

CAUSE NO. 14-0204-C277

NIEMAN PROPERTIES, LTD.
Plaintiff,

V.

CITY OF AUSTIN, TEXAS, and
GREG GUERNSEY, SOLELY IN HIS
CAPACITY AS DIRECTOR OF THE
PLANNING AND DEVELOPMENT
REVIEW DEPARTMENT OF THE CITY
OF AUSTIN, TEXAS
Defendants.

§
§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

WILLIAMSON COUNTY, TEXAS

277th JUDICIAL DISTRICT

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter referred to as the “Agreement”) is made and entered into by and among Nieman Properties, Ltd. (the “Plaintiff” or “Nieman”), the City of Austin (the “City”), and Greg Guernsey, in his official capacity as the Director of the Planning and Development Review Department of the City (hereinafter, Plaintiff, the City, and Guernsey will collectively be referred to as the “Parties”) on the dates acknowledged below.

WHEREAS, Plaintiff filed its Original Petition for Declaratory Judgment and Attorney Fees on March 7, 2014 against the City and Guernsey in a lawsuit named and styled *Nieman Properties, Ltd. v. City of Austin, Texas and Greg Guernsey, Solely in his Capacity as Director of the Planning and Development Review Department of the City of Austin, Texas*; Cause No. 14-0204-C277, in the 277th District Court, Williamson County, Texas (the “Lawsuit”);

WHEREAS, the Plaintiff owns and seeks to develop a commercial project, entailing the construction of commercial buildings and appurtenances, known as Town and Country Village Addition Section 3 (the “Project”) on a 5.795 acre parcel of land located near the intersection of

Handwritten signatures and initials, including what appears to be 'IS' and 'Jn' followed by a stylized signature.

Spicewood Springs Road and Highway 183, shown on **Exhibit A, attached to this Agreement** (the "Property").

WHEREAS, the Lawsuit arises out of a dispute between the parties concerning the application of Texas Local Government Code Chapter 245 to the Project, and what City of Austin land development regulations apply to the Project (hereinafter the "Events");

WHEREAS, further litigation of the Lawsuit will require extensive preparation and expense on behalf of the Parties unless they fully and finally settle, terminate, and dismiss the Lawsuit with prejudice at this time;

WHEREAS, the Parties desire to avoid such preparation and expense, and desire to terminate all past, present, and potential controversies among the Parties, to compromise and settle the Parties' differences, and to terminate and dismiss the Lawsuit with prejudice; and

WHEREAS, the City has denied, and continues to expressly deny, the validity of any claim(s) contained, implied, or otherwise made or asserted, directly or indirectly, by Plaintiff in the Lawsuit.

NOW, THEREFORE, in consideration of the promises and the covenants set forth herein and in full compromise, release and settlement, accord and satisfaction, payment and discharge of all alleged or potential claims or causes of action possessed by or belonging to the Parties in the past or present, which were or could have been alleged in the Lawsuit, the Parties covenant and agree as follows:

1. Agreement Contingent on Approval of Austin City Council

The Parties acknowledge and agree that, with the exception of the obligations described in Paragraph 5, this Agreement is wholly contingent upon the Austin City Council voting to approve the ordinance described below in Paragraph 5. If the Council rejects the Ordinance, this

DS
M
EF

Agreement shall be null and void. If the Council adopts the ordinance, then this Agreement shall be fully binding on the Parties.

2. Mutual Release and Covenant Not to Sue

As consideration for the promises and covenants set forth herein, and for other good and valuable consideration, the Parties on their own behalf and on behalf of all persons or entities which may claim by, through, or under them, including, but not limited to, their respective heirs, successors, assigns, shareholders, members, representatives, agents, attorneys, insurers, employees, officials, city council members, attorneys, departments, and subrogees, do hereby knowingly and voluntarily release, remise, acquit and forever discharge each other, and any of their current, past, or future partners or affiliate entities, successors, assigns, agencies, agents, attorneys, city council members, departments, employees, insurers, managers, mayors, partners, principals, officials, or representatives, from any and all causes of actions, claims, grievances, complaints, demands, liabilities, or lawsuits, past or present of any nature, known or unknown, arising from or relating to the Lawsuit, the Events, or from any transactions or occurrences that were or could have been asserted in the Lawsuit. The Parties agree that this Agreement is a post-dispute agreement entered into knowingly and voluntarily, and the Parties release one another from any recovery whatsoever, which was or could have been sought in the Lawsuit.

