

STATE OF TEXAS

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COUNTY OF FORT BEND

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AGREEMENT FOR CONTRIBUTION TOWARDS CONSTRUCTION COSTS

This agreement (Agreement) is between the political subdivision of **Fort Bend County, Texas** (Fort Bend) and **Pengu Swim School Cinco Ranch, LLC** (Pengu Swim). As used in this Agreement, the term “Parties” means Fort Bend and Pengu Swim and the term “Party” may refer to one or the other.

Development Permit

Fort Bend, acting by and through its Engineering Department, requires review and approval of plans for the development of and construction of improvements on real property before construction may begin.

Hofbauer Holdings, LLC (Hofbauer), is the owner of the real property described as Restricted Reserve “C” of Plazas at Spring Green Subdivision, Fort Bend County, Texas, according to map or plat thereof recorded as Plat No. 2011032, Plat Records of Fort Bend County, Texas (Reserve C). Reserve C is more particularly described in the Special Warranty Deed with Vendor’s Lien and Repurchase Option recorded as Document No. 2015094528 of the Official Records of Real Property of Fort Bend County, Texas. Hofbauer has leased Reserve C to Pengu Swim with the understanding and agreement that Pengu Swim will construct a swim school on Reserve C. This Agreement is entered into with the intent and understanding that it will inure to the benefit of both Hofbauer, as the owner of Reserve C, and Pengu Swim, as the tenant of Reserve C, and may be enforced by either entity.

Pengu Swim applied to Fort Bend for a Development Permit. The Development Permit is required before Pengu Swim may commence construction of the parking areas, driveways, sidewalks, swimming pool, buildings, landscaping, drainage facilities, and other improvements that will comprise the swim school. Before a Development Permit is issued by Fort Bend County, its Engineering Department must approve the plans for the development and the construction of improvements (the Plans). Fort Bend’s Engineering Department refused to approve Pengu Swim’s Plans, unless Pengu Swim first agreed to construct, in accordance with plans approved by Fort Bend County, a left turn lane within the right of way of Cinco Ranch Boulevard.

The proposed left turn lane (Turn Lane) is in an area now occupied by a landscaped median located adjacent to the eastbound lanes of traffic in Cinco Ranch Boulevard. The Turn Lane would provide access to the easternmost of two driveways that now provide access to The Plazas at Spring Green shopping center located at 27110 Cinco Ranch Boulevard, Katy, Texas. The driveway is approximately 650 feet east of the intersection of Cinco Ranch Boulevard and Spring Green Boulevard, and approximately 300 feet west of the junction of Cinco Ranch

Boulevard and Katy-Gaston Road. The Turn Lane location is also described in the Traffic Impact Analysis performed by JKnesek & Associates, dated October 7, 2015, addressed to Mr. Travis Huff, Development Coordinator, Fort Bend County Engineering.

Pengu Swim objected to Fort Bend's request that Pengu Swim agree to construct the Turn Lane as a condition to receiving a permit to develop Reserve C and construct its swim school. Fort Bend estimated that, upon completion of the swim school, ten percent (10%) of the traffic using the driveway served by the Turn Lane will consist of vehicles whose destination is the swim school.

As used below, the term "Development Permit" means any and all permits, licenses, and permissions that are or could be required by Fort Bend (including all agencies and departments thereof) to evidence Fort Bend's permission for Pengu Swim to begin construction of the parking areas, driveways, sidewalks, swimming pool, buildings, landscaping, drainage facilities, and other improvements described in the Plans that, on completion, will comprise the swim school.

Fort Bend and Pengu Swim have entered into this Agreement to resolve their differences, provide some funding for construction of the Turn Lane, and allow Pengu Swim to proceed with construction of its swim school.

