

**MSW PROSPER 380 II, LP, ROADWAY CONSTRUCTION REIMBURSEMENT
AGREEMENT**

THIS MSW PROSPER 380 II, LP, ROADWAY CONSTRUCTION REIMBURSEMENT AGREEMENT ("Agreement") is made and entered into this 1st day of April, 2022, by and between the Town of Prosper, Texas ("Prosper" or the "Town"), and MSW Prosper 380 II, LP, a Texas limited partnership ("Developer"), collectively referred to as the "Parties."

WITNESSETH:

WHEREAS, the Town and Developer wish to address the construction by Developer of a portion of Mahard Parkway and a portion of Prairie Road (such portions are collectively referred to as "the Roadways"); and

WHEREAS, for purposes of this Agreement and as more fully described herein, the Roadways to be constructed are located in the Town's Tax Increment Reinvestment Zone No. 2 ("TIRZ No. 2"); and

WHEREAS, the Town and Developer acknowledge that the construction of the Roadways, as referenced herein, is mutually beneficial to the Town and Developer.

NOW, THEREFORE, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Town and Developer covenant and agree as follows:

1. **Construction of the Roadways by Developer.** Developer agrees to construct the Roadways, and the location and anticipated construction costs of the Roadways are described in Exhibit A, attached hereto and incorporated by reference. All roadway construction by Developer shall be subject to applicable state bidding laws and Town engineering, design and construction standards. In the event the Roadways have not been accepted by the Town within two (2) years of the date of execution of this Agreement, then this Agreement shall be null and void and of no further force or effect.

2. **Reimbursements of Construction Costs from TIRZ No. 2 Funds.** The Parties agree and acknowledge that any eligible reimbursements to Developer for the construction of the Roadways shall be from the funds of TIRZ No. 2 and the Town shall have no obligation to reimburse Developer from any other Town fund or account. Reimbursements shall be tendered to Developer after current liabilities and in accordance with Town policies. The Town will use its reasonable efforts to forward any reimbursement amount to Developer annually, consistent with current practices for TIRZ No. 2 projects, provided the Roadways have been timely completed by Developer and accepted by the Town.

3. **Third Party Roadways Project Rights-of-Way.**

A. The Parties shall cooperate with each other in obtaining from third parties any and all rights-of-way ("Third Party Roadways Project Rights-of-Way") for the Roadways Project depicted in Exhibit A.

B. Developer shall be responsible for any and all costs and expenses associated with acquiring, by purchase or condemnation, all Third-Party Roadways Project Rights-of-Way, including, but not limited to, title work, appraisals, expert fees, attorneys' fees and expenses, engineering fees and expenses, surveying fees and expenses, court costs, commissioner's fees and costs of appeal, if any ("Right-of-Way Acquisition Fees"). If requested by the Town, Developer shall, at its sole cost and expense, lead all right-of-way acquisition efforts for the Third-Party Roadways Project Rights-of-Way, including, but not limited to, providing all necessary engineering and surveying support required to obtain the Third-Party Roadways Project Rights-of-Way as required. Developer shall pay any and all Right-of-Way Acquisition Fees within twenty-one (21) calendar days of receiving a written request from the Town for the same.

C. The Town will, at Developer's sole cost and expense, provide, among any other assistance deemed reasonably necessary by the Town, technical, engineering, legal and administrative assistance, as selected by the Town, to acquire, by purchase or condemnation, the Third-Party Roadways Project Rights-of-Way. The Town shall review and approve any and all documents associated with the Third-Party Roadways Project Rights-of-Way required herein. If the Town determines, in its reasonable discretion, that condemnation proceedings are necessary to secure the Third-Party Roadways Project Rights-of-Way, the Town shall have the right to, at Developer's sole cost and expense, take any and all steps the Town deems necessary to initiate said proceedings.

D. The Third-Party Roadways Project Rights-of-Way shall be filed and recorded prior to the commencement of construction of the Roadways or any portion thereof, unless a Right of Entry is secured, a condemnation award is tendered with the registry of the court and/or a right of possession by any other means is obtained on an earlier date.

E. If the Third Party Roadways Project Rights-of-Way are not obtained, or the Town has not secured the right to possess, in a form reasonably acceptable to the Town, the land made the subject of the Third Party Roadways Project Rights-of-Way, within ninety (90) days after the execution hereof on terms acceptable to the Town, then the Town shall commence, and thereafter diligently pursue to completion, condemnation proceedings to obtain such Third Party Roadways Project Rights-of-Way as soon as reasonably possible. Notwithstanding anything to the contrary herein, the Town and Developer agree that the Town may initiate condemnation proceedings prior to the expiration of the ninety (90) days referred to in this Paragraph.

