

Prepared by and Return to:
Timothy D. Davis
Gordon, Silberman, Wiggins & Childs, P.C.
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Birmingham, Alabama 35203
(205) 328-0640

UTILITY, DRAINAGE AND INGRESS/EGRESS EASEMENT AGREEMENT

THIS UTILITY AND INGRESS/EGRESS EASEMENT AGREEMENT, dated as of December 14, 1998, is made by and between **ACTIVE BUILDING CONTRACTORS, INC.**, an Alabama corporation ("Active"), and **FRANK H. BROCKSON and APRIL N. BROCKSON** (collectively, "Brockson").

RECITALS

- A. Brockson is, or will be at the time of the recording of this document, the owner of the property described on Exhibit A attached ("Parcel 1") and upon which Brockson and/or their tenant(s) operate a baseball teaching facility (the "Academy").
- B. Active is the owner of the property described on Exhibit B attached ("Parcel 2").
- C. Brockson wishes to grant, and Active wishes to receive, certain easements over, under, upon and across the property described on Exhibit C attached and being a part of Parcel 1 (the "35 Foot Easement Area").
- D. Brockson wishes to grant, and Active wishes to receive, certain easements over, under, upon and across the property described on Exhibit D attached and being a part of Parcel 1 (the "20 Foot Easement Area").
- E. Brockson wishes to grant, and Active wishes to receive, certain easements over, under, upon and across the property described on Exhibit E attached and being a part of Parcel 1 (the "Utility Easement Area"; the 35 Foot Easement Area, the 20 Foot Easement Area, and the Utility Easement Area are referred to herein collectively as the "Easement Areas").

THEREFORE, in consideration of Ten and No/100 Dollars (\$10.00) and other valuable consideration, the receipt and sufficiency of which are acknowledged, the following grants, agreements, covenants and restrictions are made:

1. GRANT OF UTILITY EASEMENT:

Brockson grants and conveys to Active a perpetual, non-exclusive easement, right, privilege, and access over, under, upon and across the 35 Foot Easement Area, the 20 Foot Easement Area, and the Utility Easement Area for the purpose(s) of providing utilities to Parcel 2, which shall include the construction, installation, inspection, replacement, repair, removal, operation and/or maintenance of such pipes, conduits, lines, fixtures, equipment, facilities or appurtenances as may be necessary for the provision of utilities to Parcel 2. Nothing contained herein shall prohibit the owner of Parcel 1 from the right jointly to use the Easement Areas for the aforementioned uses. Nothing contained herein shall permit the owner of Parcel 2 to use any portion of the Easement Areas or of Parcel 1 for any other purpose other than those specifically described herein.

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2. GRANT AND USE OF INGRESS/EGRESS EASEMENT:

Brockson grants and conveys to Active, its business invitees, licensees and employees, a perpetual, non-exclusive easement over, upon and across the 20 Foot Easement Area and the 35 Foot Easement Area for vehicular and pedestrian ingress and egress to and from Parcel 2. Both Brockson and Active will have the right of ingress and egress across the Easement Areas for any purpose granted and such ingress and egress will be exercised in a reasonable manner. No trees, permanent buildings or other structures shall be placed in or allowed to encroach upon the Easement Areas subsequent to the date of this Agreement in such a manner as to interfere with the flow of pedestrian or vehicular traffic over the Easement Areas without the prior written approval of the affected party, which approval shall not be unreasonably withheld.

3. USE OF EXISTING EASEMENT FOR INGRESS AND EGRESS AND UTILITIES:

Parcels 1 and 2 are entitled by operation of law to utilize the rights granted pursuant to that certain Declaration of Easement for Ingress and Egress and Utilities as recorded in the Probate Office of Shelby County, Alabama, in Book 230, Page 615 (the "Existing Easement"). Rights, obligations and restrictions on use pertaining to the Existing Easement shall be as set forth in said Declaration creating the Existing Easement. For purposes of paragraphs 4, 8 and 9 of this Agreement, the Existing Easement shall be deemed to be included in the definition of "Easement Areas".

4. INDEMNIFICATION:

(A) The owner of Parcel 1 indemnifies the owner of Parcel 2 against and holds such owner harmless from any loss, liability, cost or expense, including reasonable attorney's fees, resulting from the use by the owner of Parcel 1, its tenants, business invitees, agents and contractors, of the Easement Areas as provided in this Agreement.