The Agreement

In exchange for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, subject to the terms and conditions set forth below, the Parties agree as follows:

1. Payment of Construction Cost. Pengu Swim agrees to pay \$10,000 to Fort Bend, which amount represents ten percent (10%) of the estimated cost of constructing the Turn Lane. This \$10,000 amount is to be paid in five payments of \$2,000 each. Pengu Swim, however, has no obligation to construct the Turn Lane or contribute any other amount towards the cost of constructing the Turn Lane.
2. First Payment. Pengu Swim's first payment is due one business day after: (a) Pengu Swim receives written approval by the Fort Bend County Attorney's Office of the legal form of this Agreement; and (b) Pengu Swim delivers a signed copy of this Agreement to the Fort Bend County Attorney's Office. The first date on which both the foregoing events have occurred, which may be the same date, is the "Conditionally Effective Date" under this Agreement.
3. Later Payments. Subsequent payments of \$2,000 each are due annually, with each annual payment to be made on the anniversary of the Conditionally Effective Date. If the anniversary falls on a date that is not a business day, the payment is due on the next business day. A "business day" is a day that is not a Saturday, Sunday, or state or federal holiday.

4. Place of Payment. The payments may be in the form of a check made payable to “Fort Bend County.” All payments may be mailed or delivered to: Fort Bend County Engineering Department, 301 Jackson Street, Richmond, Texas 77469.
5. Approval of Plans. Pengu Swim’s Plans, submitted by its engineer, Andrew Lonnie Sikes, II, P.E., to Fort Bend’s Engineering Department have been approved by that department. If necessary or appropriate for issuance of the Development Permit, this approval will be evidenced by Fort Bend’s Engineering Department promptly placing its seal on the Plans (or taking other required action) so that the Development Permit may be issued within the time and as required by this Agreement.
6. Issuance of Development Permit. One business day after the Conditionally Effective Date, during its usual operating hours Fort Bend will make the Development Permit available for Pengu Swim to pick up, subject only to payment of the permit and inspection fees allowed by applicable law. On receipt of the Development Permit no permit or other license is required by Fort Bend before Pengu Swim, through its contractor or other agent, may begin construction of the swim school, as described in the Plans, on Reserve C.
7. Commissioners Court Approval. The full terms of this Agreement are subject to approval by the Fort Bend County Commissioners Court. Nonetheless, before that approval is given, the Development Permit will issue and Pengu Swim may begin construction of the swim school on receipt of the Development Permit.
8. Failure to Construct Turn Lane. If Fort Bend fails to construct or complete construction of the Turn Lane by November 24, 2025, reasonably soon after request is made by Pengu Swim, Fort Bend will return the \$10,000 paid by Pengu Swim.
9. Actual Construction Costs. The parties agree that the amount to be paid by Pengu Swim is fixed at \$10,000, notwithstanding the actual cost of constructing the Turn Lane. For clarification, if the cost of constructing the Turn Lane exceeds \$100,000, Pengu Swim is not responsible for any additional amount; and if the cost of constructing the Turn Lane is less than \$100,000, Pengu Swim has no right to request the return of any portion of the \$10,000 paid.
10. Failure to Issue Development Permit. If Fort Bend fails to make the Development Permit available within the time and as provided by this Agreement, Pengu Swim may give notice of Fort Bend’s default. If Fort Bend fails to cure its default by making the Development Permit available within two business days after Pengu Swim gives notice of default, Pengu Swim may terminate this Agreement by giving notice of termination, after which this Agreement will be of no force or effect and will not operate to bind or otherwise prejudice the rights of the Parties as those rights existed before this Agreement was signed, If terminated, reasonably soon thereafter, Fort Bend will return all money paid by Pengu Swim under this Agreement.

11. Failure to Make Subsequent Annual Payments. If Pengu Swim fails to make any subsequent payment of \$2,000 by such dates as provided by this Agreement, Fort Bend may give notice of Pengu Swim's default. If Pengu Swim fails to cure its default by making the full subsequent payment due within ten business days after Fort Bend gives notice of default, the entire remaining balance of the total \$10,000 payable under this Agreement shall become due within thirty calendar days of notice of default.
12. Notices. All notices allowed or required under this Agreement must be in writing. To be effective each notice must be given by first class United States Mail and via email to the party and to the attorney or other person affiliated with the party as indicated. The addresses to which notice must be given are:

If to Fort Bend: Fort Bend County Engineering Department
301 Jackson Street
Richmond, Texas 77469
Attn: Richard W. Stolleis, P.E., County Engineer
Richard.Stolleis@fortbendcountytx.gov