4. **Assignment.** Developer shall have the right to assign this Agreement, in whole, to a person or entity that succeeds Developer, only with the written consent of the

Town, such consent not to be unreasonably withheld. This Agreement shall be filed of record in Denton County, Texas.

5. **Default.** If Developer fails to comply with any provision of this Agreement after receiving fifteen (15) days' written notice to comply from the Town or such longer period as may be reasonably necessary provided that Developer commences to cure the default or breach within the 15-day period and proceeds with reasonable diligence thereafter to complete such cure, the Town may terminate this Agreement and/or seek any other relief or remedy it deems necessary in its sole discretion.

6. **Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Denton County, Texas. Venue for any action arising under this Agreement shall lie in Denton County, Texas.

7. **Notices.** Any notices required or permitted to be given hereunder shall be given by certified or registered mail, return receipt requested, to the addresses set forth below or to such other single address as either party hereto shall notify the other:

If to the Town: The Town of Prosper, Texas
P.O. Box 307
Prosper, Texas 75078
Attn: Town Manager's Office

If to Developer: MSW Prosper 380 II, LP
320 W. Main Street
Lewisville, Texas 75057
Attn: Kristian Teleki

With a copy to: Wick Phillips Gould & Martin, LLP
3131 McKinney Avenue, Suite 500
Dallas, Texas 75204
Attn: Chris Fuller and Scott Hotchkiss

8. **Prevailing Party.** In the event any person initiates or defends any legal action or proceeding to enforce or interpret any of the terms of this Agreement, the prevailing party in any such action or proceeding shall be entitled to recover its reasonable costs and attorney's fees (including its reasonable costs and attorney's fees on any appeal).

9. **Sovereign Immunity.** The parties agree that Town has not waived its sovereign immunity by entering into and performing its obligations under this Agreement; however, for purposes of enforcement of this Agreement, the Town agrees that it has waived its sovereign immunity, and to that extent only.

10. **Effect of Recitals.** The recitals contained in this Agreement: (a) are true and correct as of the effective date; (b) form the basis upon which the parties negotiated and entered into this Agreement; (c) are legislative findings of the Town Council; and (d) reflect the final intent of the parties with regard to the subject matter of this Agreement. In the event it becomes necessary to interpret any provision of this Agreement, the intent of the parties, as evidenced by the recitals, shall be taken into consideration and, to the maximum extent possible, given full effect. The parties have relied upon the recitals as part of the consideration for entering into this Agreement and, but for the intent of the parties reflected by the recitals, would not have entered into this Agreement.

11. **Consideration.** This Agreement is executed by the parties hereto without coercion or duress and for substantial consideration, the sufficiency of which is forever confessed.

12. **Counterparts.** This Agreement may be executed in a number of identical counterparts, each of which shall be deemed an original for all purposes. A facsimile signature will also be deemed to constitute an original if properly executed.

13. **Entire Agreement.** This Agreement contains the entire agreement between the parties hereto and supersedes all prior agreements, oral or written, with respect to the subject matter hereof. The provisions of this Agreement shall be construed as a whole and not strictly for or against any party.

14. **Savings/Severability.** Invalidation of any one of the provisions of this document by judgment or court order shall in no way affect any of the other provisions, which shall remain in full force and effect. In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, the Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.

15. **Authority to Execute.** The Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. The Town warrants and represents that the individual executing this Agreement on behalf of the Town has full authority to execute this Agreement and bind the Town to the same. This Agreement is and shall be binding upon Developer, its successors, heirs, assigns, grantees, vendors, trustees, representatives, and all others holding any interest now or in the future.

16. **Mediation.** In the event of any disagreement or conflict concerning the interpretation of this Agreement, and such disagreement cannot be resolved by the signatories hereto, the signatories agree to submit such disagreement to mediation.

17. **Indemnification.** Developer, individually and on behalf of its respective officers, directors, partners, employees, representatives, agents, successors, assignees, vendors, grantees and/or trustees, does hereby agree to release, defend, indemnify and hold harmless the Town and its elected and appointed officials, officers, employees and agents from and against all damages, injuries (including death), claims, property

damages (including loss of use) losses, demands, suits, judgments and costs, including reasonable attorney's fees and expenses (including attorney's fees and expenses incurred in enforcing this indemnity), caused by the negligent, grossly negligent, and/or intentional act and/or omission of Developer, its officers, directors, partners, employees, representatives, agents, or any other third parties for whom such Developer is legally responsible, in its/their performance of this Agreement, including but not limited to, the construction of any Roadway CIP Project contemplated herein (hereinafter "Claims"). Developer is expressly required to defend the Town against all such Claims arising under this Agreement, and the Town is required to reasonably cooperate and assist developer(s) in providing such defense.