3. Dismissal of the Lawsuit with Prejudice

Plaintiff and its legal counsel acknowledge and agree that within ten (10) business days of the Austin City Council voting to approve the Ordinance described below in Paragraph 5, it shall take the necessary steps to dismiss the Lawsuit with prejudice.

4. Land Development Regulations for Plaintiff's Project

a. *Applicability of Current City of Austin Code*

Handwritten signatures and initials in the bottom right corner of the page. There are two distinct signatures, one appearing to be 'DE' and the other 'AG'.

With the express exception of the *Development Terms* described in Paragraph 4(b) below, the Parties agree that the Project is subject to City Land Development Code and Regulations in effect at the time Plaintiff makes each permit application for the Project. The extant City Land Development Code and Regulations that apply to the Project shall include, but not be limited to, City requirements for storm water detention and water quality.

b. *Development Terms*

The Parties agree that the following Development Terms supersede the City of Austin Land Development Code for development of the Project provided for and described in this Agreement. However, the Parties further agree that following completion of the Project, subsequent redevelopment of the Property or subsequent changes to the Project are not entitled to these Development Terms or otherwise subject to this Agreement:

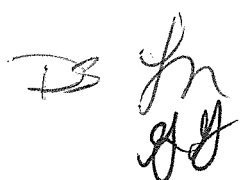
i. Impervious Cover

In connection with the construction and development of the Project, the Plaintiff may develop each lot on the Property up to 80% impervious cover. Impervious cover shall be calculated based on the gross site area (i.e., total acreage) of each lot. Notwithstanding this allowance regarding impervious cover, Plaintiff agrees that any zoning restrictions that apply to the Property, now or in the future, are not modified by this Agreement and will continue to apply to the Property.

ii. Waterways & Buffers

There are no classified waterways on the Property, and no waterways or environmental buffers in which development of the Property is restricted.

iii. Protected & Heritage Trees

Handwritten signatures and initials in the bottom right corner of the page. There are two distinct signatures, one appearing to be 'JB' and the other 'JH' or similar, with some additional scribbles below them.

In connection with the development and construction of the Project, the Parties agree that Plaintiff is required to save and preserve protected or heritage trees on the Property as shown on **Exhibit B, Exhibit C, and Exhibit D, attached to this Agreement.** Moreover, as shown on Exhibit B, Plaintiff will make enhanced efforts to save tree #'s 3295, 3296, and 3255, although these trees may be removed if deemed necessary by Nieman for the development and construction of the drainage channel to be constructed along the western and northern boundaries of the Property in connection with the construction of the Project (the "Drainage Channel"). All other trees not specifically designated as trees required to be saved or trees that Nieman will make enhanced efforts to save, may be removed if deemed necessary by Nieman for the development and construction of the Project. Notwithstanding Plaintiff's ability to remove certain trees in connection with the development and construction of the Project, Plaintiff agrees to make tree preservation a priority in the design and construction of the Project, and in the creation of lots on the Property. Furthermore, Plaintiff agrees that it will replace, inch-for-inch, any protected or heritage trees shown on Exhibit B that are removed due to the development and construction of the Project. Other than as modified by this Agreement, any such replacement of removed trees shall comply with the City standards for tree replacement in effect on the date of this Agreement.

iv. Revisions to the Preliminary Plan or Plat

The City agrees it will administratively support an application Plaintiff may file for a revised preliminary plan or plat that removes Nieman Drive from the Property, as shown on the August 17, 1979 preliminary plan. Plaintiff agrees that any such revised preliminary shall be submitted showing the Property divided into a single lot, which shall be identified as Lot 3A, as shown on the attached Exhibit A. The Parties further agree that Plaintiff may further subdivide

