment from its customer. Gross Sales, however, will not include any sums collected and paid out for any sales or excise tax.

A.6. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.7. "Lienholder" means the holder of a deed of trust covering the Premises.

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A.8. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

A.9. "Taxes and Insurance" means all ad valorem taxes and all insurance costs incurred by Landlord with respect to the Shopping Center.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant's use, maintenance of the condition, and occupancy of the Premises and Tenant's use of any Common Areas in the Shopping Center; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Shopping Center; and (iii) any rules and regulations of the Shopping Center adopted by Landlord.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay the Percentage Rent applicable to the previous month on or before the tenth day of each month. With each payment of Percentage Rent, Tenant will deliver a written statement substantiating the amount of the payment. Tenant will keep a permanent, accurate set of books and records of all sales available for Landlord's inspection.

B.1.f. Pay Tenant's Pro Rata Share of the monthly CAM Charge and monthly Taxes and Insurance on or before the first day of each month. The initial charges are based on Land-

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lord's estimates and are set forth in the Basic Terms. Landlord may adjust the monthly payment from time to time by notice to Tenant. If the actual amount of Tenant's Pro Rata Share of actual costs for any period exceeds the amount paid by Tenant, Tenant will pay to Landlord the deficiency within fifteen days following notice from Landlord; if the amount paid by Tenant exceeds Tenant's Pro Rata Share of the actual cost, then the surplus will be credited to the next payment due by Tenant, or Landlord may refund the net surplus.

B.1.g. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.h. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.i. Pay Tenant's Pro Rata Share of any utility services provided by Landlord.

B.1.j. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.k. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.l. Keep the sidewalks, service ways, and loading areas adjacent to the Premises clean and unobstructed.

B.1.m. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.n. (i) Continuously and in good faith conduct on the entire Premises the type of business for which the Premises are leased in an efficient and reputable manner and (ii) except during reasonable periods for repairing, cleaning, and decorating, keep the Premises open to

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the public for business during Operating Hours so as to produce the maximum amount of Gross Sales.

B.1.o. Vacate the Premises on the last day of the Term.

B.1.p. On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

B.1.q. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.**

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

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B.2.c. Interfere with any other tenant's normal business operations or Landlord's management of the Shopping Center.

B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Shopping Center.

B.2.f. Change Landlord's lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.j. Use the roof of the Shopping Center.

B.2.k. Place any signs on the Premises without Landlord's written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Shopping Center.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, and (iv) structural soundness of the exterior walls, excluding windows, store fronts, and doors.

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C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.f. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair

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any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE SHOPPING CENTER, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

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D.6.b. Whether or not any portion of the Premises is taken by condemnation or purchase in lieu of condemnation, Landlord or Tenant may elect to terminate this lease if 50 percent or more of the Common Area is taken.

D.6.c. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.d. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation, except for relocation or other benefits that are payable to Tenant by the condemning authority but that do not reduce the award or proceeds payable to Landlord.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of its security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease. Tenant may not terminate under this paragraph while in arrears for Rent.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

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D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this lease in the future.

D.13. Landlord's Recovery of Rent and/or Damages for Tenant's Default

D.13.a. If Tenant is in arrears on the payment of Rent and Landlord has terminated Tenant's possession, Landlord may sue Tenant for Rent as it accrues and periodically take judgments without prejudice to sue for Rent that may accrue in the future. Landlord has a duty to mitigate Rent as follows: within thirty days of Landlord taking possession, (i) place a "For Lease" sign at the Premises, (ii) place the leased Premises on Landlord's inventory of available space, (iii) make Landlord's inventory available to area brokers on a monthly basis, (iv) advertise the Premises for lease in a suitable trade journal or newspaper in the county where the Premises are located at least once per month, and (v) show the Premises to prospective tenants who request to see it. Landlord is only under a duty to show the Premises as built and for the remainder of the Term of the lease. If Landlord has made these mitigation efforts,

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Landlord and Tenant agree that Landlord has made objectively reasonable efforts to mitigate the loss of Rent as a result of the default of Tenant.

D.13.b. If Tenant has anticipatorily breached the lease and Landlord has terminated the lease, Landlord may sue Tenant for damages for Rent that may accrue for the remainder of the Term of the lease. The measure of the damages is the difference between the Rent for the remainder of the Term and the fair market value of the Premises discounted to its present value. Nothing in this section shall prevent Landlord from suing for Rent as it accrues under D.13.a. above and suing for damages for rentals that will accrue through the end of the lease Term under this section.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease and its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant.

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LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE AND ANY EXHIBITS, ADDENDA, AND RIDERS.

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Use of Common Areas. Tenant will have the nonexclusive right to use the Common Areas subject to such reasonable rules and regulations that Landlord may prescribe.

D.24. Merchants' Association. If Landlord organizes a merchants' association, Tenant must join and maintain membership and comply with its rules.

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D.25. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach exhibits, addenda, or riders or include additional clauses or lists as deemec necessary, e.g., the insurance addendum at form 25-36 or 25-37 in this chapter or clauses from form 25-13.

_____

[Name of landlord]

_____

[Name of tenant]

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Form 25-3

Office Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

[**Include if applicable:** Guarantors: [**see guaranty agreement at form 25-22 in this chapter**]]

[**Include if applicable:** Guarantors' Addresses:]

Premises

Approximate square feet:

Name of Building:

Street address/suite:

City, state, zip:

Include or attach necessary legal description.

Term (months):

Commencement Date:

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Termination Date:

Base Rent (monthly):

Security Deposit:

Tenant's Pro Rata Share: [**percent**] percent ([**percent**]%)

Permitted Use:

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [**see section 25.1:4**]

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Building Operating Hours" means 8:00 A.M. to 6:00 P.M. Monday through Friday, except holidays.

A.3. "Common Areas" means all facilities and areas of the Building [**include if applicable:** and Parking Facilities] and the related land that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Building. Landlord has the exclusive control over and right to manage the Common Areas.

A.4. "Essential Services" means the following services: (a) air-conditioning and heating to the Premises reasonable for the Permitted Use (exclusive of air-conditioning or

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heating for electronic data-processing or other specialized equipment) during Building Operating Hours and at such other times at such additional cost as Landlord and Tenant may agree on, (b) hot and cold water for lavatory and drinking purposes, (c) janitorial service and periodic window washing, (d) elevator service, if necessary, to provide access to and from the Premises, (e) electric current for normal office machines and the Building's standard lighting reasonable for the Permitted Use, and (f) lighting in Common Areas and fluorescent lights in the Building's standard light fixtures on the Premises.

A.5. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.6. "Lienholder" means the holder of a deed of trust covering the Premises.

A.7. "Operating Expenses" means all reasonable expenses, including real property taxes, that Landlord pays in connection with the ownership, operation, and maintenance of the Building, except principal and interest on any debt, expenditures classified as capital expenditures for federal income tax purposes, and expenses for which Tenant is required to reimburse Landlord.

Include the following if applicable.

A.8. "Parking Facility" means the facility or area described in the attached parking facility rider.

Continue with the following.

A.9. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

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B. Tenant's Obligations

B.1. Tenant agrees to—

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant's use, maintenance of the condition, and occupancy of the Premises and Tenant's use of any Common Areas in the Building; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Building; and (iii) any rules and regulations for the Building and Common Areas adopted by Landlord.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.g. Pay (i) monthly, in advance, Tenant's Pro Rata Share of the monthly estimated Operating Expenses and (ii) annually, any amount by which the actual Operating Expenses exceed the estimated Operating Expenses, within thirty days of receiving notice of such difference from the Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

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B.1.i. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. If requested, deliver to Landlord a financing statement perfecting the security interest created by this lease.

B.1.l. Vacate the Premises and return all keys to the Premises on the last day of the Term.

B.1.m. On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

B.1.n. Arrange with Landlord in advance for any heating, air-conditioning, or electrical needs in excess of the services provided by Landlord and pay for such additional services as billed by Landlord.

B.1.o. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR**

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EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Interfere with any other tenant's normal business operations or Landlord's management of the Building.

B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Building.

B.2.f. Change Landlord's lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

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C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Building and Common Areas.

C.1.c. Provide the Essential Services.

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, (iv) structural soundness of the exterior walls, doors, corridors, and windows, and (v) other structures or equipment serving the Premises.

C.1.e. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.f. Provide Tenant promptly after receipt of a written request from Tenant with a reconciliation of Tenant's Pro Rata Share of the actual Operating Expenses incurred by Landlord during the preceding calendar year and the estimated Operating Expenses paid by Tenant for the same period and reimburse Tenant for the amount of any estimated Operating Expenses paid by Tenant in excess of Tenant's Pro Rata Share of actual Operating Expenses for the preceding calendar year.

C.1.g. Provide Tenant with detailed invoices for all heating, air-conditioning, and electrical charges in excess of the Essential Services for which Landlord requests reimbursement.

C.1.h. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION**

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ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

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D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR BUILDING, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE BUILDING, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to

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Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If the Premises cannot be restored within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord within ten days. If Tenant does not terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

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D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service within thirty days after default, terminate this lease. Tenant may not terminate under this paragraph while in arrears for Rent.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this lease in the future.

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D.13. Landlord's Recovery of Rent and/or Damages for Tenant's Default

D.13.a. If Tenant is in arrears on the payment of Rent and Landlord has terminated Tenant's possession, Landlord may sue Tenant for Rent as it accrues and periodically take judgments without prejudice to sue for Rent that may accrue in the future. Landlord has a duty to mitigate Rent as follows: within thirty days of Landlord taking possession, (i) place a "For Lease" sign at the Premises, (ii) place the leased Premises on Landlord's inventory of available space, (iii) make Landlord's inventory available to area brokers on a monthly basis, (iv) advertise the Premises for lease in a suitable trade journal or newspaper in the county where the Premises are located at least once per month, and (v) show the Premises to prospective tenants who request to see it. Landlord is only under a duty to show the Premises as built and for the remainder of the Term of the lease. If Landlord has made these mitigation efforts, Landlord and Tenant agree that Landlord has made objectively reasonable efforts to mitigate the loss of Rent as a result of the default of Tenant.

D.13.b. If Tenant has anticipatorily breached the lease and Landlord has terminated the lease, Landlord may sue Tenant for damages for Rent that may accrue for the remainder of the Term of the lease. The measure of damages is the difference between the Rent for the remainder of the Term and the fair market value of the Premises discounted to its present value. Nothing in this section shall prevent Landlord from suing for Rent as it accrues under D.13.a. above and suing for damages for Rent that will accrue through the end of the lease Term under this section.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of

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notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease and its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE AND ANY EXHIBITS, ADDENDA, AND RIDERS.**

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

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D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Use of Common Areas. Tenant will have the nonexclusive right to use the Common Areas subject to any reasonable rules and regulations that Landlord may prescribe.

D.24. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach exhibits, addenda, or riders or include additional clauses or lists as deemed necessary, e.g., the insurance addendum at form 25-36 or 25-37 in this chapter or clauses from form 25-13.

_____

[Name of landlord]

_____

[Name of tenant]

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Form 25-4

Parking Facility Rider to Office Lease

Parking Facility:

Number of Reserved Spaces:

Identification of spaces:

Basic charge:

Number of Nonreserved Spaces:

Basic charge:

Basic Charge Adjustment:

Adjustment Stop:

General Provisions

1. Tenant leases from Landlord, for the Term, the parking spaces indicated above in the Parking Facility.

2. Basic charge payment is due on the first day of each month during the Term.

3. Landlord may adjust the basic charge as provided above but not more frequently than once a year and never in excess of the Adjustment Stop.

4. Default in the payment of any basic charge constitutes a default in the payment of Rent under the lease.

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5. Tenant may not assign or sublet any parking space without Landlord's prior written consent.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

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Form 25-5

Residential Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Premises

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Monthly Rent:

Term (months):

Commencement Date:

Termination Date:

Security Deposit:

Permitted Use: Private residence

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Occupants (other than Tenant):

Utilities to Be Provided by Landlord:

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. "Rent" means Monthly Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant's Permitted Use, maintenance of condition, and occupancy of the Premises.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Monthly Rent to Landlord at Landlord's Address.

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B.1.e. Pay, as additional Rent, all other amounts due under this lease.

B.1.f. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.g. Pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair any damage to the Premises caused by Tenant or the occupants listed under "Occupants (other than Tenant)."

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. Move out of the Premises at the end of the Term.

B.1.l. Pay Rent by check, money order, or other traceable or negotiable instrument.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises other than as a residence occupied by the named Tenant and the occupants listed under "Occupants (other than Tenant)."

B.2.b. Create or permit a nuisance or interfere with any neighbor's use of its Premises.

B.2.c. Change Landlord's lock system.

B.2.d. Alter the Premises.

B.2.e. Allow a lien to be placed on the Premises.

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B.2.f. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

C. Landlord's Obligations

Landlord agrees to—

C.1. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.2. Obey all laws, ordinances, orders, rules, regulations, and covenants applicable to the use, condition, and occupancy of the Premises.

C.3. Provide the utilities specified in the lease.

C.4. Use reasonable efforts to make repairs to the Premises, but Landlord will not be required to repair a condition unless Tenant notifies Landlord of the condition and Tenant has paid all Rent then due. Landlord will not be required to repair conditions caused by Tenant or the occupants listed under "Occupants (other than Tenant)," unless caused by normal wear and tear, and will not be required to recarpet or repaint the Premises.

C.5. Return the Security Deposit to Tenant on or before the thirtieth day after the date Tenant surrenders the Premises, after subtracting from the Security Deposit all amounts applied to cure any breach of the lease by Tenant as provided below, provided that Tenant has given Landlord written notice of Tenant's new address.

D. General Provisions

Landlord and Tenant agree to the following:

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D.1. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.2. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.3. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE PREMISES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.4. Casualty/Condemnation. If the Premises are damaged by fire or other casualty or are condemned, then either Landlord or Tenant may terminate this lease by notifying the other. Any Rent prepaid by Tenant will be returned to Tenant on termination.

D.5. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to remedy a con-

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dition that materially affects the physical health or safety of an ordinary tenant within ten days after written notice, unless such condition results from Tenant's actions.

D.6. Default by Landlord/Tenant's Remedies. **Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not remedy a condition (not resulting from Tenant's actions) that materially affects the physical health or safety of an ordinary tenant for thirty days after notice, terminate this lease.**

a. Provided Tenant is not delinquent in the payment of Rent when Tenant provides Landlord any required notices and subject to applicable limitations in section 92.056 of the Texas Property Code, if Landlord has not repaired or remedied within a reasonable time or if Landlord is not making a diligent effort to repair or remedy any condition that materially affects the physical health or safety of an ordinary tenant, and Landlord is obligated under this lease to repair or remedy the condition, then Tenant may, following notice to Landlord (i) by certified mail, return receipt requested, or by registered mail or (ii) by notice to the person to whom or at the place where Tenant's Rent is normally paid, followed by a subsequent written notice if the condition is not remedied or repaired within a reasonable period of time following the first notice—

i. terminate this lease;

ii. have the condition repaired or remedied according to section 92.0561 of the Texas Property Code if the condition involves any of the following and at least one of Tenant's notices to Landlord includes a reasonable description of the proposed repair or remedy, along with a statement that Tenant intends to repair or remedy the condition:

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(a) the backup or overflow of raw sewage inside the Premises or the flooding from broken pipes or natural drainage inside the Premises;

(b) potable water service to the Premises is not available, and Landlord has expressly or impliedly agreed in this lease to furnish potable water to the Premises;

(c) heating or cooling equipment serving the Premises is producing inadequate heat or cooled air, Landlord has expressly or impliedly agreed in this lease to furnish heating or cooling equipment, and Landlord has been notified in writing by the appropriate local housing, building, or health official or other official having jurisdiction that the lack of heat or cooling materially affects the health or safety of an ordinary tenant; or

(d) any other condition exists at the Premises that materially affects the health or safety of an ordinary tenant, and Landlord has been notified in writing by the appropriate local housing, building, or health official or other official having jurisdiction of such condition;

iii. deduct from Tenant's Rent, without necessity of judicial action, the cost of the repair or remedy of any condition listed in section D.6.a.ii. in compliance with section 92.0561 of the Texas Property Code; or

iv. obtain judicial remedies according to section 92.0563 of the Texas Property Code.

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b. If Tenant elects to terminate this lease, Tenant is—

i. entitled to a pro rata refund of Rent from the date of termination or the date Tenant moves out, whichever is later;

ii. entitled to deduct Tenant's Security Deposit from Tenant's Rent without the necessity of lawsuit or to obtain a refund of Tenant's Security Deposit according to law; and

iii. not entitled to the other repair-and-deduct remedies under section 92.0561 of the Texas Property Code or the judicial remedies under subdivisions (1) and (2) of subsection (a) of section 92.0563 of the Texas Property Code.

c. If Tenant elects to have the condition repaired or remedied following the requirements of section 92.0561 of the Texas Property Code, Tenant may have the condition repaired or remedied—

i. immediately following Tenant's notice of intent to repair if the condition involves sewage or flooding;

ii. within three days following Tenant's delivery of notice of intent to repair if the condition involves a cessation of potable water or inadequate heat or cooled air; or

iii. within seven days following Tenant's notice of intent to repair or remedy the condition if the condition involves any other matter affecting the physical health or safety of an ordinary tenant; and

Tenant may deduct the cost to repair or remedy the condition from a subsequent Rent payment, but the deduction may not exceed the amount

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of one month's Rent under the lease or $500, whichever is greater. When deducting the cost of repairs from the Rent, Tenant must furnish Landlord, along with payment of the balance of the Rent, a copy of the repair bill and the receipt for its payment. A repair bill and receipt may be the same document. Repairs and deductions may be made as often as necessary as long as Tenant otherwise complies with section 92.0561 of the Texas Property Code and the total repairs and deductions in any one month do not exceed one month's Rent or $500, whichever is greater.

d. If Tenant's Rent is subsidized in whole or in part by a governmental agency, the deduction limitation of one month's Rent shall mean the fair market rent for the dwelling and not the Rent that Tenant pays. The fair market rent shall be determined by the governmental agency subsidizing the Rent, or in the absence of such a determination, it shall be a reasonable amount of rent under the circumstances.

e. Tenant repairs pursuant to section 92.0561 of the Texas Property Code must be made by a company, contractor, or repairman listed in the yellow or business pages of the telephone directory or in the classified advertising section of a newspaper of the local city, county, or adjacent county at the time of Tenant's notice of intent to repair and must be made in compliance with applicable building codes, including a building permit when required. Unless otherwise agreed between Tenant and Landlord, any repairs made pursuant to section 92.0561 of the Texas Property Code may not be made by Tenant, Tenant's immediate family, Tenant's employer or employees, or a company in which Tenant has an ownership interest. In addition, repairs may not be made by Tenant under section 92.0561 of the Texas Property Code to the foundation or

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load-bearing structural elements of a building of which the Premises is a part if the building contains two or more dwelling units.

f. If Landlord repairs or remedies the condition or delivers to Tenant an affidavit for delay under section 92.0562 of the Texas Property Code after Tenant has contacted a repairman but before the repairman commences work, Landlord shall be liable for the cost incurred by Tenant for the repairman's trip charge and Tenant may deduct the charge from Tenant's Rent as if it were a repair cost.

g. If Tenant elects to pursue judicial remedies against Landlord pursuant to section 92.0563 of the Texas Property Code, those remedies include—

i. an order directing Landlord to take reasonable action to repair or remedy the condition;

ii. an order reducing Tenant's Rent, from the date of the first repair notice, in proportion to the reduced rental value resulting from the condition until the condition is repaired or remedied;

iii. a judgment against Landlord for a civil penalty of one month's Rent plus $500;

iv. a judgment against Landlord for the amount of Tenant's actual damages; and

v. court costs and attorney's fees, excluding any attorney's fees for a cause of action for damages relating to a personal injury.

D.7. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c)

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failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.8. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for possession or damages or both.

D.9. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this lease in the future.

> If the term of the lease is more than one year, consider replacing the following paragraph with paragraphs D.13.a. and D.13.b. from form 25-1 in this chapter (basic lease).

D.10. Mitigation. Landlord and Tenant have a duty to mitigate damages.

D.11. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.12. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

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D.13. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.14. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and any other costs.

D.15. Venue. Exclusive venue is in the county in which the Premises are located.

D.16. Entire Agreement. This lease and its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE AND ANY EXHIBITS, ADDENDA, AND RIDERS.**

D.17. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.18. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.19. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the ear-

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lier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.20. Texas Property Code. Landlord and Tenant each acknowledge that chapter 92 of the Texas Property Code, which deals with residential tenancies, affords certain rights and imposes certain duties on them.

D.21. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

D.22. Tenant's Statutory Right to Terminate. Tenant may have special statutory rights to terminate the lease early in certain situations involving family violence, military deployment or transfer, or certain sexual offenses or stalking.

D.23. Emergencies. Tenant may call [**telephone number**] to report emergencies that affect the Premises and that threaten Tenant's physical health or safety.

Attach exhibits, additional addenda, or riders or include additional clauses or lists as deemed necessary, e.g., additional clauses from form 25-13 in this chapter.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

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Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and liability insurance policy required below during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance	**Minimum Policy Limit**
Tenant's homeowner's (also known as tenant's or renter's)	*Personal Liability:* Per occurrence: $_____ Aggregate: $_____ *Property:* 100 percent of replacement cost of all Tenant's furniture, fixtures, equipment, and other personal property located in the Premises, and will include release of claims/subrogation referenced in paragraph D.3.

2. Deliver a certificate of insurance to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

B. Landlord agrees to maintain the property insurance policy required below during the Term:

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Type of Insurance	Minimum Policy Limit
Causes of loss—special form property	100 percent of replacement cost of the building in which Premises are located, exclusive of foundation, footings, infrastructure, and sitework, and will include release of claims/ subrogation referenced in paragraph D.3.

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Form 25-6

Industrial Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

[**Include if applicable:** Guarantors: [**see guaranty agreement at form 25-22 in this chapter**]]

[**Include if applicable:** Guarantors' Addresses:]

Premises

Approximate square feet:

Name of Building:

Street address/suite:

City, state, zip:

Include or attach any additional necessary legal description.

Term (months):

Commencement Date:

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Termination Date:

Base Rent (monthly):

Tenant's Pro Rata Share: [**percent**] percent ([**percent**]%)

Security Deposit:

Permitted Use:

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: [**see section 25.1:4**]

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Common Areas" means all facilities and areas of the Building that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Building, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

A.3. "Essential Services" means utility connections reasonably necessary for occupancy of the Premises for the Permitted Use.

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A.4. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.5. "Lienholder" means the holder of a deed of trust covering the Premises.

A.6. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey (i) all laws relating to Tenant's use, maintenance of the condition, and occupancy of the Premises and Tenant's use of any Common Areas in the Building; (ii) any requirements imposed by utility companies serving or insurance companies covering the Premises or Building; and (iii) any rules and regulations for the Building and Common Areas adopted by Landlord.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Reimburse Landlord for real property taxes paid on the Premises.

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B.1.g. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Pay Tenant's Pro Rata Share of any utility services provided by Landlord.

B.1.i. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.j. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, reasonable wear excepted.

B.1.k. Keep the sidewalks, service ways, and loading areas adjacent to the Premises clean and unobstructed.

B.1.l. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.m. If requested, deliver to Landlord a financing statement perfecting the security interest created by this lease.

B.1.n. Vacate the Premises and return all keys to the Premises on the last day of the Term.

B.1.o. Pay all costs caused by Tenant's introduction of materials, other than ordinary human waste, into the sanitary sewer system.

B.1.p. Install and maintain any dilution tanks, holding tanks, settling tanks, sewer sampling devices, sand traps, grease traps, or other devices required by law for the Permitted Use of the sanitary sewer system.

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B.1.q. If the Premises are served by rail and if requested by the railroad, enter into a joint maintenance agreement with the railroad and bear Tenant's Pro Rata Share of the cost of maintaining the railroad spur.

B.1.r. On request, execute an estoppel certificate that states the Commencement Date and Termination Date of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested.

B.1.s. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.**

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

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B.2.c. Interfere with any other tenant's normal business operations or Landlord's management of the Premises.

B.2.d. Permit any waste.

B.2.e. Use the Premises in any way that would increase insurance premiums or void insurance on the Premises.

B.2.f. Change Landlord's lock system.

B.2.g. Alter the Premises.

B.2.h. Allow a lien to be placed on the Premises.

B.2.i. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.j. Use the roof on the Premises.

B.2.k. Place any signs on the Premises without Landlord's written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Building.

C.1.c. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, and (iv) structural soundness of the exterior walls, excluding windows, window glass, plate glass, and doors.

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C.1.d. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.e. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF LANDLORD OR ITS AGENTS, EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

C.2. **Landlord agrees not to—**

C.2.a. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair

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any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR BUILDING, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE BUILDING, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.5. Casualty/Total or Partial Destruction

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D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

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D.6.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense, restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Premises. This lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to provide Essential Services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an Essential Service for thirty days after default, terminate this lease. Tenant may not terminate under this paragraph while in arrears for Rent.

D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to

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reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this lease in the future.

D.13. Landlord's Recovery of Rent and/or Damages for Tenant's Default

D.13.a. If Tenant is in arrears on the payment of Rent and Landlord has terminated Tenant's possession, Landlord may sue Tenant for Rent as it accrues and periodically take judgments without prejudice to sue for Rent that may accrue in the future. Landlord has a duty to mitigate Rent as follows: within thirty days of Landlord taking possession, (i) place a "For Lease" sign at the Premises, (ii) place the leased Premises on Landlord's inventory of available space, (iii) make Landlord's inventory available to area brokers on a monthly basis, (iv) advertise the Premises for lease in a suitable trade journal or newspaper in the county where the Premises are located at least once per month, and (v) show the Premises to prospective tenants who request to see it. Landlord is only under a duty to show the Premises as built and for the remainder of the Term of the lease. If Landlord has made these mitigation efforts, Landlord and Tenant agree that Landlord has made objectively reasonable efforts to mitigate the loss of Rent as a result of the default of Tenant.

D.13.b. If Tenant has anticipatorily breached the lease and Landlord has terminated the lease, Landlord may sue Tenant for damages for Rent that may accrue for the remainder of the Term of the lease. The measure of damages is the difference between the Rent for the

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remainder of the Term and the fair market value of the Premises discounted to its present value. Nothing in this section shall prevent Landlord from suing for Rent as it accrues under D.13.a. above and suing for damages for Rent that will accrue through the end of the lease Term under this section.

D.14. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.15. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.16. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.17. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.18. Venue. Exclusive venue is in the county in which the Premises are located.

D.19. Entire Agreement. This lease and its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY**

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ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE AND ANY EXHIBITS, ADDENDA, AND RIDERS.

D.20. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.21. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.22. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.23. Use of Common Areas. Tenant will have the nonexclusive right to use the Common Areas subject to any reasonable rules and regulations that Landlord may prescribe.

D.24. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

Attach exhibits, addenda, or riders or include additional clauses or lists as deemed necessary, e.g., the insurance addendum at form 25-36 or 25-37 in this chapter or clauses from form 25-13.

_____

[Name of landlord]

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[Name of tenant]

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Form 25-7

Hunting Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Premises: SURFACE ONLY of approximately [**number**] acres of land, situated in [**county**] County, Texas, as described in Exhibit [**exhibit number/letter**] ("Land").

Include or attach any additional necessary legal description.

The Premises do not include livestock, crops, or Excluded Improvements located on the Land. Tenant will not be permitted to use the Excluded Improvements.

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following: [**specify**].

Base Rent:

Term (months):

Commencement Date:

Termination Date:

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Permitted Use: Solely for hunting of the following game: [**specify**].

Tenant's Insurance: As required by Insurance Addendum

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being suitable for the Permitted Use.

B.1.c. Obey all laws relating to (i) Tenant's Permitted Use; (ii) Tenant's activities while on the Premises, including times and manner for hunting and removing game (and keeping of any applicable records), handling and discharging firearms, operating motor vehicles, and consuming alcoholic beverages; (iii) Tenant's use of any existing structure, improvement, or equipment that Tenant is permitted to use pursuant to this lease; or (iv) Tenant's use of any structure, improvement, or equipment erected or installed by Tenant on the Premises in accordance with this lease.

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B.1.d. Pay, in advance, without demand, Base Rent to Landlord at Landlord's Address.

B.1.e. Pay for all utility services used by Tenant.

B.1.f. Pay all taxes on Tenant's property located on the Premises.

B.1.g. Repair, replace, and maintain any part of the crops, livestock, or Improvements damaged by Tenant.

B.1.h. Operate vehicles on the Land in a manner that will not damage existing roads, trails, or vegetation.

B.1.i. Keep all gates on the Land closed and locked.

B.1.j. Enter and exit the Premises only at those places designated by Landlord.

B.1.k. Vacate the Premises on the last day of the Term.

B.1.l. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.m. Properly supervise all persons present on the Premises at the invitation or request of Tenant.

B.1.n. Deliver to Landlord a Release, Indemnity, and Assumption of Risks in the form attached to this lease as Exhibit B, executed by each individual (including Tenant) who will enter the Premises at the invitation or request of Tenant before entry by any such individual.

B.1.o. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD'S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING FROM OR RELATED TO TENANT'S OR TENANT'S AGENTS' USE OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS

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AGENTS, INCLUDING IN WHOLE OR IN PARTY BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL SURVIVE THE END OF THE TERM, AND (iii) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste or injury to the Premises or the crops or livestock thereon.

B.2.c. Change Landlord's lock system.

B.2.d. Alter the Premises, including clearing new roads or trails, digging ponds or tanks, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Allow a lien to be placed on the Premises.

B.2.f. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.g. Litter or leave trash, debris, or shell casings on the Premises.

B.2.h. Allow anyone other than those persons listed in Exhibit A to hunt on the Premises.

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B.2.i. Construct any kennel, blind, feeder, or stand on the Premises without Landlord's prior written consent.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Allow any use of the Premises inconsistent with Tenant's Permitted Use as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

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D.3. Release of Claims. TENANT RELEASES LANDLORD AND LANDLORD'S AGENTS FROM ALL CLAIMS OR LIABILITIES FOR ANY INJURY TO TENANT AND TENANT'S AGENTS WHILE PRESENT ON THE PREMISES OR TO TENANT'S OR TENANT'S AGENTS' PROPERTY LOCATED ON THE PREMISES. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

D.4. Condemnation/Substantial or Partial Taking

D.4.a. If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.4.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.4.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.5. Default by Landlord/Events. A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

D.6. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and terminate this lease. Tenant may not terminate under this paragraph while in arrears for the payment of Rent.

D.7. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c)

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failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.8. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be hunting on the Premises, until the default is cured, without being liable for damages.

D.9. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this lease in the future.

D.10. Mitigation. Landlord and Tenant have a duty to mitigate.

D.11. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.12. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

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D.13. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.14. Venue. Exclusive venue is in the county in which the Premises are located.

D.15. Entire Agreement. This lease and its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE AND ANY EXHIBITS, ADDENDA, AND RIDERS.**

D.16. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.17. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.18. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, per-

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sonal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.19. Mineral Interests. This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor.

D.20. Landlord's Use. Landlord, both for Landlord and for third parties, retains the right to enter on and use the Land for grazing, farming, erecting telecommunications towers or antennas, and other uses that do not materially interfere with the Permitted Use.

D.21. Identity. Landlord reserves the right to verify the identity of all persons on the Premises.

D.22. Option to Terminate. Landlord will have the option to terminate this lease with respect to any portion of the Land that is sold. Landlord's option will be exercisable by written notice delivered to Tenant no later than thirty days before the date of termination. The Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable. Tenant will receive a refund of any prepaid Base Rent fairly and reasonably allocable to the portion of the Premises for which this lease has been terminated.

If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders.

_____

[Name of landlord]

_____

[Name of tenant]

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Insurance Addendum to Hunting Lease

The landowner's liability for injuries and damages from the tenant's use of the property may be limited by compliance with the requirements of Tex. Civ. Prac. & Rem. Code ch. 75.

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the property and/or liability insurance policies required below (mark applicable boxes) during the lease Term and any period before or after the lease Term when Tenant is present on the Premises:

Type of Insurance	**Minimum Policy Limit**	
If Tenant is an individual:		
☐ Hunting lease liability	Per occurrence:	$_____
	Aggregate:	$_____
Or		
☐ Endorsement extending homeowner's policy liability to Premises		
☐ Texas personal auto	Minimum limits required by law	

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If Tenant is a business entity:

☐	Hunting lease liability	Per occurrence: Aggregate:	$_____ $_____
☐	Business automobile		$_____

Or

☐	Texas personal auto	Minimum limits required by law

2. Comply with the following additional insurance requirements: (a) the hunting lease liability or homeowner's insurance policy must be endorsed to name Landlord as "additional insured," (b) additional insured endorsements must not exclude coverage for the ordinary negligence of Landlord, (c) any property insurance policies covering Tenant's property on the Premises must contain a waiver of subrogation of claims against Landlord, and (d) certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

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Exhibit A

Individuals Who Will Hunt on the Premises

List names of those individuals who are permitted to hunt on the premises.

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Exhibit B

Release, Indemnity, and Assumption of Risks

Lease

Date:

Landlord:

Tenant:

1. *Assumption of Risks.* THE UNDERSIGNED ACKNOWLEDGES THAT (a) DANGEROUS NATURAL OR MAN-MADE CONDITIONS MAY EXIST OR OCCUR ON THE PREMISES DESCRIBED IN THE LEASE, INCLUDING STREAMS AND RIVERS WITH CURRENTS AND WATER THAT MAY BE DEEP OR FLOOD, HAZARDOUS DRIVING AND WALKING CONDITIONS, UNEVEN TERRAIN, THE PRESENCE OF WILD, DOMESTIC, POISONOUS, OR DISEASED ANIMALS, ELEVATED HUNTING STANDS, AND/OR CAMOUFLAGED SUNKEN HUNTING BLINDS; AND (b) HUNTING IS AN INHERENTLY DANGEROUS ACTIVITY INVOLVING THE USE OF FIREARMS AND OTHER LETHAL IMPLEMENTS AND THE PRESENCE OF OTHER HUNTERS. THE UNDERSIGNED ASSUMES ALL SUCH DANGERS AND RISKS.

2. *Indemnity.* THE UNDERSIGNED WILL INDEMNIFY, DEFEND, AND HOLD LANDLORD AND ITS AGENTS, EMPLOYEES, INVITEES, LICENSEES, OR VISITORS (COLLECTIVELY, "LANDLORD") HARMLESS AGAINST ALL CLAIMS, DAMAGES, AND COSTS (COLLECTIVELY, "CLAIMS") INCURRED BY OR ALLEGED AGAINST LANDLORD AND ARISING OUT OF OR RELATING TO ANY ACT OR OMISSION OF THE UNDERSIGNED OR ANY OF THE UNDERSIGNED'S AGENTS, EMPLOYEES, CONTRACTORS, LICENSEES, OR VISITORS (COLLECTIVELY, "HUNTER") WHILE AT THE PREMISES, INCLUDING ANY CLAIMS BASED ON ANY (a) INJURY TO OR DEATH OF ANY PERSON(S), (b) DAMAGE TO OR LOSS OF PROPERTY, OR (c) FAILURE OF HUNTER TO COMPLY WITH ANY APPLICABLE LAWS OR THE LEASE.

