

# **PAPERING THE DEAL: FROM LAND ACQUISITION TO DEVELOPMENT**

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**Papering the Deal:  
From Land Acquisition to Development**  
By William H. Locke, Jr.

**I. INTRODUCTION.**

"Your mission, if you choose to accept it, is to paper a real estate deal from land acquisition to development." Unidentified member of the SimCity™ Seminar Planning Committee.  
[Then followed the music from Mission Impossible.]

This paper is not a scholarly article analyzing cases interpreting contract provisions. Numerous scholarly articles are listed in the Table of Authorities. This article is a compendium of forms I have had the pleasure and opportunity to negotiate and use in recent land acquisition and development deals. It is divided into two parts: II. Land Acquisition and Site Development Documents and III. Development Documents - A Condominium MOB.

Land Acquisition and Site Development Documents is broken into the following document packages: A. Pre-Contract Documents (including Letters of Intent); B. Contract Documents (including Checklist of Contract Provisions, Sales Contracts, and Assignment of Sales Contract); C. Pre-Closing Due Diligence Documents (including Checklists and Title Objection Letter); D. Pre-Closing Documents and Closing Documents (including CC&Rs, Regional Detention Pond Construction and Maintenance Agreement, Closing Instruction Letter, Conveyance Documents, Escrow Agreements and Post Closing Agreements).

Development Documents is comprised of a Chart of Documents, a Checklist of provisions to include in a medical office building ("**MOB**") condominium project, and one of the documents listed in the Chart of Documents, a MOB Sales Contract.

Each document is identified and briefly discussed in the Chart of Documents. Documents are identified on the upper right hand corner of the first page by the letter and number of the document in the Chart of Documents (e.g., **A.1** Letter of Intent).

I especially thank the following capable counsel who played roles in the negotiation and drafting of these documents: Jim Cameron and Jennifer Klein of Strasburger & Price, LLP, Austin, Texas; Teal Lang of Mundt, Hardt, Kopf & Harr, PC, Dallas, Texas; Carl Friedsam of Martin,

Drought & Torres, Inc., San Antonio, Texas; Rick Morrison of Rash, Chapman, Schreiber & Porter, LLP, Austin, Texas; Matthew H. Baskind of Armbrust & Brown, LLP, Austin, Texas; and members of Graves, Dougherty, Heaton & Moody, PC, Terry Bray, Allan Haywood and Rick Triplett, who are the best real estate lawyers I know and with whom I have shared "a love for the practice of law."



## II. Chart of Land Acquisition and Site Development Documents

The following is a chart of documents beginning with an intent letter and through post closing development of the property. Included are documents at the following Tabs: (A) Pre-Contract Documents, (B) Contract Documents, (C) Pre-Closing Due Diligence Documents, (D) Pre-Closing Documents and Closing Documents, and (E) Post-Closing Documents.

### (A) Pre-Contract Documents.

Table	Document Title	Comments
A.1 B	Letter of Intent	This letter of intent resulted in the Sales Contract at <b>B.3</b> .
A.2 16	Feasibility Study License	This form is executed in advance of a binding Sales Contract. It permits Buyer to enter Seller's Property and to conduct tests and studies. Buyer indemnifies Seller from injuries occurring during such activities, including even if the injuries arise from Seller's concurrent negligence.
A.3 17	Confidentiality Agreement	This is a separate form of confidentiality agreement. It may be executed in connection with <b>A.1</b> or <b>A.2</b> , or if the parties have not yet negotiated the terms of a Letter of Intent.
A.4 21	Confidential Information Transmittal Letter	This letter transmits Confidential Information to a prospective Buyer and incorporates the terms of <b>A.3</b> by reference. It contains a disclaimer by Seller's counsel of any warranty as to the information transmitted.

### (B) Contract Documents.

Tab	Document Title	Comments
B.1 22	Checklist	This is a preliminary Checklist as to provisions to be included in the Sales Contract (See <b>B.2</b> for the TREC 9-5 (01-06-03) Unimproved Property Contract). Based on information to be provided pursuant to this Checklist, the Contract and related document packages are to be prepared.
B.2 27	TREC Contract with Addendum and Additional Provisions	<p><b>B.2.1</b> TREC 9-5 (01-06-03) Unimproved Property Contract is used as the platform (a "basic form") for this Article, both because it is a good building block (unimproved = from the ground up) and also because it is now the most commonly understood and accepted form. The aim for this Article is to provide the reader with a tool box to paper the deal. TREC has not promulgated an Unimproved Commercial Property or Improved Property form to complement the Unimproved Property form. TAR has published both a Commercial Contract - Improved Property (TAR-1801 2-6-02) and a Commercial Contract - Unimproved Property (TAR - 1802 2-6-02), which contain useful provisions to supplement and amend a "basic form."</p> <p><b>Addendum.</b> This form is designed to supplement and amend the printed form Contract by providing both a range of supplemental and alternative provisions.</p>

Tab	Document Title	Comments
B.3 51	Sales Contract	This form was used in 2000 in connection with the purchase of a developer's unsold but partially "developed" commercial land development project. Streets and utilities were in, but only a portion of the tracts had been platted. A portion of the Development had been sold to others. The project was being developed as a planned unit development and was subject to numerous city imposed covenants. There were endangered species on the property and a 10(a) permit had been issued to the Developer placing limits on the use of certain "preserve" tracts and covenants running with the Development to protect the preserves. The Developer had imposed on the Development a set of CC&Rs (see <b>D.1</b> below). The property and several adjoining tracts were serviced by a regional detention pond constructed by the Developer with the participation by several adjoining land owners (see <b>D2</b> below).
B.4 67	Escrow Agent's Receipt and Agreement	This document includes the agreement of the Escrow Agent to obtain an insured services closing letter from the title underwriter within 10 days of deposit of the Earnest Money. Also, it provides that the Escrow Agent is to return the Earnest Money to Buyer without obtaining a release or consent from the Seller if Buyer sends notice of contract termination to the Escrow Agent.
B.5 68	Assignment of Sales Contract	This form is a contract between an Assignor and Assignee permitting Assignee to inspect the due diligence information gathered by Assignor prior to the Assignment Fee "going hard." If Assignee terminates the assignment, the Assignor retains a portion of the Fee as independent contract consideration. The Assignment contains various representations to Assignee as to the status of the Sales Contract and Assignor's investigations.
B.6 78	Insured Closing Services Request Letter	This form initiates the underwriting of the closing services by the Title Company's underwriter. If significant earnest monies or independent contract consideration is escrowed with the Escrow Agent, the parties should request underwriter fidelity coverage for the Escrow Agent at the front end of the contract.

**(C) Pre-Closing Due Diligence Documents.**

Tab	Document Title	Comments
C.1 79	Due Diligence Checklist	This form is a "front-end" checklist covering an acquisition and development from initial site evaluation. The <b>C.5</b> Closing Checklist is tailored to closing activities.
C.2 90	Deadlines Calendar	This form acts as a ticker for key dates and actions to be taken by deadlines under the Sales Contract, including title and survey review, termination options, extension options, feasibility periods, and other pre-closing actions.

C.3 94	Title Objection Letter	This form sets up a framework to address Schedule A, Schedule B and Schedule C items, including survey exception modification, express insurance, inspection, insured closing service request, and periodic updating of existing commitments.
C.4 99	Reliance Letter	This form is to be executed by each of the Seller's consultants. It provides that Buyer may rely upon the information, studies and reports prepared by the consultant and furnished to the Seller.
C.5 100	Closing Checklist	The Closing Checklist is a checklist for addressing the following closing items: Title Policy, Survey, Insurance, Due Diligence Approvals, Inventory, Project Bank Account, Organizational Documents, Loan Closing Requirements, Closing and Funding, Closing Documents and Additional Actions.

**(D) Pre-Closing Documents and Closing Documents.**

Tab	Document Title	Comments
	<b>Pre-Closing</b>	
D.1	CC&Rs	
D.1.1 111	Declaration of Covenants, Conditions and Restrictions	This form created the CC&Rs for the commercial development which was purchased pursuant to the Sales Contract in <b>B.3</b> . The Development has extensive preserves set aside pursuant to a 10(a) permit issued by the U. S. Department of Fish and Wildlife. As a result, the CC&Rs address the on going requirements for maintenance of the preserves.
D.1.2 145	Designation of Sheltered Owner	This form designates a buyer of a tract as being entitled to "sheltered owner" status under the CC&Rs. The CC&Rs permit the Declarant to designate persons whose consent is required before amendments are effective. It affords protection to the sheltered owner against unfavorable changes in the CC&Rs.
D.2	Detention Pond	
D.2.1 145	Designation of Additional Participating Property in Regional Storm Water Detention Pond	This form adds additional tracts to an existing detention pond to accommodate storm water in a pond that has excess capacity.
D.2.2 148	Regional Detention Pond Construction and Maintenance Agreement	This form establishes the mechanism for the construction, sharing in construction costs, and post-construction use and maintenance of a detention pond for a multi-tract development. In this particular situation, additional adjoining tracts also participated in the pond.
	<b>Closing</b>	

Tab	Document Title	Comments
D.3 161	Sellers' Closing Instruction Letter	These instructions set out conditions precedent to closing and specify various closing actions to be taken by Buyer and the Closing Agent, including identifying documents requiring Buyer's signature, handling of closing funds, and recording and distribution of documents.
D.4 166	Deed	The deed will be completed at the time of sale based on an updated Title Commitment and after recording of any Pre-Closing Documents.
D.5	Assignments	
D.5.1 161	Assignment of Development Rights and Appurtenances	This is a "catch all" type form and acts as a general or blanket assignment of property interests, which might not fall within the category of "appurtenances." It is used in connection with more specific assignment forms like <b>D.5.1+</b> .
D.5.2 174	Assignment of Subdivision Construction Plans	This form is prepared by the City of Austin in connection with a sale by one subdivision developer to another developer. Generally, cities are inflexible in negotiating these type forms as they do not want to get bogged down in the deal between parties.
D.5.3 176	Partial Assignment and Assumption of BCCP Agreement and Participation Agreement	A separate assignment form as to certain property interests is advisable as it helps in dealing with program managers administering entitlement programs.
D.5.4 178	Assignment of ADTs	This form assigns a specified number of ADTs to a developer out of a larger number of ADTs approved by a city for an entire development area. Upon completion of the assignee's project, this form contemplates a further traffic study to determine if any of the assigned ADTs are not required and are to be reassigned to the developer of the balance of the development area.
D.5.5 168	Assignment of Seller's Interest in Buyer's Consultant's Work Product	The Sales Contract permits Buyer to undertake certain development activities pre-closing as to Seller's Property. The Sales Contract grants to Seller an interest in Buyer's Consultant's Work Product. The Sales Contract provides that at closing, Seller assigns to Buyer this retained interest.
D.6	Escrow Agreements	
D.6.1 181	Escrow Instruction Letter (Regional Detention Pond)	This letter agreement is by and among the title company closing the sale of the development tract acting as Escrow Agent, the Seller (Party 1), which retains the balance of the development tract (Party 2), and an adjoining landowner which wishes to participate in the construction of the regional detention pond (Party 3). The Escrow Agent holds funds escrowed with it by the parties and disburses funds for construction as approved by the parties.

Tab	Document Title	Comments
D.6.2 183	Escrow Agreement (Post-Closing Roll Back Tax Determination)	Under this agreement the parties escrow with the title company funds to cover the Seller's obligation to pay the 5 year roll back tax, penalty and interest triggered post-closing in the year of sale by the change of use occurring during the year of closing and the Buyer's obligation to pay the increase in ad valorem taxes which are predicted to occur for the year of closing due to post-closing appraisal of the property by the Appraisal District.
D.6.3 187	Escrow Agreement (Post-Closing Roll Back Tax Determination Within 5 Years Post-Closing)	Like <b>D.6.2</b> this Escrow Agreement covers post-closing roll back tax liability of the Seller. In this case, the parties contemplate that the Buyer will change the use in phases over 5 years.
D.7 190	Performance Deed of Trust	This deed of trust secures the Buyer's obligations under the Joint Facilities Development Agreement <b>6.5</b> , the Escrow Agreement <b>6.3.4</b> and the Post-Closing Agreement <b>D.11</b> . The Seller as to its Retained Property executed a similar Performance Deed of Trust to secure its obligations under these documents.
D.8 195	Joint Facilities Development Agreement	This form was entered into between a tract purchaser and a large commercial development subdivider. The purchaser sought assurance that certain to-be-developed infrastructure was in place within a specified period post closing. Either party can initiate the construction and the other party is obligated to cooperate and share in the cost. Each party encumbered its property with a Performance Deed of Trust lien to secure its obligations under the JFDA and a Post-Closing Agreement executed at Closing (see <b>D.13</b> below).
D.9 202	Wire Transfer Instructions	This form is a handy means of furnishing the Closing Agent with wire transfer information in advance of closing. It was used in a situation where there were 17 sellers with separate bank accounts.
D.10 203	Seller's Certificates	This form was used in a situation where one of several sellers and the buyer under the Sales Contract had assigned their interests prior to Closing. It was required by the contract buyer's assignee as a condition to Closing.
D.11 204	1099-S	This form is a convenient means of obtaining the requisite IRS transaction reporting information.
D.12 205	Closing Agreement	A Closing Agreement may seem redundant to a Sales Contract. However, requiring a CA to be executed at Closing may be useful in resolving lingering issues. Also, it is useful as a confirmation of the "as is" nature of a sale.
D.13 207	Post-Closing Agreement	A Post-Closing Agreement becomes necessary when there are actions to be taken after closing that were either not known or sufficiently known at the time of the execution of the Sales Contract or its amendments. It permits the parties to defer until Closing addressing the issues that need to be addressed in a written agreement surviving Closing.
D.14 210	Closing Binder Index	As a project progresses, a running index can be created for use post closing to provide the client with a binder of all transaction documents. This is an example.

**(E) Post-Closing Documents.**

<b>Tab</b>	<b>Document Title</b>	<b>Comments</b>
E.1 212	Chart of Documents - Condominium MOB Development	This form is a chart of documents to be delivered to a condominium office developer. The chart and a blank set of the referenced documents can be delivered prior to undertaking drafting of the development documents as a means of priming the discussion as to the scope of work and the information needed. The documents to be delivered include: (1) Checklists, (2) Condominium Document Package, (3) Sales Package, (4) a Sales Closing Package, (5) a Condominium Association Formation Package, and (6) an Association Formation Package.
E.2 221	Checklist of MOB Condominium Sales Contract Provisions	This checklist is keyed to the ¶ numbers in the MOB Condominium Sales Contract at <b>Tab E.3.</b>
E.3 225	Commercial Condominium Sales Contract (" <b>MOB Condominium Sales Contract</b> ")	This contract is patterned after the TREC Residential Condominium Contract (Resale). Neither TREC nor TAR publish a form for the sale of a commercial condominium. This particular form has been adapted for use for the sale of a "to-be-built" medical office condominium, and includes alternative provisions for the Seller to deliver (1) a Building Site without the Shell, (2) a Shell Building (Unfinished-Out), and (3) a Finished-Out Shell Building on a Building Site (Turnkey).

## A.1

## LETTER OF INTENT

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Re: Property comprising \_\_\_\_ acres of land, more or less, together with all improvements, permits and appurtenances thereto (as herein further defined, the "**Property**")

Dear \_\_\_\_\_:

This letter ("**Letter of Intent**") expresses the interest of \_\_\_\_\_ ("**Buyer**") to negotiate the purchase of the Property from \_\_\_\_\_ ("**Seller**") along the lines of the following Basic Terms, but subject to the sole and absolute discretion and business judgment of the parties not to consummate the negotiations by executing a binding contract (the "**Contract**"):

## A. Basic Terms.

A.1	<b>Seller</b>	_____, _____, and _____.
A.2	<b>Buyer</b>	_____, its successors and assigns.
A.3	<b>Property</b>	Approximately _____ acres of land, representing the balance of the property of the _____ P.U.D. remaining to be sold. Actual acreage is to be determined by survey. A drawing of the Property is attached as <b>Exhibit A</b> .
A.4	<b>Price and Terms</b>	\$_____ all cash at Closing.
A.5	<b>Earnest Money and Independent Contract Consideration</b>	<p>A.5.1. Upon execution of the Contract Buyer shall deposit as Earnest Money \$_____ in cash, certified funds or acceptable letter of credit (the "<b>Initial Earnest Money Deposit</b>") with _____ (the "<b>Title Company</b>"). The Initial Earnest Money Deposit will become non-refundable at 12:00 midnight on the last expiration date of the Feasibility Period (as such period is extended pursuant to the Contract), except in case of Seller's default, casualty loss or condemnation. The Initial Earnest Money Deposit is to be applied on the Purchase Price at Closing.</p> <p>A.5.2. Buyer shall deposit an additional \$_____ in cash, certified funds or acceptable letter of credit as Earnest Money at or prior to the expiration of the Feasibility Period, if Buyer has not previously terminated the Contract (the "<b>Second Earnest Money Deposit</b>"). The Second Earnest Money Deposit is to be applied on the Purchase Price at Closing.</p> <p>A.5.3. Furthermore, Buyer shall deposit an additional \$_____ in cash, certified funds or acceptable letter of credit as Earnest Money at the end of Approval Period, if Buyer has not previously terminated the Contract (the "<b>Third Earnest Money Deposit</b>"). The Third Earnest Money Deposit is to be applied on the Purchase Price at Closing.</p> <p>A.5.4. In the event Buyer elects to terminate the Contract during the Feasibility Period, Buyer, as its sole remedy, shall be entitled to receive a refund of the Earnest Money and any interest</p>

		<p>accrued thereon and Seller shall be entitled to receive the Earnest Money and any interest earned thereon, except for the Independent Contract Consideration.</p> <p>A.5.5. Buyer is to pay Seller \$____ upon execution of this Contract as consideration for Seller's entering into the Contract and as consideration for the options to terminate the Contract extended to Buyer on the conditions set out in the Contract (the "<b>Independent Contract Consideration</b>"). The Independent Contract Consideration is non-refundable under all circumstances.</p>
A.6	<b>Feasibility Period</b>	<p>A.6.1. Buyer shall have a period of the later to occur of (1) 60 days after the effective date of the Contract or (2) the expiration of the Title and Survey Review Period in which to determine that the Property is suitable for Buyer's purposes in all respects (the "<b>Feasibility Period</b>").</p> <p>A.6.2. If Buyer elects to terminate the Contract during the Feasibility Period, Buyer, as its sole remedy, shall be entitled to receive a refund of the Earnest Money and any interest accrued thereon and Seller shall be entitled to receive the Non-refundable portion of the Earnest Money and any interest earned thereon.</p> <p>A.6.3. The Feasibility Period may be extended a maximum of 2 consecutive 30 day periods, by Buyer paying to Seller the following amount ("<b>Feasibility Period Extension Fee</b>"):</p> <p>(1) \$_____ delivered to Seller prior to the expiration of the initial 60 day Feasibility Period for a 30 day extension; and (2) an additional \$_____ delivered to Seller prior to the expiration of the first 30 day extension period for a second 30 day extension. Each of the Feasibility Period Extension Fees are non-refundable and do not apply on the Purchase Price.</p>
A.7	<b>Approval Period</b>	<p>A.7.1. Seller shall have a period of time after the effective date of the Contract in which to plat the Property (the "<b>Approval Period</b>"). The Approval Period for the Contract, shall expire on the earlier of (1) the date that plat approvals are obtained or (2) 50 days after the effective date of the Contract.</p> <p>A.7.2. If Seller is unable to plat the Property prior to the expiration of the Approval Period, then, as its sole remedy, Buyer may elect to terminate the Contract by sending written notice of termination to Seller prior to the expiration of the Approval Period and Buyer shall then be entitled to receive a refund of the Earnest Money and any interest accrued thereon.</p>
A.8	<b>Title and Survey</b>	<p>A.8.1. Within 5 days after the effective date of the Contract, Seller shall order an ALTA Boundary and Title Survey of the Property ("<b>Survey</b>"), from a qualified surveyor. The Certificate shall be addressed to the Buyer, the Title Company, and its Underwriter. The Survey is to be delivered to Buyer as soon as practicable after the effective date of this Contract.</p> <p>A.8.2. Within 15 days after the effective date of the Contract, Seller shall deliver to Buyer a commitment for an owner's policy of title insurance ("<b>Title Commitment</b>"), and legible copies of any instruments of record creating exceptions to title to any of</p>



		<p>the Property ("<b>Exception Documents</b>").</p> <p>A.8.3. Buyer shall have 15 business days after receipt of the Title Commitment, Exception Documents and Survey to review them and deliver to Seller any objections with respect thereto ("<b>Title and Survey Review Period</b>").</p> <p>A.8.4. Thereafter, Seller shall have a period of 30 days to cure any such objections, but Seller shall have no obligation to do so. If Seller fails or refuses to cure any such objections, Buyer, as its sole remedy, may terminate the Contract and receive a refund of its Earnest Money, by sending written notice of termination to Seller within 10 days after the expiration of Seller's 30 day period in which to cure such objections.</p> <p>A.8.5. Prior to Closing, Seller shall cause the Title Company to reissue and deliver to Buyer an updated Title Commitment prior to the expiration of each previously issued Title Commitment.</p> <p>A.8.6. Seller to convey the real property portion of the Property by special warranty deed and to assign all assignable permits, subdivision development contracts, rights under contracts with consultants, etc. by special warranty assignment. Seller shall provide to Buyer at Seller's expense at Closing an owner's title policy issued by the Title Company pursuant to the Title Commitment.</p> <p>A.8.6. Contract and closing documents to contain "as is" disclaimers.</p>
A.9	<b>Closing Date and Extensions</b>	<p>A.9.1. The sale of the Property shall be closed at the office of the Title Company within 5 days after the expiration of the Feasibility Period ("<b>Closing</b>").</p> <p>A.9.2. Buyer may extend the Closing Date by 45 by paying Seller a non-refundable fee of \$50,000 and such fee shall not apply to the Purchase Price ("<b>Non-Refundable, Non-Applicable Closing Extension Fee</b>").</p>
A.10	<b>Review Items</b>	<p>A.10.1. Within 10 days after execution of the Contract by all parties, Seller shall deliver to Buyer all of the following items in Seller's possession ("<b>Review Items</b>"):</p> <ol style="list-style-type: none"> <li>(1) Copies of tax bills including, but not limited to, property, personal, rental and special assessments for ____ and ____, and current tax appraisals.</li> <li>(2) Surveys, topographical maps and engineering studies.</li> <li>(3) Any information regarding condemnation notices, proceedings and awards.</li> <li>(4) Any and all geotechnical, endangered species and environmental inspection reports.</li> <li>(5) Site Plan studies.</li> <li>(6) All other material related to the development of the Property.</li> </ol>

		A.10.2. In the event that the Contract should fail to close, for any reason, Buyer will return this information to Seller. All such information is furnished solely as an accommodation to Buyer and without any representations or warranties, except as may be contained in the Contract.
A.11	<b>Platting</b>	Seller shall be responsible at its expense for obtaining a final plat.
A.13	<b>Environmental</b>	A.13.1. Buyer will make its own environmental assessment and will rely exclusively on this evaluation.  A.13.2. Additionally, Buyer will warrant that it will take no action that will be in violation of the 10-A Permit covering the Property.
A.14	<b>PUD and CC&amp;Rs</b>	Buyer will comply with all requirements imposed by the Planned Unit Development Ordinance (the " <b>PUD</b> ") and covenants, conditions and restrictions (" <b>CC&amp;Rs</b> ") covering the Property.
A.15	<b>Prorations</b>	Taxes and assessments shall be prorated to the Closing Date. Seller to pay all roll back taxes.
A.16	<b>Commissions</b>	Seller to pay _____ a commission at Closing.
A.17	<b>Fiscal</b>	Buyer agrees to reimburse or replace all Seller's refundable fiscal surety held by any governmental entity, whether said fiscal surety is evidenced by deposit, letter of credit, bond or otherwise (" <b>Fiscal</b> "), at Closing. Seller will assign all right and interest in said Fiscal to Buyer at Closing.

## **B. Binding Provisions.**

This portion of the Letter of Intent will constitute a legal binding and enforceable agreement between Seller and Buyer (in recognition and consideration of the significant costs and expenses incurred by each in pursuing their negotiations under this Letter of Intent) but only with respect to the matters set forth in Paragraphs B.1-3 below.

B.1	<b>Costs</b>	Except as expressly provided in the Contract, each party shall be responsible for any and all expenses incurred by it in connection with this Letter of Intent, the Contract and the transactions contemplated hereby, including with limitations, all fees and expenses for attorneys, engineers, consultants, etc.
B.2	<b>Commissions</b>	Seller and Buyer hereby represent and warrant one to the other that neither party employed, consulted with, or contracted with any real estate brokers, finders, or other parties in connection with this transaction, and that no other individual, company or entity other than those set out in <b>A.16</b> . If this transaction does not close and fund, for whatever reason, no commission, finders fee or other similar expense will be owed to any person or entity.
B.3	<b>Confidentiality</b>	Each party agrees to maintain in strict confidence the dealings, negotiations, information, development plans and agreements of the parties with respect to the Property, this Letter of Intent and the Contract. Neither party will make any public release of information regarding those matters, unless both parties otherwise agree in writing.

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B.4	<b>Contract Proposal</b>	Buyer will endeavor to prepare and submit to Seller a Contract proposal as soon as practicable after Buyer's receipt from Seller of the signed counterparts of this letter. The Contract proposal shall reflect the terms and conditions set out in this letter.
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If this letter accurately expresses our mutual understandings, please execute 3 originals of this letter in the space provided below and return 2 fully executed originals to my attention.

Sincerely,

\_\_\_\_\_

Accepted by Seller on \_\_\_\_\_, 2004

\_\_\_\_\_

### Other and Alternative Provisions

A.4	<b>Price</b>	The Purchase Price of the Property shall be based on \$_____ per unit. The Purchase Price shall be adjusted for the actual number of multifamily apartment units approved for development on the Property with the assumption that density will be at least 20 UPA on usable land.
A.10	<b>Review Items</b>	<p>(continuation of A.10 items):</p> <p>(7) Income statements for the 3 year period immediately preceding the date hereof, monthly operating statements, tax bills, insurance premiums, utility bills, insurance loss runs for the 3 year period preceding the date hereof, rent rolls, (including lists of security tenant and other miscellaneous deposits), a profit and loss statement, and related documents.</p> <p>(8) The leases.</p> <p>(9) Current contracts, warranties and all related documents affecting title or regarding ongoing commitments in the operation of the Property.</p> <p>(10) All Construction and building plans for all improvements on the Property.</p> <p>(11) Copies of all licenses, applications, permits and certificates of occupancy with respect to the Property.</p> <p>(12) Copies of any tree and topographic surveys covering the Property.</p> <p>(13) Copies of all traffic impact analysis covering the Property.</p> <p>(14) The final recorded subdivision plat of the Property.</p> <p>(15) Copies of any geotechnical soils engineering studies covering the Property.</p> <p>(16) Copies of any reports evidencing water, gas, electrical, cable and sewer utilities at the property line of the Property.</p>
A.18	<b>Exclusive</b>	Prior to Closing the Property will be taken off the market and no other offers on the Property will be accepted by Seller.
A.19	<b>Conditions to Buyer's Closing Obligation</b>	<p>Subsequent to the Feasibility Period, if the Contract has not been sooner terminated, Buyer's obligations under the Contract will be contingent on Seller's satisfaction of the following conditions ("<b>Conditions to Buyer's Closing Obligation</b>"):</p> <p>(1) Completion of proposed street adjacent to Property from ____ to ____, including utilities.</p> <p>(2) Rezoning of Property from LO/LR to Multifamily.</p> <p>If any of the Conditions to Buyer's Closing Obligation are not satisfied before Closing, Buyer may terminate the Contract and the Earnest Money shall be returned to Buyer.</p>

A.20	<b>Tax Deferred Exchange</b>	Seller and Purchaser agree that Seller and Purchaser may elect to sell the Property as part of a tax deferred exchange under the provision of Section 1031 of the Internal Revenue Code (the " <b>Code</b> "). Seller and Purchaser agree to reasonably cooperate with each other in completing the transaction in compliance with the requirements of Section 1031 of the Code.
A.21	<b>Representations and Warranties</b>	<p>The Earnest Money Contract shall contain the following representations and warranties by Seller:</p> <ul style="list-style-type: none"> <li>(a) The Property is served with water, sewer, gas, electric, telephone and drainage facilities and service pursuant to valid and binding permits and contracts sufficient to permit the continued normal operation of the Property.</li> <li>(b) There are no lawsuits, claims, attachments, executions or proceedings pending or, to the best of Seller's knowledge, threatened against or involving Seller or the Property.</li> <li>(c) Seller has received no notice of any claims, condemnations, planned public improvements, rent strikes, pending special assessments, zoning or subdivision changes, or other adverse matters affecting the Property.</li> <li>(d) To the best of Seller's knowledge, the Property and the improvements are in compliance with all applicable statutes, rules, regulations, laws and ordinances, and a certificate of occupancy has been issued and is in effect with respect to the Property.</li> <li>(e) Seller has no knowledge of any fact or condition existing which would result or could result in the termination or reduction of the current access from the Property to existing highways and roads or to sewer or other utility services presently serving the Property.</li> <li>(f) No tenant or other party is entitled to any rebate, concession or other benefit except as set forth in the Leases and on the rent rolls provided to Purchaser.</li> <li>(g) All rentals are current and have been collected, except as may be shown on the rent rolls furnished to Purchaser, and have not been assigned and will not be assigned, encumbered or subject to any liens by Seller.</li> <li>(h) No tenant has any expansion right, option to purchase, right of first refusal, or right to any exclusivity use except as stated specifically on <b>Exhibit "B"</b> attached hereto.</li> <li>(i) No rent has been paid in advance except as may be shown on the rent rolls furnished to Purchaser, such amounts to be credited to Purchaser at Closing.</li> <li>(j) All painting, repairs, alterations, improvements and other work required to be performed by the landlord under each of the leases covering portions of the Property and all of the other obligations of the landlord required to be performed thereunder have been fully performed and paid for in full.</li> </ul>

		<p>(k) Seller holds good and valid title to the personal property free and clear of any liens, encumbrances or adverse claims and Seller has the right and authority to convey or assign to Purchaser all of the personal property.</p> <p>(l) Seller has paid, in the ordinary course of business, all bills rendered in connection with the construction, maintenance, repair, ownership, management or operation of the Property.</p> <p>(m) Seller will not enter into any tenant leases between the date of the Earnest Money Contract and the Closing without Purchaser's written approval.</p> <p>(n) At the time of Closing, all unrented spaces on the Property which are then vacant shall be in a market ready condition ready to lease without any need for repairs or replacements to such vacant spaces.</p>
A.22	<b>Assignment</b>	It is specifically understood and agreed by Seller and Purchaser that Purchaser may assign the Contract without the written consent of Seller.
B.5	<b>Disclaimer</b>	This offer letter is not a contract and, except for the above provisions regarding confidentiality, is not binding unless and until a formal Sales Contract is executed by Seller and Purchaser. This Offer Letter shall be subject to withdrawal or modification at any time by Purchaser.
B.6	<b>Expiration</b>	The terms of this offer Letter shall expire if not accepted before 5:00 p.m. the day that is the 7 <sup>th</sup> day from the date of this offer letter. Please present this offer letter to Seller immediately.

**A.2****Feasibility Study License**

This Feasibility Study License (the "**License**") is executed between \_\_\_\_\_, as Seller, and \_\_\_\_\_, as Prospective Buyer in order to permit ("**Prospective Buyer**") to make various Inquiries, Tests and Studies as to all or portions of the property described in Exhibit A hereto (the "**Property**"). The covenants in Paragraphs 2 and 4 survive termination of this License.

1. **Inquiries.** At any time prior to \_\_\_\_\_ (the "**Investigation/Feasibility Review Period**") while this License is in full force and effect, and at Prospective Buyer's sole expense, Prospective Buyer or Prospective Buyer's authorized agents shall have the right to make the following inquiries ("**Inquiries**"): Prospective Buyer may enter upon the Property for purposes of making surveys and site analyses, test borings, engineering studies, wetland studies, soil borings, soil analysis, water and sewer location availability studies, environmental studies, market studies (including costs, marketing or other analysis in order to determine the feasibility of its project), as Prospective Buyer may deem necessary ("**Tests and Studies**"), and to contact governmental authorities.

2. **Prospective Buyer's INDEMNITY and Restoration Obligations.** Prospective Buyer shall not cause or permit damage or injury to the Property, and upon termination of this License, Prospective Buyer shall promptly restore the Property to the condition existing prior to the Tests and Studies conducted pursuant to this License. **PROSPECTIVE BUYER SHALL INDEMNIFY, HOLD HARMLESS, AND DEFEND SELLER FROM AND AGAINST ALL LIENS, CLAIMS, CAUSES OF ACTION, SUITS, LIABILITIES, COSTS, DAMAGES, AND EXPENSES (INCLUDING ATTORNEYS' FEES AND COURT COSTS), INCLUDING DEATHS, DISEASE OR SICKNESS OR INJURIES TO EMPLOYEES OF PROSPECTIVE BUYER OR OTHER PERSONS, OR DAMAGES TO PROPERTY, DIRECTLY OR INDIRECTLY, PROXIMATELY OR REMOTELY, ARISING OUT OF, RESULTING FROM OR RELATING, IN WHOLE OR IN PART, TO THE ACTS OR OMISSIONS OF PROSPECTIVE BUYER OR ITS AGENTS, EMPLOYEES OR INDEPENDENT CONTRACTORS UNDER THE PROVISIONS OF THIS LICENSE (THE "INDEMNIFIED LIABILITIES"), EVEN IF SUCH INDEMNIFIED LIABILITIES ARISE FROM OR ARE ATTRIBUTABLE TO THE CONCURRENT NEGLIGENCE OR STRICT LIABILITY OF SELLER, AND SUCH INDEMNIFICATION SHALL SURVIVE THE TERMINATION OF THIS LICENSE, OR THE CLOSING OF ANY PURCHASE OF THE PROPERTY BY PROSPECTIVE BUYER, AS THE CASE MAY BE. THE INDEMNITY AND OBLIGATIONS OF PROSPECTIVE BUYER IN THIS PARAGRAPH 2 ARE REFERRED TO IN THIS LICENSE AS THE "PROSPECTIVE BUYER'S INDEMNITY AND RESTORATION OBLIGATIONS."**

3. **Not a Sales Contract or Offer.** Seller may at anytime and without liability to Prospective Buyer terminate this License. Seller is not obligated to sell the Property to Prospective Buyer and Prospective Buyer is not obligated to buy the Property. The person executing this License and any of the documents at the Closing on behalf of Seller may execute the same in her capacity as Trustee, and in no other capacity whatsoever, and such person shall have no personal liability under this License or under any of such documents. All liability of Seller shall be limited solely to the assets of such Trust at the time any such liability may be established. The provisions of this Paragraph shall survive the Closing.

4. **Confidentiality.** Prospective Buyer will promptly furnish Seller with a copy of all Inquiries, Tests or Studies made of the Property for or by Prospective Buyer. Prospective Buyer will keep the contents or results of Inquiries, Tests or Studies confidential (except to the extent required to be divulged under the Open Records Act of the State of Texas), unless Seller's written consent to divulge the Inquiries, Tests, or Studies is obtained from Seller, or unless required by law or unless Prospective Buyer buys the Property.

## A.3

**Confidential Agreement**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Re: **Confidentiality Agreement** as to prospects for acquisition of  
 \_\_\_\_\_, \_\_\_\_\_, Texas (the "**Property**")

Dear \_\_\_\_\_:

In connection with \_\_\_\_\_ ("**Seller**") furnishing you materials and other information, disclosed orally or in written form (collectively, the "**Confidential Information**") related to the Property, you agree on behalf of yourself, \_\_\_\_\_ and all related persons ("**Buyer**" or "**you**") to the following terms and conditions of this Confidentiality Agreement (the "**Agreement**"). As used herein, the term "Confidential Information" includes any and all documents, reports and other information provided to the Buyer by Seller, and/or discovered, prepared, compiled, provided to, and/or photocopied by Buyer during the course of negotiations and/or during the course of Buyer's performing investigations in connection with the Transaction and/or the Property. Notwithstanding the foregoing, as used herein, the term "Confidential Information" shall not include information which (a) is, or becomes, publicly known, otherwise than through a wrongful act of Buyer or persons to whom Buyer has disclosed any of the confidential information; (b) is in the possession of Buyer prior to receipt from Seller; (c) is independently developed by Buyer, provided that it was not derived from the confidential information; or (d) Buyer is required by law to disclose.

**1. Confidential Information.** As a condition to the Confidential Information being furnished to Buyer and by Buyer to its directors, officers, partners, employees, agents, advisors, attorneys, accountants, consultants, bankers and financial advisors ("**representatives**"), you agree to handle the Confidential Information in accordance with the provisions of this Agreement and to take or abstain from taking certain other actions as herein set forth.

**2. Non-Disclosure of Materials.** You and your representatives shall use the Confidential Information solely for the purpose of evaluating a possible transaction between Seller and you. You shall keep the Confidential Information confidential and shall not disclose any of the Confidential Information in any manner whatsoever; provided, however, that (a) you may make any disclosure of information contained in the Confidential Information to which Seller gives its prior written consent, and (b) any information contained in the Confidential Information may be disclosed to your representatives who need to know such information for the purpose of evaluating a possible transaction with Seller and who agree in writing in advance of disclosure to them to abide by this Agreement and keep such information confidential. You shall be responsible for any breach of this Agreement by your representatives. You agree to maintain a written record as to the persons to whom you disclose the Confidential Information and to provide Seller with a listing of all such persons ("**distributees**"), including the means of contacting such persons, upon request of Seller. Seller may contact any distributee of the Confidential Information and may enter into a Definitive Agreement with any distributee to sell an interest in the Property without compensation to you or your representatives. The confidential information is strictly confidential and Buyer may not discuss the information with or divulge the information to any persons or entities other than Seller without Seller's express written consent and the following persons ("**Authorized Persons**") as to which Buyer shall not be required to obtain Seller's prior written consent: Seller's consultants identified on the list attached hereto (the "**Seller's Consultants**"), each of whom Seller acknowledges that it has previously obtained a confidentiality agreement satisfactory to Seller (Buyer undertakes no liability for violation by Seller's Consultants of any such confidentiality agreement); Buyer's members, officers, directors, and employees ("**Buyer's personnel**"); Buyer's investors, partners, lenders, and attorneys ("**Buyer's controlled parties**"); and architects, engineers and other similar professionals that Buyer employs ("**Buyer's Consultants**"). Buyer shall inform as to each Authorized Person prior to divulging the information that the information so divulged is confidential and subject to a confidentiality agreement between Seller and Buyer, and as to each Authorized Person and Buyer's Consultant Buyer hereby agrees to indemnify Seller for damages due to such person's disclosure of the confidential information to the same extent as if



Buyer had made such disclosure in violation of this Confidentiality Agreement, provided that as to Buyer's Consultants, Buyer shall obtain from each such consultant an executed Consultant Confidentiality Agreement in the form provided by us to you, which Consultant Confidentiality Agreement is incorporated herein by this reference for this limited purpose.

Seller hereby agrees that Buyer, in the course of Buyer's due diligence and evaluation of the confidential information, may contact Seller's Consultants for assistance with Buyer's evaluation of the confidential information. To the extent that any information disclosed to Buyer by Seller's Consultants is not excluded from the definition of confidential information by the last sentence of Paragraph 1, then information disclosed by Seller's Consultants is also deemed to be confidential information.

Buyer is permitted to contact governmental authorities to make general inquiries for information relating to the PUD and the 10A permit. As a consequence of Buyer's acquisition or anticipated acquisition of confidential information, Buyer will occupy a position of trust and confidence with respect to Seller's affairs and business. In view of the foregoing and of the consideration to be provided to Buyer, Buyer agrees that it is reasonable and necessary that Buyer make the following covenants:

**a. No Disclosure.** During and after negotiations regarding with the Transaction and/or Buyer's performance of investigations in connection with the Transaction, Buyer will not disclose either the existence of the Transaction (except as authorized above for the disclosure of confidential information) or any confidential information to any person or entity other than as necessary in carrying out negotiations with Seller regarding the Transaction and/or in carrying out due diligence investigations in connection with the Transaction, without first obtaining the consent of Seller (except as authorized above for the disclosure of confidential information) and will take all reasonable precautions to prevent inadvertent disclosure of such confidential information.

**b. No Use, Copying or Transfer.** During and after negotiations regarding the Transaction and/or Buyer's performance of investigations in connection with the Transaction, Buyer will not use, copy or transfer confidential information other than as necessary in carrying out negotiations with Seller regarding the Transaction and/or in carrying out due diligence investigations in connection with the Transaction, without first obtaining written consent from the Seller (except as authorized above for the disclosure of confidential information), and will take all reasonable precautions to prevent inadvertent use, copying or transfer of such confidential information. This prohibition against Buyer's use, copying or transfer of the confidential information includes, but is not limited to, selling, copying, licensing or otherwise exploiting, directly or indirectly, any documents, products or services which embody or are derived from confidential information, or exercising judgment in performing analysis based upon knowledge of confidential information.

**3. Non-Disclosure of Existence of Negotiations.** Without the prior written consent of Seller, or unless required by law, neither you nor your representatives shall disclose to any other person that you or they have received the Confidential Information. Without the prior written consent of Seller, neither you nor your representatives shall disclose to any person that discussions or negotiations are taking place between the parties concerning a possible transaction between the parties as to the , including the status of such discussions or negotiations.

**4. Return of Confidential Information.** Promptly upon the written request of Seller, you will return all originals and copies of the Confidential Information to Seller. All notes, studies, reports, memoranda and other documents prepared by you or your representatives that contain or reflect the Confidential Information shall be destroyed upon written request of Seller and you will provide Seller written confirmation of such fact within 5 days of request by Seller. All confidential information prepared, photocopied, compiled, or discovered by Buyer or furnished to Buyer by Seller (including photocopies of the same) shall be the property of Seller. True and correct copies of all confidential information, work product (including but not limited to interim and final lines of inquiry, hypotheses, research and conclusions related thereto and the methods, processes, procedures, analysis, techniques and audits used in connection therewith), sketches, charts, reports, calculations, plans, specifications, lists, correspondence, computer models, data bases and other data prepared under or in connection with this Agreement and/or under or in connection with the relationship between Buyer and Seller shall be delivered to Seller, if the Transaction is not closed by the conveyance of the Property from Seller to Buyer as provided in the Transaction documents. As provided in Paragraph 2b of this Agreement, Buyer may not use any of the foregoing information after the date of execution of this Agreement, without the written consent of Seller except as permitted herein or by any

Agreement of Purchase and Sale hereafter executed by Seller and Buyer, unless and until the Transaction is closed by the conveyance of the Property from Seller to Buyer. The covenants contained herein shall survive the termination or expiration of this Agreement.

**5. Disclaimer of Warranty.** *Although Seller has endeavored to include in the Confidential Information that Seller believes to be relevant for the purpose of your initial evaluation of the Property, you acknowledge that neither Seller, its partners, any of the principals of its partners including \_\_\_\_\_, nor any of their representatives make any express or implied representation or warranty as to the accuracy or completeness of the Confidential Information. You agree that neither Seller, its partners, any of the principals of its partners including \_\_\_\_\_, nor any of their representatives shall have any liability to you or to any of your representatives relating to or resulting from the use of the Confidential Information, or any errors therein or omissions therefrom, except for material misrepresentation by any such person making a representation who has current actual awareness of making a material representation at the time it is made. Neither Seller, any of the principals of its partners including \_\_\_\_\_, any of their representatives nor any other person have made or make any representation or warranty to you or other persons as to the accuracy or completeness of the Confidential Information. You hereby acknowledge and agree that you and your representatives accept the Confidential Information "as is", and without representation or warranty, express or implied, by Seller as to the suitability of the Property for you and that in making your decision to enter into a transaction with Seller as to the Property, neither you nor your representatives will rely upon the Confidential Information nor upon any statement or information provided by Seller, verbally or in writing, in evaluating whether to enter into a transaction with Seller, any of its partners or with \_\_\_\_\_. You agree to make your decision about any such transaction based solely upon your own independent investigation of the Property and not based on the Confidential Information.*

**6. Definitive Agreement.** Unless and until a written definitive agreement ("Definitive Agreement") between Seller, its principals, successors or assigns, and you with respect to a transaction has been executed and delivered, neither Seller nor you will be under any legal obligation of any kind whatsoever with respect to a proposed transaction by virtue of this or any other written or oral expression by any of them, or their representatives; except, in the case of this Agreement, for the matters specifically agreed to herein. Either party may terminate discussions or negotiations regarding a possible transaction at any time without any liability except as agreed to herein, unless and until a binding Definitive Agreement has been executed and delivered.

**7. Stand still.** Until the expiration of 2 years from the date hereof, neither you, your heirs, successors or assigns nor those of your representatives to whom the Confidential Information have been disclosed or who have been made aware of the discussions between the parties concerning a possible transaction, shall, without the prior written consent of Seller, in any manner acquire, agree to acquire or make any proposal to acquire, directly or indirectly, any interest in the Property or the present or future owner of the Property, or any part thereof.

**8. Remedies.** You acknowledge that in the event of any breach of this Agreement, Seller, its partners and principals could not be made whole solely by monetary damages. Accordingly, Seller, its partners and principals in addition to monetary damages and any other remedy to which any of them may be entitled by law or in equity, shall be entitled to an injunction to prevent breaches of this Agreement, and to an order compelling specific performance of this Agreement without proof of actual damages. Each party further agrees to waive, and use its best efforts to cause its representatives to waive, any requirement for the securing or posting of any bond in connection with such remedy. You shall reimburse Seller, its partners and principals for all costs and expenses, including reasonable attorneys' fees, incurred by Seller in the event it successfully enforces the obligations of you and your representatives hereunder.

**9. Miscellaneous.** This Agreement represents the entire understanding and agreement of the parties hereto and may be modified or waived only by a separate writing expressly so modifying or waiving this Agreement. No failure or delay by Seller in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder. This Agreement shall be governed and construed in accordance with the internal laws of the State of Texas without regard to the laws of conflict of laws. The captions contained in this Agreement are for convenience only and shall not affect the construction

or interpretation of any provisions of this Agreement. The parties acknowledge that each party and its counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendments or exhibits hereto.

**10. WAIVER OF CONSUMER RIGHTS.** *You waive your rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of your own selection, you voluntarily consent to this waiver.*

**11. Dispute Resolution.** If a dispute arises between the parties as to whether a party has defaulted or as to any other matter relating in any manner to the Property or this Agreement, then the parties hereto, and their representatives, agree to use the following mediation and arbitration procedures:

**a. Mediation.** Individuals with decision-making authority regarding the dispute who represent the parties will promptly meet and attempt in good faith to negotiate a resolution of the dispute. If, within 10 days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will jointly appoint a mutually acceptable neutral person not affiliated with either of the parties (the "**neutral**"), using the services of the American Arbitration Association if they have been unable to agree upon such appointment within 20 days from the initial meeting. The fees of the neutral shall be shared equally by the parties. In consultation with the neutral, the parties will select or devise an alternative dispute resolution procedure ("**ADR**") by which they will attempt to resolve the dispute, and the time and the place for the ADR to be held, with the neutral making the decision as to the procedure, and/or place and time, not later than 10 days after selection of the neutral. The parties must participate in good faith in the ADR to its conclusion as designated by the neutral. All meetings, mediation conferences, ADR and other proceedings shall be in Austin, Texas.

**b. Arbitration.** If the parties are not successful in resolving the dispute through mediation, then the dispute must proceed to a binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. All meetings, arbitration hearings and other proceedings shall be in Austin, Texas. The costs of the arbitration shall be allocated by the arbitrator. **The parties waive any right for the arbitrator to award punitive damages.**

The provisions of this Paragraph 11 survive the expiration of the term of this Agreement and/or the entry into a transaction as to the Property and also apply to any disputes, either before or after the closing of any transaction between the parties or their heirs, successors and assigns.

[Signature]

**Agreed and accepted** this \_\_\_\_ day of \_\_\_\_\_, 200\_\_ by the undersigned. As part of the Confidentiality Agreement and as a material inducement to Seller furnishing the Confidential Information to the undersigned, the undersigned represent to you that we have had no interest in the Property, or any part thereof, prior to your bring this Property to our attention. Additionally, we represent that in the event that a Definitive Agreement is entered into by Seller with the undersigned or any person to whom you disclose the Confidential Information that no brokerage commission, finder's fee or other compensation shall be owing by Seller, its partners and principals to the undersigned or to any person by, through, or under the undersigned or the undersigned's heirs, successors and assigns.

## A.4

**Confidential Information Transmittal Letter**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: Delivery of as-built plans from \_\_\_\_\_ with regard to the proposed transactions between \_\_\_\_\_ (hereinafter collectively referred to as "**Seller**") and \_\_\_\_\_ (hereinafter referred to as "**Buyer**")

Dear \_\_\_\_\_:

As you and your attorney requested and in light of the execution by Buyer of the Confidentiality Agreement, I am hereby delivering to you, the \_\_\_\_\_ ("**Confidential Information**") that \_\_\_\_\_ delivered to my office, containing Confidential Information of Seller, as defined in the Confidentiality Agreement executed by Buyer. My law firm and I represent Seller and the materials described herein are delivered on behalf of Seller and in our capacity as Seller's counsel. The enclosed Confidential Information is being delivered solely as an accommodation to Buyer and subject in all respects to the terms of the Confidentiality Agreement executed by Buyer. The terms of that Confidentiality Agreement are incorporated herein for all purposes.

Please note that with regard to the information contained in the enclosed Confidential Information, (1) the information contained therein is general in nature and there are variations as to environmental and other conditions between portions of the property referred to in the Confidential Information, and from time to time; (2) Seller is providing the information in the Confidential Information solely as an accommodation and in no event shall the Seller, its owners, affiliates, officers, employees, agents, or attorneys be deemed to warrant or represent that any information or the ories contained in the Confidential Information are true, correct, or complete, and ANY AND ALL WARRANTIES AND REPRESENTATIONS, EXPRESS OR IMPLIED, WITH RESPECT TO THE INFORMATION CONTAINED IN THE CONFIDENTIAL INFORMATION ARE HEREBY DISCLAIMED; (3) Buyer shall be solely responsible for determining whether to rely on the information contained in the Confidential Information; and (4) in no event shall Seller, its owners, affiliates, officers, employees, agents, or attorneys have any liability to Buyer or to any other party relating to the information contained in the enclosed Confidential Information.

In accordance with the terms of the Confidentiality Agreement executed by Buyer, the enclosed Confidential Information is being delivered in strict confidence and shall not be used or disclosed except as provided in the Confidentiality Agreement. Additionally, you are specifically instructed that none of the information contained in the enclosed Confidential Information may be disclosed to any third parties, such as engineers and other professionals assisting Buyer in conducting due diligence, unless and until Buyer has informed said third party prior to divulging the information that the information is subject to a confidentiality agreement between Seller and Buyer, and, as to Buyer's Consultants and any third party not deemed an Authorized Person under the Confidentiality Agreement, Buyer obtains from each such Buyer's Consultant or third party an executed Consultant Confidentiality Agreement in the form that has been provided to you and forwards a copy of such executed Consultant Confidentiality Agreement to Seller and to me upon execution.

Finally, at any time before the transaction that we have been discussing matures into a fully executed and escrowed Sales Contract, you must agree to return the enclosed Confidential Information to Seller upon Seller's request for the return of the enclosed Confidential Information.

If for any reason you are unwilling to accept the enclosed Confidential Information on the terms contained in this letter, please immediately return them to me. Otherwise, your acceptance and subsequent use of the Confidential Information shall be expressly conditioned as provided herein.

[Signature]

**B.1**

**Checklist of Sales Contract Provisions**

The following is a Checklist of provisions in the TREC Sales Contract - Unimproved Property: June 18, 2004

**Sales Contract**

¶	Paragraph Heading	Comments
	<b>TREC Form Generally</b>	<p><b>Simple Transactions.</b> The TREC box at the end of the form states that “It is not suitable for complex transactions.” There is no explanation of what makes a transaction “complex.” There is no explanation of what makes the property “unimproved” (yet the Contract contains ¶ 7B as to completing repairs and ¶ Casualty Loss. This form does not appear to be limited to residential unimproved property. If the property is considered “improved,” there is not corresponding TREC form for the sale of improved commercial property.</p> <p>This form does not contain the following types of provisions found in many forms, including the TAR Commercial Contract - Unimproved Property: ¶ 3B(2) adjustment of Sales Price based on survey; ¶ 6B(2) survey criteria; ¶ 7B(1) Delivery of Property Information and related provisions (return of property information, confidentiality); ¶ 7B(5) Contracts Affecting Operations; ¶ 9 B check the box for special versus general warranty of title; ¶ 13C proration of prepaid expenses and delivery of security deposits; ¶ 18 Material Fact representations; ¶ 14 Condemnation; ¶ 21 provision that the dispute resolution provision survives termination of the Contract; ¶ 22B Choice of law; ¶ 22D Counterpart execution; ¶ 22 E Assignment; ¶ 23 Time is of the essence; ¶ 23 Holiday day counting provision; ¶ 24 Tying the Effective Date and the time periods to the date that the Contract is receipted by the Title Company if later than the date of all parties’ execution; and ¶ 26 Acceptance deadline .</p> <p>Also, not addressed are the following matters: platting; zoning; indemnity; liability insurance during pre-sale inspections; post-closing actions surviving the contract (e.g., escrows for jointly constructed improvements, roll back taxes payable as property changes use at different times); reservation of interests by Seller (e.g., easements, minerals); conditions to closing (e.g., determination of acceptable value by appraisal, compliance with permits and laws by Seller pre-closing); proration of operating expenses); information sharing by Seller with Buyer and by Buyer with Seller as to matters undertaken prior to and during the Feasibility Period; and a no oral amendments or agreements permitted provision.</p> <p>Lastly, few contracts keep up with or address technology changes (e.g., email as means of delivery or contracting).</p>

		<p><b>Revisions.</b> If the TREC form is to be revised, then the means by which it is revised should be expressly stated on the face of the form (<i>e.g., italicizing of adds, strike throughs of omissions</i>).</p>
1	<b>Parties</b>	<p><b>Multiple Parties.</b> If there is more than one Seller, consideration should be given to identifying and limiting each Seller's obligation to the respective undivided interest or tract owned by each Seller.</p>
2	<b>Property</b>	<p><b>Appurtenances.</b> The Contract defines the "<b>Property</b>" as the described land "together with all rights, privileges and appurtenances pertaining thereto, including but not limited to: water rights, claims, permits, strips and gores, easements, and cooperative or association memberships." If the value of the Property is tied to any known "rights, privileges and appurtenances," the Contract should be supplemented by an exhibit identifying these items (subdivision infrastructure construction contracts, contractor warranties, proprietary information, consultant contracts and work product, fiscal deposited with governmental authorities, endangered species program participation certificates, governmentally created ADT, PHT LUE, impervious cover rights allocated to this tract out of a larger tract).</p> <p><b>"Claims."</b> Note that this list of ancillary rights includes "claims." Consideration should be given to expanding this concept to include an express assignment of claims against third parties due to prior known or unknown contamination of the Property.</p> <p><b>"Water Rights."</b> If "water rights" are material aspect of the Property, then the parties need to address this topic in greater detail. See <u>seminar articles</u> cited in the Table of Authorities. Also, inclusion of water rights as a specific named component of the Property raises an issue as to whether "water rights title insurance" is to be included as part of the insured estate.</p> <p><b>Reservations.</b> This TREC form does not contain a provision permitting Seller to stipulate any property rights to be reserved by Seller (<i>e.g., minerals, easements</i>). Reservations may be handled by an Addendum. It is a good practice to attach the form of deed containing the reservations as an exhibit to the Addendum.</p> <p>If Minerals are reserved, the deed should address the retention or conveyance of executive rights and can address whether the Seller waives rights to use the surface for development purposes. The term "surface" should be defined (<i>e.g., excluding any rights within 500' of ground level</i>). Related concerns can be addressed (<i>e.g., directional drilling from adjoining tracts from surface locations no closer than a specified distance of the common boundary line. A specific negation of surface level seismic testing can be added, if appropriate</i>).</p>
3	<b>Sales Price</b>	<p><b>Fixed.</b> This form contemplates a fixed price irrespective of</p>

		the size of the tract or the location of easements on the tract.
5	<b>Earnest Money</b>	<b>Insured Services Closing Letter.</b> The parties should consider requesting an insured closing services letter from the Title Company's underwriter at the front of the time frames of the Contract. This in part arises out of the deposit of funds with the Escrow Agent not only at Closing but also on escrow of the Contract.
6	<b>Title Policy and Survey</b>	<p><b>Multiple Tracts.</b> If the Property is comprised of multiple tracts, then the Contract should be revised to require that the Title Commitment segregate exceptions based on tract.</p> <p><b>Pre-Approved Permitted Exceptions.</b> If there are any exceptions that are known and which the Seller does not intend to "cure objection" or as to which the Seller wishes Buyer not to condition its purchase upon raising objection, then these should be listed in an exhibit and pre-approved by Buyer.</p> <p><b>Survey Exception.</b> The Contract should provide that the Title Company and/or a party to the Contract will be responsible for providing copies of all Exception Documents listed in the Title Commitment as exceptions. The Contract should also address cooperation of the Title Company and Surveyor as to the criteria to be satisfied by the Surveyor in order to delete the "survey exception."</p> <p><b>Generic Exceptions.</b> Title Commitments typically contain generic exceptions for "visible and apparent easements" "roads," "tenants under leases," "blanket easements" and "parties in possession." In order to anticipate the standard objections to the standard exceptions, the Contract should be revised to reflect direction to the Title Company as to the parties expectation and approach to these exceptions. The Contract should direct the Title Company to review the survey and inspect the Property prior to issuance of the Title Commitment and to make specific exception for items based on such inspection and review.</p> <p><b>Express Insurance.</b> The Contract should state what forms of express insurance the Buyer requires, instead of waiting to do so during the objection period.</p> <p><b>Minerals.</b> Title Commitments typically will not trace conveyances or leases of mineral interests after the initial reservation or conveyance. The Contract needs to be revised to address a method to determine the current owners of these interests.</p> <p><b>Deed.</b> ¶ 9B(1) states that the Deed is to show "no additional exception to those permitted in Paragraph 6." This statement would appear to permit inclusion of the wording of ¶ 6A(1)-(8) and a listing of other items reflected in Schedule B to the Title Commitment as to which objection has not been raised by Buyer or if raised, waived. Automatic acceptance of ¶ 6A(1)-(8) is not acceptable and is compounded by a contractual requirement that they be</p>

		<p>included in the Deed.</p> <p><b>Survey.</b> The Contract states “Seller, at Seller’s expense, shall furnish a new survey to Buyer.” This provision should be revised to address the following: identification of the surveyor and survey criteria (e.g., ALTA or Texas Society of Professional Surveyors Category 1A Land Title Survey), title company surveyor and survey requirements, identification by reference to Title Commitment # of Exception Documents, location of appurtenant easements, the form of surveyor’s certificate including addressing it to the parties, lender, title company and its underwriter, and any items that one party or the other requires and is willing to pay for in addition to the survey requirements of the Contract).</p>
7	<b>Property Condition</b>	<p><b>As Is.</b> This paragraph is a quasi-“as is” provision. Buyer “accepts the Property in its present condition; provided Seller, at Seller’s expense, shall complete the following: _____.” No indication is given as to what goes in the blank, other than perhaps the “Repairs” referenced in ¶ 7C (which is problematic since this is an “Unimproved” property contract.</p> <p>As an “as is” provision, this provision fails to meet the following standards: ALL CAPS (a conspicuousness requirement), survival post-closing (except to the extent ¶ 9D applies), waiver of reliance on Seller provided information, whether oral or written, and reflection that price has been adjusted to reflect “as is” purchase.</p> <p><b>Knowledge.</b> ¶ 7E Seller’s Disclosures is stated in terms of “no knowledge.” This standard is not defined in the Contract and may open the Seller up to a negligent ignorance claim. The Contract does not address knowledge acquired by Seller after the Effective Date of the Contract and prior to Closing.</p>
9	<b>Closing.</b>	<p><b>Extensions.</b> This form does not contemplate extensions to Closing by payment of extension fees.</p> <p><b>Back Up Contracts.</b> Note ¶ 9D permits Seller to continue to accept back up contracts prior to closing.</p>
10	<b>Possession</b>	<p>The TREC form states that “Seller shall deliver possession of the Property to Buyer upon closing and funding.” This statement would appear to conflict with parties in possession, whose possession has been accepted pursuant to ¶ 6D (e.g., Exception Documents, tenants, encroachments). Another approach would be to state that Seller shall relinquish its possession (but subject to what ever rights are to be reserved by Seller).</p>
12	<b>Settlement and Other Expenses</b>	



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13	<b>Proration and Rollback Taxes</b>	This provision passes to the Buyer as opposed to the Seller the roll back tax triggered by a change of use after closing. If Seller is to be liable for the roll back tax, then the parties can either calculate the roll back tax as if it were triggered at Closing and offset the Sales Price or establish an escrow to pay the rollback when it is triggered.
14	<b>Casualty Loss</b>	Unimproved property?
15	<b>Default</b>	Seller's remedies are not limited to the Earnest Money Deposit.
19	<b>Representations</b>	This Seller representation is very limited in scope (no liens other than those being paid for out of closing proceeds). Other representations should be considered as to the Seller's current actual knowledge of materially adverse matters.
21	<b>Notices</b>	This provision does not address any non-specified means of notice ( <i>e.g.</i> , actual [telephone], or email).
23	<b>Termination Option</b>	Unlike the Contract generally, this provision states as to this paragraph "time is of the essence." The Contract does not address extensions of the Feasibility Period with the payment of additional fees.

**B.2**

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC) 01-06-03

**UNIMPROVED PROPERTY CONTRACT**  
**NOTICE: Not For Use For Condominium Transactions**

1. **PARTIES:** \_\_\_\_\_  
 \_\_\_\_\_ (Seller) agrees to sell and convey to  
 \_\_\_\_\_ (Buyer) and Buyer  
 agrees to buy from Seller the Property described below.
  
2. **PROPERTY:** Lot \_\_\_\_\_, Block \_\_\_\_\_,  
 \_\_\_\_\_ Addition, City of \_\_\_\_\_,  
 \_\_\_\_\_ County, Texas, known as \_\_\_\_\_,  
 \_\_\_\_\_ (address/zip code), or as described on attached exhibit together with all rights,  
 privileges and appurtenances pertaining thereto, including but not limited to: water rights, claims,  
 permits, strips and gores, easements, and cooperative or association memberships (the Property).
  
3. **SALES PRICE:**  
 A. Cash portion of Sales Price payable by Buyer at closing ..... \$ \_\_\_\_\_  
 B. Sum of all financing described below ..... \$ \_\_\_\_\_  
 C. Sales Price (Sum of A and B) ..... \$ \_\_\_\_\_
  
4. **FINANCING:** The portion of Sales Price not payable in cash will be paid as follows: (Check applicable boxes below)  
☐ A. **THIRD PARTY FINANCING:** One or more third party mortgage loans in the total amount of \$ \_\_\_\_\_. If the Property does not satisfy the lenders' underwriting requirements for the loan(s), this contract will terminate and the earnest money will be refunded to Buyer. (Check one box only)  
☐ (1) This contract is subject to Buyer being approved for the financing described in the attached Third Party Financing Condition Addendum.  
☐ (2) This contract is not subject to Buyer being approved for financing.  
☐ B. **ASSUMPTION:** The assumption of the unpaid principal balance of one or more promissory notes described in the attached TREC Loan Assumption Addendum.  
☐ C. **SELLER FINANCING:** A promissory note from Buyer to Seller of \$ \_\_\_\_\_, bearing \_\_\_\_\_% interest per annum, secured by vendor's and deed of trust liens, and containing the terms and conditions described in the attached TREC Seller Financing Addendum. If an owner policy of title insurance is furnished, Buyer shall furnish Seller with a mortgagee policy of title insurance.
  
5. **EARNEST MONEY:** Upon execution of this contract by both parties, Buyer shall deposit \$ \_\_\_\_\_ as earnest money with \_\_\_\_\_, as escrow agent, at \_\_\_\_\_ (address). Buyer shall deposit additional earnest money of \$ \_\_\_\_\_ with escrow agent within \_\_\_\_\_ days after the effective date of this contract. If Buyer fails to deposit the earnest money as required by this contract, Buyer will be in default.
  