18. **Approval of Counsel.** In its reasonable discretion, the Town shall have the right to approve counsel to be retained by Developer in fulfilling its obligation hereunder to defend and indemnify the Town. The Town reserves the right to provide a portion or all of its' own defense, at its sole cost; however, the Town is under no obligation to do so. Any such action by the Town is not to be construed as a waiver of Developer's obligation to defend the Town or as a waiver of Developer's obligation to indemnify the Town pursuant to this Agreement. Developer shall retain Town-approved defense counsel within seven (7) business days of the Town's written notice that the Town is invoking its right to indemnification under this Agreement.

19. **Survival.** Paragraph 17, "Indemnification," and Paragraph 18, "Approval of Counsel," shall survive the termination of this Agreement.

20. **Additional Representations.** Each signatory represents this Agreement has been read by the Party for which this Agreement is executed and that such Party has had the opportunity to confer with its counsel.

21. **Miscellaneous Drafting Provisions.** This Agreement shall be deemed drafted equally by all Parties hereto. The language of all parts of this Agreement shall be construed as a whole according to its fair meaning, and any presumption or principle that the language herein is to be construed against any Party shall not apply.

22. **No Third-Party Beneficiaries.** Nothing in this Agreement shall be construed to create any right in any third party not a signatory to this Agreement, and the Parties do not intend to create any third-party beneficiaries by entering into this Agreement.

23. **Applicability of Town Ordinances.** The signatories hereto shall be subject to all applicable ordinances of the Town, whether now existing or in the future arising.

24. **Rough Proportionality.** Developer hereby agrees that any land or property donated and/or dedicated pursuant to this Agreement, whether in fee simple or otherwise, to the Town relative to the Roadway is roughly proportional to the need for such land and Developer hereby waives any claim therefor that it may have. Developer

further acknowledges and agrees that all prerequisites to such a determination of rough proportionality have been met, and that any costs incurred relative to said donation are related both in nature and extent to the impact of the development referenced herein. Both Developer and the Town further agree to waive and release all claims one may have against the other related to any and all rough proportionality and individual determination requirements mandated by the United States Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and its progeny, as well as any other requirements of a nexus between development conditions and the provision of roadway services to the Property.

25. **Attorney's Fees.** Developer agrees to pay, or cause to be paid, to Prosper any attorney's fees charged to Prosper by Prosper's legal counsel for, among other things, legal review, preparation of and revision to this Agreement and all further agreements, ordinances or resolutions contemplated by this Agreement, negotiations and discussions with Developer's attorney and the provision of advice to applicable Prosper Town Staff and the Prosper Town Council, in an amount not to exceed \$3,000.00 within ten (10) days upon receipt of an invoice of same from Prosper.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have caused this document to be executed as of the date first above written.

THE TOWN OF PROSPER, TEXAS

By: _____
Name: Harlan Jefferson
Title: Town Manager

STATE OF TEXAS)
)
COUNTY OF COLLIN)

This instrument was acknowledged before me on the ____ day of _____, 2022, by Harlan Jefferson, Town Manager for the Town of Prosper, Texas, on behalf of the Town of Prosper, Texas.

Notary Public, State of Texas

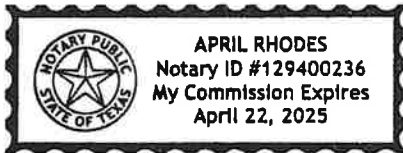
MSW PROSPER 380 II, LP, a Texas limited partnership

By: 
Name: Kristian T. Teleki
Title: Senior Vice President

STATE OF TEXAS)
)
COUNTY OF DENTON)

Before me, the undersigned authority, on this day personally appeared Kristian T. Teleki, Senior Vice of President of MSW Prosper 380 II, LP, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration expressed, and in the capacity therein stated, on behalf of such entity.

Given under my hand and seal of office this 2nd day of April, 2022.