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3. *Release.* THE UNDERSIGNED WAIVES ALL CLAIMS AGAINST LANDLORD AND RELEASES LANDLORD FROM ANY LIABILITY, BASED ON ANY (a) INJURY TO OR DEATH OF HUNTER OR (b) DAMAGE TO OR LOSS OF ANY PROPERTY BELONGING TO HUNTER.

4. *Negligence of Landlord.* **THE FOREGOING INDEMNITIES, WAIVERS, AND RELEASES WILL APPLY EVEN IF THE INCIDENT GIVING RISE TO THE CLAIM IS CAUSED IN WHOLE OR IN PART BY THE CONDITION OF THE PREMISES OR BY THE SOLE OR CONCURRENT ORDINARY NEGLIGENCE OF LANDLORD (BUT NOT THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD).**

_____

[Name of tenant]

[Date]

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Form 25-8

Agricultural Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Premises: SURFACE ONLY of approximately [**number**] acres of land, situated in [**county**] County, Texas, as described in Exhibit [**exhibit number/letter**] ("Land").

Include or attach any additional necessary legal description.

The Premises do not include and Tenant will not be permitted to use the Excluded Improvements.

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following: [**specify**].

Base Rent:

Select as applicable.

$[**amount**] payable on execution of this lease.

And/Or

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$[**amount**] (monthly) due on the first day of the month

And/Or

[**percent**] percent of all cotton produced on the Premises delivered to the gin of Tenant's choice.

And/Or

[**percent**] percent of all corn, wheat, and other grains produced on the Premises delivered at the turn row.

And/Or

[**percent**] percent of all crops produced on and harvested from the Premises.

And/Or

[**percent**] percent of the gross sales proceeds from the sale of all [**specify**] raised on and harvested from the Premises less [**percent**] percent of the cost of [**specify**] payable on the sale of the [**specify**].

And/Or

[**percent**] percent of all USDA agricultural program payments.

Continue with the following.

Term (months):

Commencement Date:

Termination Date:

Security Deposit:

Permitted Use: Solely for planting, raising, and harvesting [**specify**] and no other purpose.

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Tenant's Insurance: As required by Insurance Addendum

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant's use, maintenance of condition, and occupancy of the Premises, including the rules and regulations of the United States Department of Agriculture and the Texas Agriculture Commissioner.

B.1.d. Pay the Base Rent when it is due, without demand, to Landlord at Landlord's Address.

B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

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B.1.f. Pay for all labor, fuel, and utility services used by Tenant.

B.1.g. Pay all taxes on the crops raised on and Tenant's property located on the Premises.

B.1.h. Allow Landlord to enter the Premises to inspect the Premises and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises used by Tenant.

B.1.j. Repair any damage to the Premises, Land, or Excluded Improvements caused by Tenant.

B.1.k. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.l. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD'S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING OUT OF TENANT'S OR TENANT'S AGENTS' USE OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

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B.1.m. Deliver to Landlord a financing statement perfecting the security interest.

B.1.n. Vacate the Premises on the last day of the Term.

B.1.o. Pay all costs of planting, raising, and harvesting the crops, unless Landlord elects to receive payment in kind, in which case costs will be shared in the same proportion as the crops.

B.1.p. Cultivate the Premises in a timely, thorough, and farmer-like manner, employing the best methods of farming customarily practiced on like crops in the area.

B.1.q. Maintain adequate records on all matters related to farming the Premises and provide Landlord with a copy.

B.1.r. Keep all gates on the Premises closed and locked.

B.1.s. Enter and exit the Premises only at those places designated by Landlord.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste of the Premises.

B.2.c. Change Landlord's lock system.

B.2.d. Alter the Premises, including clearing new roads, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.f. Make any new or change any existing agreement with any governmental entity.

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B.2.g. Hunt or fish on the Land or allow anyone else to do so.

B.2.h. Litter or leave trash or debris on the Premises.

B.2.i. Allow a lien to be placed on the Premises.

Include the following if applicable.

B.2.j. Allow a lien to be placed on the crops raised on or harvested from the Premises.

Continue with the following.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.c. Obey all laws relating to Landlord's operation of the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Allow any use of the Premises inconsistent with the Permitted Use as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

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D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Release of Claims/Subrogation. TENANT RELEASES LANDLORD AND LANDLORD'S AGENTS FROM ALL CLAIMS OR LIABILITIES FOR ANY INJURY TO TENANT AND TENANT'S AGENTS OR TO TENANT'S OR TENANT'S AGENTS' PROPERTY LOCATED ON THE PREMISES. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

D.4. Condemnation/Substantial or Partial Taking

D.4.a. If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.4.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.4.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.5. Landlord's Lien. Tenant grants to Landlord a security interest in the collateral to secure payment and performance by Tenant of all obligations and payments due from Tenant under this lease. The collateral will include all of Tenant's crops, livestock, and personal property located or to be located on the Premises, and all products, proceeds, offspring, increase, governmental payments, insurance proceeds, documents of title, and warehouse receipts relating to such property.

This lease is a security agreement under both article 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest. Tenant agrees to furnish to Landlord a list of the names and addresses of any buyer, commission merchant, or selling agent to or through whom Tenant may sell the collateral. Tenant agrees to notify Landlord of the identity of any buyer, commission merchant, selling agent, or warehouse to or with whom Tenant intends to sell or store the collateral within seven days before any sale or storage of the collateral.

D.6. Default by Landlord/Events. A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

D.7. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and terminate this lease. Tenant may not terminate under this paragraph while in arrears for Rent.

D.8. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.9. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b)

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enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be farming the Premises, until the default is cured, without being liable for damages.

D.10. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this lease in the future.

D.11. Mitigation. Landlord and Tenant have a duty to mitigate.

D.12. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.13. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.14. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.15. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

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D.16. Venue. Exclusive venue is in the county in which the Premises are located.

D.17. Entire Agreement. This lease and its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE AND ANY EXHIBITS, ADDENDA, AND RIDERS.**

D.18. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.19. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.20. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

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D.21. Mineral Interests. This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor. Any damages to growing crops arising from an oil, gas, or mineral interest will be divided between Landlord and Tenant in the same proportions as the crops are divided.

D.22. Landlord's Use. Landlord retains the right to enter on and use and/or permit third parties to enter on and use the Premises for hunting, fishing, and other uses that do not materially interfere with Tenant's farming rights.

D.23. Crops Grown for Tenant's Use. If Tenant uses any of the Premises for crops for Tenant's use, Tenant will obtain Landlord's written consent and will pay Landlord the average market price for the crop harvested.

D.24. Marketing Landlord's Share. If Landlord elects to receive payment in kind, Landlord will give written notice to Tenant within [**number**] days after the Commencement Date. Landlord's share will be delivered to Landlord in [**county**] County, Texas.

D.25. Governmental Payments. If Tenant receives any payment from any governmental agency because of growing or not growing crops on the Premises and the Rent payable hereunder is based on a crop share, that payment will be divided between Tenant and Landlord in the same proportion as set out in the Rent clause.

Include the following if applicable.

D.26. Tenant's Use of Water

D.26.a. Surface. [**Describe permitted use, if any.**]

D.26.b. Subsurface. [**Describe permitted use, if any.**]

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If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

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Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the liability insurance policies required below (mark applicable boxes) during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance		**Minimum Policy Limit**	
☐	Commercial general liability (occurrence basis) endorsed to cover farm operations	Per occurrence: Aggregate:	$_____ $_____

Or

☐	Farm owner's on a renter's form such as AAIS Form No. FO-4		

Or

☐	Farm liability policy		
☐	Workers' compensation	$500,000	
☐	Employer's liability	$_____	
☐	Business automobile liability	$_____	
☐	Umbrella/excess liability (occurrence basis)	$_____	

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2. Comply with the following additional insurance requirements:

   a. All liability policies must be endorsed to name Landlord as an "additional insured" on a form that does not exclude coverage for the sole or contributory ordinary negligence of Landlord and must not be endorsed to exclude the sole negligence of Landlord from the definition of "insured contract."

   b. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

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Form 25-9

Grazing Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

Premises: SURFACE ONLY of approximately [**number**] acres of land, situated in [**county**] County, Texas, as described in Exhibit [**exhibit number/letter**] ("Land").

Include or attach any additicnal necessary legal description.

The Premises do not include crops or Excluded Improvements located on the Land. Tenant will not be permitted to use the Excluded Improvements.

Excluded Improvements: Any structure, improvement, or equipment situated on the Land and constructed or installed by any person other than Tenant, except for the following: [**specify**].

Term (months):

Commencement Date:

Termination Date:

Permitted Use: Solely for grazing of [**specify**].

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Base Rent (monthly):

Security Deposit:

Tenant's Insurance: As required by Insurance Addendum

A. Definitions

A.1. "Agent" means agents, contractors, employees, licensees, and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use or (b) harm to or death of a person.

A.3. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for the Permitted Use.

B.1.c. Obey all laws relating to Tenant's use, maintenance of condition, and occupancy of the Premises.

B.1.d. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

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B.1.e. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.f. Pay for all labor, fuel, and utility services used by Tenant.

B.1.g. Pay all taxes on Tenant's property located on the Premises.

B.1.h. Allow Landlord to inspect the Premises and show the Premises to prospective purchasers or tenants.

B.1.i. Repair, replace, and maintain any part of the Premises used by Tenant.

B.1.j. Repair any damage to the Premises, Land, or Excluded Improvements caused by Tenant.

B.1.k. Maintain the insurance coverages described in the attached Insurance Addendum.

B.1.l. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LANDLORD'S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING OUT OF TENANT'S OR TENANT'S AGENTS' USE OF THE PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT**

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AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.

B.1.m. Deliver to Landlord a financing statement perfecting the security interest.

B.1.n. Vacate the Premises on the last day of the Term.

B.1.o. Use the highest standards of animal husbandry in grazing the Premises.

B.1.p. Keep all gates on the Premises closed and locked.

B.1.q. Enter and exit the Premises at those places designated by Landlord.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises for any purpose other than the Permitted Use.

B.2.b. Create or allow a nuisance or permit any waste of the Premises.

B.2.c. Change Landlord's lock system.

B.2.d. Alter the Premises, including clearing new roads, moving or erecting any fences, or locating on the Premises any type of manufactured housing or mobile home.

B.2.e. Allow a lien to be placed on the Premises.

B.2.f. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

B.2.g. Graze more than [**number**] head of [**specify**] on the Premises.

B.2.h. Hunt or fish on the Land or allow anyone else to do so.

B.2.i. Litter or leave trash or debris on the Premises.

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C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Premises.

C.1.c. Obey all laws relating to Landlord's operation of the Premises.

C.2. **Landlord agrees not to—**

C.2.a. Allow any use of the Premises inconsistent with the Permitted Use as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at termination of this lease and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay Rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

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D.3. Release of Claims. TENANT RELEASES LANDLORD AND LANDLORD'S AGENTS FROM ALL CLAIMS OR LIABILITIES FOR ANY INJURY TO TENANT AND TENANT'S AGENTS OR TO TENANT'S OR TENANT'S AGENTS' PROPERTY LOCATED ON THE PREMISES. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR LANDLORD'S AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR LANDLORD'S AGENTS.**

D.4. Condemnation/Substantial or Partial Taking

D.4.a. If the Premises cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this lease will terminate.

D.4.b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.4.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.5. Landlord's Lien. Tenant grants to Landlord a security interest in the collateral to secure payment and performance by Tenant of all obligations and payments due from Tenant under this lease. The collateral will include all of Tenant's crops, livestock, and personal property located or to be located on the Premises, and all products, proceeds, offspring, increase, governmental payments, insurance proceeds, documents of title, and warehouse receipts relating to such property.

This lease is a security agreement under both chapter 9 of the Texas Business and Commerce Code and the federal Food Security Act of 1985. Landlord may file financing state-

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ments or continuation statements to perfect or continue the perfection of the security interest. Tenant agrees to furnish to Landlord a list of the names and addresses of any buyer, commission merchant, or selling agent to or through whom Tenant may sell the collateral. Tenant agrees to notify Landlord of the identity of any buyer, commission merchant, selling agent, or warehouse to or with whom Tenant intends to sell or store the collateral within seven days before any sale or storage of the collateral.

D.6. Default by Landlord/Events. A default by Landlord is the failure to comply with any provision of this lease that is not cured within thirty days after written notice.

D.7. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and terminate this lease. Tenant may not terminate under this paragraph while in arrears for Rent.

D.8. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Premises or vacating a substantial portion of the Premises, and (c) failing to comply within ten days after written notice with any provision of this lease other than the defaults set forth in (a) and (b).

D.9. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Premises and sue for Rent as it accrues; (b) enter and take possession of the Premises, after which Landlord may relet the Premises on behalf of Tenant and receive the Rent directly by reason of the reletting, and Tenant agrees to reimburse Landlord for any expenditures made in order to relet; (c) enter the Premises and perform Tenant's obligations; and (d) terminate this lease by written notice and sue for damages. Landlord may enter and take possession of the Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be using the Premises for grazing, until the default is cured, without being liable for damages.

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D.10. Default/Waiver. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this lease in the future.

D.11. Mitigation. Landlord and Tenant have a duty to mitigate.

D.12. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.13. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must vacate the Premises on receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.14. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.15. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.16. Venue. Exclusive venue is in the county in which the Premises are located.

D.17. Entire Agreement. This lease and its exhibits, addenda, and riders are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS**

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AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE AND ANY EXHIBITS, ADDENDA, AND RIDERS.

D.18. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.19. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.20. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.21. Mineral Interests. This lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases relating to the Land. Landlord will not be liable to Tenant for any damages for actions attributable to those agreements and will receive all consideration paid therefor.

D.22. Landlord's Use. Landlord retains the right to permit third parties to use the Premises for hunting, fishing, and other uses that do not materially interfere with Tenant's grazing rights.

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If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders.

_____

[Name of landlord]

_____

[Name of tenant]

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Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

Tenant agrees to—

1. Maintain the liability insurance policies required below (mark applicable boxes) during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance		**Minimum Policy Limit**	
☐	Commercial general liability (occurrence basis) endorsed to cover farm and ranch operations	Per occurrence: Aggregate:	$_____ $_____
Or			
☐	Farm owner's on a renter's form such as AAIS Form No. FO-4		
Or			
☐	Farm liability policy		
☐	Workers' compensation	$500,000	
☐	Employer's liability	$_____	
☐	Business automobile liability	$_____	
☐	Umbrella/excess liability (occurrence basis)	$_____	

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2. Comply with the following additional insurance requirements:

   a. All liability policies must be endorsed to name Landlord as an "additional insured" on a form that does not exclude coverage for the sole or contributory ordinary negligence of Landlord and must not be endorsed to exclude the sole negligence of Landlord from the definition of "insured contract."

   b. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

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Form 25-10

Cell Tower Lease

Basic Information

Date:

Landlord:

Landlord's Address:

Tenant:

Tenant's Address:

[**Include if applicable:** Guarantors:]

[**Include if applicable:** Guarantors' Addresses:]

Site: That certain parcel of real property depicted on Exhibit A and legally described on Exhibit D, together with any easements appurtenant thereto.

Tower: A communications tower best described at approximately the following location:

911 Address (if applicable):

FCC ASR# (if applicable):

Latitude:

Longitude:

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Tower Leased Premises: The space on the Tower reserved for the installation of Tenant's antennas and appurtenant Equipment, depicted on Exhibit B and described as follows: [**describe tower leased premises**]

Ground Leased Premises: Ground Space comprising a portion of the Site for placement of Tenant's Equipment as depicted on Exhibit A and described as follows: [**describe ground leased premises**]

Ground Space: Approximately [**number**] square feet.

Leased Premises: The Ground Leased Premises, the Tower Leased Premises, and nonexclusive use of space to connect Tenant's Equipment on the Ground Leased Premises, together with nonexclusive easements for access and utilities to Tenant's Equipment.

Tenant's Equipment: The equipment listed on Exhibit C attached hereto, as modified, changed, or substituted with the prior written approval of Landlord.

Term (months):

Commencement Date:

Termination Date:

Extension Terms:

Base Rent (monthly):

Capital Contribution Fee: Tenant shall pay Landlord on or before the Commencement Date a capital contribution of $[**amount**] toward the costs associated with modifications of the Site and Tower related to this Lease.

Security Deposit: $[**amount**]

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Permitted Use: Tenant will use the Leased Premises only for the purpose of placing, maintaining, and operating Tenant's Equipment and uses directly incidental thereto.

Tenant's Insurance: As required by the Insurance Addendum attached hereto as Exhibit E.

Landlord's Insurance: As required by the Insurance Addendum attached hereto as Exhibit E.

A. Definitions

A.1. "Agent" means agents; contractors; employees; Tenants; and, to the extent under the control of the principal, invitees.

A.2. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

A.3. "Lienholder" means the holder of a deed of trust covering the Leased Premises.

A.4. "Rent" means Base Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Leased Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Site and Leased Premises in their present condition "AS IS," the Leased Premises being currently suitable for the Permitted Use.

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B.1.c. Comply with (i) all laws and requirements relating to Tenant's use, maintenance, and occupancy of the Leased Premises and use of Tenant's Equipment and (ii) any requirements of Landlord, including the Communications Tower Safety Standards attached hereto as Exhibit F.

B.1.d. Coordinate all filings with the Federal Aviation Administration ("FAA") and/or the FCC related to the Tower height, location, or NEPA with Landlord and allow Landlord to handle, at Tenant's sole cost and expense, any amended filings with the FAA or FCC needed to accommodate Tenant's Equipment or operations.

B.1.e. Pay monthly, in advance, without demand, on the first day of the month, the Base Rent to Landlord at Landlord's Address.

B.1.f. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day after it is due.

B.1.g. Obtain and pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Pay Tenant's pro rata share of any utility services provided by Landlord.

B.1.i. Allow Landlord to enter the Leased Premises to perform Landlord's obligations, inspect the Leased Premises, and show the Leased Premises to prospective purchasers or tenants.

B.1.j. Repair, replace, and maintain in good condition any part of the Leased Premises and Tenant's Equipment.

B.1.k. Repair and replace any property of Landlord, or any property of any other tenant of the Site, that is damaged or adversely affected by reason of the installation, maintenance, use, or removal by Tenant of Tenant's Equipment. Any repairs to the Tower or to the

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property of any other tenant will, at Landlord's sole option, be performed by or on behalf of Landlord at Tenant's sole expense.

B.1.l. Install Tenant's Equipment and all subsequent approved substitutions to Tenant's Equipment and perform all other work on the Tower and at the Site (collectively, the "Work") in a good and workmanlike manner using prime quality materials (i) complying with the Communications Tower Safety Standards attached as Exhibit F; (ii) using only licensed, qualified, and reputable contractors or mechanics; (iii) performing the Work in accordance with detailed plans and specifications approved in writing by Landlord, such approval not to be unreasonably withheld, conditioned, or delayed; (iv) incorporating any reasonable modifications, terms, and conditions imposed by Landlord; and (v) beginning the Work only after it has obtained all required permits and delivered copies to Landlord.

B.1.m. Be solely responsible for the safe and proper design, construction, and installation of the Work.

B.1.n. Require that any of its contractors or subcontractors working on the Tower and at the Site have and provide to Landlord evidence of insurance coverage with reputable carriers licensed to do business in Texas in accordance with the provisions of Exhibit E.

B.1.o. Vacate the Leased Premises and return all keys to the Leased Premises on the last day of the Term.

B.1.p. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE LEASED PREMISES IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT OR ITS AGENTS, INCLUDING IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF TENANT OR ITS AGENTS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPEN-**

DENT OF TENANT'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD, LIENHOLDER, OR THEIR RESPECTIVE AGENTS.

B.1.q. Contract with utility companies serving the Site for Tenant's utility needs and promptly pay cost of the utility services. Under the direction of Landlord, Tenant may, at Tenant's cost and expense, tie the Leased Premises into the electric system serving the Site, if available, and will install a separate meter for the measurement of electricity used or consumed by Tenant.

B.2. **Tenant agrees not to—**

B.2.a. Use the Leased Premises for any purpose other than the Permitted Use.

B.2.b. Create a nuisance.

B.2.c. Permit any waste.

B.2.d. Use the Leased Premises in any way that would increase insurance premiums or void insurance on the Leased Premises.

B.2.e. Change Landlord's lock system.

B.2.f. Alter the Leased Premises.

B.2.g. Allow a lien to be placed on the Leased Premises.

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B.2.h. Assign this Lease or sublease any portion of the Leased Premises without Landlord's written consent.

B.2.i. Record this Lease, or a memorandum thereof, in any public records.

B.2.j. Use any equipment that causes, or may cause, interference with any other antenna or equipment at the Site as of the Term Commencement Date.

C. Landlord's Obligations

C.1. **Landlord agrees to—**

C.1.a. Lease to Tenant the Leased Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.1.b. Obey all laws relating to Landlord's operation of the Leased Premises.

C.1.c. Furnish access to the Leased Premises on a twenty-four-hours-a-day, seven-days-a-week basis to Tenant and Tenant's persons, agents, contractors, and other designees.

C.1.d. Return the Security Deposit to Tenant, less itemized deductions, if any, on or before the sixtieth day after the date Tenant surrenders the Leased Premises.

C.1.e. Before Tenant's installation of Tenant's Equipment, obtain from a licensed engineer chosen by Landlord at Tenant's expense a certification that the structural and loading capacity of the Tower is sufficient for Tenant's Equipment and that Tenant's installation of Tenant's Equipment in accordance with the approved plans and specifications will comply with all applicable federal, state, and local laws, regulations, and standards.

C.1.f. Approve or disapprove in writing Tenant's plans and specifications within [**number**] days of receipt.

C.2. **Landlord agrees not to—**

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C.2.a. Interfere with Tenant's possession of the Leased Premises as long as Tenant is not in default.

C.2.b. Unreasonably withhold consent to a proposed assignment or sublease.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Leased Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions, improvements, and Tenant's Equipment; repair any alterations; and restore the Leased Premises to the condition existing at the Commencement Date, normal wear excepted.

D.2. Abatement. Tenant's covenant to pay rent and Landlord's covenants are independent. Except as otherwise provided, Tenant may not abate Rent for any reason.

D.3. Insurance. Tenant and Landlord will maintain the respective insurance coverages described in the Insurance Addendum attached as Exhibit E.

D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE LEASED PREMISES, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITHIN THE LEASED PREMISES, AND LOSS OF BUSINESS OR REVENUES THAT ARE INSURED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN INSURED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE

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POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY OR ITS AGENTS BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.**

D.5. Casualty/Total or Partial Destruction

D.5.a. If the Leased Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, and structural soundness of the exterior walls of the Leased Premises and any leasehold improvements within the Leased Premises that are not within Tenant's rebuilding obligations to substantially the same condition that existed before the casualty, and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's rebuilding obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this Lease by written notice to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Leased Premises. If Landlord chooses not to restore, this Lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this Lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this Lease, the Lease will continue and Landlord will restore the Leased Premises as provided in subparagraph D.5.a. above.

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D.5.c. To the extent the Leased Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.

D.6. Condemnation/Substantial or Partial Taking

D.6.a. If the Leased Premises cannot be used for the purposes contemplated by this Lease because of condemnation or purchase in lieu of condemnation, this Lease will terminate.

D.6.b. If there is a condemnation or purchase in lieu of condemnation and this Lease is not terminated, Landlord will, at Landlord's expense, restore the Tower Leased Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

D.6.c. Tenant will have no claim to the condemnation award or proceeds in lieu of condemnation.

D.7. Uniform Commercial Code. Tenant grants Landlord a security interest in Tenant's personal property now or subsequently located on the Leased Premises. This Lease is a security agreement under the Uniform Commercial Code. Landlord may file financing statements or continuation statements to perfect or continue the perfection of the security interest.

D.8. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this Lease within thirty days after written notice and failing to provide essential services to Tenant within ten days after written notice.

D.9. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not provide an essential service for thirty days after default, terminate this Lease. Tenant may not terminate under this paragraph while in arrears for Rent.

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D.10. Default by Tenant/Events. Defaults by Tenant are (a) failing to pay Rent timely, (b) abandoning the Leased Premises or vacating a substantial portion of the Leased Premises, and (c) failing to comply within ten days after written notice with any provision of this Lease other than the defaults set forth in (a) and (b).

D.11. Default by Tenant/Landlord's Remedies. Landlord's remedies for Tenant's default are to (a) enter and take possession of the Leased Premises and sue for Rent as it accrues; (b) enter and take possession of the Leased Premises, after which Landlord may re-let the Leased Premises on behalf of Tenant and receive the rent directly by reason of the re-letting, and Tenant agrees to reimburse Landlord for any expenditures made in order to re-let; (c) enter the Leased Premises and perform Tenant's obligations; and (d) terminate this Lease by written notice and sue for damages. Landlord may enter and take possession of the Leased Premises by self-help, by picking or changing locks if necessary, and may lock out Tenant or any other person who may be occupying the Leased Premises, until the default is cured, without being liable for damages.

D.12. Default/Waiver/Mitigation. All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent will not be a waiver and will not estop Landlord from enforcing that provision or any other provision of this Lease in the future. Landlord and Tenant have a duty to mitigate damages.

D.13. Security Deposit. If Tenant defaults, Landlord may use the security deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.14. Holdover. If Tenant does not vacate the Leased Premises following termination of this Lease, Tenant will become a tenant at will and must vacate the Leased Premises on

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receipt of notice from Landlord. No holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.15. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

D.16. Attorney's Fees. If either party retains an attorney to enforce this Lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and other fees and court and other costs.

D.17. Venue. Exclusive venue is in the county in which the Leased Premises are located.

D.18. Entire Agreement. This Lease [**include if applicable:** and its exhibits, addenda, and riders] [is/are] the entire lease of the parties concerning the lease of the Leased Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE LEASED PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE LEASED PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE [include if applicable: AND ANY EXHIBITS, ADDENDA, AND RIDERS].**

D.19. Amendment of Lease. This Lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.20. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND

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ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.21. Notices. Any notice required or permitted under this Lease must be in writing. Any notice required by this Lease will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Lease. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein.

D.22. Abandoned Property. Landlord may retain, destroy, or dispose of any property left on the Leased Premises at the end of the Term.

D.23. Generator. With Landlord's prior written approval, not to be unreasonably withheld, [and on payment of an additional rent of $[**amount**] per month,] Tenant may install a generator at the Site to service Tenant's Equipment.

D.24. Interference. If Tenant's Equipment causes interference with operations of other tenants on the Tower, Tenant will immediately cease the interference and, at its own expense, make any changes to Tenant's Equipment needed to correct the interference, subject to Landlord's written approval.

D.25. Use of Site by Other Parties. Tenant's use of the Site is nonexclusive. Landlord may enter into leases with other parties for the use of the Site, Tower, and other improvements. Parties other than Landlord and Tenant will have access to the Site, and Landlord is not responsible for the behavior of the other parties. Tenant will be responsible for securing Tenant's Equipment.

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_____

[Name of landlord]

_____

[Name of tenant]

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Exhibit A

Plan of Site, Access Drive, and Leased Premises

Provide a depiction of the real property being leased for the cell tower site, including any easements.

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Exhibit B

Sketch of Tower and Tower Space

Provide a sketch of the cell tower and the space on the tower reserved for the installation of the tenant's equipment.

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Exhibit C

Tenant's Equipment

List the tenant's equipment that will be placed on the cell tower site and that will be installed on the tower itself.

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Exhibit D

Property Description

Provide the legal description of the real property being leased for the cell tower site.

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Exhibit E

Insurance Addendum to Lease

Provide details on the required insurance for both the tenant and the landlord, including any required for contractors or sub-contractors.

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Exhibit F

Communications Tower Safety Standards

A. Scope and Application

The rules in this exhibit contain requirements for policies, procedures, and safe work practices to protect the employees, agents, and contractors of Landlord and Tenant from the hazards of working on communications towers during construction, alteration, repair, operation, inspection, and maintenance activities. A "Communications Tower" is defined as any tower over six feet in height that is used primarily as an antenna or to host one or more antennas. Where the Communications Tower is affixed to another structure, such as an electrical transmission tower, church steeple, building rooftop, or water tower, the applicable part of any controlling regulation for protection of persons (e.g., 29 C.F.R. sections 1910.268 and 1910.269, and part 1926, subpart V, for transmission towers) will apply up to the point of access to the Communications Tower.

B. Definitions

In addition to the definitions set forth in 29 C.F.R. parts 1910 and 1926, the following definitions apply throughout the rules in this exhibit.

B.1. "Acceptable Conditions for Access" means the conditions that must exist before Tenant grants permission for construction, alteration, repair, or maintenance work to be performed on a Communications Tower. These conditions include the following:

B.1.a. Work under the control of a work safety program meeting the requirements of the rules in this exhibit.

B.1.b. Work where an accumulation of snow, ice, or other slippery material is not present, except as necessary for the inspection or removal of such material.

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B.1.c. Notwithstanding the prohibitions outlined in subparagraph B.1.b. above, if Tower emergency maintenance work must be performed where there is an accumulation of snow, ice, or other slippery material, Tenant will implement safe work practices (equipment, practices, and procedures) that address the hazards known to be associated with Tower work to minimize the associated risk to persons while working on the Tower structure and the support structure to which it is affixed, where applicable.

B.2. "Climbing Facility" means a component specifically designed or provided to permit access to the Tower structure, such as a fixed ladder, step bolt, or other structural member.

B.3. "Competent Person" means a person who is trained to identify existing and predictable hazards in the surroundings or working conditions that are hazardous or dangerous to persons and who has authorization from Tenant or Tenant's contractor to take prompt corrective measures to eliminate them, including halting the work as required by the rules in this exhibit.

B.4. "Elevated (High-Angle) Rescue" means the process by which methods and equipment are used to gain access to and egress from the location of an injured person on the Tower structure and lower both the injured person and the rescuer safely to the ground.

B.5. "Fall Protection Equipment" means the personal equipment that persons use in conjunction with fall protection systems, including connectors, body belts or body harnesses, lanyards, and deceleration devices.

B.6. "Ladder Safety System" means an assembly of components whose function is to arrest the fall of a user, including the carrier and its associated attachment elements (e.g., brackets, fasteners), the Safety Sleeve, and the body support and connectors, wherein the carrier is permanently attached to the climbing face of the ladder or immediately adjacent to the structure.

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B.7. "100% Fall Protection" means each person exposed to fall hazards above six feet while ascending, descending, or moving point to point must be protected at all times by fall protection as described in section E. below.

B.8. "Qualified Climber" means a person who has, by virtue of knowledge, training, and experience, been deemed qualified in writing by Tenant to perform Tower work.

B.9. "Qualified Person" means a person possessing a degree; certificate; professional standing; or knowledge, training, and experience in the field of Communications Tower work and who has demonstrated to Tenant or Tenant's contractor the ability to resolve problems relating to the subject matter, the work, or the project.

B.10. "Safety Sleeve" means the part of a Ladder Safety System consisting of the moving component with locking mechanism that travels on the carrier and makes the connection between the carrier and the body support.

B.11. "Site" means the Tower and the surrounding land or property where Tower work is being performed.

B.12. "Step Bolt" means a bolt or rung attached at intervals along a structural member and used for foot placement during climbing or standing.

B.13. "Tower Construction" means the building of a new Tower or structure or the installation of new equipment on an existing Tower or structure.

B.14. "Tower Emergency Maintenance Work" means the repair, restoration, or replacement of any preexisting device installed on the Tower in the interest of public safety, such as aviation signaling devices and equipment used to transmit or receive broadcast signals.

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B.15. "Tower Inspection" means the procedure in which a person climbs the Tower or rides the structure's elevator to visually inspect the Tower for potential problems and test for Tower plumbness and guy cable tension.

B.16. "Tower Maintenance Work" means the replacement in kind of any device on an existing Tower, the repair of existing equipment, and painting.

C. Tenant Responsibilities

C.1. Tenant will require its employees, agents, and contractors to adhere to Acceptable Conditions for Access, as defined above, before climbing the Tower at heights above six feet.

C.2. Tenant will ensure that at least two persons, including at least one Competent Person, are on the Site at all times when anyone is exposed to fall hazards above six feet, provided, however, Tenant will not be required to have more than two persons on the Site at any given time.

C.3. A Competent Person will visually inspect the Tower base for damage, deterioration, structural deficiencies, and functionality of safety features and anchorages before persons are allowed to climb the Tower at heights above six feet. Additionally, Tenant will ensure that the Tower is visually inspected for these items as it is ascended to the elevation point where work is being performed.

D. Hazard Identification and Assessment

D.1. In addition to the inspections required by paragraphs C.3. above and E.2. below, Tenant will conduct a hazard assessment to identify, assess, and control exposure to hazards as required by the standards in this exhibit and any other applicable state or federal statutes, rules, or regulations.

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D.2. Tenant will perform and document the hazard assessments required by these standards—

D.2.a. initially and daily for each Site before permitting persons to climb the structure and

D.2.b. when safety and health information or change in workplace conditions indicates that a new or increased hazard may be present.

D.3. The hazard assessments required by these standards will—

D.3.a. be performed by a Competent Person;

D.3.b. evaluate new equipment, materials, and processes for hazards before they are introduced into the workplace; and

D.3.c. identify meteorological conditions that could affect work at heights above six feet on a tower, such as wind, rain, snow, or ice.

D.4. If hazards are identified, Tenant will assess the severity of identified hazards and implement means to control such hazards, including providing persons with personal protective equipment ("PPE") designed to control the identified hazards and ensuring the proper use of the PPE by the persons.

E. Fall Protection

E.1. General. Before anyone climbs the Tower at heights above six feet, Tenant will ensure that 100% Fall Protection systems compatible with the tasks assigned are provided, used, and maintained. The rules in this section will not require the retrofitting of Communications Towers, provided that persons who are exposed to fall hazards above six feet while performing work on Communications Towers are protected from such hazards by means of a 100% Fall Protection system.

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E.2. Preclimb Planning and Inspection. In addition to the criteria for preclimb planning and inspection included in paragraph E.7. below, Tenant will ensure that the following items occur before persons climb the Tower at heights above six feet:

E.2.a. All climbing jobs will be planned by a Competent Person.

E.2.b. All climbing facilities will be visually inspected daily at the Tower base by a Competent Person for rust, corrosion, deterioration, or other hazards. Additionally, Tenant will ensure that the climbing facilities are visually inspected for these items as it is ascended, to the elevation point where work is being performed. If any such hazard is identified during this inspection, persons will not use the Climbing Facility until such hazards are abated.

E.2.c. A Competent Person will ensure that all Fall Protection Equipment is inspected before each use for wear, damage, defect, or other deterioration by persons who have been trained in accordance with section J. below. Defective equipment will be identified as defective and immediately removed from service.

E.2.d. Components of a fall protection system and the Fall Protection Equipment used by persons will be compatible with one another and will be used in accordance with the manufacturer's recommendations.

E.2.e. Tenant will ensure that the planning and inspections are performed and documented. The documentation will be maintained on the Site while work is being performed and thereafter by Tenant at its place of business. The documentation will include the date of the planning and inspection, the name of the Competent Person performing the planning and inspection, and the Site location.

E.3. Fall Protection Systems. To comply with the requirements of paragraphs E.1. and E.2. above, Tenant may permit persons to use the fall protection systems described in paragraphs E.4. through E.7. below. If the fall protection systems described therein are not

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present on the Tower, Tenant will not permit persons to climb the Tower at heights above six feet unless—

E.3.a. an alternative means of 100% Fall Protection is used that is at least as effective as the fall protection systems described in paragraphs E.4. through E.7. below;

E.3.b. an alternative means of access to the work area is used such as an aerial lift or elevated work platform; or

E.3.c. Tenant can demonstrate that the requirements for a fall protection plan under paragraph E.8. below have been met.