6. **TITLE POLICY AND SURVEY:**  
 A. **TITLE POLICY:** Seller shall furnish to Buyer at ☐ Seller's ☐ Buyer's expense an owner policy of title insurance (Title Policy) issued by \_\_\_\_\_ (Title Company) in the amount of the Sales Price, dated at or after closing, insuring Buyer against loss under the provisions of the Title Policy, subject to the promulgated exclusions (including existing building and zoning ordinances) and the following exceptions:

- (1) Restrictive covenants common to the platted subdivision in which the Property is located.
  - (2) The standard printed exception for standby fees, taxes and assessments.
  - (3) Liens created as part of the financing described in Paragraph 4.
  - (4) Utility easements created by the dedication deed or plat of the subdivision in which the Property is located.
  - (5) Reservations or exceptions otherwise permitted by this contract or as may be approved by Buyer in writing.
  - (6) The standard printed exception as to marital rights.
  - (7) The standard printed exception as to waters, tidelands, beaches, streams, and related matters.
  - (8) The standard printed exception as to discrepancies, conflicts, shortages in area or boundary lines, encroachments or protrusions, or overlapping improvements. Buyer, at Buyer's expense, may have the exception amended to read, "shortages in area."
- B. COMMITMENT: Within 20 days after the Title Company receives a copy of this contract, Seller shall furnish to Buyer a commitment for title insurance (Commitment) and, at Buyer's expense, legible copies of restrictive covenants and documents evidencing exceptions in the Commitment (Exception Documents) other than the standard printed exceptions. Seller authorizes the Title Company to mail or hand deliver the Commitment and Exception Documents to Buyer at Buyer's address shown in Paragraph 21. If the Commitment and Exception Documents are not delivered to Buyer within the specified time, the time for delivery will be automatically extended up to 15 days or the Closing Date, whichever is earlier.
- C. SURVEY: The survey must be made by a registered professional land surveyor acceptable to the Title Company and any lender. (Check one box only)
- ☐ (1) Within \_\_\_\_\_ days after the effective date of this contract, Seller, at Seller's expense, shall furnish a new survey to Buyer.
  - ☐ (2) Within \_\_\_\_\_ days after the effective date of this contract, Buyer, at Buyer's expense, shall obtain a new survey.
  - ☐ (3) Within \_\_\_\_\_ days after the effective date of this contract, Seller shall furnish Seller's existing survey of the Property to Buyer and the Title Company, along with Seller's affidavit acceptable to the Title Company for approval of the survey. If the survey is not approved by the Title Company or Buyer's lender, a new survey will be obtained at ☐ Seller's ☐ Buyer's expense no later than 3 days prior to the Closing Date.
- D. OBJECTIONS: Within \_\_\_\_\_ days after Buyer receives the Commitment, Exception Documents and the survey, Buyer may object in writing to (i) defects, exceptions, or encumbrances to title: disclosed on the survey other than items 6A(1) through (7) above; disclosed in the Commitment other than items 6A(1) through (8) above; (ii) any portion of the Property lying in the 100 year flood plain as shown on the current Federal Emergency Management Agency map; or (iii) any exceptions which prohibit the following use or activity: \_\_\_\_\_. Buyer's failure to object within the time allowed will constitute a waiver of Buyer's right to object; except that the requirements in Schedule C of the Commitment are not waived. Seller shall cure the timely objections of Buyer or any third party lender within 15 days after Seller receives the objections and the Closing Date will be extended as necessary. If objections are not cured within such 15 day period, this contract will terminate and the earnest money will be refunded to Buyer unless Buyer waives the objections.
- E. TITLE NOTICES:
- (1) ABSTRACT OR TITLE POLICY: Broker advises Buyer to have an abstract of title covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a Title Policy. If a Title Policy is furnished, the Commitment should be promptly reviewed by an attorney of Buyer's choice due to the time limitations on Buyer's right to object.
  - (2) MANDATORY OWNERS' ASSOCIATION MEMBERSHIP: The Property ☐ is ☐ is not subject to mandatory membership in an owners' association. If the Property is subject to mandatory membership in an owners' association, Seller notifies Buyer under §5.012, Texas Property Code, that, as a purchaser of property in the residential community in which the Property is located, you are obligated to be a member of the owners' association. Restrictive covenants governing the use and occupancy of the Property and a dedicatory instrument governing the establishment, maintenance, and 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

- instrument may be obtained from the county clerk. You are obligated to pay assessments to the 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 the Property.
- (3) **STATUTORY TAX DISTRICTS:** If the Property is situated in a utility or other statutorily created district providing water, sewer, drainage, or flood control facilities and services, Chapter 49, Texas Water Code requires Seller to deliver and Buyer to sign the statutory notice relating to the tax rate, bonded indebtedness, or standby fee of the district prior to final execution of this contract.
  - (4) **TIDE WATERS:** If the Property abuts the tidally influenced waters of the state, §33.135, Texas Natural Resources Code, requires a notice regarding coastal area property to be included in the contract. An addendum containing the notice promulgated by TREC or required by the parties must be used.
  - (5) **ANNEXATION:** If the Property is located outside the limits of a municipality, Seller notifies Buyer under §5.011, Texas Property Code, that the Property 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. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the Property is located within a municipality's extraterritorial jurisdiction, contact all municipalities located in the general proximity of the Property for further information.
  - (6) **UNIMPROVED PROPERTY LOCATED IN A CERTIFICATED SERVICE AREA OF A UTILITY SERVICE PROVIDER:** If the Property is located in a certificated service area of a utility service provider and the Property does not receive water or sewer service from the utility service provider on the date the Property is transferred, §13.257, Texas Water Code, requires a notice regarding the cost of providing water or sewer services to the Property. An addendum containing the notice promulgated by TREC or required by the parties must be used.
  - (7) **TEXAS AGRICULTURAL DEVELOPMENT DISTRICT:** The Property ☐ is ☐ is not located in a Texas Agricultural Development District.

## 7. PROPERTY CONDITION:

- A. **INSPECTIONS, ACCESS AND UTILITIES:** Buyer may have the Property inspected by inspectors selected by Buyer and licensed by TREC or otherwise permitted by law to make inspections. Seller shall permit Buyer and Buyer's agents access to the Property at reasonable times. Seller shall pay for turning on existing utilities.  
**NOTICE:** Buyer should determine the availability of utilities to the Property suitable to satisfy Buyer's needs.
- B. **ACCEPTANCE OF PROPERTY CONDITION:** Buyer accepts the Property in its present condition; provided Seller, at Seller's expense, shall complete the following: \_\_\_\_\_
- C. **COMPLETION OF REPAIRS:** Unless otherwise agreed in writing, Seller shall complete all agreed repairs prior to the Closing Date. All required permits must be obtained, and repairs must be performed by persons who are licensed or otherwise permitted by law to provide such repairs. At Buyer's election, any transferable warranties received by Seller with respect to the repairs will be transferred to Buyer at Buyer's expense. If Seller fails to complete any agreed repairs prior to the Closing Date, Buyer may do so and receive reimbursement from Seller at closing. The Closing Date will be extended up to 15 days, if necessary, to complete repairs.
- D. **ENVIRONMENTAL MATTERS:** Buyer is advised that the presence of wetlands, toxic substances, including asbestos and wastes or other environmental hazards, or the presence of a threatened or endangered species or its habitat may affect Buyer's intended use of the Property. If Buyer is concerned about these matters, an addendum promulgated by TREC or required by the parties should be used.
- E. **SELLER'S DISCLOSURES:** Except as otherwise disclosed in this contract, Seller has no knowledge of the following:
  - (1) any flooding of the Property which has had a material adverse effect on the use of the property;
  - (2) any pending or threatened litigation, condemnation, or special assessment affecting the Property;
  - (3) any environmental hazards or conditions which materially affect the Property;
  - (4) any dumpsite, landfill, or underground tanks or containers now or previously located on the Property;

- (5) any wetlands, as defined by federal or state law or regulation, affecting the Property; or
- (6) any threatened or endangered species or their habitat affecting the Property.

**8. BROKERS' FEES:** All obligations of the parties for payment of brokers' fees are contained in separate written agreements.

**9. CLOSING:**

- A. The closing of the sale will be on or before \_\_\_\_\_, 20\_\_\_\_ or within 7 days after objections to matters disclosed in the Commitment or by the survey have been cured, whichever date is later (Closing Date). If either party fails to close the sale by the Closing Date, the non-defaulting party may exercise the remedies contained in Paragraph 15.
- B. At closing:
  - (1) Seller shall execute and deliver a general warranty deed conveying title to the Property to Buyer and showing no additional exceptions to those permitted in Paragraph 6 and furnish tax statements or certificates showing no delinquent taxes on the Property.
  - (2) Buyer shall pay the Sales Price in good funds acceptable to the escrow agent.
  - (3) Seller and Buyer shall execute and deliver any notices, statements, certificates, affidavits, releases, loan documents and other documents required of them by this contract, the Commitment or law necessary for the closing of the sale and the issuance of the Title Policy.
- C. Unless expressly prohibited by written agreement, Seller may continue to show the Property and receive, negotiate and accept back up offers.
- D. All covenants, representations and warranties in this contract survive closing.

**10. POSSESSION:** Seller shall deliver possession of the Property to Buyer upon closing and funding.

**11. SPECIAL PROVISIONS:** (Insert only factual statements and business details applicable to the sale. TREC rules prohibit licensees from adding factual statements or business details for which a contract addendum or other form has been promulgated by TREC for mandatory use.)

**12. SETTLEMENT AND OTHER EXPENSES:**

- A. The following expenses must be paid at or prior to closing:
  - (1) Expenses payable by Seller (Seller's Expenses):
    - (a) Releases of existing liens, including prepayment penalties and recording fees; release of Seller's loan liability; tax statements or certificates; preparation of deed; one-half of escrow fee; and other expenses payable by Seller under this contract.
    - (b) Seller shall also pay an amount not to exceed \$\_\_\_\_\_ to be applied to Buyer's Expenses.
  - (2) Expenses payable by Buyer (Buyer's Expenses):
    - (a) Loan origination, discount, buy-down, and commitment fees (Loan Fees).
    - (b) Appraisal fees; loan application fees; credit reports; preparation of loan documents, interest on the notes from date of disbursement to one month prior to dates of first monthly payments; recording fees, copies of easements and restrictions, mortgagee title policy with endorsements required by lender, loan-related inspection fees, photos, amortization schedules, one-half of escrow fee; transfer fees for cooperative or association membership for utility services; all prepaid items, including required premiums for flood and hazard insurance; reserve deposits for insurance, ad valorem taxes and special governmental assessments; final compliance inspection; courier fee, repair inspection, underwriting fee and wire transfer, expenses incident to any loan, and other expenses payable by Buyer under this contract.
- B. Buyer shall pay Private Mortgage Insurance Premium (PMI), VA Loan Funding Fee, or FHA Mortgage Insurance Premium (MIP) as required by the lender.
- C. If any expense exceeds an amount expressly stated in this contract for such expense to be paid by a party, that party may terminate this contract unless the other party agrees to pay such excess. Buyer may not pay charges and fees expressly prohibited by FHA, VA, Texas Veteran's Housing Assistance Program or other governmental loan program regulations.

**13. PRORATIONS AND ROLLBACK TAXES:**

- 
- A. **PRORATIONS:** Taxes for the current year, interest, maintenance fees, assessments, dues and rents will be prorated through the Closing Date. If taxes for the current year vary from the amount prorated at closing, the parties shall adjust the prorations when tax statements for the current year are available. If taxes are not paid at or prior to closing, Buyer shall pay taxes for the current year.
- B. **ROLLBACK TAXES:** If this sale or Buyer's use of the Property after closing results in the assessment of additional taxes, penalties or interest (Assessments) for periods prior to closing, the Assessments will be the obligation of the Buyer. If Seller's change in use of Property prior to closing or denial of a special use valuation on the Property claimed by Seller results in Assessments for periods prior to closing, the Assessments will be the obligation of Seller. Obligations imposed by this paragraph will survive closing.
- 14. CASUALTY LOSS:** If any part of the Property is damaged or destroyed by fire or other casualty after the effective date of this contract, Seller shall restore the Property to its previous condition as soon as reasonably possible, but in any event by the Closing Date. If Seller fails to do so due to factors beyond Seller's control, Buyer may (a) terminate this contract and the earnest money will be refunded to Buyer (b) extend the time for performance up to 15 days and the Closing Date will be extended as necessary or (c) accept the Property in its damaged condition with an assignment of insurance proceeds and receive credit from Seller at closing in the amount of the deductible under the insurance policy. Seller's obligations under this paragraph are independent of any obligations of Seller under Paragraph 7.
- 15. DEFAULT:** If Buyer fails to comply with this contract, Buyer will be in default, and Seller may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. If, due to factors beyond Seller's control, Seller fails within the time allowed to make any non-casualty repairs or deliver the Commitment, or survey, if required of Seller, Buyer may (a) extend the time for performance up to 15 days and the Closing Date will be extended as necessary or (b) terminate this contract as the sole remedy and receive the earnest money. If Seller fails to comply with this contract for any other reason, Seller will be in default and Buyer may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money, thereby releasing both parties from this contract.
- 16. MEDIATION:** It is the policy of the State of Texas to encourage resolution of disputes through alternative dispute resolution procedures such as mediation. Any dispute between Seller and Buyer related to this contract which is not resolved through informal discussion ☐ will ☐ will not be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall bear the mediation costs equally. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.
- 17. ATTORNEY'S FEES:** The prevailing party in any legal proceeding related to this contract is entitled to recover reasonable attorney's fees and all costs of such proceeding incurred by the prevailing party.
- 18. ESCROW:** The escrow agent is not (a) a party to this contract and does not have any liability for the performance or nonperformance of any party to this contract, (b) liable for interest on the earnest money and (c) liable for the loss of any earnest money caused by the failure of any financial institution in which the earnest money has been deposited unless the financial institution is acting as escrow agent. At closing, the earnest money must be applied first to any cash down payment, then to Buyer's Expenses and any excess refunded to Buyer. If both parties make written demand for the earnest money, escrow agent may require payment of unpaid expenses incurred on behalf of the parties and a written release of liability of escrow agent from all parties. If one party makes written demand for the earnest money, escrow agent shall give notice of the demand by providing to the other party a copy of the demand. If escrow agent does not receive written objection to the demand from the other party within 30 days after notice to the other party, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursement of the earnest money. Escrow agent's notice to the other party will be effective when deposited in the U.S. Mail, postage prepaid, certified mail, return receipt requested, addressed to the other party at such party's

address shown below. Notice of objection to the demand will be deemed effective upon receipt by escrow agent.

**19. REPRESENTATIONS:** Seller represents that as of the Closing Date (a) there will be no liens, assessments, or security interests against the Property which will not be satisfied out of the sales proceeds unless securing payment of any loans assumed by Buyer and (b) assumed loans will not be in default. If any representation of Seller in this contract is untrue on the Closing Date, Buyer may terminate this contract and the earnest money will be refunded to Buyer.

**20. FEDERAL TAX REQUIREMENTS:** If Seller is a "foreign person," as defined by applicable law, or if Seller fails to deliver an affidavit to Buyer that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service together with appropriate tax forms. Internal Revenue Service regulations require filing written reports if currency in excess of specified amounts is received in the transaction.

**21. NOTICES:** All notices from one party to the other must be in writing and are effective when mailed to, hand-delivered at, or transmitted by facsimile machine as follows:

**To Buyer at:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone: ( ) \_\_\_\_\_

Facsimile: ( ) \_\_\_\_\_

**To Seller at:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone: ( ) \_\_\_\_\_

Facsimile: ( ) \_\_\_\_\_

**22. AGREEMENT OF PARTIES:** This contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this contract are (check all applicable boxes):

☐ Third Party Financing Addendum

☐ Seller Financing Addendum

☐ Loan Assumption Addendum

☐ Addendum for Property Subject to Mandatory Membership in an Owners' Association

☐ Addendum for Sale of Other Property by Buyer

☐ Environmental Assessment, Threatened or Endangered Species and Wetlands Addendum

☐ Other (list): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

☐ Addendum for Coastal Area Property

☐ Addendum for Property Located Seaward of the Gulf Intracoastal Waterway

☐ Addendum for Release of Liability on Assumption of FHA, VA, or Conventional Loan Restoration of Seller's Entitlement for VA Guaranteed Loan

☐ Addendum for Unimproved Property in a Certificated Service Area of a Utility Service Provider

☐ Addendum for "Back-Up" Contract

**23. TERMINATION OPTION:** This paragraph will be a part of this contract ONLY if both blanks are filled in and Buyer has paid the Option Fee. Buyer has paid Seller \$\_\_\_\_\_ (Option Fee) for the unrestricted right to terminate this contract by giving notice of termination to Seller within \_\_\_\_\_ days after the effective of this contract. If Buyer gives notice of termination within the time specified, the Option Fee will not be refunded, however, any earnest money will be refunded to Buyer. The Option Fee ☐ will ☐ will not be credited to the Sales Price at closing. For the purposes of this paragraph, time is of the essence; strict compliance with the time for performance stated herein is required.

**24. CONSULT YOUR ATTORNEY:** Real estate licensees cannot give legal advice. READ THIS CONTRACT CAREFULLY. If you do not understand the effect of this contract, consult an attorney BEFORE signing.

Buyer's  
Attorney is: \_\_\_\_\_

Seller's  
Attorney is: \_\_\_\_\_

Telephone: ( ) \_\_\_\_\_

Telephone: ( ) \_\_\_\_\_

Facsimile: ( ) \_\_\_\_\_

Facsimile: ( ) \_\_\_\_\_

**EXECUTED the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_ (THE EFFECTIVE DATE). (BROKER: FILL IN THE DATE OF FINAL ACCEPTANCE.)**

\_\_\_\_\_  
Buyer

\_\_\_\_\_  
Seller

\_\_\_\_\_  
Buyer

\_\_\_\_\_  
Seller

The form of this contract has been approved by the Texas Real Estate Commission. TREC forms are intended for use only by trained real estate licensees. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not suitable for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, 1-800-250-8732 or (512) 459-6544 (<http://www.trec.state.tx.us>) TREC NO. 9-5. This form replaces TREC NO. 9-4.

#### SELLER'S RECEIPT

Receipt of \$\_\_\_\_\_ (Option Fee) in the form of \_\_\_\_\_ is acknowledged.

\_\_\_\_\_  
Seller

\_\_\_\_\_  
Date

#### BROKER INFORMATION AND RATIFICATION OF FEE



Listing Broker has agreed to pay Other Broker \_\_\_\_\_ of the total Sales Price when Listing Broker's fee is received. Escrow Agent is authorized and directed to pay Other Broker from Listing Broker's fee at closing.

\_\_\_\_\_  
Other Broker

\_\_\_\_\_  
Listing Broker

\_\_\_\_\_  
License No. Telephone

\_\_\_\_\_  
License No. elephone

represents

represents

☐ Buyer only as Buyer's Agent \_\_\_\_\_  
☐ Seller as Listing Broker's sub-agent

☐ Seller and Buyer as an intermediary  
☐ Seller only as Seller's agent

\_\_\_\_\_  
Associate Telephone

\_\_\_\_\_  
Listing Associate Telephone

\_\_\_\_\_  
Broker's Address

\_\_\_\_\_  
Listing Associate's Office Address  
Facsimile

\_\_\_\_\_  
Facsimile

\_\_\_\_\_  
Selling Associate Telephone

\_\_\_\_\_  
Selling Associate's Office Address  
Facsimile

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**RECEIPT**

Receipt of ☐ Contract and ☐ \$\_\_\_\_\_ Earnest Money in the form of \_\_\_\_\_  
\_\_\_\_\_ is acknowledged.

Escrow Agent: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_  
Address

Telephone: (\_\_\_\_) \_\_\_\_\_

Facsimile: (\_\_\_\_) \_\_\_\_\_

\_\_\_\_\_  
City

State

Zip Code

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### 1.1 **Parties and Amendment to TREC Form.**

This Addendum to TREC No. 9-5 (Ed. 9-22-97) Contract (the "**Addendum**") is executed as an Addendum to the Unimproved Property Contract TREC No. 9-5 (Ed. 9-22-97) (which together with this Addendum and all other Addenda and Exhibits is called the "**Agreement**" or the "**Contract**") between \_\_\_\_\_ (which together with its successors and assigns, is referred to as "Seller") and \_\_\_\_\_ (which together with its successors and assigns are referred to as "Buyer"). The provisions of this Addendum amend and supersede any provisions in the Unimproved Property Contract to the contrary and set forth additional understandings and agreements between Buyer and Seller. This Contract is binding upon and inures to the benefit of the parties hereto, their successors and assigns. The provisions of this Contract survive closing of the sale to Buyer.

### 1.2 **Property.**

**1.2.1 Improved Property.** For convenience of the parties, the parties have used the TREC No. 9-5 (Ed. 9-22-97) Unimproved Property Contract. The parties have amended the Unimproved Property Contract to add provisions negotiated by the parties concerning its status as improved property. The Property also includes:

**.1 Improvements, Fixtures and Equipment.** All buildings, improvements, fixtures, and all property of every kind and character and description (personal or real) owned by Seller located on, attached to, or used in connection with the Property;

**.2 Appurtenances.** All rights, privileges and appurtenances pertaining thereto, including any right, title, and interest of Seller in and to adjacent streets, alleys, and rights-of-way;

**.3 Leases, Rents and Security Deposits.** Seller's interest in and to all leases or rents and security deposits including those described on **Exhibit B** attached hereto;

**.4 Warranties.** Seller's interest in all third party warranties or guaranties, if transferable, relating to the Property or to any tangible personal property and fixtures located on, attached to, or used in connection with the Property;

**.5 Trade Names.** Seller's interest in any trade names, if transferable, used in connection with the Property.

**.6 Licenses and Permits.** Seller's interest in and to all licenses, permits and service contracts with respect to the Property, including the Licenses Permits and Service Contracts described on **Exhibit B**.

**2.0 Closing.** The Closing will occur in the offices of the Title Company on or before the later to occur of (a) on or before \_\_\_\_ days after the Effective Date of this Contract (subject at Buyer's option to being extended 1 day for each day after the Effective Date that Seller's delay in delivering a copy of the Records to Buyer or access to the Property), or (b) 7 days after all conditions for Closing have been satisfied or waived by Buyer.

### 3.0 **Due Diligence.**

**3.1.1 Records.** Within \_\_\_\_ days from the date hereof, Seller shall deliver or make available to Buyer for Buyer's inspection and/or copying at Seller's expense the following records [the items to be furnished pursuant to this Paragraph \_\_\_\_ are collectively called the "**Records**"] however, Seller's obligation to provide Records does not extend to providing records after Closing:

**.1 Licenses and Permits.** Copies of all licenses and permits with respect to the ownership and operation of the Property in Seller's possession.

**.2 Environmental Matters.** Copies of all correspondence, reports, inspections, and other documents held by Seller regarding the environmental aspects of the Property or any hazardous substances (as herein defined) affecting or related to the Property. Seller authorizes and hereby directs any environmental engineer who has performed environmental inspection services for Seller to discuss with Buyer all matters covered by any reports prepared by such engineers for Seller or others.

**.3 Violation Notices.** A copy of any notice received by Seller indicating that the Property, or any portion thereof, is not in compliance with applicable law.

**.4 Authorizations.** The corporate resolution of the board of directors of Seller or other appropriate documentation authorizing the execution of this Contract and the transactions contemplated thereby.

**.5 Leases and Service Contracts.** Copies of all leases pertaining to the Property, including any modifications, supplements, or amendments to the leases ("Leases") together with a current rent roll of all leases affecting the Property certified by Seller to be true and correct and copies of all service, maintenance and management agreements relating to the ownership and operation of the Property ("**Service Contracts**").

**.6 Inventory.** A current inventory of all tangible personal property and fixtures owned by Seller and located on, attached to, or used in connection with the Property.

**.7 Financing Documents.** Copies of all notes and deeds of trust assumed or taken subject to by Buyer.

**.8 Warranties and Guaranties.** Copies of all warranties and guaranties relating to the Property, or any part thereof, or to the tangible personal property and fixtures owned by Seller and located on, attached to, or used in connection with the Property.

**.9 Insurance.** Copies of all fire, hazard, liability, and other insurance policies held by Seller on or affecting the Property.

**.10 Commission Agreements.** Copies of all leasing or other commission agreements with respect to the Property that are being assumed by Buyer.

**.11 As-Built Plans.** A copy of the "**as-built**" plans and specifications of the Property.

**.12 Utilities.** Copies of all invoices for utilities and repair expenses incurred by Seller for operation of the Property for each month for the preceding two (2) years prior to the Effective Date of this contract.

**.13 Tax Returns.** A copy of Seller's income and expense statement for the Property from \_\_\_\_\_ to \_\_\_\_\_.

Seller warrants and represents to the Buyer, to the best of the Seller's knowledge, that the Records represent all of the documents and records in the Seller's possession or control pertaining to the Property.

### **3.2 Property Analysis.**

**3.2.1 Inspections, Studies and Assessments.** At any time prior to the Closing while this Contract is in full force and effect, and at Buyer's sole expense, Buyer or Buyer's authorized agents have the right to enter upon the Property and make the following inquiries in addition to the inquiries permitted by Paragraphs \_\_\_\_ and \_\_\_\_ of the Contract (collectively called the "**inspections, studies and assessments**"):

**.1 Land and Environmental Studies.** surveys and site analyses, engineering studies, wetland studies, soil borings, soil analysis, and environmental assessments, including the performance of tests such as soils tests, air sampling, or paint sampling, and to review the records of the preparer of any environmental report prepared in connection with the Property and to discuss the preparer's

findings with its engineers, as Buyer may deem necessary and to contact governmental authorities as to the Property;

**.2 Structural Inspection.** Physical property inspections including, but not limited to, structural pest control, mechanical, structural, electrical, or plumbing inspections;

**.3 Feasibility Study.** Economic feasibility studies;

**.4 Local Law Compliance.** Compliance inspections to determine compliance with zoning ordinances, restrictions, building codes, and statutes (e.g., ADA, OSHA, and others).

Seller shall permit Buyer and Buyer's inspectors access to the Property at reasonable times. Seller shall pay for turning utilities on for inspections.

**3.3 Review Periods.** This Contract is conditioned upon Buyer's satisfaction, in Buyer's sole judgment, that the Property and the Title and Survey Review Items are satisfactory as follows within the following period (the "**Information Review Periods**"):

**3.3.1 Inquiries as to Property Condition.** Buyer has \_\_\_ days (the "**Inquiries Period**") after Seller makes all of their Records and the Property available to Buyer for inspection to elect either to continue with the Contract or to terminate the Contract by sending to Seller one of the following notices of its election: (a) Buyer's notice to continue with closing the sale of the Property in accordance with the Contract ("**Buyer's Notice of Contract Continuance**"), or (b) Buyer's notice of termination of the Contract ("**Buyer's Notice of Contract Termination**"). In the event Buyer sends Seller, Buyer's Notice of Contract Termination, within the Inquiries Period, this Contract automatically terminates, the Option Fee is retained by Seller, and all obligations and liabilities of the parties cease and terminate (except Buyer's Restoration Obligation).

**3.3.2 Title, Survey and Review of Review Items.** Within 5 days of the Effective Date of this Contract, Seller shall place an order with the Title Company to furnish to Buyer for Buyer's review a Commitment For Title Insurance (the "**Title Commitment**") together with legible copies of all instruments referred to in the Title Commitment. The Title Company shall be requested to furnish these items to Buyer within \_\_\_ days of the Effective Date of this Contract. Buyer may waive or expand the detail of the Survey specified in Paragraph \_\_\_ of the Contract.

Buyer will have a period of \_\_\_ days after the later to occur of the following delivery to Buyer of the Title Commitment, all of the instruments referred to in the Title Commitment, and the Survey (the "**Title and Survey Review Items**") within which to review and object to any matters reflected by the Title and Survey Review Items (the "**Title and Survey Review Period**"). Any such Title and Survey Review Item to which Buyer shall not object shall be deemed to be accepted by Buyer as an exception to the warranty of title to be contained in the Closing documents and are referred to herein as "**Permitted Encumbrances**"; provided, however, liens and title defects shown on Schedule C to the Title Commitment are not Permitted Encumbrances and are to be paid off or otherwise cured by Seller.

Among other matters, Buyer may raise objection as to the following types of matters: vacancies, boundary line conflicts, encroachments, restrictive covenants affecting the use of the property, and lack of, or impaired or reduced access to \_\_\_\_\_ Road.

If there are objections by Buyer as to which notice has been timely given by Buyer to Seller as above provided, Seller shall have until the later to occur of the Closing Date specified in Paragraph \_\_\_ or up to \_\_\_ days after receipt of such objections (the "**Seller's Review Item Cure Period**") to satisfy such objections; provided, however, Seller shall notify Buyer as soon as practicable of any matter objected to by Buyer (other than liens or title defects) that Seller does not intend to cure or attempt to cure. If Seller delivers written notice to Buyer that Seller is unable or unwilling to satisfy or cure a matter so objected to by Buyer (other than liens or title defects), Buyer shall on or before the later to occur of (a) the Closing Date, or (b) \_\_\_ days after request from Seller either (1) waive the objection to the matter that Seller has so notified Buyer that it will not cure and accept title subject to the matter to which Buyer had previously so objected (such uncured matters

then becoming a Permitted Encumbrance) or (2) terminate this Contract by sending Buyer's Notice of Contract Termination to Seller.

In the event Buyer sends Buyer's Notice of Contract Termination, the Earnest Money shall be refunded to Buyer, except for the Option Fee which shall be paid to Seller, and all obligations and liabilities of the parties shall cease and terminate (except Buyer's Restoration Obligation).

Upon request of Buyer, Seller agrees to secure and provide, in recordable form, appropriate Affidavits of Use and Possession covering all of the lands claimed by Seller within the Survey, and the recording of such Affidavits will be a requirement of Closing.

**3.4 Buyer's Restoration Obligation.** BUYER SHALL NOT CAUSE OR PERMIT DAMAGE OR INJURY TO THE PROPERTY, AND UPON TERMINATION OF THIS CONTRACT, BUYER SHALL PROMPTLY RESTORE THE SURFACE OF THE PROPERTY TO THE CONDITION EXISTING PRIOR TO THE TESTS AND STUDIES CONDUCTED PURSUANT TO THIS CONTRACT, AND SUCH OBLIGATION SHALL SURVIVE THE TERMINATION OF THIS CONTRACT. BUYER SHALL DEFEND SELLER FROM AND AGAINST AND SHALL PAY THE FOLLOWING ("**LIABILITIES**"): ALL LIENS, CLAIMS, CAUSES OF ACTION, SUITS, LIABILITIES, COSTS, DAMAGES, AND EXPENSES (INCLUDING ATTORNEYS' FEES AND COURT COSTS) ARISING OUT OF, RESULTING FROM OR RELATING TO THE ACTS OF BUYER OR ITS AGENTS, EMPLOYEES OR INDEPENDENT CONTRACTORS UNDER THE PROVISIONS OF THIS SUBPARAGRAPH. SUCH OBLIGATION SHALL SURVIVE THE TERMINATION OF THIS CONTRACT, OR THE CLOSING, AS MAY BE. THE OBLIGATION OF THE BUYER IN THIS PARAGRAPH IS REFERRED TO IN THIS CONTRACT AS THE "**BUYER'S RESTORATION OBLIGATION.**"

**3.5 Estoppel Certificates.** Within \_\_\_\_\_ days after the Effective Date of this Contract, Seller shall deliver to Buyer estoppel certificates signed not earlier than \_\_\_\_\_ by each tenant leasing space in the Property stating that, as of the date signed: no default exists under the terms of the lease agreement by either lessor or lessee; the amount of any rental payments made in advance, if any; the amount of any security deposits made, if any; the amount of any offsets against rent, if any; and that the tenant has no defenses against the payment of rent accruing under the terms of the lease agreement. If Seller is unable to deliver the estoppel certificates in accordance with the terms of this paragraph without fault by the specified time, Buyer may (i) terminate this Contract and the Earnest Money shall be refunded to Buyer; (ii) extend the time for performance up to 15 days and the Closing Date shall be extended as necessary; or (iii) waive Seller's requirement to deliver the estoppel certificates.

### **3.0 Representations and Warranties.**

#### **4.1 Knowledge Based.**

**4.1.1 Current Actual Knowledge.** The term "*knowledge of [Seller][Buyer]*" (the "**Representing Party**" or "*to the best of \_\_\_\_\_'s knowledge*" or "*no knowledge of \_\_\_\_\_*" when used herein or otherwise made by \_\_\_\_\_ means the current, express awareness of facts or other information of the Representing Party as of the date of this Contract and as of any time thereafter to the Closing, and without undertaking any special inquiry or investigation by such person and without searching public records or the Representing Party's files.

The Reliant Party agrees that the Representing Party is not under a duty of inquiry or investigation in order to make such representations and have no liability to them for failing to discover whether a condition as to which a representation as to the knowledge of the Representing Party is made is true or exists, even if the means to know are at hand or could be discovered upon inquiry. The Representing Party is not liable to the Reliant Party for being negligently ignorant.

Such terms do not include the past knowledge of the Representing Party, if not within the current, express awareness of the Representing Party.

Representations of "**no knowledge**" or as to some condition as existing to the "**knowledge of the Representing Party**" or "**to the best of Representing Party's knowledge**" is not an express or implied

representation or warranty that the condition does exist or does not exist, but is only a representation as to the actual knowledge of the Representing Party as of the making of the representation.

#### **4.1.2 Discovery of Misstatement Prior to Closing.**

If on or before Closing, Buyer discovers or learns that a representation or warranty made to Buyer is materially inaccurate, then, unless Seller who made the representation or warranty intentionally mislead the Buyer, Buyer's sole remedy is to terminate the Contract and receive a refund of the Earnest Money. The Closing of this sale shall constitute a waiver and release of any claims by Buyer against the Seller as to any representation or warranty determined by Buyer to be inaccurate prior to Closing.

**4.2 Seller.** In order to induce Buyer to enter into this Contract, Seller makes the following warranties and representations which will be true and correct as of the date hereof and as of the date of Closing:

**4.2.1 Authority.** Seller is, and at Closing will be, authorized and permitted to enter into this Contract and to perform all covenants and obligations hereunder, and its right to execute this Contract is not limited by any other agreements. The person signing this Contract on behalf of Seller has been authorized to do so. The execution and delivery of this Contract, the consummation of the transaction described herein and compliance with the terms of this Contract will not conflict with, or constitute a default under, any agreement to which Seller is a party or by which Seller or the Property is bound, or violate any regulation, law, court order, judgment, or decree applicable to Seller or the Property.

**4.2.2 No Litigation or Proceedings.** To the extent of the actual knowledge of Seller, there is no litigation or proceeding pending or threatened against or relating to any of the Property; and to the actual knowledge of Seller, there are no pending or threatened or contemplated condemnation actions or special assessments with respect to the Property. Seller has received no request (written or otherwise) from any governmental entity with regard to the dedication of any of the Property. Seller has no knowledge of any pending or contemplated change in any governmental regulation or private agreement applicable to Buyer's use of the Property after Closing.

**4.2.3 No Claims.** No person, corporation, or other entity has or, on the date of Closing, shall have any right or option to acquire the Property.

**4.2.4 Compliance.** To the extent of the actual knowledge of Seller, Seller has complied with and the Property is in compliance with all applicable laws, ordinances, regulations, statutes, rules, and restrictions relating to the Property.

**4.2.5 Possession.** At the Closing, the Property will be conveyed free of the rights of possession of any third parties in or to the Property except for easements, if any, filed of record or visible and apparent on the ground.

**4.2.6 Environmental Investigations.** Seller has no actual knowledge that any investigation, administrative order, consent order and agreement, litigation or settlement with respect to materials classified as municipal or industrial waste by the State of Texas, or as hazardous waste by the U.S. Environmental Protection Agency or the State of Texas, is proposed, threatened, anticipated or in existence with respect to the Property. Seller has no actual knowledge that the Property is currently on any Federal or state "superfund" or "super-lien" lists.

Seller has not received notification from any governmental agency which would indicate that any of the Property has been contaminated by any of the following substances (called collectively in this Contract "hazardous substances or materials or toxic waste"): any materials classified as municipal or industrial waste by the State of Texas, or as hazardous waste by the U.S. Environmental Protection Agency or the State of Texas, toxic or hazardous wastes, pollutants or other hazardous substances, including without limitation, asbestos, PCB's, petroleum products and byproducts, substances defined or listed as hazardous substances or toxic substances or similarly identified in or pursuant to state or federal law or regulations.

**4.2.7 Leases.** Each written lease to be furnished to Buyer under this Contract shall be in full force and effect according to its terms without amendment or modification that is not disclosed to Buyer in writing. All the leases shall contain the entire written or oral agreements of any kind for the leasing, rental, or occupancy of any portion of the Property. Seller shall disclose in writing to Buyer:

- (1) any lease modifications, amendments, or defaults made subsequent to the date the leases are furnished to Buyer but prior to closing;
- (2) any failure by Seller to comply with all of Seller's obligations under the leases;
- (3) any facts or circumstances that would constitute a default by Seller under any lease or entitle any tenant to offsets or damages;
- (4) any lease in which tenant does not actually occupy the premises leased;
- (5) if any rent under any lease has been collected in advance of the current month;
- (6) if any concessions, bonuses, free rents, rebates, or other matters affect the rental for any tenant;
- (7) if any of the leases or rentals or other sums payable under the leases have been assigned or otherwise encumbered, except as security for loan(s) assumed or taken subject to as provided in this contract; and
- (8) if any tenant under any lease is in default.

**4.3 Buyer.** In order to induce Seller to enter into this Contract, Buyer makes the following warranties and representations which will be true and correct as of the date hereof and as of the date of Closing:

**4.3.1 Authority.** Buyer is, and at Closing will be, authorized and permitted to enter into this Contract and to perform all covenants and obligations hereunder, and its right to execute this Contract is not limited by any other agreements. The person signing this Contract on behalf of Buyer has been authorized to do so. The execution and delivery of this Contract, the consummation of the transaction described herein and compliance with the terms of this Contract will not conflict with, or constitute a default under, any agreement to which Buyer is a party or by which Buyer is bound, or violate any regulation, law, court order, judgment, or decree applicable to Buyer.

**4.3.2 No Litigation or Proceedings.** To the extent of the actual knowledge of Buyer, there is no litigation or proceeding pending or threatened against or relating to Buyer's authority to purchase the Property.

## **5.0 Pre-Closing Covenants.**

**5.1 Operations Prior to Closing.** Seller covenants that from and after the date hereof, Seller shall comply with the following:

### **5.1.1 Prohibitions.**

**.1 Liens.** Seller may not create or permit any lien or other encumbrance affecting the Property, other than the lien for taxes not yet due and payable and existing liens to be released at the Closing;

**.2 Waste.** Seller may not commit any waste or nuisance upon the Property;



**.3      Encumbrances.** Seller may not impose any easements, covenants, conditions, or restrictions on the Property except as are approved in writing by Buyer, which approval will not be unreasonably withheld;

**.4      Proceedings.** Seller may not institute or participate in any zoning, platting, or other governmental action regarding the Property; or

**.5      Agents.** Seller may not enter into or modify any contract, lease or other agreement that in any way affects the Property and that will survive the Closing except as are approved in writing by Buyer, which approval will not be unreasonably withheld.

**5.1.2      Actions to Be Taken.** Seller is to promptly advise Buyer in writing of any notices concerning the Property that Seller receives from any appraisal districts, taxing authorities, or any governmental agency having jurisdiction over the Property, and of any litigation, arbitration, or administrative hearing concerning the Property.

## **6.0      Conditions.**

**6.1      Conditions Precedent to Buyer's Performance.** The obligations of Buyer to close the transaction described in this Contract are subject to the following conditions precedent:

**6.1.1      Representations and Warranties.** All the representations and warranties of Seller set forth in this Contract must be true and correct as of the date of execution of this Contract and on the date of Closing.

**6.1.2      Permitted Encumbrances.** There has been no change in the matters reflected on the Title Commitment or Survey from those matters appearing therein on the date thereof (except those changes requested by Buyer in its notice of objections), and no encumbrance or title defect affects the Property except Permitted Encumbrances.

**6.1.3      Compliance.** Seller must have duly performed and complied with all covenants, acts and agreements to be performed or complied with by Seller on or prior to the date of Closing.

**6.1.4      Appraisal.** The Property appraises for a fair market value of at least the Sales Price; provided, Buyer orders within 30 days of the Effective Date of this Contract and obtains on or before Closing an appraisal, at Buyer's expense, of the Property by a licensed appraiser of Buyer's selection.

In the event any of the foregoing conditions are not satisfied or waived in writing by Buyer prior to the Closing, Buyer may terminate this Contract by delivery of a written termination notice to Seller on or before the date of Closing, in which event the Earnest Money shall be immediately returned to Buyer free of claims by Seller and the parties shall have no further obligations to each other except as expressly set forth to the contrary under this Contract.

## **7.0      ADR**

**7.1      Dispute Resolution.** If a dispute arises between the parties either as to pre-Closing or post-Closing matters (a "**Dispute**"), then the parties agree to use the following dispute resolution procedures:

**7.1.1      Mediation.** If a Dispute arises between the parties, the following mediation procedures will be employed prior to either party pursuing arbitration:

**.1      Meeting of the Parties.** Individuals with decision-making authority regarding the Dispute who represent the parties will promptly meet and attempt in good faith to negotiate a resolution of the Dispute.

**.2      ADR.**

(a) **Selection of Mediator.** If, within 10 days after such meeting, the parties have not succeeded in negotiating a resolution of the Dispute, they will jointly appoint a mutually acceptable neutral person not affiliated with either of the parties (the “neutral”), using the services of the American Arbitration Association if they have been unable to agree upon such appointment within 20 days from the initial meeting. The fees of the neutral shall be shared equally by the parties.

(b) **ADR.** In consultation with the neutral, the parties will select or devise an alternative dispute resolution procedure (“ADR”) by which they will attempt to resolve the Dispute, and the time and the place for the ADR to be held, with the neutral making the decision as to the procedure, and/or place and time, not later than 10 days after selection of the neutral.

(c) **Process.** The parties must participate in good faith in the ADR to its conclusion as designated by the neutral. All meetings, mediation conferences, ADR and other proceedings shall be in Austin, Texas.

**7.1.2 Arbitration.** If the parties are not successful in resolving the Dispute through the ADR, then the Dispute must proceed to a binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. All meetings, arbitration hearings and other proceedings shall be in \_\_\_\_\_, Texas. The costs of the arbitration shall be allocated by the arbitrator.

**8.0 Notices.** Any notice, document or payment required or permitted to be delivered or remitted hereunder or by law shall be given by one of the following methods:

**8.1** in person;

**8.2** by deposit in the United States mail, postage prepaid, addressed to the party to whom directed at the address set out in this Contract;

**8.3** by delivery to a nationally recognized courier service addressed in accordance herewith.

Additionally, but not in lieu of the above methods, notice may be given by telephone or telefax to the telephone numbers listed in this Contract.

**9.0 Closing.** In addition to the matters to occur at closing specified in the Contract the following shall occur:

**9.1 Seller's Actions.** At closing Seller shall furnish, at Seller's expense:

**9.1.1 Tax Statements.** Seller shall cause to be delivered to the Title Company and to the Buyer tax statements showing no delinquent taxes on the Property.

**9.1.2 Bill of Sale.** Seller shall cause to be delivered to the Title Company and to the Buyer a Bill of Sale with warranties to title conveying title, free and clear of all liens, to any personal property defined as part of the Property in paragraph 2 and conveyed by this Contract.

**9.1.3 Assignment of Leases, Rents and Security Deposits.** Seller shall cause to be delivered to the Title Company and to the Buyer an assignment of all leases to or on the Property duly executed by Seller.

**9.1.4 Assignment of Licenses, Permits, Warranties, Service Contracts, and Management Agreements.** Seller shall cause to be delivered to the Title Company and to the Buyer to the extent assignable, an assignment duly executed by Seller of any licenses and permits, maintenance, management or other contracts, and any warranties or guaranties defined as part of the Property.

**9.1.5 Certified Rent Roll.** Seller shall cause to be delivered to the Title Company and to the Buyer a current rent roll of the Property certified by Seller

**9.1.6 Insurance.** Seller shall cause to be delivered to the Title Company and to the Buyer to the extent assignable, an assignment duly executed by Seller of any one or more of the insurance policies held by Seller pertaining to the Property.

**9.1.7 Authorizations.** Seller shall cause to be delivered to the Title Company and to the Buyer evidence that the person executing this contract is legally capable and authorized to bind Seller.

**9.1.8 Deposits and Prepaid Rents.** Seller shall, at closing, tender to Buyer any security deposits, prepaid expenses, and advanced rental payments paid by any and all tenants.

**9.1.9 UCC Search.** Seller shall deliver to the Buyer and to the Title Company a UCC Search showing no filed financing statements as to the Property or if there are filed financing statements a letter from the Secured Party addressed to the Title Company and the Buyer stating that the Secured Party will release its Financing Statement (or transfer the Financing Statement to Buyer's lender) upon satisfaction of conditions specified in the letter. Seller shall satisfy the conditions set forth in the letter as of Closing. The term "**UCC Search**" means reports prepared by [a non-governmental provider, stating the instruments that are on file in the Texas secretary of state's UCC records and in the UCC records of the county in which the Property is located, showing as debtor Seller and all other owners of the Personal Property during the five years before the Effective Date of this Contract.

**9.2 Prorations.** The following items shall be prorated as of the Closing Date and such prorations shall be reflected on the settlement statements prepared by Escrow Agent on the Closing Date and shall serve to adjust the Sales Price. Such prorations shall be made on the basis of a 365-day year, as of 11:59 p.m. on the day preceding the Closing Date.

**9.2.1 Revenues.** All rentals, receipts and other revenues from the Property which have been actually received by Seller and which are allocable to the period from and after the Closing Date shall be credited to Buyer. Buyer shall be entitled to collect all rentals, receipts and other revenues from the Property which are delinquent or due on or after the Closing Date. All rentals, receipts, and other revenues of any kind whatsoever (together, "**Revenues**") from the Property collected by Buyer shall be credited: if specifically identified by reference to invoice or month, to such invoice or month; and if not so specifically identified: first to current Revenues not delinquent, and second to delinquent Revenues, in the inverse order of delinquency. All Revenues which relate to the month in which the Closing Date occurs shall be credited first to Revenues for the month in which the Closing Date occurs, and second to delinquent Revenues, in the inverse order of delinquency. Any such delinquent Revenues when applied as provided herein which relate in whole or in part to any period prior to the Closing Date shall be remitted by Buyer to Seller when collected by Buyer (net only of any reasonable collection expenses actually incurred by Buyer). Any such delinquent Revenues when applied as provided herein, which relate in whole or part to any period on or subsequent to the Closing Date shall be remitted by Seller to Buyer when and if collected by Seller (net only of any reasonable collection expenses actually incurred by Seller). Seller shall have the right to enforce and collect any Revenues that are attributable to periods before the Closing Date by any means other than exercising termination or termination of possession rights or other rights under the Leases (except that Seller shall at all times have the right to bring a suit or suits for damages to collect any Revenues), and Buyer shall reasonably cooperate in such enforcement and collection efforts at no cost to Buyer other than any attorneys' fees incurred by Buyer. **[Note: Additional provisions may be needed for retail leases.]**

**9.2.2 Property Taxes.** Seller shall be responsible for all ad valorem taxes and assessments, general and special, with respect to the Property for periods prior to the calendar year containing the Closing Date. Ad valorem taxes and assessments, general and special, with respect to the Property for the calendar year containing the Closing Date shall be prorated between Seller and Buyer at Closing, as of the Closing Date. All ad valorem tax prorations shall be based on tax rates and assessments for the calendar year containing the Closing Date unless such rates and/or assessments are unavailable. If either the tax rates or the tax assessments for the Property for the calendar year containing the Closing Date are not available, then such proration shall be made based on the tax rates and assessments for the prior year (or if only the assessed value for the calendar year containing the Closing Date is known, then based on the prior year's tax rates and the current year's assessed value), and shall be adjusted between Seller and Buyer after the Closing as soon

as such rates and assessments for the year of the Closing are available. The provisions of this Section \_\_\_\_\_ shall survive Closing.

**9.2.3 Security Deposits.** All security and other deposits, if any, including any accrued interest thereon if such interest is required to be remitted to Tenants pursuant to their respective Leases, held by Seller on the Closing Date on behalf of any Tenants under any Leases shall be credited to Buyer, and Escrow Agent shall deliver a notice signed by Seller to such Tenants advising them that: (i) Buyer has purchased the Property, and (ii) the security deposit, if any, is the responsibility of Buyer.

**9.2.4 Utility Charges.** Final meter readings on all utilities charged to the Property shall be made as of the day preceding the Closing Date. Seller shall arrange for and pay for final billings of utilities to the day preceding the Closing Date, and Buyer shall be responsible for utilities used on or after the Closing Date. Any prepaid water, sewer, and other utility charges allocable to the period from and after the Closing Date shall be credited to Seller.

**9.2.5 Service Contracts.** Seller shall pay (or be charged by a proration for) all charges due pursuant to the Service Contracts which are allocable to the period prior to the Closing Date, and Buyer shall be responsible for all such charges due from and after the Closing Date pursuant to the Property Service Contracts. Prepaid charges allocable to the period from and after the Closing Date in connection with the Property Service Contracts, shall be credited to Seller at Closing. Accrued and unpaid charges allocable to the period prior to the Closing Date in connection with such Service Contracts shall be credited to Buyer at Closing. The provisions of this Section **32B5** shall survive Closing.

**9.2.6 Licenses and Permits.** Prepaid charges allocated to the period from and after the Closing Date in connection with any licenses or permits for the Property shall be credited to Seller at Closing. Accrued and unpaid charges allocable to the period prior to the Closing Date in connection with any such licenses or permits shall be credited to Buyer at Closing.

**9.2.7 Capital Expenditures; Leasing Costs.** In the event Seller desires to make any capital expenditure after the Contract Date, Seller shall notify Buyer in writing (a "**Capital Notice**"). In the event Seller desires to enter into or modify any Lease after the Contract Date, Seller shall notify Buyer in writing (a "**Lease Notice**"). In the event such Capital Notice or Lease Notice is delivered to Buyer prior to the expiration of the Contingency Period, Buyer may either (i) approve such capital expenditure or Lease (or amendment thereto), as applicable in which event Seller shall be credited with the amount of such capital expenditure or leasing costs, as applicable, at Closing or (ii) terminate this Agreement. In the event Buyer fails to respond to Seller's Capital Notice or Lease Notice given pursuant to the preceding sentence within 5 days of such Capital Notice or Lease Notice, Buyer shall be deemed to have elected option (i) above. In the event such Capital Notice or Lease Notice is delivered to Buyer after the expiration of the Contingency Period and prior to the Closing Date, Buyer may either approve or disapprove such capital expenditure. In the event Buyer fails to respond to Seller's Capital Notice or Lease Notice given pursuant to the preceding sentence within 3 days of such Capital Notice or Lease Notice, Buyer shall be deemed to have approved such capital expenditure, or leasing costs, as applicable. In the event Buyer disapproves such capital expenditure or leasing costs, as applicable, Seller shall have the option to terminate this Agreement within three (3) days of Buyer's disapproval, in which event the Earnest Money shall be returned to Buyer, and Seller and Buyer shall have no further obligations hereunder. In the event Buyer approves, or is deemed to have approved such capital expenditure or leasing costs, as applicable, Seller shall be credited with the amount of such capital expenditure or leasing costs, as applicable, at Closing. In the event of an emergency, Seller shall have the right to make any capital expenditure reasonably necessary in keeping with the quality and image of the Property and/or in accordance with the requirements of the Leases, and Seller shall be credited with the amount of such capital expenditure at Closing. As used in this Section, "**capital expenditure**" shall mean any expenditure in excess of [\$10,000.00].

**9.2.8 Operating Expenses.** Except as otherwise expressly provided herein to the contrary, Seller shall be responsible for and bear all operating expenses for the Property accrued for the period prior to the Closing Date and Buyer shall be responsible for and bear all operating expenses of the Property accrued for the period on and after the Closing Date. Prorations of items under Sections \_\_\_\_\_ and \_\_\_\_\_ shall be made at Closing on the best information available with an adjustment and reconciliation to the extent necessary

on a mutually agreed date within 90 days following the Closing Date, with payment from one party to the other (to the extent required) to be made within 30 days following reconciliation. Such prorations, as adjusted as of the 90th day following the Closing Date, shall be considered final and binding for all purposes absent material mistake of fact. To the extent that any Lease provides for any adjustment of previously paid estimated amounts of real estate tax or operating expense reimbursements on a date subsequent to the Closing Date, Seller shall be entitled to receive, or shall be responsible to pay, as the case may be (when such amounts are actually received or payable by Buyer), Seller's pro rata share of any such adjusted amounts that are applicable to periods ending prior to the Closing Date. After Closing, Seller agrees to reasonably cooperate with Buyer in providing Buyer access to Seller's books and records relating to such adjustments under the Leases so that Buyer may adequately perform such adjustments.

The provisions of this Section \_\_\_\_\_ shall survive Closing.

**10.0 Effective Date.** The effective date of this Contract (the "**Effective Date**") is the date upon which a fully signed Contract, together with the Earnest Money, is delivered to the Title Company.

**11.0 Payment of Purchase Price.** The Purchase Price shall be paid by Purchaser to Seller as follows:

\_\_\_\_\_ **11.1 Cash.** \_\_\_\_\_ of the Purchase Price shall be paid in cash (the "**Cash Consideration**"), by wire transfer of collected funds cashier's or certified check payable to the order of Seller or as Seller shall otherwise designate in writing at the Closing.

\_\_\_\_\_ **11.2 Purchase Note.** The balance of the Purchase Price, being \_\_\_\_\_ shall be evidenced by a promissory note (the "**Purchase Note**") executed and delivered by Purchaser, dated the Closing Date, payable to the order of Seller, bearing interest at the rate of \_\_\_\_ % per annum, with interest being payable semi-annually. The outstanding principal and accrued but unpaid interest on the Purchase Note shall be due and payable \_\_\_\_ years from the Closing Date. Purchaser shall have the right to prepay all or any portion of the Purchase Note at any time without penalty, upon the payment of accrued but unpaid interest to the date of prepayment. The form of the Purchase Note is attached hereto as Exhibit B-1 and made a part hereof for all purposes.

\_\_\_\_\_ **11.3 Purchase Deed of Trust.** The Purchase Note shall be secured by a vendor's lien retained in the Deed, and by a first lien deed of trust (the "**Purchase Deed of Trust**") with the Trustee named by Seller, with power of sale upon the Property and with the usual covenants and provisions as to taxes, hazard insurance, acceleration of maturity on account of default, and attorney's fees. The form of the Purchase Deed of Trust is attached hereto as Exhibit B-2 and made a part hereof for all purposes.

\_\_\_\_\_ **11.3.1 Due on Sale.** The Purchase Deed of Trust shall contain a provision whereby a default shall occur if Purchaser shall sell all or any part of the Property without paying for the required partial release. The Purchase Deed of Trust shall contain a provision whereby a default shall occur if a lien, whether or not subordinate to the Purchase Deed of Trust shall encumber the Property.

\_\_\_\_\_ **11.3.2 No Release for Cash Consideration.** Purchaser shall not be entitled to a partial release of any portion of the Property from the Purchase Deed of Trust for the payment of the Cash Consideration.

\_\_\_\_\_ **11.3.3 Partial Release Provision.** The Purchase Deed of Trust shall contain a partial release provision containing the following terms and conditions. Prior to any default in the payment of the Purchase Note, or the performance of the Purchase Deed of Trust, Purchaser shall be entitled to one or more partial releases of one or more release tract(s) (a "**Release Tract**"), as more particularly described in Exhibit A-2, upon payment to Seller the prorata amount of any accrued but unpaid interest on the Purchase Note (bearing the same proportion as the Release Tract bears to then remaining Property) and payment to Seller of the appropriate release amount (a "**Release Value**") as more particularly described in the schedule attached hereto as Exhibit A-3 (the "**Release Schedule**"). Each Release Tract shall be released, in its entirety, and the entire amount set forth in the Release Schedule for such Release Tract shall be paid to Seller. No partial release of less than all of a Release Tract shall be allowed.

**11.3.4 Agricultural Use.** The Purchaser shall not take any action, nor fail to take any action or action which would in any manner cause the Property to lose the benefit of its tax designation as **"Agricultural Use"** or **"Qualified Open-Space Land"** as described in numbered Paragraph . The Purchase Deed of Trust shall contain a provision whereby a default shall occur if Purchaser shall fail to maintain the **"Agricultural Use"** or **"Qualified Open-Space Land"** as described in numbered Paragraph .

                     **11.3.5 Tax Assessment.** Through continued diligent efforts, Seller has maintained the assessed value of the Property for ad valorem tax purposes as low as it believes is possible or practical under the circumstances. Because of this and because of the material impact a high assessment would have, Seller would not sell the Property and provide financing other than upon the agreement of Purchaser to this provision which shall also be included in the Purchase Deed of Trust. Purchaser shall take all necessary or reasonable actions to maintain the lowest reasonably possible assessed value for the Property and to preserve and protect the **"Agricultural use and Qualified Open-Space Land"** designation. Without limiting the actions which may be taken by Purchaser, (i) Purchaser shall hire or retain on a continuing basis, a tax consultant for the Property, and if reasonably necessary, attorneys, appraisers and other tax protest professionals, reasonably satisfactory to Seller, and (ii) Purchaser shall annually file or cause to be filed with the applicable governmental authority, protests of the assessed value of the Property at least thirty (30) days prior to the last date when such protests can be filed. In the event that Purchaser fails or refuses to retain tax protest professionals, or fails or refuses to file or cause to be filed, protests of the value of the Property as and when set forth above, then (i) Seller shall have the right to do so and to charge the expense thereof to Purchaser, which shall be secured by the Deed of Trust, and (ii) Purchaser shall at the option of Seller be in default under the Purchase Deed of Trust.

                     **11.4 Single Purpose Entity.** Purchaser and its general partners, managing members, principal shareholders or other controlling parties, if not individuals, shall each be a single purpose entity (a **"Single Purpose Entity"**). Purchaser and each controlling party (1) shall be entities organized and existing under the laws of the United States and authorized to transact business in the State of Texas, (2) shall not and cannot by virtue of their organizational documents engage in any business other than owning, operating and eventually should it so select, selling the Property or the interest in Purchaser, (3) shall not and cannot acquire or own material assets other than the Property or the interest in Purchaser, and personal property or other property rights relating thereto or instruments which reflect proceeds from the purchase price generated from the sale of all or a portion of the property, (4) shall maintain its assets separate and apart from the assets of any other person or entity, (5) shall hold itself out to the public as a separate legal entity from any person or entity, (6) shall conduct business solely in its name, (7) shall not and cannot incur any indebtedness other than the Purchase Note and trade payables incurred in the ordinary course of business, and (8) otherwise meets the requirements for a Single Purpose Entity as set forth by Seller.

                     **11.5 Owners.** In connection with the Purchase Note and the Purchase Deed of Trust, each Owner of all or any interest in Purchaser or a controlling entity in Purchaser or the general or limited partner of Purchaser (an **"Owner"**), shall at the Closing, execute and deliver to Seller a joint and several guaranty or guarantees (the **"Entity Matters Guaranty"**) of the Purchase Note and the Purchase Deed of Trust, together with any and all costs, expenses, losses, liabilities and damages of any kind or nature whatsoever arising from or related to the matters set forth for the Entity Matters Guaranty, described below. Each Owner of all or any interest in the general partner of Purchaser or a controlling entity in the general partner of Purchaser shall at Closing, execute and deliver to Seller a joint and general guaranty or guarantees (the **"Ag Use Guaranty"**) of the Purchase Note and the Purchase Deed of Trust, together with any and all costs, expenses, losses, liabilities and damages of any kind or nature, whatsoever arising from or related to the matters set forth for the Ag Use Guaranty, described below. If the contingencies described in the Entity Matters Guaranty or Ag Use Guaranty do not arise, then the Owners shall not be liable for the payment of the Purchase Note or the performance of the Purchase Deed of Trust or any such costs, expenses, losses, liabilities and damages.

**11.6 Entity Matters Guaranty.** The form of the Entity Matters Guaranty is attached hereto as Exhibit B-3-a and made a part hereof for all purposes. The Entity Matters Guaranty shall provide that the joint and several liability of the Owners shall be enforceable upon the occurrence of one of the following events: (a) Purchaser files for relief under the federal bankruptcy code, and Purchaser does not agree to the lifting of the automatic stay within thirty (30) days, or (b) Purchaser has an involuntary petition under the federal bankruptcy code filed against it and the same is not dismissed within sixty (60) days, or (c) Purchaser shall fail

to pay ad valorem taxes for the Property, as and when due, or (d) Purchaser shall not be, or shall fail to be or remain a Single Purpose Entity.

The form of the Ag Use Guaranty is attached hereto as Exhibit B-3-b and made a part hereof for all purposes. The Ag Use Guaranty shall provide that the joint and general liability of the Owners shall be enforceable upon the occurrence of the following event: Purchaser defaults under the provisions of the Purchase Deed of Trust regarding the maintenance of the "**Agricultural Use**" or "**Qualified Open-Space Land**" as described in numbered Paragraph 21 and such default is not occasioned by the act or inaction of Purchaser or the Owner.

**11.7 Purchaser and Owners' Representations.** Purchaser represents, warrants and covenants with Seller as follows:

**11.7.1 Authority; Binding.** The execution and delivery by Purchaser of this Agreement and the consummation by Purchaser of the transactions contemplated hereby have been duly and validly authorized. Purchaser has the full right power and authority to carry out Purchaser's obligations hereunder. All requisite actions necessary to authorize Purchaser to enter into this Agreement and perform its obligations hereunder have been taken. The joinder of no person or entity other than Purchaser will be necessary. The execution and delivery by Purchaser of this Agreement and the consummation of the transactions contemplated hereby and the performance hereof by Purchaser, will not constitute or result in a default under or result in a breach of any term, condition or provision of the documents and instruments governing its formation, existence or operation, or any law, rule, regulation, judgment, order, injunction or decree binding upon Purchaser. This Agreement, when executed and delivered by Purchaser, will constitute the legal, valid and binding obligation of Purchaser, enforceable in accordance with its terms, subject to any applicable bankruptcy, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally, and to general principles of equity.

**11.7.2 Not Prohibited.** Purchaser is not a party to any contract or agreement which will be materially and adversely affected by the transactions pursuant to this Agreement, including, but not limited to, any termination, amendment or other adverse effect, or pursuant to which any lien, charge or encumbrance against Purchaser or its properties or assets will be created by virtue of such transaction.

**11.7.3 No Litigation.** There are no actions, suits, proceedings or investigations pending or threatened against or otherwise affecting Purchaser, at law or in equity, before any court or any federal, state, municipal or other governmental or quasi-governmental department, commission, board, bureau, agency or instrumentality. No action or event has occurred which would give rise to any suit or claim against Purchaser. There are no attachments, executions, assignments for the benefit of creditors, or voluntary or involuntary proceedings in bankruptcy pending, contemplated, or to the knowledge of Purchaser, threatened against Purchaser, threatened against Purchaser before any court or instrumentality described above which has not yet risen to the level of a threat thereof. Purchaser is not, nor by virtue of consummation of the transactions contemplated hereby will it be, in violation of, or in default with respect to, any order, writ, injunction or decree of any court or any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, or delinquent with respect to any report required to be filed with any governmental or quasi-governmental department, commission, board, bureau, agency or instrumentality, with respect to any of which such violation, default or delinquency would have a material adverse effect upon Purchaser. Purchaser is not a party or subject to any judgment, order or decree entered in any action, suit or proceeding brought by any governmental or quasi-governmental department, commission, board, bureau, agency or instrumentality or by any other party against Purchaser, enjoining it in respect of, or the effect of which is to limit, restrict, regulate or prohibit, any business practice, the conduct of its business or the acquisition or sale of any property by it.

**11.7.4 Financial Disclosure.** There are no liabilities of Purchaser, accrued or contingent, other than: (a) liabilities specifically and accurately disclosed and provided for in the financial information provided to Seller on or before, or of even date herewith; (b) liabilities under any contracts or agreements in respect of which there is or may be an obligation of Purchaser in an amount of or valued at \$2,000 or less, which liabilities in the aggregate are not in excess of \$10,000; (c) liabilities incurred in the ordinary course of business since the date of the financial information provided to Seller pursuant to Paragraph 40, none of which

have or have had a material adverse effect on the business, results of operations, assets, financial condition, prospects or manner of conducting the business of Purchaser.

           **11.7.5 Single Purpose Entity.** Purchaser, if not an individual, and its controlling parties, if not individuals, are each a Single Purpose Entity.

           **11.8 Survival.** To the best of Purchaser's knowledge and belief, the representations, warranties and covenants set forth herein shall be true and complete in all material respects as of the date hereof and shall be true and complete in all material respects on the Closing Date with the same force and effect as if made at that time. The representations, warranties and covenants shall survive the Closing for a period of twelve months following the full and final payment of the Purchase Note and the Purchase Deed of Trust, and shall not be affected by any investigation, verification or approval by any party hereto, to or by anyone on behalf of any party hereto.