(B) The owner of Parcel 2 indemnifies the owner of Parcel 1 against and holds such owner harmless from any loss, liability, cost or expense, including reasonable attorney's fees, resulting from the use by the owner of Parcel 2, its tenants, business invitees, agents and contractors, of the Easement Areas as provided in this Agreement.

5. RUNNING OF BENEFITS:

All provisions of this instrument, including the benefits and burdens, run with the land and are binding upon and inure to the benefit of the heirs, assigns, licensees, invitees, successors in title, tenants, employees and personal representatives of the parties.

6. CONSTRUCTION:

The rule of strict construction does not apply to the grants provided in paragraphs 1 and 2. The grants provided in paragraphs 1 and 2 shall be given a reasonable construction so that the intention of the parties to convey a commercially usable right of enjoyment to Brockson and Active, as applicable, is carried out. Brockson and Active agree to execute such further agreements and documents necessarily required to more fully effectuate the intents and purposes of this Agreement.

7. EFFECT OF AGREEMENT:

A. Any mortgage affecting any portion of Parcels 1 or 2 shall at all times be subject to and subordinate to the terms of this Agreement except as otherwise expressly provided herein. Any party foreclosing any mortgage shall acquire title to Parcels 1 or 2 subject to all the terms, conditions and other provisions of this Agreement.

B. Any transferee of all or any part of Parcels 1 and 2 shall automatically be deemed, by acceptance of the title to any portion of such property, to have assumed all obligations of this Agreement related thereto and have agreed to execute any and all instruments and to do any and all things reasonably required to carry out the purpose and intent of this Agreement.

C. Notwithstanding the foregoing, however, any purchaser at any foreclosure sale, as well as any grantee by deed in lieu of foreclosure under a first mortgage shall assume only those obligations of this Agreement accruing from and after such acquisition. Any purchaser at any foreclosure sale, as well as any grantee by deed in lieu of foreclosure sale, under a first mortgage shall be liable hereunder only to the extent of its interest in the property from date of acquisition.

D. Nothing contained in this Agreement shall be a gift or dedication of any portion of any of the land affected by the general public or any public use or purpose whatsoever.

E. No change or modification of this Agreement shall be binding unless made in writing signed by the then owner or owners of Parcels 1 and 2 and their respective mortgagees.

F. Any provision or provisions of this Agreement that shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any of the remaining provisions of this Agreement and the remaining provisions shall nevertheless remain in full force and effect.

G. The captions of the various sections of this Agreement are for convenience only and shall not be considered or referred to in resolving questions and interpretations of their construction.

H. This Agreement shall be governed by and construed in accordance with the laws of the State of Alabama.

8. **MAINTENANCE:**

A. The owners of Parcels 1 and 2 (herein referred to singularly as "Owner" or plurally as "Owners") hereby agree to maintain the surface of the Easement Areas set aside for ingress and egress hereunder in a commercially reasonable manner so as to provide adequate access to both Parcels 1 and 2. The existing utilities located in the Easement Areas are maintained by either the City of Pelham or by the applicable public utility company. The Owners will use their best efforts to have all future utilities, if any, installed in the Easement Areas accepted for maintenance by the City of Pelham or by the appropriate public utility.

B. It is further agreed that any and all maintenance required in the Easement Areas shall be the responsibility of the Owner of Parcel 1 until such time as the Owner of any portion of Parcel 2 commences to develop any portion of Parcel 2 and actually utilizes all or any portion of the Easement Areas for any purpose permitted hereunder. Following the commencement of development of Parcel 2, all maintenance of the Easement Areas shall be shared equally by the Owners of Parcels 1 and 2, subject to the provisions of this Agreement.

C. Before commencing the development of Parcel 2 or any construction activity by either Owner utilizing the Easement Areas involving heavy trucks or equipment, the Owners agree to meet with their respective mortgagees and/or their perspective mortgagees and visually inspect ALL Easement Areas. During such inspection, photographs, notes and any other information relative to the existing condition shall be made and shared between the Owners and their mortgagees for use in determining any damage inflicted as a result of any construction activity.

D. Before commencing any construction, the Owner(s) of Parcel 1 and/or 2, as may be applicable, shall post a bond in the amount of \$25,000.00 to cover any damage resulting from such activity. The bond shall remain in effect for 1 year after completion of work.