E.4. Guardrail Systems. Tenant will ensure that guardrail systems and their components that are used by persons as a means of 100% Fall Protection conform to the criteria in 29 C.F.R. section 1926.502(b).

E.5. Personal Fall Arrest Systems ("PFAS"). Tenant will ensure that personal fall arrest systems ("PFAS") and their components that are used by persons as a means of 100% Fall Protection conform to the criteria in 29 C.F.R. section 1926.502(d) and are used according to the manufacturer's recommendations. Tenant will ensure that Step Bolts and attachment points to the structure, when used by persons as an anchorage as part of a PFAS, are designed to meet the requirements of an approved anchorage in accordance with 29 C.F.R. section 1926.502(d) and are designed to ensure the connector will not slip off the end of the Step Bolt.

E.6. Positioning Device System. Tenant will ensure that positioning device systems and their components that are used by persons as a means of 100% Fall Protection conform to the criteria in 29 C.F.R. section 1926.502(e).

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E.7. Ladder Safety Systems. Tenant will ensure that, in addition to the applicable criteria in 29 C.F.R. part 1926, subpart X, Ladder Safety Systems and related support systems for fixed ladders that are used by persons as a means of 100% Fall Protection conform to the following criteria:

E.7.a. Before any persons climb the structure, Tenant will ensure that the persons have tested the Ladder Safety System for proper operation and that all components used with the Ladder Safety System are compatible.

E.7.b. To perform the test required by subparagraph E.7.a. above, the persons will—

i. approach the ladder at the base and connect to the functional safety;

ii. climb the system to a height less than six feet;

iii. forcibly engage the device without letting go of the ladder;

iv. if the device functions as intended, begin the ascension;

v. if the device does not function properly, immediately descend the structure and not use the device until it functions properly; and

vi. if a ladder is obstructed, inhibiting the effective use of the Ladder Safety System, use an alternative means of 100% Fall Protection that is at least as effective as the types of fall protection described by this rule.

E.8. Fall Protection Plan. This paragraph applies when persons are working on a structure where no adequate tie-off anchorage point exists, the fall protection systems described in paragraph E.3. above are not feasible or create a greater hazard, and the work cannot be completed using an alternative means of access to the work area such as an aerial

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lift or elevated work platform. If Tenant demonstrates the foregoing conditions are present, then in addition to the criteria in 29 C.F.R. section 1926.502(k), Tenant will conform to the following provisions:

E.8.a. Tenant will ensure that each person under the fall protection plan has been trained as a Qualified Climber.

E.8.b. The fall protection plan will be made available and communicated to exposed persons before the persons begin work, and such communication will be documented.

E.8.c. The fall protection plan will identify each location on the Tower structure where fall protection methods as described in paragraph E.3. above cannot be used. As soon as adequate tie-off anchorage points or other fall protection systems can be established, Tenant will use any of the fall protection systems described in paragraph E.3.

E.9. Emergency and Rescue Procedures. Tenant will establish procedures for rescue of persons in the event of an emergency, which will include whether Tenant will designate its own persons to perform the rescue procedures or whether Tenant will designate a third party to perform the rescue procedures. The procedures will be documented and available for review by the Deputy Commissioner of Labor for Occupational Safety and Health or his designee, upon request.

E.10. Tenant to Perform Rescue Procedures. Tenant will take the following measures:

E.10.a. Ensure at least two trained and designated rescue persons or contractors are on the Site when persons are working at heights over six feet on the Tower, provided, however, where there are only two persons on the Site, Tenant may comply with this requirement if one person is a trained and designated rescue person and one person has received documented orientation outlining steps to take in an emergency.

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E.10.b. Ensure that personal protective equipment ("PPE") and Elevated (High–Angle) Rescue equipment needed to conduct elevated rescues are provided, used, and maintained by the designated rescue persons.

E.10.c. Train designated rescue persons so they are proficient in the use and maintenance of PPE and Elevated (High–Angle) Rescue equipment needed to conduct elevated rescues or contract with persons with such proficiency.

E.10.d. Train designated rescue persons to perform assigned rescue duties to ensure that they become competent to perform such duties, including conducting simulated rescue operations at least once every twelve months, or contract with persons with such competency.

E.11. Third Party to Perform Rescue Procedures. If Tenant designates a third-party rescue and emergency service to provide Elevated (High-Angle) Rescue and emergency services, Tenant will take the following measures:

E.11.a. Obtain verification from the third-party rescue team or service that it is able to respond to a rescue summons in a timely manner.

E.11.b. Obtain verification from the third-party rescue team or service that it is proficient with rescue-related tasks and equipment as they relate to rescuing climbers from elevated heights on communications structures.

E.11.c. Select a rescue team or service from those evaluated that has verified it has the capability to reach the victims and is equipped for and capable of performing the needed rescue services.

E.11.d. Provide the selected rescue team or service with contact information regarding all Towers/structures from which rescue may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations as it deems necessary.

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E.11.e. Before the first day on which persons perform work at heights over six feet on the Tower, inform the selected rescue team or service of the Site and location of the Towers to be climbed, the hazards identified on the Site, the number of persons that will climb the Towers, the heights at which persons will be working, the names and telephone numbers for any Tenant contacts, and any other information that is requested by the rescue team or service.

E.12. First Aid/CPR Training and Supplies. In addition to the requirements of 29 C.F.R. sections 1910.151 and 1926.50, Tenant will ensure that at least two persons on the Site are trained and hold current certifications in basic first aid and cardiopulmonary resuscitation ("CPR") issued by the American Red Cross or any other organization whose standards are equivalent to the American Red Cross, provided, however, where there are only two persons on the Site, Tenant may comply with the requirements of this paragraph if one person is trained and holds current certifications in basic first aid and CPR.

F. Nonionizing Radiation

F.1. General. Tenant will ensure that persons performing work on Communications Towers are not exposed to radio frequency ("RF") electromagnetic fields in excess of the Federal Communications Commission ("FCC") maximum permissible exposure ("MPE") limits for exposure as prescribed in 47 C.F.R. section 1.1310.

F.2. Protection from Radiation Exposure. Persons will not enter areas where RF exposure levels are above the general population/uncontrolled MPE limits described in 47 C.F.R. section 1.1310 unless they understand the potential for exposure and can exercise control over the exposure.

F.3. Control Procedures. Before persons perform work in areas on a Communications Tower where RF exposure levels exceed the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310, Tenant will enact and enforce written control procedures that pro-

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vide for the reduction, elimination, avoidance, or protection from such RF exposure levels. These written control procedures will include the following:

F.3.a. Reducing the transmitter power to a level that ensures RF exposure levels in areas where persons are working do not exceed the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310 and that the transmitter power level is not increased until all persons have ceased working in those areas. If this method is chosen, the transmitter power will be locked out and tagged out at the reduced level by a Competent Person in accordance with 29 C.F.R. section 1910.147. Before removing lock-out/tag-out devices and restoring the original transmitter power level, all persons will be notified, and the work area will be checked to ensure that all persons have been safely positioned and removed.

F.3.b. If the transmitter power level in areas where persons are working cannot be reduced and maintained at a level that ensures RF exposure levels do not exceed the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310, the transmitter power will be locked out and tagged out by a Competent Person in accordance with 29 C.F.R. section 1910.147. Before removing lock-out/tag-out devices and restoring the transmitter power level, all persons will be notified, and the work area will be checked to ensure that all persons have been safely positioned and removed.

F.3.c. If the transmitter power level cannot be reduced or eliminated, Tenant may permit persons to access areas where the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310 are exceeded if it implements engineering or administrative controls that comply with the FCC's regulations concerning such exposure, including limiting the duration of the exposure and using monitoring equipment, RF protective clothing, and other related PPE.

F.3.d. If Tenant cannot ensure that the conditions in subparagraph F.3.a., F.3.b., or F.3.c. above are met, persons will not be permitted to access areas where RF exposure levels exceed the occupational/controlled MPE values stated in 47 C.F.R. section 1.1310.

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F.4. Use of Controls. Before commencing work on a Communications Tower, a Competent Person will assess potential RF hazards of areas that may be accessed by persons in the course of their work and post temporary signage to indicate areas where the RF hazard exceeds the general population/uncontrolled MPE limits for exposure set forth in 47 C.F.R. section 1.1310. Temporary signage will remain in place while work is performed and the hazard exists.

F.5. RF Safety Program. When persons are exposed to RF fields in excess of the general population/uncontrolled MPE limits established in 47 C.F.R. section 1.1310 as a consequence of their work, Tenant will develop, implement, and maintain a written safety and health program with Site-specific procedures and elements based on the electromagnetic radiation hazards present, in accordance with these standards.

G. Hoists

Hoists used during the construction, alteration, repair, maintenance, or demolition of Communications Towers will meet the following requirements:

G.1. All hoists will meet the requirements set forth in this rule and 29 C.F.R. parts 1910, subpart N, and 1926, subpart N, where applicable.

G.2. All hoists will meet applicable requirements for design, construction, installation, testing, inspection, maintenance, and operation as prescribed by the manufacturer or a licensed professional engineer.

G.3. Tenant will maintain at the work Site the operating manual developed by the manufacturer for the specific make and model of hoist being used, as well as documentation for any inspection, testing, and operator training certification required by the rules in this section.

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G.4. Tenant will not operate or permit to be operated a hoist that Tenant knows, or reasonably should know, will expose persons to an unsafe condition that is likely to result in personal injury or property damage.

H. Gin Poles

H.1. Rigging Equipment

H.1.a. Wire rope, slings, chains, shackles, turnbuckles, links, hooks, sheaves, rotating rooster heads, blocks, and hoists used in a gin pole lifting arrangement will meet the manufacturer's safe working load limits. In addition, each component will have a nominal breaking strength of no less than five times the static load applied. Consideration for end fitting losses and actual positioning of connecting parts will be given.

H.1.b. Lugs or other devices for lifting or attaching the gin pole in position will be designed with load and resistance factors appropriate for their intended use.

H.1.c. Only alloy chains marked by the manufacturer with an 8, a T, or an A, rated for lifting, will be used.

H.1.d. Only quenched and tempered hooks and shackles will be used. The manufacturer's load rating will be stamped on the product.

H.1.e. The breaking strength of the sheave will equal or exceed the breaking strength of the wire rope intended for the sheave.

H.2. Gin Pole Use

H.2.a. A user's gin pole load chart will be provided for each pole.

H.2.b. Any special engineered pick that is outside of the load chart will be allowed only at the direction of a licensed professional engineer. Monitoring and measuring condi-

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tions, as specified by a licensed professional engineer, will be provided and used during all special engineered picks.

H.2.c. Modifications or repairs of a gin pole will be made with like or similar materials to meet or exceed the original specifications. Modifications or repairs will be recertified by a licensed professional engineer.

H.2.d. A mechanism will be in place to prevent the gin pole from tipping during the jumping process.

H.3. Wire Rope. Wire rope used for rigging will be as follows:

H.3.a. Compatible with the sheaves of the rooster head and hoisting blocks.

H.3.b. Lubricated in accordance with manufacturer specifications to prevent corrosion and wear.

H.3.c. End connections will be terminated per industry and manufacturer's specifications.

H.3.d. Wedge sockets will have a minimum tail length of one rope lay with a properly torqued clip attached to prevent accidental disengagement.

H.3.e. Flemish eyes will contain heavy-duty thimbles of appropriate size for the wire rope diameter and will have a minimum tail length of one rope lay secured with a properly torqued clip at its end.

H.4. Inspections

H.4.a. Gin poles will have a documented inspection annually by a Qualified Person.

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H.4.b. In addition to the annual inspection, Tenant will designate a Competent Person who will visually inspect the gin pole and rigging before each use and during use to make sure it is in safe operating condition. Any deficiencies will be repaired before use continues.

H.4.c. During each inspection, the Qualified Person or Competent Person will—

i. inspect the legs and bracing members for bends or distortion;

ii. inspect the straightness tolerances for the overall assembly (including leg and bracing members);

iii. visually inspect the welds for quality, deformation, cracks, rust, or pitting or loss of cross-sectional area;

iv. inspect the members for excessive rust or pitting or loss of cross-sectional area;

v. inspect the sling attachment points for distortion, wear, cracks, and rust;

vi. ensure that proper bolts are used and all associated hardware is in good condition;

vii. inspect side plates on rooster heads for distortion or other damage;

viii. inspect all attachment hardware, including rigging and parts such as cables, slings, and sling attachment points, shackles, hooks, and sockets for wear, distortion, cracks, and rust; and

ix. ensure that all problems identified during the inspection are corrected before placing the gin pole into service.

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I. Recordkeeping

To fulfill responsibilities under the provisions of the rules in this section, Tenant will, upon request, provide the Deputy Commissioner of Labor for Occupational Safety and Health or his designee access to the following records:

I.1. Training Records. All material related to Tenant's training and education program, pursuant to section J. below.

I.2. Medical Records and Nonionizing Radiation Exposure Records. All medical records (in accordance with 29 C.F.R. section 1910.1020(d)(1)(i)) and material related to each analysis using exposure or medical records (in accordance with 29 C.F.R. section 1910.1020(d)(1)(iii)).

I.3. Equipment Inspections and Testing Records. All material related to the modification, repair, test, calibration, or maintenance service of all equipment.

J. Training

J.1. Persons working at heights above six feet on a Communications Tower must be approved for such work in advance by a Qualified Person.

J.2. Competency of Trainer. Training of persons in Communications Tower work will be performed by or under the supervision of a Qualified Person.

J.3. Written Work Procedures

J.3.a. Tenant's written work procedures will be provided to persons as part of their training.

J.3.b. Pictures and symbols may be used as a means of instruction if understanding is improved using this method.

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J.3.c. Manufacturers' operating manuals for personnel hoisting systems satisfy the requirement for operating procedures for the respective equipment or can serve as the basis for these procedures.

J.4. Hazardous Materials Training. Persons required to handle or use flammable liquids, gases, or toxic materials will be instructed in the safe handling and use of these materials and made aware of the specific requirements contained in 29 C.F.R. sections 1926.55 and 1910.1200, as applicable.

J.5. Fall Protection Training

J.5.a. Tenant will provide a training program for each person who might be exposed to fall hazards.

J.5.b. The program will enable each person to recognize the hazards of falling and will train each person in the procedures to be followed to minimize these hazards.

J.5.c. Tenant will ensure that each person has been trained by or under the supervision of a Qualified Person in the following areas:

i. the nature of fall hazards in the work area;

ii. the correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used;

iii. the correct procedures for inspecting Fall Protection Equipment for wear, damage, defect, or deterioration;

iv. climbing safety procedures;

v. the use and operation of the fall protection systems used by Tenant, as described in these standards;

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vi. the role of each person in any safety monitoring system being used;

vii. the correct procedures for the handling and storage of equipment and materials and the erection of overhead protection;

viii. the role of persons in fall protection plans; and

ix. the compatibility of Fall Protection Equipment and fall protection systems.

J.6. Hoist Operator Training. Tenant will maintain documentation that the hoist operator has practical training on the hoist he is operating. Training of hoist operators will meet the requirements of 29 C.F.R. section 1910.179 and part 1926, subpart N.

J.7. RF Training

J.7.a. All persons exposed in excess of the general population/uncontrolled MPE limits stated in 47 C.F.R. section 1.1310 will receive RF hazard awareness training by or under the supervision of a Qualified Person in the following areas:

i. MPE limits for occupational/controlled exposure;

ii. recognition of RF exposure sources in Communications Tower work;

iii. proper use and interpretation of RF exposure;

iv. work procedures to avoid excessive RF exposure;

v. proper use of RF protective clothing and other related PPE;

vi. symptoms and health issues related to RF exposure; and

vii. RF exposure first-aid procedures.

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J.7.b. Tenant will ensure that each affected person who works in an electromagnetic energy environment with potential RF exposure in excess of the general population/uncontrolled MPE limits stated in 47 C.F.R. section 1.1310 has access to and understands the specific Site information related to the RF energy and RF fields present at each individual Site.

J.8. Retraining. Unless stated otherwise in this rule, when Tenant or Qualified Person has reason to believe that any person who has already been trained does not have the understanding and skill required to safely perform the work assigned, Tenant will retrain each such person. Retraining is required in any of the following situations:

J.8.a. Changes in the workplace render previous training obsolete.

J.8.b. Changes in the types of fall protection systems or Fall Protection Equipment to be used render previous training obsolete.

J.8.c. Inadequacies in a person's knowledge or use of fall protection systems or Fall Protection Equipment indicate that the person has not retained the requisite understanding or skill.

J.9. Training Records

J.9.a. Tenant will certify that each person has been trained by preparing a certification record which includes—

i. the identity of the person trained,

ii. the signature of Tenant or the Qualified Person who conducted the training, and

iii. the date that training was completed.

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J.9.b. A copy of the training lesson plan for each topic of instruction will be maintained by Tenant.

J.9.c. The certification record will be prepared at the completion of the training required by this rule and will be maintained for the duration of the person's employment.

J.9.d. The most current certification record will be kept available for review by the Deputy Commissioner of Labor for Occupational Safety and Health or his designee, upon request.

J.9.e. Tenant may accept training records or certificates for previous training if Tenant verifies that all training and knowledge is current and applicable to the new person's job duties.

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Form 25-11

Manufactured-Home Community Lease

Notice to Tenant: Chapter 94 of the Texas Property Code governs certain rights granted to a manufactured-home community tenant and obligations imposed on a manufactured-home community landlord by law.

Basic Information

Date:

Landlord:

Landlord's Address:

Landlord's Agent for Official Notices:

Address of Landlord's Agent for Official Notices:

Property Manager:

Property Manager's Address:

Emergency Contact Person:

Emergency Contact Person's Telephone Number:

Tenant:

Tenant's Primary Residential Address:

Tenant's Manufactured Home

Manufacturer:

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Model:

Serial Number:

Label/Seal Number:

Certificate of Title Number:

Size:

Lienholder:

Lienholder's Address:

Premises

Manufactured Home Community Name:

Lot Number:

[Block Number:]

Plat Recording Information:

Lot Address:

Number and Location of Parking Spaces:

Monthly Rent:

Term (months):

Commencement Date:

Termination Date:

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Security Deposit:

Permitted Use: Placement of Tenant's Manufactured Home for use as a private residence

Occupants (other than Tenant):

Utilities to Be Provided by Landlord:

Identification of Addenda Relating to Submetering of Utility Services:

[Expiration Date of Temporary Zoning Permit:]

A. Definition

"Rent" means Monthly Rent plus any other amounts of money payable by Tenant to Landlord.

B. Tenant's Obligations

B.1. **Tenant agrees to—**

B.1.a. Lease the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

B.1.b. Accept the Premises in their present condition "AS IS," the Premises being currently suitable for Tenant's intended Use.

B.1.c. Obey all laws and rules of the Manufactured Home Community relating to Tenant's use and occupancy of the Premises and any common areas.

B.1.d. Pay monthly, in advance, on the first day of the month, the Monthly Rent to Landlord at Landlord's Address.

B.1.e. Pay, as additional Rent, all other amounts due under this lease.

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B.1.f. Pay a late charge of 5 percent of any Rent not received by Landlord by the tenth day of the month in which it is due.

B.1.g. Pay for all utility services used by Tenant and not provided by Landlord.

B.1.h. Allow Landlord to enter the Premises to perform Landlord's obligations, inspect the Premises, and show the Premises to prospective purchasers or tenants.

B.1.i. Repair any damage to the Premises caused by Tenant or Occupants.

B.1.j. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.

B.1.k. Maintain insurance on Tenant's manufactured home and personal property.

B.1.l. Move out of the Premises at the end of the Term.

B.1.m. Pay Rent by check, money order, or other traceable or negotiable instrument.

B.1.n. Give written notice to Landlord of any change in Tenant's Primary Residential Address.

B.2. **Tenant agrees not to—**

B.2.a. Use the Premises other than for the placement of Tenant's Manufactured Home as a residence to be occupied by the named Tenant and Occupants.

B.2.b. Create or permit a nuisance or interfere with any other tenant's use of its Premises.

B.2.c. Alter the Premises.

B.2.d. Allow a lien to be placed on the Premises.

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B.2.e. Assign this lease or sublease any portion of the Premises without Landlord's written consent.

C. Landlord's Obligations

Landlord agrees to—

C.1. Lease to Tenant the Premises for the entire Term beginning on the Commencement Date and ending on the Termination Date.

C.2. Obey all laws relating to Landlord's operation of the Manufactured Home Community.

C.3. Provide the utilities specified in the lease.

C.4. Use reasonable efforts to maintain and make repairs to the common areas, utility lines in the Manufactured Home Community except those maintained by a public utility or political subdivision, the roads within the Manufactured Home Community, and conditions on the Premises that would materially affect the physical health or safety of an ordinary tenant of the Manufactured Home Community and to maintain an individual mailbox for Tenant and services for garbage and solid waste removal. Landlord will not be required to repair a condition unless Tenant notifies Landlord of the condition and Tenant has paid all Rent then due. Landlord will not be required to repair conditions caused by Tenant or Occupants, unless caused by normal wear and tear, and Landlord will not be required to maintain or make any repairs to Tenant's Manufactured Home placed on the Premises.

C.5. Return the Security Deposit to Tenant on or before the thirtieth day after the date Tenant surrenders the Premises, after subtracting from the Security Deposit all amounts applied to cure any breach of the lease by Tenant as provided below, provided that Tenant has given Landlord written notice of Tenant's new address.

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C.6. At least sixty days before the date the Term expires, give Tenant written notice to vacate the Premises or an offer of lease renewal specifying the proposed monthly rent and any change of lease terms together with a statement notifying Tenant that the failure of Tenant to reject the offer of lease renewal not later than the thirtieth day before the date the Term expires will result in the automatic renewal of this lease as modified by the changes specified in the offer of lease renewal.

C.7. At least 180 days before a change of the Manufactured Home Community's land use, (a) give written notice of nonrenewal to Tenant and, if the addresses are provided to Landlord in writing, to the owner of the Manufactured Home, if different from Tenant, and any Lienholder; and (b) post a notice in a conspicuous place in the Manufactured Home Community, specifying the date that the land use will change.

D. General Provisions

Landlord and Tenant agree to the following:

D.1. Casualty/Condemnation. If the Premises or the Tenant's Manufactured Home is damaged by fire or other casualty or the Premises are condemned, either Landlord or Tenant may terminate this lease by notifying the other. Any Rent prepaid by Tenant will be returned to Tenant on termination.

D.2. Default by Landlord/Events. Defaults by Landlord are failing to comply with any provision of this lease within thirty days after written notice and failing to remedy a condition that materially affects the physical health or safety of an ordinary tenant within ten days after written notice, unless such condition results from Tenant's actions.

D.3. Default by Landlord/Tenant's Remedies. Tenant's remedies for Landlord's default are to sue for damages and, if Landlord does not remedy a condition (not resulting from Tenant's actions) that materially affects the physical health or safety of an ordinary

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tenant for thirty days after notice, terminate this lease. Tenant may not terminate under this paragraph while in arrears for Rent.

D.4. Grounds for Eviction of Tenant. Landlord may begin eviction proceedings against Tenant if Tenant fails to remove Tenant's Manufactured Home from the Premises and otherwise vacate the Premises, after Landlord terminates this lease for one of the following grounds:

D.4.a. Violation of Lease Provisions or Community Rules. Tenant's failure to comply within ten days after written notice with any provision of this lease or any rule of the Manufactured Home Community established by Landlord.

D.4.b. Abandonment. Tenant's vacating or abandoning of Tenant's Manufactured Home or the Premises.

D.4.c. Nonpayment of Rent. Tenant's failure to timely pay Rent in the aggregate amount equal to at least one Monthly Rent within ten days after written notice of the delinquent Rent.

D.5. Landlord's Recovery of Rent and/or Damages for Tenant's Default

D.5.a. If Tenant is in arrears on the payment of Rent and Landlord has terminated Tenant's possession, Landlord may sue Tenant for Rent as it accrues and periodically take judgments without prejudice to sue for Rent that may accrue in the future. Landlord has a duty to mitigate Rent as follows: within thirty days of Landlord taking possession, (i) place a "For Lease" sign at the Premises, (ii) place the leased Premises on Landlord's inventory of available space, (iii) make Landlord's inventory available to area brokers on a monthly basis, (iv) advertise the Premises for lease in a suitable trade journal or newspaper in the county where the Premises are located at least once per month, and (v) show the Premises to prospective tenants who request to see it. Landlord is only under a duty to show the Premises as built and

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for the remainder of the Term of the lease. If Landlord has made these mitigation efforts, Landlord and Tenant agree that Landlord has made objectively reasonable efforts to mitigate the loss of Rent as a result of the default of Tenant.

D.5.b. If Tenant has anticipatorily breached the lease and Landlord has terminated the lease, Landlord may sue Tenant for damages for Rent that may accrue for the remainder of the Term of the lease. The measure of damages is the difference between the Rent for the remainder of the Term and the fair market value of the Premises discounted to its present value. Nothing in this section shall prevent Landlord from suing for Rent as it accrues under D.5.a. above and suing for damages for Rent that will accrue through the end of the lease Term under this section.

D.6. Security Deposit. If Tenant defaults, Landlord may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Landlord as a result of the default.

D.7. Renewal of Lease. If Tenant fails to reject Landlord's offer to renew this lease at least thirty days before the expiration of the Term, this lease will automatically renew under the modified terms offered by Landlord beginning on the first day after expiration of the Term.

D.8. Holdover. If Tenant does not vacate the Premises following termination of this lease, Tenant will become a tenant at will and must relocate Tenant's Manufactured Home and otherwise vacate the Premises on receipt of notice from Landlord. Unless this lease is renewed, no holding over by Tenant, whether with or without the consent of Landlord, will extend the Term.

D.9. Alternative Dispute Resolution. Landlord and Tenant agree to mediate in good faith before filing a suit for damages.

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D.10. Attorney's Fees. If either party retains an attorney to enforce this lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and any other costs.

D.11. Venue. Venue is in the county in which the Premises are located.

D.12. Entire Agreement. This lease, its exhibits and riders, [and] any addenda relating to submetering of utility services [**include if applicable:** , and the Manufactured Home Community rules] are the entire agreement of the parties concerning the lease of the Premises by Landlord to Tenant. **LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS ABOUT THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OR OPERATION OF THE PREMISES OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS SPECIFICALLY SET FORTH IN THIS LEASE. AS AN INDUCEMENT TO LANDLORD TO ENTER INTO THIS LEASE, TENANT EXPRESSLY ACKNOWLEDGES AND WARRANTS THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE AND TENANT IS NOT RELYING ON ANY REPRESENTATIONS NOT CONTAINED IN THIS LEASE, ITS EXHIBITS, RIDERS, [AND] ADDENDA [include if applicable: , AND RULES].**

D.13. Amendment of Lease. This lease may be amended only by an instrument in writing signed by Landlord and Tenant.

D.14. Limitation of Warranties. THERE ARE NO IMPLIED WARRANTIES OF SUITABILITY, OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.

D.15. Notices. Any notice required or permitted under this lease must be in writing. Any notice required by this lease will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended

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recipient at the address shown in this lease. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.16. Texas Property Code. Landlord and Tenant each acknowledge that chapter 94 of the Texas Property Code, which deals with manufactured-home community tenancies, affords certain rights and imposes certain duties on them.

D.17. Abandoned Property. Landlord may retain, destroy, or dispose of any property abandoned on the Premises at the end of the Term.

Attach exhibits, riders, or addenda or include additional clauses or lists as deemed necessary, e.g., community rules or clauses from form 25-13 in this chapter.

_____

[Name of landlord]

_____

[Name of tenant]

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Form 25-12

This disclosure is required by Tex. Prop. Code § 94.051. The notice to prospective tenant must be prominently printed in at least ten-point type. Tex. Prop. Code § 94.051.

Manufactured-Home Community Disclosure

Application Date:

Landlord:

Landlord's Address:

Prospective Tenant:

Prospective Tenant's Address:

Premises

Manufactured Home Community Name:

Lot Number:

[Block Number:]

Prospective Tenant is applying to lease the Premises. Prospective Tenant acknowledges that on the Application Date Landlord has given to Prospective Tenant a copy of the proposed lease [**include if applicable:** and a copy of the rules of the Manufactured Home Community].

Notice to Prospective Tenant

You have the legal right to an initial lease term of six months. If you prefer a different lease period, you and your landlord may negotiate a shorter or longer lease period. After the initial lease period expires, you and your landlord may negotiate a new lease term by mutual

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agreement. Regardless of the term of the lease, the landlord must give you at least 60 days' notice of a nonrenewal of the lease, except that if the manufactured home community's land use will change, the landlord must give you at least 180 days' notice. During the applicable period, you must continue to pay all rent and other amounts due under the lease agreement, including late charges, if any, after receiving notice of the nonrenewal.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

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Form 25-13

Additional Clauses for Leases

Subordination

Clause 25-13-1

Landlord subordinates its security interest and liens to purchase-money security interests in Tenant's personal property.

Base Rent Adjustment

Clause 25-13-2

Beginning one year from the Commencement Date, the Base Rent will be adjusted on each anniversary of the Commencement Date (the "Adjustment Date") to reflect increases in the Consumer Price Index for "All Urban Consumers, U.S. City Average, All Items," issued by the Bureau of Labor Statistics of the United States Department of Labor.

a. The adjustments in the Base Rent will be determined by multiplying the Base Rent specified in the lease ("Initial Base Rent") by a fraction, the numerator of which is the index number for the last month before the adjustment and the denominator of which is the index number for the first month of the first year of the Term. If the product is greater than the Initial Base Rent, Tenant will pay this greater amount as Base Rent until the next rental adjustment. Base Rent will never be less than the Initial Base Rent.

b. Landlord will notify Tenant of each adjustment to Base Rent no later than sixty days after the Adjustment Date.

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Advertisement of Premises

Clause 25-13-3

During the last thirty days of the Term, Landlord may place a sign on the Premises advertising the Premises for rent or sale.

Expansion Option

Clause 25-13-4

Use the following with form 25-14 in this chapter.

Tenant has the option to lease the expansion space identified in the expansion space rider. Tenant may exercise the option by giving Landlord the prior written notice described in the expansion space rider. Tenant will lease the expansion space for the rent stated in the expansion space rider. The expansion space will be accepted in "AS IS" condition with any tenant improvements to be at the expense of Tenant. The expansion space will become part of the Premises and be subject to all the terms of this lease.

Extension Option

Clause 25-13-5

Use the following with form 25-15.

Tenant has the option to extend the Term as provided in the attached extension option rider.

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Waiver of Property Tax Protest Rights

Clause 25-13-6

Tenant waives all rights to protest the appraised value of the Premises or to appeal the same and all rights to receive notices of reappraisal as set forth in sections 41.413 and 42.015 of the Texas Tax Code.

Asbestos

Clause 25-13-7

Buildings or structures located on the Premises may contain asbestos-containing material or presumed asbestos-containing material as defined by OSHA regulations. Tenant has inspected the Premises and conducted such tests and inspections as Tenant deems necessary or desirable. Tenant will provide Landlord with copies of all such test results and inspections. Tenant will comply with all rules and regulations relating to asbestos in performing any maintenance, housekeeping, construction, renovation, or remodeling of the premises, and Tenant will bear all costs related to removal and disposal of asbestos from the Premises.

Tenant's Rebuilding Obligations

Clause 25-13-8

Include the following if the tenant will rebuild everything other than the building shell.

All partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning

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equipment, and other improvements in the Premises, whether installed by Landlord or Tenant.

Include the following if the tenant will rebuild everything installed by the tenant.

Clause 25-13-9

All partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning equipment, and other improvements originally installed in the Premises by Tenant.

Include the following if the tenant will rebuild nonstandard improvements.

Clause 25-13-10

All improvements that are not building standard leasehold improvements. For purposes of this lease, building standard leasehold improvements are all partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning equipment, and other improvements preselected by Landlord for use throughout the [Building/Shopping Center] [and described in Exhibit [**exhibit number/letter**] attached hereto].

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Form 25-14

Expansion Space Rider

Description: Approximately [**number**] square feet as outlined in Exhibit [**exhibit number/ letter**].

Rent: [At the Base Rent applicable to the Premises/At the rate of $[**amount**] per month/ [**specify other rent**]].

Exercise of Option: [At any time during the Term/[**specify other time to exercise option**]].

Prior Written Notice: At least [**number**] days before desired date of occupancy.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

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Form 25-15

Extension Option Rider

Landlord grants Tenant an option to extend the Term for the period from [**date**] to [**date**] (the "Additional Term").

Tenant's rights under this option terminate if (1) the lease or Tenant's right to possession of the Premises is terminated, (2) Tenant assigns its interest in the lease or sublets any portion of the Premises, (3) Tenant fails to timely exercise the option, or (4) default exists at the time Tenant seeks to exercise the option.

Landlord and Tenant agree to the following:

Select one of the following.

1. During the Additional Term the lease will continue as written.

Or

1. During the Additional Term the lease will continue as written except that the Base Rent will be [the prevailing rental rate, at the commencement of the Additional Term, for space of equivalent quality, size, utility, and location, with the length of the extended term and the credit standing of Tenant to be taken into account/[**specify other rent**]].

Continue with the following.

2. The option to extend for the Additional Term must be exercised by written notice delivered to Landlord ninety days before the Termination Date.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

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Form 25-16

Subordination, Attornment, and Nondisturbance Agreement

Date:

Lender:

Lender's Address:

Lease

Date:

Landlord:

Tenant:

Tenant's Address for Notices:

Deed of Trust

Date:

Grantor:

Beneficiary:

Recording information (if known):

Property:

Tenant agrees to the following:

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1. The Lease is subordinate to the Deed of Trust and all modifications, renewals, and extensions.

2. Tenant will not prepay rent more than one month before its regular monthly payment date.

3. Tenant will pay rent as instructed by a notice in substantial compliance with Texas Property Code section 64.056, received by Tenant at Tenant's Address for Notices.

4. Tenant will attorn to the purchaser at any foreclosure sale under the Deed of Trust.

5. Lender will have no obligations and incur no liability under the Lease beyond Lender's equity in the Property.

6. Tenant will not terminate the Lease until Tenant has given written notice of Landlord's default to Lender and Lender has failed to cure the default within thirty days.

Lender agrees to the following:

1. Tenant may change Tenant's Address for Notices by delivering to Lender at Lender's Address a signed notification of the change.

2. The Lease will not be terminated in any foreclosure pursuant to the Deed of Trust.

3. The purchaser at foreclosure sale will take title to the Property subject to the terms of the Lease, and Tenant's occupancy will not be disturbed except in accordance with the Lease.

_____

[Name of lender]

_____

[Name of tenant]

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Include acknowledgments if agreement is to be recorded.

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Form 25-17

Tenant's Subordination to Deed of Trust Lien

Date:

Borrower:

Borrower's Address:

Lender:

Lender's Address:

Lease

Date:

Landlord:

Tenant:

Recording information:

Note

Date:

Maker: Borrower

Payee: Lender

Original principal amount:

Deed of Trust

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Date:

Trustee:

Recording information (if known):

Property:

To secure a loan from Lender, Borrower executed the Note and Deed of Trust, which created a lien on the premises described in the Lease. Tenant is in possession of all or part of the premises. As a condition for closing the loan, advancing the funds, and accepting the Note and Deed of Trust, Lender requires that Tenant make the following agreements and warranties.