           **11.9 Assumption of Obligations.** Purchaser is not the successor of Seller. Purchaser agrees to assume and agrees to pay and perform the Agricultural Leases and the Leases and Operating Agreements, if any which Purchaser elects to assume as set forth in numbered Paragraph above, or as otherwise expressly provided herein, from and after the Closing. Purchaser shall not be liable for accrued liabilities under the Agricultural Leases and the Leases and Operating Agreements arising before Closing. Appropriate proration of such obligations will occur at Closing.

           **11.10 Mortgagee's Policy.** A form T-2 Texas Standard Mortgagee's Policy of Title Insurance (the "**Mortgagee Policy**") in the full amount of the Purchase Note, issued by the Title Company and insuring that Purchaser owns good and indefeasible fee simple title to the Property, subject only to the Permitted Exceptions and the Non-Permitted Title Exceptions and the Non-Permitted Survey Exceptions which have been waived or deemed waived by Purchaser, and have been deemed Permitted Exceptions, and that the vendor's lien retained in the Deed and the Purchase Deed of Trust are first and prior liens on the Property, subject only to the Permitted Exceptions and the Non-Permitted Title Exceptions and the Non-Permitted Survey Exceptions which have been waived or deemed waived by Purchaser, and have been deemed Permitted Exceptions.

           **11.11 Roll Back Taxes.** The parties have agreed to maintain the "**Agricultural Use**" or "**Qualified Open-Space Land**" as described in numbered Paragraph, on the Property except as to a Release Tract following the satisfaction of the conditions set forth below. The roll back of taxes shall be allowed (1) as to a Release Tract only, (2) where the Release Value has been paid to Seller, (3) following the recording of a partial release for such Release Tract, and (4) the taxing authority has provided an unsolicited rollback of the taxes for such Release Tract.

           **11.11.1 Purchaser's Assumption and Responsibility.** Purchaser shall be exclusively responsible for any and all roll back taxes for the Property or any part thereof, and expressly assumes and agrees to pay any and all such roll back taxes, if, as and when assessed, and shall indemnify and hold Seller harmless from and against any and all damage, claim, liabilities, or loss, including reasonable attorney's fees and courts costs, arising out of or in any way connected to any and all rollback taxes. Provided however, nothing herein shall cause Purchaser to be responsible for, and Purchaser has not assumed nor agreed to pay roll back taxes relating to property not a portion of the Property, including any roll back taxes relating to property not a portion of the Property sold by Seller prior to the Closing.

           **11.11.2 Seller's Disclaimer and Release from Responsibility.** Seller shall have no responsibility for any portion of the rollback taxes. Purchaser hereby waives and releases any claims against Seller arising out of or in any manner related to any loss, cost or expense whatsoever, arising from or in any manner related to any future real property taxes due on the Property, including the rollback of any real property taxes as a result of the change of land use and loss of the tax classification and any charges associated therewith, or otherwise.

           **11.11.3 Maintenance of Tax Status.** The Agricultural Leases have previously been provided to Purchaser and have been reviewed and approved by Purchaser. The Agricultural Leases will not be subject to termination as provided in numbered Paragraph and will be assumed by Purchaser. The parties acknowledge that the Property is presently assessed under the tax classification of "**Agricultural Use**" or



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**“Qualified Open-Space Land”** under statutory or constitutional provisions. Purchaser shall not terminate such classification, except as provided in numbered Paragraph above, shall take any necessary or reasonable action(s) required to maintain such classification, including those set forth in numbered Paragraph 21c above and the failure to maintain such designation shall be a default under the Purchase Note and Purchase Deed of Trust. Purchaser shall at all times maintain the Agricultural Leases and shall, if necessary to maintain the tax status, replace the Agricultural Leases with others providing for the same purposes.

**B.3****SALES CONTRACT**

This Sales Contract (the “**Agreement**”) is made and entered into by and between \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ (collectively, referred to herein as “**Seller**”) and \_\_\_\_\_ (the “**Buyer**”), upon the terms and conditions set forth in this Agreement. Each of \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ owns a portion of the Property (as hereinafter defined), and each such entity’s obligations as Seller under this Agreement shall apply only to the portion of the Property owned by such entity.

**ARTICLE 1  
PURCHASE AND SALE**

Under the terms of this Agreement, Seller agrees to sell and convey, and Buyer agrees to purchase and acquire, approximately \_\_\_\_\_ acres of real property located \_\_\_\_\_ of the intersection of \_\_\_\_\_ and \_\_\_\_\_, in or near the \_\_\_\_\_ P.U.D. (as defined in Section 10.04 below), in Travis County, Texas, said real property being more particularly described as follows:

- (a) **Land.** *[insert land description]*
- (b) **Improvements.** All improvements, fixtures, or personal property, if any, located on, attached to, or used in connection with the Property;
- (c) **Appurtenances.** all and singular the rights and appurtenances pertaining thereto, including any right, title and interest of Seller in and to adjacent streets, alleys, and rights-of-way; and
- (d) **Intangibles.** The following intangibles, if any, associated with the real property: Seller’s rights under the Restrictive Covenants, the Declaration, the Development and Construction Guidelines, the site development permits, building permits and fiscal deposited with the City of Austin, the approvals for the proposed regional storm-water detention pond, and P.U.D. zoning issued by the City of Austin, §10(a) permit issued by the U.S. Department of Fish and Wildlife any other licenses and permits with respect to the Property, third party warranties or guaranties, if transferable, any trade names, if transferable, used in connection with the Property, water rights, wastewater rights, utility rights and development rights associated with or appurtenant to the real property, including, without limitation rights to receive or install water and wastewater service from a governmental authority or utility company providing or regulating same, whether owned by Seller and/or allocable to the real property which allow for the development of the real property, and Seller’s right, title and interest in and to any and all of the confidential and Property Information divulged to Buyer pursuant to the terms of this Agreement, including but not limited to surveys, site plans, soil and substrata studies, water studies, environmental studies, renderings, plans and specifications, engineering plans and studies, landscape plans and other plans, diagrams or studies of any kind, if any, now or hereafter in Seller’s possession which relate, in whole or in part, to the real property; and
- (e) **Contracts.** The contract for the construction of the detention pond and other contracts related to the Property to be assigned by Seller to Buyer at Closing (the “**Contracts Related to the Property**”).

(collectively referred to herein as the “**Property**”). A schematic of the Property is attached as **Exhibit B** which is attached hereto and incorporated herein by reference for all purposes. Seller shall provide Buyer a listing of the Contracts related to the Property to be assigned by Seller to Buyer at Closing (and identified as such) to the best knowledge of Seller as part of the Property Information.

**ARTICLE 2  
PURCHASE PRICE**

**2.1 Purchase Price.** The “**Purchase Price**” of the Property shall be \$\_\_\_\_\_ and shall be payable in full at the Closing (hereinafter defined) in cash as described below in Article 7 of this Agreement.

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**ARTICLE 3**  
**ESCROW DEPOSIT AND INDEPENDENT CONSIDERATION**

**3.1     Escrow Deposit.**

**3.1.1     Deposits.** For the purpose of securing the performance of Buyer under the terms and provisions of this Agreement and as a condition precedent to the effectiveness of this Agreement, Buyer shall deliver to \_\_\_\_\_ Title Company (the "**Title Company**") at \_\_\_\_\_, upon Buyer's execution of this Agreement, the sum of \$50,000.00, (the "**Escrow Deposit**"), via either a cash deposit, wire transfer or cashier's check, which shall be held and distributed by the Title Company pursuant to the terms of this Agreement. Buyer shall deposit an additional sum of \$100,000.00 (the "**Supplemental Escrow Deposit**") with the Title Company, via either a cash deposit, wire transfer or cashier's check, on or before the expiration of the Review Period unless Buyer terminates this Agreement during said Review Period. Buyer shall deposit an additional sum of \$50,000.00 (the "**Approval Deposit**") with the Title Company, via either a cash deposit, wire transfer or cashier's check, upon the expiration of the Approval Period (as defined hereinafter).

**3.1.2     Non-refundable; Applicable to Purchase Price.** The Approval Deposit shall be nonrefundable in all events except the event of Seller's default under this Agreement and shall be credited against the Purchase Price at the Closing. The Escrow Deposit, the Supplemental Escrow Deposit, and the Approval Deposit shall be applied to the Purchase Price at the Closing subject to the other provisions contained herein.

**3.2     Terms of Escrow.**

**3.2.1     Account.** The Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit shall be deposited by the Title Company in interest bearing, federally insured accounts. For purposes of this Agreement, the terms "**Escrow Deposit**", "**Supplemental Escrow Deposit**", and "**Approval Deposit**" shall also include all interest earned thereon.

**3.2.2     Condition to Contract.** Notwithstanding any provisions contained herein or in any other document or instrument to the contrary, Buyer shall have no rights whatsoever under this Agreement until the Escrow Deposit has been delivered to the Title Company pursuant to the terms of this Agreement and the Title Company has signed this Agreement.

**3.2.3     Acceptance by Escrow Agent.** The Title Company must sign this Agreement as evidence that the Title Company agrees to be bound by the obligations contained herein with respect to the Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit. In the event the Title Company does not sign this Agreement, Buyer and Seller shall mutually and reasonably select another title company on or before the expiration of five days following written notice by either party to the other that said selection is required.

**3.3     Independent Consideration.**

**3.3.1     Purpose.** As a condition precedent to the effectiveness of this Agreement, Buyer shall deliver to Seller, upon Buyer's execution of this Agreement, the sum of \$100.00 (the "**Independent Consideration**"), via either a cash deposit, wire transfer, or cashier's check, as independent contract consideration paid to Seller for Buyer's option to terminate this Agreement as specifically set forth herein.

**3.3.2     Non-refundable.** The Independent Consideration shall be non-refundable in all events and shall not be credited against the Purchase Price at the Closing.

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**ARTICLE 4**  
**TITLE COMMITMENT AND OTHER MATTERS**

**4.1     Title Commitment.**

**4.1.1     Scope.** Within 15 days after the Effective Date (herein after defined), Seller, at Seller's sole cost and expense, shall cause the Title Company to produce and deliver to Buyer a commitment to issue a standard owner's policy of title insurance (the "**Title Commitment**") committing to insure fee simple title to the Property and an easement estate in any easements appurtenant to the Property as being vested in Buyer upon closing together with complete and legible copies (to the extent available from public records) of all exception documents applicable to the Property that are referred to in the Title Commitment (collectively with the Title Commitment, referred to herein as the "**Title Documents**"). The Title Commitment shall identify the particular tract out of the Property encumbered by each exception listed in **Schedule B**. The Title Company shall be requested to trace the ownership of any outstanding mineral interest and derivative instruments at the expense of the Buyer. The Title Commitment and the Title Documents shall be provided by the Title Company to the Surveyor for the Surveyor's use in preparation of the Survey. The Title Commitment shall be reissued and updated after review by the Title Company of the Survey and an inspection of the Property. The Title Company is directed by the parties not to make general exception for "**parties in possession**," "**roads**," "**tenants**," or "**visible and apparent easements**," but to only make specific exception for any such matter as is determined based upon the Title Company's inspection and/or review of the Survey. As to any blanket easement or mineral exception, the Title Company is requested pursuant to Rule P-39 to issue express insurance insuring the Buyer against loss due. The Title Company is instructed to issue to Buyer and Buyer's lender an insured services closing letter as permitted by Article 9.49 of the Texas Insurance Code.

**4.1.2     Review Period.** Buyer shall have a period of 15 days after receipt of the Title Commitment as revised by the Title Company based on its review of the Survey and an inspection of the Property, the Title Documents and the Survey to review same and to deliver to Seller, in writing (delivered both by fax and by mail), any objections Buyer may have to any matters contained therein. Buyer's failure to object to specific title and survey matters within the relevant time period and in the manner provided in this paragraph shall constitute a waiver of Buyer's right to object to such matters, and all title matters to which Buyer does not properly object shall be deemed waived, accepted and approved by Buyer, except as hereinafter provided.

**4.1.3     Cure Period.** In the event Buyer timely notifies Seller of any objections as provided above, Seller may, but has no obligation to, undertake to eliminate or modify any objectionable matters. In the event Seller does not eliminate such matters or otherwise satisfy Buyer's objections within the greater (the "**Cure Period**") of 10 days after receipt of such written notice ("**Seller's Minimum 10 Day Period**") or the 60 day Review Period hereafter provided in Section 5.1.1, Buyer shall have as its sole remedy the option either (i) to terminate this Agreement by giving written notice of termination to Seller within the later to occur of ten days after the end of the Cure Period, in which event the Escrow Deposit and the Supplemental Escrow Deposit, if any, shall be returned to Buyer, subject to Sections 4.2.2 and 4.3.3 or (ii) to have such objections be deemed waived, accepted and approved, as provided herein.

**4.1.4     Waiver of Objection.** If Buyer does not terminate this Agreement in accordance with the terms of Section 4.1.3, all uncured title objections and Buyer's right to terminate under this Section 4.1 shall be deemed to be waived for all purposes, and the Escrow Deposit and the Supplemental Escrow Deposit, if any, shall become non-refundable except as provided herein.

**4.1.5     Permitted Exceptions.** Notwithstanding the foregoing, all matters reflected on Schedule C of the Title Commitment, liens, assessments and items which are designated by the Title Company as matters to be satisfied at or prior to the Closing shall not constitute Permitted Exceptions, shall not be deemed approved or waived by Buyer and shall be discharged and satisfied by Seller at or prior to the Closing. The matters which are reflected on Schedule B of the Title Commitment and matters which are approved or deemed waived or approved by Buyer as provided herein are referred to herein as the "**Permitted Exceptions**".

#### **4.2     Survey.**

**4.2.1     Order.** Within 5 days after the Effective Date, Seller shall, at Seller's sole cost and expense, order a survey of the Property (the "**Survey**") from a licensed Texas surveyor to be selected by Seller who is acceptable to Buyer.

**4.2.2     Scope.** The Survey shall be addressed to Seller, Buyer, Buyer's lender and the Title Company and shall:

(1) locate and depict all visible or recorded easements and rights-of-way (including applicable recording data and easements appurtenant to the Property), encroachments, conflicts and protrusions affecting the Property;

(2) show all improvements located on the Property;

(3) contain a metes and bounds description of the Property and each of the tracts to be platted;

(4) set forth the gross square feet within the Property, and each of the tracts to be platted;

(5) show the approximate location of any portion of the Property situated within the 100 year flood plain as established by the most recent FEMA flood map that includes the Property;

(6) satisfy the requirements of a Category 1A Land Title Survey according to the specifications of the Texas Society of Professional Surveyors' Manual of Practice for Land Surveying in Texas, the current "**Minimum Standard Detail Requirements for Land Title Surveys**" jointly established by the American Land title Association ("**ALTA**") and the American Congress on Surveying and Mapping;

(7) show the location of all zoning, use and density classifications, noting any permitted grandfathered non-conformities, special use permits, variances or the like; and

(8) shall state that the Surveyor has reviewed the Title Commitment and each of the Title Documents, state that it satisfies the criteria established by the Title Company for the deletion of the Schedule B survey exception, and specifically identify the Title Commitment and reflect on the Survey the Title Commitment exception number/letter for each of the matters listed in Schedule B susceptible of location by Survey.

Any different or additional information not set forth above which is requested by Buyer to be included on the Survey shall be at Buyer's sole cost and expense. In the event this Agreement is terminated for any reason, except due to Seller's default, the cost of the Survey up to \$10,000.00 shall be deducted from the Escrow Deposit, the amount so deducted shall be paid to Seller, and the remaining Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit, if any, shall be distributed as provided in this Agreement, all subject to Section 4.3.3.

**4.2.3     Description.** The legal description of the Property contained in the Survey shall be incorporated herein, and the Agreement shall be deemed amended by the substitution of the legal description of the Property contained in the Survey. Notwithstanding the foregoing, if, at the time of the Closing, the platting process has been completed, then the lot and block legal description shall be used to convey that portion of the Property that has been platted.

#### **4.3     Seller Provided Information.**

**4.3.1     Property Information.** Within 10 days from the Effective Date, Seller shall deliver to Buyer a copy of tax bills including, but not limited to, property, personal, rental and special assessments for the years ending \_\_\_\_\_ and \_\_\_\_\_ and current tax appraisals; existing surveys, topographical maps and engineering studies of the Property; any and all information regarding condemnation notices, proceedings and

awards; any and all geotechnical, endangered species and environmental inspection reports; site plan studies; soils reports; and all other items related to the development of the Property, but only to the extent that the above-listed items are in Seller's possession and relevant to the ownership or operation of the Property (collectively, the **"Property Information"**).

**4.3.2 Non-Reliance.** Notwithstanding any provisions contained herein or in any other document or instrument to the contrary, with respect to the Property Information, Buyer acknowledges and agrees that (1) the information contained in the Property Information is general in nature and that there are variations as to environmental and soil conditions between portions of the Property, and from time to time, (2) Seller is providing the Property Information as an accommodation, and in no event shall Seller, its owners, affiliates, officers, employees or agents, be deemed to warrant that any information or theories contained in the Property Information are true, correct or complete, and any and all warranties, express or implied, with respect to the Property Information are hereby disclaimed, (3) Buyer shall be solely responsible for determining whether to rely on the information contained in the Property Information and (4) in no event shall Seller, its owners, affiliates, officers, employees or agents, have any liability to Buyer or to any other party relating to the soils conditions, the environmental conditions, the Property Information or the improvements to be constructed on the Property.

**4.3.3 Confidentiality.** The Property Information shall be delivered to Buyer in strict confidence and shall not be disclosed to any third parties, except such engineers and other professionals as necessary for Buyer to conduct its due diligence on the Property, without the prior written consent of Seller; provided, that Buyer shall also be entitled to disclose the Property Information without the consent of Seller: (a) as required by law, court order or subpoena; and (b) to Buyer's employees, architects, engineers, attorneys, lenders, partners, investors and other related parties in connection with Buyer's decision to purchase, planned development of or loan obtained in connection with the Property. Buyer hereby agrees that, to the extent Buyer discloses any Property Information to third party consultants such as engineers and other professionals (other than Buyer's legal counsels) assisting Buyer in conducting due diligence, Buyer shall obtain from each such third party an executed consultant confidentiality agreement in the form provided in Exhibit D, attached hereto and made a part hereof for all purposes, and Buyer shall promptly forward a copy of such executed consultant confidentiality agreement to Seller. Seller hereby agrees that Buyer, in the course of Buyer's due diligence and evaluation of the confidential information, may contact Seller's consultants for assistance with Buyer's evaluation of the confidential information. Seller agrees to request Seller's consultants to be fully cooperative with Buyer. Buyer is permitted to contact governmental authorities to make inquiries as to the status of any policy, permit or governmental regulation affecting the Property, and in so doing may note that Buyer is evaluating purchasing the Property or has contracted to purchase the Property.

In the event that this Agreement is terminated for any reason, Buyer shall return all Property Information to Seller within 15 days after termination. Delivery of the Property Information shall be a condition precedent to Buyer's right to receive a refund of the Escrow Deposit, the Supplemental Escrow Deposit, or the Approval Deposit as set forth herein. Buyer's obligation to return the Property Information to Seller shall survive any termination of this Agreement.

## ARTICLE 5 FEASIBILITY STUDY, INSPECTION AND APPROVAL PERIOD

### 5.1 Feasibility Study.

**5.1.1 Review Period.** Buyer shall have a period of 60 days beginning the day after the Effective Date (the **"Review Period"**) to review and study the Property and to determine whether or not the Property is suitable for Buyer's needs. Such review and study shall include all inspections, if any, obtained by Buyer pursuant to Section 5.2 hereof.

**5.1.2 Termination.** In the event Buyer determines in its sole opinion, for any or no reason, that the Property is not suitable for its needs and intended uses or Buyer does not desire to proceed with the acquisition of the Property, Buyer may terminate this Agreement by giving a written termination notice to Seller prior to the expiration of the Review Period. If such notice is delivered by Buyer to Seller within the Review

Period or if Buyer fails to deliver the Supplemental Escrow Deposit to the Title Company before the end of the Review Period, this Agreement will terminate, and the Escrow Deposit, the Supplemental Escrow Deposit, if any, and the Approval Deposit, if any, shall be returned to Buyer by the Title Company, subject to Sections 4.2.2 and 4.3.3, and neither party will have any further rights or obligations under this Agreement, except as otherwise expressly provided in this Agreement.

**5.1.3 Continuanace After Review Period.** Buyer's delivery of the Supplemental Escrow Deposit to the Title Company prior to the end of the Review Period is a condition precedent to this Agreement continuing in effect beyond the end of the Review Period. If the termination notice has not been delivered to Seller within the Review Period, and the Supplemental Escrow Deposit has been delivered by Buyer to the Title Company before the end of the Review Period, then this Agreement will continue in full force and effect, and the Escrow Deposit and the Supplemental Escrow Deposit shall become non-refundable for all purposes, except as otherwise provided in this Agreement.

**5.1.4 Waiver of Title Objections.** If this Agreement continues in effect as provided in Section 5.1.3 above, Buyer shall be deemed to have waived all rights to object to any title matters which Seller has not agreed and is not obligated to cure, as well as all rights, if any, to object to items delivered or made available to Buyer pursuant to Article 4, and all rights, if any, to object to matters discovered (or matters that could have, with reasonable diligence, been discovered) during the inspections, if any, obtained by Buyer pursuant to Section 5.2, and all such items and matters referenced earlier in this sentence shall be deemed accepted and approved by Buyer.

## **5.2 Inspection.**

**5.2.1 Entry.** During the Review Period, Buyer, at Buyer's expense, through its authorized agents, personnel, employees, independent contractors and consultants shall be entitled to enter upon the Property in order to make such inspections as it may deem necessary. Buyer shall give Seller not less than one business day notice of Buyer's intention to conduct such inspections and shall advise Seller of the identity of the firms and/or individuals authorized by Buyer to conduct such investigations and inspections. All investigations and inspections shall be conducted during reasonable business hours.

**5.2.2 Indemnification.** Buyer agrees to indemnify Seller and hold Seller harmless from any and all claims, demands, liabilities, damages and costs, including attorneys' fees arising out of or resulting directly or indirectly from any activity of Buyer pursuant to this Section 5.2.1.

**5.2.3 Survival.** Notwithstanding any provision of this Agreement to the contrary, the indemnity set forth in Section 5.2.2 shall survive the Closing or termination of this Agreement and shall not be subject to any limitation or liquidation of damages set forth herein.

**5.2.4 Restoration.** If the sale of the Property is not consummated, Buyer shall restore, or cause to be restored, the surface of the Property to as near the condition thereof, existing prior to any entry by Buyer, its agents, employees, contractors or representatives due to physical changes to the Property arising out of or caused by Buyer, its agents, employees, contractors or representatives, as may be practicable.

## **5.3 Infrastructure Improvements.**

**5.3.1 Cooperation.** During the Review Period, Buyer and Seller shall cooperate to plan and develop the Property.

**5.3.2 Regulatory Approvals.** Seller shall attempt to obtain approvals for the proposed regional storm-water detention pond by the Closing, and Seller is authorized to impose restrictive covenants, grant easements and take all other actions required by the City of Austin and any other regulatory authority in connection therewith, all of which restrictive covenants, easements and actions shall be deemed approved by Buyer and copies of which shall be supplied to Buyer within the Review Period. At the Closing, Seller shall assign to Buyer and Buyer shall assume all of Seller's rights and obligations in and to such approvals, if any. If, however, Seller does not obtain the approvals by the Closing, Buyer shall assume all of Seller's rights and obligations in and to the applications for such approvals and shall be responsible for completing the application

process, obtaining the necessary approvals for the proposed regional storm-water detention pond and completing the construction of such regional storm-water detention pond. At the Closing, Seller shall assign and Buyer shall assume all contracts relating to the storm-water detention pond.

**5.3.3 Ponds.** If Seller has funded any of the cost of designing, permitting, constructing and/or obtaining approvals for said proposed regional storm-water detention pond, then at the Closing, Buyer shall reimburse Seller for such costs not to exceed \$ \_\_\_\_\_ as provided in Article 7 herein.

#### **5.4 Approval Period.**

**5.4.1 Platting.** Seller shall have a period of time after the Effective Date in which to use commercially reasonable efforts to plat the Non-preserve Property (the "**Approval Period**"); however, such platting shall not be deemed a condition precedent to the Closing.

**5.4.2 Period.** The Approval Period shall commence upon the Effective Date and shall expire on the earlier of (i) the date that the plat approvals are obtained, or (ii) 50 days after the Effective Date.

**5.4.3 Election.** In the event Seller does not plat the Property prior to the expiration of the Approval Period, then Buyer, as its sole remedy, may elect either (i) to terminate this Agreement by giving a written termination notice to Seller prior to the expiration of the Approval Period, or (ii) not to terminate this Agreement and to assume, at the Closing, any and all of Seller's rights and obligations pertaining to such platting, and Buyer shall be solely responsible for completing such application process and obtaining all plat approvals.

**5.4.4 Termination.** If Buyer elects to terminate this Agreement, such notice shall be delivered by Buyer to Seller within the Approval Period in order for this Agreement to terminate, in which event the Escrow Deposit and the Supplemental Escrow Deposit, if any, shall be returned to Buyer by the Title Company, subject to Sections 4.2.2 and 4.3.3, and neither party will have any further rights or obligations under this Agreement, except as otherwise expressly provided in this Agreement.

**5.4.5 Continuance After Approval Period.** Buyer's delivery of the Approval Deposit to the Title Company prior to the expiration of the Approval Period is a condition precedent to this Agreement continuing in effect beyond the end of the Approval Period. If the termination notice has not been delivered to Seller within the Approval Period, and the Approval Deposit has been delivered by Buyer to the Title Company before the end of the Approval Period, then this Agreement will continue in full force and effect with Buyer assuming at the Closing responsibility and obligation for obtaining the plat approvals, and the Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit shall become non-refundable for all purposes, except as otherwise provided in this Agreement.

### **ARTICLE 6**

#### **SALE OF PROPERTY AS-IS, WHERE IS, WITH ALL FAULTS**

**6.1 NO WARRANTIES.** AS A MATERIAL PART OF THE CONSIDERATION FOR THIS AGREEMENT, BUYER ACKNOWLEDGES AND AGREES THAT EXCEPT FOR THE WARRANTIES OF SELLER'S DEED, SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO: (A) THE NATURE, QUALITY OR CONDITION OF SUCH PROPERTY, INCLUDING, WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY; (B) THE INCOME TO BE DERIVED FROM THE PROPERTY; (C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH BUYER MAY CONDUCT THEREON; (D) THE COMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY, INCLUDING, WITHOUT LIMITATION, THE ENDANGERED SPECIES ACT ("**ESA**") AND ANY FEDERAL, STATE, AND/OR LOCAL LAWS AND/OR REGULATIONS DESIGNED TO IMPLEMENT OR RELATED TO THE ESA; (E) THE HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF SUCH PROPERTY; OR (F) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY. WITHOUT



LIMITING THE FOREGOING, SELLER DOES NOT AND HAS NOT MADE ANY REPRESENTATION OR WARRANTY REGARDING THE PRESENCE OR ABSENCE OF ANY HAZARDOUS SUBSTANCES (AS HEREINAFTER DEFINED) ON, UNDER OR ABOUT SUCH PROPERTY OR THE COMPLIANCE OR NONCOMPLIANCE OF SUCH PROPERTY WITH THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, THE SUPERFUND AMENDMENT AND REAUTHORIZATION ACT, THE RESOURCE CONSERVATION RECOVERY ACT, THE FEDERAL WATER POLLUTION CONTROL ACT, THE FEDERAL ENVIRONMENTAL PESTICIDES ACT, THE CLEAN WATER ACT, THE CLEAN AIR ACT, THE TEXAS NATURAL RESOURCES CODE, THE TEXAS WATER CODE, THE TEXAS SOLID WASTE DISPOSAL ACT, THE TEXAS HAZARDOUS SUBSTANCES SPILL PREVENTION AND CONTROL ACT, ANY SO CALLED FEDERAL, STATE OR LOCAL "SUPERFUND" OR "SUPER LIEN" STATUTE, OR ANY OTHER STATUTE, LAW, ORDINANCE, CODE, RULE, REGULATION, ORDER OR DECREE REGULATING, RELATING TO OR IMPOSING LIABILITY (INCLUDING, WITHOUT LIMITATION, STRICT LIABILITY) OR STANDARDS OF CONDUCT CONCERNING ANY HAZARDOUS SUBSTANCES (COLLECTIVELY, THE "HAZARDOUS SUBSTANCE LAWS"). FOR PURPOSES OF THIS AGREEMENT, THE TERM "HAZARDOUS SUBSTANCES" SHALL MEAN AND INCLUDE, WITHOUT LIMITATION, (A) THOSE ELEMENTS OR COMPOUNDS WHICH ARE CONTAINED ON THE LIST OF HAZARDOUS SUBSTANCES AND/OR HAZARDOUS WASTES ADOPTED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE LIST OF TOXIC POLLUTANTS DESIGNATED BY CONGRESS OR THE ENVIRONMENTAL PROTECTION AGENCY OR DESIGNATED UNDER ANY HAZARDOUS SUBSTANCE LAWS; (B) ASBESTOS; (C) UNDERGROUND STORAGE TANKS, WHETHER EMPTY, FILLED OR PARTIALLY FILLED WITH ANY SUBSTANCE; (D) PETROLEUM AND PETROLEUM BASED SUBSTANCES; AND (E) ANY OTHER SUBSTANCE WHICH BY ANY REQUIREMENT OF ANY GOVERNMENTAL AUTHORITY REQUIRES SPECIAL HANDLING OR NOTIFICATION OF ANY GOVERNMENTAL AUTHORITY IN THE COLLECTION, STORAGE, TREATMENT OR DISPOSAL OF SUCH SUBSTANCE. BUYER FURTHER ACKNOWLEDGES AND AGREES THAT BEING GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, BUYER WILL BE PURCHASING THE PROPERTY PURSUANT TO ITS INDEPENDENT EXAMINATION, STUDY, INSPECTION AND KNOWLEDGE OF THE PROPERTY, AND BUYER IS RELYING UPON ITS OWN DETERMINATION OF THE VALUE OF THE PROPERTY AND USES TO WHICH THE PROPERTY MAY BE PUT, AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER. BUYER FURTHER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE PROPERTY WAS OR WILL BE OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE AND WILL NOT BE OBLIGATED TO MAKE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND SELLER MAKES NO REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION. THE OCCURRENCE OF THE CLOSING SHALL CONSTITUTE AN ACKNOWLEDGMENT BY BUYER THAT THE PROPERTY WAS ACCEPTED WITHOUT REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED (EXCEPT FOR THE WARRANTIES OF TITLE SET FORTH IN THE DEED), AND OTHERWISE IN AN "AS IS", "WHERE IS", AND "WITH ALL FAULTS" CONDITION BASED SOLELY ON BUYER'S OWN INSPECTION. THE ACKNOWLEDGMENTS AND AGREEMENTS OF BUYER SET FORTH IN THIS PARAGRAPH SHALL SURVIVE THE CLOSING AND SHALL NOT BE MERGED THEREIN. THIS ENTIRE PARAGRAPH SET FORTH IN CAPITALIZED TYPE HAS BEEN THE SUBJECT OF NEGOTIATION BETWEEN THE PARTIES TO THIS AGREEMENT, AND THE TERMS CONTAINED IN THIS PARAGRAPH HAVE BEEN BARGAINED FOR AND ARE A MATERIAL PART OF THE CONSIDERATION FOR THIS AGREEMENT. THE DEED, AND ANY OTHER CONVEYANCING DOCUMENTS, DELIVERED AT THE CLOSING SHALL CONTAIN DISCLAIMERS OF WARRANTY AND "AS IS" LANGUAGE AS SET FORTH ABOVE.

## ARTICLE 7 CLOSING

### 7.1 Closing

**7.1.1 Closing Date.** The "Closing" of this transaction shall occur at the office of the Title Company on the fifth day after the expiration of the Review Period, or at such other time, date and place as Seller and Buyer may mutually agree upon (which date is herein referred to as the "Closing Date").

**7.1.2 Extension.** Buyer may extend the Closing for one 45 day period by giving written notice to Seller and paying to Seller a non-refundable fee of \$50,000.00 before the end of the Review Period as consideration to Seller for the extension. The consideration which must be paid by Buyer in order to purchase the extension shall be non-refundable to Buyer in all events and shall not be credited against the Purchase Price at the Closing.

**7.2 Seller's Obligations.** At the Closing, Seller shall:

**7.2.1 Deed.** Deliver to Buyer 3 duly executed and acknowledged Special Warranty Deeds (from \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, respectively) conveying good and in defeasible title in fee simple to each entity's respective portion of the Property, each deed being substantially in the form attached hereto as **Exhibit C** and incorporated herein by reference for all purposes.

**7.2.2 Possession.** Deliver to Buyer possession of the Property.

**7.2.3 Title Policy.** Pay the Title Company the basic premium for a Texas Owner's Title Policy to be issued by the Title Company in Buyer's favor in the full amount of the Purchase Price, insuring Buyer's fee simple title to the Property, subject only to those title exceptions allowed under this Agreement, such other exceptions as may be accepted by Buyer, or deemed accepted by Buyer as provided in this Agreement, and the standard printed exceptions contained in the usual form of Texas Owner's Title Policy. Buyer shall pay the Title Company's fee for inspecting the Property and deleting the exception for rights of parties in possession in Schedule B of the Title Policy.

**7.2.4 Title Company Documents.** Execute and deliver such other documents as the Title Company may reasonably require in order to consummate the transaction contemplated under this Agreement.

**7.2.5 Costs.** Pay Seller's Closing costs and expenses, as described in Section 7.5.

**7.2.6 FIRPTA.** Execute and deliver an affidavit regarding FIRTPA compliance as described in Section 14.12 below.

**7.2.7 Commission.** Pay the commission costs of Duncan Commercial as provided by separate commission agreement.

**7.2.8 Fiscal Assignment.** Execute and deliver an assignment of all Seller's right and interest in Seller's cash fiscal deposits related to the Property held by any governmental entity, to the extent said cash fiscal deposits are reimbursed to Seller by Buyer.

**7.2.9 Assignments.** Execute and deliver one or more documents assigning, to the extent and in the manner allowed by law, any and all of Seller's rights and obligations in and under (a) the Confidentiality Agreements executed by Seller and Seller's Consultants and other persons, such as prospective Buyers, (b) the Contracts related to the Property (identifying with particularity each such Contract and the obligations being assumed), and (c) Intangible Property, including the Restrictive Covenants, the Declaration, the Development and Construction Guidelines, the PUD, the 10(a) Permit, the approvals for the proposed regional storm-water detention pond and all Contracts related to the Property.

**7.3 Buyer's Obligations.** At the Closing, Buyer shall:

**7.3.1 Price Paid.** Deliver to Seller the Purchase Price either in cash, by cashier's check, by wired funds or by other instruments or means acceptable to Seller in Seller's sole discretion not later than 2:00 p.m. on the Closing Date. Subject to Section 12.4 hereof, the Escrow Deposit, the Supplemental Escrow Deposit, and the Approval Deposit, if any, shall be applied to the Purchase Price at the Closing.

**7.3.2 Title Policy Endorsements.** Pay the Title Company the additional premium and the inspection fee for the deletion of the rights of parties in possession exception and the boundary survey exception, except for shortages in area, if desired by Buyer.

**7.3.3 Costs.** Pay Buyer's Closing costs and expenses, as described in Section 7.5.

**7.3.4 Title Company Documents.** Execute and deliver such other documents as the Title Company may reasonably require in order to consummate the transaction contemplated under this Agreement.

**7.3.5 Pond.** Pay to Seller the portion of the cost of the planning and development of the regional storm-water detention pond, not to exceed \$\_\_\_\_\_.

**7.3.6 Fiscal Replacement.** Reimburse or replace all Seller's cash fiscal deposits related to the Property held by any governmental entity.

**7.3.7 Bonds.** Replace all Seller's non-cash fiscal surety (Letters of Credit or Bonds) related to the Property held by any governmental entity.

**7.3.8 Assumptions.** Execute and deliver one or more documents assuming and accepting an assignment of any and all of Seller's rights and obligations under the Restrictive Covenants, the Declaration, the Development and Construction Guidelines, the PUD, the Permit, approvals for the proposed regional storm-water detention pond and all contracts related to the Property.

#### **7.4 Adjustments to the Purchase Price.**

**7.4.1 Items.** The following adjustments to the Purchase Price shall be made between Seller and Buyer and shall be prorated on a per diem basis as of the day of the Closing: real estate and personal property taxes, ad valorem taxes and other state, city, county or other governmental taxes, charges and assessments affecting the Property on the basis of the time for which the same are levied, assessed or paid (except for special assessments such as paving assessments, which are payable over multiple years; any such special assessments are not to be prorated but paid by Seller at Closing). If the rate of any such taxes, charges or assessments are not fixed before the date of the Closing, the adjustment thereof shall be on the basis of the rate for the previous year applied to the latest assessed valuation for each taxing authority. If, after the Closing, any adjustments made at the Closing pursuant to this Section 7.4 prove to be erroneous, then either party hereto who is entitled to additional monies shall invoice the other party for such additional amounts as may be owing, and such amounts shall be paid within ten days from the receipt of the invoice; provided, however, that Seller shall not be responsible for (and shall have no obligation to re-prorate taxes based upon) any increases in tax assessments based upon improvements to the Property which are made subsequent to the Closing Date.

**7.4.2 Rollback Taxes.** Seller shall be solely responsible for and shall pay all rollback taxes, penalty or interest associated therewith on the Property, if any, whether or not triggered by this sale of the Property or by Buyer's use of the Property after Closing. If the Property will be subject to rollback taxes, they shall either be paid at Closing and a full release obtained from the taxing authorities or an appropriately estimated amount shall be escrowed with the Title Company and the rollback tax and any associated penalties and interest paid to the taxing authorities at the earliest date that such amounts may be paid. Obligations of this Section shall survive Closing.

**7.5 Closing and Other Costs.** All costs and expenses of the Closing, and certain other costs associated with the sale and purchase of the Property, shall be borne and paid as follows:

**7.5.1 Escrow Fee.** The escrow fee, if any, charged by the Title Company shall be paid one-half by Seller and one-half by Buyer.

**7.5.2 Title Policy.** Fees for the Title Commitment and the Texas Owner's Title Policy shall be paid by Seller, exclusive of deletion of the boundary survey exception, except for shortages in area and any fees for inspecting the Property in order to delete the exception for rights of parties in possession, which shall be paid by Buyer.

**7.5.3 Filing Fees.** Filing fees for the deed, and any deed of trust and/or other financing documents shall be paid by Buyer. Filing fees for any releases of liens or similar documents shall be paid by Seller.

**7.5.4 Party's Own Expenses.** Except as otherwise expressly provided in this Agreement, each party shall pay any and all costs and expenses incurred by the respective party in connection with this Agreement and the transactions contemplated hereby, including, without limitation, attorneys' fees and expenses.

**7.6 Survival.** The agreements as to prorations, adjustments, reimbursements, replacements and so forth in this Article 7 shall survive the Closing and shall not be merged therein.

**7.7 Closing Statements.** Buyer and Seller acknowledge and agree that the Title Company shall prepare separate closing statements for each of \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ in connection with the portion of the Property being conveyed by each respective entity.

## **ARTICLE 8 REAL ESTATE COMMISSIONS**

Seller and Buyer hereby represent and warrant one to the other that neither party contracted with any real estate brokers, finders or other parties in connection with this transaction, other than \_\_\_\_\_, and that neither party has taken any action which would result in any real estate broker's, finder's or other fees being due and payable to any persons or entities other than \_\_\_\_\_ with respect to the transaction contemplated hereby. Each party hereby agrees to indemnify and hold the other harmless from any loss, liability, damage, cost or expense (including reasonable attorneys' fees) resulting to the other party by reason of the breach of this representation and warranty. At the Closing, Seller shall pay to \_\_\_\_\_ a commission as provided for by separate commission agreement between Seller and \_\_\_\_\_. Notwithstanding anything to the contrary contained in this Agreement, the indemnities set forth in this paragraph shall survive the Closing or termination of this Agreement.

## **ARTICLE 9 COVENANTS OF SELLER**

Between the Effective Date and the Closing, Seller shall:

**9.1 Maintenance.** Maintain the Property in its normal manner and in the ordinary course of its business;

**9.2 Discharge Liens.** Allow no liens or encumbrances to be imposed or exist on the Property that will not be paid or discharged at the Closing; and

**9.3 Notify as to Litigation.** Promptly advise Buyer in writing of any litigation initiated with respect to the Property of which Seller becomes aware.

## **ARTICLE 10 ACKNOWLEDGMENTS, REPRESENTATIONS**

### **10.1 Restrictive Covenants and Development and Construction Guidelines.**

**10.1.1 CC&Rs.** Buyer acknowledges that the Property is currently subject to the Declaration of Covenants, Restrictions and Easements (the "CC&Rs") recorded at Volume \_\_\_\_\_, Page \_\_\_\_\_ of the Real Property Records of Travis County, Texas.

**10.1.2 Guidelines.** Buyer further acknowledges that, pursuant to the CC&Rs, the Property is subject to the Development and Construction Guidelines promulgated in accordance with the CC&Rs. A copy of the Development and Construction Guidelines has been delivered to Buyer.

**10.1.3 Permitted Exceptions.** Buyer agrees that the CC&Rs, the Declaration and the Development and Construction Guidelines are Permitted Exceptions.

**10.1.4 Compliance.** Buyer further agrees to comply with the CC&Rs, the Declaration, and the Development and Construction Guidelines, including, but not limited to complying with all architectural controls contained within the CC&Rs and the Development and Construction Guidelines.

**10.2 Assignment and Assumption of Certain Rights and Permits.** At the Closing, Seller shall assign and Buyer shall assume and accept an assignment, to the extent and in the manner allowed by law, of any and all of Seller's rights and obligations under the CC&Rs, the Declaration, the Development and Construction Guidelines, the PUD and the Permit (as defined below). Additionally, Seller shall assign and Buyer shall assume and accept an assignment of all contracts related to the Property which have been provided to Buyer during the Review Period. Buyer and Seller agree to cooperate after the Closing to change the holder of the Permit from Seller to Buyer. Buyer and Seller will also perform all acts required or reasonably necessary under Federal regulations to effect the transfer of the Permit, including but not limited to preparing and filing a joint submission of Buyer and Seller with the U.S. Fish and Wildlife Service.

**10.3 Back-Up Contracts.** Notwithstanding any other provision herein, Buyer acknowledges and agrees that Seller may enter into one or more "**back-up contracts**" (i.e., a contract in which the buyer's rights and Seller's obligations are subject to the rights of Buyer pursuant to this Agreement) with other persons or entities for the sale of the Property or portions thereof.

**10.4 Planned Unit Development; Section 10(a) Permit.** Buyer acknowledges that the Property within an area that is subject to the Planned Unit Development and Conceptual Land Use Plan, City of Austin Case No. C \_\_\_\_\_ (the "**PUD**") and a Section 10(a) permit (the "**Permit**") issued by the U.S. Fish and Wildlife Service effective \_\_\_\_\_, 2004. All of Buyer's activities on the Non-preserve Property and the Preserve are subject to the terms and provisions of the PUD and the Permit, and Buyer covenants that it shall conduct its activities and shall cause its agents, employees and invitees to conduct their respective activities on the Property in compliance with the PUD and the Permit and in such a way that the PUD or the Permit is not violated or jeopardized. Buyer hereby indemnifies Seller, its agents, partners and employees and agrees to hold Seller, its agents, partners and employees harmless from and against any loss, damage, claim, cost or liability, including attorneys' fees, that Seller, its agents, partners or employees may incur or become subject to as a result of the breach of its covenant in the immediately preceding sentence. This indemnity and Buyer's other obligations under this Section 10.4 shall survive the Closing or the termination of this Agreement.

**10.5 Survivability.** The provisions of this Article 10 shall survive the Closing of this transaction and shall not be merged therein.

## ARTICLE 11 CONDEMNATION

In the event between the Effective Date and the Closing Date any condemnation or eminent domain proceedings are initiated which might result in the taking or damaging of eight acres or more of the Property, Buyer may, at its option and as its sole remedy, either (i) terminate this Agreement by giving written notice to Seller within ten days after Buyer receives notice of condemnation or eminent domain proceeding, in which event all rights and obligations of the parties hereunder shall cease, and the Escrow Deposit, the Supplemental Escrow Deposit, if any, and the Approval Deposit, if any, shall be returned to Buyer, subject to Sections 4.2.2 and 4.3.3, or (ii) waive this right of termination, proceed to the Closing, and either receive the condemnation proceeds or an assignment of Seller's right thereto.

## ARTICLE 12 DEFAULT AND REMEDIES

**12.1 Default by Seller.** In the event of a breach or default by Seller in the performance of its covenants under this Agreement (except as a result of a default by Buyer), and the continuation of such breach or default for ten days after written notice thereof has been given by Buyer and received by Seller ("**Notice and Cure Period**"), Buyer shall have the right, as its sole and exclusive remedy with respect to such breach or default, to terminate this Agreement by giving written notice thereof to Seller, whereupon neither party shall have any further rights or obligations under this Agreement except as specifically provided otherwise in this Agreement, and the Title Company shall deliver the Escrow Deposit, the Supplemental Escrow Deposit and

the Approval Deposit to Buyer (subject to Sections 4.2.2 and 4.3.3 above), unless Buyer elects (by giving written notice ("**Election Notice**") to Seller within 180 days after the expiration of the Notice and Cure Period and by filing a lawsuit for specific performance within such 180-day period), to enforce specific performance of Seller's obligations under this Agreement and accept such title as Seller is able to convey, in which event Buyer's pursuit of such specific performance remedy shall be Buyer's sole and exclusive remedy; provided, however, with respect to (A) any title exceptions which existed prior to the effective date of the Title Commitment and which are discovered by the Title Company for the first time after Buyer has received the Title Commitment, and (B) any title exceptions which arise after the effective date of the Title Commitment which are not caused by Seller, Seller shall reasonably cooperate with the Title Company in the elimination of such title exceptions (but shall not be required to incur costs or to institute litigation to eliminate said title exceptions), the Closing shall occur as scheduled, and said title exceptions (to the extent not eliminated) shall be additional Permitted Exceptions, unless Buyer, as its sole and exclusive remedy in lieu of the specific performance remedy provided above, terminates this Agreement by giving written notice to Seller by no later than the earlier of (i) five days after the Title Company or Seller gives Buyer written notice of such title exceptions, or (ii) the Closing Date, in which event Buyer shall receive a refund of the Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit (subject to Sections 4.2.2 and 4.3.3 above), and the parties hereto shall have no further obligation to each other except as otherwise expressly provided herein.

Notwithstanding the foregoing (i) Seller shall not be entitled to receive written notice and a ten-day opportunity to cure in connection with Seller's default in closing the transaction contemplated hereby on the Closing Date set pursuant to Section 7.1, and (ii) in case of such default by Seller in failing to timely close, the Election Notice must be given and any lawsuit for specific performance must be filed (if Buyer elects to pursue such remedy) within 180 days following the Closing Date provided for in Section 7.1.

Notwithstanding anything to the contrary contained herein, Buyer's failure to give the Election Notice and file a lawsuit for specific performance within the applicable time period set forth above shall constitute an irrevocable election by Buyer not to pursue its remedy of specific performance, in which event this Agreement shall automatically terminate and neither party shall have any further rights or obligations under this Agreement (except as otherwise expressly provided herein).

In no event shall Seller be liable to Buyer for damages (whether actual, speculative, consequential, punitive or otherwise) for a breach or default in the performance of Seller's covenants under this Agreement, except as provided in Section 12.3 below.

**12.2 Default by Buyer.** In the event that performance of this Agreement is tendered by Seller and the sale is not consummated through default by Buyer, then Seller, as Seller's sole and exclusive remedy, shall have the right to terminate this Agreement by giving written notice thereof to Buyer, whereupon the Title Company immediately shall deliver the Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit to Seller, free of any claims by Buyer, as liquidated damages, and neither party hereto shall have any further rights or obligations under this Agreement except as specifically provided otherwise in this Agreement. The Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit constitute a good faith estimate of actual damages that Seller would suffer and shall be liquidated damages for default of Buyer because of the difficulty, inconvenience and uncertainty of ascertaining Seller's actual damages for Buyer's failure to close this Agreement.

**12.3 Other Remedies.** If Seller willfully defaults in its obligation to close, then Buyer, in lieu of the specific performance remedy set forth in Section 12.1 above, shall be entitled to pursue actual damages caused by such default on the part of Seller (provided, however, the maximum liability of Seller for such damages shall be \$100,000.00 except in the case of Seller's default of Seller's covenant in Section 15.1 as to which there will be no maximum liability of Seller for such damages). Each party shall have the right to pursue a claim for any and all actual damages against the other party (i) for a breach of any covenant contained herein that is performable after or that survives the occurrence of the Closing, or (ii) for a breach of any representation or warranty made by the other party in this Agreement. In no event shall either party be liable for any speculative, consequential or punitive damages.

**12.4 Disbursement of Escrow Deposits.** Seller and Buyer expressly agree that notwithstanding any provisions contained herein or in any other document or instrument to the contrary, the Escrow Deposit,

the Supplemental Escrow Deposit and the Approval Deposit shall be disbursed by the Title Company to Seller at 5:00 p.m., Austin, Texas time, on the Closing Date if this Agreement shall not have been fully closed and funded (with "**collected funds**" at the escrow depository bank used by the Title Company) by such time, unless and only unless the failure to close and fund shall have been caused by Seller's default. Seller shall deliver to the Title Company and Buyer, on or after such time, a certificate stating that Buyer has defaulted under the terms of this Agreement and Seller is entitled to the Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit. All parties to this Contract expressly and irrevocably instruct the Title Company to make such disbursement of the Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit, without any other written authorization from any parties hereto, and all parties do hereby agree to indemnify and hold the Title Company harmless for making any disbursement in an attempt to comply with the provisions hereof. These indemnities shall survive the Closing or termination of this Agreement. Nothing in this Article 12 shall delay the Title Company in disbursing the Escrow Deposit, the Supplemental Escrow Deposit and the Approval Deposit as described in this Section 12.4, and the Title Company shall disburse those items in accordance with the terms of this Section 12.4 regardless of any notice and cure period contained herein.

**12.5 Attorneys' Fees and Costs.** In the event of litigation regarding this Agreement, the non-prevailing party shall be obligated and agrees to pay reasonable attorneys' fees and expenses incurred by the prevailing party, whether at the trial or appellate level. This provision shall survive the Closing or termination of this Agreement.

### ARTICLE 13 NOTICES

All notices, demands, requests, and other communications under this Agreement must be in writing and shall be deemed received on the date of delivery if delivered by hand or by facsimile to the party to whose attention it is directed and the sending telecopier generates confirmation of sending, or on the third business day if sent by registered or certified mail, return receipt requested, postage prepaid, or on the next day if by nationally recognized overnight courier service, addressed as follows:

If to Seller:

If to Buyer:

or such other address as either party hereto designates to the other in writing or not less than five days' advance notice.

### ARTICLE 14 MISCELLANEOUS

**14.1 Assignment of Agreement.** This Agreement may only be assigned by Buyer with Seller's prior written consent or in whole or in part to one of more entities of which Buyer is a participant. Any assignee of Buyer must expressly assume all of Buyer's liabilities, obligations and duties hereunder.

**14.2 Texas Law to Apply.** This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Travis County, Texas.

**14.3 Parties Bound.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

**14.4 Legal Construction.** In case anyone or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, this invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if the invalid, illegal or unenforceable provision had never been contained herein.

**14.5 Prior Agreements Superseded.** This Agreement constitutes the sole and only agreement of the parties and supersedes any prior understandings or written or oral agreements between the parties

respecting the within subject matter. This Agreement may only be amended by a written document, signed by both Seller and Buyer. This Agreement may not be amended orally.

**14.6 Time of Essence.** Time is of the essence in this Agreement, including but not limited to each and every time constraint and deadline imposed by the terms of this Agreement, together with the obligation of the parties to close the transaction contemplated by this Agreement on the Closing Date; provided, however, if any date specified herein or if the last date of any time specified herein is a Saturday, Sunday or national bank holiday, such date shall be extended to the next following date that is not a Saturday, Sunday or national bank holiday.

**14.7 Gender.** Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, and vice versa, unless the context requires otherwise.

**14.8 Recordation Prohibited.** In no event shall this Agreement or any memorandum hereof be recorded without the prior written consent of Seller, which may be granted or withheld in Seller's sole discretion and judgment, and any such recordation or attempted recordation shall constitute a breach of this Agreement by the party responsible for such recordation or attempted recordation.

**14.9 Compliance with Texas Real Estate License Act.** IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 20 OF THE TEXAS REAL ESTATE LICENSE ACT, Buyer IS HEREBY ADVISED THAT Buyer SHOULD BE FURNISHED WITH OR OBTAIN A POLICY OF TITLE INSURANCE OR Buyer SHOULD HAVE AN ABSTRACT COVERING THE PROPERTY EXAMINED BY AN ATTORNEY OF Buyer'S OWN SELECTION.

**14.10 Acceptance of Offer.** This instrument shall be regarded as an offer by Buyer to Seller, and shall be open for acceptance until 5:00 o'clock p.m., Central Time, on the date that is five days after Seller receives three executed copies of this Agreement from Buyer. This offer may be accepted by Seller only by the delivery of one executed copy of this Agreement to Buyer by the time specified for acceptance.

**14.11 Effective Date.** As used herein, the term "Effective Date" shall mean the date on which the Title Company acknowledges receipt of a fully signed copy of this Agreement and the Escrow Deposit.

**14.12 FIRPTA Compliance.** At the Closing, Seller shall deliver to Buyer, in recordable form, an affidavit prepared by Buyer's attorney and sworn to by Seller and all other persons and entities, if any, owning an interest in the subject property, under penalty of perjury, stating:

**14.12.1** The taxpayer identification number for Seller and for all persons and entities, if any, owning an interest in the Property; and

**14.12.2** That neither Seller nor any person or entity owning an interest in the Property is a foreign person within the meaning of the Foreign Investment in Real Property Tax Act, ("FIRPTA"), as amended by the Tax Reform Act of 1984; and

**14.12.3** That Buyer is not required to withhold any sums under FIRPTA, as amended by the Tax Reform Act of 1984, at the Closing.

**14.13 Authority.** Each party warrants and represents to the other that it is now and shall at the Closing be in good standing, fully authorized to do business in Texas, in compliance with all applicable laws, rules, and regulations, and fully licensed, authorized, and empowered to perform its respective rights and obligations under this Agreement without the need for further consent, approval, or ratification from any other person or entity.

**14.14 Treatment as Like-Kind Exchange.** Buyer and Seller acknowledge and agree that Seller or Buyer, as the case may be, may desire to have the Transaction as to a portion of the Property to Buyer qualify as a deferred like-kind exchange within the meaning of Section 1031 of the Internal Revenue Code of 1986, as amended. In such event, Seller or the Buyer, as the case may be, may effectuate a deferred like-kind



exchange through the use of an intermediary in the manner described in the appropriate Treasury Regulations. Buyer and Seller agree to cooperate in effectuating such a deferred like-kind exchange through the use of such an intermediary including consenting to an assignment of Seller's or Buyer's rights under this Agreement to an intermediary, with no liability or cost to the other party to this Agreement.

**ARTICLE 14**  
**DISPOSITION OF THE PROPERTY BY SELLER**

**15.1 General.** Notwithstanding any provision of this Agreement to the contrary, prior to the due termination or expiration of this Contract, Seller covenants that it shall not convey, assign, or lease the Property, or any part thereof, to any person or entity other than Buyer in a transaction that survives closing of the sale of the Property to Buyer; and this provision.

*[Execution and exhibits]*

**B.4****Escrow Agent's Receipt and Agreement**

Date: \_\_\_\_\_

Re: Sales Contract between \_\_\_\_\_ ("Seller") and \_\_\_\_\_ ("Buyer")  
 GF # \_\_\_\_\_ . Property: \_\_\_\_\_ .

**1. Earnest Money.** \_\_\_\_\_, as Escrow Agent hereby acknowledges receipt of check in the amount of \$\_\_\_\_\_, tendered as Earnest Money to be held by Escrow Agent in accordance with the terms and conditions of the referenced Sales Contract ("**Earnest Money**"). Escrow Agent does not assume and shall not incur any liability, implied or otherwise, as a result of any banking institution's dishonor of such check for any reason, or the performance or non-performance by any party to the Contract. If the check is dishonored for any reason after being deposited for collection, Escrow Agent may, at its option, notify all parties to the transaction of such dishonor, require that any replacement of the dishonored check be accomplished with a cashier check or deposit by wire transfer of funds, and collect any banking charges incurred by Escrow Agent as a result of such dishonor. The Earnest Money has been deposited into the general trust account maintained by Escrow Agent for use with escrow funds, which is a non-interest bearing account. Escrow Agent shall not be liable for any interest or other charge on the funds held and shall assume no liability for the funds until the check is cleared through regular channels of banking. Escrow Agent shall not refund or invest the funds until it has received collected funds into its escrow account.

IF BUYER SHOULD REQUEST OR THE CONTRACT REQUIRE THE EARNEST MONEY TO BE DEPOSITED INTO AN INTEREST BEARING ACCOUNT, ESCROW AGENT MUST BE CONTACTED AS ADDITIONAL REQUIREMENTS ARE NECESSARY, including execution of a Form W-9 and an Authorization to Invest Funds.

**2. Sales Contract.** Escrow Agent acknowledges receipt of a fully executed copy of the Sales Contract. Escrow Agent agrees to perform the duties of the Escrow Agent and Title Company, including disbursement of the Earnest Money strictly in accordance with the terms of the Sales Contract. If termination notice is given by Buyer, the Escrow Agent shall immediately return the Earnest Money to Buyer without the need for any approval by Seller, and even despite any potential objection by Seller, it being agreed that the Title Company may conclusively rely upon the certification by Buyer of its entitlement to the Earnest Money, and Seller's sole remedy, if the certification is incorrect, is against Buyer and not against the Title Company.

Seller: \_\_\_\_\_

Buyer: \_\_\_\_\_

\_\_\_\_\_ (initial)

**3. Insured Closing Services Letter.** Escrow Agent shall obtain from the title underwriter and furnish to Seller, Buyer an insured closing services letter within 10 days of the date of execution of this Agreement by Escrow Agent.

**4. Title Commitment and Exception Documents.** Escrow Agent shall furnish separate copies to Seller, Buyer, and their respective counsel of each Title Commitment, revision and update upon issuance thereof, and copies of the exception documents cited in the Title Commitment.

\_\_\_\_\_ [Title Company].

By: \_\_\_\_\_

**B.5****Assignment of Sales Contract****(Due Diligence Period - Free Look [or Non-Refundable Assignment Fee])**

\_\_\_\_\_ as Buyer ("**Assignor**") and the \_\_\_\_\_ as Seller ("**Seller**") executed that one certain Commercial Improved Property Earnest Money Contract ("**Contract**") for the sale to Buyer of the real property situated in \_\_\_\_\_ County described as \_\_\_\_\_ acres, located on \_\_\_\_\_ Drive in \_\_\_\_\_, Texas, together with all rights, privileges and appurtenances pertaining thereto (hereinafter referred to as the "**Property**"), a copy of which Contract is attached hereto as **Exhibit A**.

**A. Background**

1. **Escrow**. The Contract was receipted by \_\_\_\_\_ ("**Title Company**") on \_\_\_\_\_, 200\_\_\_\_, and the Contract in Paragraph \_\_\_\_ provides that such date is the effective date of the Contract ("**Contract's Effective Date**").

2. **Earnest Money**. Assignor deposited with the Title Company \$ \_\_\_\_\_ as the earnest money required by the Contract ("**Earnest Money**").

The Earnest has [not] been held in an interest bearing account.

[The Buyer has paid Seller \$ \_\_\_\_\_ as a non-refundable option fee (the "**Option Fee**").]

Assignor desires to assign to Assignee all of its interest as Buyer under the Contract, including

- (a) Buyer's interest in the Earnest Money [and the Option Fee,] and
- (b) Buyer's interest in the Title Commitment and in any surveys, inspection reports, soil tests, environmental audits, studies, warranties, rights, and permits obtained or to be obtained by Assignor under or in connection with the Contract (the "**Due Diligence Items**")

(the "**Assigned Contract Rights**"); and

3. **Assignment**. \_\_\_\_\_, a \_\_\_\_\_ ("**Assignee**") desires to acquire the Assigned Contract Rights and agree to assume all of Assignor's obligations under the Contract upon the terms and conditions and for the consideration herein expressed.

**B. Provisions**

NOW, THEREFORE, in consideration of \$10.00, the receipt and sufficiency of which is hereby acknowledged, and the further consideration of the parties' satisfaction of the terms and provisions described below, Assignor hereby assigns the Assigned Contract Rights to Assignee, and Assignee hereby agrees to assume all of Assignor's obligations under the Contract from and after the expiration of the Inspection Period, if Assignee has not terminated the Assignment during the Inspection Period (as defined below) upon the terms and conditions herein provided.

**1. Substitute Earnest Money.**

a. **Deposit Amount and Deposit Deadline**. Assignee is to deposit the sum of \$ \_\_\_\_\_ ("**Substitute Earnest Money**") together with an executed original of this Assignment of Earnest Money Contract ("**Assignment**") executed by Assignee with the Title Company prior to 5:00 p.m. C.S.T. \_\_\_\_\_, 200\_\_\_\_ ("**Deposit Deadline**").

The execution of this Assignment by the first party constitutes an offer to buy or sell the Assigned Contract Rights. Unless accepted by the other party by the Deposit Deadline the offer shall lapse and be null and void. The offer may be accepted by Assignee by Assignee's depositing with the Title Company an Assignment executed by Assignee together with a cash or check payable to the Title Company in the amount of the Substitute Earnest Money. The date that the Title Company receipts for this Assignment executed by both parties and the Substitute Earnest Money is referred to herein as the **"Effective Date of this Assignment."**

**b. Disposition of Substitute Earnest Money.** The Substitute Earnest Money shall be returned to Assignee, if the Assignment is terminated by Assignee during the Inspection Period (as defined herein) less the sum of \$\_\_\_\_\_ (**"Independent Contract Consideration"**). The Independent Contract Consideration is to be paid by the Title Company to the Assignor and retained by Assignor as independent consideration for Assignee's right to terminate this Assignment. If the Assignment is not terminated by Assignee during the Inspection Period, the Substitute Earnest Money will be substituted for the funds deposited by Assignor with the Title Company as Earnest Money and the funds deposited by the Assignor with the Title Company as Earnest Money together with any interest accrued thereon shall be released by the Title Company to Assignor.

The Substitute Earnest Money shall be deposited by the Title Company in an interest bearing account in a federally insured financial institution chosen by the Title Company and any interest shall be credited to Assignee.

## **2. Assignment Fee.**

**a. Amount and Deadline.** Prior to the expiration of the Inspection Period Assignee shall deposit the sum of \$\_\_\_\_\_ (**"Assignment Fee"**) with \_\_\_\_\_, Attorney at Law, acting as an escrow agent for this Assignment (**"Assignment Fee Escrow Agent"**). If Assignee fails to deposit the Assignment Fee with the Assignment Fee Escrow Agent as required by this Assignment, Assignee shall be deemed to have terminated this Assignment pursuant to Paragraph 3c hereof and the Assigned Contract Rights shall automatically revert to Assignor without requirement of notice to Assignee. The Assignment Fee is paid as cash consideration for the assignment of the Assigned Contract Rights and does not apply to the Sales Price of the Property.

### **Alternative Where Assignment Fee is Paid To Assignor's Agent Upfront.**

[Assignee shall deposit the sum of \$\_\_\_\_\_ (herein referred to as the **"Assignment Fee"**) with \_\_\_\_\_, Attorney at Law, acting as an escrow agent for this assignment (the **"Assignment Fee Escrow Agent"**) within 3 days of the Effective Date of this Assignment. If Assignee fails to deposit the Assignment Fee with the Assignment Fee Escrow Agent as required by this Assignment, Assignee shall be in default. The Assignment Fee is paid to Assignor and does not apply to the Sales Price of the Property. The Assignment Fee is consideration for the assignment by Assignor to Assignee of the Assigned Contract Rights.]

**b. Disposition of Assignment Fee.** Upon payment of the Assignment Fee to the Assignment Fee Escrow Agent this Assignment shall become final and unconditional and the Assignment Fee shall be paid by the Assignment Fee Escrow Agent to Assignor.

### **Alternative Where Assignment Fee is Paid To Assignor's Agent Upfront.**

**[b. Disposition of Assignment Fee.** If the assignment is terminated by Assignee during the Due Diligence Period, the Assignment Fee shall be returned by the Assignment Fee Escrow Agent to Assignee less the sum of \$\_\_\_\_\_ (the **"Independent Contract Consideration for the Termination Right"**). The Independent Contract Consideration for the Termination Right is to be retained by Assignor as independent consideration for Assignee's right to terminate this Assignment.