E. If the construction activity inflicts any obvious damage at the surface or below the surface, including any and all utilities, it shall be the responsibility of the Owner causing such damage to immediately repair and any all damage and fully restore the Easement Areas to their condition as existed immediately prior to the commencement of said construction at said Owner's sole expense.

F. Upon completion of any construction activity, the Owners and their mortgagees shall visually inspect the area and note any damage (which can be determined) as a result of the construction. Any non-emergency repairs shall be placed for "bid" by three licensed contractors normally engaging in such work. The lowest responsive, responsible bidder shall make the repairs at the sole expense of the Owner causing the damage. Further, if it is agreed that further capital improvements should be done simultaneously with the repairs, the amount of the noted repairs shall be paid into the Maintenance Escrow Fund (as hereinafter defined) and used for the agreed capital improvements within the Easement Areas.

G. In an effort to insure the Easement Areas remain serviceable and in a good state of repair, the Owners hereby agree to establish and maintain a non-interest-bearing escrow account at the Bank of Alabama (the "Maintenance Escrow Fund"). The Maintenance Escrow Fund shall be established simultaneously with the execution of this Agreement with each Owner contributing the sum of \$500.00. Each Owner agrees to contribute to the Maintenance Escrow Fund on or before January 1, 2000, and annually thereafter, the sum of \$500.00 or a greater amount as may be mutually agreed to insure the sufficiency of the fund. The Owners will meet annually, or more often if deemed necessary, to review the need for maintenance and the expenditure of funds for any needed maintenance or capital improvements within the Easement Areas. The Owners hereby agree that all maintenance expenses shall be paid from the Maintenance Escrow Fund; the Owners hereby further agree that, if the amounts contained in the Maintenance Escrow Fund are insufficient, the Owners shall pay all costs and expenses pertaining to the Easement Areas, including but not limited to capital improvements, routine or major repairs, routine or major maintenance and administrative costs, the aforementioned work to be performed (except for work required by subsections E and F above) by the owner of Parcel 1, subject to the terms of this instrument; all such costs and expenses shall be paid one-half by the Owner of Parcel 1 and one-half by the Owner of Parcel 2. Notwithstanding anything contained herein to the contrary, the Owners shall be entitled to enter into the Easement Areas to conduct any and all emergency repairs as shall be necessary to restore and/or maintain the use of the Easement Areas for access to the parcels or to maintain the availability of public utilities to either of the parcels; the cost and expense of all such emergency repairs shall be shared in accordance with the provisions of this paragraph 8. All non-emergency construction, repairs and maintenance to the Easement Areas shall be conducted only after the provision of ten (10) days written notice to the Owners by the party proposing to conduct such activity.

H. Each Owner or their designated representative shall be a member of a perpetual committee to manage the maintenance of the Easement Areas. All disbursements from the Maintenance Escrow Fund must be approved by this committee; neither the failure of the committee to approve any disbursement nor the inadequacy of the amounts in the Maintenance Escrow Fund to cover required maintenance shall relieve any Owner of its obligations to share in the cost and expense of the maintenance of the Easement Areas under this Agreement.

I. The rights and easements granted to the owner of Parcel 2 hereunder shall include the right and easement of such Owner, its employees, agents, contractors and subcontractors, to enter into the Easement Areas for the purpose of performing any repair or maintenance that the owner of Parcel 1 is required to perform hereunder but shall have refused or failed to perform after ten (10) days prior written notice delivered by registered mail, return receipt requested, which time period shall be automatically extended for repair or maintenance begun within said time period until completed provided such is diligently pursued to a conclusion. If the owner of Parcel 1 has failed to perform as required, it will indemnify and hold harmless

the owner of Parcel 2 for all costs, losses and liabilities arising out of the entry of the owner of Parcel 2 onto Parcel 1 and its repair and maintenance thereon. All repair and maintenance by either Owner shall comply with all governmental requirements. Repair and maintenance by either Owner shall be performed so as not unreasonably to interfere with the continued use of the Easement Areas by all Owners entitled to the use thereof.