In return for valuable consideration, Tenant (1) subordinates the Lease and all of Tenant's rights under it to the Deed of Trust lien, (2) agrees that the Deed of Trust lien will remain superior to the Lease and all of Tenant's rights under it, regardless of the frequency and manner of renewal, extension, or alteration of the Note and the liens securing it, and (3) warrants that the rent specified in the Lease is being paid to Landlord.

_____

[Name of tenant]

Include acknowledgment.

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Form 25-18

Subordination of Landlord's Lien

Date:

Landlord:

Landlord's Address:

Secured Party:

Secured Party's Address:

Tenant:

Tenant's Address:

Secured Property: All items described in attached Schedule 1.

Secured Indebtedness:

Lease

Date:

Landlord:

Tenant:

Property Address:

Square Footage:

Premises:

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Landlord, Secured Party, and Tenant agree to the following:

1. Landlord subordinates Landlord's lien on the Secured Property to the lien of the Secured Party, but only to the extent of the Secured Indebtedness.

2. Landlord will grant Secured Party access to the Premises to remove the Secured Property upon receipt of written notice from Secured Party of Tenant's default as borrower under the Secured Indebtedness. Secured Party may not enter the Premises for any other purpose. In the event of Tenant's default as borrower under the Secured Indebtedness, Tenant authorizes Landlord to grant Secured Party access to the Premises to remove the Secured Property.

3. Secured Party must remove the Secured Property within thirty days after Landlord delivers notice to Secured Party demanding removal. Secured Party will be liable for all repairs resulting from the removal of the Secured Property. Failure to remove the Secured Property within the thirty-day period terminates Landlord's agreements and obligations and gives Landlord the right to remove the Secured Property and dispose of it as Landlord wishes without being obligated in any way to account to Secured Party or to Tenant.

4. Wherever any notice is required under this agreement, the notice must be in writing. Any notice is delivered when actually received by the addressee or, if earlier and regardless of whether actually received or not, when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, or when sent by messenger or courier (but not facsimile or e-mail), addressed to the applicable party at the party's address set forth above.

_____

[Name of landlord]

_____

[Name of secured party]

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[Name of tenant]

Attach Schedule 1 describing Secured Property.

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Form 25-19

Lease Assignment

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Assignor:

Assignee:

Lease

Date:

Landlord:

Tenant:

Premises:

Assignor assigns to Assignee Tenant's interest in the Lease. Assignor agrees that Assignor remains liable on the Lease.

Assignee agrees to assume Tenant's obligations under the Lease and to accept the premises in their present "AS IS" condition.

Landlord consents to this assignment.

_____

[Name of assignee]

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[Name of assignor]

[Name of landlord]

Include acknowledgement(s) as necessary.

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Form 25-20

Tenant's Acceptance Letter

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Tenant acknowledges that—

1. Tenant has taken possession of the Premises.

2. Tenant has inspected the Premises.

3. The Premises are satisfactory to Tenant in the present condition and for the purpose for which they were leased.

4. Tenant has ratified the Lease.

5. Landlord has completed all improvements required by the terms of the Lease to the satisfaction of Tenant [**include if applicable:** except as follows: [**list any improvements not completed**]].

6. The term of this Lease commenced [**date**] and terminates [**date**].

_____

[**Name of tenant**]

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Form 25-21

Tenant Estoppel Certificate

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Addressee:

Tenant certifies to Addressee that—

1. Tenant has accepted and is in possession of the Premises.

2. All required improvements have been completed to the satisfaction of Tenant.

3. Neither Landlord nor Tenant is in default in the performance of the Lease.

4. No rent under the Lease has been paid more than thirty days in advance of its due date.

5. Tenant, as of this date, has no claim of offset against the rent.

6. Tenant understands that Addressee is relying on the representations in this certificate.

7. The current monthly base rent is $[**amount**]. The next payment is due on [**date**].

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8. The Lease is valid, enforceable, and unmodified [**include if applicable:** except as follows: [**list any modifications**]].

_____

[**Name of tenant**]

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Form 25-22

Guaranty

Date:

Lease

Date:

Landlord:

Tenant:

Premises:

Guarantor:

Guarantor's Address:

To induce Landlord to enter into the Lease and for other consideration, Guarantor agrees that—

1. Guarantor guarantees the performance of Tenant's obligations under the Lease.

2. This is a primary, irrevocable, and unconditional guaranty of payment and performance and not of collection and is independent of Tenant's obligations under the Lease.

3. Guarantor will make all payments to Landlord at Landlord's address set forth in the Lease.

4. This guaranty will remain in effect regardless of any modification or extension of the Lease.

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5. Guarantor's obligations will not be diminished by any compromise or release agreed on by Tenant and Landlord or by the discharge, limitation, or modification of Tenant's obligations in any bankruptcy or other debtor relief proceeding.

6. If there is more than one guarantor, the obligations of each guarantor will be joint and several.

7. Texas law applies to the guaranty.

Guarantor waives its rights—

1. To notices of acceptance, modification, extension, and default and any other notice.

2. To claim any defense arising out of lack of diligence; any failure to pursue Tenant; loss or impairment of any right of subrogation or reimbursement; release of any other guarantor or collateral; death, insolvency, or lack of corporate authority of Tenant; and waiver, release, or election, based on Landlord's or Tenant's rights and obligations under the Lease and the enforcement of its terms.

3. Under chapter 43 of the Texas Civil Practice and Remedies Code.

The prevailing party in any dispute arising out of this guaranty will be entitled to recover reasonable attorney's fees.

_____

[Name of guarantor]

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Form 25-23

Sublease

Basic Information

Date:

Sublessor:

Sublessor's Address:

Sublessee:

Sublessee's Address:

Subleased Premises:

Sublease Commencement Date:

Sublease Termination Date:

Sublease Term:

Sublease Rent:

Permitted Sublease Use:

Base Lease

Date:

Landlord:

Tenant:

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Premises:

A. Sublessee's Obligations

A.1. **Sublessee agrees to—**

A.1.a. Sublease the Subleased Premises for the Sublease Term beginning on the Sublease Commencement Date and ending on the Sublease Termination Date.

A.1.b. Pay the Sublease Rent to Sublessor in advance of the first day of each month.

A.1.c. Obey all laws relating to Sublessee's use of the Subleased Premises and terms of the Base Lease as they apply to the Subleased Premises.

A.1.d. Vacate the Subleased Premises and return all keys to the Subleased Premises on termination of this sublease.

A.1.e. INDEMNIFY, DEFEND, AND HOLD SUBLESSOR AND SUBLESSOR'S AGENTS HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE SUBLEASED PREMISES. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF SUBLESSEE'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE SUBLEASE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF SUBLESSOR OR SUBLESSOR'S AGENTS, BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF SUBLESSOR OR SUBLESSOR'S AGENTS.**

A.1.f. Maintain liability insurance for the Subleased Premises and the conduct of Sublessee's business, with Sublessor named as an additional insured, in the amounts stated in the Base Lease.

A.1.g. Maintain insurance on Sublessee's personal property.

A.1.h. Deliver certificates of insurance to Sublessor before the Sublease Commencement Date and thereafter when requested.

A.2. **Sublessee agrees not to—**

A.2.a. Use the Subleased Premises for any purpose other than the Permitted Sublease Use.

A.2.b. Create a nuisance.

A.2.c. Interfere with any other tenant's normal business operations or Landlord's management of the building.

A.2.d. Permit any waste.

A.2.e. Use the Subleased Premises in any way that is extrahazardous, would increase insurance premiums, or would void insurance on the building.

A.2.f. Change Landlord's lock system.

A.2.g. Alter the Subleased Premises.

A.2.h. Allow a lien to be placed on the Subleased Premises.

A.2.i. Assign this sublease or sublease any portion of the Subleased Premises without Sublessor's written consent.

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B. Sublessor's Obligations

Sublessor agrees to—

B.1. Sublease the Subleased Premises to Sublessee for the Sublease Term.

B.2. Comply with Tenant's obligations under the Base Lease.

B.3. Enforce Landlord's obligations under the Base Lease.

B.4. Make available to the Subleased Premises all services and rights provided under the Base Lease.

B.5. Obey all laws relating to Sublessor's operation of the Subleased Premises.

C. General Provisions

Sublessor and Sublessee agree to the following:

C.1. Defaults by Sublessee are (a) failing to pay timely Sublease Rent, (b) abandoning or vacating a substantial portion of the Subleased Premises, and (c) failing to comply within ten days after written notice with any provision of the Base Lease or sublease other than the defaults set forth in (a) or (b).

C.2. Sublessor's remedies for Sublessee's default are to (a) enter and take possession of the Subleased Premises, after which Sublessor may relet the Subleased Premises on behalf of Sublessee and receive the Sublease Rent directly by reason of the reletting, and Sublessee agrees to reimburse Sublessor for any expenditures made in order to relet, (b) enter the Subleased Premises and perform Sublessee's obligations, and (c) terminate this sublease by written notice and sue for damages.

C.3. Default by Sublessor is failing to comply with any provision of this sublease within thirty days after written notice or for such lesser period provided in the Base Lease.

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C.4. Sublessee's remedy for Sublessor's default is to sue for damages and, if the default is the failure to enforce Landlord's obligations under the Base Lease to provide services reasonably necessary for Sublessee to occupy the Subleased Premises, terminate the Sublease.

C.5. This sublease is subordinate to the Base Lease, a copy of which Sublessee acknowledges as received.

C.6. Sublessor may retain, destroy, or dispose of any property left in the Subleased Premises at the end of the Sublease Term.

C.7. Sublessor has all the rights of Landlord under the Base Lease as to Sublessee.

C.8. If either party retains an attorney to enforce this sublease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

If applicable, include additional clauses like those suggested in form 25-13 in this chapter and/or a list of exhibits and riders.

_____

[Name of sublessor]

_____

[Name of sublessee]

Include acknowledgement(s) as necessary.

Consent of Landlord

Landlord consents to this sublease by Sublessor to Sublessee.

_____

[Name of landlord]

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Form 25-24

Landlord's Lien Waiver

Date:

Landlord:

Landlord's Mailing Address:

Tenant:

Tenant's Mailing Address:

Lender:

Lender's Security Agreement of [**date**]:

Premises:

Tenant occupies the Premises under a lease from Landlord and maintains on the Premises personal property that Lender has a security interest in, or lien on, or that Lender owns.

For valuable consideration, Landlord waives all rights to maintain or enforce a statutory or contractual landlord's lien, security interest, or any other claim against the personal property described in Lender's Security Agreement. This waiver binds Landlord's heirs and successors and inures to the benefit of Lender and its successors and assigns.

_____

[**Name of landlord**]

Include acknowledgement as necessary.

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Form 25-25

Notice of Default

[**Date**]

[**Name and address of tenant**]

Re: Lease dated [**date**] (the "Lease"), between [**name**] ("Landlord") and [**name**] ("Tenant"), for [**describe space or give suite number**] at [**address**] ("the Premises")

[**Salutation**]

We represent Landlord in connection with the Lease. You are in default under the Lease for the following reason[s]: [**describe default[s]**]. If you do not cure [this/these] default[s] by [**deadline for cure**], Landlord will pursue [his/her/its] available remedies.

Nothing in this letter waives any rights Landlord may have regarding [this/these] or other defaults. Landlord demands strict and timely compliance with all terms of the Lease, including the timely payment of rent.

Sincerely,

_____

[**Name of attorney**]

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Form 25-26

Termination of Right of Possession Letter

[**Date**]

[**Name and address of tenant**]

Re: Lease dated [**date**] (the "Lease"), between [**name**] ("Landlord") and [**name**] ("Tenant"), for [**describe space or give suite number**] at [**address**] ("the Premises")

[**Salutation**]

By letter dated [**date**], you were notified that you were in default under the Lease. To date, you have not cured the default[s]. Therefore, Landlord has elected to terminate [your right to possess the Premises and to reenter and take possession of the Premises/the Lease].

Landlord demands that you immediately vacate the Premises. [**Include if applicable:** If you do not vacate the Premises before the eleventh day after the date this letter is received and Landlord files suit against you, Landlord may recover attorney's fees.]

[**Include if applicable:** This demand does not constitute a termination or forfeiture of the Lease. Your obligation to pay rent under the Lease continues.]

Nothing in this letter waives any rights Landlord may have regarding [this/these] or other defaults.

Sincerely,

_____

[**Name of attorney**]

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Form 25-27

This notice is to be posted at the premises. It is for use with commercial leases only. *See* Tex. Prop. Code § 93.002. Do not use it with residential leases, which are governed by Tex. Prop. Code § 92.0081.

Lockout Notice Posting

[**Date**]

LANDLORD HAS TERMINATED TENANT'S RIGHT TO POSSESS THIS SPACE AND HAS CHANGED THE LOCKS. TENANT MAY ACQUIRE A NEW KEY, AFTER PAYING ALL PAST-DUE RENT, BY CONTACTING [**name**] AT [**address/telephone number**] DURING [**hours available, which must be during tenant's normal working hours**].

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Form 25-28

This form is to be used for commercial leases only. *See* Tex. Prop. Code § 93.002. Do not use it for residential leases, which are governed by Tex. Prop. Code § 92.0081.

Notice of Change of Locks Letter

[**Date**]

[**Name and address of tenant**]

Re: Lease dated [**date**] (the "Lease"), between [**name**] ("Landlord") and [**name**] ("Tenant"), for [**describe space or give suite number**] at [**address**] ("the Premises")

[**Salutation**]

You are in default under the Lease, and Landlord has changed the locks to the Premises. You may obtain a new key, after paying all past-due rent, during [[**hours available, which must be during tenant's normal working hours**]/your regular business hours] by contacting [**name**] at [**address/telephone number**].

Sincerely,

_____

[**Name of attorney**]

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Form 25-29

Tenant Improvements Rider to Lease or Work Letter

Terms and Definitions

General Description of Work: [**describe work**]

[Architect/Engineer] Preparing Plans: [**name**]

[Architect/Engineer]'s Address: [**address**]

Contractor: [**name**]

Contractor's Address: [**address**]

Contractor's Insurance

Death/bodily injury:

Property/Builder's risk:

Agreements

A. Preparation of Plans. Within [**number**] days from the execution of this lease, [Landlord/Tenant] will retain the [architect/engineer] to prepare the Plans, specifications, and other material required for completing performance of the Work (the "Plans"). The Plans will be delivered immediately to [Tenant/Landlord], who has [**number**] days to approve the Plans or to indicate any objections to the Plans. If [Tenant/Landlord] has objections to the Plans, it will communicate them to [Landlord/Tenant] within that time. This process will be repeated until the Plans are approved by both Landlord and Tenant. The cost of preparation of the Plans will be borne as follows: [**describe cost arrangement, e.g.,** Landlord will pay for the initial $[**amount**] of the cost and Tenant will pay all excess costs].

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B. Performance of Work. [Landlord/Tenant] will be responsible for retaining Contractor to perform the Work. [Landlord/Tenant/Contractor] will obtain all required permits for the Work. After approval of the Plans, Contractor will be instructed to perform the Work in accordance with the approved Plans and all applicable laws. The cost of performance of the Work will be borne as follows: [**describe cost arrangement, e.g.,** Landlord will pay for the initial $[**amount**] of the cost and Tenant will pay all excess costs].

C. Schedules

1. The parties estimate that the Plans will be approved no later than [**date**]. If the Plans are not approved by that date, the Commencement Date will be extended by the number of days of delay. If the Plans are not approved by [**date**], either party may terminate this lease by notifying the other before approval of the Plans.

2. The parties estimate that it will take [**number**] days to complete the Work. If the Work takes longer to perform and the delay is Tenant's fault, the Commencement Date will be as stated in the lease and Tenant must begin paying Rent on the Commencement Date notwithstanding that the Work is not finished. If the delay is Landlord's fault, the Commencement Date will be extended by the number of days of delay. As provided in paragraph B., [Landlord/Tenant] is responsible for retaining Contractor; accordingly, any delay in performance of the Work that is Contractor's fault will be attributable to [Landlord/Tenant].

D. Changes in Work. Any changes in the Plans or the Work after initial approval of the Plans will require approval of Landlord and Tenant. As part of such approval, the parties must agree on any required changes to the construction schedule and who will bear any increase in cost.

E. Contractor's Insurance. Contractor must maintain insurance reasonably satisfactory to Landlord in the amounts specified in the terms and definitions.

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_____

[Name of landlord]

_____

[Name of tenant]

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Form 25-30

This disclosure is used to warn a tenant about potential risks associated with lead-based paint. The form is based on the notice requirements of 40 C.F.R. § 745.113 and the disclosure form suggested by the Department of Housing and Urban Development; the language should not be altered without a review of the applicable regulations. The heading and text of the notice are required by the regulations to be in bold-faced type.

Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards

[Lease]

Lessor's Name and Address:

Lessee's Name and Address:

Description of Property:

Lead Warning Statement

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

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Lessor's Disclosure

(a) Presence of lead-based paint and/or lead-based paint hazards (check (i) or (ii) below):

☐ (i) Known lead-based paint and/or lead-based paint hazards are present in the housing [**explain, providing the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces**].

☐ (ii) Lessor has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

(b) Records and reports available to Lessor (check (i) or (ii) below):

☐ (i) Lessor has provided Lessee with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).

_____

☐ (ii) Lessor has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Lessee's Acknowledgment (initial)

____ (c) Lessee has received copies of all information listed above.

____ (d) Lessee has received the lead hazard information pamphlet described in 15 U.S.C. section 2686.

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Agent's Acknowledgment (initial)

____ (e) Agent has informed Lessor of Lessor's obligations under 42 U.S.C. section 4852d and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

_____
Lessor Date

_____
Lessee Date

_____
Agent Date

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Form 25-31

This form is used to confirm a landlord's knowledge of the presence or absence of asbestos in the property being leased, as required by 29 C.F.R. §§ 1910.1001 *et seq.*, 1926.1101 *et seq.*

Asbestos Disclosure Notice

[Lease]

Date:

Landlord's Name and Address:

Tenant's Name and Address:

Description of Property:

THIS ASBESTOS DISCLOSURE NOTICE ("NOTICE") IS A DISCLOSURE OF KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT MAY BE DESIRED. THIS NOTICE IS NOT A WARRANTY OF ANY KIND.

Landlord's Disclosure

1. Presence of asbestos-containing or presumed asbestos-containing material (check one):

☐ Known asbestos-containing material is present in the Property (explain).

_____

☐ The Property was constructed before 1981, and presumed asbestos-containing material is present in the Property (explain).

_____

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☐ The Property was constructed after 1980, and Landlord has no knowledge of asbestos-containing material in the Property.

2. Records and reports available to Tenant (check one):

☐ Landlord has provided Tenant with all available records and reports pertaining to asbestos-containing material in the Property (list documents below).

_____

☐ Landlord has no records or reports pertaining to asbestos-containing material in the Property.

Tenant's Acknowledgment

Tenant has received copies of all information listed above. Tenant is aware of Tenant's responsibility to ensure compliance with 15 U.S.C. sections 2641 through 2656 and 29 C.F.R. sections 1910.1001 *et seq.* and 1926.1101 *et seq.*

_____

Landlord Date

_____

Tenant Date

Form 25-32

Real Estate Commission Rider

1. *Commission.* Landlord agrees to pay to the real estate broker named below (Broker) a commission in the amount of [**percent**] percent of the Base Rent.

2. *Payment.* The commission will be paid out of each Base Rent payment if and when actually received by Landlord. If Tenant defaults and any rent due Landlord is collected by means of litigation or with the aid of an attorney, Broker will receive a commission out of Landlord's net recovery in the percentage amount set forth above. Landlord's net recovery is defined as the amount Landlord eventually collects from Tenant less attorney's fees, court costs, out-of-pocket expenses, and costs expended to obtain a new tenant for the remainder of Tenant's term (e.g., broker's commissions and remodeling and refurbishing costs).

3. *Brokers.* Landlord represents that it has had no dealings with any real estate broker in connection with the negotiation of this lease except Broker and knows of no other real estate broker entitled to a commission in connection with this lease. Landlord agrees to pay all real estate commissions due in connection with this lease to Broker. Landlord agrees to indemnify and hold harmless Tenant from any liability or claim arising by, through, or on behalf of Landlord, whether meritorious or not, with respect to any real estate broker not named below. Tenant represents that it has had no dealings with any real estate broker in connection with the negotiations of this lease except Broker and knows of no other real estate broker entitled to a commission in connection with this lease. Tenant agrees to indemnify and hold harmless Landlord from any liability or claim arising by, through, or on behalf of Tenant, whether meritorious or not, with respect to any real estate broker not named below.

4. *Broker Not Party to Lease.* Broker acknowledges that Broker is a party to this lease only for purposes of this Commission Rider and that Landlord and Tenant may modify,

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assign, or terminate this lease without notice to or the consent of Broker as long as Broker's commission rights are not affected.

Date: _____.

_____

[Name of landlord]

_____

[Name of tenant]

_____

[Name of broker]

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Form 25-33

Modification of Lease

Date:

Lease

Date:

Landlord:

Tenant:

Premises

Approximate square feet:

Name of building:

Street address/suite:

City, county, state, zip:

Lease Commencement Date:

Lease Termination Date:

Security Deposit:

Landlord and Tenant agree to the following modifications: [**list modifications.**]

The Lease is ratified as modified.

_____

[**Name of landlord**]

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_____

[Name of tenant]

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Form 25-34

Termination of Lease

Date:

Lease

Date:

Landlord:

Tenant:

Premises

Approximate square feet:

Name of building:

Street address/suite:

City, county, state, zip:

Lease Commencement Date:

Lease Termination Date:

Effective Termination Date:

Security Deposit:

Consideration:

1. Landlord and Tenant ratify the Lease.

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2. Landlord acknowledges receiving from Tenant the following consideration: $[**amount**].

3. The Lease is terminated as of the Effective Termination Date and Tenant agrees to surrender the Premises by that date in accordance with the terms of the Lease.

4. [Tenant's Security Deposit is forfeited to Landlord/Landlord will refund the Security Deposit subject to any charge permitted by the Lease].

_____

[**Name of landlord**]

_____

[**Name of tenant**]

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Form 25-35

Memorandum of Lease

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Landlord:

Landlord's Mailing Address:

Tenant:

Tenant's Mailing Address:

Tenant's Trade Name:

Date of Lease:

Premises: [**Describe or attach legal description as described in lease.**]

Term:

Additional Provisions: The Lease is incorporated by reference and is binding on Landlord and Tenant. If a conflict exists between any term of this Memorandum of Lease and the Lease, the Lease controls.

_____

[**Name of landlord**]

_____

[**Name of tenant**]

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Include acknowledgments.

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Form 25-36

Insurance Addendum to Lease
[Long Form]

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and/or liability insurance policies required below (mark applicable boxes) and such other insurance coverages and/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance or Endorsement		**Minimum Policy or Endorsement Limit**
General Liability Insurance Policies Required of Tenant:		
☐ Commercial general liability	Each occurrence:	$_____
	General aggregate:	$_____
Or		
☐ Business owner's policy	Each occurrence:	$_____
	General aggregate:	$_____

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Required Endorsements to Tenant's General Liability or Business Owner's Policy:

☐	Designated location(s) general aggregate limit	$_____
☐	_____	$_____

Include any other desired endorsements. See chapter 17 in this manual.

Additional Liability Insurance Policies Required of Tenant:

☐	Workers' compensation	Statutory limit
☐	Employer's liability	$_____ each accident for bodily injury by accident/each employee for bodily injury by disease/bodily injury by disease for entire policy
☐	Business auto liability	$_____
☐	Excess liability	$_____
	Or	
☐	Umbrella liability (occurrence basis)	$_____

Property Insurance Policy Required of Tenant:

☐	Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form)	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises

Or

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☐	Business owner's policy	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises

Required Endorsements to Tenant's Causes of Loss—[Special Form/Business Owner's] Policy:

☐	Business income and additional expense	Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months
☐	Equipment breakdown (formerly boiler and machinery)	$_____
☐	Flood	$_____
☐	Earth movement	$_____
☐	Increased limits of ordinance or law coverage to cover increased cost of construction	$_____
☐	Increased limits of debris removal	$_____
☐	Plate Glass	Sufficient limits to cover plate glass
☐	Increased limits for signs	Sufficient limits to cover exterior signage

Include any other desired endorsements. See chapter 17.

2. Comply with the following additional insurance requirements:

   a. The commercial general liability (or business owner's property policy) must be (i) written on an occurrence basis, (ii) endorsed to name of Landlord, Landlord's property manager, if any, and Landlord's Lienholder, if any, as "additional insureds," (iii) include contractual liability under Coverage A sufficient to respond to a broad-form indemnity, (iv) if Tenant operates multiple locations, be endorsed with a Designated Location(s) General Aggregate Limit endorsement, and (v) be primary and noncontributory with Landlord's liability insurance coverage.

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b. The commercial property insurance policies must contain (i) a waiver of subrogation clause in favor of the party not carrying the commercial property insurance [,/and] (ii) waivers of subrogation of claims against Landlord and Lienholder [**include if applicable:** [,/and] (iii) coverage for agreed value to eliminate the coinsurance clause] [**include if applicable:** and (iv) coverage for replacement cost].

c. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

3. Obtain the approval of Landlord and Lienholder with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates, and other evidence of Tenant's Insurance; the amounts of any deductibles or self-insured retentions amounts under Tenant's Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term:

Type of Insurance		**Minimum Policy Limit**	
☐	Commercial general liability (occurrence basis)	Each occurrence: General aggregate:	$_____ $_____
☐	Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form)	100 percent of replacement cost of the [Shopping Center/Building] exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirements of all lessees, and will include waiver of subrogation referenced in paragraph A.2.b.	

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Form 25-37

Insurance Addendum to Lease

[Short Form]

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the following coverages:

   a. Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form) covering Tenant's personal property, fixtures, and leasehold improvements in the Premises, and naming Landlord as "Building Owner Loss Payable."

   b. Business income and extra expense property insurance naming Landlord as an "additional insured" and covering income and ongoing expenses, including rent, for a period of at least twelve months.

   c. Commercial general liability insurance written on an occurrence basis, including contractual liability, covering Tenant's operations within the Premises, naming Landlord, Landlord's property manager, if any, and Landlord's Lienholder, if any, as "additional insured," and having limits of not less than $1,000,000 each occurrence and $2,000,000 general aggregate.

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d. Business auto liability insurance written on an occurrence basis and having a combined single limit of not less than $1,000,000.

e. Workers' compensation insurance in the statutory amount and employer's liability insurance having limits of not less than $500,000 each accident for bodily injury by accident, $500,000 each employee for bodily injury by disease, and $500,000 bodily injury by disease for entire policy. Both policies must have a waiver of subrogation in favor of Landlord.

2. Deliver certificates of insurance and copies of any additional insured and waiver of subrogation endorsements to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

B. Landlord agrees to maintain—

1. Commercial property insurance written on a causes of loss—special form covering the building in which the Premises is located.

2. Commercial general liability insurance written on an occurrence basis, including contractual liability, covering Landlord's operations within the building in which the Premises is located and having limits not less than $2,000,000 each occurrence and $4,000,000 general aggregate.

C. Landlord and Tenant agree that—

1. The commercial property insurance policies maintained by them will contain (a) optional coverage for agreed value to eliminate the coinsurance clause, (b) optional coverage for replacement cost, (c) increased limits of ordinance or law coverage to cover increased cost of construction, (d) increased limits for debris removal coverage, and (e) a waiver of subrogation clause in favor of the party not carrying the commercial property insurance.

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2. The commercial general liability insurance will be primary to the maintaining party and not contributory to any similar insurance carried by the other party and will contain a severability-of-interest clause.

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Chapter 26

Miscellaneous Documents

Form 26-1 Affidavit of Facts Concerning Identity of Heirs 1137

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Form 26-1

This affidavit establishes in the real property records the death of an owner of real property and the status of the heirs of the decedent and is used if there is no will or administration in the probate court. This form is based on the one suggested by the statute. *See* Tex. Est. Code § 203.002.

Affidavit of Facts Concerning Identity of Heirs

Date:

Decedent:

Property:

[First] Spouse:

[Second Spouse:]

Affiant:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My name is [**name of affiant**], and I live at [**address**]. I am personally familiar with the family and marital history of [**name of decedent**], Decedent, and I have personal knowledge of the facts stated in this affidavit.

2. I knew Decedent from [**date**] until [**date**]. Decedent died on [**date**]. Decedent's place of death was [**place of death**]. At the time of Decedent's death, Decedent's residence was [**address**].

3. Decedent's marital history was as follows: [**describe marital history and, if the decedent's spouse is deceased, specify the date and place of the spouse's death**].

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4. Decedent had the following children: [**specify name, birth date, name of other parent, and current address of child or date of death of child and descendants of deceased child, as applicable, for each child**].

5. Decedent did not have or adopt any other children and did not take any other children into Decedent's home or raise any other children, except: [**specify name[s] of child[ren] or state "none"**].

Include the following if the decedent was not survived by descendants.

6. Decedent's mother was: [**specify name, birth date, and current address or date of death of mother, as applicable**].

7. Decedent's father was: [**specify name, birth date, and current address or date of death of father, as applicable**].

Include the following if the decedent was not survived by descendants or by both mother and father.

8. Decedent had the following siblings: [**specify name, birth date, and current address or date of death of each sibling and parents of each sibling and descendants of each deceased sibling, as applicable, or state "none"**].

Include the following if applicable.

9. The following persons have knowledge regarding Decedent, the identities of Decedent's children, if any, and parents or siblings, if any: [**specify names of persons with knowledge or state "none"**].

Continue with the following.

10. Decedent died without leaving a written will. [**Modify statement if the decedent left a written will.**]

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11. There has been no administration of Decedent's estate. [**Modify statement if there has been administration of the decedent's estate.**]

12. Decedent left no debts that are unpaid, except: [**specify debts or state "none"**].

13. There are no unpaid estate or inheritance taxes, except: [**specify unpaid taxes or state "none"**].

14. To the best of my knowledge, Decedent owned an interest in the following real property: [**specify real property in which the decedent owned an interest or state "none"**].

Include the following if applicable.

15. The following were the heirs of Decedent: [**specify names of heirs**].

Continue w th the following.

16. [**Include additional information as appropriate, such as size of the decedent's estate.**]

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Form 26-2

This affidavit resolves ambiguities or discrepancies, such as spelling variations, abbreviations, nicknames, initials, or the use of two or more different names to identify the same person, in the name and identity of the person referred to in the affidavit.

Affidavit of Identity

Date:

Affiant:

[Affiant's Other Name(s):]

Affiant on oath swears that the following statement[s] [is/are] true and [is/are] within the personal knowledge of Affiant:

Select one of the following.

Affiant is sometimes known by Affiant's Other Name[s]. Affiant and the person[s] indicated by Affiant's Other Name[s] are the same person.

Or

Affiant is not the same person as the [**name**] named in [**specify document**].

Continue with the following.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Form 26-3

This affidavit recites marital history and identifies former or present spouses. The affidavit is used to indicate whether property should be classified as separate or community and also may be used to identify potential homestead problems or outstanding life estates in real property.

Affidavit of Marital Status

Date:

Affiant:

Property:

Date of Acquisition:

[Affiant's Spouse:]

[Date of Marriage:]

[Affiant's Former Spouse:]

[Date of Marriage:]

[Date of [Divorce/Death]:]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

Select the applicable paragraph and adapt if necessary.

Affiant acquired title to the Property on the Date of Acquisition. Affiant was then unmarried and has remained unmarried continuously through the date of this affidavit.

Or

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then unmarried. Affiant subsequently married Affiant's Spouse on the Date of Marriage, and they have remained married to each other continuously from then through the date of this affidavit.

Or

Affiant acquired title to the Property on the Date of Acquisition. Affiant was then married to Affiant's Spouse, and they have remained married to each other continuously from then through the date of this affidavit.

Or

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then married to Affiant's Former Spouse. They remained married to each other until they were divorced on the Date of Divorce, and Affiant acquired full title to the Property in the divorce. Affiant has not married again since the divorce.

Or

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then married to Affiant's Former Spouse. They remained married to each other until they were divorced on the Date of Divorce, and Affiant acquired full title to the Property in the divorce. Affiant remained unmarried until marrying Affiant's Spouse on the Date of Marriage, and they have remained married to each other continuously from then through the date of this affidavit.

Or

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then married to Affiant's Former Spouse. They remained married to each other until Affiant's Former Spouse died on the Date of Death, at which time Affiant acquired full title to the Property. Affiant has not married again since that time.

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Or

Affiant acquired title to the Property on the Date of Acquisition, and Affiant was then married to Affiant's Former Spouse. They remained married to each other until Affiant's Former Spouse died on the Date of Death, at which time Affiant acquired full title to the Property. Affiant remained unmarried until marrying Affiant's Spouse on the Date of Marriage, and they have remained married to each other continuously from then through the date of this affidavit.

Continue with the following.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Form 26-4

An oil, gas, and mineral lease affects record title until the lease is properly released of record or it terminates according to its terms. One method of showing that a lease has terminated is to have a release executed by the lessee or the assignee of the lessee and filed in the real property records. If the lessee or assignee cannot be located, an affidavit of nonproduction is another means of demonstrating that a lease has expired. Provisions in oil, gas, and mineral leases typically specify events that terminate the lease. This affidavit evidences expiration of a lease because of nonproduction. It may be required by a purchaser before buying the property, by a lienholder making a loan with the property as collateral, or by a lessee. This affidavit can be modified if the termination is caused by other events specified in the lease.

Affidavit of Nonproduction

Date:

Oil and Gas Lease

Date:

Lessor:

Lessee:

Property:

Primary Term of the lease: [**number**] years

Owner:

[Buyer:]

[Lienholder:]

[Lessee:]

[Title Company:]

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Owner on oath swears that the following statements are true and are within the personal knowledge of Owner:

Owner owns the Property. The Property was described in the Oil and Gas Lease.

Select one of the following.

No drilling operations were begun during the Primary Term. No oil, gas, or other mineral was produced from the Property during the Primary Term or on any property with which the Property was pooled or unitized. No oil, gas, or other mineral is now being produced from the Property or on any property with which the Property is pooled or unitized.

Or

Drilling operations were conducted during the Primary Term (or any extensions thereof provided by the Lease), but no oil, gas, or other mineral was produced from the Property or on any property with which the Property was pooled or unitized during the Primary Term (or any extensions thereof provided by the Lease). No oil, gas, or other mineral is now being produced from the Property or on any property with which the Property is pooled or unitized.

Or

Drilling operations were conducted during the Primary Term. Oil, gas, or another mineral was produced from the Property during the Primary Term (or any extensions thereof provided by the Lease), but no oil, gas, or other mineral is now being produced from the Property or on any property with which the Property is pooled or unitized, nor has any delay rental or shut-in payment been timely paid to Lessor necessary to maintain the Lease currently in effect.

Continue with the following.

This affidavit is to establish of record that the Oil and Gas Lease has expired by its terms.

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Include the following if applicable.

This affidavit is made for [Buyer to rely on in buying the Property/Lienholder to rely on in making a loan that is secured by a lien on the Property/Lessee to rely on in leasing the Property/Title Company to rely on in issuing title insurance with respect to the Property].