If the assignment is not terminated by Assignee during the Due Diligence Period, the Assignment Fee will be paid by the Assignment Fee Escrow Agent to Assignor and the interest accrued thereon shall be paid by the Assignment Fee Escrow Agent to Assignee.

**c. Interest on Assignment Fee.** The Assignment Fee is to be held by the Assignment Fee Escrow Agent in an interest bearing account in a federally insured financial institution chosen by the Assignee and any interest shall be for the account of Assignee.

**3. Escrow.** The Title Company and the Assignment Fee Escrow Agent are referred to as an “**Escrow Agent**” and the monies held by the Escrow Agent are referred to as the “**Escrowed Monies**.” If either party makes demand for Escrowed Monies held by Escrow Agent, the Escrow Agent has the right to require from all parties and brokers a written release of liability of Escrow Agent for disbursement of the monies held by the Escrow Agent. Any refund or disbursement of Escrowed Monies shall be reduced by the amount of unpaid expenses incurred on behalf of the party receiving the Escrowed Money, and Escrow Agent shall pay the same to the creditors entitled thereto. Demands and notices required by this paragraph shall be in writing and delivered by hand delivery or by certified mail, return receipt requested.]

**3. Inspection.**

**a. Inspection Period.** Assignee shall have the period (“**Inspection Period**”) from the Effective Date of this Assignment until 5:00 p.m. C.S.T. on \_\_\_\_\_, 200\_\_ to inspect the Property, to examine the Title Commitment and documents furnished or to be furnished by the Title Company, to conduct a survey of the Property, to review Assignor’s records as to the Property, and to undertake any other due diligence activities permitted under the Contract (“**Due Diligence Review Items**”).

**b. Extension of Inspection Period.** Assignee may extend the Inspection Period until 5:00 p.m. C.S.T. on \_\_\_\_\_, 200\_\_, upon payment to Assignor prior to 5:00 C.S.T. \_\_\_\_\_, 200\_\_ of \$\_\_\_\_\_ (“**Extension Fee**”). The Extension Fee is not refundable to Assignee even if Assignee terminates this assignment within the Inspection Period as extended. The Extension Fee is paid to Assignor and does not apply to the Sales Price of the Property.

**c. Termination.** During this Inspection Period Assignee, at its option, may terminate this Assignment. In the event Assignee elects to terminate this Assignment, then Assignee shall be entitled to the return of the Substitute Earnest Money (less the \$\_\_\_\_\_ Independent Contract Consideration) together with any accrued interest.

**d. Cooperation and Further Assurances.** Assignor will cooperate fully with Assignee to facilitate the inspection and review of the Due Diligence Review Items.

**e. Due Diligence Items in Assignor’s Possession.** Assignor shall immediately deliver to Assignee any Due Diligence Review Items, within Assignor’s possession. Assignee shall promptly deliver to Assignor all non-proprietary materials pertaining to the Property that Assignee obtains pursuant to the Contract. Assignor will authorize all persons which have provided services to Assignor in connection with the Property to disclose to Assignee all information gathered by such persons in respect to the Property, including surveyors, engineers and attorneys (“**Services Contracted for by Assignor**”). Assignor has not incurred any costs that are unpaid as of the date hereof for Services Contracted for by Assignor in respect of the Property, and Assignee does not assume any liability for the Services Contracted for by Assignor. Assignee may, if Assignee elects, independently contract for services with the same or other persons to provide services to Assignee under the Contract.

**4. Representations, Warranties and Covenants.**

**a. Assignor to Assignee.**

**(1) Modifications to Contract.** Assignor agrees not to modify or in any way alter the terms of the Contract without the prior written consent of Assignee.

(2) **Release of Seller.** Assignor agrees not to waive, excuse, condone or in any manner release or discharge the Seller of or from the obligations, covenants, conditions and agreements of Seller to be performed under the Contract.

(3) **Termination of Contract.** Assignor agrees not to terminate the Contract.

(4) **Performance of Contract.** Assignor agrees to abide faithfully by, perform and discharge each and every material obligation, covenant, and agreement of the Contract to be performed by Buyer to be performed prior to the expiration of the Inspection Period and shall obtain the Assignee's consent prior to exercising any elections or taking any actions.

(5) **Forwarding Notices.** Assignor agrees to send promptly to Assignee any notice or demand that Assignor receives from Seller.

(6) **Enforcement of Seller's Obligations.** Assignor agrees to vigorously enforce the obligations of the Seller under the Contract.

(7) **Assignor's Title.** Assignor represents and warrants to Assignee that Assignor has not assigned, pledged or otherwise encumbered the Assigned Contract Rights. No person other than Assignor has an interest in the Buyer's rights under the Contract. Assignor has the right, power and capacity to make this Assignment. This Assignment is valid, binding and enforceable against Assignor in accordance with its terms. The person signing this Assignment on behalf of Assignor is authorized to execute same on behalf of Assignor and Assignor's obligations under this Assignment do not require the consent of any other party and do not violate the provisions of any agreement to which Assignor is a party.

(8) **Status of Contract.** The Assignor has no actual knowledge that the Contract is not in full force and effect.

(9) **Complete Copy of Contract.** The copy of the Contract attached hereto as **Exhibit A** is a true, correct and complete copy of the Contract and the Contract has not been modified or amended in any respect, nor has any provision thereof been waived.

(10) **No Knowledge of Default.** Assignor has no actual knowledge that either Seller or Buyer is in default under the Contract.

(11) **Notice of Default by Assignor.** Assignor agrees to notify promptly Assignee of any notice of default by Assignor that Assignor receives.

(12) **Assignee Cure Rights.** Assignee is hereby given the right to undertake to cure any default by Assignor on the Contract.

(13) **Consent by Assignor to Assignment.** Assignor shall obtain Seller's consent for Assignor to assign the Assigned Contract Rights to Assignee prior to the Closing Date; provided, however, if Seller fails to give its consent to the assignment, then Assignor shall execute and deliver to Assignee prior to closing an irrevocable and unconditional special power of attorney in form satisfactory to the Title Company and Assignee (a form is attached as **Exhibit B** for consideration by the Title Company) for Assignee to act as Assignor's special agent to close the purchase of the Property in Assignor's name as provided in the Contract (except the Title Policy shall be waived in such transaction and Assignor shall receive a credit) in the amount of the premium for the unissued title policy and simultaneously Assignor (or Assignee acting pursuant to the special power of attorney) shall convey the Property to Assignee by deed in substantially the same form as executed by Seller upon the same terms as the Contract as if Assignor were the Seller and Assignee were the Buyer named therein and Assignor shall provide Assignee with an Owners Title Policy in the amount of the Sales Price under the Contract naming Assignee as the insured and in the form approved by Assignee pursuant to the Assignment.

(14) **Further Assignment by Assignee.** Assignee may assign its rights and obligations under this Assignment to a third party, but any such assignment shall not release Assignee, without obtaining the written release of Assignor.

(15) **Commissions.** No commission agreement exists as to Buyer's interest or the Property (other than such commissions as Seller may have contracted for, but as to which Buyer has no liability).

(16) **Status of Assignor's Due Diligence.**

(a) **Title Commitment.** *[Recite status of Title Commitment and status of objection notices given to Seller].*

(b) **Survey.** *[Recite status of Survey and status of objection notices given to Seller].*

(c) **Other Items.** *[Recite status of Due Diligence as to other Due Diligence Items and status of objection notices given to Seller].*

(d) **No Notice of Adverse Matters.** Assignor has received no notice that \_\_\_\_\_.

b. **Assignee to Assignor.**

(1) **Not Responsible for Contract Performance During Inspection Period.** Assignee is not liable to Assignor or to Seller to perform Buyer's obligations during the Inspection Period.

**Alternative**

[Assignee agrees to abide faithfully by, perform and discharge each and every material obligation, covenant, and agreement of the Contract to be performed by Buyer to be performed after the Assignment Closing Date.]

(2) **Forwarding Notices.** Assignee agrees to send promptly to Assignor any notice or demand that Assignee receives from Seller.

(3) **Binding.** This Assignment is valid, binding and enforceable against Assignee in accordance with its terms. The person signing this Assignment on behalf of Assignee is authorized to execute same on behalf of Assignee and Assignee's obligations under this Assignment do not require the consent of any other party and do not violate the provisions of any agreement to which Assignee is a party.

5. **Assignee's Dealings with the Seller.** Assignor authorizes Assignee to contact the Seller and the Title Company and obtain the Due Diligence Review Items from the Seller. Assignee shall furnish Assignor a copy of any Due Diligence Review Items it receives from the Seller or the Title Company, which have not already been furnished to the Seller. The Seller is not a third party beneficiary of the representations, warranties or covenants of the parties to this Assignment.

6. **Commission.** In the event Assignee, its successors and assigns, close the purchase of the Property, Assignee shall be responsible for payment of any real estate commission owing by Assignee to \_\_\_\_\_.

7. **Indemnity.**

a. **Disclaimer.** Assignor shall not be responsible for the discharge and performance of any duties or obligations to be performed and/or discharged in connection with the Assigned Contract Interests after the Assignment Closing Date.

**b. Assignor to Assignee.** Assignor agrees to perform all of the terms, covenants and conditions of the Contract prior to the Assignment Closing Date, but not after the Assignment Closing Date, and agrees to indemnify, save and hold harmless Assignee from and against any and all loss, liability, claims or causes of action existing in favor of or asserted by any person arising out of or relating to the Assignor's failure to perform any duties or obligations required by the owner of the Assigned Contract Rights prior to the Assignment Closing Date.

**c. Assignee to Assignor.** Assignee agrees to perform all of the terms, covenants and conditions of the Contract from and after the Assignment Closing Date, but not prior thereto, and agrees to indemnify, save and hold harmless Assignor from and against any and all loss, liability, claims or causes of action existing in favor of or asserted by any person arising out of or relating to the Assignee's failure to perform any duties or obligations required by the owner of the Assigned Contract Rights after the Assignment Closing Date.

**Alternative to Indemnity in Cases where Seller is to Release Assignor on Assignment Effective Date.**

[The Assignment is conditioned upon Seller releasing Assignor from liability on the Contract, which condition may be waived by Assignor upon such terms and conditions as Assignor may impose and Assignee may accept.]

**8. Default.** In the event any party hereto shall fail to fully and timely perform any of such party's obligations hereunder, the non-defaulting party may (a) enforce specific performance of this Assignment, (b) bring suit for damages and/or (c) exercise any other remedies it may have at law or in equity. The prevailing party in any litigation between any of the parties hereto shall be entitled to reasonable attorneys' fees and reimbursement for reasonable costs.

**9. Notice.** Notice may be given by the methods provided in the Contract to the parties hereto at the following addresses:

**Assignor:**

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas 78\_\_\_\_  
Phone: (\_\_\_\_)\_\_\_\_\_  
Fax: (\_\_\_\_)\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas 78\_\_\_\_  
Phone: (\_\_\_\_)\_\_\_\_\_  
Fax: (\_\_\_\_)\_\_\_\_\_

**Assignee:**

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas \_\_\_\_\_  
Attn.: \_\_\_\_\_  
Phone: (\_\_\_\_)\_\_\_\_\_  
Fax: (\_\_\_\_)\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_,  
A Professional Corporation  
\_\_\_\_\_  
\_\_\_\_\_, TX 78\_\_\_\_  
Phone: (\_\_\_\_)\_\_\_\_\_  
Fax: (\_\_\_\_)\_\_\_\_\_

**Assignment Escrow Agent:**

\_\_\_\_\_, Esq.  
\_\_\_\_\_  
Austin, Texas 787\_\_\_\_  
Phone: (\_\_\_\_)\_\_\_\_\_  
Fax: (\_\_\_\_)\_\_\_\_\_



**Title Company.** Notice may be given to the Title Company at the address provided in the Contract.

**10. Miscellaneous.**

- a. **Counterparts.** This Assignment may be executed in multiple counterparts.
- b. **Texas Law to Apply.** This Assignment shall be construed under and in accordance with the laws of the state of Texas.
- c. **Parties Bound.** This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns. This Assignment, including its representations, warranties and covenants, shall survive the Assignment Closing Date.
- d. **Legal Construction.** In case any one or more of the provisions contained in this Assignment for any reason shall be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Assignment shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.
- e. **Prior Agreements Superseded.** This Assignment constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the within subject matter.
- f. **Assignment of Contract.** This Assignment may be assigned by any of the Partition Parties. Such assignee shall expressly assume all of the assigning party's liabilities, obligations and duties hereunder.
- g. **Alternative Dispute Resolution.** If a dispute arises between the parties relating to whether a party has breached this Assignment or subsequent to the Effective Date of this Assignment [Assignment Closing Date] as to any matter arising out of this Assignment, then the parties agree to use the following dispute resolution procedures:
  - (1) **Meeting.** A meeting in \_\_\_\_\_, Texas, shall be held promptly between the parties, to attempt in good faith to negotiate a resolution of any dispute.
  - (2) **Mediation.** If the dispute is not resolved in the meeting, the parties agree to use the following mediation procedures:
    - (a) **Selection of Mediator.** If, within 10 days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will jointly appoint a mutually acceptable neutral person not affiliated with any of the parties (the "Neutral"), seeking assistance in such regard from the American Arbitration Association, if they have been unable to agree upon such appointment within 10 days from the initial meeting. The fees of the Neutral shall be shared equally by the Parties.
    - (b) **Procedure.** In consultation with the Neutral, the parties will select or devise a non-binding mediation procedure ("Mediation") by which they will attempt to resolve the dispute, and the time for the Mediation to be held, with the Neutral making the decision as to the procedure, and/or time, if the Parties do not agree as to such matters (but unless circumstances require otherwise, not later than 10 days after the selection of the Neutral).
    - (c) **Attempt to Resolve.** The parties agree to participate in good faith in the Mediation to its conclusion as designated by the Neutral. All meetings, Mediation conferences, and other proceedings shall be in \_\_\_\_\_, Texas, at such location as the Neutral shall designate.
  - (3) **Arbitration.** If the parties are not successful in resolving the dispute through Mediation, the parties agree that the dispute shall be settled by binding arbitration in accordance with the

Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. All meetings, arbitration hearings, and other proceedings shall be in \_\_\_\_\_, Texas, at such location as the arbitrator shall designate. The costs of the arbitration shall be allocated as determined by the arbitrator.

**(4) Provisional Remedies.** Without prejudice to the procedures specified in this Section a party may file a complaint for statute of limitations or venue reasons, or to seek a preliminary injunction or other provisional judicial relief, if in the party's sole judgment, such action is necessary to avoid irreparable damage or to preserve the *status quo*. Despite such action, the Parties will continue to participate in good faith in the procedures specified in this Section **10(g)**.

**(5) Waiver of Jury.** The parties waive the right to a jury trial in any litigation between the parties arising out of this Assignment.

**h. Expenses.** Except as otherwise provided in this Assignment, all fees, costs, and expenses incurred in negotiating this Assignment or completing the assignments described in this Assignment shall be paid by the party incurring the fee, cost, or expense.

**i. Amendments and Waivers.** The Assignment may not be amended except in a writing specifically referring to this Assignment and signed by all parties. A right created under this Assignment may not be waived except in a writing specifically referring to this Assignment and signed by the party waiving the right. Failure or delay on the part of a party in exercising any right, power or privilege under this Assignment will not operate as a waiver of any other right, power or privilege. Single or partial exercise of any right, power or privilege will not preclude further exercise of that right, power or privilege. All rights and remedies provided for in this Assignment are cumulative and are not exclusive of any rights or remedies that the parties may otherwise have. No waiver, modification, or discharge, or amendment of this Assignment will be valid without the signed consent of the parties against whom enforcement is sought, except as otherwise provided for in this Assignment.

**j. Captions; Neutral Interpretation.** All paragraph titles or captions in this Assignment and in any annexed exhibit or schedule referred to in this Assignment are for convenience only, and are not part of this Assignment, and do not affect the meaning of this Assignment. The provisions of this Assignment shall be construed as to their fair meaning, and not for or against any party based upon any attribution to such party as the source of the language in question.

**k. Governing Law; Forum.** THIS ASSIGNMENT SHALL BE CONSTRUED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND THE OBLIGATIONS OF THE PARTIES ARE AND SHALL BE PERFORMABLE IN \_\_\_\_\_ COUNTY, TEXAS EXCEPT THAT THE MEDIATION AND ARBITRATION PROVISIONS ARE PERFORMABLE IN TRAVIS COUNTY, TEXAS. BY EXECUTING THIS ASSIGNMENT, EACH PARTY HERETO EXPRESSLY:

**(1) CONSENTS AND IRREVOCABLY AND UNCONDITIONALLY SUBMIT TO THE NON-EXCLUSIVE JURISDICTION OF ANY TEXAS STATE COURT, OR ANY UNITED STATES FEDERAL COURT, SITTING IN THE \_\_\_\_\_ COUNTY OR \_\_\_\_\_ COUNTY, TEXAS, OVER ANY SUIT, ACTION OR PROCEEDING ARISING OUT OF THIS ASSIGNMENT;**

**(2) WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY CLAIM OR DEFENSE THAT SUCH VENUE IS NOT PROPER OR CONVENIENT; AND**

**(3) CONSENTS TO THE SERVICE OF PROCESS IN ANY MANNER AUTHORIZED BY TEXAS LAW.**

**ANY FINAL JUDGMENT ENTERED IN AN ACTION BROUGHT HEREUNDER SHALL BE CONCLUSIVE AND BINDING UPON THE PARTIES.**

**I. Counterparts.** This Assignment may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument notwithstanding that all Parties are not signatories to each counterpart.

**m. Legal Representation.** The parties acknowledge and agree that neither the firm of \_\_\_\_\_, P.C. nor any of its attorneys or employees represents or is an agent for the Assignor [or the Assignment Escrow Agent]. The parties acknowledge and agree that \_\_\_\_\_ does not represent and is not an agent for the Assignee.

[Execution and Acknowledgments]

### RECEIPT FOR ASSIGNMENT OF EARNEST MONEY CONTRACT AND SUBSTITUTE EARNEST MONEY

**1. Receipt.** On this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_, \_\_\_\_\_ Title Company acknowledges receipt of: (a) ☐ Assignment of Earnest Money Contract; and (b) ☐ Substitute Earnest Money in the form of \_\_\_\_\_.

**2. Title Commitment.** The Title Company agrees promptly to reissue its Commitment for Title Insurance naming Assignee as the proposed insured.

\_\_\_\_\_ Title Co., Escrow Agent

By: \_\_\_\_\_

### CONSENT TO ASSIGNMENT

**1. Assignment.** Seller consents and acknowledges notice of the assignment by \_\_\_\_\_ ("Assignor") to \_\_\_\_\_, its successors and assigns (the "Assignee") of the Assignor's rights as "Buyer" under the Commercial Improved Property Earnest Money Contract ("Contract") dated \_\_\_\_\_, 200\_\_\_\_, for the sale to Buyer of the property situated in \_\_\_\_\_ County described as \_\_\_\_\_ acres of land, more or less, together with any and all rights, privileges and appurtenances pertaining thereto (hereinafter referred to as the "Property").

**2. Title Company and Escrow Agent.** Seller consents to the Title Company and the Escrow Agent substituting Assignee as the Buyer on the Contract, and to the Escrow Agent transferring the earnest money deposit of \$\_\_\_\_\_ to the Title Company as successor Escrow Agent.

**3. Notice.** Seller acknowledges that the Buyer's attorney will be \_\_\_\_\_, and that any notices to the Buyer under the Contract are to be sent to the following addresses:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas 78\_\_\_\_  
Fax: (\_\_\_\_) \_\_\_\_\_

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas 78\_\_\_\_  
Attention: \_\_\_\_\_

---

Fax: (\_\_\_\_)\_\_\_\_\_

**4. Release of Assignor.** Seller agrees that Assignor shall be released from liability on the Contract upon closing under the Contract and delivery to Seller of receipted invoices for the survey and inspection services (including environmental inspections) obtained by Assignor and Assignee with respect to the Property.

**5. Further Assignment.** No further assignment of the Contract will be permitted, provided and except that Assignee may assign the Contract at closing to an entity owned by \_\_\_\_\_.

**6. Commissions.** Seller will pay only those real estate commissions provided, and to the persons named, in the original Contract. Assignor and/or Assignee shall be responsible for any and all other commissions.

**7. Special Conditions.** \_\_\_\_\_.

Dated as of \_\_\_\_\_, 200\_\_.

[Execution and Acknowledgment]

**B.6**

**Insured Closing Services Request Letter**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Telefaxed**

**Re:** Sale of the property (the "**Property**") described in the Sales Contract (the "**Sales Contract**")  
 by \_\_\_\_\_ ("**Seller**") to \_\_\_\_\_ (the "**Buyer**").  
 Title Co. GF # \_\_\_\_\_.

Dear \_\_\_\_\_:

On behalf of the Seller we request that you cause to be issued by \_\_\_\_\_ Title Company (the "**Underwriter**") an Seller Insured Closing Services Letter to provide fidelity coverage of funds handled by the closing agent(s) ("**Closing Agents**"), either or both: the addressee of this letter (the "**Title Company**") and \_\_\_\_\_, Esq., in the referenced transaction.

Yours very truly,

**C.1****Due Diligence Checklist****Contact List**

<b><u>SELLER:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____	<b><u>BUYER:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____
<b><u>COUNSEL FOR SELLER:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____	<b><u>COUNSEL FOR BUYER:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____
<b><u>BROKER:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____	<b><u>SURVEYOR:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____
<b><u>TITLE COMPANY:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____	<b><u>ARCHITECT:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____
<b><u>ENGINEER:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____	<b><u>ENVIRONMENTAL ENGINEER:</u></b>    Attn: _____ Phone: _____ Fax: _____ e-mail: _____

### Checklist

#### 1. Preliminary Site Information (Note: walk site/take photographs.

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
1.1	Site Location: - Address: _____ - Legal: _____				
1.2	Site Dimension: - Acres: _____ - Sq. Ft.: _____				
1.3	Project Name: _____				
1.4	Current Use: _____				
1.5	Previous Use: _____				
1.6	Surrounding Land Use/Zoning: - North _____ - South _____ - East _____ - West _____				
1.7	Transportation:				
	- Distance to Interstate Highways: _____ - Access: _____				
	- Road conditions: _____ - New roads required: Yes____; No____ - Road Improvement: Necessary____; Possible____; No____				
	- Rail Trackage: _____ - Traffic lights: _____				
1.8	Wetlands: - Does the site contain any designated wetlands? _____ - Describe the extent: _____ - Can the designated wetlands be eliminated? (How?) _____ - If not, can the designated wetlands be modified and/or mitigated? _____ - Agencies that must approve: _____				
1.9	Endangered Species: - Is the site a habitat for any endangered species or animals that must be accommodated? _____				
1.10	Sediment and Erosion Control: - State requirements, if any: _____ - Local requirements, if any: _____ (Note: Get copy of all ordinances)				

**2. Utilities**

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
2.1	Water Provider: _____ Is a letter of confirmation of services available? _____ Number of sources/back-up: _____ Currently delivered/available to site? _____ Yes _____; No _____ Size/capacity: _____ Cost responsibility to deliver: _____ Storage tanks required? Yes _____; No _____ Fire pump required: Yes _____; No _____ "Temporary" water supply available? _____ Yes _____; No _____ Conservation requirements: _____				
2.2	Electric  Provider: _____ Is a letter of confirmation of services available? _____ Currently delivered/available to site? _____ Yes _____; No _____ Cost responsibility to deliver: _____ "Temporary" water supply available? _____ Yes _____; No _____ Two-way feed: _____ _____ Existence of Electric Transformers: _____				
2.3	Gas Provider: _____ Is a letter of confirmation of services available? _____ Currently delivered/available to site? _____ Yes _____; No _____ Cost responsibility to deliver: _____ Two-way feed: _____				
2.4	Storm Provider (local): _____ Is a letter of confirmation of services available? _____ Currently delivered/available to site? _____ Yes _____; No _____ Grading/fill required? Yes _____; No _____ Cost responsibility to deliver: _____ Area in 100-year floodplain: Yes _____; No _____ Lift station required? Yes _____; No _____ Note: Existing catch basin or storm pipe: _____ Existing downspout locations: _____ Existing detention capacity: _____ Required detention capacity: _____				



#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
2.5	Sanitary Provider: _____ Is a letter of confirmation of services available? _____ Currently delivered/available to site? _____ Yes _____; No _____ Cost responsibility to deliver: _____ Waste restrictions: _____ Lift station required? Yes _____; No _____				
2.6	Communications: Provider: _____ Is a letter of confirmation of services available? _____ Currently delivered/available to site? _____ Yes _____; No _____ Cost responsibility to deliver: _____ Data capability: _____				
2.7	Telephone Service Provider: _____ Is a letter of confirmation of services available? _____ Currently delivered/available to site? _____ Yes _____; No _____ Cost responsibility to deliver: _____ Data capability: _____ (If a telephone vault is required, obtain design criteria.)				
2.8	Trash Removal Provider: _____ Cost responsibility: _____				

### 3. Planning

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
3.1	Soil Characteristics				
3.2	Subsurface Conditions <div style="margin-left: 20px;"> <input type="checkbox"/> Existing foundation  <input type="checkbox"/> Underground tanks  <input type="checkbox"/> Known dumps  <input type="checkbox"/> Rock  <input type="checkbox"/> Spring/water  <input type="checkbox"/> Standing water  <input type="checkbox"/> Abandoned utilities  <input type="checkbox"/> Pumps  <input type="checkbox"/> Cemetery </div>				
3.3	Special Foundation Requirements				

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
3.4	Restrictive Covenants/Requirements _____ Landscaping/Buffering _____ _____ Green Areas _____ _____ Screening _____ _____ Side walks _____ _____ Lighting _____ _____ Coverage _____ _____ Use (Permitted Use: _____ _____ Architectural Review Committee _____ _____ Parking requirements _____ _____ Signage _____ Storefront sign: - Maximum size: _____ - Separate sign permit required _____ Monument signage: - architectural control requirements _____ Pylon: - Maximum height: _____ - Maximum area per side: _____				
3.5	Unusual Regulatory Entities _____ _____				
3.6	Zoning Classification/Problems _____ _____				
3.7	Annexation Status				
3.8	Platting/Subdividing/Requirements and Process _____ _____ _____				
3.9	Encumbrances/Liens _____ _____ _____				
3.10	Easements Electrical: _____ Water: _____ Gas: _____ Sanitary/Sewer: _____ Communications: _____ Other: _____				
3.11	Expansion issues _____				

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
3.12	Historical Significance/Requirements _____				
3.13	Regional/Local Master Plan _____				
3.14	Environmental Impact Statement Required? Yes____; No____				

#### 4. Building/Construction

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
4.1	Building Department: Name/Title: _____ Address: _____ Telephone: _____ Fax: _____ e-mail: _____				
4.2	Cut and Fill/Retaining Walls Required? Yes____; No____				
4.3	Building Codes				
4.4	Permitting Requirements/Process/Timing - Process to obtain required approval _____ - Approximate time to accom plish a pprovals ____ _____ - Fees, assessments, reimbursables for previous work, etc. _____				
4.5	Fire/Life-Safety Requirements  ____ Exiting up to 500' ____ Draft curtains ____ Smoke ventilation ____ Separations/fire walls ____ Fire lanes/vehicle access ____ Sprinklering/FSFR ____ Storage tanks ____ Fire loop ____ Extra hydrants				
4.6	Health Department Approvals (are they needed?)  ____ Grease traps ____ Septic tanks ____ Wells ____ Swimming pools ____ Other: _____				
4.7	Trailer Storage Limitations				
4.8	Truck Maintenance Facility Restrictions				

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
4.9	Inspection Testing Issues				
4.10	Setback Requirements  Front _____ Rear _____ Left _____ Right _____				
4.11	Design Criteria:  ____ Pavement design ____ Curb and gutter ____ Other: _____				
4.12	Mechanical System Limitations				
4.13	Height Restrictions (Temporary/Permanent)  Exterior _____ Interior _____				
4.14	Special Requirements Regarding Product Types (Handling/Storage)				
4.15	Roof Screening Requirements				
4.16	Dock Doors Orientation/Screening				
4.17	Emergency Codes/Restrictions				
4.18	Traffic Signalization Requirements				
4.19	Development Fee Waivers				
4.20	Infrastructure Participations				

#### 5. Due Diligence Information to be Furnished by Seller

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
5.1	General information regarding the property				
5.1.1	Current rent roll				
5.1.2	Most recent appraisal				
5.1.3	Environmental/engineering and soils reports				
5.1.4	As-built plans and specifications				
5.1.5	Floor plans				
5.1.6	Termite inspection report				
5.1.7	Itemized inventory of all personal property				
5.1.8	Site diagram				

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
5.1.9	Evidence of compliance with applicable local, state and federal laws, including ADA regulations				
5.1.10	Copies of applicable local, state and federal regulations affecting the property				
5.1.11	Standard lease and deposit agreement (rental property)				
5.1.12	Copies of applicable rent control ordinances (apartment complexes)				
5.1.13	Copy of current leasing/marketing plan (rental property)				
5.1.14	Copies of historic and projected capital expenditures with supporting details for the last 5 years				
5.1.15	Copies of tax statements for the current year and for the last 5 years				
5.2	Copies of all existing contracts and agreements affecting the property, including:				
5.2.1	Brokerage agreement				
5.2.2	Management agreement				
5.2.3	Maintenance agreement				
5.2.4	Landscaping/grounds				
5.2.5	Pest control agreement and reports				
5.2.6	Water treatment				
5.2.7	Vending machines				
5.2.8	Coin-operated laundry (for apartment complexes)				
5.2.9	Alarm/security system				
5.2.10	Security/patrol				
5.2.11	Interior plants maintenance				
5.2.12	Phone/communication system				
5.2.13	Computer equipment				
5.2.14	Business occupational permit				
5.2.15	Other applicable state/local permits				
5.2.16	Fire and life safety				
5.2.17	Advertising				

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
5.2.18	Technical service agreements				
	With respect to rental property, also copies of the following documents and contracts:				
5.2.19	Leases				
5.2.20	Service contracts				
5.2.21	Advertising contracts				
5.3	Revenue Information for Rental Property				
5.3.1	Detailed annual operating statements for the last 3 years (and audited financial statements, if available)				
5.3.2	Monthly details of the annual operating statement for the previous year				
5.3.3	Current year's budget and year-to-day comparison				
5.3.4	Contracts/documentation relating to other income (such as lease cancellation/early termination, forfeited deposits, non-sufficient funds charges, application fees, delinquent/late rent charges, non-refundable deposits)				
5.3.5	Property status report (summarizes leasing and collection data)				
5.3.6	Property trend report (summarizes revenue item by month)				
5.3.7	Apartment status report (summarizes unit availability and current status), if applicable				
5.3.8	Lease expiration report (shows future lease expirations)				
5.3.9	Month-to-month report (shows details about tenants renting month-to-month)				
5.3.10	Occupancy and availability report				
5.3.11	Days vacant report				
5.3.12	Market rent deviation report				
5.3.13	Rent roll				
5.3.14	Scheduled concessions report				
5.3.15	Month-to-month deposit recap				
5.3.16	Cash receipts journal				
5.3.17	Security deposit control report				

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
5.3.18	Delinquency report				
5.3.19	Prepaid units report				
5.3.20	Income forecast report				
5.4	Expense Information for the Property				
5.4.1	Copies of all equipment leases and rental agreements				
5.4.2	Copies of all capital leases with payoff balances				
5.4.3	Copies of all operational contracts/service agreements (see list above)				
5.4.4	Property taxes/protests				
5.4.5	Tax Abatement Information				
5.4.6	Copies of recent utility bills on an ongoing basis				
5.4.7	On-site employees list with salary, date of hire and bonus information				
5.5	If still valid, obtain copies of all contractor's guarantee letters and equipment/construction warranties, and operating and maintenance manuals that would normally be transferred to a new owner.				
5.6	Existing Construction Documents				
5.6.1	Certified "as built" building plans and specifications				
5.6.2	A list of all changes made to building plans and specifications				
5.6.3	Copy of soil reports, compaction tests and concrete tests				
5.6.4	Civil engineer's signed and sealed steel structural report (if required by local code)				
5.6.5	Architect's Certification of Completion				
5.6.6	Certificate of seismic zone conformance from engineer or architect				
5.6.7	Health Department approval for facilities				
5.6.8	Fire Department approval of fire and life safety systems				
5.6.9	Elevator approval (if required by local code)				
5.6.10	HVAC approval (if required by local code)				
5.6.11	Plumbing approval (if required by local code)				

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
5.6.12	Electrical inspector's approval (if required by local code)				
5.6.13	Building Department's approval				
5.6.14	List of violations issued by the Building Department (if any)				
5.6.15	All zoning and other code variances granted				
5.6.16	Certificates of occupancy				

## 6. Environmental Matters

#	Description	Resp. Pty.	Rec'd	Apprv'd	Status
6.1	<ul style="list-style-type: none"> <li>- Phase I Environmental Report</li> <li>- Phase II Environmental Report</li> <li>- Reliance letters</li> <li>- Closure reports/certificates</li> <li>- Underground storage tank reports</li> <li>- Asbestos study</li> <li>- Remediation plan (if applicable)</li> <li>- Notices regarding environmental conditions/hazardous substance release</li> </ul>				



## C.2

### Deadlines Calendar

Time Period Due	Actual Date Done	#	Action
N/A	<b>Done:</b> 7/25/04	Page 20	<b><u>Contract Execution:</u></b> Parties execute.
Effective Date	<b>Done:</b> 7/26/2004 208 <sup>th</sup> day	Receipt Page 21 and separate Escrow Receipt and Notice to the Parties	<b><u>Escrow Opened:</u></b> executed original contract escrowed with title company on July 26, 2004; Escrow Deposit deposited on July 25, 2004.
60 days of Effective Date	<b>Done:</b> 07/26/2004	§3.02, p. 2	<b><u>Interest Bearing Escrow.</u></b> Title Company deposits Escrow Deposit in federally insured interest bearing account.
Earlier of (1) date plat approvals obtained or (2) 50 days of Effective Date [09/14/2004]	<b>Due:</b> 09/25/2004 [268 <sup>th</sup> day is Sunday 09/24/2004] <b>Done:</b> ----- <b>Due:</b> 09/14/2004 <b>Done:</b> 09/14/2004	§3.01 §5.04, p. 8	<b><u>Supplemental Escrow Deposit.</u></b> Deposit of \$100,000 with Title Company on or before expiration of Review Period.  <b><u>Approval Deposit.</u></b> \$50,000 to be deposited prior to expiration of Approval Period.
On Buyer's execution of Contract	<b>Due:</b> 07/25/2004 <b>Done:</b> 08/02/2004	§3.03, p. 3	<b><u>Independent Consideration:</u></b> \$100 Independent Consideration paid to Seller.

Time Period Due	Actual Date Done	#	Action
15 days of Effective Date of Contract	<b>Due:</b> 08/10/2004 223 <sup>rd</sup> day <b>Done:</b> 08/08/2004	§4.01(a), p. 3	<b>Title Commitment and Title Documents Delivered:</b> Title Commitment and copies of any instruments to be listed as Schedule B title exceptions (the "Title Documents") delivered to Buyer.
5 days of Effective Date  As soon as prepared	<b>Done:</b> 07/27/2004  <b>Done:</b> 08/28/2004	§4.02, pp. 4-5	<b>Survey Ordered:</b> Surveyor requested to prepare survey of Property.  <b>Survey Delivered:</b> Survey delivered to Buyer.
On or before 15 days after receipt of Survey and Title Documents	<b>Due:</b> 09/13/2004 <b>Done:</b> 09/13/2004	§4.01(b), p. 3	<b>Title and Survey Review:</b> Buyer may make objections to Seller regarding Title Documents and/or Survey. Objections to be sent by both fax and mail.
On or before 10 days after Seller's receipt of Buyer's objections.  Earlier of (i) 10 days after the expiration of the Cure Period or (ii) the expiration of the Review Period in which to terminate the Contract due to Seller's failure to cure objections.	<b>Due:</b> 09/23/2004 <b>Done:</b> -----  <b>Due:</b> 09/25/2004 <b>Done:</b> -----	§4.01(c), p. 3	<b>Cure Period:</b> Contract provides Seller with an optional Cure Period, commencing upon receipt of Buyer's title or survey objections and ending 10 days thereafter ("Cure Period").  <b>Termination Right:</b> In the event Seller elects not to cure Buyer's objections, Buyer has until the earlier of (i) 10 days after the expiration of the Cure Period or (ii) the expiration of the Review Period in which to terminate the Contract due to Seller's failure to cure objections. If Buyer does not terminate the Contract during this period, Buyer's objections are deemed waived.

Time Period Due	Actual Date Done	#	Action
On or before 5 days after receipt of Revised Title Commitment and Title Documents—Received on 9/15/2004	<p><b>Due:</b> 09/20/2004 <b>Done:</b> _____</p>	§4.01(d), pp. 3-4	<p><b><u>Period to Object to Additional Exceptions:</u></b> If any matter is inserted in Title Commitment after Seller provides Title Documents to Buyer, Buyer has 5 days to object in writing delivered both by fax and by mail.</p>
See §§4.01(c) and (d)	<p><b>Due:</b> _____ <b>Done:</b> _____</p>	§4.01(c)	<p>In the event Buyer timely notifies Seller of any objections as provided above, Seller may, but has no obligation to, undertake to cure the objectionable matters. In event Seller does not cure the objections, Buyer has the options described in §4.01(c).</p>
10 days of Effective Date	<p><b>Due:</b> 08/07/2004 <b>Done:</b> <u>yes</u></p>	§4.03, pp. 5-6	<p><b><u>Confidential Information.</u></b> Seller to deliver "Confidential Information" to Buyer.</p>
60 days of Effective Date	<p><b>Due:</b> Monday 09/25/2004 [268<sup>th</sup> day is Sunday 09/24/2004] <b>Done:</b> _____</p>	<p>§5.01, pp. 6-7</p> <p>§5.01(b), p. 6</p> <p>§5.02(a), p. 7</p> <p>§5.03, p. 7</p>	<p><b><u>Review Period:</u></b> Period for Buyer to undertake feasibility, inspections, studies and assessments of Property and contact governmental authorities</p> <p><b><u>Termination.</u></b> Buyer may terminate Contract by notice to Seller prior to expiration of Review Period.</p> <p>Same result occurs if Buyer does not post Supplemental Escrow Deposit with Title Company before end of Review Period.</p> <p><b><u>Inspection Notice.</u></b> Buyer must give 1 business day's notice of intention to conduct inspection.</p> <p><b><u>Pond.</u></b> Buyer and Seller cooperate to plan and develop the Land, including Seller attempting to obtain approvals for regional storm-water detention pond.</p> <p>Seller to provide to Buyer copies of any required restrictive covenants and easements and inform Buyer of requirements of City.</p>

<b>Time Period Due</b>	<b>Actual Date Done</b>	<b>#</b>	<b>Action</b>
Earlier to occur of (a) plat approvals obtained or (b) 50 days of Effective Date	<b>Due:</b> 09/14/2004 <b>Done:</b> _____	§5.04, pp. 7-8	<b><u>Approval Period.</u></b> Seller to use commercially reasonable efforts to obtain platting of Property.  Buyer may terminate Contract prior to earlier to occur of (a) plat approvals obtained or (b) 50 days after Effective Date.
On or before 5 <sup>th</sup> day after Review Period [5 days after 09/25/2004 falls on weekend, so Closing Date is next business day, Monday 10/02/2004]  On or before expiration of Review Period  On or before 45 days of Closing Date	<b>Due:</b> Monday 10/02/2004 276 <sup>th</sup> day  <b>Done:</b> _____  <b>Due:</b> 09/25/2004 <b>Done:</b> _____  <b>Due:</b> 11/16/2004 321 <sup>st</sup> day <b>Done:</b> _____	§7.01, p. 9  §7.01, p. 9	<b><u>Closing Date.</u></b>  <b><u>Extended Closing Option Date.</u></b> Option to extend Closing for 45 days by paying \$50,000 fee and giving notice to Seller.  <b><u>Extended Closing Date.</u></b>

**C.3**

**Title Objections Letter**

\_\_\_\_\_, 200\_\_

\_\_\_\_\_  
Escrow Agent  
\_\_\_\_\_  
Title Company  
\_\_\_\_\_  
Road  
Austin, Texas 787\_\_

**Federal Express - \_\_\_\_\_ Delivery**

\_\_\_\_\_  
[Seller's Attorney] **Federal Express - \_\_\_\_\_ Delivery**  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas 787\_\_

\_\_\_\_\_  
[Seller] **Federal Express - \_\_\_\_\_ Delivery**  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn.: \_\_\_\_\_

**Re:** Sale of the property (the "**Property**") described in or to be covered by the Sales Contract (the "**Sales Contract**") by \_\_\_\_\_ (the "**Seller**") to \_\_\_\_\_ (the "**Buyer**")  
Title Co. GF Number: \_\_\_\_\_

Dear \_\_\_\_\_:

**1. Our Client.** This Buyer's Title Objections Letter is being sent both by overnight delivery. Our Firm is counsel for \_\_\_\_\_ ("**Buyer**"), the buying entity which signed the Sales Contract as the Buyer. This Letter does not amend, waive or override the written Sales Contract between Seller and Buyer. The title objections made in this Letter may be amended, waived or overridden by us. The matters contained in this Letter does not waive or release Seller from its obligations on the Sales Contract.

**2. Enclosed.** Enclosed with this Letter is a copy of the Commitment for Title Insurance ("**Title Commitment**") issued by \_\_\_\_\_ Title Company (the "**Title Company**") for \_\_\_\_\_ (the "**Title Underwriter**") Effective Date \_\_\_\_\_, 200\_\_ at \_\_\_\_\_ a.m., and Issued Dated \_\_\_\_\_, 200\_\_ at \_\_\_\_\_ a.m., showing the record title holder to the Property as being in the Seller, subject to the matters set forth in Schedules A, B and C and the Terms and Conditions of the Title Commitment, and the Proposed Insured as being Buyer.

**3. Title and Survey Objection Periods.** The Sales Contract provides in ¶\_\_ that the Buyer is afforded until \_\_\_\_\_, \_\_\_\_\_, 200\_\_ to object to the status of title reflected in the Title Commitment and in ¶\_\_ until \_\_\_\_\_, \_\_\_\_\_, 2000 to object to the status of the Property reflected in the Survey.

**4. Survey.** The Buyer has not yet received the Survey, but anticipates receiving it prior to \_\_\_\_\_, 2000. Buyer reserves its right to object to any matter shown in the Title Commitment based on matters to be reflected by the Survey (e.g., omission of property from the Title Commitment, the location of easements, set back lines, encroachments or the detection of boundary line conflicts) such that Buyer may object to such matters prior to \_\_\_\_\_, 200\_\_ as reflected on the Survey to be received prior to \_\_\_\_\_, 200\_\_.

**5. Schedule A Objections.** The following objections are made to matters reflected in Schedule A to the Title Commitment:

**5.1 Item 2.** It appears from Schedule B that there are various easements appurtenant to the Property and that Item 2 needs to also cover these appurtenant easements. Therefore, objection is raised to the failure to state in Item 2 "easement estate" as to any item that turns out to be an appurtenant easement to the Property.

**5.2 Item 4.**

**(a) Omitted Property.** Objection is raised to the omission from the Item 4 of any tract of land that Buyer determines based on its review of the Survey that it thought it was purchasing that is not included within the description of the Property set out in Item 4. Specific objection is now raised for the failure of Item 4 to include as part of the Property being conveyed to Buyer and insured by the Title Policy to be issued at closing to the property conveyed to \_\_\_\_\_, recorded in Volume \_\_\_\_\_, Page \_\_\_\_\_, \_\_\_\_\_ County Real Property Records.

**(b) Failure to Describe by Plat Reference.** Objection is raised to the description of the Property as being acreage tracts to the extent it is determined that the any of such acreage descriptions are actually platted lots.

**(c) Appurtenant Easements.** Objection is raised to the omission from Item 4 of any easement appurtenant to the Property, including the Items listed in Schedule B, as Items 9\_\_ and 9\_\_, for example if the instruments reflected in such items create reciprocal easements.

**6. Schedule B Objections.** Objection is raised to the inclusion of the following Items as exceptions:

**6.1 Item 1, Item 9x:** Objection is raised to the following Items:

**(a) Volume , Page .** This appears to be applicable to property other than the Property.

**(b) Volume , Page .** This appears to be applicable to property other than the Property.

**6.2 Item 2 - Survey Exception.** Objection is raised/reserved to the inclusion of Item 2 as a general exception, and Buyer requires that the Title Company review the Survey once it is prepared and list any specific items that it will carry forward into the Title Policy by virtue of the deletion of Item 2 (except for the non-deletable portion of this Item "shortages in area" which may not be deleted under title insurance rules).

**6.3 Item 9x - Oil, Gas and Mineral Reservation.** Buyer objects to the failure of the Title Commitment and Title Policy to contain express insurance as is permitted by Texas Title Insurance Rules expressly insuring that no use may be made of the surface of the Property by the owner of the mineral estate so reserved in the instrument listed as Item 9x.

**6.4 Items not Limited by Designation in Schedule B as to the Tract Affected.** Objection is raised to the failure in Schedule B to designate as to the following Items which of the Tracts in Schedule A, Item 4 they relate to and once they are designated in a Updated, Revised Title Commitment, reservation is here made to object to the Items to the extent they are objectionable: Items 9 \_\_\_\_\_.

**6.5 Item 9x.** Objection is raised to Item 9\_\_ to the extent that any of the monies to be paid by the owner of the Property pursuant thereto have not been paid prior to closing.

**6.6 Item 9x - Lease.** Objection is raised to Item 9\_\_ to the extent that it is determined that the Seller is in default of its obligations under the lease as of closing.

**6.7 Items 9x.** Objection is raised to Items 9 \_\_\_\_\_ to the extent that it is determined that the Seller is in default of its obligations under any of these agreements as of closing.

7. **Schedule C Curative Items to Be Cured by Seller.** Objection is raised as to any matters on Schedule C to the Title Commitment that are items that are for the Seller to satisfy in order for the Title Company to issue the Title Policy to the extent Seller does not satisfy same (the "**Schedule C Curative Items to be Cured by Seller**") including:

7.1 **Seller's Authority.** [Items 5 and 6]. Providing to the Title Company satisfactory proof of the authority of the person signing on behalf of the Seller to bind the Seller.

7.2 **Subdivision Association Assessments.** [Item 8]. Providing the Title Company with proof that no unpaid assessments are owing against the Property.

7.3 **Legal Description.** [Item 7]. Providing the Title Company with a sufficient legal description of the Property.

7.4 **No Defect, Lien or Other Matter After Title Commitment.** [Item 4]. Curing any defect, lien or other matter that arises or is filed after the date of the Title Commitment.

7.5 **Curative.** [Item 2]. Providing the Title Company with evidence that:

(a) no person occupying the land claims any interest in that land against the person named in Item 3 of Schedule A;

(b) all standby fees, taxes, assessments and charges against the Property have been paid;

(c) all improvements or repairs to the Property are completed and accepted by the owner, and that all contractors, subcontractors, laborers and suppliers have been fully paid, and that no mechanic's, laborer's or materialmen's liens have attached to the Property that are not released as of closing; and

(d) there is legal right of access to and from the land.

8. **Additional Title Matters to be Delivered by Seller.** As a condition to closing you are to obtain the following documents (the "**Closing Documents to Be Delivered by Seller**"):

8.1 **Seller's Affidavits.** Affidavits of the following types of affidavit (which may be combined into one or more affidavits (the "**Seller's Affidavits**") as may be required to issue the Title Policy in form required by the Sales Contract and to close in the fashion required by the Sales Contract:

(a) **Non-Foreign Person Affidavit.** Affidavit attesting that the Seller is not a foreign person (the "**Non-Foreign Person Affidavit**").

(b) **Affidavits of Debts and Liens.** Affidavit in form acceptable to the Title Company by the Seller as to there not being "debts or liens" or other matters customarily covered by such form of title company required affidavit to issue the Title Policy to the Buyer (the "**Affidavits of Debts and Liens**").

(c) **Surveyor's Affidavit.** The affidavit of the Surveyor, at the expense of the Buyer, in form acceptable to the Title Company to delete the "Parties in Possession Exception", the "Roads Exception" and the "Visible and Apparent Easements Exception" from the Title Commitment and the Title Policy which deletion is to be based on an inspection of the Property undertaken for the Title Company (the "**Surveyor's Affidavit**").

(d) **Non-Production Affidavit.** The affidavit of such affiants as are acceptable to the Title Company to delete any exception to the Title Policy for oil and gas leases or term interests of record in \_\_\_\_\_ County, Texas (the "**Non-Production Affidavit**").

(e) **Affidavit as to Use and Possession.** The affidavit of such affiants as are

acceptable to the Title Company as to the use and possession of the Property to issue the Title Policy without the "Parties in Possession Exception", the "Roads Exception" and the "Visible and Apparent Easements Exception" or other similar use and possession exceptions (the "**Affidavits as to Use and Possession**").

## 8.2 **Insured Closing Service Letter.**

(a) **T-51.** A Form T-51 Buyer Insured Closing Service Letter signed by the Title Underwriter and Buyer covering the handling by the Title Company of the Settlement Funds (the "**Insured Closing Service Letter**") and acknowledged by telephone confirmation by the Title Underwriter that it has received in its offices a telefaxed copy of the Insured Closing Service Letter signed by the Buyer and that the Insured Closing Service Letter is in effect.

(b) **Escrow Account Auditor's Letter.** Letter from the Title Company's independent C.P.A. auditor stating that the Escrow Account and other interestbearing accounts opened in the name of the owner/beneficiary of the escrowed funds with the financial institution as the escrow agent are audited as required by the Texas Department of Insurance (the "**Escrow Account Auditor's Letter**").

(c) **Updated, Revised Title Commitment.** A currently dated and effective Title Commitment updated as of a time on the Closing Date prior to Closing and revised in accordance with these Buyer's Closing Instructions (the "**Updated, Revised Title Commitment**").

8.3 **Title Policy.** As of Closing, before the Title Company may disburse any of the Settlement Funds, the Title Company will need determine that it can as of closing issue to Buyer an Owner Policy of Title Insurance (the "**Title Policy**") in the form prescribed by the Texas State Board of Insurance and the Sales Contract, written by the same underwriter that issued the Title Commitment with an Issuance Date and Effective Date and time the same as the Closing Date, under the above-referenced GF number. The Owner Policy must be issued in accordance with the Title Commitment, except as follows:

(a) **Insured's Name.** The Insured under the Title Policy must read exactly as the Buyer's name is set forth in the Deed;

(b) **Effective Date.** The effective date and time of the Title Policy must be the date and time on which the Deed is filed of record;

(c) **Description.** The real property described in the Title Policy must be the same property described in the Deed and in the Survey of the Property;

(d) **Title.** Fee simple title to the real property described in the Deed must be shown by the Title Policy to be vested in the Buyer, and any easements benefitting the real property must be included in the description of the property insured by the Title Policy;

(e) **Survey Exception.** Item 2 of Schedule B of the Owner Policy, must be modified to read "shortages in area" only (the "**Survey Exception**") [referred to as "**Deletion of the Survey Exception**"] with the cost of the Deletion of the Survey Exception being paid for by the \_\_\_\_\_ and provided, however, if any specific exception is to be listed in Schedule B as a result of the Deletion of the Survey Exception, the Title Company must prior to Closing advise Buyer and us of the new specific exception.

(f) **Taxes Exception.** 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 200\_\_ and subsequent years, not yet due and payable (the "**Taxes Exception**");

(g) **Schedule B Exceptions.** The exceptions to title shown on Schedule B of the Owner Policy must include only the exceptions permitted herein (the "**Permitted Schedule B Exceptions**").

(h) **Schedule C Items Satisfied.** 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 ("**Schedule C Items Satisfied**").



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(i) **Parties in Possession Exception and Visible and Apparent Easements Exception.** There must not appear in the Updated, Revised Title Commitment or the Title Policy any exception for:

(a) **Parties in Possession Exception.** "Parties in possession" (the "Parties in Possession Exception").

(b) **Visible and Apparent Easements Exception.** "Visible and apparent easements" (the "Visible and Apparent Easements Exception").

(j) **Inspection Exception.** There must not appear in the Title Policy any matter which would be revealed by an inspection of the Property conducted by the Title Company or its agent or contractor, if an inspection is or would be made by the Title Company, its agent or contractor (the "Inspection Exception"). If the inspection reveals matters that are to be listed in the Title Policy, then these matters must be disclosed to Buyer and us and to Seller and Seller's Counsel before the Settlement Funds are deposited with the Title Company and must be approved in writing before the request for the wire transfer.

Buyer reserves its right to make further objection on or before \_\_\_\_\_, 200\_\_ as to title matters. If you have any questions regarding any aspect of this transaction, please call us at your earliest opportunity.

Sincerely,

**C.4****Reliance Letter**

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Re: Reliance Letter: Acquisition of \_\_\_\_\_ ("**Property**")

Gentlemen:

The undersigned has provided certain consulting services and information to \_\_\_\_\_ ("**Client**"). Our client entered into a Sales Contract to purchase the referenced Property; the undersigned understands that all rights of Buyer under the Sales Contract have been assigned to you, and that you are acquiring the referenced Property. This letter shall confirm that you shall be entitled to use and rely upon the consulting services and information provided by the undersigned to our Client. Such services and information are summarized on the attached Schedule.

Sincerely,

**C.5****Closing Checklist****1. Title Commitment and Title Policy.**

#	Title Commitment	Comments
1	<b>Updated Title Commitment</b>	<b>Delivery.</b> Updated, revised Title Commitment must be delivered to Buyer before closing day.
1.1	<b>Schedule A</b>	<b>Assignee.</b> Change insured to name of new Buying Entity
		<b>Description.</b> Property description to be the description as now being revised by the Surveyor
1.2	<b>Schedule B</b>	
1.2.1	<b>Survey Exception</b>	<b>Expense.</b> Item 2 to be deleted at [Seller's] [Buyer's] expense.
		<b>Title Company Review Existing Survey.</b> Have Title Company review existing survey to determine if it has any requirements at this point—have it approve current survey as acceptable for this purpose.
		<b>Title Company Review of Revised Survey.</b>
		<b>Survey.</b> Have survey revised to reflect the following:
		<b>[a] Refer to Title Commitment.</b> GF # of Title Commitment and Title Commitment Date.
		<b>[b] Certificate Addressed to Title Company.</b> Have Certificate be addressed to Title Company and its underwriter.
		<b>[c] Certificate Addressed to Buyer and Lender.</b> Have Certificate be addressed to Buyer and Lender.
1.2.2	<b>Taxes Exception</b>	<b>Schedule B.</b> (Schedule B, Item # 5).
		<b>Worksheet.</b> Have Title Company furnish a worksheet as to how they have calculated the tax proration. Address issue of Property being part of a larger tax parcel and without separate tax account number. Determine if size of land is understated on tax rolls. Determine if tax rolls do not include all improvements on Property.
		<b>Title Certificates.</b> Have Title Company furnish pre-closing a copy of the Tax Certificates issued by the Tax offices for each taxing jurisdiction.
		<b>New Tax Account No.</b> Contact Tax Authorities to set up new separate tax account nos. for this tract. Determine if there will be any problem in doing this.

#	Title Commitment	Comments
		<b>Open Space/Ag Tax Exemption.</b> Determine the basis under which the property is being taxed. Does the Buyer need to file any forms with the Tax Authorities to qualify for the Exemption that is currently on the property? Address tax roll back and parties' liabilities post-closing if roll back will occur post closing. (See <b>Tab D6</b> for Roll Back Escrow Agreement).
1.2.3	<b>Leases</b>	<b>Objection.</b> (Schedule B, Item s 9__ : "Rights of tenants under leases"). Exception must be deleted or identified and reference limited to specific tenants as shown on rent roll.
1.2.4	<b>Parties In Possession and Visible and Apparent Easements General Exceptions</b>	<b>Inspection.</b> (Schedule B, Item 9__ ). Require the Title Company to make an inspection of the Property as of closing and reissue a revised Title Commitment.
		<b>Title Company to Identify Requirements to Delete General Exception.</b> Ask the Title Company to identify its requirements to delete this exception.
		<b>Pre-Closing Title Company Inspection.</b> If it involves inspecting the Property, then ask that the Title Company pre-closing inspect the Property and identify to parties what matters it will continue to list as exceptions based on its inspection.
		<b>Further Requirements.</b> The Title Company needs to list what actions will be needed to delete the exceptions it makes based on its pre-closing inspection (e.g., affidavit of the Seller, etc.).
		<b>Process.</b> Determine the process involved in the inspection and make arrangements for the inspection.
		<b>Cost.</b> Have Title Company identify the cost and who is to undertake the inspection.
		<b>Roads.</b> Have Title Company specifically confirm that it will not make a general exception for "roads" and that it is obtaining from Seller whatever documentation (e.g., affidavits) to insure that there is not access across the Property by adjoining neighbors using existing roads that will survive closing.
1.3	<b>Schedule C</b>	
1.3.1	<b>Actions</b>	<b>Checklist of Title Company Requirements.</b> Identify actions to resolve and delete conditions to Title Policy issuance.
1.3.2	<b>Title Company Sign Off</b>	<b>Agreed Course of Action.</b> Determine acceptance of each such actions with Title Company prior to closing and funding.

#	Title Commitment	Comments
1.3.3	<b>New Entity</b>	<b>Entity Matters.</b> Determine Title Company Schedule C requirements related to new entity.
1.3.4	<b>Resolutions of Seller</b>	<b>Title Company Review.</b> Have Title Company review all resolutions or other authorizations for entities to sign closing documents.
		<b>Buyer Review.</b> Have Title Company/Seller(s) provide Buyer with a copy of each proposed resolution before the pre-closing for its review and approval.
1.3.5	<b>Resolutions of Buyer/Buyer's Assignor</b>	<b>Title Company Review.</b> Have Title Company review all resolutions or other authorizations for entities to sign closing documents.
		<b>Seller/Lender Review.</b> Provide Seller and Lender with a copy of each proposed resolution before the pre-closing for their review and approval.

## 2. Survey.

#	Item	Comments
2.1	<b>Certificate</b>	<b>Addressees.</b> Surveyor's certificate addressed to Title Company, Title Underwriter, Seller, Buyer and Lender.
2.2	<b>Items Addressed</b>	
2.2.1	<b>Title Policy</b>	<b>Sign Off.</b> Verify acceptance by Title Company and use in Title Policy.
		<b>Schedule B Exceptions Depicted.</b> Locate all Schedule B exceptions and reference by recording info and title commitment exception number.
2.2.2	<b>Flood Plain Classification</b>	<b>Verify Classification.</b> Review Surveyor's certificate as to flood plain classification.
2.2.3	<b>Lender Approval</b>	<b>Verify.</b> Verify acceptance by Lender.

## 3. Insurance.

#	Item	Comments
3	<b>Certificate</b>	<b>Approving Parties.</b> Verify certificate of insurance is in form acceptable to Lender. (See <b>Tab E.3.5.1-5 - Certificate of Insurance</b> ).
3.1	<b>Approved Issuers</b>	<b>Rating.</b> Verify acceptable Best Rating.
3.2	<b>Approved Coverages</b>	
3.2.1	<b>Lines</b>	<b>Property.</b>
		<b>Liability.</b>

#	Item	Comments
		<b>Rent Loss.</b>
3.2.1	<b>Additional Insured/Mortgagee</b>	<b>Owner.</b> Owner and its partners and principals specifically listed.
		<b>Lender.</b>
		<b>Manager.</b>
3.2.2	<b>Waiver of Subrogation</b>	<b>Released Parties.</b> As to Owner and its partners and principals (each specifically referenced).
3.2.3	<b>Certificate Holder</b>	<b>Designated Persons.</b> Certificate Holder designation is different than being named as additional insured or mortgagee in Certificate of Insurance.

#### 4. Due Diligence Approvals.

#	Items	Comments
4.1	<b>Termite Inspection</b>	
4.2	<b>Inspection</b>	
4.2.1	<b>Building</b>	
4.2.2	<b>Personal Property</b>	<b>FF&amp;E.</b>
		<b>Supplies.</b>
4.2.3	<b>Environmental Audit</b>	
4.3	<b>Reliance Letters</b>	<b>Addressees.</b> Letter from each inspector to Client, Other Party & Lender (" <i>Reliance Parties</i> ") confirming that they may rely upon Report.
4.4	<b>Local Law Search</b>	
4.4.1	<b>Zoning</b>	<b>Zoning Comfort Letter.</b> City letter addressed to Client and Lender.
		<b>Ordinance.</b> Copy of Ordinance as to Property.
		<b>Zoning Map.</b>
4.4.2	<b>Building Code</b>	<b>Code Comfort Letter.</b> City letter addressed Buyer and Lender.
		<b>Certificate of Occupancy.</b>
		<b>Other Permits.</b>
		<b>[1] Swimming Pool.</b>
		<b>[2] Signage.</b>
4.4.3	<b>Utilities</b>	<b>Waste Water Discharge.</b> LUEs.

**5. Inventory.**

#	Items	Comments
5.1	<b>Personal Property</b>	<b>Pre-Closing.</b> Inventory of all furniture, fixtures, equipment and supplies being sold to Buyer.
		<b>Confirmation as of Closing.</b> Confirmation at closing that all Personal Property is in good working order and at site.
5.2	<b>Service Contracts</b>	
5.2.1	<b>Laundry</b>	
5.2.2	<b>Cable</b>	
B.2.3	<b>Security</b>	
B.2.4	<b>Trash</b>	
B.2.5	<b>Management</b>	

**6. Project Bank Account.**

#	Item	Comments
6.1	<b>Establish Account</b>	<b>Signature Card.</b> Provide evidence that a Bank account has been set up in the buying/borrowing entity's name. If a bank statement is not available by loan closing, then have the Bank provide a letter addressed to Lender acknowledging the existence of the account (attach a copy of the signature card).
6.2		<b>Resolutions.</b> Adopt bank account resolution.

**7. Organizational Documents.**

#	Item	Comments
7.1	Certified Resolution Approving the Sale Seller's Partnership Consent	

#	Item	Comments
7.2	Seller's Organization Documents  - Articles of Incorporation and Bylaws or Articles of Organization/Certificate of Organization and Operating Agreement/Regulations - Partnership Agreement - Certificate of Limited Partnership - Assumed Name Certificate	
7.3	Copy of deed into Seller	
7.4	Certificate of Existence (Domestic corporation) Certificate of Authority to Transact Business (Foreign corporation)	
7.5	Certificate of Good Standing/Account Status	
7.6	<b>Lender Approval</b>	<p><b>Provide to Lender.</b> Provide all organizational documents to the Lender, including preparing resolutions and assignment of the contract to the new entity being formed to close the purchase of the Property.</p> <p><b>Single Purpose Entity Provisions.</b> Obtain approval by Lender of organizational documents (e.g., single purpose entity provisions required by Lender).</p>
7.6	<b>Assignment</b>	Assignment from Contract Buyer to Buying Entity.
7.8	<b>Certificates</b>	
7.8.1		<b>Certificate of Good Standing.</b> Comptroller.
7.8.2		<b>Certificate of Existence.</b> Secretary of State.

## 8. Loan Closing Requirements.

#	Item	Comments
8.1	<b>Fee</b>	<b>Payment.</b> Commitment fee and all other fees paid to Lender.
8.2	<b>Legal Opinion Approval by Lender.</b>	<b>Form.</b> Agree on format. ACREL. Lender's "standard" form.
8.2.1	<b>Opinions</b>	<b>Choice of Law.</b>
8.2.2		<b>Opining Jurisdictions.</b>



#	Item	Comments
8.2.3		<b>Usury Considerations.</b> <b>(a) Classification of Loan under Texas Law.</b> <b>(1) "Commercial Loan".</b> <b>(2) "Qualified Commercial Loan".</b> <b>(3) "First Lien Residential Loan".</b> <b>(b) Matters to Address in Opinion.</b> <b>(1) Points.</b> <b>(2) Prepayment Penalty.</b> <b>(3) Late Charges.</b> <b>(4) Savings Clause.</b>
8.2.4		<b>Local Law Compliance.</b> <b>(a) Zoning.</b> <b>(b) Building Code.</b>
8.2.5		<b>Personal Property.</b> Lien perfection and priority.
8.3	<b>O &amp; M Plan</b>	If needed, Buyer to obtain from Environmental Consultant.
8.4	<b>Financial Reports</b>	<b>Loan Agreement Requirements.</b> See Lender's Checklist list other items to be prepared and furnished to Lender including financial statements, Property cash flow audits, appraisals, historical operating statements, "gap" operating statements, and other information required for each loan.
8.5	<b>Wire Transfer and Escrows</b>	
8.6	<b>Loan Documents</b>	<b>Review and approval.</b>

## 9. Closing and Funding.

#	Item	Comments
9.1	<b>Title Company's Escrow Account.</b>	
9.1.1		<b>Acct. No.</b> _____ <b>Bank:</b> Acct. No. _____.
9.1.2		<b>Wire Instructions.</b> ABA Wire Transfer Instructions. Obtain pre-closing written wire instructions from Title Company.