J. All costs and expenses including but not limited to those accruing under the provisions of paragraph 3 herein and the remaining terms of this Agreement together with interest thereon from the due date at 10% per annum and the cost of collection thereof (including reasonable attorney's fees) shall be a charge against the applicable parcel, and shall constitute a lien thereon. Said lien may be enforced by foreclosure proceedings against the applicable parcel in accordance with then applicable Alabama law. The Lot Owner enforcing its rights hereunder shall have the right to file with the appropriate governmental office or offices a memorandum of lien, lis pendens or other notice or notices as may be required by law to give notice of such lien and the amount thereof. The lien herein granted shall be, and hereby is, subordinated to any mortgage, deed of trust or other financing on the applicable parcel then existing or arising after the date on which notice of such lien and the amount thereof is filed with the appropriate governmental office or offices.

9. INSURANCE:

The owners of Parcels 1 and 2 shall maintain public liability insurance covering liability arising out of the use of the Easement Areas with limits of not less than \$100,000.00 with respect to one incident and \$250,000.00 in the aggregate. The owner of each parcel shall provide the other owner with a certificate or certificates evidencing such insurance, naming the other owner, any mortgagee or any lot owners association as an additional insured as their interests may appear. All policies for such insurance will require that any additional insured will be notified thirty (30) days in advance of the cancellation or modification thereof. Certificates evidencing such insurance will be delivered to any additional insured upon request therefor.

10. GRANTS TO GOVERNMENTAL AUTHORITIES:

Nothing herein contained shall restrict the right of either owner to grant easements to governmental authorities or public utilities across, under or through the Easement Areas, provided any such grant will not materially interfere with the herein defined uses of the Easement Areas as created herein and that said governmental authority or public utility shall restore the Easement Area(s) to its condition prior to any work to be performed thereon.

11. NOTICE:

All notices shall be validly given, made or served if in writing and delivered personally or sent by United States certified mail, return receipt requested, postage prepaid, as set forth below:

- | | | |
|-----|--------------|--|
| (a) | To Brockson: | Frank and April Brockson
4357 Heritage View Road
Birmingham, Alabama 35242 |
| (b) | To Active: | Active Building Contractors, Inc.
26695 U.S. Highway 31
Jemison, Alabama 35085 |

Any party may lodge written notice of a change of address to the other party.

IN WITNESS WHEREOF, Brockson and Active, or their duly authorized representatives or officers, have hereunto set their signatures and seals this 14th day of December, 1998.

ACTIVE BUILDING CONTRACTORS, INC., an Alabama corporation

By:

Its: President

Donald Gilbert
Frank H. Brockson

April N. Brockson
April N. Brockson

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, the undersigned, a Notary Public in and for said County in said State, hereby certify that J. Donald Gilbert, whose name as President of Active Building Contractors, Inc., an Alabama corporation, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this 14th day of December, 1998.

[Signature]

Notary Public

My Commission Expires: 2-13-99

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, the undersigned, a Notary Public in and for said County in said State, hereby certify that Frank H. Brockson and April N. Brockson, whose names are signed to the foregoing instrument, and who are known to me, acknowledged before me on this day that, being informed of the contents of said instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 14th day of December, 1998.

[Signature]

Notary Public

My Commission Expires: 2-13-99

EXHIBIT "A"

Commence at the NW corner of SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ Section 13, Township 20 South, Range 3 West, Shelby County, Alabama and run South $86^{\circ}10'38''$ East, 103.61 feet to the point of beginning; thence South $86^{\circ}00'00''$ East, 220.00 feet; thence South $04^{\circ}00'00''$ West, 35.00 feet; thence South $86^{\circ}00'00''$ East, 40.00 feet; thence South $05^{\circ}03'54''$ West, 204.58 feet; thence North $86^{\circ}28'21''$ West, 97.16 feet; thence North $57^{\circ}58'42''$ West, 75.23 feet; thence North $86^{\circ}00'00''$ West, 93.00 feet; thence North $04^{\circ}06'08''$ East, 205.00 feet to the point of beginning.

All lying in the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 13, Township 20 South, Range 3 West, Shelby County, Alabama.