Notary public in and for the State of California
My commission expires: 04/22/2025

EXHIBIT A

(Location and Anticipated Construction Costs)

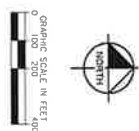
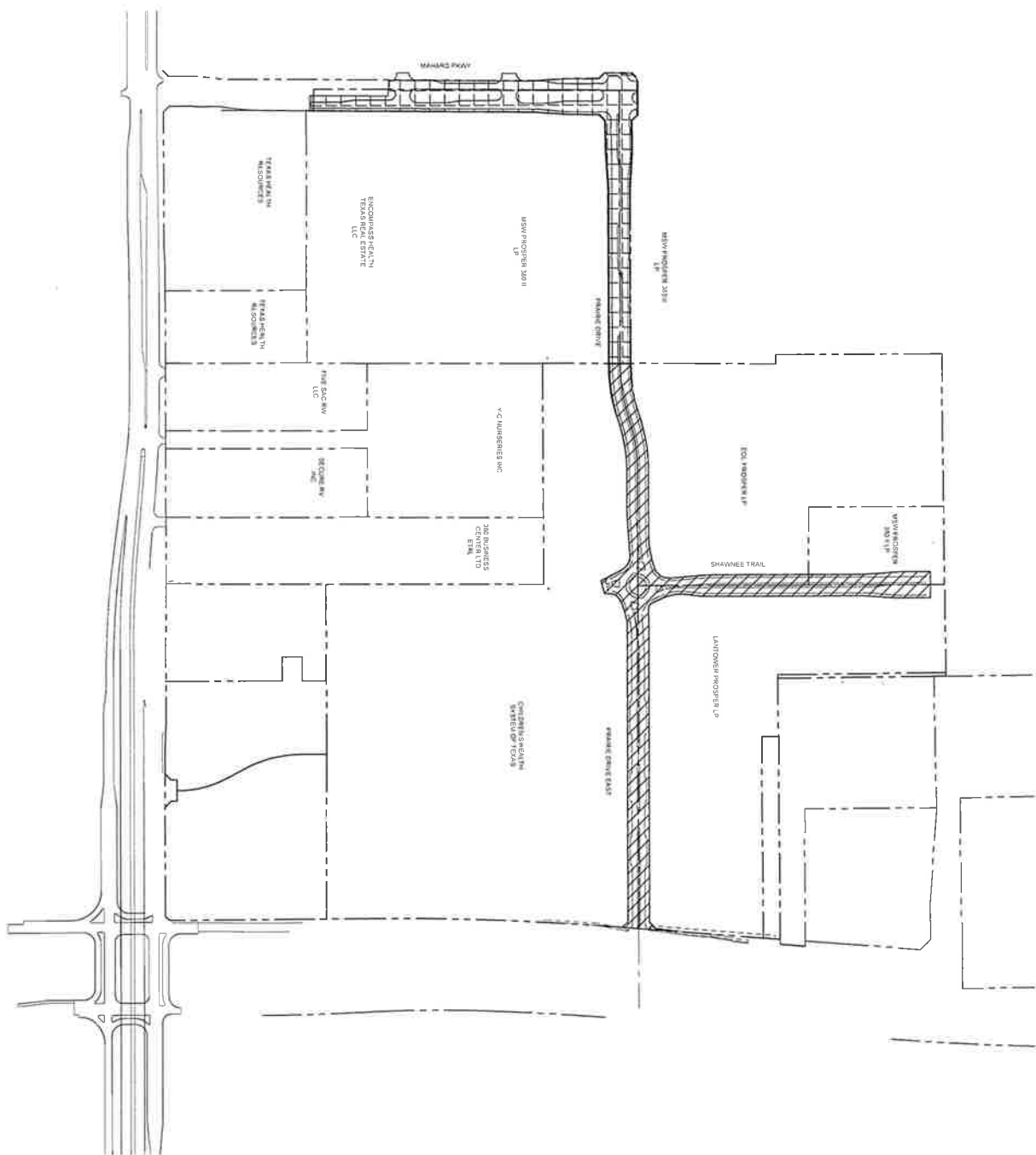


EXHIBIT A



PROSPER WEST
INFRASTRUCTURE

PROSPER, TEXAS

KHA PROJECT
067286015
DATE
FEBRUARY 2022
SCALE AS SHOWN
DESIGNED BY: HAN
DRAWN BY: HAN
CHECKED BY: JH

Kimley»Horn

© 2021 KIMLEY-HORN AND ASSOCIATES INC
260 EAST DAVIS STREET MCKINNEY TX 75069
PHONE 469-301-2360 FAX 972-729-3820
WWW.KIMLEY-HORN.COM TF 6028

No	REVISIONS	DATE	BY

Anticipated Construction Cost for Prosper West & Mahard Parkway and Prairie Road Infrastructure

Mahard Pkwy, Prairie Drive, Shawnee Trail

Erosion Control	35,507
Excavation	914,658
Underground Utilities	5,317,617
Paving	4,946,344
Landscape	443,046
Street Lights	1,022,010
Testing, SWPPP	30,000
Construction Management (3%)	380,270
Contingency (10%)	1,264,018
Total	<hr/> 14,399,970