#	Item	Comments
9.1.3	<b>Buyer's Acct.</b>	<b>Acct. No.</b> _____ <b>Bank Acct. No.</b> _____.
9.2	<b>Title Company to List Steps to Complete Insured Closing Handling of Funds and Funding.</b>	<b>Request.</b> Have the Title Company obtain prior to Closing an insured closing letter (Art. 9.49 of the Texas Insurance Code). Procedure involves:
9.2.1		<b>Letter Returned to Underwriter Pre-Closing.</b> Letter must be requested, received and signed and returned to the underwriter prior to closing.
9.2.2		<b>Duplicate of Letter delivered to Buyer Pre-Closing.</b>
9.2.3		<b>Audited Escrow Account.</b> Title Company must deposit settlement proceeds in an audited escrow account of the Title Company. Letter from Title Company to Buyer confirming audited account status. Verification by Title Company's Bank of account style, status.
9.2.4		<b>Account at Title Company's Bank.</b> Open account of Title Company at Buyer's Bank to facilitate quick "inside-the-bank" transmission of closing funds to title company as opposed to relying upon Dallas fed wire.
9.2.5		<b>Coverage of Agent.</b> Have underwriter confirm that the Insured Closing Letter covers closing actions of specified title company escrow agents handling funds.
9.3	<b>Fed Id No.</b>	<b>Furnish to Title Company.</b> Buyer's Fed Id. No. _____.

#### 10. Closing Documents and Additional Actions.

#	Item	Comments
10	<b>Deed</b>	
10.1.1		<b>Form.</b> Have Seller (and intermediary Buyer if any) furnish pre-closing a copy of the deed (s) to be used to transfer title from the present owner to the Buying Entity.
10.1.2		<b>Survey.</b> Revise Deed description.
10.1.3		<b>Permitted Exceptions.</b> Agree on list.
10.2	<b>Assignment of Contract</b>	
10.3	<b>Service Contracts/Leases</b>	
10.3.1	<b>Termination of Existing Service Contracts/Leases</b>	
10.3.2	<b>Assignment and Assumption of Contracts, Licenses and Permits</b>	
10.3.3	<b>Listing of Assigned Contracts</b>	<b>Exhibit.</b> To be attached as <u>Exhibit</u> to Assignment is list of assigned service contracts.

#	Item	Comments
10.4.1	<b>Laundry</b>	<p><b>Actions.</b> Parties need to do the following as of Closing:</p> <p>[a] <b>Notice of Sale.</b> Have Seller provide notice of sale of Project to Buyer. Approve form of Vendor Notification Letter.</p> <p>[b] <b>Insurance.</b> Obtain proof of insurance and have Buyer and its Lender listed as additional insureds.</p> <p>[c] <b>Proration.</b> Arrange proration of gross receipts sharing. Request proration of prepaid bonus.</p> <p>[d] <b>Estoppel Certificate.</b> Have Buyer advise if want to seek.</p> <p>[e] <b>SNDA.</b> Lender has advised that it requires the Laundry Lease be subordinated to Lender's Lien. Lender's counsel is to provide a form of SNDA to be sent to Seller to send to Laundry Company.</p>
10.4.2	<b>Cable</b>	<p><b>Actions.</b> Parties need to do the following as of Closing:</p> <p>[a] <b>Notice of Sale.</b> Have Seller provide notice of sale of Project to Buyer. Approve form of Vendor Notification Letter.</p> <p>[b] <b>Insurance.</b> Obtain proof of insurance and have Buyer and its Lender listed as additional insureds.</p> <p>[c] <b>Proration.</b> Arrange proration of gross receipts sharing. Request proration of prepaid bonus.</p> <p>[d] <b>Estoppel Certificate.</b> Have Buyer advise if want to seek.</p>
10.4.3	<b>Others</b>	Have Seller notify of change of ownership and prorate expenses.
10.5	<b>Delivery</b>	Seller to deliver originals of all Service Contracts.
10.6	<b>Assignment and Assumption of Leases</b>	
10.6.1		<b>Notice of Sale.</b> Have Seller provide notice of sale of Project to Buyer. Prepare form of Tenant Notification Letter. Have Seller prepare and send notice letters to all tenants on certified rent roll.

#	Item	Comments
10.6.2		<b>Proration.</b> <b>(a) Rents.</b> Arrange proration of monthly collected rents. <b>(b) Deposits.</b> Audit of deposits.
10.6.3		<b>Leases.</b> Seller to deliver original of all Leases.
10.7	<b>Bill of Sale</b>	<b>Inventory.</b> Seller to attach inventory as Exhibit to Bill of Sale.
10.8	<b>Vendors</b>	<b>Notify.</b> Have Seller send notice of sale to any vendors in addition to Service Contract providers.
10.9	<b>Utilities</b>	
10.9.1.1	<b>Electric</b>	<b>Prorate.</b> Parties to arrange for meter reading.
10.9.1.2		<b>Transfer of Service.</b> Buyer to arrange for utility deposit and transfer of service.
10.9.2.1	<b>Water</b>	<b>Prorate.</b> Parties to arrange for meter reading.
10.9.2.2		<b>Transfer of Service.</b> Buyer to arrange for utility deposit and transfer of service.
10.9.3.1	<b>Gas</b>	<b>Prorate.</b> Parties to arrange for meter reading.
10.9.3.2		<b>Transfer of Service.</b> Buyer to arrange for utility deposit and transfer of service.
10.9.4.1	<b>Telephone</b>	<b>Prorate.</b> Parties to arrange for meter reading.
10.9.4.2		<b>Transfer of Service.</b> Buyer to arrange for utility deposit and transfer of service.

# 11. Title Company

#	Item	Comments
11	<b>Title Company</b>	
11.1	<b>Closing Statements</b>	<b>Closing Statements.</b> Have Title Company provide <i>pro forma</i> closing statement in advance of "pre-closing".
11.1.1	<b>Credits</b>	<b>(1) Earnest Money.</b> <b>(2) Interest.</b> <b>(3) Taxes.</b> <b>(4) Tenant Deposits.</b>

#	Item	Comments
11.1.2	<b>Expenses</b>	<p>(1) <b>Third Party Services.</b></p> <p>[a] <b>Surveyor</b></p> <p>[b] <b>Inspectors.</b></p> <p>[c] <b><u>Attorney.</u></b></p> <p>(2) <b>Lender's Fees.</b></p> <p>(3) <b>Broker.</b></p>
11.1.3	<b>Paid/Settled Out Side of Closing</b>	<p>(1) <b>Operating Expenses.</b> Identify.</p> <p>(2) <b>Employees.</b> Terminate and rehire.</p>
11.2	<b>Affidavits of Debts and Liens</b>	<b>Form.</b> Have Title Company provide Buyer with the form of Affidavit that Seller will sign.
11.3	<b>Waiver of Inspection</b>	<b>Buyer Not Waive.</b> Notify Title Company that Buyer will not sign and that inspection will be required.
		<b>Title Company to Identify Additional Exceptions by Inspection.</b>
		<b>Buyer Review/Object.</b>
11.4	<b>Arbitration</b>	<b>Buyer Not Accept.</b> Notify Title Company that Buyer does not consent to arbitration.
11.5	<b>Other Forms</b>	<b>Pre-approve.</b> Have Title Company provide Buyer with a copy of any other documents that the Buyer will be requested to sign by the Title Company. Need forms for review before "pre-closing".
11.6	<b>Buyer's Closing Instructions to Title Company</b>	

**D.1.1**

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS**

**FOR**

\_\_\_\_\_

\_\_\_\_\_, 2004

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**DECLARATION OF COVENANTS, RESTRICTIONS AND EASEMENTS  
FOR \_\_\_\_\_**

This Declaration of Covenants, Restrictions and Easements for \_\_\_\_\_ (this "**Declaration**") is made as of the \_\_\_\_ day of \_\_\_\_\_, 200\_, by \_\_\_\_\_ ("**Declarant**").

Declarant is the owner of certain real property located in Travis County, Texas, described in the attached Exhibit A (the "**Property**") except for portions thereof that may have been dedicated or conveyed to governmental entities for public rights-of-way or other public purposes. Declarant is the developer of the Property. Declarant intends that the portion of the Property outside of the Habitat Preserve Areas (hereinafter defined) be developed as a high quality multi-use business and multi-family residential community and that the Property be subject to the covenants, restrictions and easements set forth in this Declaration in order to establish a plan for the development, improvement and use of the Property with architectural, landscaping and maintenance controls.

Declarant intends to create an entity to have and exercise the rights and duties and to perform on behalf of, and as agent for, the Owners (hereinafter defined) the functions set forth in this Declaration which include, without limitation, the maintenance of certain portions of the Property, the reviewing of plans for improvements to be constructed on the Property and the assessing, collecting and disbursing of assessments provided for herein.

NOW, THEREFORE, Declarant adopts, establishes and imposes the following covenants, restrictions, easements, liens and charges upon the Property and declares that the Property and all portions thereof are and shall be held, transferred, sold, conveyed and occupied subject to such covenants, restrictions, easements, liens and charges.

**ARTICLE I  
GENERAL**

**SECTION 1.01. PURPOSE.** The purpose of this Declaration is to promote the orderly development and use of the Property; to encourage the construction of quality-designed Improvements (hereinafter defined) on the portion of the Property outside of the Habitat Preserve Areas (hereinafter defined); to restrict certain uses of the Property; to provide for certain development and maintenance standards; and generally to preserve the aesthetic appearance of the Property and Improvements constructed thereon from time to time.

**SECTION 1.02. DEFINITIONS.** The following words or phrases when used in this Declaration shall have the following meanings:

- a. "**Assessments**" shall have the meaning set forth in Section 4.01 of this Declaration.
- b. "**Association**" shall mean the non-profit corporation to be created under the laws of the State of Texas under the name "\_\_\_\_\_ Association" or such other name as is selected by Declarant or its successors.
- c. "**Association Documents**" shall mean the Articles of Incorporation and the Bylaws of and the resolutions adopted by the Association, as such may be amended from time to time.
- d. "**Board**" shall mean the Board of Directors of the Association.
- e. "**Building Setback**" shall have the meaning set forth in Section 7.03 of this Declaration.
- f. "**City**" shall mean the City of Austin, Texas.
- g. "**Common Areas**" shall mean:
  - (i) Unpaved Right-of-Way;

- (ii) Project Identification Signage Areas; and
- (iii) Parkway Landscape Areas.

h. **"Common Expenses"** shall mean any and all expenses incurred by or on behalf of the Association, as agent for the Owners, for (i) the maintenance, repair and operation of the Common Areas, the Habitat Preserve Areas, the Landscaping in the Common Areas (to the extent not required to be performed by the Owners) and the Common Facilities, (ii) for the provision of the Common Services, and (iii) as otherwise incurred in accordance with and as authorized in this Declaration. "Maintenance and repair" as used, in this Declaration includes not only all labor and materials necessary to keep the Common Areas, the Landscaping in the Common Areas and the Common Facilities in good and neat appearance and in good operating condition but also all parts and replacement materials necessary to keep such in good appearance and operating condition and shall include, but not be limited to, replacement trees, plants, and other vegetation, except that common Expenses shall not include the initial costs of installing signage in the Project Signage Identification Areas or the costs of initial installation or replacement of trees or shrubs that die within one year after the installation thereof by Declarant, the replacement of which shall be the responsibility of Declarant. Common Expenses shall include, without limitation, the costs of preparing the surveys and reports required under the 10(a) Permit and of satisfying other requirements of the 10(a) Permit, including, without limitation, the cost of maintaining the fencing on the perimeters of the Habitat Preserve Areas but excluding, however, the cost of the initial development of a Site to satisfy the requirements of the 10(a) Permit, such as constructing improvements, including without limitation, erecting the new temporary and permanent fencing and installing landscaping required by the 10(a) Permit in connection with development on a Site, which costs shall be the responsibility of the Owner of that Site.

i. **"Common Facilities"** shall mean all Landscaping, jogging and bike trails, lighting, signage, entry-way features, detention ponds and water features (and related equipment) installed in the Common Areas, all equipment of any nature (including, but not limited to, vehicles) used by the Association in connection with the repair, maintenance or operation of the Common Areas and the Landscaping in the Common Areas or the provision of the Common Services, and, to the extent approved by a Special Vote of the Class A Members, other equipment, structures and improvements installed within the Common Areas.

j. **"Common Services"** shall mean such services provided from time to time by Declarant or by the Association on behalf of and for the common benefit of the Owners that have been approved by a Special Vote of the Class A Members.

k. **"Conversion Date"** shall mean the earlier of (i) the date on which Declarant and all affiliates of Declarant do not own any portion of the Property, or (ii) the date Declarant voluntarily terminates its Class B Member status by recording a written notice of such termination in the Real Property Records of Travis County, Texas. Any Person owned or controlled by Declarant, by any partner of Declarant or its general partner or by any, Person owning or controlling any partner of Declarant, shall be considered an "affiliate" of Declarant for the purpose of this definition.

l. **"Declarant"** shall mean \_\_\_\_\_, and such successors or assigns to whom rights and powers reserved herein to Declarant expressly are conveyed or assigned in writing but shall not include any person or entity merely purchasing one or more Sites, or portions thereof, from Declarant.

m. **"Declaration"** shall mean this Declaration of Covenants, Restrictions and Easements for Four Points Centre, and all amendments thereto filed for record in the Official Public Records of Travis County, Texas.

n. **"Default Rate of Interest"** shall mean the lesser of (i) 15% per annum, or (ii) the maximum allowable contract rate of interest under applicable law.

o. **"Development and Construction Guidelines"** shall mean those guidelines adopted by the Board pursuant to the provisions of Section 5.03 of this Declaration.

- 
- p. **"DRB"** shall mean the Development Review Board of the Association.
  - q. **"Front Yard Setbacks"** shall have the meanings set forth in Section 7.03 of this Declaration.
  - r. **"Governmental Entity"** shall mean the City, the County of Travis, the State of Texas and any agency or department thereof and the United States of America and any agency or department thereof.
  - s. **"Habitat Preserve Areas"** shall mean those portions of the Property identified in the attached Exhibit "B" for such period of time that construction activities are restricted thereon pursuant to the 10(a) Permit.
  - t. **"Improvements"** shall mean any and all changes to the Property, from initial construction through later construction or maintenance, which are intended to be temporary or permanent in nature (other than changes made during a period of construction which will be removed when the construction period is complete), including, but not limited to, new buildings and structures, changes to building exteriors and exterior roof structures, parking areas, loading areas, vehicle circulation lanes and approaches, private driveways and streets, utility and drainage systems, surface parking areas and parking structures, exterior lighting, sculptures, sidewalks, fences, walls, Landscaping, poles, antennae, ponds, lakes, fountains, swimming pools, tennis or athletic courts, signs, changes in exterior color or shape, glazing or reglazing of exterior windows and any new exterior construction or exterior improvement which may not be included in any of the foregoing. "Improvements" include both original improvements and all later changes and improvements.
  - u. **"Landscaping"** shall mean plants, including, but not limited to, grass, vines, ground cover, trees, shrubs, flowers, mulch and bulbs; rocks; landscape edging; water features; berms; lighting in landscaped areas; irrigation systems and related landscape improvements and materials.
  - v. **"Lots"** shall mean those parcels identified as lots in certain specified blocks in the Zoning Plan.
  - w. **"Majority Vote of the Members"** shall have the meaning set forth in Section 3.04 of this Declaration.
  - x. **"Member"** shall have the meaning set forth in Section 3.01 of this Declaration.
  - y. **"Member in Good Standing"** shall have the meaning set forth in Section 3.02 of this Declaration.
  - z. **"Non-Member Owners"** shall have the meaning set forth in Section 3.01 of this Declaration.
  - aa. **"Notice of Unpaid Assessments"** shall have the meaning set forth in Section 4.07 of this Declaration.
  - bb. **"Owner"** shall mean each Person (other than the Association) who is a record owner of any parcel of land within the Property, but excluding any Person who holds only a lien in any parcel of land within the Property as security for the performance of an obligation.
  - cc. **"Parkway Landscape Area"** shall mean (a) with respect to R. M. \_\_\_\_0, the manicured landscape easement that abuts the easterly right-of-way line of R. M. \_\_\_\_ as shown in the Zoning Plan, and (b) with respect to other Streets, a strip of land along each side of the Streets that is not more than 25 feet in width measured from the back of the outside curbing of the pavement on such Street, except that the Parkway Landscape Area along the portions of the Streets that abut any Habitat Preserve Areas shall not extend outside of the Unpaved Right-of-Way. The exact width of such area (which may vary) shall be as designated by Declarant.

dd. **"Parkway Landscape Plan"** shall mean the plan adopted by Declarant, as such may be amended by Declarant or by the Board (with the consent of Declarant prior to the Conversion Date) from time to time, specifying the nature, type, scheme, extent and maintenance of Landscaping required to be installed by an Owner of a Site (other than Declarant or the Association) in the Parkway Landscape Area.

ee. **"Paving Setbacks"** shall have the meanings set forth in Section 7.03 of this Declaration.

ff. **"Person"** shall mean any natural person, corporation, partnership, trust, Governmental Entity or other legal entity.

gg. **"Project Identification Signage Areas"** shall mean those portions of the Property described in the attached Exhibit "C" as areas in which project signage identifying the development name for the Property or other entry features, structures or Landscaping are or may be installed.

hh. **"Property"** shall mean the real property described in Exhibit "A" attached hereto subject to any additions thereto or deletions therefrom as provided in Section 1.03 of this Declaration.

ii. **"Quorum"** shall have the meaning set forth in Section 3.04 of this Declaration.

jj. **"Regular Assessments"** shall have the meaning set forth in Section 4.02 of this Declaration.

kk. **"Side and Rear Yard Setbacks"** shall have the meaning set forth in Section 7.03 of this Declaration.

ll. **"Site"** shall mean any single parcel of land within the Property on which Improvements are or are to be constructed. No portion of the Habitat Preserve Areas shall be a Site.

mm. **"Special Member Assessment"** shall have the meaning set forth in Section 4.04 of this Declaration.

nn. **"Special Purpose Assessment"** shall have the meaning set forth in Section 4.03 of this Declaration.

oo. **"Special Vote of the Class A Members"** shall have the meaning set forth in Section 3.04 of this Declaration.

pp. **"Street"** shall mean any land located within an easement or a right-of-way in or adjacent to the Property now or at any time hereafter dedicated to any Governmental Entity for public use as a roadway for motor vehicles.

qq. **"10(a) Permit"** shall mean the Federal Fish and Wildlife Permit pertaining to the Property, effective \_\_\_\_, 2004, issued by the United States Department of the Interior, U.S. Fish and Wildlife Service under section 10(a)(1)(B) of the Endangered Species Act, as such may be amended from time to time.

rr. **"Unpaved Right-of-Way"** shall mean medians in Streets and the portion of a Street between the outside edge of the Street pavement (or curbs if curbs are installed) and the right-of-way line of the Street.

ss. **"Voting/Assessment Allocation Change Date"** shall mean January 1 of the calendar year immediately following the calendar year in which Declarant or its affiliates own less than \_\_ acres of the Property in the aggregate, exclusive of any Habitat Preserve Areas. Declarant shall file a notice of the Voting/Assessment Association Change Date in the Official Public Records of Travis County, Texas.

tt. "Zoning Plan" shall mean the Revised Preliminary Plan approved on \_\_\_\_\_, 2004 by the City Development Review and Inspection Department under Case #C \_\_\_\_\_, as such may be amended from time to time by the City.

Other terms used in this Declaration are defined in various provisions of this Declaration.

**SECTION 1.03. PROPERTY SUBJECT TO DECLARATION.** Declarant, from time to time and without the necessity of the joinder of any other Person, (a) may subject additional land to the provisions of this Declaration provided that such additional land is adjacent to the Property or to a Street adjacent to the Property or is in the general vicinity of the Property and the aggregate of all such additional land does not exceed \_\_\_ acres, and (b) may delete from the Property Parcels sold to Governmental Entities. Declarant may do so by recording a supplement to this Declaration in the Official Public Records of Travis County, Texas. Declarant, in deleting tracts from the Property as permitted in (b) above, (i) shall impose on such deleted tract restrictions requiring development of that tract substantially in accordance with the provisions of Article VII of this Declaration and the Development and Construction Guidelines, and (ii) at its election, may provide in documents related to the conveyance of such tract to a Governmental Entity that this Declaration again may become applicable to such deleted parcel if such parcel is conveyed in the future to a Person other than a Governmental Entity, and if such occurs, the parcel that again becomes a part of the Property and subject to this Declaration shall not be included in the computation of the \_\_\_0 acres under (a) above. The term "**Property**" as used in this Declaration shall include any such additional tracts that from time to time are subjected to the provisions of this Declaration as provided above and shall not include any tracts that from time to time are deleted as provided above (subject to the provisions of the preceding sentence). All of the Property and any right, title or interest therein shall be owned, held, leased, sold and/or conveyed by Declarant; and any subsequent Owner, lessee, tenant or other occupant of all or any part thereof, subject to this Declaration and the covenants, restrictions, easements, charges and liens set forth in this Declaration. Each Owner, lessee, tenant or other occupant of any portion of the Property, by the acceptance of a deed, lease or other conveyance or transfer of any interest in the Property or any portion thereof, shall be deemed to have covenanted and agreed to be bound by the provisions of this Declaration.

**SECTION 1.04. PURPOSE OF THE ASSOCIATION.** The Association shall have and exercise the rights and shall perform the functions of the Association for the benefit of, and as agent for, the Owners as set forth in this Declaration.

**SECTION 1.05. HABITAT PRESERVE AREAS.** The Property is subject to the 10(a) Permit, pursuant to which construction on the Property is limited to those areas outside the Habitat Preserve Areas. The 10(a) Permit imposes certain obligations on all who construct Improvements on or occupy the Property, including, without limitation, restrictions as to certain time periods when no construction will be allowed on the Property. By accepting title to any portion of the Property, an Owner agrees to comply with all of the requirements of the 10(a) Permit and acknowledges that construction and other activities on such Owner's Site are restricted as provided in the 10(a) Permit. VIOLATION OF THE 10(a) PERMIT COULD ADVERSELY AFFECT THE DEVELOPMENT OF THE PROPERTY. DECLARANT DOES NOT GUARANTEE TO THE OWNERS THAT ANY OWNER (OTHER THAN DECLARANT) OR THE ASSOCIATION OR EITHER OF SUCH PERSON'S AGENTS, EMPLOYEES, CONTRACTORS, REPRESENTATIVES, TENANTS OR INVITEES WILL NOT VIOLATE THE 10(a) PERMIT AND SHALL HAVE NO LIABILITY OR RESPONSIBILITY TO ANY OWNER FOR ANY SUCH VIOLATION. EACH OWNER ACKNOWLEDGES THAT NONE OF THE DECLARANT, THE ASSOCIATION OR THE DRB HAS ANY OBLIGATION TO MONITOR OR TO ASSURE ANY OWNER'S COMPLIANCE WITH OR NONVIOLATION OF THE 10(a) PERMIT. FURTHER, EACH OWNER ACKNOWLEDGES THAT IT MAY HAVE LIABILITY TO THE PRESERVE MEMBERS, DECLARANT, OTHER OWNERS AND THE ASSOCIATION RELATING TO ANY ACTION TAKEN BY SUCH OWNER THAT IS IN VIOLATION OF THE 10(a) PERMIT. SUBJECT TO THE FINAL SENTENCE OF THIS SECTION 1.05, EACH OWNER SHALL INDEMNIFY THE PRESERVE MEMBERS, DECLARANT, ALL OTHER OWNERS AND THE ASSOCIATION FROM AND AGAINST ANY AND ALL LOSS, CLAIM, DAMAGE, FINES, PENALTIES, EXPENSES AND OTHER LIABILITIES OF ANY NATURE THAT MAY BE INCURRED BY, SUFFERED BY OR ASSESSED AGAINST SUCH INDEMNIFIED PERSON RESULTING FROM ANY ACTION TAKEN BY SUCH OWNER THAT CAUSES A VIOLATION OF OR THAT IS NOT IN COMPLIANCE WITH THE 10(a) PERMIT. BY ACCEPTING TITLE TO A PORTION OF THE PROPERTY, EACH OWNER RELEASES DECLARANT, AND ITS PARTNERS (AND THEIR OFFICERS, DIRECTORS AND OWNERS), THE ASSOCIATION (AND ITS DIRECTORS, OFFICERS, EMPLOYEES AND REPRESENTATIVES) AND THE DRB FROM ANY LOSS,

CLAIM, DAMAGE, FINE, PENALTY, EXPENSE OR OTHER LIABILITY OF ANY NATURE THAT MAY BE INCURRED BY, SUFFERED BY OR ASSESSED AGAINST SUCH OWNER AS A RESULT OF ANY ACT OR OMISSION TAKEN BY ANY OWNER (OR BY ITS AGENT, EMPLOYEE, CONTRACTOR, REPRESENTATIVE, TENANT OR INVITEE) OTHER THAN DECLARANT OR BY THE ASSOCIATION OR THE DRB THAT CAUSES A VIOLATION OF OR THAT IS NOT IN COMPLIANCE WITH THE 10(a) PERMIT. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, IN NO EVENT SHALL AN OWNER BE LIABLE FOR ANY CLAIM FOR CONSEQUENTIAL OR PUNITIVE DAMAGES.

## **ARTICLE II**

### **DESIGNATION OF LOTS AND STREETS; ZONING**

**SECTION 2.01. DESIGNATION OF LOTS.** Declarant shall have the right and power, prior to the Conversion Date, to resolve any issues or disputes regarding boundaries of the Lots and such resolution shall be conclusive on the Owners. The Board shall have such right following the Conversion Date. Declarant shall have the right and power, but not the obligation, to subdivide all or any portion of the Property owned by Declarant, without the necessity of the joinder of any other Person, into subparcels or platted lots. Declarant shall have the further right and power, but only with respect to portions of the Property owned by Declarant and without the necessity of the joinder of any other Person, to withdraw its designation of any part thereof as a lot, to redesignate previously designated areas thereof as a lot having different boundaries and configurations from those previously described and to divide or subdivide a lot into one or more lots. An Owner, other than Declarant, may create platted lots on its Site or modify any existing platted lots on its Site only with the prior written approval of such action by Declarant prior to the Conversion Date or by the Board after the Conversion Date; provided, however, (a) such approval will not be withheld unless, in the reasonable opinion of Declarant or the Board, as the case may be, such action proposed to be taken by the Owner of a Site adversely affects the Zoning Plan or the 10(a) Permit; (b) the Owner of such Site must insure that any such action is in compliance with the requirements of Section 7.01 of this Declaration; (c) such action does not result in a non-compliance with other provisions of this Declaration; and (d) any approval of the DRB required under this Declaration is obtained.

**SECTION 2.02. DESIGNATION OF STREETS.** Declarant and the Association shall have the right and power, from time to time, to dedicate, designate, reserve, convey fee simple title or grant easements for Streets in portions of the Property owned by Declarant or the Association at the time of such action. The provisions of this Declaration shall be subordinate to the rights of the City in such dedicated Streets. No Owner other than Declarant or the Association shall have the right to dedicate, designate, reserve, convey fee simple title or grant easements for Streets on any portion of the Property owned by such Owner, unless such action is approved in writing by Declarant prior to the Conversion Date or by the Board after the Conversion Date. This provision does not restrict any Owner from installing private roadways for its own use within its own Site in compliance with the provisions of this Declaration.

**SECTION 2.03. ZONING.** Declarant shall have the right and power, from time to time, to change the zoning of any portion of the Property owned by Declarant in such manner as Declarant deems appropriate for the overall development of the Property. No Owner other than Declarant shall apply for any change in zoning of any portion of the Property owned by such Owner, unless such zoning change is approved in writing by Declarant prior to the Conversion Date or by the Board after the Conversion Date.

## **ARTICLE III**

### **MEMBERSHIP AND VOTING RIGHTS IN THE ASSOCIATION**

**SECTION 3.01. MEMBERSHIP.** Each and every Owner automatically is a member of the Association ("Member"), except for the following ("Non-Member Owners"): (i) the City shall not be considered as a Member during such time that it owns only Streets, public utility easements, drainage easements or parcels used solely for a fire or police station or public park unless the City agrees in writing to become a Member of the Association; and (ii) any public utility shall not be considered a Member during such time that it owns only a utility easement or a parcel used solely for a utility sub-station, unless such utility agrees in writing to become a Member of the Association. An Owner of all or any part of the Habitat Preserve Areas is referred to in this Declaration as a "Preserve Member". Membership in the Association is appurtenant to, and cannot be separated from, ownership of a parcel in the Property by an Owner other than a Non-Member Owner. The membership of a Person in the Association shall terminate automatically whenever such Person ceases to be an Owner, except

that such termination shall not release or relieve such Person from any liability or obligation arising under this Declaration during his period of ownership. Any transfer of title to any parcel in the Property shall operate automatically to transfer (or, in cases of a transfer by a Non-Member Owner, to vest) membership in the Association appurtenant to such parcel to the new Owner, unless such new Owner is a Non-Member Owner. The term "**Owner**" and the term "**Member**" as used in the remainder of this Article III and in Article IV of this Declaration does not include any Non-Member Owner or Preserve Member, except as otherwise specifically provided in Article IV below.

**SECTION 3.02. MEMBER IN GOOD STANDING.** A Member shall be considered to be a "**Member in Good Standing**" and eligible to vote if such Member:

- a. Has, at least ten days prior to the taking of any vote by the Association, fully paid all Assessments or other charges levied by the Association, as such Assessments or charges are provided for hereunder;
- b. Does not have a Notice of Unpaid Assessments filed by the Association against the parcel in the Property owned by such Owner; and
- c. Has discharged all other obligations to the Association as may be required of Members hereunder or under the Association Documents.

The Board shall have sole authority for determining the good standing status of any Member at any time and shall make such determination with respect to all Members prior to a vote being taken by the Association on any matter. The Board shall have the right and authority, in its sole discretion, to waive the ten-day prior payment requirement and require only that such payment be made at any time before such vote is taken if the Board shall determine, in its own judgment, that extenuating circumstances exist which have prevented prior payment. Any Member not conforming with the provisions of this Section 3.02 shall be declared by the Board not to be a Member in Good Standing and shall not be entitled to vote on matters before the Association until such time as Member in Good Standing status is attained and so declared by the Board.

**SECTION 3.03. CLASSES OF VOTING MEMBERS.** The Association shall have two classes of voting membership.

a. Class A. "Class A Members" shall be all Members including Declarant, but excluding any Preserve Member. Prior to the Voting/Assessment Allocation Change Date Class A Members shall be entitled to one vote for each acre in the Property owned by such Owners (rounded to the nearest 1/100th of an acre) as of the date of the notice of the meeting at which such vote is to be cast, except as provided in Section 3.05 below. For the purpose of this Section 3.03 and for any other reason that acreage or other area is necessary to be determined under this Declaration, the Board shall determine the acreage contained in the Property and the acreage contained in specific parcels or portions thereof. For each calendar year beginning with the year next following the year in which the Voting/Assessment Allocation Change Date falls, Class A Members shall be entitled to one vote for each \$100,000, or fraction thereof, of assessed value of that portion of the Property owned by such Owner as used by Travis County, Texas for ad valorem tax purposes for such calendar year, except as provided in Section 3.05 below. For votes of the Class A Members to be cast in a calendar year prior to the establishment for that year of the assessed value to be used by Travis County, Texas for ad valorem taxes, the Board may estimate such assessed value, and the votes of Class A Members shall be set based on such estimate. If any parcel is owned by more than one Owner, the number of votes attributable to such parcel shall be the same number of votes as if there were only one Owner of such parcel, and the votes attributable to such parcel may be cast only if all of the Owners owning such parcel, prior to the time of the vote in question, have delivered to the Association a written agreement as to how such votes are to be cast or a written designation of one of such Owners to cast the votes attributable to such parcel. A Class A Member may delegate its right to vote to any tenant occupying its parcel provided such delegation is made in writing delivered to the Board.

b. Class B. The only "Class B Member" shall be Declarant. The Class B Member shall be entitled to a number of votes equal to 101% of the aggregate of all votes eligible to be cast by Class A Members; provided, however, the Class B membership shall cease on the Conversion Date, and

Declarant thereafter shall only be a Class A Member for so long as it owns any portion of the Property.

**SECTION 3.04. QUORUM, VOTING AND NOTICES.** Members holding 25% of the aggregate votes entitled to be cast by Class A Members in Good Standing, represented at a meeting of the Members in person or by a legitimate proxy in a form approved by the Board, shall constitute a quorum for voting on matters brought before the Members at meetings called by the Board (a “**Quorum**”). The vote of Members in Good Standing (considering all Class A Members and the Class B Member as one voting class) holding, in the aggregate, a majority of the votes entitled to be cast by the Members in Good Standing present or voting by legitimate proxy at a called meeting at which a Quorum is present (the “**Majority Vote of the Members**”) shall be the act of the Members. Notice requirements for all actions proposed to be taken by the Association which require a voted approval by the Members shall be given as set forth in the Association Documents. The term “**Special Vote of the Class A Members**” as used herein, means, at the time such vote is to be taken, the written consent of Declarant (until the Conversion Date) plus the vote of Class A Members in Good Standing (including Declarant) holding, in the aggregate two-thirds of the votes eligible to be cast by all Class A Members in Good Standing (including Declarant) present or voting by legitimate proxy at a called meeting at which a Quorum is present.

**SECTION 3.05. SPECIAL PROVISIONS REGARDING PRESERVE MEMBERS.** No Preserve Member other than Declarant or its affiliate shall be entitled to any vote on Association matters, as no votes are allocated to any portion of the Habitat Preserve Area that is not owned by Declarant or its affiliate. Declarant (or its affiliate) as an owner of all or any portion of the Habitat Preserve Area shall be entitled to one vote as a Class A Member attributable to all of the Habitat Preserve Area owned by Declarant or such affiliate. In the event that all or any portion of the Property that, as of the date of this Declaration, is a Habitat Preserve Area in the future becomes no longer subject to the 10(a) Permit, such area of Property no longer shall be a Habitat Preserve Area, and the Owner of such area no longer shall be a Preserve Member. Accordingly, and notwithstanding any provision in this Declaration to the contrary, the limitation on voting rights and assessments liability attributable to such area when it was a Habitat Preserve Area as set forth in this Declaration no longer shall be applicable to such area.

## **ARTICLE IV ASSESSMENTS**

**SECTION 4.01. COVENANTS FOR ASSESSMENTS.** Each Owner of a parcel within the Property, by acceptance of a deed or other conveyance or transfer of legal title to the Property or any portion thereof, whether or not it shall be so expressed in any such deed or other conveyance, shall be deemed to have covenanted and agreed to pay to the Association, or to an independent entity or agency which may be designated by the Association to receive such monies, the following assessments (“**Assessments**”):

- a. Regular Assessments as provided for in Section 4.02 below;
- b. Special Purpose Assessments as provided for in Section 4.03 below; and
- c. Special Member Assessments, as provided in Section 4.04 below.

All Assessments shall remain the property of the Owner making such payment and shall be expended by the Association on behalf of the Owners only for the specified purposes provided in this Declaration. No profit, gain or other benefit is to be derived by the Association from the Assessments, but, instead, such funds shall be expended only as agent for the Owners. All services contemplated to be paid from Assessments shall be obtained by the Association on behalf of the Owners. Upon termination of the Association, all Assessments held at that time by the Association shall be allocated and returned to the Owners in the same manner as votes are allocated among Class A Members as provided in Section 3.03 above. Notwithstanding anything to the contrary in this Declaration, no Assessments shall be levied against any portion of the Habitat Preserve Areas, and, accordingly, no Preserve Member shall be subject to the lien hereinafter provided for to secure payment of Assessments. This exception as to liability of Preserve Members for Assessments does not affect the liability for Assessments of such Owners who own parcels within the Property outside of the Habitat Preserve Areas, who shall have liability for Assessments as provided in this Declaration.

**SECTION 4.02. REGULAR ASSESSMENTS.** “**Regular Assessments**” shall be determined, assessed



and expended on a calendar year basis, which shall be the fiscal year of the Association; provided, however, Regular Assessments may be assessed and expended for the partial year, if any, following the date of this Declaration. Regular Assessments shall be used for the payment of Common Expenses and other expenses incurred by the Association or the Board on behalf of the Owners as authorized in this Declaration (exclusive of the expenses referenced in Section 4.04 below). Regular Assessments from the date of this Declaration through the end of the calendar year in which this Declaration is dated shall be set by the Board as the Board deems necessary to pay applicable expenses for such partial year. For each year thereafter while this Declaration is in force, the Board shall set the amount of the Regular Assessments to be levied for that year, taking into consideration Common Expenses for the immediately preceding year, expected increases in such expenses, a contingency amount (not exceeding 5% of the anticipated expenditures for that year) and an optional reserve fund contribution (not exceeding 5% of the anticipated expenditures for that year); provided, however, no reserve fund contribution amount shall be included in Regular Assessments for any year in which the unused balance of the reserve fund equals or exceeds 15% of the other anticipated expenditures for that year. The Board shall endeavor to set the Regular Assessments for each full calendar year by no later than the beginning of such year or as soon thereafter as such determination reasonably can be made by the Board. Regular Assessments shall be allocated among Owners (including Declarant) in the same manner as votes are allocated among Class A Members as provided in Section 3.03a above, that is, the percentage of the aggregate Regular Assessments allocated to a particular parcel in the Property shall be a fraction with the numerator equal to the number of Class A Member votes allocable to such parcel and with the denominator equal to the aggregate number of votes for all Class A Members; provided, however, no Regular Assessments shall be allocated to the Habitat Preserve Areas or to any Preserve Member by reason of its ownership of all or any portion of the Habitat Preserve Areas, and the one Class A Member vote allocated to Declarant or its affiliate as Preserve Members shall not be used in the arithmetic formula described above. The allocation of any Regular Assessments based on an allocation of votes among Class A Members that is based on an estimate by the Board of assessed value as provided in Section 3.03a above shall be adjusted, as necessary, to reflect the actual assessed value when such is established. Should any excess surplus exist at the end of any year, the Board shall reduce the amount required for the next year's Regular Assessments by an amount equal to such surplus.

**SECTION 4.03. SPECIAL PURPOSE ASSESSMENTS.** The Board, from time to time, may levy for any partial or full calendar year following the date of this Declaration, a "**Special Purpose Assessment**" for the purpose of paying any unanticipated expense that normally would have been paid out of Regular Assessments which was not included in that year's budget for Regular Assessments. Such Special Purpose Assessments shall be allocated among the Owners (including Declarant) in the same manner as the Regular Assessments are allocated among the Owners, subject to the same exemption applicable to Preserve Members for Regular Assessments.

**SECTION 4.04. SPECIAL MEMBER ASSESSMENTS.** The Board may levy a "**Special Member Assessment**" on any Member, to the extent any directly related insurance proceeds paid to the Association are not sufficient to pay all such costs, for the purpose of:

- a. Paying the cost of any damage or loss requiring maintenance, repairs or replacement of the Common Areas, Landscaping in the Common Areas or in the Parkway Landscape Area or the Common Facilities which damage or loss has been determined by the Board to have been caused, either directly or indirectly, by the acts of such Member, or its agent, employee or occupant;
- b. Reimbursing the Association for any and all direct or indirect costs incurred by the Association with regard to the maintenance, repair or replacement of Landscaping, signs, screening or decorative walls, surface parking areas, ponds, lakes, fountains, pools, exterior lighting, sculptures, utilities, drainage systems or park and recreational facilities and equipment on such Member's parcel or on the Unpaved Right-of-Way contiguous to such parcel, including, but not limited to, the removal of trash, litter and abandoned items, that such Member fails to repair, maintain or replace as required by the provisions of this Declaration, provided such Member fails to correct such deficiency within seven days after written notice thereof is given to such Member by the Board (or in cases where such deficiency cannot reasonably be corrected within seven days, within a reasonable period of time necessary to correct such deficiency as determined by the Board, provided that the Member commences corrective work within such seven-day period and thereafter proceeds diligently to complete such corrective work); or

c. Reimbursing the Association for all damages, expenses and fines that may be incurred by or levied against the Association resulting from any act or omission of a Member (or its employee, agent, representative, contractor, tenant or invitee) that is a violation of or that is not in compliance with the 10(a) Permit.

The provisions of this Section 4.04 apply also to each Non-Member Owner, and each Non-Member Owner is liable for any Special Member Assessment made against such Non-Member Owner, and, to the fullest extent permitted by law, such Non-Member Owner's particular Site is subject to a lien to secure payment of such Special Member Assessment, all as provided in Section 4.06 and Section 4.07 below.

**SECTION 4.05. DUE DATE OF ASSESSMENTS.** The Regular Assessments provided for herein shall be payable annually within 30 days after an invoice is delivered by the Association to an Owner; provided, however, the Board shall have the right to require payment of Regular Assessments at other intervals if it deems such is appropriate (but with payment not required any earlier than 30 days after delivery of the invoice therefor). The due date of any Assessment under Section 4.03 or Section 4.04 shall be fixed in the notice to the Owner or Owners providing for such Assessment, but will not be sooner than 30 days after the date of such notice.

**SECTION 4.06. PERSONAL OBLIGATION FOR PAYMENT OF ASSESSMENTS.** The Assessments provided for herein shall be the personal recourse debt of the Owner of the portion of the Property with respect to which such Assessment is made. No Owner, for any reason, may exempt itself from liability for Assessments. In the event that any Assessment or part thereof is not paid when due, the Owner or Owners of such property shall be obligated to pay interest on such unpaid Assessment from such due date at the Default Rate of Interest together with all costs and expenses of collection thereof, including, but not limited to, reasonable attorneys' fees. The Board shall have the right to reject any partial payment of any Assessment and demand full payment thereof, or the Board may, in its sole discretion, elect to accept any such partial payment on account only, without in so doing waiving any rights established hereunder with respect to any remaining balance due. The obligation of any Owner to pay an Assessment with respect to a parcel made for any period of time that an Owner owns the parcel shall remain its personal recourse obligation, as the case may be, (notwithstanding any future sale or conveyance of its parcel) and shall not pass to unrelated third-party purchasers of such property or portion thereof unless expressly assumed in writing by such purchaser. However, the lien for any unpaid Assessments shall be unaffected by any sale or assignment of full or partial ownership interest in such property affected thereby, or portion thereof, and shall continue in full force and effect. In the event of full or partial sale of an ownership interest in any portion of the Property, it shall be the obligation of the then Owner of such interest to disclose to any buyer, assignee, title company designated to handle such transaction, financing entity or other party to such sale any unpaid Assessments, such notice to be given in writing to all parties to the intended transaction at least 15 days before that date at which such transaction is to be consummated. A copy of such notice shall be sent to the Association at the same time. A former Owner shall not be liable for Assessments made with respect to a parcel after such Person no longer is the Owner of such parcel.

**SECTION 4.07. ASSESSMENT LIEN AND FORECLOSURE.** ALL SUMS ASSESSED IN THE MANNER PROVIDED FOR IN THIS ARTICLE, TOGETHER WITH INTEREST FROM SUCH DUE DATE AT THE DEFAULT RATE OF INTEREST AND THE COSTS OF COLLECTION, INCLUDING, BUT NOT LIMITED TO, REASONABLE ATTORNEYS' FEES, ARE SECURED BY A CONTINUING CONTRACTUAL LIEN AND CHARGE ON THE PROPERTY COVERED BY SUCH ASSESSMENT, WHICH SHALL BIND SUCH PROPERTY AND THE OWNER THEREOF AND ITS HEIRS, SUCCESSORS, DEVISEES, PERSONAL REPRESENTATIVES AND ASSIGNEES. The aforesaid continuing contractual lien shall attach to the Property as of the date of the recording of this Declaration and shall be superior to all liens other than (a) a deed of trust or mortgage constituting a lien on the land of an Owner that secures financing or refinancing of the acquisition cost of such land or the cost of the construction of improvements thereon, (b) any sale and leaseback agreement or lease and subleaseback agreement whereby an Owner sells and simultaneously acquires a possessory interest under a lease from or other agreement with such transferee, and (c) the lien securing real estate taxes; provided, however, the types of liens referenced in (a) and (b) above shall be inferior and subordinate to the lien securing the obligation to pay Assessments to the extent of all unpaid Assessments set forth in any recorded Notice of Unpaid Assessments (as defined below) existing as of the date of such other lien that has not been duly released by the Association. The Association shall have the power to subordinate the aforesaid Assessment lien to any other lien. The exercise of such power shall be entirely discretionary with the Association. Except for a conveyance to a purchaser at a foreclosure sale pursuant to a lien to which the Assessment lien is subordinate as provided above, all parcels within the Property are conveyed to and accepted

and held by the Owner thereof subject to the Assessment lien provided for in this Section 4.07. To evidence any unpaid Assessments, the Association may prepare a written notice of unpaid Assessment (the "**Notice of Unpaid Assessments**") setting forth the amount of the unpaid indebtedness, name of the Owner of the affected property and a description of the affected property. Such notice shall be signed by one of the officers of the Association and shall be recorded in the Official Public Records of Travis County, Texas. The Association shall record an appropriate release of any recorded Notice of Unpaid Assessments when the amounts referenced therein have been paid. **THE LIEN FOR PAYMENT OF ASSESSMENTS MAY BE ENFORCED BY FORECLOSURE OF THE LIEN UPON THE DEFAULTING OWNER'S PROPERTY BY THE ASSOCIATION SUBSEQUENT TO THE RECORDING OF THE NOTICE AS PROVIDED ABOVE EITHER BY JUDICIAL FORECLOSURE OR BY NONJUDICIAL FORECLOSURE THROUGH A PUBLIC SALE IN LIKE MANNER AS A MORTGAGE ON REAL PROPERTY IN ACCORDANCE WITH SECTION 51.002, TEXAS PROPERTY CODE, AS SUCH MAY BE REVISED, AMENDED, SUPPLEMENTED OR REPLACED FROM TIME TO TIME.** In addition, the Association may institute suit against the Owner personally to obtain a judgment for unpaid Assessments. In any foreclosure proceeding, whether judicial or nonjudicial, or in any other suit against the Owner, the Owner shall be required to pay the costs, expenses and reasonable attorneys' fees incurred by the Association. The Association shall have the right and power to buy the property at foreclosure or other legal sale and to acquire, hold, lease, mortgage, convey or otherwise deal with the same. Upon the written request of any mortgagee holding a lien on any part of the Property, the Association shall report to said mortgagee any Assessments which are delinquent and unpaid at the time of the report.

**SECTION 4.08. CERTIFICATE.** Upon request by an Owner, the Association shall furnish a certificate setting forth any unpaid Assessments owed by an Owner.

## **ARTICLE V**

### **ASSOCIATION BOARD OF DIRECTORS**

**SECTION 5.01. CREATION OF BOARD.** The Association shall be governed by the Board elected by a Majority Vote of the Members. The size and composition of the Board, its method of election and its duties and authorities shall be as provided in the Association Documents and this Declaration, except that all members of the Board shall be Owners or employees, agents or officers of Owners. The Board shall exist and function solely for the benefit of the Property, the Association and the Members.

**SECTION 5.02. USE OF ASSESSMENT FUNDS.** The Board shall be responsible for the setting, collection and disbursement of Assessments. In general, the Board shall be empowered to cause the Association to take the following actions and to expend Regular Assessment and Special Purpose Assessment funds for the following purposes:

- a. the payment of the Common Expenses;
- b. if approved by a Special Vote of the Class A Members, the employment of contractors to maintain and repair Streets and utilities, but only to the extent that the City (or other responsible Governmental Entity) or appropriate utility company fails to do so in a manner deemed appropriate in the judgment of the Board;
- c. the employment of independent consultants or independent contractors to manage day-to-day operations of the Association; provided, however, neither the directors of the Association nor members of the DRB shall be paid any salary or other compensation for serving in such capacity;
- d. the employment of legal, accounting, engineering, architectural or other independent professional services, including, but not limited to, any services required to provide architectural review for any plans for the construction of Improvements on a Site;
- e. the purchase of a policy or policies of insurance insuring the Association, the Board and the DRB against any liability to the public or to the Owners (and/or visitors or occupants) incident to operation of the Association or the DRB;
- f. the purchase of fidelity bonds;

g. the payment for materials, supplies, services, maintenance, repairs, alterations, insurance, ad valorem and other taxes on property owned by the Association or in which the Association has an easement and general and administrative expenses which, in the opinion of the Board, shall be necessary or proper for the operation or protection of the Association or for the enforcement of this Declaration, including, but not limited to, reasonable expenses of the DRB; and

h. the payment of costs incurred in the exercise and performance by the Board or the Association of any of their authorities, duties and rights set forth in this Declaration.

In addition to the expending of Regular Assessment and Special Purpose Assessment funds for the aforementioned purposes, the Board also shall be empowered to expend funds collected through Special Member Assessments for those purposes set forth in Article IV of this Declaration.

**SECTION 5.03. ADDITIONAL AUTHORITIES AND DUTIES OF THE ASSOCIATION.** Subject to the provisions of Section 7.01b below, the Board shall have the following additional authorities and duties exercisable on behalf of the Association with respect to performance of the rights and obligations of the Association hereunder and the right to expend Assessment funds to pay the costs thereof:

a. to enter into agreements or contracts with respect to: (i) insurance coverage for the Common Areas and the Common Facilities; (ii) utility consumption and services matters necessary for the operation of the Common Areas and the Common Facilities and the provision and operation of the Common Services; (iii) maintenance, repair and operation of the Common Areas and of Landscaping in the Common Areas, in the Unpaved Right-of-Way and in the Parkway Landscape Areas and Common Facilities; and (iv) design, engineering and other consultant contracts;

b. to determine the Common Services that should be obtained by the Association for the benefit of the Owners, subject to the approval of a Special Vote of the Class A Members;

c. to designate Common Areas and Common Facilities not listed in Section 1.02g and Section 1.02i, subject to the approval of a Special Vote of the Class A Members;

d. to designate Project Signage Identification Areas;

e. to borrow funds to pay any costs of operation, secured by assignment or pledge of Assessments, as the Board may determine to be necessary and appropriate in accordance with this Declaration;

f. to enter into contracts for goods and services or other purposes, maintain one or more bank accounts and generally to have all the powers necessary or incidental as may be required for prudent operation and management of the Association;

g. to sue or to defend in any court of law on behalf of the Association;

h. to make, or cause to be made, any tax returns, reports or other filings required by federal, state or local governmental authorities;

i. to make available to each Owner within 90 days after the end of any Association fiscal year a written annual report on financial affairs of the Association for the preceding year, and, upon written request of Members in Good Standing holding two-thirds of the Class A Member votes eligible to be cast by all of the Class A Members in Good Standing, to have such report audited by an independent certified public accounting firm selected by the Board, which audited report, if required, shall be completed and made available to each Member as soon as practical after a request is received by the Board; provided, however, prior to the Conversion Date, (i) unless Declarant votes in favor of such audit, the cost shall be borne by all Class A Members other than Declarant, and the Association may require that such audit costs be paid in advance, and (ii) notwithstanding the above, Declarant shall pay the costs of the audit if such audit reveals a discrepancy of greater than 5% in the accounting reports furnished by the Association that is adverse to the Association or the Members;

j. to adjust the amount, collect and use any insurance proceeds to repair or replace any damaged or lost property or to reimburse persons or entities entitled to receive reimbursement for injury, damage or losses, and, if said insurance proceeds are insufficient to provide full reimbursement as may be required, the Board may act to collect funds through Special Purpose Assessments or Special Member Assessments, whichever is applicable;

k. to enforce the provisions of this Declaration and the Development and Construction Guidelines and to enjoin action or seek damages and/or remedial action from any Owner for violation of this Declaration or the Development and Construction Guidelines, which right shall include, but is not limited to, the right, but not the obligation, to enter onto any part of the Property to perform obligations of the Owner thereof who has failed to do so in accordance with the provisions of this Declaration or the Development and Construction Guidelines;

l. to maintain books and records with respect to all aspects of the operations of the Association and to the levy, collection, receipt, administration, expenditure and disposition of all Assessments and other funds held by the Association in accordance with sound accounting practices (that separately reflect all Association reserve funds), and to permit any Owner (or a person designated by such Owner in writing) to inspect, copy and audit the same upon reasonable notice during normal business hours at an office of the Association or the Declarant;

m. to promulgate Development and Construction Guidelines (the "**Development and Construction Guidelines**") to serve as a guide for Owners in the planning and construction of Improvements and as a guide for the DRB in reviewing and approving or disapproving plans and specifications for Improvements and to revise such from time to time as the Board, in its discretion, deems appropriate, with copies of revisions to be furnished to all Owners. The Development and Construction Guidelines shall not contain any provisions (i) that conflict with the provisions of this Declaration, (ii) that attempt to prohibit uses that comply with Section 7.01a below and that are not prohibited by Section 7.02 below, or (iii) that restrict or diminish rights of Owners as specifically provided in this Declaration;

n. to appoint members of the DRB as described in Article VI below,

o. to own fee simple title or an easement interest to the Project Signage Identification Areas, the Common Areas and any other areas determined by the Board to be appropriate;

p. to promulgate reasonable rules governing the use of the Common Areas, the Common Facilities and the Common Services; and

q. to perform such other duties and functions as are necessary to carry out the rights and obligations of the Board and the Association under this Declaration.

The Association shall have the right to perform such other functions, and to utilize Assessments to pay the cost thereof, to the extent that such other functions and services are approved by a Special Vote of the Class A Members.

**SECTION 5.04. AFFILIATED CONTRACTS.** The Board, acting on behalf of the Association, shall have the full power and authority to contract with any Owner, including, without limitation, Declarant, or their affiliates for performance of services which the Association is obligated or authorized to obtain, such contracts to be at competitive rates then prevailing for such services and upon such other terms and conditions, and for such consideration as the Board may deem advisable and in the best interest of the Association provided that the level of service received is consistent with that available from third parties. In determining whether any such affiliated contract is competitive, the Board shall obtain estimates, bids or informal quotes from other possible providers of similar services, all of which shall be made available for review by any Owner upon written request submitted to the Association.

**SECTION 5.05. LIABILITY LIMITATIONS.** No Member, director, officer or representative of the Association shall be personally liable for debts or liabilities of the Association. The directors and officers of the Association shall not be liable for any mistake of judgment, whether negligent or

otherwise, except for their own individual willful misfeasance or malfeasance, misconduct, bad faith, intentional wrongful acts or as provided in the Association Documents. Such directors and officers shall have no personal liability with respect to any contract or other commitment made by them, in good faith, on behalf of the Association, and the Association, as a Common Expense of the Association, shall indemnify and hold such directors and officers harmless from any and all expense, loss or liability to others on account of any such contract or commitment (to the extent not covered by insurance proceeds). In addition, each director and each officer of the Association shall be indemnified and held harmless by the Association, as a Common Expense of the Association from any expense, loss or liability to others (to the extent not covered by insurance proceeds) by reason of having served as such director or as such officer and against all expenses, losses and liabilities, including court costs and reasonable attorneys' fees, incurred by or imposed upon such director or officer in connection with any proceeding to which he may be a party or have become involved by reason of being such director or officer at the time such expenses are incurred subject to any provisions regarding indemnity contained in the Association Documents, except in cases wherein the expenses, losses and liabilities arise from a proceeding in which such director or such officer is adjudicated guilty of willful misfeasance or malfeasance, misconduct, bad faith in the performance of his duties, intentional wrongful acts or any act specified in the Association Documents as an act for which any limitation of liability set forth in the Association Documents is not applicable (**THIS INDEMNITY DOES COVER LIABILITIES RESULTING FROM SUCH DIRECTOR'S OR OFFICER'S NEGLIGENCE**). In the event of a settlement of any such proceeding, the indemnification provided hereby shall apply only when the Board approves such settlement and reimbursement as being in the best interests of the Association. Any right to indemnification provided for herein shall not be exclusive of any other rights to which a director or officer, or former director or officer, may be entitled. The Association shall have the right to purchase and maintain, as a Common Expense, directors' and officers' insurance on behalf of any person who is or was a director or officer of the Association against any liability asserted against him and incurred by him in such capacity, or arising out of his status as such.

**SECTION 5.06. INSURANCE.** The Association, acting through the Board shall have the right to purchase, carry and maintain in force, to the extent such is available (a) liability insurance covering any employees and any and all portions of the Common Areas, and any improvements thereon or appurtenant thereto, and covering the Common Facilities, Common Services and the Parkway Landscape Areas, for the interest of the Association, the Board, agents and employees, and of all Members, in such coverage and amounts and with such endorsements as shall be considered by the Board, in its sole discretion, to be reasonable; (b) errors and omissions insurance for the Board, officers of the Association and the DRB, and (c) fidelity bonds for all Board members, officers or employees of the Association. The Board shall carry such insurance at such limits of coverage and with financially sound companies licensed to do business in Texas as the Board deems appropriate. Notwithstanding the above, the Association shall carry and maintain, to the extent such coverage is reasonably available as determined by the Board liability insurance with policy limits of at least \$1,000,000 covering occurrences in the Common Areas or as the result of the operation of Common Services or Common Facilities. The Association shall use any net insurance proceeds for the purpose the insurance was intended, including, but not limited to, the repair and/or replacement of any damaged or lost property, whether real or personal. Any unused balance from the proceeds of insurance paid to the Association shall be retained by the Association for use in the payment of Common Expenses. Should insurance proceeds be insufficient to fully reimburse any loss or damage, the Association may levy a Special Purpose Assessment or a Special Member Assessment, whichever is applicable, to cover such deficiency.

## **ARTICLE VI**

### **DEVELOPMENT REVIEW BOARD**

**SECTION 6.01. CREATION OF DEVELOPMENT REVIEW BOARD.** The Association shall establish and maintain a Development Review Board (the "DRB") consisting of not fewer than three persons appointed by the Board. At least two members of the DRB shall be Owners or employees, agents or officers of Owners. One member of the DRB shall be a representative of the Preserve Member that owns the largest portion of the Habitat Preserve Area. Until the Conversion Date, the appointment of the members of the DRB must be approved by Declarant, and any or all members of such DRB may be removed by the Board or Declarant with or without cause. After the Conversion Date, the Board then shall have the exclusive right and authority at any time, and from time to time thereafter, to create and fill vacancies on the DRB and to remove members of the

DRB with or without cause. The vote of the majority of the voting members of the DRB shall be the act of the DRB.

**SECTION 6.02. FUNCTION OF DEVELOPMENT REVIEW BOARD.** A function of the DRB is to review and approve or disapprove plans and specifications for Improvements proposed to be installed or modified on portions of the Property. NO IMPROVEMENTS SHALL BE ERECTED, CONSTRUCTED, PLACED, ALTERED, REMODELED, DEMOLISHED OR PERMITTED TO REMAIN ON SUCH PORTION OF THE PROPERTY UNTIL PLANS AND SPECIFICATIONS REQUIRED HEREUNDER TO BE SUBMITTED TO THE DRB, IN SUCH FORM AND DETAIL AS THE DRB MAY DEEM NECESSARY, SHALL HAVE BEEN SUBMITTED TO THE DRB AND APPROVED BY IT IN WRITING. The vote of a majority of the members of the DRB shall be considered as the act of the DRB. The Board, from time to time, may establish and revise a standard review fee which must be paid by an Owner at the time plans are submitted for review. The DRB shall have the authority to select and employ professional consultants to assist it in discharging its duties if the DRB determines that it does not have sufficient expertise or time to review any submitted plans, the cost of such consultants to be paid by the Owner of the Site for which plans and specifications have been submitted for approval, which cost shall be in addition to the review fee referenced above. The process of reviewing and approving plans and specifications is one which of necessity requires that the DRB is called upon from time to time to make subjective judgments on items for which specific standards or guidelines are not expressly set forth in this Declaration or the Development and Construction Guidelines. The DRB is given full power and authority to make any such subjective judgments and to interpret the intent and provisions of this Declaration and the Development and Construction Guidelines in such manner and with such results as the DRB, in its sole discretion, may deem appropriate, and in the absence of final adjudication by a court of competent jurisdiction that the DRB has abused its discretion, such action by the DRB shall be final and conclusive. While the Development and Construction Guidelines are intended as a general guide for development within the Property, the DRB shall have the right to grant variances from the Development and Construction Guidelines as it, in its sole judgment, deems appropriate. The DRB shall have the sole discretion to determine whether plans and specifications submitted to it for approval are acceptable, and the DRB or the Association shall be entitled and empowered to enjoin or remove any construction undertaken pursuant to plans and specifications that have not been approved in writing by the DRB. Improvements for which DRB approval is required are to be constructed in accordance with the Development and Construction Guidelines in existence as of the date the preliminary plans therefor are submitted to the DRB as required hereunder. Subsequent changes to the Development and Construction Guidelines shall not require changes in existing construction or plans previously approved by the DRB. THE RIGHTS AND POWERS OF THE DRB UNDER THIS ARTICLE VI ARE SUBJECT TO THE PROVISIONS OF SECTION 7.01b BELOW.

**SECTION 6.03. PLANS AND SPECIFICATIONS.**

a. The focus of the review by the DRB will be matters affecting the Site other than areas interior to buildings constructed on a Site. Accordingly, neither the DRB nor the Development and Construction Guidelines will require an Owner to submit for review detail plans and specifications of building interiors. The DRB shall have the right to disapprove any submitted plans that are not in compliance with this Declaration and the Development and Construction Guidelines, if they are incomplete or if the DRB determines that such plans are deficient from an engineering or design standpoint. The DRB may base its approval or disapproval on, among other things:

- (i) architectural character of all proposed Improvements, taking into consideration the aesthetic quality of any structures with respect to height, form, proportion, volume, siting, exterior materials and roofing materials (with regard to type, scale, texture, color and durability), proposed quality of workmanship;
- (ii) adequacy of Site dimensions for the proposed Improvements;
- (iii) conformity and harmony of external design with Improvements on neighboring Sites and types of operations and uses thereof,
- (iv) relation to topography, grade and finish ground elevations to that of neighboring Sites;

- (v) screening of mechanical and other installations;
- (vi) functional appropriateness with respect to vehicle handling, pedestrian circulation, siting of buildings (both in relationship to one another and in relationship to buildings, existing or proposed, located on other Sites), drainage, utility service systems and lighting;
- (vii) extent and quality of landscaped areas;
- (viii) exterior signing;
- (ix) compliance with the purpose and general plan, intent and provisions of this Declaration and the Development and Construction Guidelines;
- (x) compliance with the Zoning Plan; and
- (xi) compliance with the 10(a) Permit.