Handwritten signature and initials in the bottom right corner of the page.

the Property into smaller lots in which event the Development Terms will remain applicable to the smaller lots. A single water detention and water quality pond facility may be constructed on the area covered by Lot 3A to serve such smaller lots as well as Lot 2A. If such newly constructed water detention and water quality pond also serves the drainage area covered by the existing water detention and water quality ponds on Lot 2A, such existing ponds on Lot 2A may be removed.

v. Fill for the Project

Plaintiff, in connection with development and construction of the Project, shall have the right to fill the Property to maximum height of 941.5 feet above sea-level.

vi. Existing Berms may be Modified

In connection with the development and construction of the Project, the existing berms on the Property may be modified or removed for the purpose of accommodating development of the Project. The Plaintiff shall not, however, adjust the berms such that any adjustment would cause the destruction or removal of any tree designated as a tree that is required to be saved on Exhibit B.

vii. The Drainage Channel & Drainage Criteria Manual

(1) All of the Drainage Channel, as constructed, shall be located in a drainage easement.

The form of the drainage easement shall be acceptable to the City.

(2) The Drainage Channel shall be maintained by Nieman, or by any subsequent owner(s) of the owner of the Property. The City of Austin shall not be responsible for maintaining the Drainage Channel.

(3) Due to the low velocity of flow in the 30-ft drainage channel for the 2-year and 100-year frequency storm and the greater-than-normal height of the outer berm of the

Handwritten signature and initials, possibly "DS" and "JH", in the bottom right corner.

channel, the following requirement of the Drainage Criteria Manual is waived:
Section 6.4.1(A) to allow the channel velocity for the 2-year storm to be less than 2 feet-per-second.

- (4) Regardless of any contrary curvature of the Drainage Channel that may be shown on Exhibits B or C, the Parties agree that Section 6.4.1 (E) of the Drainage Criteria Manual shall apply to the development of the Drainage Channel and the Project unless subsequently waived by the City.

Except as otherwise specifically indicated in this Agreement, all provisions of the Drainage Criteria Manual shall apply to the Project unless subsequently waived or modified by the City.

5. Settlement Ordinance

The City agrees that an ordinance adopting and reflecting the land development regulations outlined in Paragraph 4 shall be placed on the agenda of the Austin City Council as soon as practicable. City staff shall recommend to Council that it adopt the ordinance, which shall apply only to the development and construction of the Project as outlined in this Agreement. The Parties understand and agree this Agreement does not bind any member of the Austin City Council to vote for or against the ordinance.

6. No Further Payments or Consideration

Plaintiffs acknowledges and agrees that it is not entitled to and will not make any claim for any payment of any kind, including, but not limited to payments for court costs or attorney's fees from the City, arising out of or related to the Events or the facts of the Lawsuit.

7. Agreement Not an Admission of Liability

The Parties acknowledge and agree that neither the Agreement, nor any of its terms and conditions, constitute an admission of any wrongdoing or any liability on the part of the Parties.



8. Entire Agreement

This Agreement sets forth the entire agreement between the Parties and fully replaces any and all prior understandings, statements, or agreements (verbal or written) between the Parties.

9. Waivers and Amendment

The Parties agree that no breach of any provision hereof can be waived unless in writing. Waiver of any breach shall not be deemed to be a waiver of any other breach of the same or other provisions hereof, nor shall such waiver constitute a continuing waiver. This Agreement may be amended only by a written agreement executed by the Parties.

10. Severability

The Parties agree that if any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this Agreement, such provision shall be fully severable, this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never been a part of this Agreement, and the remaining provisions of the Agreement shall remain in full force and effect. The Parties further agree that in lieu of each such illegal, invalid, or unenforceable provision, there shall be added automatically as part of this Agreement a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid and enforceable.