Continue with the following.

_____

[**Name of owner**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

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Form 26-5

This certificate is to be used by a corporation, limited partnership, limited liability partnership, limited liability company, or foreign filing entity to register an assumed name in the county records and secretary of state's records. See the Assumed Business or Professional Name Act, Tex. Bus. & Com. Code ch. 71, particularly Tex. Bus. & Com. Code §§ 71.101–.104, for requirements of execution and filing.

Assumed [Business/Professional] Name Certificate for Incorporated Business or Profession

Date:

Registrant:

Assumed Name:

[County/Counties]:

The time period during which the assumed name will be used may not exceed ten years. *See* Tex. Bus. & Com. Code § 71.052(3).

Period of Use:

Select one of the following.

1. Registrant [is conducting/will conduct] business under the Assumed Name.

Or

1. Registrant [is rendering/will render] professional service under the Assumed Name.

Continue with the following.

2. The name of Registrant as stated in its [certificate of formation/application for registration/[**specify comparable document**]] is [**name of registrant**].

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3. The state, country, or other jurisdiction under the laws of which Registrant was [incorporated/organized/associated] is [**jurisdiction**]. The address of Registrant's registered or similar office in that state, country, or jurisdiction is [**address**].

4. The period during which the Assumed Name will be used is the Period of Use.

5. Registrant is a [for-profit corporation/nonprofit corporation/professional corporation/professional association/limited partnership/limited liability partnership/limited liability company/foreign filing entity/[**specify type of organization**]].

6. The address of Registrant's principal office is [**address**].

Select one of the following.

7. Business [is being/will be] conducted under the Assumed Name in the [**county/counties**].

Or

7. Professional services [are being/will be] rendered under the Assumed Name in the [**county/counties**].

Include the following if applicable.

8. The attorney-in-fact executing this certificate for Registrant has been duly authorized in writing by [his/her] principal to execute and acknowledge this certificate.

Continue with the following.

_____

[**Name**]

Include acknowledgment.

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Form 26-6

This certificate is used by an unincorporated business, professional service, partnership, joint venture, estate, real estate investment trust, or other company that is not a corporation, limited partnership, registered limited liability partnership, or limited liability company to register an assumed name in the county records. See the Assumed Business or Professional Name Act, Tex. Bus. & Com. Code ch. 71, particularly Tex. Bus. & Com. Code §§ 71.101–.104, for authorized signers and for requirements of execution and filing.

Assumed [Business/Professional] Name Certificate for Unincorporated Business or Profession

Date:

Registrant:

Assumed Name:

[County/Counties]:

The time period during which the assumed name will be used may not exceed ten years. *See* Tex. Bus. & Com. Code § 71.052(3).

Period of Use:

Select one of the following.

1. Registrant [is conducting/will conduct] business under the Assumed Name.

Or

1. Registrant [is rendering/will render] professional service under the Assumed Name.

Select one of the following.

2. Registrant is an individual whose full name and residence address are [**name and address**].

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Or

2. Registrant is a partnership named [**name of partnership**]. The partnership office address is [**address**]. The full names and addresses of each general partner are [**names and addresses (residence for individuals, office for other entities)**].

Or

2. Registrant is a joint venture named [**name of joint venture**]. The joint venture office address is [**address**]. The full names and addresses of each joint venturer are [**names and addresses (residence for individuals, office for other entities)**].

Or

2. Registrant is an estate named [**name of estate**]. The estate's address is [**address**]. The full names and addresses of each representative of the estate are [**names and addresses (residence for individuals, office for other entities)**].

Or

2. Registrant is a real estate investment trust named [**name of trust**]. The address of the trust is [**address**]. The full names and addresses of each trustee manager are [**names and addresses (residence for individuals, office for other entities)**].

Or

2. Registrant is a company other than a real estate investment trust or a corporation. The name of the company is [**name of company**]. The state, country, or other jurisdiction under the laws of which it was organized or associated is [**jurisdiction**]. Its office address is [**address**].

Continue with the following.

3. The period during which the Assumed Name will be used is the Period of Use.

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4. The [business/professional service] that [is/will be] [conducted/rendered] in the [county/counties] under the Assumed Name [is being/will be] [conducted/rendered] as a [proprietorship/sole practitioner/joint venture/partnership/real estate investment trust/ joint-stock company/[**other form of unincorporated business or professional association or legal entity other than a limited partnership, registered limited liability partnership, or limited liability company**]].

Include the following if applicable.

5. The attorney[s]-in-fact executing this certificate for Registrant [has/have] been duly authorized in writing by [his/her/their] principal[s] to execute and acknowledge this certificate.

Include signature and acknowledgment for each registrant who is an individual. For all other registrants, include signatures and acknowledgments under oath.

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Form 26-7

This form is used to establish the common boundary between two parcels by agreement if the location of the boundary has become obscured over time because of fence locations or discrepancies in survey calls.

Boundary Line Agreement and Special Warranty Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Owner:

Owner's Address:

Owner's Property: That certain tract containing [**number**] acres, more or less, which is located in [**county**] County, Texas and is more fully described in Exhibit [**exhibit number/letter**] attached hereto and incorporated herein by reference for all purposes.

Adjoining Owner:

Adjoining Owner's Address:

Adjoining Owner's Property: That certain tract containing [**number**] acres, more or less, which is located in [**county**] County, Texas and is more fully described in Exhibit [**exhibit number/letter**] attached hereto and incorporated herein by reference for all purposes.

Based on [an examination of title/surveys] of Owner's Property and Adjoining Owner's Property, there appears to be a question as to the location of the common boundary line

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between Owner's Property and Adjoining Owner's Property. Owner and Adjoining Owner desire to settle the question by executing this agreement.

In consideration of settling the existing boundary line dispute and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Owner and Adjoining Owner hereby agree as follows:

1. Set forth in Exhibit [**exhibit number/letter**] attached hereto and incorporated herein by reference for all purposes is a metes-and-bounds description of the line that Owner and Adjoining Owner have agreed will henceforth constitute the common boundary line between Owner's Property and Adjoining Owner's Property.

2. Owner and Adjoining Owner hereby grant, sell, and convey to each other their respective interests, if any, in the real property lying on the opposite side of the agreed common boundary line from the remaining property that each of them owns, together with, all and singular, the rights and appurtenances thereto in any way belonging, to have and to hold such interests to the grantee and grantee's heirs, successors, and assigns forever, and hereby agree to warrant and forever defend the title to these interests in the grantee and the grantee's respective heirs, successors, and assigns against all claims arising by, through, or under the grantor but not otherwise.

3. This agreement binds and inures to the benefit of Owner and Adjoining Owner and their respective heirs, personal representatives, successors, and assigns.

_____

[**Name of owner**]

_____

[**Name of adjoining owner**]

Include acknowledgments and exhibits.

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Form 26-8

All property acquired during marriage is presumed to be community property, except property acquired by gift, devise, or descent. During marriage, real property is presumed to be subject to the sole management, control, and disposition of the spouse in whose name the property is held. *See* Tex. Fam. Code §§ 3.102, 3.104. A spouse may evidence that certain property is subject to the sole management, control, and disposition of the other spouse by executing this form.

Certificate of Management, Control, and Disposition

Date:

Spouse A:

Spouse B:

[Purchaser:]

[Lienholder:]

Property:

[Spouse B/Spouse A] represents and warrants to [Purchaser/Lienholder/Purchaser and Lienholder] that [Spouse A/Spouse B] has the sole management, control, and disposition of the Property and that no divorce action is pending between the Spouses.

This instrument is executed for valuable consideration. [Purchaser/Lienholder/Purchaser and Lienholder], all subsequent transferees of the Property, all title insurance companies and agencies insuring title of the Property, and the world at large may rely on this instrument in dealing with [Spouse A/Spouse B] without [Spouse B/Spouse A]'s joinder.

_____

[Name of [spouse B/spouse A]]

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Include acknowledgment.

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Form 26-9

This form certifies that a corporation has authorized an action. Most often this is done to confirm an individual officer's authority to act on behalf of the corporation in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions

[Corporation]

Date:

Corporation:

Date of Adoption: [**date of meeting of board of directors or of written consent of directors**]

The undersigned [secretary/assistant secretary] of the Corporation certifies the following facts:

1. The Corporation is organized and operating under the laws of [Texas/[**other state**], is registered to do business in Texas,] and is in good standing.

2. No proceeding for [termination of the certificate of formation/revocation of the registration] of the Corporation or for voluntary or involuntary termination of the Corporation is pending.

3. Neither the certificate of formation nor the bylaws of the Corporation limit the power of the board of directors to pass the resolutions [below/attached].

4. The undersigned is authorized to make and sign this certificate.

5. The undersigned keeps the records and minutes of the proceedings of the board of directors of the Corporation, and the resolutions [below/attached] are an accurate reproduction

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of the ones made in those proceedings. They have not been amended, modified, or rescinded and are now in full force and effect.

Select one of the following. *See* Tex. Bus. Orgs. Code §§ 6.201, 6.202.

6. The resolutions [below/attached] were duly adopted on the Date of Adoption. The meeting of the board of directors was called and held in accordance with law and the bylaws of the Corporation, and a quorum was present.

Or

6. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the board of directors, and all directors had signed a waiver of notice of the meeting in accordance with law and the bylaws of the Corporation.

Or

6. The resolutions [below/attached] were duly adopted by unanimous written consent of all directors as of the Date of Adoption, and the unanimous consent conforms with law and the bylaws of the Corporation.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

7. [Set forth below/Attached] is a list of the names, titles, and signatures of the individuals who are currently serving as officers of the Corporation.

_____

[Name of [secretary/assistant secretary]]

Include corporate seal (if necessary) and corporate acknowledgment.

Include the following if applicable.

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The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [**name of corporation**]; that [**name**] is the duly elected and qualified [secretary/assistant secretary] of [**name of corporation**]; that the signature above is [**name**]'s genuine signature; and that the foregoing certificate of resolutions is true and correct.

_____

[**Name of president**]

Include acknowledgment.

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Form 26-10

This form certifies that a general partnership has authorized an action. Most often this is done to confirm an individual partner's authority to act on behalf of the partnership in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions

[General Partnership]

Date:

Partnership:

Date of Adoption: [**date of meeting of partners or of written consent of partners**]

We, the partners of the Partnership, a general partnership, certify that we have custody of the records of the Partnership and that we are authorized to execute and deliver this certificate of resolutions on behalf of the Partnership. We further certify as follows:

Select one of the following.

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A meeting of the partners of the Partnership was called and held in accordance with law and the partnership agreement of the Partnership, and a quorum was present. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Or

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the partners of the Partnership, and all partners had signed a waiver of notice of the meeting in accordance with law and the partnership agreement of the Partnership. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

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Or

1. The resolutions [below/attached] were duly adopted by written consent of partners of the Partnership owning [all/the requisite percentage] of the ownership in the Partnership as of the Date of Adoption, and the written consent conforms with law and the partnership agreement of the Partnership. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

2. We further certify that the Partnership is duly formed and validly existing under the laws of the state of Texas; that no proceeding is pending for the winding up or termination of the Partnership; that there is no provision in the partnership agreement of the Partnership limiting the powers of the partners of the Partnership to adopt the resolutions referred to above and that the resolutions are in conformity with the requirements of the partnership agreement of the Partnership; that the undersigned are the keepers of the records and minutes of the proceedings of the Partnership; and that the following persons constitute all of the partners of the Partnership:

_____

[Name of partner]

_____

[Name of partner]

Include acknowledgments.

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Form 26-11

This form certifies that a limited liability company has authorized an action. Most often this is done to confirm an individual member's or manager's authority to act on behalf of the limited liability company in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions

[Limited Liability Company]

Date:

Company: [**name of limited liability company**]

Date of Adoption: [**date of meeting or of written consent**]

[I/We], the [members/managers/secretary/[**other authorized officer**]] of the Company, a Texas limited liability company, certify that [I/we] have custody of the records of the Company and that [I am/we are] authorized to execute and deliver this certificate of resolutions on behalf of the Company. [I/We] further certify as follows:

Select one of the following.

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A meeting of the [members/managers] of the Company was called and held in accordance with law and the company agreement of the Company, and a quorum was present. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Or

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the [members/managers] of the Company, and all [members/managers] had signed a waiver of notice of the meeting in accordance with law and the company agreement of the Company. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

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Or

1. The resolutions [below/attached] were duly adopted as of the Date of Adoption by written consent of the [members/managers] of the Company as required by law and the operating agreement of the Company. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

2. [I/We] further certify that the Company is duly organized and existing under the laws of the state of [Texas/[**name of state**], is registered to do business in Texas,] and is in good standing; that no proceeding is pending for the termination of the [certificate of formation/registration] of the Company or for the winding up or termination, voluntary or involuntary, of the Company; that there is no provision of the company agreement or certificate of formation of the Company limiting the powers of the members or managers of the Company to adopt the resolutions referred to above and that the resolutions are in conformity with the provisions of the company agreement and the certificate of formation of the Company; that the undersigned is the keeper of the records and minutes of the proceedings of the Company; and that the following persons constitute all of the [members/managers] of the Company:

_____

[**Name of member/manager**]

_____

[**Name of member/manager**]

Include signatures of members, managers, or secretary and acknowledgments.

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Form 26-12

This form certifies that a limited partnership has authorized an action. Most often this is done to confirm the general partner's authority to act on behalf of the limited partnership in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions
[Limited Partnership]

Date:

Partnership: [**name**], a Texas limited partnership

Date of Adoption: [**date of meeting of partners or of written consent**]

I, the duly elected [secretary/[**other authorized officer**]] of [**name of company**] (the "Company"), a Texas [**type of company**], in its capacity as general partner of the Partnership, certify that I have custody of the [corporate/partnership] records of the Company and the partnership records of the Partnership and that I am authorized to execute and deliver this certificate of resolutions on behalf of the Company in its capacity as general partner of the Partnership. I further certify as follows:

Select one of the following.

1. Partners holding [all/the required percentage] of the partnership interests in the Partnership consented to the activities by the Partnership reflected in the resolutions [below/attached]. The resolutions were duly adopted on the Date of Adoption. A meeting of the partners of the Partnership was called and held in accordance with law and the partnership agreement of the Partnership, and a quorum was present. The consent has not been amended, modified, or rescinded and is now in full force and effect.

Or

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1. Partners holding [all/the required percentage] of the partnership interests in the Partnership consented to the activities by the Partnership reflected in the resolutions [below/attached]. The resolutions were duly adopted on the Date of Adoption. A quorum was present at the meeting of the partners of the Partnership, and all partners had signed a waiver of notice of the meeting in accordance with law and the partnership agreement of the Partnership. The consent has not been amended, modified, or rescinded and is now in full force and effect.

Or

1. Partners holding [all/the required percentage] of the partnership interests in the Partnership have given written consent to the activities by the Partnership reflected in the resolutions [below/attached]. The resolutions were duly adopted by written consent of the partners of the Partnership as of the Date of Adoption in accordance with law and the partnership agreement of the Partnership. The consent has not been amended, modified, or rescinded and is now in full force and effect.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

2. I further certify that the Company is duly organized and existing under the laws of the state of [Texas/[**name of state**], is registered to do business in Texas,] and is in good standing; that no proceeding is pending for the winding up or termination, voluntary or involuntary, of the Company or the Partnership; that there is no provision of the partnership agreement or certificate of formation of the Partnership limiting the powers of the partners of the Partnership to adopt the consent referred to above and that the consent is in conformity with the provisions of the agreement of limited partnership and certificate of formation; that the undersigned is the keeper of the records and minutes of the proceedings of the partners of the Partnership; and that the following persons constitute all of the partners of the Partnership:

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_____

[**Name of partner**]

_____

[**Name of partner**]

_____

[**Name of secretary or other officer**]

Include acknowledgment.

Include the following if applicable.

The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [**name of company**]; that [**name**] is the duly elected and qualified [secretary/[**other officer**]] of [**name of company**]; that the signature above is [**name**]'s genuine signature; and that the foregoing certificate of resolutions is true and correct.

_____

[**Name of president**]

Include acknowledgment.

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Form 26-13

This form certifies that a nonprofit corporation has authorized an action. Most often this is done to confirm an individual officer's authority to act on behalf of the nonprofit corporation in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions
[Nonprofit Corporation]

Date:

Corporation:

Date of Adoption: [**date of meeting or of written consent**]

[I/We], the [members/directors/secretary/[**other authorized officer**]] of [**name of corporation**] (the "Corporation"), a Texas nonprofit corporation, certify that [I/we] have custody of the records of the Corporation and that [I am/we are] authorized to execute and deliver this certificate of resolutions on behalf of the Corporation. [I/We] further certify as follows:

Select one of the following.

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A meeting of the [members/directors] of the Corporation was called and held in accordance with law and the bylaws of the Corporation, and a quorum was present. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Or

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the [members/directors] of the Corporation, and all [members/directors] had signed a waiver of notice of the meeting in accordance with law and the bylaws of the Corporation. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

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Or

1. The resolutions [below/attached] were duly adopted as of the Date of Adoption by written consent of the [members/directors] of the Corporation as required by law and the bylaws of the Corporation. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

2. [I/We] further certify that the Corporation is duly organized and existing under the laws of the state of [Texas/[**name of state**], is qualified to do business in Texas,] and is in good standing; that no proceeding is pending for the termination of the Corporation's [certificate of formation/registration] or for the winding up or termination, voluntary or involuntary, of the Corporation; that there is no provision of the bylaws or certificate of formation of the Corporation limiting the powers of the [members/directors] of the Corporation to adopt the resolutions referred to above and that the resolutions are in conformity with the provisions of the bylaws and the certificate of formation of the Corporation; that the undersigned is the keeper of the records and minutes of the proceedings of the Corporation; and that the following persons constitute all of the [members/directors] of the Corporation:

_____

[**Name of member or director**]

_____

[**Name of member or director**]

Include signatures of members, directors, or secretary and acknowledgments.

Include the following if applicable.

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The undersigned hereby certifies that [he/she] is the duly elected and qualified president of [**name of corporation**]; that [**name**] is the duly elected and qualified [secretary/[**other officer**]] of [**name of corporation**]; that the signature above is [**name**]'s genuine signature; and that the foregoing certificate of resolutions is true and correct.

_____

[**Name of president**]

Include acknowledgment.

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Form 26-14

This form certifies that an unincorporated association has authorized an action. Most often this is done to clarify an individual's authority to act on behalf of the unincorporated association in connection with buying, selling, or mortgaging real property.

Certificate of Resolutions
[Unincorporated Association]

Date:

Unincorporated Association:

Date of Adoption: [**date of meeting of members or of written consent**]

I, the [**title**] of [**name of association**] (the "Association"), an unincorporated association, certify that I have custody of the records of the Association and that I am authorized to execute and deliver this certificate of resolutions on behalf of the Association. I further certify as follows:

Select one of the following.

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A meeting of the members of the Association was called and held in accordance with law and the governing documents of the Association, and a quorum was present. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Or

1. The resolutions [below/attached] were duly adopted on the Date of Adoption. A quorum was present at the meeting of the members of the Association, and all members had signed a waiver of notice of the meeting in accordance with law and the governing documents of the Association. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

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Or

1. The resolutions [below/attached] were duly adopted as of the Date of Adoption by written consent of the required percentage of the members of the Association, and the written consent conforms with law and the governing documents of the Association. The resolutions have not been amended, modified, or rescinded and are now in full force and effect.

Continue with the following.

Include or attach full text of resolution(s). See, e.g., form 10-6 in this manual.

2. I further certify that the Association is qualified to do business in Texas; that no proceeding is pending for the winding up or termination of the Association; that there is no provision in the governing documents of the Association limiting the powers of the members of the Association to adopt the resolutions referred to above and that the resolutions are in conformity with the requirements of the governing documents; that the undersigned is the keeper of the records and minutes of the proceedings of the Association; and that the following persons constitute all of the officers of the Association:

_____

[Name of officer]
[Title]

_____

[Name of officer]
[Title]

Include acknowledgment(s).

Include the following if applicable.

The undersigned hereby certifies that [he/she] is the duly elected and qualified president of **[name of association]**; that **[name]** is the duly elected and qualified [secretary/**[other**

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officer]] of [**name of association**]; that the signature above is [**name**]'s genuine signature; and that the foregoing certificate of resolutions is true and correct.

_____

[**Name of president**]

Include acknowledgment.

Form 26-15

This form is used by a borrower or borrower's counsel to instruct an escrow agent regarding the closing of a real estate transaction and disbursement of the documents evidencing and securing a loan secured by real estate.

Closing Instructions

[from Borrower]

[**Date**]

[**Name of escrow officer**]
[**Name and address of escrow agent**]

Re: $[**amount**] Loan ("Loan") from
[**name of lender**] ("Lender") to
[**name of borrower**] ("Borrower")
Your GF Number:

[**Salutation**]

Set forth below are Borrower's instructions for closing the above-referenced Loan from Lender to Borrower.

1. Enclosed with this letter or otherwise delivered to you are the following documents for your use in closing this Loan (collectively, the "Documents"):

Select as applicable from the following examples.

a. Promissory Note in the original principal amount of the Loan (the "Note").

b. Deed of Trust [**include as applicable:** , Security Agreement, Assignment of Rents and Leases, [and] Financing Statement] (the "Deed of Trust").

c. Financing Statement to be filed with the Texas secretary of state's office (the "Financing Statement").

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d. Borrower's Closing Certificate and Affidavit (the "Closing Certificate").

e. Certificate of Resolutions (the "Resolution Certificate").

f. Form of Opinion of Borrower's Legal Counsel (the "Borrower's Opinion").

Include title(s) of other document(s) as applicable.

2. It is understood that you will prepare a settlement statement setting forth the proceeds of the Loan being disbursed and the purposes for which the proceeds are being applied (the "Settlement Statement").

3. It is also understood that the Documents either have been executed and acknowledged, if required, in the manner contemplated in the Documents before their delivery to you or will be executed and acknowledged, if required, by the appropriate party before the closing of the Loan as contemplated in these instructions. Please confirm that all blanks in the Documents are completed before their execution.

Adapt paragraphs 4. and 5. to reflect only those documents used in the transaction.

4. When you have received from Lender the proceeds of the Loan to be disbursed as shown on the Settlement Statement, you are authorized to deliver to Lender the signed originals of each of the following: the Note, the Closing Certificate, the Resolution Certificate, [and] the Borrower's Opinion [**include if applicable:** , and [**title[s] of other document[s]**]]. At that same time, please deliver to Lender two copies, certified by you to be true and correct, of each of the following signed documents: the Deed of Trust, the Financing Statement, [and] the Settlement Statement executed by Borrower [**include if applicable:** , and [**title[s] of other document[s]**]]; record the original Deed of Trust [**include if applicable:** and [**title[s] of other document[s]**]] in the real property records of [**county**] County, Texas; and file the Financing Statement with the Texas secretary of state's office. At that same time, please deliver to

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Lender such other documents and information by then delivered to you by or on behalf of Borrower as will be required by Lender's instructions in conjunction with closing the Loan.

5. Before releasing, recording, or filing any of the Documents, you must be prepared to disburse the proceeds of the Loan to or on behalf of Borrower in the manner shown on the Settlement Statement immediately on the recording of the Deed of Trust [**include if applicable:** and [**title[s] of other document[s]**]] in the real property records of [**county**] County, Texas, and the filing of the Financing Statement with the Texas secretary of state's office, and you must have determined that all requirements of Lender for disbursement of the funds have been satisfied or waived by Lender. The disbursement of the proceeds of the Loan as shown on the Settlement Statement must be accomplished promptly on the satisfaction of such conditions, with any balance of the proceeds of the Loan that are to be disbursed to Borrower to be disbursed by wire transfer or check in accordance with Borrower's separate instructions.

6. We have enclosed our statement for services on behalf of Borrower, which you are instructed to collect and remit to us as part of the closing.

7. By disbursing the funds, you will certify to Borrower that you have complied with the requirements and conditions of this letter and that all matters disclosed in Schedule C of the Commitment for Title Insurance (the "Commitment") have been or will be paid, satisfied, or otherwise resolved to the complete satisfaction of the title insurer before the issuance date of the loan policy of title insurance (the "Loan Policy") and that no exceptions for any item on Schedule C of the Commitment will be contained in the Loan Policy.

8. If for any reason you cannot or will not comply with all of the requirements and conditions of this letter, please inform the undersigned immediately. The Title Company is not authorized to close the transaction on behalf of Borrower unless the Title Company complies with the requirements and conditions of this letter.

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If you have any questions regarding any aspect of this transaction, please call us at your earliest opportunity.

Very truly yours,

_____
Legal Counsel for Borrower

By:_____
(Authorized signature)

Enc.
c: [**name of borrower**]

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Form 26-16

This form is used by a lender or lender's counsel to instruct an escrow agent regarding the closing of a real estate transaction and disbursement of a loan secured by real estate.

Closing Instructions
[from Lender]

[Date]

[Name of escrow officer]
[Name and address of escrow agent]

Re: $[**amount**] Loan ("Loan") from
[**name of lender**] ("Lender") to
[**name of borrower**] ("Borrower")
Your GF Number:

[Salutation]

Set forth below are Lender's instructions for closing the above-referenced Loan to Borrower.

1. Enclosed with this letter or otherwise delivered to you are the following documents for your use in closing this Loan (collectively, the "Documents"):

Select as applicable from the following examples.

a. Promissory Note in the original principal amount of the Loan (the "Note").

b. Deed of Trust [**include as applicable:** , Security Agreement, Assignment of Rents and Leases, [and] Financing Statement] (the "Deed of Trust").

c. Financing Statement to be filed with the Texas secretary of state's office (the "Financing Statement").

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d. Borrower's Closing Certificate and Affidavit (the "Closing Certificate").

e. Certificate of Resolutions (the "Resolution Certificate").

f. Form of Opinion of Borrower's Legal Counsel (the "Borrower's Opinion").

Include title(s) of other document(s) as applicable.

2. It is understood that you will prepare a settlement statement setting forth the proceeds of the Loan being disbursed and the purposes for which the proceeds are being applied (the "Settlement Statement").

3. Also enclosed is a copy of Lender's closing instructions (the "Closing Instructions"), which are being supplemented by the information set forth in this letter.

Adapt paragraphs 4. and 5. to reflect only those documents used in the transaction.

4. Before you request any funds from Lender or otherwise advise that this transaction has closed, please deliver to Lender the signed originals of each of the following: the Note, the Closing Certificate, the Resolution Certificate, [and] the Borrower's Opinion [**include if applicable:** , and [**title[s] of other document[s]**]]. At that same time, please deliver to Lender two copies, certified by you to be true and correct, of each of the following signed documents: the Deed of Trust, the Financing Statement, [and] the Settlement Statement executed by Borrower [**include if applicable:** and [**title[s] of other document[s]**]]. Also deliver to Lender with the foregoing documents a currently dated and effective title commitment or the Loan Policy described below, and the original hazard insurance policy described in the closing instructions.

5. Confirm that all blanks in the enclosed Documents are completed before their execution. Please be certain that the Deed of Trust [**include if applicable:** and [**title[s] of other document[s]**]] [is/are] immediately recorded in the real property records of [**county**] County,

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Texas, the Financing Statement is immediately filed in the Texas secretary of state's office, and [**other instructions**].

6. Before you disburse any funds received by you from Lender or otherwise advise Lender that this transaction has closed, please be certain that the title insurer is in a position to issue, and will issue, to Lender a loan policy of title insurance (the "Loan Policy") in the form prescribed by the Texas State Board of Insurance, written by the same underwriter that issued the Commitment for Title Insurance (the "Commitment") with an issuance date of [**date**] and an effective date of [**date**] under the above-referenced GF number. The Loan Policy must be issued in accordance with the Commitment, except as follows:

a. The Insured under the Loan Policy must read exactly as the Lender's name is set forth in the Note, with the following additional phrase: "and its successors and/or assigns who are the lawful owner or owners of the evidence of debt identified herein and any subsequent owner or owners thereof";

b. The effective date of the Loan Policy must be the date on which the Deed of Trust is filed of record;

c. The lien insured by the Loan Policy must be the first-priority lien arising under the Deed of Trust;

d. The real property described in the Loan Policy must be the same property described in the Deed of Trust and in the survey dated [**date**], prepared by [**name**];

e. Fee simple title to the real property described in the Deed of Trust must be shown by the Loan Policy to be vested in Borrower, and any easements benefiting the real property must be included in the description of the property insured by the Loan Policy;

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f. Item 2 of Schedule B of the Loan Policy must be modified to read "shortages in area" only, provided, however, that if the final survey delivered to you reflects one or more encroachments or other matters, the Loan Policy may except to the encroachments and other matters reflected in the survey if the Loan Policy contains a T-19 endorsement as to those encroachments or other matters;

g. Item 3 of Schedule B of the Loan Policy must be modified to delete the words "and subsequent assessments, for prior years due to change in land usage or ownership," and must except only to taxes, assessments, and stand-by fees for the year [**year**] and subsequent years, not yet due and payable;

h. The exceptions to title shown on Schedule B of the Loan Policy must include only the Permitted Exceptions set forth in the Deed of Trust (so that the following-listed items from Schedule B of the Commitment must be deleted: [**list items**]);

i. All matters described on Schedule C of the Commitment must be satisfied and resolved to your complete satisfaction so that none of these matters will appear as exceptions in the Loan Policy;

j. There should be no exception in the Loan Policy for any lack of right of access to and from the Property;

k. The Arbitration Clause in the Conditions and Stipulations section of the Loan Policy should be deleted pursuant to Procedural Rule P-36;

l. There should be no exception in the Loan Policy for parties in possession (except for tenants as lessees only under unrecorded leases with no right of purchase or right of first refusal);

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m. There should be no exception in the Loan Policy for visible or apparent easements on the Property; and

n. The following endorsements to the Loan Policy should be provided: [**list any applicable endorsements**].

7. By disbursing Loan funds, you will certify to Lender that all matters disclosed in Schedule C of the Commitment have been or will be paid, satisfied, or otherwise resolved to the complete satisfaction of the title insurer before the issuance date of the Loan Policy, that no exceptions for any item on Schedule C of the Commitment will be contained in the Loan Policy, and that you have complied with the requirements and conditions of the letter.

8. We have also enclosed our statement for services on behalf of Lender, which you are instructed to collect and remit to us as part of the closing.

9. If for any reason you cannot or will not comply with all of the requirements and conditions of this letter, please inform the undersigned immediately. The Title Company is not authorized to close the transaction on behalf of Lender unless the Title Company complies with the requirements and conditions of this letter.

If you have any questions regarding any aspect of this transaction or the instructions set forth herein, please call us at your earliest opportunity.

Very truly yours,

_____

Legal Counsel for Lender

By:_____

(Authorized signature)

Enc.

c: [**name of lender**]

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Form 26-17

This form is used by a purchaser's counsel to instruct an escrow agent regarding the closing of a real estate transaction.

Closing Instructions
[from Purchaser]

[**Date**]

[**Name of escrow officer**]
[**Name and address of escrow agent**]

Re: Purchase of real property ("Property") from
[**name of seller**] ("Seller") by
[**name of purchaser**] ("Purchaser")
Your GF Number:

[**Salutation**]

We represent the Purchaser in connection with the purchase of the above-referenced Property. Set forth below are Purchaser's instructions for closing this transaction.

1. Enclosed with this letter [is/are] the Settlement Statement (the "Settlement Statement") [**include if applicable:** and [**title[s] of other document[s]**]] for your use in closing the purchase.

2. Also being delivered to you in conjunction with this letter are funds in the amount of $[**amount**] (the "Funds"), representing the net amount that is payable at closing by Purchaser with respect to the purchase price for the Property.

3. Also enclosed are copies of the form of [general/special] warranty deed (the "Deed") and [**title[s] of other document[s]**], to be executed by Seller. The original of each of these documents is to be executed by Seller and delivered to your offices.

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4. Determine that all of the foregoing documents are fully and properly executed and acknowledged when appropriate. Confirm that all blanks in the enclosed documents are completed before their execution.

5. Before you disburse any of the Funds or otherwise advise that this transaction has closed, deliver to Purchaser one copy, certified by you to be true and correct, of the signed originals of the Deed and [**title[s] of other document[s]**]. These documents are to be in the forms enclosed. Also deliver to Purchaser with the foregoing documents a currently dated and effective title commitment or the Owner Policy described below.

6. Be certain that the Deed and [**title[s] of other document[s]**] are immediately recorded in the real property records of [**county**] County, Texas, in the order set forth in this paragraph.

7. Before you disburse any of the Funds or otherwise advise Purchaser that this transaction has closed, be certain that the title insurer is in a position to issue, and will issue, to Purchaser an owner policy of title insurance (the "Owner Policy") in the form prescribed by the Texas State Board of Insurance, written by the same underwriter that issued the Commitment for Title Insurance (the "Commitment") with an issuance date of [**date**] and an effective date of [**date**] under the above-referenced GF number. The Owner Policy must be issued in accordance with the Commitment, except as follows:

a. The Insured under the Owner Policy must read exactly as the Purchaser's name is set forth in the Deed;

b. The effective date of the Owner Policy must be the date on which the Deed is filed of record;

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c. The real property described in the Owner Policy must be the same property described in the Deed and in the survey of the Property dated [**date**], prepared by [**name**];

d. Fee simple title to the real property described in the Deed must be shown by the Owner Policy to be vested in Purchaser, and any easements benefiting the real property must be included in the description of the property insured by the Owner Policy;

e. Item 2 of Schedule B of the Owner Policy must be modified to read "shortages in area" only, provided, however, that if the final survey delivered to you reflects one or more encroachments or other matters, the Owner Policy may except to the encroachments and other matters reflected in the survey if the Owner Policy contains a T-19.1 endorsement as to those encroachments or other matters;

f. Item 3 of Schedule B of the Owner Policy must be modified to except only to taxes, assessments, and stand-by fees for the year [**year**] and subsequent years, not yet due and payable, and subsequent assessments for prior years due to change in land usage or ownership;

g. The exceptions to title shown on Schedule B of the Owner Policy must include only the Permitted Exceptions set forth in the Deed (so that the following-listed items from Schedule B of the Commitment must be deleted: [**list items**]);

h. All matters described on Schedule C of the Commitment must be satisfied and resolved to your complete satisfaction so that none of these matters will appear as exceptions in the Owner Policy;

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i. There should be no exception in the Owner Policy for any lack of right of access to and from the Property;

j. The Arbitration Clause in the Conditions and Stipulations section of the Owner Policy should be deleted pursuant to Procedural Rule P-36;

k. There should be no exception in the Owner Policy for parties in possession (except for tenants as lessees only under unrecorded leases with no right of purchase or right of first refusal);

l. The Owner Policy will not contain any exceptions for visible or apparent easements on the Property; and

m. The following endorsements to the Owner Policy should be provided: [**list any applicable endorsements**].

8. By disbursing the Funds, you certify to Purchaser that you have complied with the requirements and conditions of this letter and all matters disclosed in Schedule C of the Commitment have been or will be paid, satisfied, or otherwise resolved to the complete satisfaction of the title insurer before the issuance date of the Owner Policy and that no exceptions for any item on Schedule C of the Commitment will be contained in the Owner Policy.

9. If for any reason you cannot or will not comply with all of the requirements and conditions of this letter, inform the undersigned immediately. The Title Company is not authorized to close the transaction on behalf of Purchaser unless the Title Company complies with the requirements and conditions of this letter.