Each Owner shall follow the procedures and requirements for the submission of plans and specifications for proposed Improvements as set forth in the Development and Construction Guidelines. The DRB shall be available on a reasonable basis, upon reasonable request of an Owner, to meet with an Owner or its representatives to discuss and answer questions concerning proposed Improvements and their compliance with this Declaration and the Development and Construction Guidelines.

b. The development review process consists of three phases: the concept plan phase, the preliminary plans review and the final plans review.

c. The concept plan phase is the opportunity for the DRB to communicate to an Owner any specific development requirements for the Owner's Site and for the Owner to present to the DRB such Owner's concept design for the Improvements proposed to be constructed or installed on its Site. The concept design plan submitted by the Owner shall provide and show all information specified and required in the Development and Construction Guidelines. The DRB must approve in writing the Owner's design concept before the DRB will accept the Owner's submission for preliminary plans review. THIS DESIGN CONCEPT PRESENTATION SHALL OCCUR AS EARLY AS POSSIBLE IN THE DESIGN PHASE FOR ANY IMPROVEMENTS. A PRIMARY PURPOSE OF THIS INITIAL PRESENTATION IS TO IDENTIFY ANY GENERAL DESIGN ASPECTS OF THE PROPOSED IMPROVEMENTS THAT ARE UNACCEPTABLE TO THE DRB AT A TIME PRIOR TO THE OWNER HAVING INCURRED SUBSTANTIAL DESIGN AND ENGINEERING COSTS.

d. Based on the design concept approved by the DRB, the Owner shall submit to the DRB its preliminary plans for the proposed Improvements on its Site for preliminary plans review by the DRB. Such plans shall provide and show all of the information, drawings and data specified and required in the Development and Construction Guidelines and such other information as may be required by the DRB. The DRB must approve in writing the Owner's preliminary plans for such improvements before the DRB will accept the Owner's submission for Final Plans Review.

e. Based upon the preliminary plans approved by the DRB, the Owner shall submit to the DRB its final plans and specifications for the proposed Improvements on its Site for final plans review by the DRB. Such plans and specifications shall be prepared by an architect, professional engineer, landscape architect and land surveyor (as appropriate) registered under Texas law, bearing the signature, seal and certification of such architect, professional engineer, landscape architect and land surveyor and shall provide and show all of the information, drawings and data specified and required in the Development and Construction Guidelines and such other information as may be required by the DRB. The plans shall be accompanied by the written certification by the Owner's architect that the Improvements comply with the provisions of the Development and Construction Guidelines, this Declaration, the Zoning Plan and the 10(a) Permit. If any of the plans or specifications that are submitted do not comply with this Declaration, the Development and Construction Guidelines, the Zoning Plan and the 10(a) Permit, the Owner's architect, in such certificate, shall specify and explain



any noncompliance.

f. At the request of an Owner, the DRB shall review plans for phased or "fast-track" construction prior to reviewing plans for the completed construction project. All additional costs of consultants necessary to provide this type of review shall be paid by the Owner. Any such request for such approval procedure shall be at the risk of such Owner, because the DRB shall have the right to withhold further approvals or to withdraw its approval of plans previously submitted if later plans for further construction on such Site result in such previously approved Improvements no longer being in substantial compliance with this Declaration or the Development and Construction Guidelines or being consistent in all material respect with plans for the Site previously approved by the DRB. In such event, the Owner shall modify any such previously constructed improvements as may be required by the DRB.

g. Approval of plans and specifications shall be based upon a determination by the DRB as to whether or not in its judgment such plans and specifications adequately meet objectives established for the Property with regard to aesthetic quality, as well as meeting the requirements created by this Declaration and the Development and Construction Guidelines. The DRB shall notify the Owner of the DRB's disapproval of any portion of the plans or other submissions and shall give the reasons for such disapproval. Approval of any plans and specifications with regard to certain improvements shall not be deemed a waiver of the DRB's right, in its discretion, to disapprove similar plans and specifications, or any of the features or elements included therein, for any other Improvements or to refrain from granting similar variances.

h. If any submission of plans is not complete or does not include all data required by this Declaration or the Development and Construction Guidelines, the DRB, within 15 days after such submission, shall notify the Owner of such deficiencies, and such plans shall not be considered to have been submitted until such deficiencies have been corrected. Should the DRB fail to approve or disapprove any concept design plans, preliminary plans or final plans, properly presented by an Owner as provided above, within 20 days after submittal thereof to the DRB in a form and fully complete as required by the DRB and the Development and Construction Guidelines, it shall be presumed that the DRB has approved such properly submitted plans and specifications, unless prior to the end of such 20-day period, the DRB shall have notified the Owner submitting such plans and specifications in writing that an additional time period, not to exceed ten days, is needed for further review, after which additional period it shall be presumed that approval has been given absent specific disapproval in writing having been given by the DRB during such additional review period. The DRB in the future may modify, by provisions in the Development and Construction Guidelines, the procedure for the submission and review of plans provided the review times set forth above are not materially changed.

i. If work is not commenced within 18 months from the date of DRB approval of final plans, then the approval given pursuant to this Article VI shall be deemed revoked by the DRB, unless the DRB extends the time for commencing work. In any event, all work covered by such approval, once commenced, shall be constructed with due diligence and completed as soon as reasonably possible, but must be completed within three years of the commencement thereof, except for such period of time as such completion is rendered impossible or would result in great hardship due to strikes, fires, national emergencies, critical materials shortages or other intervening forces beyond the control of the Owner, unless the DRB extends the time for completion.

**SECTION 6.04. INSPECTIONS.** The DRB, or its designees, shall have the right during reasonable business hours to enter upon and inspect any Site or Improvements then under construction to determine whether or not the plans therefor have been approved by the DRB. If the DRB shall determine that such plans have not been approved or that the plans which have been so approved are not being substantially complied with, the DRB may, in its discretion, give the Owner of such Site and Improvements written notice to such effect and, thereafter, the Board or the DRB, on behalf of the Association, shall be entitled to enjoin further construction and to require the removal or correction of any work in place that does not comply with approved plans. If any Improvements shall be altered or replaced on any Site otherwise than in substantial conformity with the approved plans therefor, such action shall be deemed to have been undertaken without requisite approval of the DRB and to be in violation of this Declaration; and the Board or the DRB, on behalf of the Association, shall be entitled to take action as permitted under this Declaration with respect thereto.

**SECTION 6.05. INTERIOR ALTERATIONS.** Notwithstanding any other provisions of this Declaration or the Development and Construction Guidelines, an Owner may make improvements and alterations within the interior of any building on its Site without first obtaining DRB approval, provided such do not change the exterior appearance of any Improvements.

**SECTION 6.06. CHANGES.** No construction or installation of Improvements on a Site that is inconsistent with, in addition to or materially different from any previously approved plans shall be commenced or permitted until the plans reflecting such change or addition have been submitted to and approved by the DRB in accordance with this Article VI; provided, however:

(a) no such approval is required for changes within the interior of any building that do not change exterior appearance; and

(b) The DRB, for reasons of (i) architectural character of the proposed improvements, (ii) conformity and harmony of external design with Improvements on neighboring Sites, (iii) extent and quality of landscaped areas, and (iv) exterior signage, shall not withhold approval of plans for proposed changes to the exterior of buildings previously constructed on such Site or the exterior appearance of new Improvements proposed to be constructed on such Site ("**Proposed Exterior Building Changes**") if such plans are in conformance with plans previously approved by the DRB as provided in this Declaration with respect to buildings or Improvements previously constructed on such Site ("**Previously Approved Plans**"). Furthermore, the DRB shall not withhold approval of plans based on the types of operations and uses thereof as reflected under Section 6.03(a)(iii) if the types of operations and uses are in conformity with the Zoning Plan and the CC&Rs. If a dispute should arise between an Owner and the DRB as to whether the Proposed Exterior Building Changes conform to Previously Approved Plans for purposes hereof, such dispute shall be resolved by Overland Partners, Madison Smith architect or another architect reasonably acceptable to both the DRB and the Owner.

**SECTION 6.07. LIMITATION OF LIABILITY.** Declarant, the Association, the Board or any of its members and the DRB or any of its members, shall not, individually or in combination, be liable in damages or otherwise to any Person submitting plans or specifications for approval or to any Owner of any portion of the Property, by reason of subjective decisions, mistake in judgment, negligence or nonfeasance arising out of or in connection with the approval or disapproval or failure to approve or to disapprove any plans and specifications submitted; provided, however, this provision does not apply to acts of willful misfeasance or malfeasance, misconduct, bad faith or intentional wrongful acts. Declarant, the Association, the Board or any of its members and the DRB or any of its members shall not, individually or in combination, be liable in damages or otherwise in connection with any construction, design, engineering or defect associated with any improvement constructed on the Property. APPROVAL OF PLANS AND SPECIFICATIONS BY THE DRB DOES NOT CONSTITUTE ANY WARRANTY OR REPRESENTATION THAT SUCH PLANS AND SPECIFICATIONS COMPLY WITH THE ZONING PLAN, THE 10(a) PERMIT OR ANY OTHER GOVERNMENTAL REQUIREMENTS OR GOOD AND PRUDENT DESIGN, ENGINEERING AND CONSTRUCTION PRACTICES. IT IS THE SOLE RESPONSIBILITY OF THE OWNER TO DETERMINE AND SEE THAT ITS PLANS AND SPECIFICATIONS COMPLY WITH SUCH REQUIREMENTS AND PRACTICES.

**SECTION 6.08. CERTIFICATE OF COMPLIANCE.** Upon request by an Owner who has complied with the provisions of this Article VI, the Association shall deliver to such Owner, a written certificate of such compliance in recordable form, and such certificate shall be conclusive evidence of such compliance.

**SECTION 6.09. DOCUMENTATION.** Within 60 days after completion of any Improvements, the Owner of such Site shall provide to the Association as-built site, utility, drainage and landscape plans, plans for irrigation systems in the Parkway Landscape Area on and adjacent to such Site and such other as-built information which may be requested by the Board or the DRB.

## **ARTICLE VII** **DEVELOPMENT COVENANTS**

### **SECTION 7.01 GENERAL.**

a. No use shall be permitted on the Property which is not allowed under applicable public codes and ordinances either already adopted or as may be adopted by the City or other controlling public authority. Each Owner, occupant or other user of any portion of the Property at all times shall comply with this Declaration and the Development and Construction Guidelines and with any and all laws, ordinances, policies, rules, regulations and orders of all federal, state, county and municipal governments or their agencies having jurisdictional control over the Property, specifically including, but not limited to, the 10(a) Permit, the Zoning Plan and any other applicable zoning restrictions placed upon the Property as they exist from time to time. IN SOME INSTANCES GOVERNMENTAL REQUIREMENTS MAY BE MORE OR LESS RESTRICTIVE THAN THE PROVISIONS OF THIS DECLARATION AND THE DEVELOPMENT AND CONSTRUCTION GUIDELINES. IN THE EVENT A CONFLICT EXISTS BETWEEN ANY SUCH GOVERNMENTAL REQUIREMENT AND ANY REQUIREMENT OF THIS DECLARATION OR THE DEVELOPMENT AND CONSTRUCTION GUIDELINES, THE MOST RESTRICTIVE REQUIREMENT SHALL PREVAIL, EXCEPT IN CIRCUMSTANCES WHERE COMPLIANCE WITH A MORE RESTRICTIVE PROVISION OF THE DECLARATION OR THE DEVELOPMENT AND CONSTRUCTION GUIDELINES WOULD RESULT IN A VIOLATION OF MANDATORY APPLICABLE GOVERNMENTAL REQUIREMENTS, IN WHICH EVENT THOSE GOVERNMENTAL REQUIREMENTS SHALL APPLY. COMPLIANCE WITH MANDATORY GOVERNMENTAL REQUIREMENTS WILL NOT RESULT IN THE BREACH OF THIS DECLARATION OR THE DEVELOPMENT AND CONSTRUCTION GUIDELINES EVEN THOUGH SUCH COMPLIANCE MAY RESULT IN NON-COMPLIANCE OF PROVISIONS OF THIS DECLARATION OR THE DEVELOPMENT AND CONSTRUCTION GUIDELINES. WHERE A GOVERNMENTAL REQUIREMENT DOES NOT CLEARLY CONFLICT WITH THE PROVISIONS OF THIS DECLARATION OR THE DEVELOPMENT AND CONSTRUCTION GUIDELINES BUT PERMITS ACTION THAT IS DIFFERENT FROM THAT REQUIRED BY THIS DECLARATION OR THE DEVELOPMENT AND CONSTRUCTION GUIDELINES, THE PROVISIONS OF THIS DECLARATION AND THE DEVELOPMENT AND CONSTRUCTION GUIDELINES SHALL PREVAIL. All portions of the Property shall be developed in accordance with this Declaration as such may be amended as herein provided. The provisions of this Article VII set forth certain requirements which, in addition to the other provisions of this Declaration and the Development and Construction Guidelines, shall apply with respect to the development and use of the Property.

b. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THE PROVISIONS OF THIS DECLARATION OTHER THAN THIS SECTION 7.01b, THE ASSOCIATION, THE BOARD AND THE DRB SHALL NOT HAVE THE RIGHT OR AUTHORITY TO EXERCISE ANY OF THE POWERS OR RIGHTS GRANTED TO ANY OF THEM IN THIS DECLARATION IN SUCH A MANNER AS TO PROHIBIT THE USE BY ANY OWNER OF ITS SITE FOR ANY USE (a) THAT COMPLIES WITH THE FOREGOING PROVISIONS OF SECTION 7.01a ABOVE, AND (b) THAT IS NOT PROHIBITED BY THE PROVISIONS OF SECTION 7.02 BELOW. BY WAY OF EXAMPLE, THE BOARD SHALL NOT ADOPT (INITIALLY OR BY AMENDMENT) DEVELOPMENT AND CONSTRUCTION GUIDELINES THAT ARE DESIGNED TO PROHIBIT AN OWNER'S USE OF ITS SITE THAT OTHERWISE WOULD BE IN COMPLIANCE WITH THE PROVISIONS OF SECTION 7.01a ABOVE AND NOT PROHIBITED BY SECTION 7.02 BELOW. FURTHER, BY WAY OF EXAMPLE, THE DRB SHALL NOT EXERCISE ITS APPROVAL RIGHTS UNDER ARTICLE VI OF THIS DECLARATION IN A MANNER INTENDED TO PROHIBIT AN OWNER'S USE OF ITS SITE THAT OTHERWISE WOULD BE IN COMPLIANCE WITH THE PROVISIONS OF SECTION 7.01a ABOVE AND NOT PROHIBITED BY SECTION 7.02 BELOW. THE PROVISIONS OF THIS SECTION 7.01b, HOWEVER, DO NOT AFFECT (i) THE RIGHT AND AUTHORITY OF THE ASSOCIATION, THE BOARD OR THE DRB TO EXERCISE THEIR RIGHTS AND POWERS SET FORTH IN THIS DECLARATION, OR (ii) THE OBLIGATIONS OF EACH OWNER TO COMPLY FULLY WITH THE PROVISIONS OF THIS DECLARATION, SPECIFICALLY, BY WAY OF EXAMPLE, BUT NOT IN LIMITATION, THE PROVISIONS OF ARTICLES VI AND VII OF THIS DECLARATION NOTWITHSTANDING ANY INCIDENTAL EFFECT OF SUCH COMPLIANCE ON AN OWNER'S USE OF ITS SITE.

**SECTION 7.02. PROHIBITED USES.** Without limiting the generality of Section 7.01 above, the following uses are prohibited on the Property:

a. overnight parking of campers, mobile homes, boats or motor homes except in areas

that are covered, enclosed or screened in a manner approved by the DRB;

b. junk yard, salvage yard or storage facility for abandoned vehicles, abandoned aircraft or abandoned aircraft or vehicle parts;

c. the dumping and incineration of garbage or refuse of any nature, except as the DRB may specifically permit in writing;

d. the smelting of iron, tin, zinc or other ore unless specifically permitted in writing by the DRB;

e. sanitary landfill;

f. pawn shop;

g. sexually-oriented business such as, but not limited to, x-rated movie or video sales, theater or rental facility, nude modeling studio, massage parlor, lounge or club featuring nude or semi-nude entertainers or escort service;

h. slaughterhouse or feedlot;

i. the raising, breeding or keeping of animals or poultry, except (i) in connection with operation of a retail pet store or a small animal only veterinarian clinic; or (ii) the keeping of animals in buildings or enclosures screened in a manner required by the DRB, are permitted;

j. drive-in movie theater,

k. mineral refining facility or operations;

l. horse or dog racing track or any facility for off-track parimutual betting; and

m. any use that would result in a violation of or that is not in compliance with the 10(a) Permit.

### **SECTION 7.03. SETBACKS.**

a. Except as hereinafter specifically provided, each Site shall be subject to "**Front Yard Setbacks**" consisting of a "**Paving Setback**" and a "**Building Setback**" measured in feet from the right-of-way line of each Street contiguous to such Site (a Site shall have a front yard on each boundary abutting a Street) as follows:

<u>Street</u>	<u>Paving Setback</u>	<u>Building Setback</u>
_____ Drive	25 feet	As established by the Zoning Plan and other applicable City ordinances
_____ Blvd.	25 feet	As established by the Zoning Plan and other applicable City ordinances
R .M. _____	As established by the Zoning Plan and other applicable City ordinances	As established by the Zoning Plan and other Zoning Plan and other applicable City ordinances
R. M. _____	50 feet	As established by the Zoning Plan and other applicable City

		ordinances
All other Streets	As established by the Zoning Plan and other applicable City ordinances	As established by the Zoning Plan and other applicable City ordinances

Notwithstanding the Building Setbacks specified above, each front yard Building Setback for any building (other than buildings in which at least 80% of the total building square footage is used for hotel or general office use on Sites not adjacent to median divided Streets) to be constructed on a Site that will be greater in height than the width of the above-specified applicable front yard Building Setbacks shall be increased one foot for each one foot of building height in excess of the width of the above-specified applicable front yard Building Setback up to a maximum required front yard Building Setback of 100 feet.

b. Except as hereinafter specifically provided, each Site shall be subject to **“Side and Rear Yard Setbacks”** on all sides of a Site not abutting a Street consisting of a five-foot Paving Setback and a 30-foot Building Setback, measured from the applicable boundary lines of the Site.

c. No Improvements shall be constructed, installed or planted by an Owner within a Paving Setback or within the Unpaved Right-of-Way on or adjacent to a Site other than Landscaping, sidewalks, underground utility lines and connections (including surface mounted switchgear), driveways crossing such area into the Site, and, but only if such are approved in writing by the DRB, gates and gatehouses, landscape walls, signs, flags, sculpture and other Improvements specifically authorized by the DRB.

d. No Improvements shall be constructed, installed or planted on any Site between the Paving Setback and the Building Setback applicable to such Site except for:

- (i) those Improvements permitted in Section 7.03c above;
- (ii) underground structures;
- (iii) steps, pedestrian plaza, benches and related hardscape;
- (iv) planters and retaining walls;
- (v) fences, screening walls and security walls approved in writing by the DRB;
- (vi) driveways, porte cocheres and surface parking areas; and
- (vii) other Improvements specifically authorized by the DRB.

e. Notwithstanding the setbacks specified above, the DRB shall have the right, with respect to any retail shopping areas or centers developed on the Property, to waive or reduce any applicable Front, Side or Rear Yard Setbacks.

**SECTION 7.04. SITE CIRCULATION.** Declarant intends for the Property to be developed in such a manner to minimize the number of curb cuts on to and median cuts in Streets, all of which curb and median cuts must be approved in writing in advance by the DRB. Driveways on a Site shall be paved with concrete and shall accommodate adequate vehicle stacking so that stacking on Streets of vehicles entering the Site is minimized. Notwithstanding the provisions of Section 7.03 above, the DRB may, in its discretion, permit jointly used driveways along the common side or rear yard boundary lines of two adjacent Sites designed to facilitate vehicular circulation provided other side and rear yard Landscaping is provided on such Sites acceptable to the DRB. Each Owner, in accordance with the provisions of the Development and Construction Guidelines, shall install sidewalks on its Site and the Unpaved Right-of-Way of any abutting Street if, as and when required to do so by the City or the Association. The design, materials and location of such sidewalks are subject to approval of the DRB. In addition, pedestrian circulation areas around buildings and parking areas shall be installed and landscaped as shown on the Preliminary Plans approved by the DRB.

**SECTION 7.05. FIRE PROTECTION.** All buildings shall be designed, constructed and maintained so as to comply fully at all times with any applicable public codes, ordinances, rules, regulations and orders relating to fire protection. All such buildings and their associated ingress and egress from and to Streets and surface parking areas shall be so related to one another and arranged as to permit ease of access for emergency fire vehicles. Designated fire lanes within any Site shall be so located, marked and protected from encroachment as to function effectively at all times. Appropriate signage, subject to DRB approval, shall be installed for such fire lanes as may be required either by any public authority or by the DRB and be kept in readable condition.

**SECTION 7.06. PARKING.** Each Owner must provide on its Site adequate parking areas for employees, the handicapped, visitors and service vehicles. No parking shall be permitted on Streets or on entrance driveways on the Site. All surface parking shall be paved and shall have integral concrete curbs and gutters. To the extent required by the DRB, all surface parking shall be screened to block the ground level view of automobiles below their hood lines and otherwise reduce the visibility of vehicles and parking surfaces from Streets, in a manner satisfactory to the DRB.

**SECTION 7.07. SIGNAGE.** No sign or other advertising device of any nature shall be placed on the Property except as approved by the DRB. No rooftop signs shall be placed on the Property. Declarant or the Association shall have the right to install and maintain standard directional/informational signage and traffic signage in any Unpaved Right-of-Way. No Owner or occupant of a Site shall use the name "Four Points" in the name of any building or project or in any printed advertising or promotional material without the prior written consent of Declarant.

**SECTION 7.08. EXTERNAL ILLUMINATION.** External lighting of buildings, drives, parking areas, walks and plazas on a Site, pursuant to plans approved by the DRB, is required. Standards and requirements for illumination, with respect to fixture type, method of erection, height, material, finish, color and base installation, must be approved by the DRB in its sole discretion. To the extent practical, lighting on a Site shall be from concealed sources unless otherwise approved by the DRB and shall be designed to minimize glare or light flow onto adjacent structures and property.

**SECTION 7.09. ANTENNAE AND TOWERS.** No exterior towers, tower antennae or satellite receiving or transmitting equipment shall be installed on the Property that are not approved in advance by the DRB.

**SECTION 7.10. UNDERGROUND UTILITIES.** Any and all pipes, lines and wires used for the transmission of water, fuel, natural gas, electricity, telephone, television, sewage, sound or any other utilities which are not within a building shall be constructed and maintained underground within the Property unless required to be above ground for technical or environmental reasons and approved by the DRB. However, temporary above-grade utilities may be approved by the DRB for use during construction and until permanent underground service is available to the Site upon written advance approval by the DRB. No well shall be constructed on the Property except by Declarant or the Association on Property owned by Declarant or the Association unless otherwise approved by the Declarant.

**SECTION 7.11. SCREENING.** All towers, tower antennae, satellite receiving and transmitting equipment, roof-mounted equipment, other equipment, outside storage areas and service areas on the Property, and such other items and areas designated by the DRB, shall be screened to the extent reasonably practical from ground level view and as approved by the DRB. The DRB shall have full power to determine what facilities or areas must be screened and the screening materials and requirements for each.

**SECTION 7.12. LOADING DOCKS AND AREAS.** Each Site shall provide sufficient on-site loading facilities to accommodate site activities and all loading movements, including, but not limited to, turnarounds, which shall be made off of Streets. No materials, supplies or equipment shall be permitted to remain outside of any structure unless screened in a manner satisfactory to the DRB. Loading docks and areas and maneuvering areas shall be located on a Site and screened in accordance with the provisions of the Development and Construction Guidelines or as required by the DRB.

**SECTION 7.13. LANDSCAPING.** Each Owner, contemporaneously with the development of Improvements on a Site, shall install Landscaping on all unimproved areas on its Site in accordance with plans approved by the DRB (other than on land held for expansion purposes as approved by the DRB), except that the Owner shall not be required to install Landscaping in any Parkway Landscape Area on or adjacent to his Site

unless Declarant elects not to do so by written notice delivered to such Owner, in which event such Owner shall promptly install Landscaping in such Parkway Landscape Area in accordance with the Parkway Landscape Plan. An Owner shall keep all of such Landscaping in good condition and repair and in a neat and orderly appearance and shall be responsible for all expenses relating to the maintenance, repair or replacement of Landscaping on the Owner's Site and on the Unpaved Right-of-Way adjacent to such Site. Automatic underground irrigation systems must be installed in all landscaped areas on a Site (other than land held for expansion purposes as approved by the DRB) and the adjacent Unpaved Right-of-Way. No changes shall be made to the Landscaping plan for a Site or an adjacent Unpaved Right-of-Way without the prior written approval of the DRB.

**SECTION 7.14. PARKWAY LANDSCAPE AREAS.** Declarant, at its expense, may install Landscaping in any or all Parkway Landscape Areas. The Association shall maintain such Landscaping in the Parkway Landscape Areas until, on a Site by Site basis, the Association, at such time as it deems appropriate, turns such maintenance duties over to the Owner of such Site. The Association shall notify an Owner not less than 30 days prior to the date on which such Owner is to become responsible for such Landscape maintenance. Thereafter, it shall be the responsibility of such Owner, at its expense, to maintain in good condition and repair, in a neat and orderly appearance and in accordance with the Parkway Landscape Plan requirements all of the Landscaping then existing or thereafter installed by Declarant or such Owner in the Parkway Landscape Area on his Site and in the Unpaved Right-of-Way adjacent to his Site. No Landscaping shall be installed in the Parkway Landscape Area except as is permitted in the Parkway Landscape Plan. Declarant may choose initially to install in certain portions of the Parkway Landscape Areas less than the full Landscaping permitted in the Parkway Landscape Plan. Therefore, Declarant, from time to time and at its expense, shall have the right to install additional Landscaping in Parkway Landscaping Areas as permitted in the Parkway Landscaping Plan, subject to the provisions of Section 7.13 above regarding an Owner's obligation to install such Landscaping.

**SECTION 7.15. TRASH AND GARBAGE.** No Site, or part thereof, shall be used or maintained as a dumping ground for rubbish, trash or garbage before, during or after the installation of any improvements. Trash collection containers shall be situated and enclosed or otherwise screened as required by the DRB as not to be visible from Streets or other adjacent Sites. Each Owner shall observe and comply with any and all requirements established by the DRB in connection with the storage and removal of trash and garbage. If within five days after the issuance of written notice by the Association to an Owner, said Owner shall have failed either to remove any trash, rubble or construction debris, or to exercise reasonable care or conduct to prevent or remedy a dangerous, unclean or unsightly condition, then the Association shall have the authority and right to go on the Site for the purpose of cleaning said Site and/or otherwise correcting said condition, or conditions.

**SECTION 7.16. SURFACE WATER FLOW AND DRAINAGE.** Plans for all dams, lakes, ponds, other "water features" of any kind and general Site drainage must be submitted in advance for DRB approval. Each Owner shall control water runoff drainage from his Site to prevent damage to adjacent tracts, Streets or any other area in the Property. The DRB may require enhanced screening and landscaping around detention and retention areas and ponds.

**SECTION 7.17. ENVIRONMENT.**

a. No Owner, lessee, tenant, operator or other occupant of the Property or any portion thereof shall handle, store, deposit, use, process, manufacture, dispose of or release or allow any of its agents, employees, contractors or invitees to handle, store, deposit, use, process, manufacture, dispose of or release any Hazardous Substances (hereinafter defined) of any kind from, on, in, under or in the air above any part of the Property, including, but not limited to, any surface waters or groundwater located on the Property, or into public sanitary or storm sewer systems serving the Property without complying with all Environmental Laws (hereinafter defined), including, but not limited to, performing pre-treatment obtaining permits and giving notices as required by Environmental Laws. "Hazardous Substances" means those substances now or hereafter included within (whether as a result of such substance's inclusion on a list, physical characteristics or otherwise) any of the definitions of "hazardous substances", "hazardous waste", "hazardous materials", "pollutant" "contaminant" or "toxic substance" under, or otherwise regulated by, any Environmental Law; including, but not limited to (i) mixtures containing listed Hazardous Substances and waste generated from the treatment, storage or disposal of Hazardous Substances, (ii) asbestos, (iii) polychlorinated biphenyls, (iv) radioactive materials, and (v) petroleum (including crude oil or any fraction thereof), natural gas, natural gas liquids, liquified natural gas and synthetic gas. "**Environmental Laws**" shall mean and include all present and

future federal, state or local laws, rules, orders, ordinances and regulations pertaining to environmental regulation, or the use, processing, storage, disposal, generation or transportation of Hazardous Substances, or any contamination, cleanup or disclosure related thereto, including, but not limited to, the Solid Waste Disposal Act, TEX. REV. CIV. STAT. ANN. 4477-7, Chapter 26 of the TEX. WATER CODE ANN., the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 et seq., the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9601 et seq., the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq., and such amendments as may be made to these statutes and such regulations as may be promulgated with respect thereto, including, but not limited to the regulations contained in 40 CFR Part 280.

b. Each owner and each lessee, tenant, occupant and other user of any Site shall be responsible for and shall pay all costs and expenses related to the disposal or release by such Owner, lessee, tenant, occupant or other user of such Site of any Hazardous Substances, sewage or wastes of any kind in, on, under or in the air above the Property, which costs and expenses shall include, but not be limited to, closure, removal, remediation, cleanup, containment and other response costs, injuries to persons, damages to property, legal expenses, and interest paid to any Governmental Entity; provided, however, this covenant does not apply to Hazardous Substances generated on or migrating from other Sites or already existing on the Site in question as of the date of the acquisition of such Site by such Owner.

c. The provisions of this Section 7.17 do not affect the rights, liabilities or obligations of any Person under Environmental Laws or other applicable laws.

d. SPECIFICALLY, BUT WITHOUT LIMITATION, THE CONSTRUCTION OF ANY IMPROVEMENTS ON THE PROPERTY SHALL BE IN COMPLIANCE WITH THE ZONING PLAN AND THE 10(a) PERMIT, AND NO IMPROVEMENTS SHALL BE CONSTRUCTED WITHIN THE HABITAT PRESERVE AREAS.

**SECTION 7.18. FUEL FACILITIES.** Fuel storage and dispensing facilities may be installed on a Site only after prior written authorization of the DRB has been obtained. The Owner of the Site on which such facilities are installed shall be fully responsible for insuring that such facilities and their installation comply fully with all applicable laws and regulations, and the provisions of Section 7.17 above shall be applicable to such facilities.

**SECTION 7.19. FENCES.** The Owner of a Site shall install fences as required by the 10(a) Permit for temporary and permanent fencing of such Site from the Habitat Preserve Areas. The use of other fences on the Property is permitted only if specifically approved in writing in advance by the DRB.

**SECTION 7.20. PROHIBITED ACTIVITIES.** No dangerous, noxious, offensive or nuisance activities, in the opinion of the Board, or any activities which violate any applicable laws shall be conducted or permitted to occur by any Owner or its agents, employees, contractors, occupants or invitees on any portion of the Property. No operation or use of any portion of the Property shall be permitted or maintained by any Owner or its agents, employees, contractors, occupants or invitees that, in the opinion of the Board, causes or produces noise or sound that is objectionable because of its volume, duration, frequency or shrillness, smoke, noxious, toxic or corrosive fumes or gases, obnoxious odors, dust or dirt or unusual fire or explosion hazards. The above prohibitions are in addition to those set forth in Sections 7.01 and 7.02 above.

**SECTION 7.21. CERTAIN DECLARANT USES.** Declarant may conduct its sales and marketing program for the Property from any permanent or temporary sales buildings or trailers and may conduct improvement work and activities on portions of the Property owned by Declarant and do all things reasonably necessary or convenient as required to expeditiously commence, continue and complete such improvement work, including, but not limited to, the provision of temporary buildings (including trailers), temporary storage of construction materials and equipment and the installation of temporary signage of such types, in such sizes and at such locations on portions of the Property owned by Declarant as Declarant deems appropriate. In addition, Declarant shall have the right, at its expense, to install on any Site a standardized sign announcing a future development on such Site, and such sign may remain on such Site following its sale until completion of such development, and if Declarant chooses to do so, the Owner of such Site shall not install another sign for the same purpose except for a sign that complies with standards established by the DRB for such type signs.



## **SECTION 7.22. CONSTRUCTION STANDARDS.**

a. Any builder engaged to construct Improvements on any portion of any Site may conduct its construction operations and activities and do all things reasonably necessary as required to expeditiously commence, continue and diligently complete construction of any such Improvements, including the provision of temporary buildings or trailers for administration of work and for the storage of materials and equipment, and the construction of temporary security fences and lighting, except that all construction activities, temporary structure, storage of materials and equipment, all construction-related parking and temporary security fences shall be confined entirely on such Site. Top soil shall be scraped and preserved before laying temporary parking lots.

b. Each Owner shall take such action as is necessary to keep the Property reasonably free from mud, dirt and debris resulting from construction activities on that Owner's Site. Each Owner is responsible for, and shall cause, through appropriate contractual provisions, all costs of cleaning up any debris or waste improperly disposed of anywhere on the Property. Each Owner and its contractors shall maintain an attractive, clean, nuisance-free environment during the period of construction. Declarant shall have the right to reasonably designate points of ingress and egress on the Site and within the Property for construction vehicles, and each Owner of a Site on which Improvements are being constructed shall keep all Streets reasonably cleared of mud and dirt left by construction vehicles entering such Site. Once commenced, all construction on a Site shall be continued with due diligence and good faith until completion. Each Owner shall cause its contractors to comply with the requirements of Declarant or the DRB regarding points of construction access to a Site, cleaning mud and construction debris from Streets, reestablishment of Landscaping, keeping mud from washing onto Streets and adjoining Sites and other matters set forth in the Development and Construction Guidelines.

c. Each Owner expressly covenants that it will use its reasonable good faith efforts to prevent adverse impacts (such as, but not limited to, air, soil and water pollution, soil erosion, elimination of trees without replacement or increased runoff rates) to areas outside its Site in any way (negligent or otherwise) resulting from construction, alteration, maintenance, repair, replacement or removal of Improvements to the Site and that it will indemnify and hold harmless the Association, the DRB, Declarant and other Owners from any and all damages resulting therefrom. All possible contaminants must be stored in a containment facility that will not allow such to enter any soils on or off the Site.

d. Prior to any excavation on a Site, the Owner will determine and mark the location of and will protect all existing utilities and landscape irrigation lines. Declarant or the Association, upon written request by an Owner, will furnish plans showing the location of any such facilities installed by Declarant or the Association. Utility lines and landscape irrigation lines are to be located before earth moving or drilling equipment operations are allowed to start near underground utilities or landscape irrigation lines. All backfill will be adequately compacted to prevent future settlement, especially under pavement and other structures.

e. THE 10(a) PERMIT CONTAINS RESTRICTIONS AGAINST CONSTRUCTION BETWEEN MARCH 15 AND AUGUST 1 OF EACH YEAR.

## **ARTICLE VIII EASEMENTS**

**SECTION 8.01. UTILITY AND SERVICE EASEMENTS.** Notwithstanding any provision in this Declaration to the contrary, Declarant reserves for itself and its successors and assigns, an easement for installation, maintenance, repair and removal of underground utilities or other underground services (including, but not limited to, electric power, water, fuel, storm drainage, sewer, industrial sewage, natural gas, telephone, security and other telecommunications systems such as closed-circuit cable television) on all portions of each Site within 25 feet of the right-of-way boundary of Streets (or, 20 feet for non-median divided Streets) and within five feet from all boundaries of the Site other than those boundaries abutting Streets. Full right of ingress and egress shall be permitted for Declarant at all times over each Site for the installation, operation, maintenance, repair or removal of any such utility or service together with the right to remove any obstruction that may be placed in such easement that would constitute interference with the use of such easement, or with the use,

maintenance, operation or installation of such utility or service; provided, however, such activities shall be conducted in a manner so as to minimize disruption of other access to and use of a Site by an Owner and its employees and business invitees. An Owner may construct, install or plant in the setback areas affected by these easements those Improvements specifically authorized in Section 7.03 c and d above, subject to the rights of Declarant in this Section 8.01. Declarant shall have the right to assign and convey, in whole or in part, the easements reserved hereunder to one or more public utility companies, to the Association, to the City or to any other Person. In addition, Declarant reserves a temporary construction and maintenance easement within the easement areas specified above in this Section 8.01 only to such extent and only for such duration as is reasonably necessary for the construction and maintenance of Streets, utilities, drainage facilities and related improvements. Declarant (or its assignee exercising such easement rights) shall repair any Landscaping or pavement damaged by the exercise by Declarant (or its assignee exercising such easement rights) of the rights set forth in this Section 8.01.

**SECTION 8.02. OTHER EASEMENTS.** Declarant and the Association shall have an easement for full right of ingress and egress at all times over and upon the Property for the exercise of rights under this Declaration and for the carrying out by the Association of their other rights, functions, duties and obligations set out in this Declaration. Any such entry by Declarant or the Association upon the Property shall be made with as minimum inconvenience to the affected Owner as practical.

## **ARTICLE IX MAINTENANCE BY OWNERS**

Each Owner shall have the duty and responsibility, at its sole cost and expense, to keep its Site and all Unpaved Right-of-Way adjacent to the Site and, subject to ordinary wear, tear and deterioration, buildings and other Improvements thereon in a well-maintained, safe, clean, neat, orderly and attractive condition at all times, except as such may be maintained by the Association as provided in Section 7.14 above. Such maintenance includes, but is not limited to, the following: prompt removal of all litter, trash, refuse and wastes; lawn mowing; tree and shrub care; watering; other Landscaping maintenance; keeping exterior lighting and mechanical facilities in working order; keeping lawn and garden areas, driveways and private roads in good repair; keeping all signs in good repair; complying with all government health and police requirements; repairing exterior damage to Improvements; and striping of parking areas and repainting of Improvements. An Owner shall maintain the Unpaved Right-of-Way adjacent to its Site and the front yard Paving Setback area on that site on such schedule and in such manner as is specified by the DRB in an effort to maintain a reasonably consistent appearance of all Unpaved Right-of-Way and front yard Paving Setback areas in the Property. The Association shall have the right to perform any action required of an Owner or its contractors under this Article IX and to perform any maintenance, repair or replacement of Landscaping, signs, screening or decorative walls, surface parking areas, ponds, lakes, fountains, pools, exterior lighting, sculptures, utilities, drainage systems, lighting and park and recreational facilities and equipment on a Site or the adjacent Unpaved Right-of-Way upon the failure of the Owner to do so with such failure continuing for seven days after written notice thereof is given by the Association to such Owner (or after such longer notice period as may be allowed by the DRB due to the nature of such deficiency).

## **ARTICLE X GENERAL PROVISIONS**

**SECTION 10.01. BINDING EFFECT AND DURATION.** The covenants and restrictions of this Declaration shall run with and bind the Property, shall be binding on all Owners and shall inure to the benefit of and be enforceable by Declarant, the Association and the Owners and their respective heirs, executors, legal representatives, successors and assigns, and shall be and remain in effect for a period of 50 years from and after the date of the recording of this Declaration, after which time this Declaration shall automatically be extended for three successive periods of ten years each, unless after such 50 years an instrument executed and duly acknowledged by Owners owning, in the aggregate, at least a majority of the gross acreage (exclusive of acreage in the Streets and the Common Areas) in the Property has been recorded in the Official Public Records of Travis County, Texas, abolishing this Declaration.

**SECTION 10.02. OTHER PERSONS.** The covenants and restrictions contained in Articles VI, VII, VIII and IX of this Declaration shall be binding upon and enforceable against not only the Owners but also all lessees, tenants or other occupants of a Site.

**SECTION 10.03. INTERPRETATION.** In all cases, the provisions set forth or provided for in this Declaration shall be construed together and given that interpretation or construction which, in the opinion of the Board, will best effect the intent of Declarant's general plan of development as reflected in this Declaration. The Board shall have the right, power and authority to determine all questions arising under or in connection with this Declaration and to construe and interpret their provisions, and any determination, construction or interpretation made by the Board, in the absence of an adjudication by a court of competent jurisdiction that such action was an abuse of discretion, shall be binding on the Owners. The provisions of this Declaration shall be given full force and effect notwithstanding the existence of any zoning ordinance or building codes which are less restrictive. The effective date of this Declaration shall be the date of its filing for record in the Official Public Records of Travis County, Texas. The captions of each Article and Section hereof as to the contents of each Article and Section are inserted only for convenience and are in no way to be construed as defining, limiting, extending or otherwise modifying or adding to the particular Article or Section to which they refer. The singular wherever used herein shall be construed to mean the plural when applicable and vice versa, and the use here in of any gender shall mean any other gender when applicable. The exhibits referred to herein and attached here to are made a part hereof by reference. This Declaration shall be construed under and in accordance with the laws of the State of Texas.

**SECTION 10.04. AMENDMENTS.** Except as otherwise provided in this Section 10.04 this Declaration, or any provisions hereof, may be terminated, amended or vacated as to any portion of the Property only by a document duly executed and acknowledged by Owners owning, in the aggregate, at least a majority of the gross acreage contained in the Property (exclusive of acreage in Streets and the Common Areas); provided, however, (a) that, until the Conversion Date, no such termination, amendment or vacation shall be effective without the written approval of Declarant; (b) Declarant, without the joinder of any other party, shall have the absolute right to make minor changes or amendments to this Declaration to correct or clarify errors, omissions, mistakes or ambiguities contained herein, and (c) Declarant shall have the right to supplement this Declaration for the inclusion of additional property or for the deletion of property as provided in Section 1.03 above (with such supplement to include, at Declarant's option, specifications of Paving Setbacks and Building Setbacks and/or minimum site size designations applicable to such additional property as determined by Declarant). No such termination, amendment, supplement or vacation shall be effective until a written instrument setting forth the terms thereof has been executed by the parties by whom approval is required as set forth above and recorded in the Official Public Records of Travis County, Texas. Notwithstanding the above, no amendments shall be made to the following provisions of this Declaration unless such have been first approved by a Special Vote of the Class A Members as evidenced by a certification of the Secretary of the Association on any such amendment document:

- a. changing the definition of Common Areas, Common Facilities, Common Services, Conversion Date or Default Rate;
- b. increasing the number of acres that can be made subject to this Declaration solely by Declarant as provided in Section 1.03(a) or that can be deleted from the Property solely by Declarant as provided in Section 1.03(b);
- c. changing the provisions requiring membership in the Association as provided in Section 3.01;
- d. changing the allocation of voting rights as provided in Section 3.03;
- e. changing the definition of a Quorum as provided in Section 3.04;
- f. changing the type of and basis for allocation of Assessments as provided in Sections 4.01, 4.02, 4.03, 4.04 and 4.05;
- g. changing the limits on the Association reserve fund amount and annual contribution as provided in Section 4.02;
- h. changing the provisions regarding the subordination of the lien for Assessments as provided in Section 4.08;

- i. changing the Members' audit rights as provided in Section 5.03i;
- j. changing the provisions regarding affiliated contracts as provided in Section 5.04;
- k. changing the provisions regarding the limitations of the rights and powers of the Association, the Board and the DRB as provided in Section 7.01b;
- 1. changing the list of prohibited uses as provided in Section 7.02;
- m. changing the setbacks as provided in Section 7.03 (subject to the DRB's rights specified in such Section 7.03 and to the above provision regarding setbacks applicable to additional property subjected to this Declaration as provided in Section 1.03 above);
- n. changing the provisions of Section 7.18b;
- o. expanding the reserved easements as provided in Section 8.01;
- p. changing the extent of the Association's rights to enter a Site to perform maintenance as provided in Article IX; or
- q. changing this Section 10.04.

Further notwithstanding any of the above, no amendment shall be made to this Declaration, without the written consent of all Preserve Members, that affects the Habitat Preserve Areas or the obligations of the Owners with respect to the Habitat Preserve Areas or that would result in a violation of or non-compliance with the 10(a) Permit.

**SECTION 10.05. ENFORCEMENT.** Declarant, the Association and the Owners (and any lessees, tenants or other occupants of an Owner's Site) shall have the right, but not the obligation, to enforce the covenants and restrictions set out in this Declaration. Enforcement may be made by any proceedings at law or in equity against any Person violating or attempting to violate any part of this Declaration, as such may be amended, either to restrain or enjoin violations or to recover damages. Damages shall not be deemed adequate compensation for any breach or violation of any provision of this Declaration, and Declarant, the Association and each Owner (and any lessees, tenants or other occupants of an Owner's Site) shall be entitled to relief by way of injunction, as well as any other remedy either at law or in equity. With respect to any litigation hereunder, the prevailing party shall be entitled to recover reasonable attorneys' fees and court costs from the non-prevailing party. Notwithstanding the foregoing or the provisions of Sections 10.04, Declarant, the Association and the Owners shall have no right to enforce against a Sheltered Owner a Subsequent Amendment (hereinafter defined). For purposes of this Section 10.05, "Subsequent Amendment" shall mean an amendment to this Declaration (i) made pursuant to Section 10.04 subsequent to the date an Owner acquires its property within the Property; (ii) that would have a material and adverse effect on such property of a Sheltered Owner, (iii) to which the Sheltered Owner has not otherwise consented in writing; and (iv) not relating to the 10a Permit. "**Sheltered Owner**" shall mean an Owner or other Person who, at the time it acquires its lot or an interest therein, obtains from Declarant a letter designating it as a Sheltered Owner. The rights, powers and remedies provided in this Declaration shall be cumulative and not restrictive of other remedies at law or in equity, and the exercise by a Person of any particular right, power or remedy shall not be deemed an election of remedies or to preclude such Person's resort to other rights, powers or remedies available to it.

**SECTION 10.06. NO WAIVER OR OBLIGATION TO ENFORCE.** No delay or failure on the part of Declarant, the Association or any other aggrieved party to invoke any available right, power or remedy in respect to a breach of this Declaration shall be held to be a waiver by that party (or estop that party from asserting) any right, power or remedy available to it upon the recurrence or continuance of said breach or the occurrence of a different breach. Declarant and the Association, or its officers or directors, shall not be under any obligation to take any action to enforce the terms of this Declaration.

**SECTION 10.07. LIENS/VALIDITY AND SEVERABILITY.** Violation of or failure to comply with this Declaration shall not affect the validity of any mortgage, lien or other similar security instrument which may then be existing on any Site. Invalidity of any one or more of the provisions of this Declaration, or any portions

thereof, by a judgment or court order shall not affect any of the other provisions or covenants herein contained, which shall remain in full force and effect.

**SECTION 10.08. OWNER/OCCUPANT RECORDS.** Except for those Owners who purchase portions of the Property from Declarant, any person, on becoming an Owner of a parcel within the Property, shall furnish the Board a true and correct copy of the recorded instrument of conveyance vesting such ownership in said Owner. Each Owner shall furnish to the Association the name of a contact person with such Owner and a street address for receiving notices from the Association. Each Owner shall notify the Association of the name and address of all lessees of long-term ground leases or long-term build-to-suit leases (meaning leases with combined primary and renewal terms exceeding five years) affecting the Owner's Site. It shall be the responsibility of the Owner (and a non-Owner occupant of a Site, if any) to keep such information current and to advise the Association of any changes.

**SECTION 10.09. NOTICES.** Any notice required to be given to Declarant, the Association or any Owner under the provisions of this Declaration shall be deemed to have been properly delivered when actually delivered by hand-delivery or three days after it is deposited in the United States Mail, postage prepaid, certified or registered mail, return receipt requested, addressed, (a) for notice to an Owner to the address of the Owner as shown on the records of the Association at the time of such mailing, and (b) for notice to Declarant or the Association to \_\_\_\_\_, or at such other address specified by Declarant by a document recorded for such purpose in the Official Public Records of Travis County, Texas. Notices to be given to an Owner of a Site also shall be given to any lessee of that Site of whom Declarant and the Association has been given notice as provided in Section 10.08 above, such notices to be given in the manner specified in this Section 10.09.

**SECTION 10.10. MORTGAGEES.** The holder of a mortgage of any interest in a Site shall be furnished with written notification from the Association of any default by the respective Owner or lessee of that Site in the performance of obligations set forth in this Declaration provided that the Association has theretofore been furnished, in writing, with the correct name and address of such mortgage holder and a request to receive such notification, and cure by said mortgage holder within the times herein provided for performance by Owner or a lessee of such default shall be accepted. No default by an Owner or a lessee of a Site under any provision of this Declaration shall affect any existing lien or mortgage on that Site. A mortgagee shall not be liable for Assessments made or for any other obligations of an Owner that accrue with respect to a parcel during any period its only interest in the parcel is that of mortgagee.

**SECTION 10.11. APPROVALS.** No approval by the Declarant, the Board or the DRB pursuant to the provisions hereof shall be effective unless in writing, except otherwise expressly provided herein.

IN WITNESS WHEREOF, Declarant and Hillwood have caused this Declaration to be executed as of the \_\_\_\_ day of \_\_\_\_\_, 2004.

[Execution block and acknowledgment]

**EXHIBIT "A"**

Description of the Property

**EXHIBIT "B"**

Identification of Habitat Preserve Areas

**EXHIBIT "C"**

**Project Identification Signage Areas**

1. The areas on both sides of \_\_\_\_\_ Drive right-of-way at the intersection of \_\_\_\_\_ Drive and R. M. \_\_\_\_ that are identified and shown as "Sign Esmt." on the Zoning Plan.

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2. Such areas on both sides of the Four Points Drive right-of-way at or near the intersection of \_\_\_\_\_ Drive and \_\_\_\_\_ Boulevard as designated by Declarant of size comparable to the areas referenced in Paragraph 1 of this Exhibit C.

3. Areas designated by Declarant within the median of Four Points Drive at or near (a) the intersection of \_\_\_\_\_ Drive and R.M. \_\_\_\_\_, and (b) \_\_\_\_\_ Drive and \_\_\_\_\_ Boulevard of size comparable to the areas referenced in Paragraph 1 of this Exhibit C.

## D.1.2

### Designation of Sheltered Owner

STATE OF TEXAS                   §  
   §                   KNOW ALL PERSONS BY THESE PRESENTS:  
 COUNTY OF TRAVIS           §

This Designation of Sheltered Owner (this "**Amendment**") is made as of the \_\_\_\_ day of \_\_\_\_\_, 200\_\_ (the "**Effective Date**") by \_\_\_\_\_ ("**Developer**").

#### A. Recitals

1.     **Declaration.** Developer is the "**Declarant**" under the following documents governing \_\_\_\_\_ Planned Unit Development, City of Austin Case Number C \_\_\_\_\_, as revised ("**P.U.D. Center**"): the Declaration of Covenants, Restrictions and Easements for \_\_\_\_\_ recorded at Volume \_\_\_\_\_, Page \_\_\_\_\_, *et seq.*, Real Property Records, Travis County, Texas (the "**Master Declaration**"); as supplemented and amended by Supplemental Declaration of Covenants, Restrictions and Easements recorded at \_\_\_\_\_; as assigned and assumed by Developer by Assignment and Assumption of Declarant and Association Documents, recorded under Document No. \_\_\_\_\_, Official Public Records, Travis County, Texas (the Master Declaration as supplemented and amended, the "**Declaration**").

2.     **Authority to Amend.** Declarant is an Owner owning, in the aggregate, a majority of the gross acreage contained in the Property (exclusive of acreage in Streets and the Common Areas), and the before its consent, by this document duly executed and acknowledged, is effective pursuant to Section 10.04 of the Declaration to amend the Declaration.

3.     **Conveyance of Big Box Tract.** As a portion of the consideration for the execution of this Amendment, Big Box Corporation is acquiring from Developer Lot \_\_, Block \_\_, \_\_\_\_\_ P.U.D., a subdivision in Travis County, Texas, according to map or plat thereof recorded under Document No. \_\_\_\_\_, Official Public Records, Travis County, Texas (the "**Big Box Tract**"). Big Box Corporation, its successors and affiliates, and its or their assigns, as owner of the Big Box Tract, is referred to herein as "**Big Box**."

#### B. Provisions

1.     **Assessments and Signs.** For so long as Big Box owns the Big Box Tract, unless Big Box consents in writing to a change, the type of and basis for allocation of Assessments as to the Big Box Tract shall continue as prescribed by the Declaration as of the Effective Date of this Amendment and the sign program applicable to YYY in effect as of the Effective Date of this Amendment shall not be revised.

2.     **Sheltered Owner.** Big Box is hereby designated as a "**Sheltered Owner**" pursuant to Section \_\_\_\_\_ of the Master Declaration for so long as Big Box is the owner of the Big Box Tract. Big Box may assign its designation as a Sheltered Owner to any subsequent owner of the Big Box Tract without the consent of Declarant. A copy of any amendment to the Declaration shall be provided to the Sheltered Owner at least thirty (30) days before Declarant's execution thereof.

3.     **Ratification and Miscellaneous.** The Declaration heretofore placed of record by Declarant, together with any and all subsequent amendments thereto, is hereby ratified and shall remain in full force and effect. In the event of any conflict between this Amendment and the Declaration, the specific provisions of this Amendment shall govern to the extent permitted by the Declaration. Terms used in this Amendment that are not specifically defined herein shall have the meanings defined in the Declaration. This Amendment is binding on \_\_\_\_\_ and any successor to \_\_\_\_\_ as Declarant under the Declaration and on all Owners and shall inure to the benefit of and be enforceable by Big Box.

[Execution block and acknowledgment]

**D.2.1**

**Designation of Additional Participating Property in  
Regional Storm water Detention Pond**

STATE OF TEXAS                   §  
  §                   KNOW ALL PERSONS BY THESE PRESENTS:  
COUNTY OF TRAVIS           §

This Designation of Additional Participating Property in Four Points Centre Regional Detention Pond (the "**Designation**") is made this \_\_\_\_ day of \_\_\_\_\_, 200\_\_ (the "**Effective Date**") by YYY \_\_\_\_\_, L.P. ("**Declarant**").

**A. Background**

1.     **Regional Storm Water Detention Pond.** Declarant's predecessor, XXX Joint Venture, and certain other parties entered into that certain Regional Detention Pond Construction and Maintenance Agreement (the "Agreement") recorded under Document No. \_\_\_\_\_, Official Public Records, Travis County, Texas, and as amended by Declaration Regarding Regional Detention Pond Construction and Maintenance Agreement dated \_\_\_\_\_, 2004 (the "**Declaration**"), recorded under Document No. 2004 \_\_\_\_\_, Official Public Records, Travis County, Texas (the Agreement as amended is called herein the "**Pond Agreement**"). The Pond Agreement concerns the original construction and subsequent maintenance and use of a regional storm water detention pond (the "**Detention Pond**") on Lot 7, Block A ("**Lot 7A**"), \_\_\_\_\_ P.U.D., a subdivision in Travis County, Texas, according to map or plat thereof recorded under Document No. \_\_\_\_\_, Official Public Records, Travis County, Texas, by the owners of the properties designated therein or subsequently by Declarant as "**Participating Properties**." Except as otherwise specified herein, capitalized terms used herein shall have the meaning given them in the Pond Agreement.

2.     **Additional Participating Properties.** The Pond Agreement permits Declarant to designate one or more additional properties (respectively, a "**Designated Property**") as Participating Properties entitled to participate in the use of the Detention Pond upon the satisfaction of certain conditions and the acceptance by the owner of the Designated Property of the covenants of the Pond Agreement as an obligation of such and as being covenants running with the ownership of the Designated Property. Declarant has determined that the property described below qualifies for being designated a Participating Property.

**B. Provisions**

1.     **Designation as a Participating Property.** The property described in Exhibit A hereto (the "**Additional Property**") is hereby designated as a Participating Property under the Pond Agreement, conditioned on the execution by the owner thereof of the Acceptance of Designation attached hereto.

2.     **Allocation of Obligations to Participating Properties.** Declarant confirms that the Participating Properties, including the Additional Property are listed on Exhibit B attached hereto, and that the obligations under the Pond Agreement shall be allocated among the Participating Properties as set forth therein and in the Pond Agreement. Exhibit B to the Agreement (as amended) is hereby deleted and Exhibit B attached hereto is substituted therefor.

3.     **Miscellaneous.** The Pond Agreement, including this Designation, shall run with the land and shall be binding upon and inure to the benefit of the owners of the Participating Properties, their respective heirs, administrators, legal representatives, successors and assigns.

[Execution and Acknowledgments]



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**ACCEPTANCE OF DESIGNATION**

1. **Acceptance.** The undersigned (the "**Additional Property Owner**"), owner of the property described on Exhibit A hereto (the "**Additional Property**"), accepts the designation by YYY, L.P. of the Additional Property as a Participating Property under the Pond Agreement. The Additional Property Owner agrees to pay the share of Maintenance Costs allocated to the Designated Property under the Pond Agreement (as may be adjusted from time to time) and to comply with the covenants of the Pond Agreement, as set forth therein. The address of the Additional Property Owner for notice purposes under the Pond Agreement is set out below.

2. **Binding Effect.** The Pond Agreement and this Designation of Additional Property and Acceptance of Designation shall run as covenants running with ownership of the Additional Property, and shall be binding upon and inure to the benefit of the owner of the Additional Property, its successors and assigns; and this Acceptance of Designation inures to the benefit of the owners of the Participating Properties, their successors and assigns.

[Execution and Acknowledgment]

**Exhibit A****Additional Property**

Lot \_\_\_\_, Block \_\_\_\_\_, \_\_\_\_\_, a subdivision in Travis County, Texas, according to map or plat thereof recorded under Document No. \_\_\_\_\_, Official Public Records, Travis County, Texas.

**Exhibit B****Participating Properties**

<b>Participating Property in Regional Detention Pond (Lot/Block)</b>	<b>Number Of Acres</b>	<b>Cost Allocation Percentage</b>	<b>Participating Property Owner</b>
_____ (Additional Property)	_____		_____
1A and 2A*	30.921	_____%	xxx****
4A*	5.078	_____%	yyy
5A*	5.360	_____%	yyy
6A*	18.000	_____%	yyy
2B*	7.296	_____%	yyy
3B*	13.610	_____%	yyy
4B*	7.932	_____%	yyy
5B*	8.951	_____%	yyy
6B*	9.345	_____%	yyy
1C*	9.953	_____%	yyy
Lot 1 Outparcel 1**	0.938	_____%	yyy
Lot 2 Outparcel 1**	0.939	_____%	yyy
Outparcel 2***	0.890	_____%	yyy
<b>Total</b>	_____	100.000%	

According to map or plat thereof recorded in the Official Public Records, Travis County, Texas under Document No.:

\* 20021111  
 \*\* 20012222  
 \*\*\* 20013333  
 \*\*\*\* \_\_\_\_\_, L.P.

**D.2.2**

**REGIONAL DETENTION POND  
CONSTRUCTION AND MAINTENANCE AGREEMENT**

STATE OF TEXAS                   §  
  §  
COUNTY OF TRAVIS           §

THIS REGIONAL DETENTION POND CONSTRUCTION AND MAINTENANCE AGREEMENT (the "**Agreement**") is made and entered into effective as of \_\_\_\_\_, 2004, by and among \_\_\_\_\_ Association, Inc. (the "**Association**"), a Texas non-profit corporation, \_\_\_\_\_ ("**Owner 1**"), \_\_\_\_\_ ("**Owner 2**") and \_\_\_\_\_ ("**Owner 3**") (collectively referred to herein as the "**Parties**" and singularly referred to as the "**Party**" or by name).

**A. Recitals**

1. The Parties each own property located in or adjacent to the \_\_\_\_\_ Planned Unit Development, City of Austin Case No. \_\_\_\_\_ (the "**PUD**"), which properties are described with more particularity in Exhibit "A" attached hereto and incorporated herein by reference for all purposes.

2. The Parties agree that the development of their properties and the PUD should include the installation and maintenance of a regional stormwater detention pond to be used by the Participating Properties (as defined below).

3. The parcel acreage in or adjacent to the PUD owned by each Party and the "Cost Allocation Percentage" for each Party based on said acreage is set forth in Exhibit B attached hereto and incorporated herein by reference for all purposes.

4. The Parties intend to share the costs of the design, construction and maintenance of such regional stormwater detention pond, as provided herein, according to each party's percentage of ownership interest in the Participating Properties (as defined below), as determined by reference to each Party's Cost Allocation Percentage.

5. The Parties agree to give the Association the right, authority and obligation to maintain the stormwater detention pond, and the right to assess annually each of the Parties for its portion of the cost of such maintenance and, the Parties agree that, in the event a Party fails to promptly pay the maintenance assessment, the Association shall have lien rights against the Participating Property owned by the defaulting Party.

**B. Agreement**

NOW, THEREFORE, in consideration of the mutual agreements and covenants set forth in this Agreement, for the benefits received by the parties, the mutual promises herein expressed, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each Party, the undersigned Parties hereby agree to the design, construction and maintenance of the regional stormwater detention pond according to the terms hereinafter set forth:

**I.**

**Definitions**

Unless the context otherwise specifies or requires, the following words and phrases when used herein shall have the following meanings:

- 1.1** “**Affiliated Entity**” shall mean and refer to, including without limitation, any divisions, subsidiaries, affiliates, officers, directors, employees, agents, representatives, and/or any other person or entity with common ownership of any Party.
- 1.2** “**Board**” shall mean and refer to the Board of Directors of the Association.
- 1.3** “**Cost Allocation Percentage**” shall mean and refer to the percentage of acreage owned by each Party in relation to the aggregate acreage of all the Participating Properties, as set forth on Exhibit B.
- 1.4** “**Constructing Party**” shall mean and refer to that Party having full responsibility for and performing the obligations set forth for the Constructing Party in Article II herein.
- 1.5** “**Costs of Construction**” shall mean and refer to the cost of all engineering, planning, designing, obtaining permits and approvals, constructing, inspections, bonds, and all other costs associated with the development and construction of the Detention Pond.
- 1.6** “**Detention Pond**” shall mean and refer to the regional stormwater detention pond to be constructed and maintained pursuant to this Agreement within Lot \_\_\_, Block \_\_\_ of the PUD.
- 1.7** “**Engineer**” shall mean and refer to \_\_\_\_\_, which shall perform the obligations set forth for the Engineer detailed in Article II; provided, however, that if for any reason \_\_\_\_\_ withdraws as Engineer or for any other reason is unable to perform its obligations hereunder, the Constructing Party shall appoint a replacement Engineer, subject to prior approval of the Parties, such approval not to be unreasonably withheld, to perform the duties set forth in Article II.
- 1.8** “**Participating Properties**” shall mean and refer to the real property and any improvements located thereon described in Exhibit A hereto, save and except the Preserve properties described in Exhibit A.
- 1.9** “**Maintenance Costs**” shall mean and refer to all costs of the ongoing maintenance, upkeep, repair, restoration and inspection of the Detention Pond, any and all costs associated with the engagement of professionals for the purposes of such inspection and repairs, any and all costs associated with repairs or upkeep as may be specifically required by the City of Austin, and any costs incurred to repair damage caused by the Association to access easements granted to the Association for access to and from the Detention Pond, including, without limitation, all costs incurred in performing all maintenance which is required in order to comply with the rules and regulations of the City of Austin and all other governmental entities and quasi-governmental entities having jurisdiction over the Detention Pond and/or the Participating Properties, which include the water and any submeters required for irrigation of the Detention Pond and surrounding area, to the extent not otherwise addressed in the construction documents described herein.

## II.

### Construction

- 2.1** **Responsibility.** JPI agrees that it shall be the Constructing Party and shall fulfill all of the duties and obligations set forth in this Article II. All aspects of the engineering, designing, planning, permitting and construction of the Detention Pond, including, without limitation: developing plans, obtaining approval from the City of Austin and any other governmental entities or agencies, hiring contractors and subcontractors, overseeing construction, managing the construction contract, evaluating the construction progress, determining and providing final approval of the contractors’ and subcontractors’ work, and initially paying the Costs of Construction from the Escrow Account in accordance with Sections 2.3.4. and 2.3.5., shall be the responsibility of the Constructing Party. The construction documents, which shall include the plans, construction contract and bid, shall be approved in writing, in advance, through Owner 1’s engineer (“Engineer”). Failure to disapprove in writing within five business days after receipt shall be deemed approval of such construction documents. Constructing Party shall use commercially reasonable efforts to complete said construction as quickly as possible; but in no event shall completed construction of the Detention Pond be delayed beyond February 28, 2004, unless written approval is obtained from The U.S. Fish and Wildlife Service in conjunction with the Permit held by Owner 1 (described hereinafter). In the event such written approval is required, Owner 1 shall use commercially reasonable efforts to obtain the approval upon receipt of Constructing Party’s written request of

Owner 1.

**2.2 Bidding Requirements.** The Parties have advertised for and solicited bids for the construction of the Detention Pond, and the Parties have agreed to accept the bid submitted by \_\_\_\_\_. (“**Principal Contractor**”). The Parties have made such investigations as they deem necessary to determine the ability of Principal Contractor to perform the work, and Principal Contractor has furnished to the Parties all such information and data for this purpose as the Parties may request.

**2.2.1 Performance Bond.** The construction documents with Principal Contractor shall provide that Principal Contractor shall post a statutory performance bond, which performance bond shall include coverage sufficient to meet the Principal Contractor’s warranty obligations provided hereinafter. Engineer has approved the bid submitted by Principal Contractor, as provided by Section 2.1 herein. A “**Notice to Proceed**” shall be delivered by the Constructing Party (its affiliated entity or Apartment, as the case may be) to Principal Contractor within 3 business days after the execution of this Agreement.

**2.2.2 Special Requirements.**

2.2.2.1 The construction documents with Principal Contractor shall provide that Principal Contractor shall construct the required irrigation facilities and shall maintain same during the warranty period provided in the construction documents. Additionally, the construction documents shall provide that Principal Contractor will warrant the construction of the irrigation facilities and such warranty shall remain in full force and effect until the expiration of the warranty period provided in the construction documents. Thereafter, the Association shall be responsible for maintaining the irrigation facilities, and the cost of such use and maintenance shall be deemed Maintenance Costs subject to annual assessments.

2.2.2.2 The construction documents with Principal Contractor shall provide that the Constructing Party (its affiliated entity or Apartment, as the case may be) shall post private payment bonds and such other bonds as may be required as such that said bonds shall be Principal Contractor’s (including subcontractors hired by Principal Contractor) sole recourse in lieu of any liens against the property upon which the Detention Pond is to be constructed. The cost of such bonds are included in the Budget (as defined below). The construction documents shall contain a waiver of Principal Contractor’s (including subcontractors hired by Principal Contractor) right to file liens against the property. As owner of the property upon which the Detention Pond is to be constructed, Owner 1 will reasonably cooperate with Constructing Party and Principal Contractor in order that Constructing Party (its affiliated entity or Apartment, as the case may be) and Principal Contractor can obtain the bonds described above.

2.2.2.3 The construction documents with Principal Contractor shall provide that Principal Contractor will warrant the work from defect in materials and workmanship for a period of two years, said warranty to include the replacement of landscape, if such replacement becomes necessary. The construction documents shall also provide and the Parties hereby agree that the warranty shall, during the two year warranty period, take precedence over any obligation of the Association for maintenance of the Detention Pond which may arise due to defect in materials or workmanship in the construction of the Detention Pond. If during the warranty period, Principal Contractor fails to repair, maintain or replace the landscape or any elements related to the construction of the Detention Pond, the Association shall have the right and authority to perform the required repair, maintenance or replacement and to receive the proceeds of the warranty secured by the performance bond and to seek any other remedies available to it at law or in equity.