11. Applicable Law

The Parties agree that this Agreement is to be governed by and construed under the laws of the State of Texas. The Parties further agree venue for any action brought, related to or in connection with a breach of this Agreement shall be in Williamson County, Texas.

12. Attorney's Fees and Costs

Handwritten signatures and initials in the bottom right corner of the page. There are two distinct signatures, one appearing to be 'DS' and the other 'HJ', both written in dark ink.

The Parties agree that they shall bear and pay their own attorney's fees and costs of court arising from all events related to the Lawsuit and this Agreement.

13. Binding Effect

The Parties agree that this Agreement shall be binding on, and inure to the benefit of the employees, representatives, heirs, legal representatives, subsequent owners, successors, and assigns of the Parties.

14. Enforcement of Agreement

The Parties acknowledge and agree that this Agreement is admissible in any subsequent proceeding between the Parties, including, but not limited to, a lawsuit between the Parties relating to the Lawsuit or this Agreement.

15. Representation by Legal Counsel

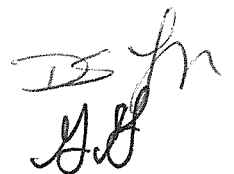
The Parties acknowledge and agree that they have been represented and advised by legal counsel of their own choosing in negotiations for and the preparation of this Agreement, the Parties have read this agreement, or had it read to them by legal counsel, and that the Parties are each fully aware of the contents and legal effect of this Agreement.

16. Voluntary Agreement

The Parties acknowledge and agree that they have carefully read this Agreement and know the contents thereof and that they sign the same freely, knowingly, and voluntarily. The Parties further agree that the promises and covenants made herein are not made under duress, coercion, or undue influence.

17. Contract Execution

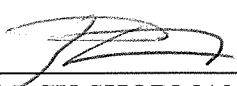
The Parties acknowledge and agree that this Agreement may be executed in multiple counterparts and/or facsimile copies with the same force and effect as if all signatures were set

Handwritten signatures of two parties, likely representing the agreement.

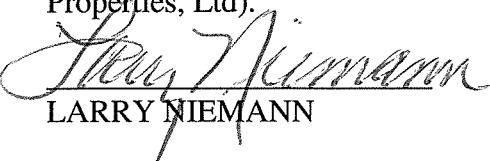
forth on a single non-facsimile instrument. This Agreement shall be executed by the Parties before a notary public who shall acknowledge and notarize as provided by law that under oath each party has sworn he, she, or it has made and entered into this Agreement with the authority and the capacity so expressed.

IT IS SO AGREED.

PLAINTIFF NIEMAN PROPERTIES, LTD.

By:  DATE: Jan 13, 2015
DARCY SHORMAN

Its: ACTING PRESIDENT, NIEMAN MANAGEMENT, INC. (General Partner of Nieman Properties, Ltd).

By:  DATE: Jan 13, 2015
LARRY NIEMANN

Its: POWER OF ATTORNEY (ATTORNEY IN FACT)

CITY OF AUSTIN, TEXAS

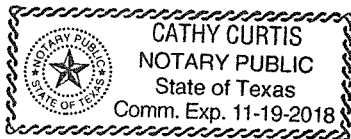
By:  DATE: Jan. 13, 2015
GREG GUERNSEY

Its: DIRECTOR, PLANNING AND DEVELOPMENT REVIEW DEPARTMENT

NOTARIZATION PAGE FOR PLAINTIFF NIEMAN PROPERTIES, LTD.

BEFORE ME, the undersigned authority, on this day personally appeared Larry Niemann known to me to be the person whose name is subscribed to the foregoing SETTLEMENT AGREEMENT AND RELEASE made in connection with a suit named and styled *Nieman Properties, Ltd. v. City of Austin, Texas and Greg Guernsey, Solely in his Capacity as Director of the Planning and Development Review Department of the City of Austin, Texas*; Cause No. 14-0204-C277, in the 277th District Court, Williamson County, Texas and who holds the power of attorney (attorney in fact) for Nieman Properties, Ltd., and after being duly sworn, acknowledged to me that he has executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 13th day of January,
2014.
2015. *a*



Cathy Curtis

NOTARY PUBLIC – STATE OF TEXAS

DS *JK*
AG

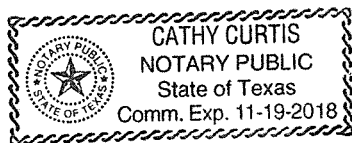
NOTARIZATION PAGE FOR PLAINTIFF NIEMAN PROPERTIES, LTD.