If you have any questions regarding any aspect of this transaction or the instructions set forth herein, please call us at your earliest opportunity.

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Very truly yours,

_____

Legal Counsel for Purchaser

By:_____

(Authorized signature)

Enc.

c: [**name of purchaser**]

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Form 26-18

This form is used by a seller's counsel to instruct an escrow agent regarding closing the sale of a parcel of real estate.

Closing Instructions
[from Seller]

[**Date**]

[**Name of escrow officer**]
[**Name and address of escrow agent**]

Re: Sale of real property ("Property") by
[**name of seller**] ("Seller") to
[**name of purchaser**] ("Purchaser")
Your GF Number:

[**Salutation**]

We represent the Seller in connection with the sale (the "Sale") of the above-referenced Property. Set forth below are Seller's instructions for closing this transaction.

1. Enclosed with this letter are the following documents, which have been executed by Seller, for your use in closing the Sale:

   a. [General/Special] Warranty Deed (the "Deed").

   b. Settlement Statement (the "Settlement Statement"), executed on behalf of Seller.

Include title(s) of other document(s) as applicable.

2. Do not deliver the Deed to Purchaser, or otherwise advise Seller that this transaction has closed, until Purchaser has executed the enclosed Settlement Statement and you are in

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a position to disburse to Seller the amount reflected on the Settlement Statement as "Cash to Seller."

3. Following the closing, return to Seller a fully executed copy of the Settlement Statement and copies of the other closing documents. When available, provide Seller a copy of the Deed that reflects the applicable recording information.

4. By delivering the Deed to Purchaser and disbursing the funds to Seller, you certify to Seller that you have complied with these instructions and the conditions set forth in this letter. If for any reason you cannot comply strictly with these instructions, then immediately return to Seller the Deed and the other items deposited by Seller in connection with this transaction. Comply before [**date**].

If you have any questions regarding any aspect of this transaction, please call us at your earliest opportunity.

Very truly yours,

_____
Legal Counsel for Seller

By:_____
(Authorized signature)

Enc.
c: [**name of seller**]

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Form 26-19

A purchaser of realty from a foreign individual or entity in the United States must withhold 10 percent of the sales price and forward it to the Internal Revenue Service within twenty days of the date of transfer. A purchaser should assume a seller is foreign unless the purchaser obtains an affidavit to the contrary. *See* 26 U.S.C. § 1445; 26 C.F.R. § 1.1445–2(b)(2)(iv). This form is used if the seller is not an individual. If the seller is an individual, see form 26-20 in this chapter. No particular form is required; the following language is taken from 26 C.F.R. § 1.1445–2(b)(2)(iv).

Declaration of Nonforeign Status—Entity

Date:

Transferor:

Transferor's Office Address:

Transferor's U.S. Taxpayer Identification Number:

Transferee:

Property:

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. For U.S. tax purposes, including purposes of section 1445, the owner of a disregarded entity that has legal title to a U.S. real property interest under local law will be the transferor of the property and not the disregarded entity. To inform Transferee that withholding of tax is not required on the disposition of a U.S. real property interest by Transferor, I certify on behalf of Transferor that the contents of this declaration are true.

Transferor is the owner of the Property described above.

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Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations).

Transferor is not a disregarded entity as defined in Treasury Regulation § 1.1445–2(b)(2)(iii).

Transferor understands that this certification may be disclosed to the Internal Revenue Service by Transferee and that any false statement contained in this declaration could be punished by fine, imprisonment, or both.

UNDER PENALTIES OF PERJURY I DECLARE THAT I HAVE EXAMINED THIS DECLARATION AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IT IS TRUE, CORRECT, AND COMPLETE, AND I FURTHER DECLARE THAT I HAVE AUTHORITY TO SIGN THIS DOCUMENT ON BEHALF OF TRANSFEROR.

_____

By:
Title:

Name of Entity:

Include acknowledgment if the declaration is to be recorded.

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Form 26-20

A purchaser of realty from a foreign individual or entity in the United States must withhold 10 percent of the sales price and forward it to the Internal Revenue Service within twenty days of the date of transfer. A purchaser should assume a seller is foreign unless the purchaser obtains an affidavit to the contrary. *See* 26 U.S.C. § 1445; 26 C.F.R. § 1.1445–2(b)(2)(iv). This form is used if the seller is an individual. If the seller is not an individual, see form 26-19 in this chapter. No particular form is required; the following language is taken from 26 C.F.R. § 1.1445–2(b)(2)(iv).

Declaration of Nonforeign Status—Individual

Date:

Transferor:

Transferor's Home Address:

Transferor's Social Security Number:

Transferee:

Property:

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform Transferee that withholding of tax is not required on my disposition of a U.S. real property interest, I affirm that the contents of this declaration are true.

I am not a nonresident alien for purposes of U.S. income taxation.

I understand that this certification may be disclosed to the Internal Revenue Service by Transferee and that any false statement I have made here could be punished by fine, imprisonment, or both.

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UNDER PENALTIES OF PERJURY I DECLARE THAT I HAVE EXAMINED THIS DECLARATION AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IT IS TRUE, CORRECT, AND COMPLETE.

_____

[**Name of transferor**]

Include acknowledgment if the declaration is to be recorded.

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Form 26-21

If a person may claim a homestead and has not done so, Tex. Prop. Code § 41.005 provides that the property on which the person receives a homestead exemption under Tex. Tax Code § 11.43 is generally considered to have been designated as the person's homestead. Tex. Prop. Code § 41.005(e). Section 41.005 also allows a person to voluntarily designate a homestead. A person may find it necessary to designate a homestead in aid of enforcement of a judgment debt. *See* Tex. Prop. Code § 41.022. This form may be used for either of these purposes. If a homestead claimant's homestead has changed, the voluntary filing of a designation of homestead may facilitate changing the tax exemption to the new homestead.

A rural homestead may not exceed two hundred acres if it is the homestead of a family or one hundred acres if it is the homestead of a single adult. Tex. Prop. Code § 41.002(b). An urban homestead may not exceed ten acres. Tex. Prop. Code § 41.002(a). Tex. Prop. Code § 41.002 sets forth criteria by which a homestead is categorized as rural or urban. See also the discussion on rural and urban homesteads at section 11.9:8 in this manual.

If a rural homestead includes property in more than one survey, state the number of acres in each survey. *See* Tex. Prop. Code § 41.005(c). See also section 3.7 concerning property description. If the rural homestead exceeds ten acres, the optional clause stating that the homestead is not considered urban will assist the taxing authorities in determining that the acreage in excess of ten is entitled to the exemption.

Designation of Homestead

Date:

Claimant:

Current Record Title Holder of Property:

Property:

Pursuant to section [41.005/41.022] of the Texas Property Code, Claimant designates the Property as Claimant's homestead.

Include the following if applicable.

The Property contains [**number**] acres, more or less, with [**number**] acres in the [**name**] Survey and [**number**] acres in the [**name**] Survey.

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And/Or

The Property [is/is not] considered to be urban under the provisions of section 41.002(c) of the Texas Property Code.

Continue with the following.

_____

[Name]

_____

[Name]

Include acknowledgments.

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Form 26-22

This form is used to grant an easement across one tract of land for ingress to and egress from another tract of land.

Easement Agreement for Access

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

[Grantor's Lienholder:]

[Grantor's Lienholder's Mailing Address:]

Dominant Estate Property: [**describe by metes and bounds or plat reference the real property benefited by the easement**], and portions thereof.

Easement Property: [**Describe by metes and bounds the location of the easement and include a drawing of the easement as an exhibit, if available.**]

Easement Purpose: For providing free and uninterrupted pedestrian and vehicular ingress to and egress from the Dominant Estate Property, to and from [**describe public thoroughfare**].

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Consideration: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Grantor.

Reservations from Conveyance: [**Describe here or in an attached exhibit any reservations from the conveyance in this instrument.**]

Exceptions to Warranty: [**Describe here or in an attached exhibit any exceptions to the warranties in this instrument.**]

Grant of Easement: Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee's heirs, successors, and assigns an easement over, on, and across the Easement Property for the Easement Purpose and for the benefit of the Dominant Estate Property, together with all and singular the rights and appurtenances thereto in any way belonging (collectively, the "Easement"), to have and to hold the Easement to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part thereof, except as to the Reservations from Conveyance and Exceptions to Warranty [**include if applicable:** , to the extent that such claim arises by, through, or under Grantor but not otherwise].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. *Character of Easement.* The Easement is appurtenant to and runs with all or any portion of the Dominant Estate Property, whether or not the Easement is referenced or described in any conveyance of all or such portion of the Dominant Estate Property. The Easement is nonexclusive and irrevocable. The Easement is for the benefit of Grantee and

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Grantee's heirs, successors, and assigns who at any time own the Dominant Estate Property or any interest in the Dominant Estate Property (as applicable, the "Holder").

2. *Duration of Easement.* [The duration of the Easement is perpetual./The duration of the Easement is for [**number**] years beginning [**date**].]

3. *Reservation of Rights.* Grantor reserves for Grantor and Grantor's heirs, successors, and assigns the right to continue to use and enjoy the surface of the Easement Property for all purposes that do not interfere with or interrupt the use or enjoyment of the Easement by Holder for the Easement Purposes. Grantor reserves for Grantor and Grantor's heirs, successors, and assigns the right to use all or part of the Easement in conjunction with Holder and the right to convey to others the right to use all or part of the Easement in conjunction with Holder, as long as such further conveyance is subject to the terms of this agreement and the other users agree to bear a proportionate part of the costs of improving and maintaining the Easement.

4. *Secondary Easement.* Holder has the right (the "Secondary Easement") to use as much of the surface of the property that is adjacent to the Easement Property ("Adjacent Property") as may be reasonably necessary to install and maintain a road reasonably suited for the Easement Purpose within the Easement Property. However, Holder must promptly restore the Adjacent Property to its previous physical condition if changed by use of the rights granted by this Secondary Easement.

5. *Improvement and Maintenance of Easement Property.* Improvement and maintenance of the Easement Property will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove a road with all culverts, bridges, drainage ditches, sewer facilities, and similar or related utilities and facilities under or across any portion of the Easement Property

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(collectively, the "Road Improvements"). All matters concerning the configuration, construction, installation, maintenance, replacement, and removal of the Road Improvements are at Holder's sole discretion, subject to performance of Holder's obligations under this agreement. Holder has the right to remove or relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Road Improvements or for the road to continue onto other lands or easements owned by Holder and adjacent to the Easement Property, subject to replacement of the fences to their original condition on the completion of the work. On written request by Holder, the owners of the Easement Property will execute or join in the execution of easements for sewer, drainage, or utility facilities under or across the Easement Property.

6. *Equitable Rights of Enforcement.* This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

7. *Attorney's Fees.* If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

8. *Binding Effect.* This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

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9. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

10. *Counterparts.* This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

11. *Waiver of Default.* A default is not waived if the nondefaulting party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

12. *Further Assurances.* Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

13. *Indemnity.* Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party. The obligations of the parties under this provision will survive termination of this agreement.

14. *Survival.* The obligations of the parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

15. *Entire Agreement.* This agreement and any exhibits are the entire agreement of the parties concerning the Easement Property and the grant of the Easement by Grantor to Grantee. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of the other party or any agent of the other party, that are not in this agreement and any exhibits.

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16. *Legal Construction.* If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

17. *Notices.* Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

_____

[Name of grantor]

_____

[Name of grantee]

Include acknowledgments.

Include the following if applicable.

Consent and Subordination by Lienholder

Lienholder, as the holder of [a] lien[s] on the Easement Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordi-

nates its lien[s] to the rights and interests of Holder, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Holder.

_____

[Name of lienholder]

Include acknowledgment.

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Form 26-23

This form is used if the parties are granting reciprocal rights of access across their respective properties.

Easement Agreement for Reciprocal Access

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

First Party:

First Party's Mailing Address:

Second Party:

Second Party's Mailing Address:

[First Party's Lienholder:]

[First Party's Lienholder's Mailing Address:]

[Second Party's Lienholder:]

[Second Party's Lienholder's Mailing Address:]

First Party's Property: [**Describe by metes and bounds or plat reference the real property owned by the first party.**]

Second Party's Property: [**Describe by metes and bounds or plat reference the real property owned by the second party.**]

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Easement Purpose: For providing free and uninterrupted pedestrian and vehicular ingress to, egress from, and access across and between First Party's Property and Second Party's Property and portions thereof.

Consideration: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties.

Reservations from Conveyance of First Party's Property: [**Describe here or in an attached exhibit any reservations from the conveyance of the first party's property in this instrument.**]

Exceptions to Warranty of First Party's Property: [**Describe here or in an attached exhibit any exceptions to the warranties of the first party's property in this instrument.**]

Reservations from Conveyance of Second Party's Property: [**Describe here or in an attached exhibit any reservations from the conveyance of the second party's property in this instrument.**]

Exceptions to Warranty of Second Party's Property: [**Describe here or in an attached exhibit any exceptions to the warranties of the second party's property in this instrument.**]

Grants of Easements:

First Party, for the Consideration and subject to the Reservations from Conveyance of First Party's Property and Exceptions to Warranty of First Party's Property, grants, sells, and conveys to Second Party and Second Party's heirs, successors, and assigns an easement to, over, and across First Party's Property for the Easement Purpose and for the benefit of all or any portion of Second Party's Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold the easement, rights, and appurtenances to Second Party and Second Party's heirs, successors, and assigns forever. First Party binds First Party and First Party's heirs, successors, and assigns to warrant and forever defend

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the title to the easement, rights, and appurtenances in Second Party and Second Party's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the easement, rights, or appurtenances, or any part thereof, except as to the Reservations from Conveyance of First Party's Property and Exceptions to Warranty of First Party's Property [**include if applicable:** , to the extent that such claim arises by, through, or under First Party but not otherwise].

Second Party, for the Consideration and subject to the Reservations from Conveyance of Second Party's Property and Exceptions to Warranty of Second Party's Property, grants, sells, and conveys to First Party and First Party's heirs, successors, and assigns an easement to, over, and across Second Party's Property for the Easement Purpose and for the benefit of all or any portion of First Party's Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold the easement, rights, and appurtenances to First Party and First Party's heirs, successors, and assigns forever. Second Party binds Second Party and Second Party's heirs, successors, and assigns to warrant and forever defend the title to the easement, rights, and appurtenances in First Party and First Party's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the easement, rights, or appurtenances, or any part thereof, except as to the Reservations from Conveyance of Second Party's Property and Exceptions to Warranty of Second Party's Property [**include if applicable:** , to the extent that such claim arises by, through, or under Second Party but not otherwise].

The easements, rights, and appurtenances hereby granted by and between First Party and Second Party are referred to herein as the "Easements." First Party's Property and Second Party's Property are sometimes referred to herein collectively as the "Properties." First Party and Second Party are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

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Terms and Conditions: The following terms and conditions apply to the Easements granted by this agreement:

1. *Character of Easements.* The Easements are appurtenant to and run with the Properties, and portions thereof, whether or not the Easements are referenced or described in any conveyance of the Properties, or any portion thereof. The Easements are for the benefit of the Parties and the heirs, successors, and assigns of the Parties who at any time own the Properties or any interest therein (as applicable, the "Holders").

2. *Duration of Easements.* [The duration of the Easements is perpetual./The duration of the Easements is for [**number**] years beginning [**date**].]

3. *Nonexclusiveness of Easements.* The Easements are nonexclusive, and each of the Parties reserves for itself and its heirs, successors, and assigns the right to use all or part of the Easements in conjunction with any other Holder and the right to convey to others the right to use all or part of the Easements in conjunction with the Holders, as long as such further conveyance is subject to the terms of this agreement.

4. *Use and Location of Easements.* The Parties and other Holders will be entitled to exercise direct access to and between the Properties without interference except as set forth in this agreement and to use all access areas, driveways, and parking lots located on any portion of the Properties in exercising the Easements. A Holder may erect curbs or other barriers to traffic between the Properties owned by that Holder and adjacent portions of the Properties, including but not limited to differences in grade levels, only to the extent that such curbs or other barriers will not unreasonably interfere with or restrict direct access to and between the Properties by the Holders of other portions of the Properties and their employees, customers, and other invitees. A Holder may erect buildings and other improvements on the portion of the Properties owned by that Holder only to the extent that the buildings and other improvements will not unreasonably interfere with the use of and access to the access areas, driveways, and

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parking lots on such portion of the Properties by the other Holders and their employees, customers, and other invitees. A Holder's employees, customers, and other invitees will not be entitled to park on the other Holder's Properties but will be permitted to walk or drive across and otherwise traverse the Properties to obtain ingress to or egress from the other Properties.

5. *Maintenance of Easement Property.* All access ways, driveways, and parking lots located on the Properties must be maintained at a level of appearance and utility consistent with the highest industry standards then prevailing for similarly used properties in the market in which the Properties are located. Each Holder will be solely responsible for the costs of maintaining the access ways, driveways, and parking lots located on that Holder's Properties. If a Holder does not perform the required maintenance then any other Holder, after giving the nonperforming Holder thirty days' written notice, will have the right to perform the maintenance and receive reimbursement from the nonperforming Holder. Reimbursement will be payable on demand and include the costs of the maintenance, plus interest at the highest rate permitted by law (or if no maximum rate is prescribed by law, at the rate of 18 percent per year).

6. *Rights Reserved.* Each Party reserves for that Party and that Party's heirs, successors, and assigns the right to continue to use and enjoy the surface of the Properties for all purposes that do not unreasonably interfere with or interrupt the use or enjoyment of the Easements.

7. *Equitable Rights of Enforcement.* These Easements may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the Parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction

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or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

8. *Attorney's Fees.* If [either/any] Party retains an attorney to enforce this agreement, the Party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

9. *Binding Effect.* This agreement binds, benefits, and may be enforced by the Parties and their respective heirs, successors, and permitted assigns.

10. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any other jurisdiction. Venue is in the county or counties in which the Properties are located.

11. *Counterparts.* This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

12. *Waiver of Default.* A default is not waived if the nondefaulting Party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

13. *Further Assurances.* Each signatory Party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

14. *Indemnity.* Each Party agrees to indemnify, defend, and hold harmless the other Party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying Party. The obligations of the Parties under this provision will survive termination of this agreement.

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15. *Survival.* The obligations of the Parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

16. *Entire Agreement.* This agreement and any exhibits are the entire agreement of the Parties concerning their respective Properties and the reciprocal Easements granted by the Parties. There are no representations, agreements, warranties, or promises, and neither Party is relying on any statements or representations of the other Party or any agent of the other Party, that are not in this agreement and its exhibits.

17. *Legal Construction.* If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the Parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. This agreement will not be construed more or less favorably between the Parties by reason of authorship or origin of language.

18. *Notices.* Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

_____

[Name of first party]

_____

[Name of second party]

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Include acknowledgments.

Include the following if applicable, adapting as necessary if there is only one lienholder.

Consent and Subordination by Lienholders

Lienholders, as the holders of liens on the Properties, consent to the above grants of Easements, including the terms and conditions of the grants, and Lienholders subordinate their liens to the rights and interests of Holders, so that a foreclosure of the liens will not extinguish the rights and interests of Holders.

_____

[Name of lienholder]

_____

[Name of lienholder]

Include acknowledgments.

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Form 26-24

This form is used to grant an easement for the installation and maintenance of utility facilities.

Easement Agreement for Utilities

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

[Grantor's Lienholder:]

[Grantor's Lienholder's Mailing Address:]

Dominant Estate Property: [**Describe by metes and bounds or plat reference the real property being benefited by the easement.**]

Easement Property: [**Describe by metes and bounds the location of the easement and include a drawing of the easement as an exhibit, if available.**]

Easement Purpose: For the installation, construction, operation, maintenance, replacement, repair, upgrade, and removal of [**specify**] and related facilities (collectively, the "Facilities").

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Consideration: Good and valuable consideration, the receipt and sufficiency of which are acknowledged by Grantor.

Reservations from Conveyance: [**Describe here or in an attached exhibit any reservations from the conveyance in this instrument.**]

Exceptions to Warranty: [**Describe here or in an attached exhibit any exceptions to the warranties in this instrument.**]

Grant of Easement: Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee's heirs, successors, and assigns an easement over, on, and across the Easement Property for the Easement Purpose, together with all and singular the rights and appurtenances thereto in any way belonging (collectively, the "Easement"), to have and to hold the Easement to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part of the Easement, except as to the Reservations from Conveyance and Exceptions to Warranty [**include if applicable:** , to the extent that such claim arises by, through, or under Grantor but not otherwise].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. *Character of Easement.* The Easement is appurtenant to, runs with, and inures to the benefit of all or any portion of the Dominant Estate Property, whether or not the Easement is referenced or described in any conveyance of all or such portion of the Dominant Estate Property. The Easement is nonexclusive and irrevocable. The Easement is for the benefit of

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Grantee and Grantee's heirs, successors, and assigns who at any time own any interest in the Dominant Estate Property (as applicable, the "Holder").

2. *Duration of Easement.* [The duration of the Easement is perpetual./The duration of the Easement is for [**number**] years beginning [**date**].]

3. *Reservation of Rights.* Holder's right to use the Easement Property is nonexclusive, and Grantor reserves for Grantor and Grantor's heirs, successors, and assigns the right to use all or part of the Easement Property in conjunction with Holder as long as such use by Grantor and Grantor's heirs, successors, and assigns does not interfere with the use of the Easement Property by Holder for the Easement Purpose, and the right to convey to others the right to use all or part of the Easement Property in conjunction with Holder, as long as such further conveyance is subject to the terms of this agreement.

4. *Secondary Easement.* Holder has the right (the "Secondary Easement") to use as much of the surface of the property that is adjacent to the Easement Property ("Adjacent Property") as may be reasonably necessary to install and maintain the Facilities within the Easement Property that are reasonably suited for the Easement Purpose. However, Holder must promptly restore the Adjacent Property to its previous physical condition if changed by use of the rights granted by this Secondary Easement.

5. *Improvement and Maintenance of Easement Property.* Improvement and maintenance of the Easement Property and the Facilities will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove the Facilities under or across any portion of the Easement Property. All matters concerning the Facilities and their configuration, construction, installation, maintenance, replacement, and removal are at Holder's sole discretion, subject to performance of Holder's obligations under this agreement. Holder has the right to remove or

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relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Facilities, subject to replacement of the fences to their original condition on the completion of the work.

6. *Equitable Rights of Enforcement.* This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

7. *Attorney's Fees.* If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

8. *Binding Effect.* This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

9. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

10. *Counterparts.* This agreement may be executed in mulitple counterparts. All counterparts taken together constitute this agreement.

11. *Waiver of Default.* A default is not waived if the nondefaulting party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit

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of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

12. *Further Assurances.* Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

13. *Indemnity.* Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party. The obligations of the parties under this provision will survive termination of this agreement.

14. *Survival.* The obligations of the parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

15. *Entire Agreement.* This agreement and any exhibits are the entire agreement of the parties concerning the Easement Property and the grant of the Easement by Grantor to Grantee. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of the other party or any agent of the other party, that are not expressly set forth in this agreement and any exhibits.

16. *Legal Construction.* If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

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17. *Notices.* Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

_____

[Name of grantor]

_____

[Name of grantee]

Include acknowledgments.

Include the following if applicable.

Consent and Subordination by Lienholder

Lienholder, as the holder of [a] lien[s] on the Easement Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordinates its lien[s] to the rights and interests of Holder, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Holder.

_____

[Name of lienholder]

Include acknowledgment.

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Form 26-25

This form is used to convey the sole privilege of making the uses of the grantor's land that are authorized in the form. Neither the grantor nor any other person except the grantee is entitled to make such uses. Examples are for uses of the land covered by the easement for a sign, billboard, cell tower, or wind turbine.

Easement in Gross Agreement

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

[Grantor's Lienholder:]

[Grantor's Lienholder's Mailing Address:]

Grantor's Property: All of the property described in Exhibit A, attached hereto and incorporated herein.

Easement Property: All of the property within Grantor's Property as described in Exhibit B, attached hereto and incorporated herein, and as much of the remainder of Grantor's Property as may be reasonably necessary for ingress and egress by Grantee, its employees, agents, and contractors to and from the Easement Property, to construct, install, operate,

maintain, inspect, repair, and replace the Facilities, ONLY to the extent that the Easement Property is not accessible by using existing rights-of-way, streets, roads, driveways, and parking areas to the maximum extent reasonably possible.

Easement Purpose: For the installation, construction, operation, maintenance, replacement, repair, upgrade, and removal of [**specify, e.g.,** a tower, billboard, sign, wind turbine] and related equipment (collectively, the "Facilities").

Consideration: Good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Grantor.

Reservations from Conveyance: [**Describe here or in an attached exhibit any reservations from the conveyance in this instrument.**]

Exceptions to Warranty: [**Describe here or in an attached exhibit any exceptions to the warranties in this instrument.**]

Grant of Easement: Grantor, for the Consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, grants, sells, and conveys to Grantee and Grantee's heirs, successors, and assigns an easement over, on, and across the Easement Property for the Easement Purpose, together with all and singular the rights and appurtenances thereto in any way belonging (collectively, the "Easement"), to have and to hold the Easement to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs, successors, and assigns to warrant and forever defend the title to the Easement in Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the Easement or any part thereof, except as to the Reservations from Conveyance and Exceptions to Warranty [**include if applicable:** , to the extent that such claim arises by, through, or under Grantor but not otherwise/, without express or implied warranty. All warranties that might arise

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by common law and the warranties in Section 5.023 of the Texas Property Code (or its successor) are excluded].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. *Character of Easement.* The Easement and related rights granted by Grantor in this agreement to Grantee are an [exclusive/nonexclusive] and irrevocable easement in gross for the benefit of Grantee and its successors and assigns, as owner of the rights created by the Easement in gross, and is exclusive and irrevocable (as applicable, the "Holder"). The Easement and related rights granted by Grantor in this agreement are binding on Grantor; on the Grantor's heirs, legal representatives, successors, and assigns; and on all future owners of the Easement Property. This Easement and other rights granted by Grantor in this agreement are independent of any lands or estates of interest in lands; there is no other real property benefitting from the Easement granted in this agreement.

2. *Assignment.* Grantee may assign, sublease, license, transfer, or convey its interest in this agreement or any part of its interest in the Easement without Grantor's consent, provided that the assignee or transferee shall be subject to all of the obligations, covenants, and conditions applicable to Grantee.

3. *Duration of Easement.* [The duration of the Easement is perpetual./The duration of the Easement is for [**number**] years beginning [**date**].]

4. *Improvement and Maintenance of Easement Property.* Improvement and maintenance of the Easement Property and the Facilities will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property that interfere with the Easement Purpose. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove the Facilities on, under, or across any portion of the Easement Property. All matters concerning the

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Facilities and their configuration, construction, installation, maintenance, replacement, and removal are at Holder's sole discretion, subject to performance of Holder's obligations under this agreement. Holder has the right to remove or relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Facilities, subject to replacement of the fences to their original condition on the completion of the work.

5. *Equitable Rights of Enforcement.* This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

6. *Attorney's Fees.* If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

7. *Binding Effect.* This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

8. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

9. *Counterparts.* This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

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10. *Waiver of Default.* A default is not waived if the nondefaulting party fails to declare default immediately or delays in taking any action with respect to the default. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

11. *Further Assurances.* Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

12. *Indemnity.* Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party. The obligations of the parties under this provision will survive termination of this agreement.

13. *Survival.* The obligations of the parties in this agreement that cannot be or were not performed before termination of this agreement survive termination of this agreement.

14. *Entire Agreement.* This agreement and any exhibits are the entire agreement of the parties concerning the Easement Property and the grant of the Easement by Grantor to Grantee. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of the other party or any agent of the other party, that are not expressly set forth in this agreement and any exhibits.

15. *Legal Construction.* If any provision in this agreement is unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or femi-

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nine gender, and vice versa. This agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

16. *Notices.* Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

_____

[Name of grantor]

_____

[Name of grantee]

Include acknowledgments.

Include the following if applicable.

Consent and Subordination by Lienholder

Lienholder, as the holder of [a] lien[s] on the Easement Property, consents to the above grant of an Easement, including the terms and conditions of the grant, and Lienholder subordinates its lien[s] to the rights and interests of Holder, so that a foreclosure of the lien[s] will not extinguish the rights and interests of Holder.

_____

[Name of lienholder]

Include acknowledgment.

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Exhibit A

Description of Grantor's Property

Describe by metes and bounds or plat reference the real property within which the easement is located.

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Exhibit B

Description of Easement Property

Describe by metes and bounds the location of the easement and include a drawing of the easement as an exhibit, if available.

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Form 26-26

This form is used if two parties wish to deposit funds or documents in escrow with a neutral party to hold and distribute when the agreed conditions have been satisfied.

Escrow Agreement

Date:

Escrow Agent:

Depositing Party:

Performing Party:

1. Escrow Agent, Depositing Party, and Performing Party are entering into this agreement.

2. Depositing Party is depositing in escrow with Escrow Agent the following: [**describe deposits**].

3. The purpose of this agreement is [**describe purpose**].

4. Escrow Agent is to hold the [funds/documents/funds and documents] in escrow in anticipation of performance by the Performing Party of the following acts: [**describe contingencies**].

5. If Performing Party completes the contingencies referred to in paragraph 4. of this agreement during the time specified in this agreement, Escrow Agent is instructed to dispose of the [funds/documents/funds and documents] in the following manner: [**describe disposition, e.g.,** record them with the [**county**] county clerk].

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6. The contingencies required of Performing Party must be fully performed within [**number**] days from the date of this agreement. If all contingencies are not fully performed within that time, Escrow Agent will dispose of the [funds/documents/funds and documents] in the following manner: [**describe disposition, e.g.,** return them to Depositing Party].

7. Escrow Agent agrees to hold the [funds/documents/funds and documents] in accordance with the provisions of this agreement.

8. Escrow Agent will receive a fee of $[**amount**] for performance of the services called for under this agreement. Payment of the fee will be made equally by Depositing Party and Performing Party.

9. Depositing Party and Performing Party agree that Escrow Agent will have no responsibility under this agreement except for the safekeeping and handling of the [funds/documents/funds and documents] deposited with Escrow Agent by Depositing Party. Escrow Agent will not be liable for any act or thing done by it relating to this agreement, except for the negligence or willful misconduct of Escrow Agent. If conflicting demands are made on Escrow Agent by Depositing Party and Performing Party, Escrow Agent may withhold its performance under the terms of this agreement until the conflicting demands are withdrawn or the rights of the parties making the demands are settled by a court of competent jurisdiction.

10. Escrow Agent may resign as Escrow Agent by giving [**number**] days' written notice to Depositing Party and Performing Party of its resignation. Escrow Agent will then deliver the [funds/documents/funds and documents] it is holding under the terms of this agreement in accordance with the joint written instructions given it by Depositing Party and Performing Party. If no instructions are given to Escrow Agent within the stated time period, Escrow Agent is authorized to deposit all the [funds/documents/funds and documents] into the registry of a court of competent jurisdiction.

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11. Depositing Party and Performing Party may remove Escrow Agent, with or without cause, and appoint a substitute escrow agent by giving joint written notice to Escrow Agent. Escrow Agent will deliver the [funds/documents/funds and documents] as directed in the notice within ten days after the date of notice.

_____

[Name of depositing party]

_____

[Name of performing party]

_____

[Name of escrow agent]

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Form 26-27

This form is used to release a judgment lien by affidavit pursuant to Tex. Prop. Code § 52.0012.

Homestead Affidavit as Release of Judgment Lien

Date:

Affiant:

Affiant's Address:

Judgment Debtor:

Judgment Creditor:

Judgment

Date:

Cause number:

Style of case:

Court:

Abstract of Judgment/Judgment Lien Recording Information:

Property: [**description of homestead property**]

Before me, the undersigned authority, on this day personally appeared Affiant, who being first duly sworn, on oath stated:

1. I own the Property.

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2. This Affidavit is made for the purpose of effecting a release of the Judgment Lien on the Property.

3. The Property includes as its purpose use for a home for Affiant and is the homestead of Affiant, as defined in Texas Property Code section 41.002. The Property does not exceed—

a. ten acres of land, if used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, or

b. two hundred acres for a family or 100 acres for a single, adult person not otherwise entitled to a homestead, if used for the purposes of a rural home.

4. Attached to this Affidavit is evidence that—

a. Affiant sent a letter and a copy of this Affidavit, without attachments and before execution of the Affidavit, notifying Judgment Creditor in the Judgment Lien of this Affidavit and Affiant's intent to file for record this Affidavit, and

b. the letter and this Affidavit were sent by registered or certified mail, return receipt requested, thirty or more days before this Affidavit was filed to (i) Judgment Creditor's last known address, (ii) the address appearing in Judgment Creditor's pleadings in the action in which the Judgment was rendered or another court record, if that address is different from Judgment Creditor's last known address, (iii) the address of Judgment Creditor's last known attorney as shown in those pleadings or another court record, and (iv) the address of Judgment Creditor's last known attorney as shown in the records of the State Bar of Texas, if that address is different from the address of the attorney as shown in those pleadings or another court record.

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5. This Affidavit serves as a release of the Judgment Lien as to the Property in accordance with Texas Property Code section 52.0012.

_____
[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____
Notary Public, State of Texas

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Form 26-28

Tex. Prop. Code § 12.007 authorizes the filing of a lis pendens with the county clerk in each county in which the property is located to give notice that a proceeding is pending.

Lis Pendens

Date:

Party Filing Lis Pendens:

[Party's Address/Party's Attorney's Address]:

Other Party to Proceeding:

[Other Party's Address/Other Party's Attorney's Address:]

Proceeding

Court:

Cause number:

Style of case:

Type of proceeding:

Property:

Notice is given that the Proceeding is pending and that the Party Filing Lis Pendens is affirmatively seeking title to, the establishment of an interest in, or enforcement of an encumbrance against the Property.

Repeat as needed.

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Tex. Prop. Code § 12.007(b) requires the lis pendens be signed by the party or the party's attorney.

_____

[Name of party or party's attorney]

Include acknowledgment.

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Form 26-29

This form is used to create an agency relationship between a seller and a broker if the seller appoints the broker as the seller's sole and exclusive agent to sell the property for the price and on the terms specified in the agreement but retains the right to sell the property directly without using the agent.

Listing Agreement

[Exclusive Agency]

Date:

Seller:

Seller's Mailing Address, Telephone Number, and E-mail Address:

Broker:

Broker's Mailing Address, Telephone Number, and E-mail Address:

Property:

Commencement Date:

Termination Date:

Listing Price:

Broker's Fee:

Agreement

In consideration of services to be performed by Broker, Seller appoints Broker as Seller's sole and exclusive agent to sell the Property for the price and on the terms described in this agreement, it being understood and agreed that Seller reserves the right to sell,

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exchange, or otherwise dispose of the Property to a buyer procured by Seller without the assistance of Broker.

A. Agreement and Term. This agreement will commence on the Commencement Date and will continue for a term that will expire at 11:59 P.M. local time on the Termination Date. However, if there is a pending contract in effect on the Termination Date between Seller and a buyer procured by Broker and that transaction has not been closed and funded, this agreement will continue in effect beyond the Termination Date solely with respect to that contract until the earlier of the closing and funding of the transaction described in the contract or the termination of the contract in a manner permitted in the contract. The term of this agreement is also subject to extension and early termination as provided in this agreement.