2.2.2.4 The construction documents with Principal Contractor shall provide that Principal Contractor (as well as any subcontractors hired by Principal Contractor) waives any entitlement to any mechanics, materialmen, statutory and constitutional liens against the property on which the Detention Pond shall be constructed. Any subcontract documents between Principal Contractor and Principal Contractor’s subcontractors shall contain a similar provision.

2.2.2.5 The construction documents with Principal Contractor shall provide that said

documents and the agreements contained therein are for the benefit only of the Parties and Principal Contractor and that there are no other third party beneficiaries to said construction documents. Any subcontract documents between Principal Contractor and Principal Contractor's subcontractors shall contain a similar provision.

2.2.2.6 The construction documents with Principal Contractor shall provide that Principal Contractor (as well as any subcontractors hired by Principal Contractor) shall look only to the private payment bond(s) or other bonds described in Section 2.2 of this Agreement posted by Principal Contractor, the Parties or any Party to this Agreement for recourse against the Constructing Party for failure to pay the costs associated with the construction documents and that Principal Contractor (as well as any subcontractors hired by Principal Contractor) shall not be entitled to seek a lien against the property subject to the construction documents. Any subcontract documents between Principal Contractor and Principal Contractor's subcontractors shall contain a similar provision. The construction documents shall provide, and the Constructing Party hereby agrees, that neither the Constructing Party (its affiliated entity, as the case may be) nor Apartment shall be entitled to seek and/or file a lien against the property subject to the construction documents or this Agreement, and the Constructing Party (its affiliated entity, as the case may be) and Apartment hereby waive any and all such lien rights.

2.2.2.7 The construction documents with Principal Contractor shall provide that Principal Contractor, at all times while work is being performed on the Detention Pond, shall provide and keep in force liability insurance covering the Parties for liability for property damage and personal injury. This insurance is to be carried by one or more insurance companies duly authorized or admitted to transact business in Texas, selected by Principal Contractor and approved by the Parties, and will be paid for by Principal Contractor. The insurance provided under this provision must be in the amount of not less than five million dollars for general liability and combined umbrella insurance, one million dollars for automobile liability and one million for employer's liability. The Parties shall be listed as additional insureds under such insurance coverage. Principal Contractor must furnish the Parties with certificates of all insurance required by this provision. If Principal Contractor does not keep this insurance in full force, the Constructing Party (its affiliated entity or Apartment, as the case may be) may notify Principal Contractor of this failure, and if Principal Contractor does not deliver to the Parties certificates showing all such insurance to be in full force within fifteen (15) days after this notice, the Constructing Party may, at its option, take out or pay from the Escrow Account (as hereinafter defined) the premiums on the insurance needed to fulfill Principal Contractor's obligations under this provision. On the Constructing Party's (its affiliated entity or Apartment, as the case may be) demand, Principal Contractor must reimburse the Escrow Account (or the Constructing Party or Apartment, as the case may be) the full amount of any insurance premiums paid by the Constructing Party, Apartment or from the Escrow Account under this provision, with interest at the rate of twelve percent (12%) annually from the date of the Constructing Party's (its affiliated entity or Apartment, as the case may be) demand until reimbursement by Principal Contractor. Principal Contractor shall also maintain adequate worker's compensation insurance.

## 2.3 Administration and Funding the Construction of the Detention Pond.

**2.3.1 Escrow Agent & Engineer.** Within five (5) days after the execution of this Agreement, the Constructing Party shall appoint \_\_\_\_\_ Title Company as escrow agent (the "**Escrow Agent**") and all Parties shall execute a contract (the "Escrow Contract") with said Escrow Agent whereby the Escrow Agent and Engineer will administrate the funds used to finance the Costs of Construction.

**2.3.2 Budget.** The estimated budget for the Costs of Construction (the "Budget") is attached hereto as Exhibit C. The Constructing Party shall have the right to enter change orders ("Change Order") as provided herein, and the Constructing Party shall immediately notify Engineer, Engineer and the other Parties in writing regarding the Change Order. Change Orders for which the cumulative effect of all Change Orders entered into by Constructing Party do not exceed 10% of the Budget or 10% of the estimated cost for each specific construction detail must be approved by Engineer and Engineer in writing within three (3) business days of receipt of the notice of Change Order. Failure to disapprove in writing within said three (3) business days shall effect an approval. Both Engineer and Engineer must approve such Change Order. Any proposed Change Order that would exceed 10% of the Budget or 10% of the estimated cost for a specific construction detail must be approved by a majority of the

Parties, such majority to be determined in accordance with each Party's respective Cost Allocation Percentage. If the cumulative effect of any proposed Change Order exceeds 10% of the Budget or exceeds the estimated cost of the specific construction detail by 10%, the Parties shall have three (3) business days to approve or disapprove such proposed Change Order and failure to disapprove within three (3) business days, in writing, shall effect an approval by the non-approving Party. Change Orders required by a governmental entity are subject to the notice but not the approval requirements of this Section 2.3.2.

**2.3.3 Required Escrow Deposits.** Within five (5) business days after the execution of this Agreement, the Parties shall deposit with the Escrow Agent via cash deposit, wire transfer or cashier's check the amounts shown beside each Party's name on Exhibit D, attached hereto and made a part hereof (collectively the "**Escrow Account Deposit**"). Within five (5) business days after the approval of a Change Order as provided in Section 2.3.2. (or notice of a Change Order required by a governmental agency), the Parties shall deposit with the Escrow Agent via cash deposit, wire transfer or cashier's check their pro rata portion of the amount approved by the Change Order in accordance with their respective Cost Allocation Percentage. Such deposits in accordance with approved Change Orders shall be included within the definition of Escrow Account Deposit. Any Costs of Construction or amounts of the Budget that exceed the Escrow Account (as defined hereinafter) and which are the result of a Change Order requiring approval under Section 2.3.2 but which approval has been denied in accordance with Section 2.3.2 shall be borne entirely by JPI (unapproved Change Orders). Failure of any Party to deposit its portion of the Escrow Account Deposit by the time stated herein shall constitute a default of this Agreement and shall result in a penalty of twelve percent (12%), such penalty to be disbursed to the non-defaulting Party or Parties in proportion to their Cost Allocation Percentage, as if the non-defaulting Party or Parties held 100% of the Escrow Account.

**2.3.4 Escrow Account.** The Escrow Agent shall immediately deposit the Escrow Account Deposit in an interest bearing, federally insured account (the "**Escrow Account**"). The Parties agree that the funds from the Escrow Account shall be used to pay the Costs of Construction, Escrow Agent's fee, if any, and the Management Fee; provided however, Escrow Agent shall have the sole power to release portions of the Escrow Account to the Principal Contractor or other parties listed on the Budget as approved in accordance with Section 2.3.5. Ten percent (10%) of the Escrow Account shall be retained in the Escrow Account until Constructing Party has completed construction of the Detention Pond in accordance with the retainage requirements in Texas Property Code, §53.101 *et seq.* (the "**Retainage**").

**2.3.5 Releases from the Escrow Account.** Releases (the "Releases") of money by the Escrow Agent from the Escrow Account to Principal Contractor or other parties shown on the Budget shall be made for the payment of the Costs of Construction. Releases shall be made not more frequently than two (2) times each month, within five (5) business days after receipt by Escrow Agent of (i) a notice of release ("**Release Notice**") from Engineer stating that Engineer and Apartment have received an application for payment of funds (the "**Application for Payment**") from Principal Contractor (which Application for Payment shall itemize all actual costs incurred, owing and payable as of the date of the Application for Payment and shall include appropriate lien releases from Principal Contractor and/or any subcontractors or entities providing goods, services, labor or materials related to the construction of the Detention Pond), and (ii) a certificate (the "**Certificate**") from Engineer confirming that Engineer has inspected progress on construction of the Detention Pond and that Engineer and Apartment have approved the Application for Payment. Each Release Notice shall only be for the payment of actual incurred Costs of Construction. The foregoing procedure shall be followed for each Release made for payment of Costs of Construction and any Change Order made in accordance with Section 2.3.2. If the Escrow Account, less the required Retainage, is insufficient to pay in full the Costs of Construction itemized by Principal Contractor in the Application for Payment approved by Engineer and Apartment and presented to the Escrow Agent with the Certificate, and if the overage in the Costs of Construction is not caused by the negligence or misconduct of Principal Contractor or Constructing Party and is not contrary to Section 2.3.2 herein, the Parties shall, upon the agreement of the Parties or otherwise in accordance with Section 2.3.2 within 3 business days of the Application for Payment and in accordance with the terms of Section 2.3.3, deliver to Escrow Agent via cash deposit, wire transfer or cashier's check each Party's Cost Allocation Percentage of the funds necessary to complete payment of the Application for Payment. For informational purposes only, Engineer shall send to the Parties a copy any Application for Payment, the Release Notice, the Certificate, and any accompanying supporting

documentation immediately upon receipt of such Application for Payment or other documentation.

**2.3.6 Completion.** After construction on the Detention Pond is complete, final approval of the construction by the City of Austin is obtained by the Constructing Party and all other required approvals from governmental entities and agencies have been obtained and confirmed, a written notice of completion (the “**Completion Notice**”) shall be provided by the Engineer to each of the Parties and Escrow Agent. The notice shall include a statement detailing all of the actual Costs of Construction, together with a duplicate of all related invoices and other information substantiating the final Costs of Construction and evidencing payment in full of such Costs of Construction. If the Escrow Account exceeds the actual Costs of Construction, the remaining funds of the Escrow Account and any interest earned on the Escrow Account, shall be distributed by Escrow Agent among each Party in the ratio of each Party’s Escrow Account Deposit, to the extent that each Party paid the required Escrow Account Deposits into the Escrow Account. If the Escrow Account is insufficient to pay in full the actual Costs of Construction, the remaining Costs of Construction shall be paid in accordance with the terms of Sections 2.3.2, 2.3.3 and 2.3.5. However, notwithstanding the foregoing, no Party shall be required to pay for cost overages caused by the negligence or misconduct of the Constructing Party or the Principal Contractor, or contrary to Sections 2.3.2, 2.3.3, or 2.3.5.

**2.3.7 Management Fee.** The Constructing Party shall be entitled to collect a fee for its management of the construction of the Detention Pond (the “**Management Fee**”). The Management Fee shall be three percent (3%) of the Budget, exclusive of the Management Fee and any Change Orders, and shall be deposited by the Parties in the Escrow Account as provided in Section 2.3.3 herein. The Management Fee shall be paid to the Constructing Party from the Escrow Account with each disbursement made therefrom and shall be prorated over the period of construction.

**2.4 Remedies.** In the event the Constructing Party (its affiliated entity or Apartment, as the case may be), other than by its negligence or willful misconduct, defaults on its obligations set forth in this Article II, then any Party or combination of Parties shall have the right, but not the obligation, to take any and all actions necessary to cure the applicable default, including, without limitation assuming the obligations of the Constructing Party (its affiliated entity or Apartment, as the case may be); provided, however, that prior to taking any curative action, the curing Party or Parties shall give fifteen (15) days written notice thereof to the Constructing Party (its affiliated entity or Apartment, as the case may be) and provide the Constructing Party (its affiliated entity or Apartment, as the case may be) the opportunity to cure all such claimed defaults within said 15 day period (the “Cure Period”). If the Constructing Party (its affiliated entity or Apartment, as the case may be) fails to cure its default and if a Party or combination of Parties cures such default, the Constructing Party (its affiliated entity or Apartment, as the case may be) shall, within five (5) days after receipt of a written demand and copies of paid invoices from the curing Party or Parties, reimburse the curing Party or Parties, or the Escrow Account, as the case may be, for all costs and expenses incurred by the curing Party or Parties in curing such default. Any such demand shall specify with particularity the nature of the default and the action taken by the curing Party or Parties to cure the default. In the event the Constructing Party (its affiliated entity or Apartment, as the case may be) defaults on its obligations set forth in this Article II due to its negligence or willful misconduct and fails to cure such default within the Cure Period, the non-defaulting Parties shall be entitled to seek any and all remedies available at law or in equity.

**2.5 Indemnity.** Except to the extent a Party does not make a required deposit into the Escrow Account, the Constructing Party (its affiliated entity or Apartment, as the case may be) hereby agrees to indemnify and hold harmless Owner 1 and any successor owner of Lot \_\_, Block \_\_ of the PUD from and against any and all valid and enforceable mechanics, materialmen, statutory, and/or constitutional liens recorded against said Lot 7, Block A of the PUD by any person or entity providing goods, services, labor or materials related to the work contemplated by the construction documents. The Constructing Party (its affiliated entity or Apartment, as the case may be) hereby agrees to indemnify and hold harmless Owner 1 and any successor owner of Lot 7, Block A of the PUD from and against any loss, damages, claim, cost or liability, including attorney’s fees, that Owner 1, its successors and assigns, may incur or become subject to as a result of any violation of the PUD or Permit (described below) in relation to the construction of the Detention Pond.

### III.



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## **Maintenance**

**3.1     Responsibility.** Except as otherwise provided in this Agreement, all aspects of the maintenance, upkeep, repair, and restoration of the Detention Pond and curing any damage to the access easements caused by the Association, to the extent not covered by Principal Contractor's warranty, shall be the responsibility of the Association, and the Association hereby agrees to promptly and timely perform such maintenance, upkeep, repair, and restoration of the Detention Pond and such access easements on a continuous basis following the date of the completion of the Detention Pond and pay all related Maintenance Costs which are incurred.

**3.2     Maintenance.** The maintenance of the Detention Pond shall include, without limitation, all maintenance and actions (i) which are necessary or advisable to insure that the Detention Pond is able to serve its intended functions and purposes on a continuing basis, (ii) which are required to comply with the 10(a) permit issued by the U.S. Fish and Wildlife Service effective March 12, 1996, and (iii) which are required in order to comply with the rules and regulations of the City of Austin and all other governmental entities and agencies and quasi-governmental entities having jurisdiction over the Detention Pond and/or the Participating Properties.

**3.3     Covenant for Assessment.**

3.3.1     Each Party (other than the Association), whether or not it shall be so expressed in any assignment, transfer, deed or other conveyance of an interest of a Party or right, title and interest in and to a Participating Property, by acceptance of such assignment, transfer, deed or other conveyance shall be deemed to have covenanted and agreed to pay the Association, or to an independent entity or agency which may be designated by the Association to receive such monies, the assessments for Maintenance Costs.

3.3.2     The assessments shall be determined, assessed and expended on a calendar year basis, which shall be the fiscal year of the Association; provided, however, the assessments may be assessed and expended for the partial year, if any, following the date of this Agreement. The assessments shall be used for the payment of Maintenance Costs. There shall be no such assessments for the year 2004. For each year thereafter while this Agreement is in force, the Board shall set the amount of the assessments to be levied for that year based upon an engineer's estimate of the Maintenance Costs for that year. The Board shall endeavor to set the assessments for each full calendar year by no later than the beginning of such year or as soon thereafter as such determination reasonably can be made by the Board.

3.3.3     Each Party hereby agrees that this Agreement shall be filed of record to evidence the covenants contained herein which shall run with the land of each Participating Property.

**3.4     Notice of Assessment.** On an annual basis, the Association shall send a written maintenance assessment notice (the "**Maintenance Assessment Notice**") to each of the other Parties to this Agreement. The books of the Association shall be available to the Parties for review and audit. The Maintenance Assessment Notice shall also state the amount assessed against each Party based on each such Party's Cost Allocation Percentage. The Maintenance Assessment Notice shall be separate and distinct from any other Association assessment notices as provided for in the Association's Bylaws or Articles of Incorporation, or in the 2004 Declaration (as hereinafter defined).

**3.5     Payment of Assessments.** Within thirty (30) days of receiving the Maintenance Assessment Notice, each Party shall pay to the Association the amount assessed against such Party.

**3.6     Personal Obligation for Assessments.** The assessments provided for herein shall be the personal recourse debt of the Party for the portion of the Participating Property with respect to which such assessment is made. No Party, for any reason (other than the Association), may exempt itself from liability for the assessments. In the event that any assessment or part thereof is not paid when due, the Party or Parties shall be obligated to pay interest on such unpaid assessment from such due date at the lesser of (i) 15% per annum, or (ii) the maximum allowable contract rate of interest under applicable law (the "**Default Rate of Interest**"), together with all costs and expenses of collection thereof, including but not limited to, reasonable attorneys' fees. The Board shall have the right to reject any partial payment of any assessment and demand full payment thereof, or the Board may, in its sole discretion, elect to accept any such partial payment on account only, without in so

doing waiving any rights established hereunder with respect to any remaining balance due. The obligation of any Party to pay an assessment shall remain its personal recourse obligation, as the case may be, and shall not pass to unrelated third-party successors in interest or assigns of the Party unless expressly assumed in writing by such successor or assignee. However, the lien for any unpaid assessments shall be unaffected by any sale or assignment of interest in a Party or sale or assignment of full or partial ownership interest in a Party's right, title and interest in and to the Participating Property, and shall continue in full force and effect. In the event of a sale or assignment as provided in this Section 3.6, it shall be the obligation of the respective Party to disclose to any buyer, successor, assignee, title company designated to handle such transaction, financing entity or other party to such sale or assignment any unpaid assessments, such notice to be given in writing to all parties to the intended transaction at least 15 days before that date at which such transaction is to be consummated. A copy of such notice shall be sent to the Association at the same time. Except as otherwise provided herein, a Party no longer owning a Participating Property shall not be liable for assessments made with respect to such property after such Party no longer is the owner of such property.

**3.7 Assessment Lien.** ALL SUMS ASSESSED IN THE MANNER PROVIDED FOR IN THIS AGREEMENT, TOGETHER WITH INTEREST FROM SUCH DUE DATE AT THE DEFAULT RATE OF INTEREST AND THE COSTS OF COLLECTION, INCLUDING, BUT NOT LIMITED TO, REASONABLE ATTORNEYS' FEES, ARE SECURED BY A CONTINUING CONTRACTUAL LIEN AND CHARGE ON THE PROPERTY OWNED BY EACH PARTY AND COVERED BY SUCH ASSESSMENT, WHICH SHALL BIND SUCH PROPERTY AND THE OWNER THEREOF AND ITS HEIRS, SUCCESSORS, DEVISEES, PERSONAL REPRESENTATIVES AND ASSIGNEES. The aforesaid continuing contractual lien shall attach to the Party's Participating Property as of the date of recording of this Agreement and shall be superior to all liens other than (a) a deed of trust or mortgage constituting a lien on the land of a Party that secures financing or refinancing of the acquisition cost of such land or the cost of construction of improvements thereon, (b) any sale and leaseback agreement or lease and subleaseback agreement whereby a Party sells and simultaneously acquires a possessory interest under a lease from or other agreement with such transferee, (c) the lien securing real estate taxes, and (d) the lien under the Declaration of Covenants, Restrictions and Easements recorded at Volume \_\_\_\_\_, Page \_\_\_\_\_ of the Official Public Records of Travis County, Texas (the "**CC&Rs**") as may be amended from time to time; provided, however, the types of liens referenced in (a), (b), and (d) above shall be inferior and subordinate to the lien securing the obligation to pay assessments to the extent of all unpaid assessments set forth in any recorded Notice of Unpaid Assessments (as defined below) existing as of the date of such other lien that has not been duly released by the Association. The Association shall have the power to subordinate the aforesaid assessment lien to any other lien. The exercise of such power shall be entirely discretionary with the Association. Except for a conveyance to a purchaser at a foreclosure sale pursuant to a lien to which the assessment lien is subordinate as provided above, all Participating Properties are conveyed to and accepted and held by the owner thereof subject to the assessment lien provided for in this Agreement. To evidence any unpaid assessments, the Association may prepare a written notice of unpaid assessment (the "**Notice of Unpaid Assessments**") setting forth the amount of the unpaid indebtedness, name of the owner of the affected property and a description of the affected property. Such notice shall be signed by one of the officers of the Association and shall be recorded in the Official Public Records of Travis County, Texas. The Association shall record an appropriate release of any recorded Notice of Unpaid Assessments when the amounts referenced therein have been paid. THE LIEN FOR PAYMENT OF ASSESSMENTS MAY BE ENFORCED BY FORECLOSURE OF THE LIEN UPON THE DEFAULTING PARTY'S OR OWNER'S PARTICIPATING PROPERTY BY THE ASSOCIATION SUBSEQUENT TO THE RECORDING OF THE NOTICE AS PROVIDED ABOVE EITHER BY JUDICIAL FORECLOSURE OR BY NONJUDICIAL FORECLOSURE THROUGH A PUBLIC SALE IN LIKE MANNER AS A MORTGAGE ON REAL PROPERTY IN ACCORDANCE WITH SECTION 51.002, TEXAS PROPERTY CODE, AS SUCH MAY BE REVISED, AMENDED, SUPPLEMENTED OR REPLACED FROM TIME TO TIME. In addition, the Association may institute suit against a Party personally to obtain a judgment for unpaid assessments incurred during such Party's ownership of a Participating Property. In any foreclosure proceeding, whether judicial or nonjudicial, or in any other suit against the Party, the Party shall be required to pay the costs, expenses and reasonable attorneys' fees incurred by the Association. The Association shall have the right and power to buy the Party's Participating Property at foreclosure or other legal sale and to acquire, hold, lease, mortgage, convey or otherwise deal with the same. Upon the written request of any mortgagee holding a lien on any part of the Party's or successor Party's property, the Association shall report to said mortgagee any assessments which are delinquent and unpaid at the time of the report.

**3.7.1** The failure of any Party to pay an assessment under this Agreement shall be a violation of the terms of this Agreement, and the Association shall have recourse to all legal remedies set forth herein or otherwise available at law or in equity.

#### IV.

##### Notices

All notices, demands, requests and other communications under this Agreement shall be effective upon actual receipt, shall be in writing and shall be deemed properly served if delivered by hand or by facsimile to the Party to whose attention it is directed, or if sent by registered or certified mail, return receipt requested, postage prepaid, or overnight delivery addressed as follows:

[insert addresses]

or other such address as a Party, its administrator, legal representative, successor or assign, shall designate to the Association in writing. This Agreement may be from time to time amended to reflect any Party's change of address for purposes of notification.

#### V.

##### Miscellaneous

**5.1 Parties Bound.** This Agreement shall run with the land and shall be binding upon and inure to the benefit of the Parties and their respective heirs, administrators, legal representatives, successors, and assigns and any person acquiring title to a Participating Property.

**5.2 Texas Law to Apply.** This Agreement has been executed in Texas. This Agreement shall be deemed to be a contract made under and shall be construed in accordance with and governed by the laws of the State of Texas and of the United States of America, as applicable. All obligations of the Parties contemplated by this Agreement shall be performable in Travis County, Texas.

**5.3 Legal Construction.** In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, this invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if the invalid, illegal, or unenforceable provision had never been contained herein.

**5.4 Prior Agreements Superseded.** This Agreement and the Letter Agreement constitute the sole and only agreement of the Parties and supersedes any prior understandings or written or oral agreements between the Parties respecting the within subject matter. This Agreement may only be amended by a written document, signed by all the Parties to this Agreement. This Agreement may not be amended orally.

**5.5 Time of Essence.** Time is of the essence in this Agreement, including but not limited to each and every time constraint and deadline imposed by the terms of this Agreement; provided, however, if any date specified herein or if the last date of any time specified herein is a Saturday, Sunday or national bank holiday, such date shall be extended to the next following date that is not a Saturday, Sunday or national bank holiday.

**5.6 Gender.** Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, and vice versa, unless the context requires otherwise.

**5.7 Authority.** Each Party warrants and represents to the others that it is now in good standing, fully authorized to do business in Texas, in compliance with all applicable laws, rules, and regulations, and fully licensed, authorized, and empowered to perform its respective rights and obligations under this Agreement without the need for further consent, approval, or ratification from any other person or entity.

**5.8 Covenant Running With the Land / Change in Ownership.** It is understood and agreed that this

Agreement to share the Costs of Construction and the Maintenance Costs for the Detention Pond shall be and is a covenant running with the land and shall be and is binding upon all subsequent owners of all or any part of the Participating Properties. When a Party no longer owns an interest in a Participating Property, that Party shall no longer have any obligation under this Agreement and the new owner shall automatically become a Party hereto and shall automatically assume such transferring Party's obligations hereunder with respect to the portion of the Participating Properties that is transferred or conveyed to such new owner from and after the date of transfer. In the event that any Party transfers or conveys all or a portion of the Participating Properties to another person or entity, such transferring Party shall notify the Association of the transfer.

**5.9 Planned Unit Development; Section 10(a) Permit.** The Parties acknowledge and agree that the Detention Pond lies within an area that is subject to the PUD and to a Section 10(a) permit (the "Permit") issued by The U.S. Fish and Wildlife Service effective \_\_\_\_\_, 2004. All of the Parties' activities, if any, relating to the Detention Pond are subject to the terms and provisions of the PUD and the Permit, and the Parties covenant that they shall conduct their activities and shall cause their agents, employees and invitees to conduct their respective activities on the Participating Properties in compliance with such PUD and Permit and in such a way that the PUD and the Permit are not violated or jeopardized and shall indemnify and hold harmless P-W B from and against any violation of the PUD and the Permit resulting from the said Parties' (and agents, employees and invitees) conduct related to the Detention Pond.

**5.10 Third Party Beneficiaries.** This Agreement is for the benefit of the Parties (and their successors in accordance with Section 5.10 of this Agreement) only and said Parties hereby agree that there are no third beneficiaries to this Agreement and the transactions contemplated hereunder.

**5.11 Counterparts.** This Agreement may be executed in several counterparts, all of which are identical and all of which counterparts together shall constitute one and the same instrument. To facilitate execution of this Agreement, the Parties may execute and exchange by telephone facsimile counterparts of the signature pages of this Agreement.

EXECUTED to be effective as of the date first set forth above.

[Execution block and acknowledgments]

#### **EXHIBIT A**

<u>Tract</u>	<u>Owner</u>
_____	_____
_____	_____
_____	_____

**EXHIBIT B**

Property in Sub-Regional Detention Program	Number of Acres	Cost Allocation Party Percentage	Owner
1A and 2A	30.921	24.258%	Owner 2
3A; Retail	6.444	5.055%	Owner 3
3A-1/A; Retail	1.813	1.422%	Owner 1
4A; Hotel	5.078	3.984%	Owner 1
5A; Garden Office	5.360	4.205%	Owner 1
6A; Research & Dev.	18.000	14.121%	Owner 1
Lot 1, Block C, Research & Dev.	9.953	7.808%	Owner 1
2B; Mid-Rise Office	7.296	5.724%	Owner 1
3B; Bock B; Retail And Lots 4-6B; Mid-Rise Office	39.838	31.253%	Owner 1
Lot 1, Outparcel 1	0.890	0.698%	Owner 4
Lot 2, Outparcel 1	1.198	0.940%	Owner 5
Outparcel 2	<u>0.678</u>	<u>0.532%</u>	Owner 5
	127.469	100.000%	

**EXHIBIT C****APPROVED BUDGET***To: Jimmy Evans Company*

Stabilized Entrance	incl.
Rock Berm	incl.
Silt Fence	incl.
Environmental Controls	\$8,000.00
Tree Protection	incl.
Hydromulch (Re-veg)	\$9,820.00
Clearing & Layout	incl.
Excavate/Embankment	\$225,933.00
Concrete Outlet Structure (total)	\$195,600.00
RipRap/Rock Rubble	\$69,120.00
Tree Replacement	\$3,000.00
Landscape	\$27,000.00
Construction Sub-Total:	\$538,473.00

*To: Bonding Agency, or Constructing Party*  
*Upon Evidence of Payment of Bonds*

Performance & Payment Bond (2%)	\$10,777.00
Construction Total:	\$549,250.00

*To: Structural Inspector*

Structural Inspections	\$5,000.00
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*To: Geotechnical Tester & Inspector*

Geotechnical Testing & Inspections	\$25,000.00
Overall Sub-Total:	\$579,250.00

*To: Constructing Party*

3% Construction Management Fee	\$17,377.50
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**Grand Total: \$596,627.50**

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**EXHIBIT D****INITIAL ESCROW ACCOUNT DEPOSIT**

<b><u>PARTY</u></b>	<b><u>AMOUNT</u></b>
Owner 1	\$147,983.94
Owner 2	\$38,643.56
Owner 3	\$410,000.00

**D.3****Seller's Closing Instruction Letter**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Re: Sale of the property (the "**Property**") described in the Sales Contract (the "**Sales Contract**")  
 by \_\_\_\_\_ (the "**Sellers**") to \_\_\_\_\_ ("**Buyer**" 1 and \_\_\_\_\_ ("**Buyer**" 2) (the "**Buyers**").

Dear \_\_\_\_\_:

Our firm represents the persons listed above as Sellers. These Closing Instructions do not amend, waive or override the written Sales Contract between Sellers and Buyer, but are supplemental to the Sales Contract. These Closing Instructions may be amended, waived or overridden by the undersigned or other counsel for the Sellers. These Closing Instructions do not waive or release Buyer from its obligations on the Sales Contract. The "**Closing Documents**" are comprised of the herein identified Sellers' Escrowed Documents and the Buyer's Documents.

**1. Enclosed Documents.** Enclosed are the documents listed in **Schedule 1** executed by the Sellers except as noted, delivered to you to be held in escrow to be disbursed in accordance with this letter (the "**Sellers' Escrowed Documents**"). You are to hold the Sellers' Escrowed Documents in escrow in strict accordance with the terms and conditions set forth in this letter.

**2. Conditions to Closing.** The Closing Documents are to be held by you in escrow until the following conditions have been satisfied (the "**Conditions to Closing**"):

**2.1. Closing Documents Obtained From Buyer.** (1) You shall have received from Buyer executed counterparts of such of the Items in Schedule 1 which are to be executed by such parties and executed originals of the documents listed in **Schedule 2** (the "**Buyer Documents**"). (2) You shall have permitted us to review the executed and completed Buyer's Documents and shall have received from us our approval to close.

**2.2. Title Company Documents.**

**2.2.1 Funds.** You shall have received approval from the Sellers of the settlement statement for the Sellers (the "**Sellers' Settlement Statement**") and from counsel for the Buyer for the corresponding settlement statement for the Buyer (the "**Buyer's Settlement Statement**"); you shall have received from Buyer immediately available funds in the amount required to be delivered by Buyer pursuant to Buyer's Settlement Statement to close the purchase of the Property (the "**Closing Amount**"); and you are prepared to make the disbursements as provided in the Settlement Statements by delivery to Sellers the "**Net Amount Due Sellers**" prior to the Federal Reserve's wire transfer deadline to initiate wire transfers for same day delivery to the Sellers as the day you receive the funds from the Buyer. Enclosed are Wire Transfer Instructions for wire transfer to each of the Sellers of their respective portion of the Net Amount Due Sellers.

In the event that all of the Conditions to Closing have not been fully satisfied and performed by 1:00 p.m., Central Daylight Time, on the day of Closing, but no later than such time on Wednesday \_\_\_\_\_, 2004, you are to contact me for further instructions.

**2.2.2 Insured Services Closing Letter.** You shall have delivered to me (a) a signed original of a current title commitment updated to the day before the Closing Date reflecting satisfaction of all Schedule C items and items requested to be deleted from Schedule B, as requested by Buyer's counsel, except as expressly noted in your cover letter, (b) confirmation from the Title Underwriter that it has issued a Seller Insured Closing Services Letter (Form T-51) to provide fidelity coverage of funds handled by the closing agents and has received from Sellers the counterpart required to be signed by Sellers and delivered to the Underwriter prior to Closing.



2.2.3 Special District Notices. Please investigate and advise us if any portion of the Property lies within a special district requiring sellers to give buyers notice (e.g., Chapter 49 water districts). If so, closing is conditioned on our being provided with a copy of the district's notice of taxing information or service area filed with the county clerk; and closing is conditioned on the parties executing and filing for record the required notice.

2.2.4 Inspection. Please verify that the Buyer is waiving an inspection of the Property by the Title Company. If not, then conduct the inspection and Closing is conditioned on your receipt from us of written approval of any exceptions to title and/or exceptions that will be listed in the title policy based on your inspection.

3. **Closing Actions.** Upon your satisfaction of the Conditions to Closing, you are instructed to complete the following actions in the following order (the "**Closing Actions**"):

3.1 **Assemble and Date.** You are to assemble and date the Closing Documents as of the closing date or other date as you may be directed by joint instructions from counsels for Sellers and Buyer.

3.2 **Fill in Blanks and Attach Exhibits.** You are to complete any blanks in the Closing Documents and attach all missing exhibits as appropriate, including as indicated on **Schedules** attached hereto.

3.3 **Record Documents.** You are to record the Closing Documents listed on **Schedule 3** attached hereto in the Official Public Records of Kent County, Texas in the order listed therein.

3.4 **Disburse Funds to/on behalf of Sellers.** You are to pay from the Closing Amount the expenses as shown on the Sellers' Settlement Statement and deliver the Net Amount Due Sellers separately allocated to each of the Sellers as shown on the Sellers' Settlement Statement and the 1099-S. I will fax to you a statement for our services prior to Closing for inclusion on the Sellers' Settlement Statement and to be deducted for the sales proceeds in calculating the Net Amount Due Sellers. The Net Amount Due Sellers is to be sent to each Seller by wire transfer in accordance with the wire instructions provided to you prior to Closing or as you otherwise may be directed by the respective Seller (\_\_\_\_\_ 's amount is to be sent to him by cashier's check and mailed to him at the address provided in the enclosed Mailing Instructions). You are authorized to deduct from the amount being wire transferred to each Seller the bank's wire transfer fee. Please call me when you have commenced initiation of the wire transfers. Fax to me a breakout of the amount allocated to each Seller.

3.5 **Disburse Funds on Behalf of Buyer.** You are to pay from the Closing Amount the expenses as shown on the Buyer's Settlement Statement.

3.6 **Deliver Documents to Sellers.** You are to deliver to the Sellers (c/o of Graves, Dougherty, Hearon & Moody, P.C.) as indicated on **Schedule 4**.

3.7 **Deliver Documents to Buyer.** You are to deliver to Buyer (c/o Buyer's counsel, \_\_\_\_\_) an executed original of the Closing Documents as indicated in **Schedule 4**, and a copy of all other documents executed in connection with the Closing.

3.8 **Distribute Recorded Documents.** After Closing, you are to deliver to me or Buyer's counsel, as specified in **Schedule 4**, the recorded original of the indicated document and a copy of the other recorded Closing Documents reflecting their recording information.

You are not authorized to execute any of the Closing Actions unless you are able to execute all of the Closing Actions. Please note that you are not authorized to disburse any funds except in strict accordance with the Settlement Statements, unless the express advanced written consent of Sellers or the undersigned is obtained.

Your release of any of the Closing Documents from escrow shall constitute a binding and irrevocable commitment by the Title Company to make all disbursements reflected by Sellers' Settlement Statement and to issue the Title Policy as required by the Sales Contract.

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Please execute the acknowledgment set forth below to confirm your agreement and acceptance of this closing instruction letter, and return a copy to me via facsimile, with an original to follow. By your acceptance hereof, you agree to comply with all requests and requirements contained herein. Please contact me with any questions regarding this matter.

Yours very truly,

**Agreed and accepted by:**

Closing Agent:

\_\_\_\_\_, 2004  
\_\_\_\_\_(Name)  
\_\_\_\_\_(Title)

**Schedule 1**  
**Sellers' Escrowed Documents**

#	Document	Completion Action Required
1	Powers of Attorney – executed originals of the following appointing _____ as attorney-in-fact	
2	Warranty Deed With Vendor's Lien – Duplicate executed originals	
4	Affidavit of Debts and Liens – Sellers executed original	
6	FIRPTA Certificate of Non-Foreign Status – for Sellers (other than _____ Trust) executed original	
7	FIRPTA Certificate of Non-Foreign Status – The _____ Trust executed original	
9	1099-S – for Sellers executed original	
11	Sellers' Settlement Statement – Sellers	Not yet received from you. Will be signed and returned by _____ on behalf of the Sellers after receipt from you.
12	Wiring Instructions – for each of the following Sellers: _____	
13	Assignment of Development Rights and Appurtenances – duplicate executed originals	Buyer's signature needed.
14	Assignment and Assumption of Subdivision Construction Contract – duplicate executed originals	Buyer's signature needed.
15	Partial Assignment and Assumption of BCCP Agreement and Participation Agreement – duplicate executed originals	Buyer's signature needed.
16	Assignment of ADTs duplicate executed originals	Buyer's signature needed.
17	Assignment of Seller's Interest in Buyer's Consultant's Work Product	Buyer's signature needed.
17	Joint Facilities Development Agreement duplicate executed originals	Buyer's signature needed.
18	Escrow Agreement duplicate executed originals	Buyer's signature needed.
19	Seller's Performance Deed of Trust duplicate executed originals	
20	Designation of Additional Participating Property in Regional Storm Water Detention Pond	
21	Designation of Sheltered Owner	

22	Memorandum of JFDA and Post Closing Agreement duplicate executed originals	Buyer's signature needed.
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**Schedule 2  
Buyer's Documents**

#	Document	Completion Action Required
1	Buyer's Settlement Statement	Buyer's signature needed.
2	Waiver of Inspection	If waived, Buyer's signature needed.
3	Assignment of Partial Interest in Contract by Buyer	_____ ("Buyer 1") is to assign by written assignment delivered to the Title Company a partial interest in the Buyer's rights and obligations under the Sales Contract prior to Closing.
4	Title Commitment	Updated to current date prior to Closing with copy delivered and received by me and Buyer's Counsel by Telefax or mail prior to Closing. Approval by Seller's and Buyer's counsel of the updated Title Commitment is a condition to Closing.
5	Buyer's Performance Deed of Trust	Buyer's signature needed.

**Schedule 3  
Recording Order**

1	Designation of Sheltered Owner
2	Designation of Additional Participating Property in Regional Storm Water Detention Pond
3	Seller's Powers of Attorney
4	Seller's Lender's Partial Release and Consent to JFDA, Designation of Sheltered Owner, Designation of Additional Participating Property in Regional Storm Water Detention Pond and Post-Closing Agreement
5	Warranty Deed
6	Assignment of Development Rights and Appurtenances
7	Partial Assignment and Assumption of BCCP Agreement and Participation Agreement
8	Assignment of ADTs
9	Memorandum of JFDA and Post Closing Agreement
9	Buyer's Interim Lender Deed of Trust
10	Seller's Performance Deed of Trust
11	Buyer's Performance Deed of Trust

**Schedule 4  
Distribution of Documents on Closing**

Party	Document	Original	Copy
<b>Sellers</b>			
1	Seller's Lender's Partial Release and Consent		x
2	Seller's Powers of Attorney		x
3	Warranty Deed		x
4	Designation of Sheltered Owner		x
5	Designation of Additional Participating Property in Regional Storm Water Detention Pond		x
6	Assignment of Development Rights and Appurtenances		x

7	Partial Assignment and Assumption of BCCP Agreement and Participation Agreement		x
8	Assignment of ADTs		x
9	Memorandum of JFDA and Post Closing Agreement		x
10	JFDA - duplicate original	x	
11	Post Closing Agreement - duplicate original	x	
12	Seller's Performance Deed of Trust		x
13	Buyer's Performance Deed of Trust		x
14	Buyer's Waiver of Inspection		x
15	Seller's Affidavit of Debts and Liens		x
16	Seller's Settlement Statement		x
<b>Buyer</b>			
1	Seller's Lender's Partial Release and Consent		x
2	Seller's Powers of Attorney		x
3	Warranty Deed – Duplicate original.	x	
4	Designation of Sheltered Owner		x
5	Designation of Additional Participating Property in Regional Storm Water Detention Pond	x	
6	Assignment of Development Rights and Appurtenances		x
7	Partial Assignment and Assumption of BCCP Agreement and Participation Agreement		x
8	Assignment of ADTs		x
9	Memorandum of JFDA and Post Closing Agreement		x
10	JFDA - duplicate original	x	
11	Post Closing Agreement - duplicate original	x	
12	Seller's Performance Deed of Trust		x
13	Buyer's Performance Deed of Trust		x
14	Sellers' Affidavits of Debts and Liens		x
15	Buyer's Affidavit of Debts and Liens		x
16	Powers of Attorney		x
17	Buyer's Settlement Statement		x
18	Buyer's Interim Lender's Deed of Trust		x

#### Distribution of Recorded or Original Documents after Recording

Party	Document	Recorded Original*	Copy of Recorded or Issued
<b>Seller</b>			
1	Warranty Deed		x
2	Powers of Attorney	x	
3	Title Policy *		x
4	Designation of Sheltered Owner	x	
5	Designation of Additional Participating Property in Regional Storm Water Detention Pond		
6	Assignment of Development Rights and Appurtenances		x
7	Partial Assignment and Assumption of BCCP Agreement and Participation Agreement		x
8	Assignment of ADTs		x
9	Memorandum of JFDA and Post Closing Agreement		x
10	Seller's Performance Deed of Trust		x
11	Buyer's Performance Deed of Trust	x	
<b>Buyer</b>			
1	Warranty Deed	x	
2	Powers of Attorney		x
3	Title Policy *	x	

4	Designation of Sheltered Owner		x
5	Designation of Additional Participating Property in Regional Storm Water Detention Pond		x
6	Assignment of Development Rights and Appurtenances	x	
7	Partial Assignment and Assumption of BCCP Agreement and Participation Agreement	x	
8	Assignment of ADTs	x	
9	Memorandum of JFDA and Post Closing Agreement	x	
10	Seller's Performance Deed of Trust	x	
11	Buyer's Performance Deed of Trust		x
12	Buyer's Interim Lender's Deed of Trust		x
<b>Lender</b>			
1	Buyer's Interim Lender's Deed of Trust	x	

\* Title Policy issued showing recording information.

**D.4**

**DEED**

**NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.**

STATE OF TEXAS

KNOW ALL PERSONS BY THESE PRESENTS:

COUNTY OF TRAVIS

**A. Conveyance.** \_\_\_\_\_, as to its undivided \_\_\_\_\_ interest, \_\_\_\_\_, as to its undivided \_\_\_\_\_ interest, and \_\_\_\_\_, as to its undivided \_\_\_\_\_ interest (which together with their successors and assigns are herein called the "**Grantors**") for Ten Dollars and other good and valuable consideration and the further consideration of the execution and delivery by the Grantee of the Promissory Note in the original amount of \$\_\_\_\_\_ payable to the order of \_\_\_\_\_ (the "**Lender**"), which is secured by the Vendor's Lien herein retained and is additionally secured by a Deed of Trust conveying the Property herein conveyed to \_\_\_\_\_, Trustee, which has been recorded contemporaneously herewith in the records of the County, in hand paid to Grantors by Grantee, the receipt of which is hereby acknowledged by Grantors, with Grantors directing that the consideration payable to Grantors be paid to Grantors in the percentages listed in an Exhibit attached hereto, have Granted, Sold, and Conveyed, and by these presents do Grant, Sell, and Convey to \_\_\_\_\_ (which together with its successors and assigns are herein called the "**Grantee**") whose mailing address is \_\_\_\_\_, and subject to the Exceptions and other provisions herein stated, the following described property located in Travis County, Texas, to-wit (the "**Property**"):

The surface estate in and to real property described on Exhibit A hereto ("**Land**") including all improvements ("**Improvements**"); all right, title and interest, if any, of Grantors, in and to any land lying in the bed of any street, road or access way, opened or proposed, in front of, at a side of or adjoining the Land or Improvements to the centerline thereof ("**Property Rights**"); and all right, title and interest of Grantors, reversionary or otherwise, in and to all easements and utility rights in or upon the Land; and all other rights and appurtenances belonging or in anywise pertaining thereto ("**Appurtenances**") together with all of Grantors' right, title and interests in the oil, gas and other minerals in, on, under or that may be produced from the Land. This conveyance of acreage is in gross with Grantee waiving any claim against Grantors for shortages in area, if it is determined that the acreage is less than the number stated. Grantors waive any claim for additional compensation if the acreage is greater than the number stated.

**B. Exceptions.** This conveyance is made and accepted subject to all easements, rights-of-way and prescriptive rights that are visible or of record; all presently recorded restrictions, reservations, covenants, conditions, mineral severances and mineral reservations; all zoning laws, regulations and ordinances of municipal and/or governmental authorities; any discrepancies, conflicts or shortages in area or boundary lines, encroachments or overlapping of improvements; and the liens, if any, for governmental assessments, standby fees and ad valorem taxes for the year 2004; the payment of which is hereby assumed by Grantee, together with the lien, if any, for subsequent assessments for prior years due to change in land usage or ownership. Grantee accepts the Property in its present "*as is*" condition and makes certain covenants, releases, waivers and indemnities as set forth in Exhibit B attached hereto.

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto, belonging, unto Grantee, its successors and assigns, forever, subject to the Exceptions and provisions stated herein.

**C. Title Warranty.** Grantors hereby binds each respective Grantor's successors and assigns, to warrant and forever defend all and singular the Property, as to each Grantor's respective undivided percentage interest in the Property as designated herein to warrant and forever defend the title to the Property unto Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part

thereof, by, through, and under Grantors, but not otherwise, subject to the Exceptions and provisions stated above.

BUT it is expressly agreed that the Vendor's Lien, as well as the superior title in and to the Property, is retained against the Property as to the purchase money portions of the proceeds of the Promissory Note and are transferred to Lender without recourse on Grantors until the purchase money portion of the proceeds of the Promissory Note and all renewals, extensions and modifications thereof, and all interest thereon are fully paid according to the face, tenor, effect and reading thereof, when this Deed shall become absolute.

Executed as of \_\_\_\_\_, 2004, but executed on the date of the acknowledgment of the respective person executing this Deed. This instrument may be executed for convenience in multiple original counterparts, as if the parties executing this instrument executed on the same document, with all counterparts constituting the original instrument.

[Execution block and acknowledgments]

EXHIBIT A  
Description

EXHIBIT B

### **Disclaimer, Release, Indemnity and Waiver**

A. **As Is.** Grantee has relied solely on Grantee's own investigations of the Property and not on any information or disclosure provided by Grantors or Grantors' agents or contractors. The conveyance of the Property is made on an "AS-IS, WHERE IS, WITH ALL FAULTS" basis. Except for the warranty of title contained in this Deed, Grantors make NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING, BUT IN NO WAY LIMITED TO, ANY WARRANTY OF PHYSICAL CONDITION, HABITABILITY, SUITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY.

B. **RELEASE.** GRANTEE WAIVES AND RELEASES GRANTORS FROM ALL LIABILITIES (AS DEFINED IN PARAGRAPH C HEREOF), INCLUDING CONSEQUENTIAL DAMAGES, ARISING OUT OF THE LACK OF SUITABILITY, LACK OF MERCHANTABILITY, LACK OF GOOD AND WORKMANLIKE CONSTRUCTION, VIOLATION OF LAW, RULE, CODE, ORDINANCE OR REGULATION, OR LACK OF QUALITY OF CONSTRUCTION OF THE IMPROVEMENTS TO THE PROPERTY, OR GRANTEE'S USE OF THE PROPERTY, INCLUDING ANY BODILY OR PERSONAL INJURY TO, SICKNESS, DISEASE, OR DEATH OF ANY PERSON OR DAMAGE TO OR LOSS OF PROPERTY ARISING OUT OF THE PROPERTY (the "**Released Liabilities**").

C. **INDEMNITY.** GRANTEE AGREES TO PROTECT, DEFEND, INDEMNIFY AND HOLD GRANTORS HARMLESS FROM AND AGAINST ALL LIABILITIES, ARISING OUT OF THE OWNERSHIP, OCCUPANCY OR USE OF THE PROPERTY, INCLUDING BUT NOT BY WAY OF LIMITATION, OUT OF ANY ACT, OMISSION, NEGLIGENCE, WILLFUL MISCONDUCT, STRICT LIABILITY, BREACH OF WARRANTY, EXPRESS OR IMPLIED, OR DEFAULT BY ANY OF GRANTORS OR RESULTING FROM, RELATING TO OR ARISING OUT OF THE CONDITION OF THE PROPERTY (INCLUDING, WITHOUT LIMITATION, THE PRESENCE, RELEASE OR CONTAMINATION BY HAZARDOUS SUBSTANCES OR ORGANISMS, INCLUDING MOLD OR ASBESTOS, IN, ON OR UNDER THE PROPERTY), WHETHER BEFORE, AS OF, OR AFTER THE DATE HEREOF, WHETHER NOW KNOWN OR LATER DISCOVERED, AND WHENEVER INCURRED, WHETHER PREVIOUS TO, ON, OR AFTER THE DATE HEREOF (the "**Indemnified Liabilities**"). GRANTEE AT ITS EXPENSE, SHALL ASSUME ON BEHALF OF GRANTORS AND CONDUCT WITH DUE DILIGENCE AND IN GOOD FAITH THE DEFENSE THEREOF WITH COUNSEL SATISFACTORY TO GRANTORS; PROVIDED, HOWEVER, GRANTORS SHALL HAVE THE RIGHT, AT GRANTORS'S OPTION, TO BE ADDITIONALLY REPRESENTED THEREIN BY COUNSEL OF THEIR GRANTORS'S SELECTIONS AND AT GRANTORS'S OWN EXPENSE. IN THE EVENT OF FAILURE BY GRANTEE TO FULLY PERFORM IN ACCORDANCE WITH THIS AGREEMENT, GRANTORS, AT GRANTORS'S OPTION, AND WITHOUT RELIEVING GRANTEE OF ITS OBLIGATIONS HEREUNDER, MAY SO PERFORM, BUT ALL COSTS AND EXPENSES SO INCURRED BY GRANTORS IN THAT EVENT SHALL BE REIMBURSED BY GRANTEE TO



GRANTORS, TOGETHER WITH INTEREST ON THE SAME FROM THE DATE ANY SUCH EXPENSE WAS PAID BY GRANTORS UNTIL REIMBURSED BY GRANTEE, AT THE RATE OF INTEREST PROVIDED TO BE PAID ON JUDGMENTS UNDER THE LAWS OF THE STATE OF TEXAS. THIS INDEMNIFICATION SHALL NOT BE LIMITED TO THE COST OF REPAIR OR OTHER DAMAGES PAYABLE UNDER THE WRITTEN WARRANTY OR BY THE TERMS, CONDITIONS AND LIMITATIONS OF THE WRITTEN WARRANTY.

**D. BROAD RELEASE AND INDEMNITY.** THE RELEASED AND INDEMNIFIED LIABILITIES INCLUDE AND ARE WITHOUT REGARD TO THE CAUSE OR CAUSES THEREOF, STRICT LIABILITY OR NEGLIGENCE, INCLUDING WHETHER THE RELEASED AND/OR INDEMNIFIED LIABILITIES MAY RESULT OR MAY HAVE RESULTED IN WHOLE OR IN PART FROM THE SOLE, JOINT OR CONCURRENT NEGLIGENCE OF ANY OF GRANTORS, OR MAY HAVE OR MAY RESULT IN WHOLE OR IN PART FROM AN INTENTIONAL TORT OF ANY OF GRANTORS, OR WHETHER THE NEGLIGENCE BE ACTIVE, PASSIVE OR GROSS NEGLIGENCE. THIS RELEASE AND INDEMNITY IS UNLIMITED AS TO AMOUNT OR DURATION; IS BINDING ON AND INSURES TO BENEFIT OF GRANTORS, GRANTORS'S HEIRS AND ASSIGNS.

**E. WAIVER OF CONSUMER RIGHTS.** As to Grantors, Grantors' successors and assigns, Grantee waives Grantee's rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 *et seq.*, Texas Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of Grantee's own selection, Grantee voluntarily consents to this waiver.

**F. Definitions.** As used herein the term "**Liabilities**" shall mean and include all, whether foreseeable or unforeseeable, claims, demands, damages (including actual, consequential and punitive), losses, fines, penalties, liens, causes of action, suits, judgments, agreed judgments, arbitrator's awards, settlements and expenses [including court costs, attorney's fees including attorney's fees in defending and/or settling a claimed Liability and attorney's fees to collect on the indemnity herein provided), costs of investigation, and expert witnesses of any nature, kind or description by, through, or of any person or entity, including property loss or damage, bodily or personal injury including libel, slander, emotional distress, loss of profits, loss of opportunity, treble or punitive damages under any applicable law, prejudgment interest, attorney's fees, penalties allowed by law, and any other loss or detriment, past, present, or future, known or unknown.

**G. Insurance.** For a period of no less than 4 years from the date hereof, Grantee shall maintain commercial general liability insurance in an insured amount of no less than \$1,000,000 which shall include as part of its coverage contractually assumed liability coverage for the indemnity herein contained as an insured contract and shall name Grantors as an additional insured without exclusion for Grantors' negligence, whether sole or contributory, as to injuries or property damage arising out of the Property, including completed operations coverage. Grantee shall deliver to Grantors proof of insurance from the insurance carrier reflecting Grantors as the certificate holder and as the additional insured as herein required.

**H. Running with the Land.** As a covenant running with and lien on the Property, if Grantors are the prevailing party in any legal proceeding brought under or in connection with this Deed, Grantors shall be additionally entitled to recover court costs and reasonable attorney fees, and all other litigation expenses, including deposition costs, travel and expert witness fees. The provisions of this Exhibit are covenants running with the land, binding on the owner of the Property, its successors and assigns.

### D.5.1.1

### Assignment of Development Rights and Appurtenances

THE STATE OF TEXAS                   §  
COUNTY OF \_\_\_\_\_ §

KNOW ALL PERSONS BY THESE PRESENTS:

THAT \_\_\_\_\_, a \_\_\_\_\_ ("**Assignor**") for the consideration hereinafter set forth does hereby sell, assign and transfer to \_\_\_\_\_ ("**Assignee**"), its successors and assigns, subject to the terms and conditions the reof, all of Seller's right, title and interest in and to:

1. All development rights, or evidences of such rights, and all other rights, privileges, entitlements, governmental or quasi-governmental authorizations and approvals that have been issued, or that are pending, if any, that are specifically attributable to that certain tract of land containing \_\_\_\_\_ acres of land (the "**Land**") in the \_\_\_\_\_ Survey, Abstract No. \_\_\_\_, as more particularly described in a Special Warranty Deed of even date herewith from Assignor to Assignee,

[including that certain [Site Plan/Development Permit] for the construction of a \_\_\_\_\_ square foot \_\_\_\_\_, parking, landscaping and other associated improvements on the Land issued by the City of \_\_\_\_\_, 200\_, under Permit Number [SP-\_\_-\_\_\_\_\_] which allow for the development of the Land or the construction and/or operation of any improvements thereon, including all utility commitments, water and wastewater taps, living unit equivalents, capital improvement contracts, utility construction agreements with municipal or other public utilities, rights to receive or install water, wastewater, electricity, gas, telephone, telecommunications, drainage or other utilities and services, streets, driveways or other access to the Land, and all such rights, powers, privileges, options and other benefits of Seller the reunder that specifically pertain to, affect, are attributable to, are appurtenant to, benefit or otherwise apply to, the Land

[, but excluding any such rights to the extent specifically pertaining or attributable to the remaining property owned by Assignor ("**Retained Property**") described as \_\_\_\_\_ ("**Tract II**") in that certain Sales Contract (the "**Sales Contract**") dated \_\_\_\_\_, \_\_\_\_\_, between Assignor and \_\_\_\_\_, which has assigned its rights thereunder to Assignee].

2. All permits, licenses, franchises, approvals, authorizations, certificates, variances, easements, site plans, contracts, agreements, infrastructure construction plans and specifications, no action letters or similar assurances granted or issued by a private person, public utility or by any governmental or quasi-governmental authority, agency, commission, committee or official which has, or purports to have, jurisdiction over the Land and the use and development thereof, that are required or useful to evidence compliance with applicable legal requirements or that specifically pertain to, affect, are attributable to, are appurtenant to, benefit or otherwise apply to, the Land, excluding, however, any and all deposits, letters of credit, fiscal security, refunds, rebates or other sums due or to become due under any of the foregoing or any of the development rights hereby assigned which shall be replaced or substituted by Assignee, but including all applications, requests or other documents that have been filed with and are pending before any public utility or any governmental or quasi-governmental authority, agency, commission, committee or official which has, or purports to have, jurisdiction over the Land and the use and development thereof

[, but excluding any such rights to the extent specifically pertaining or attributable to the Retained Property owned by Assignor described as Tract II in the Sales Contract].

3. all surveys, site plans, soil or substrata studies, water or drainage studies, environmental or other studies or reports, renderings, diagrams, plans and specifications, and other information submitted in connection with or supporting any permit, approval or authorization, or any pending application therefor, if any, that specifically pertain to, affect, are attributable to, are appurtenant to, benefit or otherwise apply to, the Land and the use and development thereof

- [, but excluding any such rights to the extent specifically pertaining or attributable to the retained Property owned by Assignor described as Tract II in the Sales Contract].
4. any and all other rights, interests, privileges and appurtenances owned by Assignor and in any way specifically related to the Land, [but excluding any such rights to the extent specifically pertaining or attributable to the remaining property owned by Assignor described as Tract II in the Sales Contract].
  5. [those certain plans and specifications entitled " \_\_\_\_\_," dated \_\_\_\_\_, prepared by \_\_\_\_\_ (the "**Architect**"), consisting of a Project Manual and sheets \_\_\_\_\_, including all common law, statutory and other reserved rights, including the copyright, on and subject to the terms of that certain Standard Form of Agreement Between Owner and Architect dated \_\_\_\_\_, \_\_\_\_\_, between Seller and the Architect (the "**Architect Contract**"); all rights, causes of action and claims with respect to the design of the Project under the Architect Contract; and all rights and interest of Seller as the Owner under the Architect Contract; provided that the foregoing assignment of Seller's right, title and interest under the Architect Contract to the extent of services to be performed by the Architect after the date hereof (but not the assignment of Seller's right, title and interest in and to the plans and specifications, common law, statutory and other reserved rights, including the copyright, and rights, causes of action and claims as provided above) is made by Seller subject to and conditioned upon the consent of the Architect and the Architect and Buyer executing an amendment to the Architect Contract providing for the continuation of the Architect's services thereunder on such terms and conditions as the Architect and Buyer may mutually agree.]

Without limiting the generality of the foregoing, this Assignment includes all right, title and interest of Assignor in, to and under those contracts and agreements described on Exhibit A attached hereto and made a part hereof.

This Assignment is executed and delivered as part of the sale and conveyance of the Land by Assignor to Assignee, and in addition to such sale and conveyance, the consideration for this Assignment is the sum of Ten and No/100 Dollars (\$10.00), and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged[, and to secure the payment of which no lien or security interests, express or implied, are retained].

Assignor warrants to Assignee that Assignor has not previously sold or transferred its right, title and interest in and to the rights, interests and property assigned hereby, and that the same are free and clear of all liens and encumbrances, except those matters of record in the \_\_\_\_\_ Records, \_\_\_\_\_ County, Texas.

[Short Form: Except as expressly set forth in the preceding sentence, this Assignment is made by Assignor and accepted by Assignee without any warranty, express or implied, by or against Assignor.]

[LONG FORM: EXCEPT FOR THE SPECIFIC WARRANTIES AND REPRESENTATIONS SET FORTH IN SECTION \_\_\_ OF THE SALES CONTRACT,] [ASSIGNEE ACKNOWLEDGES AND AGREES THAT IT HAS CONDUCTED ITS OWN INDEPENDENT INVESTIGATION AND INSPECTION OF ALL ASPECTS OF THE PROPERTY, IT IS RELYING ON SUCH INDEPENDENT INVESTIGATION AND INSPECTION IN PURCHASING THE PROPERTY AND IT IS NOT RELYING ON ANY INFORMATION PROVIDED BY ASSIGNOR. ASSIGNEE FURTHER ACKNOWLEDGES AND AGREES THAT ASSIGNEE IS FULLY AND COMPLETELY SATISFIED THAT THE PROPERTY IS SATISFACTORY IN ALL RESPECTS FOR ITS INTENDED USE AND AFTER CLOSING, ASSIGNEE SHALL HAVE NO RECOURSE WHATSOEVER AGAINST ASSIGNOR IN CONNECTION WITH ANY ASPECT OF THE PROPERTY[, OTHER THAN ASSIGNOR'S LIMITED WARRANTY OF TITLE CONTAINED IN THIS ASSIGNMENT AND AS EXPRESSLY SET FORTH IN SECTION \_\_\_ OF THE SALES CONTRACT].

ASSIGNEE HEREBY ACKNOWLEDGES AND AGREES THAT [EXCEPT FOR THE SPECIFIC REPRESENTATIONS AND WARRANTIES OF ASSIGNOR SET FORTH IN SECTION \_\_\_ OF THE SALES CONTRACT,] ASSIGNOR HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY AND ALL REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO THE PROPERTY,

INCLUDING, BUT NOT LIMITED TO: (A) THE NATURE, QUALITY OR CONDITION OF THE PROPERTY, (B) THE INCOME TO BE DERIVED FROM THE PROPERTY; (C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL USES; (D) THE COMPLIANCE OF THE PROPERTY WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY, INCLUDING, LIMITED TO, ANY STATE OR FEDERAL ENVIRONMENTAL LAWS; OR (E) THE MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, AND ASSIGNEE HEREBY WAIVES ANY SUCH REPRESENTATION, WARRANTY, PROMISE, COVENANT, AGREEMENT OR GUARANTY. [SUBJECT TO SECTION \_\_\_ OF THE SALES CONTRACT,] ASSIGNOR IS CONVEYING THE PROPERTY TO ASSIGNEE "AS IS, WHERE IS", AND "WITH ALL FAULTS."]

EXECUTED on the dates of the parties respective acknowledgments to be effective \_\_\_\_\_,  
200\_.

[Execution and Acknowledgments]

**D.5.2**

**Assignment and Assumption of  
Subdivision Construction Agreements**

This Assignment and Assumption of Subdivision Construction Agreements (the "**Assignment**") is entered into effective as of the \_\_\_\_ day of \_\_\_\_\_, 2004 (the "**Effective Date**"), by and among \_\_\_\_\_ (the "**Assignor**"), \_\_\_\_\_ (the "**Assignee**"), and is consented to by the **City of Austin, Texas**, a municipal corporation (the "**City**")

WITNESSETH

WHEREAS, certain Subdivision Construction Agreements (the "**Agreements**"), dated \_\_\_\_\_, 2004, were entered into by and between City and Assignor, as subdivider (the "**Subdivider**"), a copy of the Agreements being attached hereto as Exhibit 1;

WHEREAS, pursuant to the Agreements, Assignor has agreed to construct and install certain external and internal subdivision improvements as described on Exhibit B to the Agreements;

WHEREAS, Assignee desires to purchase and Assignor desires to sell the real property, improvements and appurtenances thereto (the "**Property**") as more particularly described on Exhibit A to the Agreements and as more particularly described in a Special Warranty Deed of even date herewith from Assignor, as Grantor, to Assignee, as Grantee, but Assignor is not conveying to Assignee Section 1, a subdivision in Travis County, a map or plat of which is of record in the Plat Records of Travis County, Texas (the "**Reserved Property**"); and

WHEREAS, in connection with the purchase and sale of the Property, the Assignor now desires to assign its rights and obligations under the Agreements to the Assignee, and the Assignee desires to accept the assignment thereof upon and subject to the terms and conditions contained herein;

NOW THEREFORE, for and in consideration of the sum of Ten and No/100 Dollars (\$10.00), the recitals stated above, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. As of the Effective Date hereof, the Assignor hereby assigns and transfers to the Assignee all of Assignor's rights and obligations under the Agreements and the Assignee hereby agrees to and does accept this assignment and in addition expressly assumes and agrees to timely keep, perform, satisfy, and fulfill all the terms, covenants, conditions, and obligations required to be kept, performed, satisfied, and fulfilled by the Assignor as the Subdivider of the Property under the Agreements, including the timely completion of all improvements as set forth therein.

2. Assignee hereby agrees to indemnify and hold Assignor harmless from and against all and any costs, liability, damage or expense, including specifically but not limited to, attorneys' fees, arising out of acts or omissions of Assignee accruing or arising on or subsequent to the Effective Date of this Assignment and arising out of or in any way connected with the Agreements.

3. City hereby releases, discharges, and agrees to hold harmless Assignor, its officers, directors, shareholders, partners, employees, agents and affiliates, from and against any costs, liability, payments, damage or expense, including specifically but not limited to, attorneys' fees, for all charges and events accruing or arising on or subsequent to the Effective Date of this Assignment and arising out of or in any way connected with the Agreements. City shall look solely to Assignee for the payment of all expenses and satisfaction of all obligations and other charges after the Effective Date of this Assignment as to the Property and the Agreements to the extent they pertain to the Property, and Assignee hereby assumes said obligations of Assignor for events arising after the Effective Date of this Assignment.

4. This Assignment shall be binding upon and inure to the benefit of the parties hereto, and their successors in interest and assigns.