BEFORE ME, the undersigned authority, on this day personally appeared Darcy Shorman known to me to be the person whose name is subscribed to the foregoing SETTLEMENT AGREEMENT AND RELEASE made in connection with a suit named and styled *Nieman Properties, Ltd. v. City of Austin, Texas and Greg Guernsey, Solely in his Capacity as Director of the Planning and Development Review Department of the City of Austin, Texas*; Cause No. 14-0204-C277, in the 277th District Court, Williamson County, Texas and who is the Acting President of Nieman Management, Inc, which is the General Partner of Nieman Properties, Ltd., and after being duly sworn, acknowledged to me that he has executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 13th day of January

2014.
2015. ce

Cathy Curtis
NOTARY PUBLIC - STATE OF TEXAS



[Handwritten initials]

NOTARIZATION PAGE FOR CITY OF AUSTIN, TEXAS

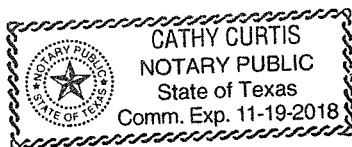
BEFORE ME, the undersigned authority, on this day personally appeared Greg Guernsey, known to me to be the person whose name is subscribed to the foregoing Settlement Agreement and Release made in connection with a lawsuit named and styled *Nieman Properties, Ltd. v. City of Austin, Texas and Greg Guernsey, Solely in his Capacity as Director of the Planning and Development Review Department of the City of Austin, Texas*; Cause No. 14-0204-C277, in the 277th District Court, Williamson County, Texas, and who is the Director of the City of the Planning and Development Review Department, and after being duly sworn, acknowledged to me that he has executed the same for the purposes and consideration therein expressed.

2014.

2015^a

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 13th day of January

Cathy Curtis
NOTARY PUBLIC - STATE OF TEXAS



DS
af

CAUSE NO. 14-0204-C277

NIEMAN PROPERTIES, LTD.
Plaintiff,

V.

CITY OF AUSTIN, TEXAS, and
GREG GUERNSEY, SOLELY IN HIS
CAPACITY AS DIRECTOR OF THE
PLANNING AND DEVELOPMENT
REVIEW DEPARTMENT OF THE CITY
OF AUSTIN, TEXAS
Defendants.