B. Listing Price and Terms. Seller agrees to sell the Property for the Listing Price or any other price that Seller may accept. Unless otherwise agreed by Seller, the Property will be sold for cash, and Seller will not provide any financing with respect to the sale. Seller will pay the typical transaction and closing costs borne by or charged to sellers of real property in Texas.

C. Exclusive Agency Relationship. Unless otherwise specified by written agreement between Seller and Broker, it is understood and agreed that Broker will act solely as Seller's agent in connection with the sale of the Property and that Broker is not authorized to act as an intermediary between Seller and any buyer of the Property.

D. Broker's Fee. Seller will pay Broker the Broker's Fee in cash if the Broker's Fee is earned and payable in accordance with the following provisions:

Select one of the following.

D.1. The Broker's Fee will be earned and payable when the sale or exchange of the Property to a buyer procured by Broker, individually or in cooperation with another broker,

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under a contract executed by Seller is finally closed and funded, whether this occurs during the term of this agreement or after the termination of this agreement.

Or

D.1. The Broker's Fee will be earned if Broker, during the term of this agreement, individually or in cooperation with another broker, procures a buyer who enters into a contract with Seller to buy the Property. The Broker's Fee, once earned with respect to a particular sale or exchange of the Property, will be payable, either during the term of this agreement or after the termination of this agreement, on either of the following events: (a) the closing and funding of the sale or exchange of the Property or (b) Seller's wrongful refusal to close the sale or exchange of the Property.

Continue with the following.

D.2. Unless otherwise provided in this agreement, the Broker's Fee will be determined on the basis of the sale price (the "Sale Price") specified in the contract between Seller and the buyer. If the disposition of the Property is consummated as an exchange of the Property for other property, the Sale Price of the Property will be deemed to be the Listing Price unless otherwise specified by Broker and Seller in writing.

D.3. If a buyer procured by Broker with whom Seller has entered into a contract for the sale of the Property during the term of this agreement breaches that contract and Seller receives the buyer's earnest money or a portion thereof as liquidated damages, Seller will pay Broker the lesser of one-half of the amount of the liquidated damages or the Broker's Fee.

D.4. If litigation, mediation, or arbitration is instituted with respect to a contract between Seller and a buyer procured by Broker for the sale of the Property that is executed during the term of this agreement, and Seller collects all or a portion of the Sale Price or damages by judgment, compromise, settlement, or otherwise, Seller will pay Broker the lesser of (a) one-half of the amount collected after deduction of attorney's fees and other expenses of

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collection or (b) the Broker's Fee (determined after reducing the Sale Price by the amount of attorney's fees or other expenses of collection).

D.5. Seller will not owe Broker the Broker's Fee if a sale of the Property does not close or fund as a result of (a) Seller's failure to deliver a title policy to a buyer, caused by Seller's inability to cure the buyer's title objections due to matters beyond Seller's reasonable control; (b) Seller's loss of ownership due to foreclosure, conveyance in lieu of foreclosure, or other legal proceeding; or (c) Seller's failure to restore the Property following any casualty or condemnation to its previous condition by the closing date set forth in a contract for the sale of the Property.

D.6. Seller authorizes any escrow or closing agent authorized to close a transaction for the sale or other disposition of the Property contemplated in this agreement to collect and disburse to Broker the Broker's Fee due under this agreement if the buyer was procured by Broker. Seller authorizes Broker to instruct any closing or escrow agent to collect and disburse the Broker's Fee due under this agreement if the buyer was procured by Broker.

D.7. Seller will not owe Broker the Broker's Fee in connection with any transaction in which the buyer or other party to the transaction was procured by Seller without the assistance or participation of Broker.

E. Protection Period. Subject to the conditions set forth in paragraph D. above, if, within ninety days after the termination of this agreement (the "Protection Period"), Seller enters into a contract to sell the Property to one of Broker's Registered Buyers (as hereinafter defined) or sells, exchanges, or otherwise transfers an interest in the Property to one of Broker's Registered Buyers, Seller will pay Broker the Broker's Fee. For purposes of this agreement, the Broker's Registered Buyers will consist only of those persons whose attention has been called to the Property by Broker during the term of this agreement, or with whom Broker has negotiated the sale, exchange, or other transfer of the Property during the term of this

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agreement, and whose names and addresses have been provided in writing by Broker to Seller within five days after the termination of this agreement. It is specifically understood and agreed, however, that the foregoing provisions regarding the Protection Period will not be applicable with respect to any sale, exchange, or other transfer of the Property that occurs after the termination of this agreement while the Property is listed exclusively with another broker.

F. Broker's Duties and Authorities. During the term of this agreement, Broker will be authorized and required to take the following actions:

F.1. Broker will make reasonable efforts and act diligently to sell the Property in accordance with the terms of this agreement. Seller authorizes Broker and Broker's associates, at Broker's sole cost and expense, to (a) advertise the Property by the means and methods Broker reasonably determines to be appropriate for the Property based on then-current market practices for properties substantially similar to the Property; (b) place a "For Sale" sign on the Property in compliance with any state and local laws, rules, ordinances, restrictions, or covenants; (c) remove from the Property all other signs offering the Property for sale or lease; (d) furnish comparative marketing and sale information about other properties to prospective buyers; (e) disseminate information about the Property to other brokers and their associates through a multiple-listing service or such other means as Broker reasonably determines to be appropriate; (f) enter the Property, and accompany other brokers and their associates who wish to enter the Property, at reasonable times and, if the Property is then occupied, on reasonable advance notice, to show the Property to prospective buyers; (g) authorize property inspectors, appraisers, and repair personnel to enter the Property at reasonable times and, if the Property is then occupied, on reasonable notice, for pertinent purposes; (h) obtain information from any holder of any note secured by a lien on the Property concerning the note or lien; and (i) on a final and closed sale of the Property, disclose the Sale Price and terms to the local tax appraisal district and, if applicable, multiple-listing service.

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F.2. Broker is not authorized to (a) execute any document in the name of or on behalf of Seller with respect to the Property, (b) authorize any repairs to the Property without Seller's prior written consent, (c) authorize the expenditure of any funds on behalf of Seller without Seller's prior written consent, (d) negotiate any earnest money deposit or other instrument in connection with the Property, or (e) use a "lock-box" for keys to the Property.

F.3. Broker will not be obligated to market the Property after Seller has entered into a binding contract unless the contract provides otherwise. If Broker is obligated to submit subsequent or backup offers, Seller will specifically provide in the contract for the sale of the Property with a buyer that Seller may continue to market the Property so that Broker may receive subsequent or backup offers, which will be submitted to Seller as received for consideration by Seller when the prior contract is terminated or renegotiated. If Seller enters into a contract to sell the Property that does not provide for the submission of backup offers, and Broker subsequently receives a subsequent or backup offer to purchase the Property, Broker will inform Seller and submit the subsequent or backup offer to Seller when the prior contract is terminated or renegotiated.

F.4. Broker will not be responsible in any manner for personal injury to Seller resulting from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing water pipes, or other causes, except the negligence or misconduct of Broker. If the Property becomes vacant during the term of this agreement, Seller will notify Seller's casualty insurance company and request that the insurance coverage regarding the Property be modified to include a "vacancy clause" to cover the Property. Broker will not be responsible for the security of the Property or for inspecting the Property on any periodic basis unless otherwise agreed in writing by Seller and Broker.

G. Broker's Representations and Covenants. Broker represents and warrants to, and covenants with, Seller as follows:

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G.1. Broker is duly licensed as a real estate broker authorized to provide real estate brokerage services in accordance with this agreement by the Texas Real Estate Commission (the "Commission") under the Texas Real Estate License Act (the "Act"), as amended, and will maintain that license in full force and effect at all times during the term of this agreement. All associates employed by Broker to assist with marketing and selling the Property, and all other brokers with whom Broker cooperates in connection with marketing and selling the Property, will be duly licensed by the Commission as real estate brokers or agents in accordance with the Act when any such services are rendered.

G.2. All activities by Broker and Broker's associates hereunder will be conducted in strict compliance with the Act, the rules and regulations of the Commission, and all other provisions of applicable law, including, without limitation, all fair housing laws.

H. Seller's Representations and Covenants. Seller represents and warrants to, and covenants with, Broker as follows:

H.1. Seller represents that (a) Seller has fee simple title to the Property, peaceable possession of the Property and all improvements and fixtures on the Property unless rented, and the legal capacity to convey the Property; (b) Seller is not now a party to a listing agreement with another broker for the sale, exchange, or lease of the Property; (c) no person or entity has any right to purchase, lease, or acquire the Property by virtue of a contract, option, right of first refusal, or other agreement; (d) there are no delinquencies or defaults under any deed of trust, mortgage, or other encumbrance on the Property; (e) the Property is not subject to the jurisdiction of any court whose permission or consent is required for the execution of this agreement or the sale, exchange, or other disposition of the Property; and (f) all information regarding the Property that has been provided by Seller to Broker, or that may be provided by Seller to Broker after the execution of this agreement, has been or will be, to the best of Seller's knowledge, true, correct, and complete in all material respects.

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H.2. Seller will cooperate fully and in good faith with Broker to facilitate the showing and marketing of the Property at Broker's sole cost and expense; not enter into any listing agreement with another broker for the sale, exchange, or lease of the Property to become effective during the term of this agreement; and provide Broker with copies of all leases or rental agreements pertaining to the Property, if any, and advise Broker of any tenants moving into or out of the Property.

H.3. Seller will provide Broker and all prospective buyers of the Property with disclosure notices regarding the condition of the Property, if and to the extent required by law. Seller authorizes Broker to deliver such disclosure notices to prospective buyers of the Property at or before the time a contract is executed for the sale, exchange, or other disposition of the Property. Seller agrees to complete all such disclosure notices based on Seller's best knowledge and belief and in a manner that discloses all material defects or facts concerning the Property that are actually known to Seller. Seller agrees to indemnify, defend, and hold Broker and Broker's associates harmless from any damages, costs, attorney's fees, or expenses arising from Seller's knowingly giving to Broker or Broker's associates or any buyer of the Property information regarding the Property that is actually known to Seller to be incorrect in any material respect or from Seller's failure to disclose to Broker or Broker's associates or any buyer of the Property any material information regarding the Property that is actually known to Seller.

H.4. Seller will furnish to a buyer of the Property (a) an owner policy of title insurance at Seller's expense for the basic premium cost of such policy (without regard to any modifications or endorsements) in the amount of the Sale Price and dated at or after the closing of the sale of the Property; (b) a [general/special] warranty deed conveying title to the Property subject only to liens securing payment of a debt created or assumed as part of the Sale Price, taxes for the current year, restrictive covenants and utility easements common to any platted subdivision in which the Property is located, and other reservations or exceptions

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that will not materially impair or interfere with the buyer's anticipated use of the Property or that are otherwise acceptable to the buyer; (c) property tax statements showing no delinquent taxes; and (d) copies of restrictive covenants and documents evidencing exceptions to any title commitment other than the standard printed title exceptions.

H.5. Seller will indemnify, defend, and hold Broker harmless from any damages, costs, attorney's fees, or expenses arising from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing of water pipes, or any other causes, except the negligence or misconduct of Broker.

H.6. Seller will furnish to the escrow or closing agent closing any sale or other disposition of the Property contemplated by this agreement such information regarding Seller and the transaction as the agent will require to report the transaction to the Internal Revenue Service in accordance with applicable law.

H.7. Unless otherwise specified by written notice from Seller to Broker, Seller represents that Seller is not a nonresident alien, foreign corporation, foreign partnership, foreign trust, foreign estate, or other foreign person, requiring a buyer of the Property to withhold a portion of the Sale Price under section 1445 of the Internal Revenue Code of 1986, as amended. At or before the sale or other disposition of the Property, Seller will provide Broker and any buyer of the Property any affidavits and other information reasonably required to confirm the representations concerning the nonforeign status of Seller.

I. Termination for Cause. Either party is entitled to terminate this agreement before the Termination Date if the other party fails to perform its obligations under the agreement and the failure to perform is not cured to the reasonable satisfaction of the party giving written notice of such failure within thirty days after receipt of the notice. Except for a termination due to Broker's failure to be licensed under the Act, any such termination will not be effective

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with respect to any contract for the sale, exchange, or other disposition of the Property previously executed by Seller and a buyer that is then pending closing.

J. Attorney's Fees. If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

K. Binding Effect. This agreement binds, benefits, and may be enforced by the successors in interest to the parties.

L. Choice of Law. This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Property is located.

M. Counterparts. This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

N. Waiver of Default. It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

O. Further Assurances. Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

P. Indemnity. Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party.

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Q. Entire Agreement. This agreement is the entire agreement of the parties. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of any agent of the other party, that are not in this agreement.

R. Legal Construction. If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. The agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

S. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

T. Recitals. Any recitals in this agreement are represented by the parties to be accurate, and constitute a part of the substantive agreement.

U. Time. Time is of the essence. Unless otherwise specified, all references to "days" mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

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Include the following if applicable.

V. Broker's Lien. BROKER HAS THE RIGHT TO CLAIM A LIEN UNDER THE PROVISIONS OF TEXAS PROPERTY CODE CHAPTER 62.

Continue with the following.

_____

[Name of seller]

_____

[Name of broker]

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Form 26-30

This form is used to create an agency relationship between a seller and a broker if the seller appoints the broker as the seller's sole and exclusive agent and grants the broker an irrevocable and exclusive right to sell the property for the price and on the terms specified in the agreement.

Listing Agreement

[Exclusive Right to Sell]

Date:

Seller:

Seller's Mailing Address, Telephone Number, and E-mail Address:

Broker:

Broker's Mailing Address, Telephone Number, and E-mail Address:

Property:

Commencement Date:

Termination Date:

Listing Price:

Broker's Fee:

Agreement

In consideration of services to be performed by Broker, Seller appoints Broker as Seller's sole and exclusive agent and grants to Broker the irrevocable and exclusive right to sell the Property for the price and on the terms described in this agreement.

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A. Agreement and Term. This agreement will commence on the Commencement Date and will continue for a term that will expire at 11:59 P.M. local time on the Termination Date. However, if there is a pending contract in effect on the Termination Date between Seller and a buyer and that transaction has not been closed and funded, this agreement will continue in effect beyond the Termination Date solely with respect to that contract until the earlier of the closing and funding of the transaction described in the contract or the termination of the contract in a manner permitted in the contract. The term of this agreement is also subject to extension and early termination as provided in this agreement.

B. Listing Price and Terms. Seller agrees to sell the Property for the Listing Price or any other price that Seller may accept. Unless otherwise agreed by Seller, the Property will be sold for cash, and Seller will not provide any financing with respect to the sale. Seller will pay the typical transaction and closing costs borne by or charged to sellers of real property in Texas.

C. Exclusive Agency Relationship. Unless otherwise specified by written agreement between Seller and Broker, it is understood and agreed that Broker will act solely as Seller's agent in connection with the sale of the Property and that Broker is not authorized to act as an intermediary between Seller and any buyer of the Property.

D. Broker's Fee. Seller will pay Broker the Broker's Fee in cash if the Broker's Fee is earned and payable in accordance with the following provisions:

Select one of the following.

D.1. The Broker's Fee will be earned and payable when the sale or exchange of the Property under a contract executed by Seller is finally closed and funded, whether this occurs during the term of this agreement or after the termination of this agreement.

Or

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D.1. The Broker's Fee will be earned if Broker, during the term of this agreement, individually or in cooperation with another broker, procures a buyer who enters into a contract with Seller to buy the Property. The Broker's Fee, once earned with respect to a particular sale or exchange of the Property, will be payable, either during the term of this agreement or after the termination of this agreement, on either of the following events: (a) the closing and funding of the sale or exchange of the Property or (b) Seller's wrongful refusal to close the sale or exchange of the Property.

Continue with the following.

D.2. Unless otherwise provided in this agreement, the Broker's Fee will be determined on the basis of the sale price (the "Sale Price") specified in the contract between Seller and the buyer. If the disposition of the Property is consummated as an exchange of the Property for other property, the Sale Price of the Property will be deemed to be the Listing Price unless otherwise specified by Broker and Seller in writing.

D.3. If Seller breaches this agreement, or leases, rents, or otherwise transfers the Property without Broker's prior written consent, the Broker's Fee will be earned and payable at the time of the transaction and the Sale Price will be deemed to be the Listing Price for purposes of calculating the Broker's Fee.

D.4. If a buyer with whom Seller has entered into a contract for the sale of the Property during the term of this agreement breaches that contract and Seller receives the buyer's earnest money or a portion thereof as liquidated damages, Seller will pay Broker the lesser of one-half of the amount of the liquidated damages or the Broker's Fee.

D.5. If litigation, mediation, or arbitration is instituted with respect to a contract between Seller and a buyer for the sale of the Property that is executed during the term of this agreement, and Seller collects all or a portion of the Sale Price or damages by judgment, compromise, settlement, or otherwise, Seller will pay Broker the lesser of (a) one-half of the

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amount collected after deduction of attorney's fees and other expenses of collection or (b) the Broker's Fee (determined after reducing the Sale Price by the amount of attorney's fees or other expenses of collection).

D.6. Seller will not owe Broker the Broker's Fee if a sale of the Property does not close or fund as a result of (a) Seller's failure to deliver a title policy to a buyer, caused by Seller's inability to cure the buyer's title objections due to matters beyond Seller's reasonable control; (b) Seller's loss of ownership due to foreclosure, conveyance in lieu of foreclosure, or other legal proceeding; or (c) Seller's failure to restore the Property following any casualty or condemnation to its previous condition by the closing date set forth in a contract for the sale of the Property.

D.7. Seller authorizes any escrow or closing agent authorized to close a transaction for the sale or other disposition of the Property contemplated in this agreement to collect and disburse to Broker the Broker's Fee due under this agreement. Seller authorizes Broker to instruct any closing or escrow agent to collect and disburse the Broker's Fee due under this agreement.

E. Protection Period. Subject to the conditions set forth in paragraph D. above, if, within ninety days after the termination of this agreement (the "Protection Period"), Seller enters into a contract to sell the Property to one of Broker's Registered Buyers (as hereinafter defined) or sells, exchanges, or otherwise transfers an interest in the Property to one of Broker's Registered Buyers, Seller will pay Broker the Broker's Fee. For purposes of this agreement, the Broker's Registered Buyers will consist only of those persons whose attention has been called to the Property by Broker, any other broker, or Seller during the term of this agreement, or with whom Broker, any other broker, or Seller has negotiated the sale, exchange, or other transfer of the Property during the term of this agreement, and whose names and addresses have been provided in writing by Broker to Seller within five days after the termination of this agreement. It is specifically understood and agreed, however, that the

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foregoing provisions regarding the Protection Period will not be applicable with respect to any sale, exchange, or other transfer of the Property that occurs after the termination of this agreement while the Property is listed exclusively with another broker.

F. Broker's Duties and Authorities. During the term of this agreement, Broker will be authorized and required to take the following actions:

F.1. Broker will make reasonable efforts and act diligently to sell the Property in accordance with the terms of this agreement. Seller authorizes Broker and Broker's associates, at Broker's sole cost and expense, to (a) advertise the Property by the means and methods Broker reasonably determines to be appropriate for the Property based on then-current market practices for properties substantially similar to the Property; (b) place a "For Sale" sign on the Property in compliance with any state and local laws, rules, ordinances, restrictions, or covenants; (c) remove from the Property all other signs offering the Property for sale or lease; (d) furnish comparative marketing and sale information about other properties to prospective buyers; (e) disseminate information about the Property to other brokers and their associates through a multiple-listing service or such other means as Broker reasonably determines to be appropriate; (f) enter the Property, and accompany other brokers and their associates who wish to enter the Property, at reasonable times and, if the Property is then occupied, on reasonable advance notice, to show the Property to prospective buyers; (g) authorize property inspectors, appraisers, and repair personnel to enter the Property at reasonable times and, if the Property is then occupied, on reasonable notice, for pertinent purposes; (h) obtain information from any holder of any note secured by a lien on the Property concerning the note or lien; and (i) on a final and closed sale of the Property, disclose the Sale Price and terms to the local tax appraisal district and, if applicable, multiple-listing service.

F.2. Broker is not authorized to (a) execute any document in the name of or on behalf of Seller with respect to the Property, (b) authorize any repairs to the Property without Seller's prior written consent, (c) authorize the expenditure of any funds on behalf of Seller

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without Seller's prior written consent, (d) negotiate any earnest money deposit or other instrument in connection with the Property, or (e) use a "lock-box" for keys to the Property.

F.3. Broker will not be obligated to market the Property after Seller has entered into a binding contract unless the contract provides otherwise. If Broker is obligated to submit subsequent or backup offers, Seller will specifically provide in the contract for the sale of the Property with a buyer that Seller may continue to market the Property so that Broker may receive subsequent or backup offers, which will be submitted to Seller as received for consideration by Seller when the prior contract is terminated or renegotiated. If Seller enters into a contract to sell the Property that does not provide for the submission of backup offers, and Broker subsequently receives a subsequent or backup offer to purchase the Property, Broker will inform Seller and submit the subsequent or backup offer to Seller when the prior contract is terminated or renegotiated.

F.4. Broker will not be responsible in any manner for personal injury to Seller resulting from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing water pipes, or other causes, except the negligence or misconduct of Broker. If the Property becomes vacant during the term of this agreement, Seller will notify Seller's casualty insurance company and request that the insurance coverage regarding the Property be modified to include a "vacancy clause" to cover the Property. Broker will not be responsible for the security of the Property or for inspecting the Property on any periodic basis unless otherwise agreed in writing by Seller and Broker.

G. Broker's Representations and Covenants. Broker represents and warrants to, and covenants with, Seller as follows:

G.1. Broker is duly licensed as a real estate broker authorized to provide real estate brokerage services in accordance with this agreement by the Texas Real Estate Commission (the "Commission") under the Texas Real Estate License Act (the "Act"), as amended, and

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will maintain that license in full force and effect at all times during the term of this agreement. All associates employed by Broker to assist with marketing and selling the Property, and all other brokers with whom Broker cooperates in connection with marketing and selling the Property, will be duly licensed by the Commission as real estate brokers or agents in accordance with the Act when any such services are rendered.

G.2. All activities by Broker and Broker's associates hereunder will be conducted in strict compliance with the Act, the rules and regulations of the Commission, and all other provisions of applicable law, including, without limitation, all fair housing laws.

H. Seller's Representations and Covenants. Seller represents and warrants to, and covenants with, Broker as follows:

H.1. Seller represents that (a) Seller has fee simple title to the Property, peaceable possession of the Property and all improvements and fixtures on the Property unless rented, and the legal capacity to convey the Property; (b) Seller is not now a party to a listing agreement with another broker for the sale, exchange, or lease of the Property; (c) no person or entity has any right to purchase, lease, or acquire the Property by virtue of a contract, option, right of first refusal, or other agreement; (d) there are no delinquencies or defaults under any deed of trust, mortgage, or other encumbrance on the Property; (e) the Property is not subject to the jurisdiction of any court whose permission or consent is required for the execution of this agreement or the sale, exchange, or other disposition of the Property; and (f) all information regarding the Property that has been provided by Seller to Broker, or that may be provided by Seller to Broker after the execution of this agreement, has been or will be, to the best of Seller's knowledge, true, correct, and complete in all material respects.

H.2. Seller will (a) cooperate fully and in good faith with Broker to facilitate the showing and marketing of the Property at Broker's sole cost and expense; (b) not negotiate with any prospective buyer who may contact Seller directly, but refer all prospective buyers to

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Broker; (c) not enter into any listing agreement with another broker for the sale, exchange, or lease of the Property to become effective during the term of this agreement; and (d) provide Broker with copies of all leases or rental agreements pertaining to the Property, if any, and advise Broker of any tenants moving into or out of the Property.

H.3. Seller will provide Broker and all prospective buyers of the Property with disclosure notices regarding the condition of the Property, if and to the extent required by law. Seller authorizes Broker to deliver such disclosure notices to prospective buyers of the Property at or before the time a contract is executed for the sale, exchange, or other disposition of the Property. Seller agrees to complete all such disclosure notices based on Seller's best knowledge and belief and in a manner that discloses all material defects or facts concerning the Property that are actually known to Seller. Seller agrees to indemnify, defend, and hold Broker and Broker's associates harmless from any damages, costs, attorney's fees, or expenses arising from Seller's knowingly giving to Broker or Broker's associates or any buyer of the Property information regarding the Property that is actually known to Seller to be incorrect in any material respect or from Seller's failure to disclose to Broker or Broker's associates or any buyer of the Property any material information regarding the Property that is actually known to Seller.

H.4. Seller will furnish to a buyer of the Property (a) an owner policy of title insurance at Seller's expense for the basic premium cost of such policy (without regard to any modifications or endorsements) in the amount of the Sale Price and dated at or after the closing of the sale of the Property; (b) a [general/special] warranty deed conveying title to the Property subject only to liens securing payment of a debt created or assumed as part of the Sale Price, taxes for the current year, restrictive covenants and utility easements common to any platted subdivision in which the Property is located, and other reservations or exceptions that will not materially impair or interfere with the buyer's anticipated use of the Property or that are otherwise acceptable to the buyer; (c) property tax statements showing no delinquent

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taxes; and (d) copies of restrictive covenants and documents evidencing exceptions to any title commitment other than the standard printed title exceptions.

H.5. Seller will indemnify, defend, and hold Broker harmless from any damages, costs, attorney's fees, or expenses arising from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing of water pipes, or any other causes, except the negligence or misconduct of Broker.

H.6. Seller will furnish to the escrow or closing agent closing any sale or other disposition of the Property contemplated by this agreement such information regarding Seller and the transaction as such agent will require to report the transaction to the Internal Revenue Service in accordance with applicable law.

H.7. Unless otherwise specified by written notice from Seller to Broker, Seller represents that Seller is not a nonresident alien, foreign corporation, foreign partnership, foreign trust, foreign estate, or other foreign person, requiring a buyer of the Property to withhold a portion of the Sale Price under section 1445 of the Internal Revenue Code of 1986, as amended. At or before the sale or other disposition of the Property, Seller will provide Broker and any buyer of the Property any affidavits and other information reasonably required to confirm the representations concerning the nonforeign status of Seller.

I. Termination for Cause. Either party is entitled to terminate this agreement before the Termination Date if the other party fails to perform its obligations under the agreement and the failure to perform is not cured to the reasonable satisfaction of the party giving written notice of such failure within thirty days after receipt of the notice. Except for a termination due to Broker's failure to be licensed under the Act, any such termination will not be effective with respect to any contract for the sale, exchange, or other disposition of the Property previously executed by Seller and a buyer that is then pending closing.

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J. Attorney's Fees. If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

K. Binding Effect. This agreement binds, benefits, and may be enforced by the successors in interest to the parties.

L. Choice of Law. This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Property is located.

M. Counterparts. This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

N. Waiver of Default. It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

O. Further Assurances. Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

P. Indemnity. Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party.

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Q. Entire Agreement. This agreement is the entire agreement of the parties. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of any agent of the other party, that are not in this agreement.

R. Legal Construction. If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. The agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

S. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

T. Recitals. Any recitals in this agreement are represented by the parties to be accurate, and constitute a part of the substantive agreement.

U. Time. Time is of the essence. Unless otherwise specified, all references to "days" mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

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Include the following if applicable.

V. Broker's Lien. BROKER HAS THE RIGHT TO CLAIM A LIEN UNDER THE PROVISIONS OF TEXAS PROPERTY CODE CHAPTER 62.

Continue with the following.

_____

[Name of seller]

_____

[Name of broker]

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Form 26-31

This form is used to create an agency relationship between a seller and a broker if the seller appoints the broker as the seller's nonexclusive agent to sell the property for the price and on the terms specified in the agreement but retains the right to sell the property without using the agent, by selling it either directly or through another agent.

Listing Agreement
[Open Listing]

Date:

Seller:

Seller's Mailing Address, Telephone Number, and E-mail Address:

Broker:

Broker's Mailing Address, Telephone Number, and E-mail Address:

Property:

Commencement Date:

Termination Date:

Listing Price:

Broker's Fee:

Agreement

In consideration of services to be performed by Broker, Seller appoints Broker as Seller's nonexclusive agent to sell the Property for the price and on the terms described in this agreement, it being understood and agreed that Seller reserves the right to sell, exchange, or

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otherwise dispose of the Property to a buyer procured by Seller directly or through another broker without the assistance of Broker.

A. Agreement and Term. This agreement will commence on the Commencement Date and will continue for a term that will expire at 11:59 P.M. local time on the Termination Date. However, if there is a pending contract in effect on the Termination Date between Seller and a buyer procured by Broker and that transaction has not been closed and funded, this agreement will continue in effect beyond the Termination Date solely with respect to that contract until the earlier of the closing and funding of the transaction described in the contract or the termination of the contract in a manner permitted in the contract. The term of this agreement is also subject to extension and early termination as provided in this agreement.

B. Listing Price and Terms. Seller agrees to sell the Property for the Listing Price or any other price that Seller may accept. Unless otherwise agreed by Seller, the Property will be sold for cash, and Seller will not provide any financing with respect to the sale. Seller will pay the typical transaction and closing costs borne by or charged to sellers of real property in Texas.

C. Exclusive Agency Relationship. Unless otherwise specified by written agreement between Seller and Broker, it is understood and agreed that Broker will act solely as Seller's agent in connection with the sale of the Property and that Broker is not authorized to act as an intermediary between Seller and any buyer of the Property.

D. Broker's Fee. Seller will pay Broker the Broker's Fee in cash if the Broker's Fee is earned and payable in accordance with the following provisions:

Select one of the following.

D.1. The Broker's Fee will be earned and payable when the sale or exchange of the Property to a buyer procured by Broker, individually or in cooperation with another broker,

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under a contract executed by Seller is finally closed and funded, whether this occurs during the term of this agreement or after the termination of this agreement.

Or

D.1. The Broker's Fee will be earned if Broker, during the term of this agreement, individually or in cooperation with another broker, procures a buyer who enters into a contract with Seller to buy the Property. The Broker's Fee, once earned with respect to a particular sale or exchange of the Property, will be payable, either during the term of this agreement or after the termination of this agreement, on either of the following events: (a) the closing and funding of the sale or exchange of the Property or (b) Seller's wrongful refusal to close the sale or to close the exchange of the Property.

Continue with the following.

D.2. Unless otherwise provided in this agreement, the Broker's Fee will be determined on the basis of the sale price (the "Sale Price") specified in the contract between Seller and the buyer. If the disposition of the Property is consummated as an exchange of the Property for other property, the Sale Price of the Property will be deemed to be the Listing Price unless otherwise specified by Broker and Seller in writing.

D.3. If a buyer procured by Broker with whom Seller has entered into a contract for the sale of the Property during the term of this agreement breaches that contract and Seller receives the buyer's earnest money or a portion thereof as liquidated damages, Seller will pay Broker the lesser of one-half of the amount of the liquidated damages or the Broker's Fee.

D.4. If litigation, mediation, or arbitration is instituted with respect to a contract between Seller and a buyer procured by Broker for the sale of the Property that is executed during the term of this agreement, and Seller collects all or a portion of the Sale Price or damages by judgment, compromise, settlement, or otherwise, Seller will pay Broker the lesser of (a) one-half of the amount collected after deduction of attorney's fees and other expenses of

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collection or (b) the Broker's Fee (determined after reducing the Sale Price by the amount of attorney's fees or other expenses of collection).

D.5. Seller will not owe Broker the Broker's Fee if a sale of the Property does not close or fund [**include if applicable:** as a result of (a) Seller's failure to deliver a title policy to a buyer, caused by Seller's inability to cure the buyer's title objections due to matters beyond Seller's reasonable control; (b) Seller's loss of ownership due to foreclosure, conveyance in lieu of foreclosure, or other legal proceeding; or (c) Seller's failure to restore the Property following any casualty or condemnation to its previous condition by the closing date set forth in a contract for the sale of the Property].

D.6. Seller authorizes any escrow or closing agent authorized to close a transaction for the sale or other disposition of the Property contemplated in this agreement to collect and disburse to Broker the Broker's Fee due under this agreement if the buyer was procured by Broker. Seller authorizes Broker to instruct any closing or escrow agent to collect and disburse the Broker's Fee due under this agreement if the buyer was procured by Broker.

D.7. Seller will not owe Broker the Broker's Fee in connection with any transaction in which the buyer or other party to the transaction was procured by Seller directly or through the services of another broker without the assistance or participation of Broker.

E. Protection Period. Subject to the conditions set forth in paragraph D. above, if, within ninety days after the termination of this agreement (the "Protection Period"), Seller enters into a contract to sell the Property to one of Broker's Registered Buyers (as hereinafter defined) or sells, exchanges, or otherwise transfers an interest in the Property to one of Broker's Registered Buyers, Seller will pay Broker the Broker's Fee. For purposes of this agreement, the Broker's Registered Buyers will consist only of those persons whose attention has been called to the Property by Broker during the term of this agreement, or with whom Broker has negotiated the sale, exchange, or other transfer of the Property during the term of this

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agreement, and whose names and addresses have been provided in writing by Broker to Seller within five days after the termination of this agreement. It is specifically understood and agreed, however, that the foregoing provisions regarding the Protection Period will not be applicable with respect to any sale, exchange, or other transfer of the Property that occurs after the termination of this agreement while the Property is listed exclusively with another broker.

F. Broker's Duties and Authorities. During the term of this agreement, Broker will be authorized and required to take the following actions:

F.1. Broker will make reasonable efforts and act diligently to sell the Property in accordance with the terms of this agreement. Seller authorizes Broker and Broker's associates, at Broker's sole cost and expense, to (a) advertise the Property by the means and methods Broker reasonably determines to be appropriate for the Property based on then-current market practices for properties substantially similar to the Property; (b) furnish comparative marketing and sale information about other properties to prospective buyers; (c) disseminate information about the Property to other brokers and their associates through a multiple-listing service or such other means as Broker reasonably determines to be appropriate; (d) enter the Property, and accompany other brokers and their associates who wish to enter the Property, at reasonable times and, if the Property is then occupied, on reasonable advance notice, to show the Property to prospective buyers; (e) authorize property inspectors, appraisers, and repair personnel to enter the Property at reasonable times and, if the Property is then occupied, on reasonable notice, for pertinent purposes; (f) obtain information from any holder of any note secured by a lien on the Property concerning the note or lien; and (g) on a final and closed sale of the Property to a buyer procured by Broker, disclose the Sale Price and terms to the local tax appraisal district and, if applicable, multiple-listing service.

F.2. Broker is not authorized to (a) execute any document in the name of or on behalf of Seller with respect to the Property, (b) authorize any repairs to the Property without

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Seller's prior written consent, (c) authorize the expenditure of any funds on behalf of Seller without Seller's prior written consent, (d) negotiate any earnest money deposit or other instrument in connection with the Property, (e) use a "lock-box" for keys to the Property, or (f) place any "For Sale" signs on the Property or remove other signs offering the Property for sale or lease without Seller's prior written consent.

F.3. Broker will not be obligated to market the Property after Seller has entered into a binding contract unless the contract provides otherwise. If Broker is obligated to submit subsequent or backup offers, Seller will specifically provide in the contract for the sale of the Property with a buyer that Seller may continue to market the Property so that Broker may receive subsequent or backup offers, which will be submitted to Seller as received for consideration by Seller when the prior contract is terminated or renegotiated. If Seller enters into a contract to sell the Property that does not provide for the submission of backup offers, and Broker subsequently receives a subsequent or backup offer to purchase the Property, Broker will inform Seller and submit the subsequent or backup offer to Seller when the prior contract is terminated or renegotiated.