TOGETHER WITH THE RIGHTS TO ACCESS AND UTILITY EASEMENT TO THE ABOVE PARCEL BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

Begin at the Northeast corner of the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 13, thence run West along the North $\frac{1}{4}$ - $\frac{1}{4}$ line 92.44 feet, thence turn left $88^{\circ}03'49''$ and run South 5.68 feet; thence turn right $90^{\circ}00'00''$ to the tangent of a counterclockwise curve having a delta angle of $14^{\circ}58'34''$ and a radius of 328.32 feet and run Westerly along the arc of said curve 85.82 feet; thence continue tangent to said curve 18.58 feet to point of a clockwise curve having a delta angle of $39^{\circ}40'57''$ and a radius of 114.57 feet, thence run along the arc of said curve 79.35 feet to a point on the Southeast right of way of U.S. Highway #31; thence turn left $90^{\circ}00'00''$ from tangent and run Southwest along said highway right of way 24.00 feet, thence turn left $90^{\circ}00'00''$ to the tangent counterclockwise curve having a delta angle of $39^{\circ}40'57''$ and a radius of 138.57 feet, and run Easterly along the arc of said curve 95.97 feet; thence continue tangent to said curve 18.58 feet to the point of a clockwise curve having a delta angle of $14^{\circ}58'34''$ and a radius of 304.32 feet, thence run Easterly along the arc of said curve 79.57 feet, thence continue Easterly and tangent to said curve 217.11 feet, thence turn left $91^{\circ}52'05''$ and run North 37.00 feet to a point on the North line of the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 13, thence turn left $90^{\circ}04'06''$ and run West along said $\frac{1}{4}$ - $\frac{1}{4}$ line 123.58 feet to the point of beginning.

EXHIBIT "B"

The following described real estate, situated in Shelby County, Alabama, to-wit:

A tract of land in the SW 1/4 of NW 1/4 of Section 13, Township 20 South, Range 3 West, described as follows:

Commence at the southwest corner of said quarter-quarter section; thence run east along the south line for a distance of 552.40 feet to a point on the east right-of-way line of U.S. Highway #31; thence run in a northeasterly direction along said right-of-way for a distance of 1451.48 feet to an iron pin found; thence turn an angle to the right of 63°21'26" and run in an easterly direction for a distance of 392.23 feet to an iron pin set at the point of beginning; thence continue along last stated course for a distance of 336.88 feet to an iron pin found at the northwest corner of old Parcel 2, as recorded in Deed 21, Page 28, in the Office of the Judge of Probate, Shelby County, Alabama; thence turn an angle to right of 00°01'34" and run in an easterly direction for a distance of 289.92 feet to an iron pin found; thence turn an angle to the right of 80°00'46" and run in a southeasterly direction for a distance of 263.25 feet to an iron pin found; thence turn an angle to the right of 21°11'32" and run in a southwesterly direction for a distance of 40.96 feet to an iron pin found; thence turn an angle to the right of 78°41'44" and run in a westerly direction for a distance of 327.26 feet to an iron pin found at the southwest corner of said old Parcel 2; thence turn an angle to the right of 00°04'58" and run in a westerly direction for a distance of 337.46 feet to an iron pin set; thence turn an angle to the right of 90°03'32" and run in a northerly direction for a distance of 299.96 feet to the point of beginning; being situated in Shelby County, Alabama.

LESS AND EXCEPT that certain parcel of real estate described on Exhibit A to this Agreement, and which parcel of real estate was deeded by Active to Brockson pursuant to deed dated December 14, 1998, and recorded in the Office of the Judge of Probate, Shelby County, Alabama, on December 17, 1998, in Instrument #1998-50326.

EXHIBIT "C"

35 FOOT EASEMENT AREA

Begin at the Northwest corner of the property described on Exhibit A, thence South $86^{\circ}00'00''$ East, 220.00 feet; thence South $04^{\circ}00'00''$ West, 35.00 feet; thence North $85^{\circ}53'52''$ West, 220.06 feet; thence North $04^{\circ}06'08''$ East, 35.00 feet to the point of beginning.

EXHIBIT "D"

20 FOOT EASEMENT AREA

Commence at the Northwest corner of the property described on Exhibit A, thence South $86^{\circ}00'00''$ East, 49.13 feet to the point of beginning; thence South $86^{\circ}00'00''$ East, 20.00 feet; thence South $03^{\circ}34'28''$ West, 205.01 feet; thence North $86^{\circ}00'00''$ West, 20.00 feet; thence North $03^{\circ}34'28''$ East, 205.01 feet to the point of beginning.

EXHIBIT "E"

UTILITY EASEMENT AREA

Commence at the Northwest corner of the property described on Exhibit A, thence South 86°00'00" East, 69.13 feet to the point of beginning; thence South 86°00'00" East, 21.98 feet; thence South 03°34'28" West, 205.01 feet; thence North 86°00'00" West, 21.98 feet; thence North 03°34'28" East, 205.01 feet to the point of beginning.

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