§
§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

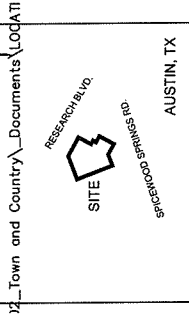
WILLIAMSON COUNTY, TEXAS

277th JUDICIAL DISTRICT

SETTLEMENT
AGREEMENT AND
RELEASE
EXHIBIT A

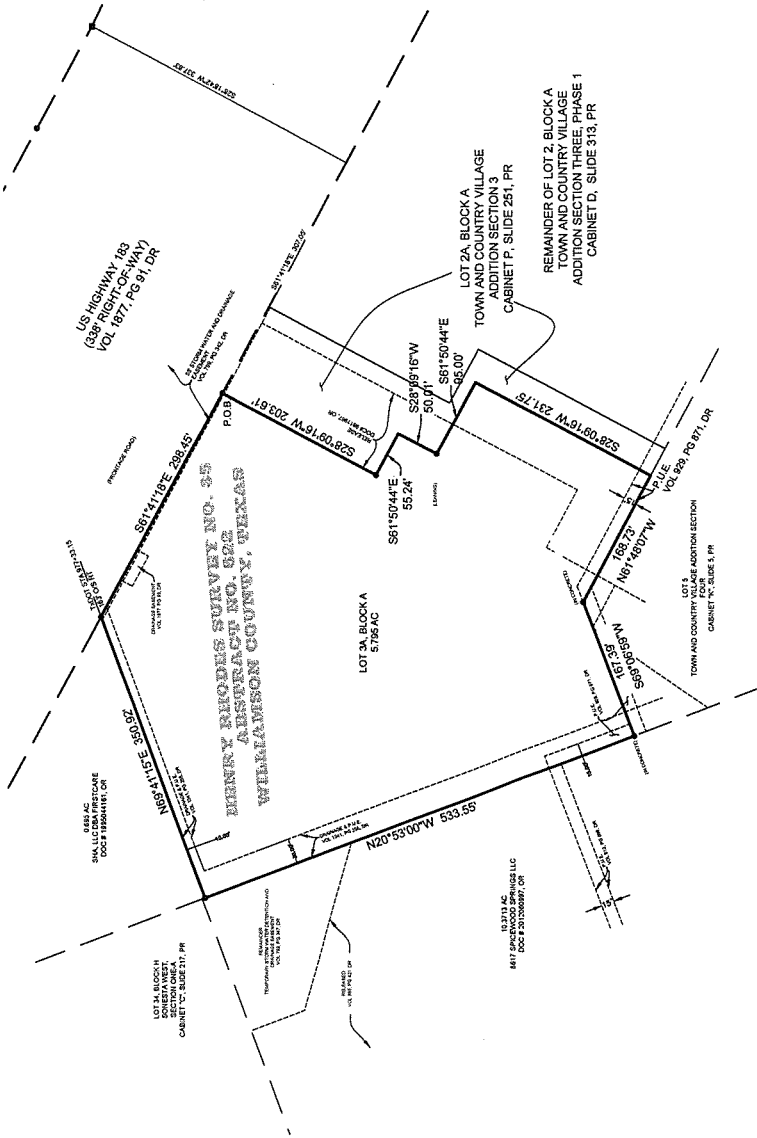
gr
72 *ln*

TOWN AND COUNTRY VILLAGE ADDITION SECTION THREE LOT 3A, BLOCK A



GRAPHIC SCALE
(IN FEET)
1 inch = 100 ft.

LOCATION MAP
NOT TO SCALE



LEGEND

- 1/2" IRON ROD FOUND (UNLESS STATED)
- 1/2" IRON PIPE FOUND (UNLESS STATED)
- CONCRETE HWY. MONUMENT FOUND (TYPE II)
- ✱ PUNCH MARK FOUND
- 1/2" IRON ROD W/OD SET (UNLESS STATED)
- B.L. BUILDING LINE
- DR. DRAINAGE EASEMENT
- P.U.E. PUBLIC UTILITY EASEMENT
- PR. PLAT RECORD INFORMATION
- DR. DEED RECORDS WILLAMSON COUNTY, TEXAS
- OPR. OFFICIAL PUBLIC RECORDS WILLAMSON COUNTY, TEXAS
- P.O.B. POINT OF BEGINNING
- P.O.C. POINT OF COMMENCEMENT
- ⊕ BENCHMARK

AREA:	5.795 ACRES
SURVEY:	HENRY RHODES SURVEY NO. 35, ABSTRACT NO. 522, WILLAMSON CO., TEXAS
LOTS:	1 NON-RESIDENTIAL
BLOCK:	1
OWNER:	NEWMAN PROPERTIES, A TEXAS GENERAL PARTNERSHIP, WILLAMSON CO., TEXAS
SURVEYOR:	CUNNINGHAM ALLEN, INC., 3103 BEE CAVE ROAD, SUITE 202, AUSTIN, TX, 78746
ENGINEER:	CUNNINGHAM ALLEN, INC., 3103 BEE CAVE ROAD, SUITE 202, AUSTIN, TX, 78746
STREET DEDICATION:	NONE
RIGHT-OF-WAY DEDICATION:	NONE
JURISDICTION:	CITY OF AUSTIN