F.4. Broker will not be responsible in any manner for personal injury to Seller resulting from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing water pipes, or other causes, except the negligence or misconduct of Broker. If the Property becomes vacant during the term of this agreement, Seller will notify Seller's casualty insurance company and request that the insurance coverage regarding the Property be modified to include a "vacancy clause" to cover the Property. Broker will not be responsible for the security of the Property or for inspecting the Property on any periodic basis unless otherwise agreed in writing by Seller and Broker.

G. Broker's Representations and Covenants. Broker represents and warrants to, and covenants with, Seller as follows:

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G.1. Broker is duly licensed as a real estate broker authorized to provide real estate brokerage services in accordance with this agreement by the Texas Real Estate Commission (the "Commission") under the Texas Real Estate License Act (the "Act"), as amended, and will maintain that license in full force and effect at all times during the term of this agreement. All associates employed by Broker to assist with marketing and selling the Property, and all other brokers with whom Broker cooperates in connection with marketing and selling the Property, will be duly licensed by the Commission as real estate brokers or agents in accordance with the Act when any such services are rendered.

G.2. All activities by Broker and Broker's associates hereunder will be conducted in strict compliance with the Act, the rules and regulations of the Commission, and all other provisions of applicable law, including, without limitation, all fair housing laws.

H. Seller's Representations and Covenants. Seller represents and warrants to, and covenants with, Broker as follows:

H.1. Seller represents that (a) Seller has fee simple title to the Property, peaceable possession of the Property and all improvements and fixtures on the Property unless rented, and the legal capacity to convey the Property; (b) no person or entity has any right to purchase, lease, or acquire the Property by virtue of a contract, option, right of first refusal, or other agreement; (c) there are no delinquencies or defaults under any deed of trust, mortgage, or other encumbrance on the Property; (d) the Property is not subject to the jurisdiction of any court whose permission or consent is required for the execution of this agreement or the sale, exchange, or other disposition of the Property; and (e) all information regarding the Property that has been provided by Seller to Broker, or that may be provided by Seller to Broker after the execution of this agreement, has been or will be, to the best of Seller's knowledge, true, correct, and complete in all material respects.

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H.2. Seller will cooperate fully and in good faith with Broker to facilitate the showing and marketing of the Property at Broker's sole cost and expense and will provide Broker with copies of all leases or rental agreements pertaining to the Property, if any, and advise Broker of any tenants moving into or out of the Property.

H.3. Seller will provide Broker and all prospective buyers of the Property with disclosure notices regarding the condition of the Property, if and to the extent required by law. Seller authorizes Broker to deliver such disclosure notices to prospective buyers of the Property at or before the time a contract is executed for the sale, exchange, or other disposition of the Property. Seller agrees to complete all such disclosure notices based on Seller's best knowledge and belief and in a manner that discloses all material defects or facts concerning the Property that are actually known to Seller. Seller agrees to indemnify, defend, and hold Broker and Broker's associates harmless from any damages, costs, attorney's fees, or expenses arising from Seller's knowingly giving to Broker or Broker's associates or any buyer of the Property information regarding the Property that is actually known to Seller to be incorrect in any material respect or from Seller's failure to disclose to Broker or Broker's associates or any buyer of the Property any material information regarding the Property that is actually known to Seller.

H.4. Seller will furnish to a buyer of the Property (a) an owner policy of title insurance at Seller's expense for the basic premium cost of such policy (without regard to any modifications or endorsements) in the amount of the Sale Price and dated at or after the closing of the sale of the Property; (b) a [general/special] warranty deed conveying title to the Property subject only to liens securing payment of a debt created or assumed as part of the Sale Price, taxes for the current year, restrictive covenants and utility easements common to any platted subdivision in which the Property is located, and other reservations or exceptions that will not materially impair or interfere with the buyer's anticipated use of the Property or that are otherwise acceptable to the buyer; (c) property tax statements showing no delinquent

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taxes; and (d) copies of restrictive covenants and documents evidencing exceptions to any title commitment other than the standard printed title exceptions.

H.5. Seller will indemnify, defend, and hold Broker harmless from any damages, costs, attorney's fees, or expenses arising from acts of third parties or loss of or damage to personal or real property due to vandalism, theft, freezing of water pipes, or any other causes, except the negligence or misconduct of Broker.

H.6. Seller will furnish to the escrow or closing agent closing any sale or other disposition of the Property contemplated by this agreement such information regarding Seller and the transaction as the agent will require to report the transaction to the Internal Revenue Service in accordance with applicable law.

H.7. Unless otherwise specified by written notice from Seller to Broker, Seller represents that Seller is not a nonresident alien, foreign corporation, foreign partnership, foreign trust, foreign estate, or other foreign person, requiring a buyer of the Property to withhold a portion of the Sale Price under section 1445 of the Internal Revenue Code of 1986, as amended. At or before the sale or other disposition of the Property, Seller will provide Broker and any buyer of the Property any affidavits and other information reasonably required to confirm the representations concerning the nonforeign status of Seller.

I. Termination for Cause. Either party is entitled to terminate this agreement before the Termination Date if the other party fails to perform its obligations under the agreement and the failure to perform is not cured to the reasonable satisfaction of the party giving written notice of such failure within thirty days after receipt of the notice. Except for a termination due to Broker's failure to be licensed under the Act, any such termination will not be effective with respect to any contract for the sale, exchange, or other disposition of the Property previously executed by Seller and a buyer that is then pending closing.

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J. Attorney's Fees. If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

K. Binding Effect. This agreement binds, benefits, and may be enforced by the successors in interest to the parties.

L. Choice of Law. This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Property is located.

M. Counterparts. This agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument.

N. Waiver of Default. It is not a waiver of or consent to default if the nondefaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in this agreement or provided by law.

O. Further Assurances. Each signatory party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this agreement and all transactions contemplated by this agreement.

P. Indemnity. Each party agrees to indemnify, defend, and hold harmless the other party from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this agreement by the indemnifying party.

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Q. Entire Agreement. This agreement is the entire agreement of the parties. There are no representations, agreements, warranties, or promises, and neither party is relying on any statements or representations of any agent of the other party, that are not in this agreement.

R. Legal Construction. If any provision in this agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability will not affect any other provision hereof, and this agreement will be construed as if the unenforceable provision had never been a part of the agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this agreement are for reference only and are not intended to restrict or define the text of any section. The agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

S. Notices. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

T. Recitals. Any recitals in this agreement are represented by the parties to be accurate, and constitute a part of the substantive agreement.

U. Time. Time is of the essence. Unless otherwise specified, all references to "days" mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

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Include the following if applicable.

V. Broker's Lien. BROKER HAS THE RIGHT TO CLAIM A LIEN UNDER THE PROVISIONS OF TEXAS PROPERTY CODE CHAPTER 62.

Continue with the following.

_____

[Name of seller]

_____

[Name of broker]

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Form 26-32

This form is used to effect a partial release of specified property from a judgment lien.

Partial Release of Judgment Lien

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Judgment Debtor:

Judgment Creditor:

Judgment

Date:

Cause number:

Style of case:

Court:

Abstract of Judgment Recording Information:

Judgment Creditor acknowledges satisfaction of the Judgment in part and releases to Judgment Debtor any and all liens existing by reason of the Judgment and the filing of the abstract of judgment only against the following described property: [**describe property**].

The liens existing by reason of the Judgment and the filing of the abstract of judgment continue in full force and effect as to all properties not expressly released by this instrument.

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_____

[Name of judgment creditor]

Include acknowledgment.

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Form 26-33

This form is used to evidence a buyer's acceptance of property subject to a disclaimer of warranties by the seller.

Property Condition Disclaimer

Date:

Seller:

Seller's Address:

Buyer:

Buyer's Address:

Transaction: The purchase of the Property by Buyer from Seller.

Buyer's Reliance Items: [**List items of information regarding the property that the seller has provided to the buyer.**]

Property:

[Contract:]

[Closing Documents:]

Consideration: The same consideration exchanged in the Transaction; in addition, Buyer's stipulation that Seller has sold the Property at the purchase price in this Transaction on the basis that this disclaimer is a material part of the Transaction, and Seller would have required additional consideration had this disclaimer not been a part of the Transaction.

For the Consideration stated, Buyer agrees and represents to Seller as follows:

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1. *Inspections.* Buyer has been entitled to inspect every aspect of the Property to Buyer's satisfaction, and Buyer has actually inspected to Buyer's satisfaction each aspect of the Property considered to be a substantial or material factor by Buyer in making the decision to complete the Transaction.

2. *Importance of Disclaimer.* BUYER IS TAKING THE PROPERTY IN AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE CONSIDERATION WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS OR EXPRESS OR IMPLIED WARRANTIES [**include if applicable:** , EXCEPT FOR THE WARRANTY OF TITLE STATED IN THE [DEED/CLOSING DOCUMENTS] [AND SELLER'S REPRESENTATIONS AND WARRANTIES TO BUYER SET FORTH IN THE SALES CONTRACT]]. This disclaimer is not an incidental or boilerplate provision. Buyer and Seller have relatively equal bargaining positions.

3. *Level of Buyer's Knowledge.* Buyer understands that Buyer has the right to employ professionals to advise Buyer on every aspect of the Property, and Buyer has agreed not to rely on Seller for such information.

4. *Absence of Seller Representations.* Other than for the Buyer's Reliance Items, which Seller has furnished to Buyer and on which Buyer is relying, Buyer is not relying on any of Seller's representations, statements, or assertions concerning the Property. Buyer is not relying on Seller to provide any information about the Property that Buyer has not independently verified. Other than the Buyer's Reliance Items, Buyer is relying solely on Buyer's independent verifications, rather than Seller's information, assertions, statements, or representations. Other than the Buyer's Reliance Items, any information, assertions, statements, or representations made by Seller or Seller's representatives have been recognized as puffing or opinion. Further, if such information, assertions, statements, or representations were or are incorrect, their insignificance to Buyer would not be affected, and they would not constitute misrepresentations of material fact.

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5. *Waiver of Warranties.* BUYER IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS DISCLOSURE [**include as applicable:** , THE CONTRACT, THE CLOSING DOCUMENTS, AND [**describe other documents**]]. BUYER IS NOT RELYING ON ANY INFORMATION REGARDING THE PROPERTY PROVIDED BY ANY PERSON, OTHER THAN BUYER'S OWN INSPECTION AND THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS DISCLOSURE, THE CONTRACT, AND THE CLOSING DOCUMENTS.

6. *Dangerous Conditions.* Buyer has thoroughly inspected the Property to determine the existence of any conditions posing unreasonable risk of harm. To the extent such conditions have been discovered, Buyer will prevent persons from being subject to the risks of such conditions and Buyer will exercise reasonable care to reduce or eliminate the risks.

7. *Consequences of Disclaimer.* Buyer understands that, by executing this disclaimer, Buyer has agreed to make Buyer's own appraisal of the bargain and to accept the risk that Buyer may be wrong. Furthermore, Buyer agrees not to hold Seller liable if the Property turns out to be worth less than the price paid or if the Property turns out to have patent or latent defects that Buyer has not discovered before closing. Instead, Buyer would be the sole cause of any loss occasioned by the foregoing, because Buyer is relying on surveys, elevation analyses, appraisals, inspections, and other analyses conducted only by Buyer's representatives, in determining the condition, suitability, and value of the Property, or because Buyer has been free to conduct such analyses but has chosen not to do so.

8. *Permits.* Buyer is solely responsible for determining what, if any, permits, licenses, certificates, and the like (collectively, the "Permits") are necessary for Buyer's intended uses of the Property. Buyer is solely responsible for taking all necessary steps to obtain any such Permits that Buyer deems necessary for Buyer's intended uses of the Property.

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9. *No Reliance of Buyer on Seller's Disclosure Notice.* Buyer has not relied on any of the information contained in the [**select one of the following:** Seller's Disclosure Notice (TAR)/Seller's Disclosure of Property Condition (TREC Residential)/Commercial Property Condition Statement (TAR Commercial)], if one has been provided in connection with the transaction.

10. *Survival.* Buyer's agreements with and representations to Seller made in this disclaimer will survive closing.

11. *Construction.* When the context requires, singular nouns and pronouns include the plural.

_____

[**Name of buyer**]

Include acknowledgment.

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Form 26-34

This form is used to effect a complete release of a recorded judgment lien.

Release of Judgment Lien

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Judgment Debtor:

Judgment Creditor:

Judgment

Date:

Cause number:

Style of case:

Court:

Abstract of Judgment Recording Information:

Judgment Creditor acknowledges satisfaction of the Judgment and releases to Judgment Debtor any and all liens existing by reason of the Judgment and the filing of the abstract of judgment.

_____

[Name of judgment creditor]

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Include acknowledgment.

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Form 26-35

Revocation of Power of Attorney

Date:

Principal:

Principal's Mailing Address:

Agent (Attorney-in-fact):

Agent's Mailing Address:

Power of Attorney

Date:

[Recording Information:]

[Expiration Date:]

Property:

Principal revokes the Power of Attorney and all power and authority given to the Agent (Attorney-in-fact) in the Power of Attorney.

_____

[**Name of principal**]

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STATE OF TEXAS)

COUNTY OF)

This instrument was acknowledged before me on [**date**] by [**name**].

[SEAL]

_____

[**Title of officer**]

My commission expires: [**date**]

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Form 26-36

This form permits a principal to designate an agent. The specific powers granted may be selected from the suggested powers shown in the form. Additional provisions that further limit the grant of power should be considered. This form of power of attorney is durable; that is, it survives the disability of the principal. Although the power of attorney may be made a springing power, effective on the disability of the principal, this form does not contain such a provision. The form must be filed for record in the county in which the real estate is located not later than thirty days after the recordation of each instrument signed by the agent. Tex. Est. Code § 751.151. See section 2.75 in this manual for the various special requirements relating to a durable power of attorney. See also the Durable Power of Attorney Act, Tex. Est. Code ch. 751.

There is a "statutory durable power of attorney" form provided for in chapter 752 of the Texas Estates Code. *See* Tex. Est. Code § 752.051. It has broad, sweeping, detailed powers and can be used for real estate transactions as well as a wide variety of other transactions.

Special Durable Power of Attorney for Real Estate Transactions

Date:

Principal:

Principal's Mailing Address:

Agent:

Agent's Mailing Address:

Effective Date:

[Expiration Date:]

Property:

Powers Given with Respect to the Property:

The following are suggested powers for the sale of real estate.

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1. Enter into real estate listing agreements offering the Property for sale at any price on any terms and with any commission agreement.

2. Contract to sell the Property for any price on any terms.

3. Convey the Property.

4. Execute and deliver any legal instruments relating to the sale and conveyance of the Property, including but not limited to general and special warranty deeds binding Principal with vendor's liens retained or disclaimed as applicable or transferred to a third-party lender, affidavits (for example, federal tax statements), notices, disclosures, waivers, and designations.

5. Accept notes, deeds of trust, and other legal instruments.

6. Approve closing statements authorizing deductions from the sale price.

7. Receive Principal's net sales proceeds by check payable to Principal.

8. Indemnify and hold harmless any third party who accepts and acts under this Power of Attorney.

9. Do everything and sign everything necessary or appropriate to sell the Property and accomplish the powers set out.

The following are suggested powers for the purchase of real estate.

1. Contract to purchase the Property for any price on any terms.

2. Execute, deliver, and accept any legal instruments relating to the purchase of the Property and to any borrowing for the purchase, including but not limited to deeds, notes, deeds of trust, guaranties, and closing statements.

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3. Approve closing statements authorizing payment of prorations and expenses.

4. Pay Principal's net purchase price from funds provided by Principal.

5. Indemnify and hold harmless any third party who accepts and acts under this power of attorney.

6. Do everything and sign everything necessary or appropriate to purchase the Property and accomplish the powers set out.

Continue with the following.

Principal appoints Agent to act for Principal in accordance with the powers given with respect to the Property, and Principal ratifies all acts done under this appointment. Agent's authority will begin on the Effective Date and end [on the Expiration Date unless revoked sooner/only if revoked] by Principal's signing an instrument revoking this power of attorney and filing it for record in the real property records of [**county**] County, Texas. A signed and filed revocation instrument will be effective, without limitation or exception, including but not limited to being effective against a third party relying on this power of attorney without receipt of actual notice of the revocation, on the date and time of filing.

This is a durable power of attorney under chapter 751 of the Texas Estates Code, which is not affected by subsequent disability or incapacity of Principal and will not lapse because of a passage of time [**include if applicable:** , but it will expire on the Expiration Date].

If applicable, the following paragraph is a suggested indemnity clause.

Principal binds Principal and Principal's heirs and personal representatives to indemnify and hold Agent harmless from all claims, demands, losses, damages, actions, and expenses that Agent may sustain or incur in connection with carrying out the authority granted to Agent in this power of attorney.

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Continue with the following.

THE ATTORNEY-IN-FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

_____

[Name of principal]

Include acknowledgment.

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Affidavit of Attorney-in-Fact

Date:

Principal:

Principal's Mailing Address:

Effective Date of Power of Attorney:

Affiant: [**name of attorney-in-fact**]

Affiant's Mailing Address:

Affiant on oath swears that the following statements are true and within the personal knowledge of Affiant:

1. Affiant is the attorney-in-fact for Principal, having been appointed in the Power of Attorney.

2. The power of attorney has not been terminated by revocation, by Principal's death, by Principal's divorce or the annulment of the marriage of Principal if the attorney-in-fact is Principal's spouse, or by the qualification of a guardian of the estate of Principal.

_____

[**Name of attorney-in-fact**]

SWORN TO AND SUBSCRIBED before me on _____

by [**name of attorney-in-fact**].

_____

Notary Public, State of Texas

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STATE OF TEXAS

COUNTY OF [**county**]

This instrument was acknowledged before me on [**date**] by [**name of attorney-in-fact**].

_____

Notary Public, State of Texas

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Form 26-37

This form is provided by section 752.051 of the Texas Estates Code. It has broad, sweeping, and detailed powers and can be used for real estate transactions as well as a wide variety of other transactions.

Statutory Durable Power of Attorney

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO. IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until:

(1) you die or revoke the power of attorney;

(2) your agent resigns, is removed by court order, or is unable to act for you; or

(3) a guardian is appointed for your estate.

I, _____(insert your name and address), appoint _____ (insert the name and address of the person appointed) as my agent to act for me in any lawful way with respect to all of the fol-

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lowing powers that I have initialed below. (YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (O) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (N).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

____ (A) Real property transactions;

____ (B) Tangible personal property transactions;

____ (C) Stock and bond transactions;

____ (D) Commodity and option transactions;

____ (E) Banking and other financial institution transactions;

____ (F) Business operating transactions;

____ (G) Insurance and annuity transactions;

____ (H) Estate, trust, and other beneficiary transactions;

____ (I) Claims and litigation;

____ (J) Personal and family maintenance;

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____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

____ (L) Retirement plan transactions;

____ (M) Tax matters;

____ (N) Digital assets and the content of an electronic communication;

____ (O) ALL OF THE POWERS LISTED IN (A) THROUGH (N). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (O).

SPECIAL INSTRUCTIONS:

Special instructions applicable to agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.

____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

____ Each of my co-agents may act independently for me.

____ My co-agents may act for me only if the co-agents act jointly.

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____ My co-agents may act for me only if a majority of the co-agents act jointly.

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

____ I grant my agent the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

Include the following, if applicable, pursuant to Tex. Est. Code § 752.052.

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. If you DO NOT want to grant your agent one or more of the following powers, you may also CROSS OUT a power you DO NOT want to grant.)

____ Create, amend, revoke, or terminate an inter vivos trust

____ Make a gift, subject to the limitations of Section 751.032 of the Durable Power of Attorney Act (Section 751.032, Estates Code) and any special instructions in this power of attorney

____ Create or change rights of survivorship

____ Create or change a beneficiary designation

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____ Authorize another person to exercise the authority granted under this power of attorney.

Continue with the following.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

UNLESS YOU DIRECT OTHERWISE BELOW, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT TERMINATES.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.

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(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Termination of this durable power of attorney is not effective as to a third party until the third party has actual knowledge of the termination. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. The meaning and effect of this durable power of attorney is determined by Texas law.

If any agent named by me dies, becomes incapacitated, resigns, or refuses to act, or is removed by court order, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent's authority to act under this power of attorney), I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:

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_____

_____

Signed this _____ day of _____, _____.

_____
(your signature)

State of _____

County of _____

This document was acknowledged before me on _____ (date) by _____ (name of principal).

_____
(signature of notarial office)
(Seal, if any, of notary)

_____
(printed name of notary)

My commission expires: _____

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IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, you establish a "fiduciary" relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated, suspended, or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

(1) act in good faith;

(2) do nothing beyond the authority granted in this power of attorney;

(3) act loyally for the principal's benefit;

(4) avoid conflicts that would impair your ability to act in the principal's best interest; and

(5) disclose your identity as an agent when you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

(1) maintain records of each action taken or decision made on behalf of the principal;

(2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and

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(3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:

(A) the property belonging to the principal that has come to your knowledge or into your possession;

(B) each action taken or decision made by you as agent;

(C) a complete account of receipts, disbursements, and other actions of you as agent that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;

(D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset's current value, if known to you;

(E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;

(F) each known liability;

(G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and

(H) all documentation regarding the principal's property.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates or suspends this power of attorney or your authority under this power of attorney. An event

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that terminates this power of attorney or your authority to act under this power of attorney includes:

(1) the principal's death;

(2) the principal's revocation of this power of attorney or your authority;

(3) the occurrence of a termination event stated in this power of attorney;

(4) if you are married to the principal, the dissolution of your marriage by a court decree of divorce or annulment or declaration that your marriage is void, unless otherwise provided in this power of attorney;

(5) the appointment and qualification of a permanent guardian of the principal's estate unless a court order provides otherwise; or

(6) if ordered by a court, your removal as agent (attorney in fact) under this power of attorney. An event that suspends this power of attorney or your authority to act under this power of attorney is the appointment and qualification of a temporary guardian unless a court order provides otherwise.

Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

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Form 26-38

This form is provided by section 751.203(b) of the Texas Estates Code. A certification made in compliance with section 751.203(b) of the Texas Estates Code is conclusive proof of the factual matter that is the subject of the certification.

Certification of Durable Power of Attorney by Agent

I, _____ (agent), certify under penalty of perjury that:

1. I am the agent named in the power of attorney validly executed by _____ (principal) ("principal") on _____ (date), and the power of attorney is now in full force and effect.

2. The principal is not deceased and is presently domiciled in _____ (city and state/territory or foreign country).

3. To the best of my knowledge after diligent search and inquiry:

   a. The power of attorney has not been revoked by the principal or suspended or terminated by the occurrence of any event, whether or not referenced in the power of attorney;

   b. At the time the power of attorney was executed, the principal was mentally competent to transact legal matters and was not acting under the undue influence of any other person;

   c. A permanent guardian of the estate of the principal has not qualified to serve in that capacity;

   d. My powers under the power of attorney have not been suspended by a court in a temporary guardianship or other proceeding;

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e. If I am (or was) the principal's spouse, my marriage to the principal has not been dissolved by court decree of divorce or annulment or declared void by a court, or the power of attorney provides specifically that my appointment as the agent for the principal does not terminate if my marriage to the principal has been dissolved by court decree of divorce or annulment or declared void by a court;

f. No proceeding has been commenced for a temporary or permanent guardianship of the person or estate, or both, of the principal; and

g. The exercise of my authority is not prohibited by another agreement or instrument.

4. If under its terms the power of attorney becomes effective on the disability or incapacity of the principal or at a future time or on the occurrence of a contingency, the principal now has a disability or is incapacitated or the specified future time or contingency has occurred.

5. I am acting within the scope of my authority under the power of attorney, and my authority has not been altered or terminated.

6. If applicable, I am the successor to _____ (predecessor agent), who has resigned, died, or become incapacitated, is not qualified to serve or has declined to serve as agent, or is otherwise unable to act. There are no unsatisfied conditions remaining under the power of attorney that preclude my acting as successor agent.

7. I agree not to:

a. Exercise any powers granted by the power of attorney if I attain knowledge that the power of attorney has been revoked, suspended, or terminated; or

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b. Exercise any specific powers that have been revoked, suspended, or terminated.

8. A true and correct copy of the power of attorney is attached to this document.

9. If used in connection with an extension of credit under Section 50(a)(6), Article XVI, Texas Constitution, the power of attorney was executed in the office of the lender, the office of a title company, or the law office of _____.

Date: _____

_____
(signature of agent)

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Form 26-39

Road Maintenance Agreement

Date:

Property Owner A:

Mailing Address:

Property:

Property Owner B:

Mailing Address:

Property:

Description of Roadway:

The Parties, whose property is benefited or burdened by the Roadway described above, agree to the following:

Select one of the following.

1. Property Owner A will pay all expenses of maintenance, repair, and restoration of the Roadway covered by this Agreement.

Or

1. The Parties will share equally in the expenses for normal maintenance and repair of the Roadway. No expense shall be incurred by any Party without consent of the other Party. Such consent shall be in writing and signed by all Parties, with a copy delivered to each Party.

Continue with the following.

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2. The Roadway will be maintained in good, passable condition under all traffic and weather conditions, and in a condition no less than equal to its condition at the time of execution of this Agreement. Maintenance and repair will include snow plowing and drainage facilities as well as surface work.

Select one of the following.

3. If Property Owner A does not perform the required maintenance, Property Owner B, after giving the nonperforming Property Owner A thirty days' written notice, will have the right to perform the maintenance and receive reimbursement from the nonperforming Property Owner A.

Reimbursement will be payable on demand and include the costs of the maintenance, plus interest at the highest rate permitted by law (or if no maximum rate is prescribed by law, at the rate of 18 percent per year).

Or

3. The cost for agreed maintenance and repair shall be borne and shared equally by the Parties. In the consent to repair, the Parties shall designate a party to be the agent for contracting or undertaking the agreed repair or maintenance and to collect each Party's share of the cost.

Continue with the following.

4. If a Party damages or disturbs the surface of the roadway (other than normal automobile and service ingress and egress), that Party is responsible for immediately restoring the road surface to as nearly as possible the condition in which it existed before being disturbed.

5. This Agreement runs with the properties described above and is appurtenant to the land.

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6. This Agreement is made by and between Parties who own property benefited/burdened by the Roadway. The property for Property Owner A is described within Exhibit A, and the property for Property Owner B is described within Exhibit B. All such Parties shall have the right of access over the Roadway. All property accessed over the Roadway is deemed benefited thereby.

7. *Attorney's Fees.* If either Party retains an attorney to enforce this Agreement, the Party prevailing in litigation is entitled to recover reasonable attorney's fees, other fees, and court and other costs.

8. *Binding Effect.* This Agreement binds and inures to the benefit of the Parties and their respective heirs, successors, and permitted assigns.

9. *Choice of Law.* This Agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any other jurisdiction. Venue is in the county or counties in which the Properties are located.

10. *Waiver of Default.* It is not a waiver of or consent to default if the nondefaulting Party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this Agreement does not preclude pursuit of other remedies in this Agreement or provided by law.

11. *Further Assurances.* Each signatory Party agrees to execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this Agreement and all transactions contemplated by this Agreement.

12. *Integration.* This Agreement contains the complete agreement of the Parties and cannot be varied except by written agreement of the Parties. The Parties agree that there are no

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oral agreements, representations, or warranties that are not expressly set forth in this Agreement.

13. *Legal Construction.* If any provision in this Agreement is for any reason unenforceable, to the extent the unenforceability does not destroy the basis of the bargain among the Parties, the unenforceability will not affect any other provision hereof, and this Agreement will be construed as if the unenforceable provision had never been a part of the Agreement. Whenever context requires, the singular will include the plural and neuter include the masculine or feminine gender, and vice versa. Article and section headings in this Agreement are for reference only and are not intended to restrict or define the text of any section. This Agreement will not be construed more or less favorably between the Parties by reason of authorship or origin of language.

14. *Notices.* Any notice required or permitted under this Agreement must be in writing. Any notice required by this Agreement will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Agreement. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein.

15. *Time.* Time is of the essence. Unless otherwise specified, all references to "days" mean calendar days. Business days exclude Saturdays, Sundays, and legal public holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or legal public holiday, the date for performance will be the next following regular business day.

16. *Rights Reserved.* Each Party reserves for that Party and that Party's heirs, successors, and assigns the right to continue to use and enjoy the surface of the Properties for all

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purposes that do not unreasonably interfere with or interrupt the use or enjoyment of the Roadway.

17. *Equitable Rights of Enforcement.* This Roadway may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the Parties to or those benefited by this Agreement, provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

_____

[Name of property owner A]

_____

[Name of property owner B]

Include acknowledgments.

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Form 26-40

This affidavit identifies one or more individuals with authority to transfer on behalf of a domestic or foreign entity an estate or interest in real property in the name of the entity if the entity is "(1) a limited liability company, a limited partnership, or a professional entity as defined by Section 301.003, Business Organizations Code; and (2) active or in good standing under the laws of the entity's jurisdiction of formation." Tex. Prop. Code § 12.019(c). This affidavit may not be used by a domestic nonprofit entity or a foreign entity that is exempt from federal taxation as further described in Tex. Prop. Code § 12.019(b) or in "a transaction involving the transfer of an estate or interest in real property in an amount that exceeds $1 million." Tex. Prop. Code § 12.019(b). Further limitations and requirements are contained in Tex. Prop. Code § 12.019.

"Transfer" means a transaction to sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition or consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options concerning, lease or sublet, or otherwise dispose of an estate or interest in real property or a right incident to real property. Tex. Prop. Code § 12.019(a)(2).

Affidavit of Authority to Transfer
(Pursuant to Section 12.019, Texas Property Code)

Date:

Name of Domestic or Foreign Entity Owning Title to the Property (the "Entity"):

Entity's Address: [**include street address**]

Property to Be Transferred: [**insert legal description**]

Name[s] and Title[s] of Individual[s] Authorized to Transfer on Entity's Behalf an Estate or Interest in the Property:

Affiant:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

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1. My name is [**name of affiant**]. I am at least eighteen years of age. I am authorized to execute this affidavit on behalf of the Entity. I am competent to execute this affidavit. I understand that third parties will rely on the truthfulness of the statements made in this affidavit and that this affidavit is made under penalty of perjury.

2. The name of the Entity that holds title to the Property is set forth above.

3. The address, including street address, of the Entity's principal place of business in Texas, or, if the Entity does not have a principal place of business in Texas, the address of the Entity's principal place of business in the state or country that is the Entity's jurisdiction of formation, is set forth above.

4. The Entity is active or in good standing under the laws of the Entity's jurisdiction of formation.

5. The legal description of the Property, an estate or interest in which is to be transferred, is set forth above.

6. The nature of the transfer authorized hereby is [**insert using definition of "transfer" set forth in Tex. Prop. Code § 12.019(a)(2)**].

7. The name[s] and title[s] of the person[s] authorized to transfer on the Entity's behalf an estate or interest in the Property [is/are] set forth above.

Include the following if the entity is a domestic entity that files a franchise tax public information report under Tex. Tax Code § 171.203.

8. Affiant is authorized to execute this affidavit because on the date this affidavit is executed, Affiant is [a manager or member of the limited liability company/a general partner of the limited partnership/a director or officer of the professional entity].

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Include the following if affiant and the person authorized to transfer on the entity's behalf are the same person.

9. The Entity is [a limited liability company and Affiant is the sole member and manager of the limited liability company/a limited partnership and Affiant is the sole general partner of the limited partnership/a professional entity and Affiant is the sole director and officer of the professional entity].

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Include acknowledgment.

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Form 26-41

A domestic or foreign entity that has executed and recorded an affidavit authorizing one or more individuals with authority to transfer on behalf of the entity an estate or interest in real property in the name of the entity may terminate the transfer authority specified in the affidavit at any time by recording a written termination of the authority specified in the affidavit with the county clerk in the county in which the real property is located. Tex. Prop. Code § 12.019(n).

Affidavit of Termination of Authority to Transfer (Pursuant to Section 12.019, Texas Property Code)

Date:

Name of Domestic or Foreign Entity Owning Title to the Property (the "Entity"):

Entity's Address: [**include street address**]

Property to Be Transferred: [**insert legal description**]

Affidavit of Authority to Transfer: [**insert recording information**]

Affiant:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My name is [**name of affiant**]. I am at least eighteen years of age. I am authorized to execute this affidavit on behalf of the Entity. I am competent to execute this affidavit. I understand that third parties will rely on the truthfulness of the statements made in this affidavit and that this affidavit is made under penalty of perjury.

2. The authority to transfer an estate or interest in the Property as contained in the Affidavit of Authority to Transfer described above is terminated effective when this Affidavit

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of Termination of Authority to Transfer is indexed by the county clerk of the county where the Property is located.

_____

[**Name of affiant**]

SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].

_____

Notary Public, State of Texas

Include acknowledgment.

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Appendix

Third-Party Legal Opinion Letters

Lenders often require a borrower's counsel to issue a legal opinion letter to the lender on certain aspects of a loan transaction, including, among other matters, an opinion regarding the borrower's legal status and the enforceability of the lender's loan documents. Historically, the initial form of the legal opinion letter is presented to the borrower's counsel by the lender or its counsel. Although several national, state, and local private attorney organizations and bar association groups have published suggested standard third-party legal opinion letter formats for use in rendering a third-party legal opinion letter, neither a single opinion format nor a single standard for interpreting the opinions included in an opinion letter has been universally accepted by lenders, borrowers, or their respective legal counsel. Information and guidance on the preparation and use of third-party legal opinion letters may be obtained from sources listed in the selected bibliography in this appendix. Additional information can be obtained from the Legal Opinion Resource Center at **www.americanbar.org/groups/business_law/committees/opinions/tribar**.

Several of the articles listed in the bibliography discuss the Texas Supreme Court case of *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999), which held that attorneys (as well as other professionals) could be liable in Texas for the tort of negligent misrepresentation, as defined by the *Restatement (Second) of Torts* § 552 (1977). Even as the supreme court reaffirmed the availability in Texas of the defense of a lack of privity in legal malpractice cases, it noted several times that section 552 does not require privity to impose liability for negligent misrepresentation or implicate the policy concerns behind the privity rule. *See McCamish*, 991 S.W.2d at 792–93, 795.

As the supreme court pointed out in *McCamish*, an attorney can be liable to a nonclient for negligent misrepresentation based on the issuance of an opinion letter; however, section 552 limits liability to situations in which (1) the attorney who provides the false information is aware of the nonclient and intends that the nonclient rely on the false information and (2) the nonclient justifiably relies on the false information. *See McCamish*, 991 S.W.2d at 793–94. Furthermore, the supreme court expressly recognized that "[a] lawyer may also avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself." *See McCamish*, 991 S.W.2d at 794. The foregoing quote explains a good deal of the scope of reliance disclaimers in current third-party opinion letter practice.

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Art. I, § 17 . . . . . 2.47
Art. I, § 19 . . . . . 2.47
Art. I, § 26 . . . . . 2.224
Art. I, § 33 . . . . . 2.43
Art. VIII 2.5
Art. VIII, § 1–b 2.5
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Art. XVI, § 50(a)(5)(A) 20.1:2
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ISBN-13: 978-1-938873-92-8

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