With a copy to: Marcus D. Spencer
First Asst. County Attorney
Fort Bend County
401 Jackson, 3rd Floor
Richmond, Texas 77469
Marcus.Spencer@fortbendcountytx.gov

If to Pengu Swim: Pengu Swim Cinco Ranch, LLC
1137 Gardendale
Houston, Texas 77018
Attn: Tiffany Hofbauer
tiffhofbauer@gmail.com

With a copy to: Jim Brissee
Williams, Birnberg & Andersen, LLP
2000 Bering Drive, Suite 909
Houston, Texas 77057
jbrissee@wba-law.com

To be effective, the sender of any notice(s) must retain a copy (electronic or printed) of the email (and attachment, if any) sent. The copy retained must identify the email addresses of the sender and the recipient(s) and must identify the date and time of day the email was sent. Notice is effective when both forms of notice have been given in the manner described above, however, notice given after 5:00 p.m., C.S.T., will be deemed

given the next business day. Any party or person may change its address by giving five days notice of the party's or person's new address(es).

13. The Parties agree to cooperate with each other and execute all other applications, permits, licenses, and other instruments reasonably required to accomplish, in a prompt and timely manner, the purposes of this Agreement, including the issuance of the Development Permit.


Other Terms and Conditions

1. This Agreement is the complete and entire agreement between the parties hereto with respect to the subject of the Agreement. Fort Bend will not impose or seek to impose on Pengu Swim any other terms or conditions relating to the Turn Lane. Fort Bend will not withhold from or deny to Pengu Swim any permit, license, or other authorization because of the Turn Lane. Each of the Parties has read this Agreement and by execution confirms that it accurately states the entire agreement between the Parties concerning the subject of the Agreement. All prior or contemporaneous agreements, understandings, representations and statements (oral or written) are merged into this Agreement and, if not expressly set forth or described herein, are of no force or effect.
2. The invalidity or unenforceability of any one or more of the terms, provisions, or parts of this Agreement do not in any way affect or invalidate any other term, provision or part of this Agreement, and all these other terms, provisions, and parts will remain in full force and effect to the greatest extent allowed and in all circumstances in which they may be legally enforced.
3. This Agreement is fully enforceable in a court of law. If a Party files suit to enforce or construe this Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees, costs, and expenses (including expert witness fees and other costs and expenses) from the other Party or Parties. A "prevailing party" under this Agreement may include a Party awarded nominal damages or no damages.
4. This Agreement was prepared after consulting with all Parties and all Parties have had the opportunity to participate in its preparation, whether directly or through counsel. If this Agreement is later determined to be uncertain or ambiguous in any way, it will not be interpreted against any Party, regardless of whether or not one Party prepared all or most of this Agreement.
5. This Agreement may be executed in multiple identical counterparts, each of which will be deemed an original. The signatures of each Party hereto need not appear on each counterpart hereof, provided the signature appears on an identical counterpart. Each Party agrees that a copy of this signed Agreement transmitted to another Party (whether transmitted by email, fax, or equivalent means) will be treated as a signed original and fully binding for all purposes.

6. This Agreement shall be construed in accordance with the laws of the State of Texas. The Parties agree that venue for any litigation arising out of or related to this Agreement shall lie only in a court of competent jurisdiction in Fort Bend County, Texas, and in no other court.


IN WITNESS THEREOF, the undersigned have duly executed this Agreement, intending to be fully bound hereto.

**PENGU SWIM SCHOOL CINCO RANCH,
LLC, a Texas limited liability company**

By: 

Lothar Hofbauer, Managing Member

Date Signed: 11-19, 2015

By: 

Tiffany Hofbauer, Managing Member

Date Signed: 11-12, 2015

FORT BEND COUNTY, TEXAS

Robert E. Hebert, County Judge

Date Signed: _____, 2015

ATTEST:

Laura Richard, County Clerk

Date Signed: _____, 2015

APPROVED:

Richard W. Stolleis, P.E., County Engineer

Date Signed: _____, 2015

APPROVED AS TO LEGAL FORM:

Marcus D. Spencer, First Assistant County Attorney

Date Signed: _____, 2015