BEARINGS ARE BASED ON THE TEXAS COORDINATE SYSTEM OF 1983. ALL DISTANCES ARE ADJUSTED TO THE SURFACE USING A SURFACE ADJUSTMENT FACTOR OF 1.000105888. (SURFACE = GRID X SURFACE ADJUSTMENT FACTOR)

UTILITY SERVICE:
ELECTRIC - AUSTIN ENERGY
WATER - CITY OF AUSTIN
WASTEWATER - CITY OF AUSTIN
CITY OF AUSTIN GRID G38

PRELIMINARY FOR REVIEW ONLY. THIS DOCUMENT IS FOR ANY PURPOSE. CUNNINGHAM ALLEN, INC. MAY 23, 2013

C8- SUBMITTAL DATE: / / 2013

Cunningham Allen
Engineers - Surveyors

3103 Bee Cave Road, Suite 202
Austin, Texas 78746-5819
Tel: (512) 327-2946
Fax: (512) 327-2973
www.cunningham-allen.com

DATE: 05/20/13
PROJECT NO.: 003.003
DRAWN BY: MAE
SHEET 1 OF 2

Y. J. D. H.

AG DS h



HEC-RAS Plan: 30' Bend River: offsite flow Reach: 1

Reach	River Sta	Profile	Q Total (cfs)	Min Ch El (ft)	W.S. Elev (ft)	Crit W.S. (ft)	E.G. Elev (ft)	E.G. Slope (ft/ft)	Vel Chnl (ft/s)	Flow Area (sq ft)	Top Width (ft)	Froude # Chl	Max Chl Dpth (ft)
1	100	PF 1	158.75	932.77	935.36	934.24	935.49	0.005006	2.85	55.71	29.67	0.37	2.59
1	100	PF 2	54.88	932.77	934.24	933.56	934.30	0.005001	2.11	26.04	22.89	0.35	1.47
1	385	PF 1	158.75	934.20	936.81		936.93	0.004887	2.82	56.20	29.76	0.36	2.61
1	385	PF 2	54.88	934.20	935.68		935.74	0.004863	2.09	26.29	22.96	0.34	1.48
1	420	PF 1	158.75	934.37	936.95		937.08	0.005128	2.87	55.22	29.57	0.37	2.58
1	420	PF 2	54.88	934.37	935.81		935.89	0.005267	2.15	25.57	22.77	0.36	1.44
1	455	PF 1	90.22	934.54	937.13		937.17	0.001623	1.62	55.63	29.65	0.21	2.59
1	455	PF 2	30.92	934.54	935.96		935.98	0.001782	1.24	25.00	22.62	0.21	1.42
1	560	PF 1	90.22	935.07	937.38		937.50	0.005585	2.73	33.09	21.38	0.39	2.31
1	560	PF 2	30.92	935.07	936.27		936.36	0.007677	2.36	13.08	14.73	0.44	1.20
1	825	PF 1	90.22	936.39	938.78		938.88	0.004909	2.60	34.76	21.85	0.36	2.39
1	825	PF 2	30.92	936.39	937.80		937.85	0.004304	1.90	16.24	15.97	0.33	1.41
1	850	PF 1	90.22	936.52	938.91		939.02	0.004885	2.59	34.82	21.86	0.36	2.39
1	850	PF 2	30.92	936.52	937.92		937.97	0.004459	1.93	16.03	15.89	0.34	1.39
1	890	PF 1	90.22	936.69	939.07		939.17	0.004994	2.61	34.53	21.78	0.37	2.38
1	890	PF 2	30.92	936.69	938.06		938.12	0.004769	1.98	15.63	15.74	0.35	1.37
1	950	PF 1	90.22	937.00	939.30		939.33	0.001416	1.57	76.69	75.30	0.20	2.30
1	950	PF 2	30.92	937.00	938.28		938.31	0.001948	1.31	27.12	34.28	0.22	1.28

gg.
Ln