5. This Assignment, its validity, construction and enforcement shall be governed by and construed in accordance with the laws of the State of Texas where it has been executed and delivered and where the subject property is located.

6. This Assignment may be executed in multiple counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument.

EXECUTED EFFECTIVE as of the date and year first above written.

**ASSIGNOR:**

**ASSIGNEE:**

[Signature blocks and Acknowledgments]

**CONSENT OF CITY**

The undersigned is the City in the Subdivision Construction Agreements described in the foregoing Assignment and hereby consents to the assignment of all obligations and responsibilities thereunder to \_\_\_\_\_, and agrees to release \_\_\_\_\_, from all liability and hold Assignee liable for all payments and obligations arising under the Subdivision Construction Agreement.

**CITY OF AUSTIN, TEXAS**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

[Acknowledgment]

**EXHIBIT 1**

**Subdivision Construction Agreements**

All terms, conditions and provisions of that certain Subdivision Construction Agreement of record in Volume \_\_\_\_\_, Page \_\_\_\_\_, of the \_\_\_\_\_ Records of Travis County, Texas (Lots, Block \_\_\_\_\_, Section \_\_\_\_\_, and Lots \_\_\_\_\_, Block \_\_\_\_\_, Amended Plat of Lots \_\_\_\_\_, Block \_\_\_\_\_, of \_\_\_\_\_ Section \_\_\_\_\_).

**D.5.3**

**Partial Assignment and Assumption of  
BCCP Agreement and Participation Agreement**

This Partial Assignment and Assumption of BCCP Agreement and Participation Certificate (the "**Assignment**") is entered into effective as of the \_\_\_\_ day of \_\_\_\_\_, 2004 (the "**Effective Date**"), by and among \_\_\_\_\_ (the "**Assignor**"), and \_\_\_\_\_ (the "**Assignee**").

**A. Background**

1. **BCCP.** A certain agreement (the "**BCCP Contract**"), dated May 4, 1999 was entered into by and between the Balcones Canyonlands Coordinating Committee, an entity created pursuant to Section 791.013 of the Texas Government Code, as an instrumentality of the parties to the Interlocal Cooperation Agreement between Travis County and the City of Austin Implementing the Balcones Canyonlands Conservation Plan - Shared Vision, dated August 3, 1995, acting by and through its designated representative, the Travis County Program Manager for the Balcones Canyonlands Conservation Plan (the "**BCCP**") as the Permit Holders (the "**Permit Holders**") and Assignor, as the Participant (the "**Participant**") of record as Document No. 1999039377 of the Official Records of Travis County, Texas, which BCCP Contract is incorporated herein as a part hereof and for all other purposes.

2. **Participation Certificate.** Pursuant to the BCCP Contract, the Permit Holders issued a Participation Certificate to the Participant as the owner of a tract of \_\_\_\_ acres of land described in Exhibit A to the BCCP Contract, a copy of the Participation Certificate is attached hereto as **Exhibit B**.

3. **Retained Property.** Assignee desires to purchase and Assignor desires to sell the land as more particularly described on **Exhibit A** attached hereto and the improvements and appurtenances thereto (the "**Property**") as more particularly described in a Special Warranty Deed of even date herewith from Assignor, as Grantor, to Assignee, as Grantee, but Assignor is not conveying to Assignee Section \_\_, a subdivision in Travis County, a map or plat of which is of record in the Plat Records of Travis County, Texas (the "**Retained Property**").

4. **Assigned Rights.** In connection with the purchase and sale of the Property, the Assignor now desires to assign its rights and obligations under the BCCP Contract and the Participation Certificate (the "**Agreements**") to the Assignee to the extent and only to the extent that they relate to the Property, but not the Retained Property, and the Assignee desires to accept the assignment thereof upon and subject to the terms and conditions contained herein;

**B. Agreement**

NOW THEREFORE, for and in consideration of the sum of Ten and No/100 Dollars (\$10.00), the recitals stated above, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **Assignment and Assumption.** As of the Effective Date hereof, the Assignor hereby assigns and transfers to the Assignee all of Assignor's rights and obligations under the Agreements and the Assignee hereby agrees to and does accept this assignment and in addition expressly assumes and agrees to timely keep, perform, satisfy, and fulfill all the terms, covenants, conditions, and obligations required to be kept, performed, satisfied, and fulfilled by the Assignor as the owner of the Property under the Agreements to the extent they relate to the Property but not the Retained Property.

2. **As Is.**

2.1 **Generally Disclaimed Matters.** Other than as expressly contained in the Settlement Agreement between Assignor and Assignee, (1) Assignee accepts the Agreements "AS IS, WHERE IS AND WITH ALL FAULTS", and (2) ASSIGNEE AGREES THAT ASSIGNOR MAKES AND HAS MADE NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW,

INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, OF THE AGREEMENTS. Without limiting the generality of the foregoing, the assignment of the Agreements is without any representation or warranty relating to the following except as may be expressly contained in the Settlement Agreement between Assignor and Assignee:

**2.2 Specifically Disclaimed Matters.** Without limiting the generality of the foregoing, the conveyance of the Property is without any warranty relating to:

**2.2.1 Design Quality.** The nature or quality of any construction, structural design and engineering of any aspect of the Property;

**2.2.2 Construction Quality.** The quality of any labor and materials included in the Property;

**2.2.3 Development Potential.** The soil conditions, drainage, utilities or other conditions existing at the Property with respect to any particular purpose, developmental potential or otherwise; or

**2.2.4 Environmental Condition.** The presence or absence of hazardous substances in, on or under the Property.

**3. Indemnification.** Assignee hereby agrees to indemnify and hold Assignor harmless from and against all and any costs, liability, damage or expense, including specifically but not limited to, attorneys' fees, arising out of acts or omissions of Assignee accruing or arising on or subsequent to the Effective Date of this Assignment and arising out of or in any way connected with the Agreements.

**4. Binding Effect.** This Assignment shall be binding upon and inure to the benefit of the parties hereto, and their successors in interest and assigns.

**5. Governing Law; Forum. THIS ASSIGNMENT, ITS VALIDITY, CONSTRUCTION AND ENFORCEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS WHERE IT HAS BEEN EXECUTED AND DELIVERED AND WHERE THE SUBJECT PROPERTY IS LOCATED.**

**6. Counterparts.** This Assignment may be executed in multiple counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument.

EXECUTED EFFECTIVE as of the date and year first above written.

**ASSIGNOR:**

**ASSIGNEE:**

[Execution and Acknowledgment]



**D.5.4**

**Assignment of ADTs**

THE STATE OF TEXAS           §  
  §       KNOW ALL PERSONS BY THESE PRESENTS:  
COUNTY OF TRAVIS         §

THAT \_\_\_\_\_ (collectively, "**Assignor**"), has ALLOCATED, ASSIGNED, TRANSFERRED AND CONVEYED, and does hereby ALLOCATE, ASSIGN, TRANSFER AND CONVEY unto \_\_\_\_\_ ("**Assignee**"), all of Assignor's right, title and interest in and to 2,891 adjusted trips per day ("**ADTs**") as described and set forth in City of Austin Ordinance No. \_\_\_\_\_ (the "**Ordinance**"), such ADTs assigned hereby to be used in connection with that certain real property in Travis County, Texas, more particularly described as follows (the "**Property**"):

Lot \_\_\_\_, Block \_\_\_\_, \_\_\_\_\_, a subdivision in Travis County, Texas, according to the map or plat thereof recorded as Document No. \_\_\_\_\_ of the Official Records of Travis County, Texas.

The consideration for this Assignment is the sum of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged. The Property is within Tract \_\_ as described in the Ordinance. Assignor warrants to Assignee that (i) Assignor has not previously assigned or transferred its rights to the ADTs assigned hereby, (ii) Assignor will not utilize, transfer or assign the ADT's assigned hereby for any other property, and (iii) the ADT's assigned hereby are part of the \_\_\_\_\_ adjusted trips per day described in the Ordinance. Except as expressly set forth in the preceding sentence, this assignment of ADTs is made by Assignor and accepted by Assignee without any warranty, express or implied, by or against Assignor.

It is acknowledged and understood that the ADTs assigned hereby are required for the development of the Property for \_\_\_\_\_ multifamily dwelling units as set forth on the site plan prepared by \_\_\_\_\_ and filed with the City of Austin as Site Plan Multifamily Part B, City of Austin Permit No. SP-01-\_\_\_\_B (the "**Site Plan**"). It is expressly understood and agreed that at such time as the Property has been fully developed (as evidenced by the issuance of final certificates of occupancy for development of the Property as set forth on the Site Plan), Assignor may deliver to Assignee a letter addressed to Assignee executed by the City of Austin stating that development of the Property as set forth on the Site Plan requires an amount less than \_\_\_\_\_ ADTs (the "**City Letter**"). The City Letter cannot contain any condition, requirement or assumption to its conclusion concerning ADTs that could require ADTs for the Property in an amount more than those Assignee has or will have under the terms of this Assignment. Any of the ADTs assigned hereby which are not required for development of the Property as set forth on the Site Plan as stated in the City Letter (the "**Excess ADTs**") shall be reassigned by Assignor to Assignee, and Assignee, on behalf of itself, its successors and assigns, and all subsequent owner(s) of the Property agrees to execute and deliver, within ten (10) days after written request of Assignor, or their successors and assigns, a reassignment instrument in recordable form with respect to the Excess ADTs. The terms and provisions of this Assignment shall inure to the benefit of, and shall be binding upon, Assignor, Assignee, their respective successors and assigns, and the owner(s) of all or any part of the Property. This Assignment may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

[Execution and acknowledgments by Assignor and Assignee and Consent by City.]

**D.5.5**

**Assignment of Seller's Interest in Buyer's  
Consultant's Work Product**

This Assignment of Seller's Interest in Buyer's Consultant's Work Product ("**Assignment**") is made as of \_\_\_\_\_, 200\_\_ by ("**Seller 1**") and \_\_\_\_\_ ("**Seller 2**") (collectively, "**Assignor**"), and \_\_\_\_\_ ("**Assignee**").

**A. Background**

1. **Sales Contract.** \_\_\_\_\_, as Seller, entered into a Sales Contract dated effective \_\_\_\_\_, 2004 with \_\_\_\_\_, as Buyer, covering the land more particularly described on Exhibit A attached hereto and incorporated herein (the **Property**).

2. **Assignment by Seller.** \_\_\_\_\_ ("**Seller 1**") assigned her interest in the Sales Contract to \_\_\_\_\_, L.P. by that certain Assignment of Rights and Assumptions of Liabilities dated effective \_\_\_\_\_, 2004.

3. **Assignor's Interest in Work Product of Consultant's Hired by Buyer.** Assignee (or its predecessor), as Buyer under the Sales Contract, contracted with several consultants to prepare documents, applications, and other materials ("**Materials**") with respect to development and use of the Property as a \_\_\_\_\_ project ("**Project**"). Section \_\_\_ of the Sales Contract provides that as Materials are prepared, such Materials shall be simultaneously delivered to Assignor, with Assignor entitled to utilize and rely on such Materials, and that at the closing of the Sales Contract, Assignor shall release to Assignee all rights to Materials.

4. **Resulting Permits.** Assignor applied for and received the following Site Development Permits ("**Permits**") from the City of Austin on the following dates:

\_\_\_\_\_, 2004 - Site Plan Part A, Permit No. SPC-01-\_\_\_A; and  
\_\_\_\_\_, 2004 - Site Plan Multifamily Part B, Permit No. SP-01-\_\_\_B.

5. **Sale of Property.** Simultaneously with the execution of this Assignment, Assignee is acquiring the Property pursuant to the Sales Contract, and Assignor and Assignee are entering into this Assignment to document agreements relating to the Materials and the Permits.

**B. Agreement**

For good and valuable consideration, receipt of which is acknowledged, Assignor and Assignee agree as follows:

1. **Assignment of Permits.** Assignor assigns to Assignee all of its right, title, and interest in the Permits as they relate to the Property and Project.

2. **Release of Rights to Consultants' Work Product.** In accordance with Section \_\_\_ of the Sales Contract, Assignor releases to Assignee all of its right, title, and interest in the Materials as they relate to the Property and Project.

[Execution and Acknowledgment]

**D.6.1**

**Escrow Instructions Letter**  
**(Regional Detention Pond)**

Escrow Number: \_\_\_\_\_

\_\_\_\_\_, 2004

To: \_\_\_\_\_ Title Company

\_\_\_\_\_  
\_\_\_\_\_

The undersigned hereby deliver to Escrow Agent in escrow the papers, money or property hereinafter described to be held and disposed of by Escrow Agent in accordance with the following instructions and upon the terms and conditions hereinafter set forth, to which the undersigned hereby agree:

**1. Definitions:**

**Parties:** \_\_\_\_\_ ("Party 1"), \_\_\_\_\_ ("Party 2"), \_\_\_\_\_ ("Party 3")

**Constructing Party:**

**Engineer:**

**Agreement** That certain Regional Detention Pond Construction and Maintenance Agreement dated effective \_\_\_\_\_, 2004, by and between the Parties, \_\_\_\_\_ Association, Inc., a Texas nonprofit corporation, and \_\_\_\_\_ Construction, L.P.

**Property:** Approximately \_\_\_\_\_ acres of real property located northeast of the intersection of \_\_\_\_\_ and \_\_\_\_\_ (as defined in the Agreement).

Any capitalized terms not defined herein shall have the meaning assigned to them in the Agreement.

**2. Escrowed Property.** The Parties have delivered to Escrow Agent cash in the following amounts: (i) Party 1--\$\_\_\_\_\_; (ii) Party 2--\$\_\_\_\_\_; and (iii) Party 3--\$\_\_\_\_\_, which such amounts represent the Initial Escrow Account Deposit under the Agreement. In accordance with the terms of the Agreement, the Parties shall deliver additional cash amounts to Escrow Agent in accordance with approved Change Orders.

**3. Investment.** The Escrowed Property shall be held in an interest-bearing, federally-insured escrow account by Escrow Agent.

**4. Purpose.** The Escrowed Property shall be utilized to pay the Costs of Construction and the Management Fee upon Escrow Agent's receipt of a Release Notice, all in accordance with the terms of the Agreement.

**5. Release/Disbursement.** Escrow Agent shall disburse the Escrowed Property in accordance with the following instructions. The terms and conditions herein above referred to and to which the undersigned hereby agree for themselves, their heirs, successors and assigns are the following:

5.1 \_\_\_\_\_ (herein called "**Escrow Agent**") is not a party to, or bound by, any agreement which may be deposited under, evidenced by, or which arises out of the foregoing instructions.

5.2 Escrow Agent shall retain 10% of the Escrowed Property in accordance with the Retainage requirements of the Agreement and in accordance with Texas Property Code § 53.101 *et seq.*

5.3 Not more frequently than two (2) times each month and within five (5) business days after Escrow

Agent's receipt of a Release Notice from Engineer, Escrow Agent shall disburse the amount set out in the Release Notice from the Escrowed Property, to Principal Contractor or other parties identified on the Release Notice. With each disbursement made from the Escrowed Property in accordance with a Release Notice, Escrow Agent shall disburse to Constructing Party its portion of the Management Fee, as prorated over the period of construction.

- 5.4 If the Escrowed Property, less the required Retainage, is insufficient to pay in full the amount shown on the Release Notice and the disbursement to the Constructing Party of the prorated portion of the Management Fee, Escrow Agent shall immediately notify in writing Constructing Party and Engineer of the deficiency, detailing the amount of the deficiency.
- 5.5 Upon receipt by Escrow Agent of the Completion Notice from Engineer, Escrow Agent shall disburse any remaining Retainage as set out in the Completion Notice and in accordance with Texas Property Code § 53.101 *et seq.* to Principal Contractor and the remaining Escrowed Property and all interest accrued thereon, to the Parties in the ratio of the amount of each Party's total contribution to the Escrowed Property as a percentage of the total Escrowed Property. If, upon receipt by Escrow Agent of the Completion Notice from Engineer the Escrowed Property, including the required Retainage, and all interest accrued thereon is insufficient to pay in full the final costs authorized by the Completion Notice, Escrow Agent shall immediately notify in writing Constructing Party and Engineer of the deficiency, detailing the amount of the deficiency.
- 5.6 Escrow Agent acts hereunder as a depository only and is not responsible or liable in any manner whatever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it hereunder, or with respect to the form or execution of the same, or the identity, authority, or rights of any person executing or depositing the same, nor is Escrow Agent liable for or responsible for the performance of any other party specified in this escrow instruction letter.
- 5.7 These instructions shall not be subject to rescission or modification except upon receipt by Escrow Agent of written instructions of all parties hereto or their successor in interest, and no such modification shall be effective unless and until consented to in writing by Escrow Agent.
- 5.8 Escrow Agent shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by Escrow Agent to be genuine and to be signed by the proper party or parties.
- 5.9 Escrow Agent shall not be liable for any error of judgment or for any act done or step taken or omitted by it in good faith, or for any mistake of fact or law, or for anything which it may do or refrain from doing in connection herewith, except its own negligence and willful misconduct, and Escrow Agent shall have no duties to anyone except those signing these instructions.
- 5.10 Escrow Agent hereby acknowledges receipt of good and valuable consideration and therefore agrees to be bound by these escrow instructions and agrees that no additional compensation shall be paid to Escrow Agent for its ordinary services hereunder.
- 5.11 In the event that Escrow Agent performs any service not specifically provided herein above, or that there is any assignment or attachment of any interest in the subject matter of this escrow or any modification thereof, or that any controversy, oral or written, arises with respect to any matter related to the subject of this escrow, or that Escrow Agent is made a part to, or intervenes in, any litigation pertaining to this escrow or the subject matter thereof, Escrow Agent shall be reasonably compensated therefor and reimbursed by the parties hereto for all costs and expenses occasioned thereby, it being understood and agreed that Escrow Agent may interplead the subject matter of this escrow into any court of competent jurisdiction, and the act of such interpleader shall immediately relieve Escrow Agent of its duties, liabilities and responsibilities hereunder.
- 5.12 If the Escrowed Property is being invested as stipulated herein above, it is further specifically understood and agreed that Escrow Agent shall not be responsible for any penalties or loss of principal or interest or any delays in the withdrawal of the escrowed funds which may be imposed by the depository as a result of the making or redeeming of any investment pursuant to this escrow

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agreement, nor shall Escrow Agent be liable for any loss or impairment of Escrowed Property while the property is in the course of collection or while the property is on deposit in a financial institution if such loss or impairment results from the failure, insolvency or suspension of a financial institution.

**PARTIES:**

[Signature block]

**ESCROW AGENT:**

\_\_\_\_\_ hereby acknowledges receipt of the letter of escrow instructions of which the foregoing is a copy, of the papers, money or property there in referred to, and of the Agreement, and agrees in consideration of the foregoing to hold and dispose of the same in accordance with said instructions and upon the terms and conditions above set forth.

[Signature block]

**D.6.2****Escrow Agreement****(Post-Closing Roll Back Tax Determination)****ESCROW NO.** \_\_\_\_\_

This Escrow Agreement (the "**Agreement**") is made and entered into by and between \_\_\_\_\_ ("**Seller**"), \_\_\_\_\_ ("**Buyer**"), and ("**Escrow Agent**") and is as follows:

**A. Background**

1. **Contract.** Seller and \_\_\_\_\_ ("**Purchaser**") entered into that certain Sales Contract, dated \_\_\_\_\_, 2004, for the purchase and sale of \_\_\_\_\_ acre tract of land out of the \_\_\_\_\_, \_\_\_\_\_ County, Texas, as more particularly described on Exhibit A attached hereto and incorporated herein (the "**Property**"), as amended and (iv) that certain Assignment of Sales Contract, dated \_\_\_\_\_, 2004 executed by Purchaser, Buyer and Seller in which Purchaser assigned its interest therein to Buyer (the Sales Contract, as amended and assigned, shall be referred to as the "**Contract**").

2. **Roll Back and Proration.** Under the Contract, Seller agreed to be responsible for the payment of any and all roll back taxes imposed by any taxing jurisdiction as a result of the transaction under the Contract or the Buyer's planned use of the Property and Seller and Buyer agreed to prorate the taxes for the year 2004 ("**2004 Taxes**").

3. **Post-Closing Determination.** The parties have agreed that roll back taxes would be estimated and such estimated amounts would be escrowed along with Seller and Buyer's prorated amount of the estimated 2004 Taxes with the Escrow Agent to be paid by Escrow Agent at such time as the actual amount of roll back taxes and 2002 Taxes are known and are payable.

**B. Agreement**

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is acknowledged, Seller, Buyer and Escrow Agent agree as follows:

1. **Deposit of Escrow Funds.** Concurrently with Seller's and Buyer's execution and delivery of all documents necessary or required for closing under the Contract (collectively the "Closing Documents"),

1.1 **Seller's Escrow Funds.** Seller will deliver funds in the amount of \$250,000.00 (the "**Seller's Escrow Funds**") to Escrow Agent simultaneously with the execution and delivery of this Agreement, to be held and disbursed by Escrow Agent as set forth below. The amount deposited by Seller pursuant to the preceding sentence represents the (i) estimate of roll back taxes that will be assessed against the Property arising out of the sale and the Buyer's proposed use of the Property and (ii) Seller's prorata portion of the estimated 2004 Taxes. The Escrow Agent acknowledges receipt of Seller's Escrow Funds and agrees to hold, deposit and distribute Seller's Escrow Funds pursuant to the terms of this Agreement.

1.2 **Buyer's Escrow Funds.** Buyer will deliver funds in the amount of \$4,893.15 (the "**Buyer's Escrow Funds**", Seller's Escrow Funds and Buyer's Escrow Funds to be collectively referred to as "**Escrow Funds**") to Escrow Agent simultaneously with the execution and delivery of this Agreement, to be held and disbursed by Escrow Agent as set forth below. The amount deposited by Buyer pursuant to the preceding sentence represents Buyer's prorata portion of the estimated 2004 Taxes. The Escrow Agent acknowledges receipt of Buyer's Escrow Funds and agrees to hold, deposit and distribute Buyer's Escrow Funds pursuant to the terms of this Agreement.

2. **Escrow Agent Establishes Account.** The Escrow Agent will deposit into (i) a separate segregated interest bearing account (the "**Seller's Escrow Account**") into which Seller's Escrow Funds will be held

and (ii) a separate segregated non-interest bearing account into which Buyer's Escrow Funds will be held ("**Buyer's Escrow Account**", Seller's Escrow Account and Buyer's Escrow Account shall be collectively referred to as the "**Account**"). All interest or other income earned or accrued on Seller's Escrow Funds shall be held for the benefit of Seller and distributed pursuant to this Agreement. Withdrawals from the Account shall be made only pursuant to the terms and provisions of this Agreement.

**3. Disbursement Procedure.** Buyer and Seller hereby acknowledge and agree that Escrow Agent will not receive the tax statements for the roll back taxes or the 2004 Taxes from the taxing entities, and agree that the Escrow Agent is not responsible for obtaining such statements. Seller and Buyer agree that upon receipt by either of them of the roll back tax statements or statement for the 2002 Taxes, they will immediately forward copies of same to the other parties as set out herein. In the event that any such statement is sent to Escrow Agent after the date of assessment of any penalty or interest thereon, then Seller and Buyer shall jointly and severally indemnify and hold harmless Escrow Agent from any liability therefor. In the event that the amount of the roll back taxes and Seller's prorata portion of the 2002 Taxes due on the Property exceeds Seller's Escrow Funds, Seller will pay to Escrow Agent in good funds the amount of such shortfall within seven (7) business days following notice from the Escrow Agent that there are insufficient funds in Seller's Escrow Account to pay such roll back taxes and Seller's prorata portion of the 2004 Taxes. In the event that the amount of Buyer's prorata portion of the 2004 Taxes due on the Property exceeds Buyer's Escrow Funds, Buyer will pay to Escrow Agent in good funds the amount of such shortfall within seven (7) business days following notice from the Escrow Agent that there are insufficient funds in Buyer's Escrow Account to pay Buyer's prorata portion of the 2004 Taxes. Escrow Agent will copy the Seller and Buyer on any correspondence sent to governmental entities in connection with the payment by it of roll back taxes or 2004 Taxes as well as on any such notice to any party notifying it of such insufficiency. In the event that there are insufficient funds in Seller's Escrow Account and Seller fails to pay to Escrow Agent any such remaining taxes owed within seven (7) business days as provided for above, then Buyer may pay in good funds such sums to Escrow Agent and Seller will reimburse the Buyer for such expended sums within ten (10) business days after written demand from the Buyer and such sums will bear interest at the lesser of: (i) ten percent (10%) per annum; or (ii) the highest rate allowed by law. In the event that there are insufficient funds in the Buyer's Escrow Account and Buyer fails to pay to Escrow Agent any such remaining taxes owed within seven (7) business days as provided for above, then Seller may pay in good funds such sums to Escrow Agent and Buyer will reimburse the Seller for such expended sums within ten (10) business days after written demand from the Seller and such sums will bear interest at the lesser of: (i) ten percent (10%) per annum; or (ii) the highest rate allowed by law. Within three (3) business days after Escrow Agent's receipt of the roll back tax statements and statement for 2004 Taxes from all applicable governmental entities, and provided there are adequate Escrow Funds to pay the roll back taxes and 2004 Taxes, Escrow Agent will disburse the Escrow Funds to the recipients as designated in the roll back tax statements and statement for 2004 Taxes. Escrow Agent will be protected in relying on the documentation provided by the parties. Upon the payment in full of all roll back taxes and 2004 Taxes which are due and payable to any governmental entity in whose jurisdiction the Property is located, any remaining Seller's Escrow Funds, together with any interest earned on Seller's Escrow Funds, shall be disbursed to Seller and any remaining Buyer's Escrow Funds shall be disbursed to Buyer.

**4. Dispute; Interplead.** In the event of any disagreement or controversy between the parties, or if conflicting demands or notices are made upon Escrow Agent arising out of or relating to this Escrow Agreement, then Escrow Agent may refrain from acting in any manner until it receives written agreement from all parties, or Escrow Agent may file a suit in interpleader in a court of appropriate jurisdiction, and the act of such interpleader shall immediately relieve Escrow Agent of its duties, liabilities and responsibilities under this Agreement.

**5. Escrow Agent Depositary Only; Not Liable.** Escrow Agent acts hereunder as a depositary only and is not responsible or liable in any manner whatever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it hereunder, or with respect to the form or execution of the same, or the identity, authority, or rights of any person executing or depositing the same. Escrow Agent shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by Escrow Agent to be genuine or to be signed by the proper party or parties. Escrow Agent shall not be liable for any error of judgment or for any act done or step taken or omitted by it in good faith, or for any mistake of fact or law, or for anything which it may do or refrain from doing in connection herewith, except its own willful misconduct or gross negligence, and Escrow Agent shall have no duties to anyone except those signing these instructions.

**6. Entire Agreement; Exhibits.** This Escrow Agreement and the Contract contain the entire agreement of the parties with respect to the roll back taxes, 2004 Taxes and funds. Except for the Contract, there are no other agreements, oral or written, between the parties regarding the funds and this Escrow Agreement can

be amended only by written agreement signed by the parties to this Agreement, and by reference made a part hereof. All exhibits or other documents attached to or referred to in this Agreement are incorporated by reference. Notwithstanding the preceding sentence, Escrow Agent is not a party to or bound by the Contract or any other agreement which may be deposited under, evidenced by, which arises out of, or which may be an exhibit to, this Agreement. The holding and disbursement of the Escrow Funds are governed strictly by the terms of this Agreement.

**7. Indemnity.** Seller and Buyer agree to indemnify Escrow Agent, its partners, employees, and agents (each herein called an "**Indemnified Party**") against, and hold each Indemnified Party harmless from all losses, costs, damages, expenses, claims and attorney's fees, including but not limited to costs of investigation, suffered or incurred by any Indemnified Party (herein referred to as "**Indemnified Losses**") in connection with or arising from or out of this Agreement, except such acts or omissions as may result from the willful misconduct or gross negligence of such Indemnified Party.

**8. Notices.** Any notice, instrument or other communication required or permitted to be given by one of the parties hereto to the other under this Agreement shall be considered as properly given if in writing and (a) hand delivered, or (b) mailed by registered or certified mail, return receipt requested and postage prepaid, or (c) sent by telecopy, in each case at the address below.

**Seller**

with copy to: [insert address]

**Buyer**

with copy to: [insert address]

**Escrow Agent**

**9. Consultation with Legal Counsel.** Escrow Agent may consult with its counsel or other counsel satisfactory to it concerning any question relating to its duties or responsibilities under this Agreement or otherwise in connection herewith and shall not be liable for any action taken, suffered or omitted by Escrow Agent in good faith upon the advice of such counsel. Escrow Agent may act through its officers, employees, agents and attorneys.

**10. Compensation and Reimbursement of Expenses.** For its ordinary services hereunder, Escrow Agent shall be entitled to an initial fee of **\$0.00**, payable concurrently with its acceptance hereof, and to additional compensation as follows. In the event that Escrow Agent performs any service not specifically provided hereinabove, or that there is any assignment or attachment of any interest in the subject matter of this escrow or any modification thereof, or that any controversy arises hereunder, or that Escrow Agent is made a party to, or intervenes in, any litigation pertaining to this escrow or the subject matter thereof, Escrow Agent shall be reasonably compensated therefor and reimbursed for all costs and expenses occasioned thereby, and the parties hereto agree jointly and severally to pay the same, and to indemnify Escrow Agent against any loss, liability or expense incurred in any act or thing done by it hereunder. It is understood and agreed that in the case of any controversy, Escrow Agent may refrain from acting in any manner until it receives written agreement from all parties hereto, or Escrow Agent may interplead the subject matter of this escrow into any court of competent jurisdiction, and the act of such interpleader shall immediately relieve Escrow Agent of its duties, liabilities and responsibilities hereunder.

**11.** The parties hereto expressly acknowledge Escrow Agent's right to interplead the papers, money, or property into a court of competent jurisdiction domiciled in Travis County, Texas.

**12. Resignation.** Escrow Agent may resign upon ten (10) days' prior written notice to Seller and Buyer, and upon joint instructions of Seller and Buyer, shall deliver the Escrow Funds to any designated substitute Escrow Agent mutually selected by Seller and Buyer. If Seller and Buyer fail mutually to designate a substitute Escrow Agent within ten (10) days after the giving of such notice, Escrow Agent may, in its sole discretion and its sole option, institute a bill of interpleader as contemplated herein.



**13. Severability.** If one or more of the provisions shall for any reason be held to be invalid, illegal or unenforceable in any respect under applicable law, such invalidity, illegality or unenforceability shall not affect any other provisions, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained in this Agreement.

**14. Termination.** Upon final disbursement of the Escrow Funds, this Agreement shall terminate; provided, that the provisions of Section 7, will remain in full force and effect for so long as Escrow Agent may have any liability.

**15. General.** The section headings contained in this Agreement are for reference purposes only and will not affect in any way the meaning or interpretation of this Agreement. This Agreement may be executed simultaneously in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. The terms and provisions of this Agreement constitute the entire agreement between the parties hereto. This Agreement or any provision of the Agreement may be amended, modified, waived or terminated only by written instrument duly signed by the parties or their successors and assigns. This Agreement shall inure to the benefit of and be binding upon the parties, and their respective heirs, devisees, executors, administrators, personal representatives, successors, trustees, receivers and assigns. Nothing in this Agreement, express or implied, is intended to confer upon any other person rights or remedies under or by reason of this Agreement.

[Execution]

**D.6.3****Escrow Agreement****(Post-Closing Roll Back Determination within 5 Years Post-Closing)**

ESCROW NO. \_\_\_\_\_

This Escrow Agreement (the "**Agreement**") is made and entered into by and among \_\_\_\_\_ ("**Seller**"), \_\_\_\_\_ ("**Buyer**"), and \_\_\_\_\_ ("**Escrow Agent**") and is as follows:

**A. Background**

1. **Sale.** On this date Buyer purchased from Seller those certain tracts of real property situated in \_\_\_\_\_ County, Texas, and containing a total of \_\_\_\_\_ acres, said property being more particularly described in the attached Exhibit A (the "**Property**").

2. **Post-Closing Roll Back Payments.** The purpose of this Escrow Agreement is to set forth the terms and conditions upon which the amount in escrow is to be used. Therefore, Seller and Buyer agree that, concurrently with the Closing of the Property from Seller to Buyer, Seller shall deposit with Escrow Agent the sum of \$ \_\_\_\_\_ to be held in an interestbearing Escrow Account. The funds in the Escrow Account are to be used only for the payment of *ad valorem* taxes on the Property for the years 2004 and earlier, including but not limited to those which may become due as a result of the change in use of the Property (the "**Roll Back Taxes**").

**B. Agreement**

1. **Escrow account.** The Seller and Buyer direct the Escrow Agent to withhold from the funds due to Seller at Closing the total sum of \$ \_\_\_\_\_ (the "**Trust Funds**"), and to hold the Trust Funds as Escrow Agent. Seller and Buyer further direct the Escrow Agent to deposit the Trust Funds in an interestbearing account to be held for payment of the Roll Back Taxes and the 2004 Ad Valorem taxes against the Property.

2. **Terms of Escrow.** The undersigned agree that: (i) the term of this Agreement is 65 months; (ii) such Trust Funds will be released only upon the submission of written authorization signed by all parties to this Agreement; (iii) in the event said authorization is not submitted within the 65 month term, then the Escrow Agent is authorized, but not required, to tender such Trust Funds, at its discretion, into a court of competent jurisdiction.

3. **Payment of Trust Funds.** Within three (3) business days of notice from \_\_\_\_\_ County to Buyer or Seller of the final amount of the 2004 Ad Valorem Taxes and the Roll back Taxes (or portion thereof, if less than all of the Property is "rolled back" by Buyer), Buyer and Seller shall notify Escrow Agent, in writing, of the total amount of the 2004 Ad Valorem Taxes and/or the Roll back Taxes, and (i) Seller shall pay the entire amount due; or (ii) Seller and Buyer shall request, in writing, that Escrow Agent pay such taxes out of the Trust Funds. Any request to Escrow Agent to pay any taxes out of the Trust Funds shall include a legible copy of the tax notice(s) stating the amount of such taxes due. After all 2004 ad valorem taxes and Roll back Taxes are paid in full, or are otherwise released from Seller's obligation to pay them pursuant to this Agreement, Buyer and Seller shall jointly authorize Escrow Agent to pay any remaining Trust Funds to Seller.

Beginning on February 1, 2005, and on each February 1 thereafter until the earlier of (i) February 1, 2009 or (ii) all of the Trust Funds are otherwise released by Buyer and Seller, Seller and Buyer shall calculate the amount, if any, by which the Trust Fund exceeds the ad valorem taxes and Roll back taxes for years remaining through 2004, and jointly direct the Escrow Agent to refund the excess Trust Funds to Seller. Notwithstanding the foregoing sentence, if, on any February 1, there has been a parcel of the Property "rolled back" by Buyer for which Buyer and Seller have not yet received the invoice for the Roll back Taxes associated therewith, then no disbursement shall be made to Seller until such invoice is received and paid in accordance with this Agreement. For example, if Buyer rolls back 10 acres in January, 2005, and does not receive the invoice for the Roll Back Taxes associated with such 10 acres until March, 2005, then the disbursement to Seller which would have been due on February 1, 2005 will be made after payment of the pending invoice, and will be calculated based on the

balance of the Trust Funds after payment of said invoice.

**4. Additional Trust Funds.** In the event that the Trust Funds are insufficient to pay, in full, the Roll Back Taxes against the Property, Seller shall have three (3) business days, after receipt of the tax notice stating the amount of the Roll back Taxes, to deposit additional Trust Funds, in good and available funds, with Escrow Agent. Such additional deposits shall be added to the Trust Funds, and used by Escrow Agent to pay the Roll back Taxes against the Property. In the event that Seller fails or refuses to deposit any necessary additional Trust Funds in accordance with this Paragraph, Buyer may, but shall not be obligated to, make such additional deposit on behalf of the Seller. In the event that Seller has not made such additional deposit with Escrow Agent within ten (10) business days after receipt of the tax notice stating the amount of the Roll Back Taxes, Escrow Agent may, but shall not be obligated to, in its sole discretion, (i) release the Trust Funds to Buyer (including any interest accrued thereon), declare this Agreement terminated, and have no further liability or obligation to the parties hereto; or (ii) tender Trust Funds into a court of competent jurisdiction.

**5. Indemnity.** We agree to INDEMNIFY and HOLD HARMLESS the Escrow Agent and its officers, directors, employees, and agents from and against any and all claims, demands, liens, judgments, and expense (including but not limited to reasonable fees and expenses of attorneys and other persons) arising out of or caused from the holding and disbursing of the escrowed funds and being a party to this Agreement. In this respect, the parties hereto grant to the Escrow Agent the "RIGHT OF OFFSET" for the enforcement of this paragraph.

**6. As to Escrow Agent.** Escrow Agent is not a party to or bound by any agreement which may be deposited under, evidenced by, or which arises out of the foregoing instructions.

Escrow Agent acts hereunder as a depository only and is not responsible or liable in any manner whatever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it hereunder, or with respect to the form or execution of the same, or the identity, authority, or rights of any person executing or depositing the same. Escrow Agent shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by Escrow Agent to be genuine and to be signed by the proper party or parties.

Escrow Agent shall not be required to take or be bound by notice of any default of any person, or to take any action with respect to such default involving any expense or liability, unless notice in writing is given to an officer of Escrow Agent of such default and unless it is indemnified in a manner satisfactory to it against any such expense or liability. These instructions shall not be subject to rescission or modification except upon receipt by Escrow Agent of written instructions of all the parties hereto or their successors in interest, and no such modification shall be effective unless and until consented to in writing by Escrow Agent.

Escrow Agent shall not be liable for any error of judgment or for any act done or step taken or omitted by it in good faith, or for any mistake of fact or law, or for anything which it may do or refrain from doing in connection herewith, except its own willful misconduct or gross negligence, and Escrow Agent shall have no duties to anyone except those signing these instructions.

Escrow Agent may seek advice from legal counsel in the event of any dispute or questions as to the construction of the foregoing instructions, or Escrow Agent's duties hereunder, and Escrow Agent shall incur no liability and shall be fully protected in acting in accordance with the opinion and instructions of such counsel.

Seller and Buyer hereby jointly and severally agree to defend, indemnify and hold harmless the Escrow Agent from and against any and all claims, demands, causes of action, losses, liabilities, damages, costs and expenses, including, without limitation, court costs, legal expenses and attorneys' fees, incurred or suffered by the Escrow Agent in connection with the performance of its obligations under this Agreement or otherwise arising, directly or indirectly, by reason of this Agreement, except to the extent any such claims, demands, causes of actions, losses, liabilities, damages, costs or expenses are incurred or suffered by the Escrow Agent directly as a result of its own gross negligence or willful misconduct. The obligations of indemnity of Seller and Buyer shall survive the expiration or any termination of this Escrow Agreement and shall be performable at the office of the Escrow Agent in \_\_\_\_\_, Texas.

For its ordinary services hereunder, Escrow Agent shall be entitled to an initial fee of **\$0.00**, payable concurrently with its acceptance hereof, and to additional compensation as follows:

In the event that Escrow Agent performs any service not specifically provided here in above, or that there is any assignment or attachment of any interest in the subject matter of this escrow or any modification thereof, or that any controversy arises hereunder, or that Escrow Agent is made a party to, or intervenes in, any litigation pertaining to this escrow or the subject matter thereof, Escrow Agent shall be reasonably compensated therefor and reimbursed for all costs and expenses occasioned thereby, and the parties hereto agree jointly and severally to pay the same, and to indemnify Escrow Agent against any loss, liability or expense incurred in any act or thing done by it hereunder. It is understood and agreed that in the case of any controversy, Escrow Agent may refrain from acting in any manner until it receives written agreement from all parties hereto, or Escrow Agent may interplead the subject matter of this escrow into any court of competent jurisdiction, and the act of such interpleader shall immediately relieve Escrow Agent of its duties, liabilities and responsibilities hereunder.

The parties hereto expressly acknowledge Escrow Agent's right to interplead the papers, money, or property into a court of competent jurisdiction domiciled in \_\_\_\_\_ County, Texas.

**7. Benefit.** This Agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

[Execution and date]

D.7

**Performance Deed of Trust and  
Security Agreement – Financing Statement**

STATE OF TEXAS                   §  
   §                   KNOW ALL PERSONS BY THESE PRESENTS:  
COUNTY OF TRAVIS         §

This Performance Deed of Trust and Security Agreement – Financing Statement ("**Performance Deed of Trust**") dated effective \_\_\_\_\_, 2004 (the "**Effective Date**"), is executed by and among \_\_\_\_\_ ("**Seller**"), \_\_\_\_\_ ("**Buyer**"), and the hereinafter named Trustee, its successors and substitutes.

**A. Background**

**1.     Joint Facilities.** As a material consideration to induce Seller to sell certain property in Travis County, Texas (referred to by the parties as the "**Buyer Property**" to Buyer and for Buyer to purchase the Buyer Property from Seller, Seller and Buyer have entered into a Joint Facilities Development Agreement (the "**JFDA**") providing for the construction and funding of certain Joint Facilities (the "**Joint Facilities**") benefiting certain property owned by Seller and referred to by the parties hereto as the "**Retained Property**" and the Buyer Property.

**2.     Post-Closing Agreement.** Seller and Buyer have also entered into a Post-Closing Agreement (the "**Post-Closing Agreement**") setting out certain understandings and other agreements as to matters and obligations surviving the closing of the sale of the Buyer Property to Buyer.

**3.     Escrow Agreement.** In connection with the JFDA, Seller, Buyer and Stewart Title of Austin, Inc. as Escrow Agent have entered into an Escrow Agreement (the "**Escrow Agreement**") pursuant to which the Escrow Agent is to hold in escrow funds deposited with it by Seller and Buyer, including funds to pay for the Joint Facilities. Seller is to deposit the amount owing to Buyer as a credit on Buyer's share of the Joint Facilities Costs with the Escrow Agent to be held by the Escrow Agent in Buyer's Joint Facilities Costs Escrow Account.

**B. Agreement**

**Article 1**

**Creation of Encumbrance**

**1.1     Deed of Trust Lien.** THAT, \_\_\_\_\_, as Grantor (who together with his heirs and assigns is the "**Grantor**") for the purpose of securing the obligations hereinafter described to and for the benefit of Seller (which together with its successors and assigns is called herein the "**Beneficiary**"), and in consideration of the sum of Ten Dollars (\$10.00) to Grantor in hand paid by the Trustee hereinafter named, the receipt of which is hereby acknowledged, and for the further consideration of the uses, purposes and trusts hereinafter set forth, have granted, sold and conveyed, and by these presents do grant, sell and convey unto \_\_\_\_\_, Trustee whose address is set out on the last page hereof and his substitutes or successors in trust, all of the following property (the "**Mortgaged Property**"):

**1.1.1   Land.** The real property described in the Exhibits attached hereto and made a part hereof for all purposes (the "**Land**");

**1.1.2   Improvements.** Any now or hereafter improvements located in, on or under the Land (herein called the "**Improvements**");

**1.1.3   Appurtenances.** The benefits, privileges, permits, easements, tenements, hereditaments, water, riparian or littoral rights, roads, strips or gores of land adjacent to any of the Mortgaged Property, and appurtenances thereon or in anywise appertaining thereto and all right, title and interest of Grantor

in and to all streets, roads, easements, rights-of-way, licenses, rights of ingress and egress, existing or proposed, abutting, adjacent, used in connection with or pertaining to the Land or the Improvements; and all water and water rights, timber, crops and mineral interests in, on, under or pertaining to the Land (herein called the “**Appurtenances**”); and

**1.1.4 Other.** All right, title and interest of Grantor in and to (1) all streets, roads, alleys, easements, rights-of-way, licenses, rights of ingress and egress, vehicle parking rights and public places, existing or proposed, abutting, adjacent, used in connection with or pertaining to the Land or the Improvements; (2) all fixtures, now or hereafter on the Land; (3) all building and construction materials, supplies, and articles of personal property, of every kind and character, now owned or hereafter acquired by Grantor, which are now or hereafter attached to or situated in, on or about the Land or the Improvements, or used in or necessary to the complete and proper planning, development, use, occupancy or operation thereof, or acquired (whether delivered to the Land or stored elsewhere) for use or installation in or on the Land or the Improvements, and all renewals and replacements of, substitutions for and additions to the foregoing; (4) all permits, licenses, franchises, certificates, commitments and rights for utilities, and other rights and privileges obtained from Beneficiary in connection with the Mortgaged Property, including but not limited to the rights set out as Entitlements in Exhibit 2 attached hereto; (5) all (i) plans and specifications for the Improvements; (ii) Grantor’s rights, but not liability for any breach by Grantor, under all commitments (including any commitment for financing to pay any of the Secured Obligations), insurance policies and other contracts and general intangibles (including but not limited to trademarks, trade names and symbols) related to the Mortgaged Property or the operation thereof; (iii) deposits (including but not limited to Grantor’s rights in tenants’ security deposits, deposits with respect to utility services to the Mortgaged Property, and any deposits or reserves hereunder or under any of the agreements for the Projects, taxes, insurance or otherwise), money, accounts, instruments, documents, notes and chattel paper arising from or by virtue of any transactions related to the Mortgaged Property, including but not limited to the following constituting Collateral: Escrow Funds held by \_\_\_\_\_ Title Company or its successors or substitutes as Escrow Agent under Escrow Agreements executed by Seller, Buyer and Escrow Agent pursuant to the JFDA, including as substitute collateral pursuant to the partial release provision in this Mortgage, together with all reinvestments thereof including in deposits, bank deposits, certificates, securities, securities accounts, financial assets, U. S. governmental securities, money market mutual fund shares, contract rights, bankers’ acceptances, repurchase transactions, and general intangibles, and the interest, dividends or income earned on the foregoing, and the proceeds thereof (all such terms having the meaning given to such terms by Chapters 8 and 9 of the Texas Business and Commerce Code, as amended from time to time; (iv) permits, licenses, franchises, certificates, development rights, commitments and rights for utilities, and other rights and privileges obtained in connection with the Mortgaged Property, including but not limited to the rights set out as Entitlements in Exhibit 2 attached hereto; (v) leases, rents, royalties, bonuses, issues, profits, revenues and other benefits of the Mortgaged Property; (vi) construction contracts, design and engineering services contracts and related plans and specifications, payment and performance bonds, fiscal security posted with governmental authorities; and (vii) engineering, accounting, title, legal, and other technical or business data concerning the Mortgaged Property which are in the possession of Grantor or in which Grantor can otherwise grant a security interest; (6) all proceeds of or arising from the Mortgaged Property (other than leases and rents); and (7) all rights, titles and interests referred to above, including but not limited to proceeds of any sale or other disposition thereof, proceeds of the taking thereof or of any rights appurtenant thereto, by eminent domain or transfer in lieu thereof for public or quasi-public use under any law, and proceeds arising out of any damage thereto; rights of ingress and egress and remainders, reversions and reversionary rights or interests;

to secure the performance and payment of the Secured Obligations of Grantor to Beneficiary and to such person’s heirs, successors and assigns. This instrument together with all renewals, extensions, and amendments hereto is referred to as the “**Deed of Trust**” or the “**Mortgage**”.

TO HAVE AND TO HOLD the Mortgaged Property, together with the rights, privileges and appurtenances thereto belonging unto the Trustee, and to his substitutes or successors forever. And Grantor does hereby bind itself, its successors and assigns to warrant and forever defend the Mortgaged Property unto the Trustee, his substitutes or successors and assigns forever, against the claim, or claims, of all persons claiming or to claim the same or any part thereof, by, through, and under Grantor, but not otherwise, and subject to the Permitted Encumbrances referenced herein.

**1.2 Security Interest.** Grantor hereby grants to Beneficiary a security interest in all of the Mortgaged Property, including the Collateral, to secure the payment and performance of the Secured Obligations. In addition

to its rights hereunder or otherwise, Beneficiary shall have all of the rights of a secured party under the Texas Business and Commerce Code, or under the Uniform Commercial Code in force in any other state to the extent the same is applicable law. The Collateral shall be held and invested by the Escrow Agent subject to the terms of this Mortgage and the Escrow Agreements.

**1.3 Permitted Encumbrances.** This conveyance is made and accepted subject to the following qualifications (the "**Permitted Encumbrances**"): the presently existing restrictive covenants, easements, and mineral interests, if any, held or owned by others, and all other matters relating to the Mortgaged Property referenced on Exhibit 2 hereto, but only to the extent they are still in effect; statutory liens for ad valorem taxes and standby fees on the Mortgaged Property which are not yet delinquent, presently existing visible and apparent, but unrecorded easements, if any; presently existing encroachments or overlapping of improvements; and discrepancies, conflicts or shortages in area or boundary lines; and all laws and regulations affecting the Mortgaged Property, including zoning laws, platting laws, environmental laws and municipal and governmental ordinances and regulations, relating to the Mortgaged Property.

**1.4 Title.** Grantor, and Grantor's successors and assigns, will warrant and forever defend title to the Mortgaged Property, subject as aforesaid, by, through, and under Grantor, but not otherwise, to Trustee and his successors or substitutes and assigns, against the claims and demands of all persons claiming or to claim the same or any part thereof. Grantor will punctually pay, perform, observe and keep all covenants, obligations and conditions in or pursuant to any Permitted Encumbrance. Grantor will pay, or cause to be paid, all taxes, assessments, and other charges or levies imposed upon or against or with respect to the Mortgaged Property or the ownership, use, occupancy or enjoyment of any portion thereof, or any utility service thereto, as the same become due and payable (subject to the right of Grantor in good faith to contest any such tax or the amount or method of calculation thereof), including but not limited to all ad valorem taxes assessed against the Mortgaged Property or any part thereof, and shall deliver promptly to Beneficiary such evidence of the payment thereof as Beneficiary may require.

**1.5 Payment and Performance.** Grantor will make due and punctual payment and performance of the Secured Obligations. Grantor will timely and properly perform and comply with all of the covenants, agreements, and conditions imposed upon Grantor by this Mortgage and will not permit a default to occur hereunder or thereunder.

**1.6 Partial Releases.** Beneficiary shall upon request of Grantor release the lien securing the Secured Obligations as to one or more portions of the Mortgaged Property identified by Grantor ("**Partial Release Parcel**") provided (a) there does not exist an uncured notified default hereunder; (b) Grantor shall deposit with Escrow Agent an amount (the "**Escrow Funds**") equal to 200% times the Per Acre Collateral Amount as determined by the Parties to the JFDA pursuant to the JFDA to be held by the Escrow Agent in accordance with the terms of the Escrow Agreement and the JFDA; and (c) the requested Partial Release Parcel shall be a platted lot or a lotas depicted on the Preliminary Plan 1 (COA Case No. \_\_\_\_\_). Grantor shall provide Beneficiary with a legal description of the Partial Release Parcel prepared by and bearing the stamp and signature of the surveyor preparing the description. Grantor shall provide Beneficiary with an appropriate form of Partial Release for execution. Grantor shall cause the Partial Release to be filed of record following its execution by Beneficiary.

## **Article 2**

### **Obligations**

**2.1 Secured Obligations.** This conveyance, however, is made in TRUST to secure payment and performance of the Grantor's obligations under the JFDA, the Post-Closing Agreement, and the Escrow Agreement (the "**Secured Obligations**").

**2.2 Payment and Performance.** Should Grantor do and perform all of the covenants and agreements herein contained, and make prompt payment of said Secured Obligations as the same shall become due and payable, then this conveyance shall become null and void and of no further force and effect, and shall be released at the expense of Grantor, by Beneficiary.

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### **Article 3**

#### **Default and Remedies**

**3.1 Protective Actions.** Upon the occurrence of an uncured notified default hereunder, then Beneficiary may, at its option, but without being required to do so, prosecute or defend any suits in relation to the preservation of the prior lien and security interest of this Deed of Trust on the Mortgaged Property, or take such other action as Beneficiary reasonably determines to be necessary.

**3.2 Foreclosure.**

**3.2.1 Default.** The occurrence of any of the following events constitutes an event of default hereunder (an “**event of default**”): (1) any of the Secured Obligations are not paid or performed when due; or (2) any covenant, agreement or condition herein is not fully and timely performed, observed, satisfied, or kept.

**3.2.2 Foreclosure.** If a monetary event of default shall continue for 10 days or a non-monetary default shall continue for 30 days after written notice of such occurrence is given by Beneficiary to Grantor without cure; provided, however, that if such non-monetary event of default is of a nature that it cannot be cured within such 30 day period, the Grantor shall not be in default if Grantor commences good faith efforts to cure such default within said 30 day period, demonstrates continuous diligent efforts to cure such event of default in a manner reasonably satisfactory to Beneficiary and, within a reasonable period, not to exceed 180 days after the date of notification of default was received by Grantor, completes the cure of such default, then and in any of such events of an uncured notified default, Beneficiary may elect to declare the entire principal of the Secured Obligations with all interest accrued thereon immediately due and payable, and it shall thereupon, or at any time thereafter, be the duty of the Trustee, or his successor or substitute as hereinafter provided, at the request of Beneficiary (which request is hereby conclusively presumed), to enforce this trust; and after advertising the time, place and terms of the sale of the above described and conveyed property, then subject to the lien hereof, and mailing and filing of notices as required by Section 51.002, Texas Property Code, as then amended, and otherwise complying with that statute, the Trustee shall sell the above described Mortgaged Property, then subject to the lien hereof, at public auction in accordance with such notices on the first Tuesday in any month between the hours of ten o'clock A.M. and four o'clock P.M., to the highest bidder for cash, selling all of the Mortgaged Property as an entirety or in one or more parcels, subject to the Permitted Encumbrances, and make due conveyance to the purchaser or purchasers, with special warranty binding Grantor, its successors and assigns, as to the Mortgaged Property; and in each instance, subject to the Permitted Encumbrances, which shall be covenants running with the land, and out of the money arising from such sale, the Trustee acting shall pay first, all the expenses of advertising the sale and making the conveyance and attorney's fees of Beneficiary, and then Trustee shall pay all Secured Obligations secured hereby rendering the balance of the sale price, if any, to Grantor, its successors or assigns; and the recitals in the conveyance to the purchaser or purchasers shall be full and conclusive evidence of the truth of the matters therein stated, and all prerequisites to said sale shall be presumed to have been performed, and such sale and conveyance shall be conclusive against Grantor, its successors and assigns.

**3.3 Resort to Other Remedies.** It is agreed that in the event a foreclosure hereunder should be commenced by the Trustee, or his substitute or successor, Beneficiary may at any time before the sale of the Mortgaged Property direct the Trustee to abandon the sale, and may then institute suit for the collection of any of the Secured Obligations, and for the foreclosure of the Deed of Trust lien and/or security interest; it is further agreed that if Beneficiary should institute a suit for the collection thereof, and for a foreclosure of this Deed of Trust lien and/or security interest, Beneficiary may at any time before the entry of a final judgment in said suit dismiss the same, and require the Trustee, his substitute or successor to sell the Mortgaged Property or any part thereof in accordance with the provisions of this Mortgage. The lien of this Mortgage shall constitute a continuing lien to secure the payment and performance of the Secured Obligations, and the foreclosure of the lien granted hereby shall continue on the portion of the Mortgaged Property sold at foreclosure sale for the benefit of the Beneficiary as a continuing lien to secure the payment and performance of the Secured Obligations by the purchaser thereof.

**3.4 Bidding By Beneficiary.** If Beneficiary is the highest bidder, Beneficiary shall have the right to purchase at any sale of the Mortgaged Property, and to have the amount for which such Mortgaged Property is sold credited on the debt then owing.

**3.5 Appointment of Substitute Trustee.** With or without cause, Stewart Title of Austin, Inc. as the



Escrow Agent under the Escrow Agreements is hereby authorized to appoint a substitute trustee, or a successor trustee, to act instead of the Trustee named herein without other formality than an oral designation, which designation may be evidenced by a designation in writing of a substitute or successor trustee; and the authority hereby conferred shall extend to the appointment of other successor and substitute trustees successively until the Secured Obligations have been paid and performed in full, or until the Mortgaged Property is sold hereunder, and each substitute and successor trustee shall succeed to all of the rights and powers of the original trustee named herein.

**3.6 Possession of Mortgaged Property.** In the event any sale is made of the above described Mortgaged Property, or any portion thereof, under the terms of this Deed of Trust, Grantor, its successors and assigns, shall forthwith upon the making of such sale surrender and deliver possession of the Mortgaged Property so sold to the purchaser at such sale, and in the event of their failure to do so they shall thereupon from and after the making of such sale be and continue as tenants at will of such purchaser, and in the event of their failure to surrender possession of said property upon demand, the purchaser, its successors or assigns, shall be entitled to institute and maintain an action for forcible detainer of the Mortgaged Property in the Justice of the Peace Court in the Justice Precinct in which such Mortgaged Property, or any part thereof, is situated.

**3.7 Subrogation.** It is agreed that the lien hereby created shall take precedence over and be a prior lien to any other lien of any character whether vendor's, materialmen's or mechanic's lien hereafter created on the Mortgaged Property, and in the event the proceeds of the indebtedness secured hereby as set forth herein are used to pay off and satisfy any liens heretofore existing on the Mortgaged Property, then Beneficiary is, and shall be, subrogated to all of the rights, liens and remedies of the holder of the indebtedness so paid.

#### **Article 4**

##### **Miscellaneous**

**4.1 Extensions and Releases.** It is agreed that an extension, or extensions, may be made of the time of payment of all, or any part, of the Secured Obligations, and that any part of the Mortgaged Property may be released from this lien without altering or affecting the priority of the lien created by this Mortgage in favor of any junior encumbrancer, mortgagee or purchaser, or any person acquiring an interest in the Mortgaged Property, or any part thereof; it being the intention of the parties hereto to preserve this lien on the Mortgaged Property including any improvements that may be hereafter constructed thereon, or that may be fixed, given or imposed by law thereon after the execution of this instrument notwithstanding any such extension of the time of payment, or the release of a portion of the Mortgaged Property from this lien.

**4.2 Modification or Termination.** This Mortgage may only be modified or terminated by a written instrument or instruments intended for that purpose and executed by the party against which enforcement of the modification or termination is asserted. Any alleged modification or termination which is not so documented shall not be effective as to any party hereto.

**4.3 Applicable Law.** This Mortgage, and its validity, enforcement and interpretation, shall be governed by Texas law (without regard to any conflict of laws principles) and applicable United States Federal law.

**4.4 Construction Mortgage.** This Mortgage constitutes a "construction mortgage" as defined in Chapter 9 of the Texas Business and Commerce Code, as amended from time to time.

Dated effective as of the Effective Date. This instrument may be executed in multiple counterparts.

[Execution and Acknowledgments]

**D.8****Joint Facilities Development Agreement**

This Joint Facilities Development Agreement (the "**JFDA**") dated effective \_\_\_\_\_, 2004 (the "**Effective Date**") is executed by and between \_\_\_\_\_ (which together with its successors and assigns are collectively called "**Seller**") and \_\_\_\_\_ (who together with his heirs and assigns are collectively called "**Buyer**") and is binding upon the heirs and successors of the signatories hereto and their assigns and is a covenant running with the ownership of the Development (as hereinafter defined). The signatories hereto, their heirs, successors and assigns are collectively called herein "**Parties**" or a "**Party**".

**A. Background**

1. **Development.** The property in Travis County, Texas, depicted and described in **Exhibit A** attached hereto is collectively referred to herein as the "**Development**." The Development is comprised of the parcels described in **Exhibit B** attached hereto being hereinafter referred to as "**Retained Property**" owned by Seller and the parcels described in **Exhibit C** attached hereto being conveyed contemporaneously herewith by Seller to Buyer. The property being conveyed by Seller to Buyer is hereinafter referred to as "**Buyer Property**."

2. **Sales Contract.** Seller and Buyer entered into an Earnest Money Contract as amended by the First Amendment to Earnest Money Contract referred to herein as the "**Sales Contract**" and incorporated herein for all purposes. Pursuant to the Sales Contract, Seller has conveyed the Buyer Property to Buyer for the consideration and upon the terms set out in the Sales Contract. Seller and Buyer have also entered into a Post-Closing Agreement (the "**Post-Closing Agreement**") setting out certain understandings and other agreements as to matters and obligations surviving the closing of the sale of the Buyer Property to Buyer. The Sales Contract and the Post-Closing Agreement are incorporated herein for all purposes.

3. **The Development.** As a material consideration to induce Seller to sell the Buyer Property to Buyer and for Buyer to purchase the Buyer Property from Seller, Seller and Buyer agreed in the Sales Contract to enter into this JFDA providing for the construction of certain Joint Facilities described in **Exhibit D-1** attached hereto (the "**Joint Facilities**") benefiting the Retained Property and the Buyer Property. The Joint Facilities are composed of each of the discrete portions identified in **Exhibit D-1** as a Project (each called a "**Project**"), including the \_\_\_\_\_ Project, the \_\_\_\_\_ Water Line Project, and the \_\_\_\_\_ Water Line Project.

4. **Performance Deed of Trust.** By Joint Facilities Performance Deeds of Trust and Security Agreement-Financing Statement (the "**Performance Deeds of Trust**") Seller and Buyer have granted to each other a reciprocal first lien against a portion of the Retained Property in the case of Seller and the Buyer Property in the case of Buyer (the "**Mortgaged Property**") to secure their respective performance of their obligations under this JFDA, the Escrow Agreement executed pursuant hereto, and the Post-Closing Agreement (the "**Secured Obligations**"). The Performance Deeds of Trust are incorporated herein by this reference. The Performance Deeds of Trust provides that a Party may substitute cash or letter of credit (the "**Collateral**") as collateral security for its Secured Obligations and obtain a release of the lien and security interest of the Performance Deed of Trust as to a portion (the "**Partial Release Parcel**") of the Mortgaged Property. The Collateral is to be deposited in escrow with the Escrow Agent, which shall hold the Collateral in escrow to secure the depositing Party's Secured Obligations.

5. **Escrow Agreement.** The Parties desire to provide for a mechanism by which funds or letters of credit may be held in escrow to be disbursed or drawn upon to pay the costs of the development of the Joint Facilities and for such purpose are executing an escrow agreement ("**Escrow Agreement**") between the Parties and an escrow agent (the "**Escrow Agent**").

**B. Agreements**

Now, therefore, for and in consideration of the premises and the mutual promises and covenants set forth herein, the receipt and sufficiency of which are hereby acknowledged by all Parties, Seller and Buyer agree as follows:

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**Article 1**  
**Design and Construction**

**1.1 Development of Joint Facilities.**

**1.1.1 Determination of Developing Party.** Unless both Parties otherwise agree, at any time after \_\_\_\_\_, each Party is given the option to be the Developing Party (the “**Developing Party**”) of the Joint Facilities, or one or more of the Projects thereof, provided it complies with this JFDA. The Party desiring to act as the Developing Party shall notify the other Party of its desire to do so (“**Notice of Intent to Proceed**”). In the event the other Party does not elect to act with the Developing Party as a co-Developing Party by notifying the initiating Party within 10 business days of receipt of the Notice of Intent to Proceed, the Developing Party shall proceed with carrying out the Developing Party’s Responsibilities as herein provided. In the event that both Parties elect to be the Developing Party, then the Parties agree to cooperate with each other in a prompt and commercially reasonable manner. The Party not electing to be the Developing Party is referred to herein as the “**Non-Developing Party.**”

The Developing Party shall designate a “**Project Engineer**” to be its representative and contact person. The Non-Developing Party shall designate a Project Engineer to be its representative and contact person for the Joint Facilities. The Parties may choose to designate a single Project Engineer. The Project Engineer for each Party is under the sole control and responsibility of the Party contracting for its services. The costs of each Party’s Project Engineer shall be paid by such Party.

Neither the Developing Party nor the Non-Developing Party shall charge or receive any fees or other form of payment or compensation for performing its obligations hereunder. All approvals to be given by the Non-Developing Party to matters submitted to it by the Developing Party shall not be unreasonably withheld, delayed or conditioned.

**1.1.2 Developing Party’s Responsibilities.** The Developing Party’s Responsibilities are the following:

**1.1.2.1 Diligence.** Developing Party shall commence and pursue with commercially reasonable diligence the design (including the preparation and finalization of plans and specifications), engineering, permitting, hiring contractors, overseeing construction, managing the construction contracts, evaluating the construction progress, and determining and achieving completion of the Joint Facilities (or Project(s), as the case may be) in accordance with this JFDA, in a good and workmanlike manner, and in compliance with all applicable laws and regulations. Developing Party shall solicit requests for proposals from at least 3 engineers for the engineering services required for the Joint Facilities (or Project(s), as the case may be), including the preparation of the Plans and Specifications and the supervision of the permitting, construction and completion of the Joint Facilities/Project(s). Unless both Parties otherwise agree, Developing Party shall accept the most competitive proposal having due regard for the experience of the applicable engineer and the reasonableness of such proposal. The decision of the Developing Party as to the selection of the engineer shall be final. The Developing Party’s Project Engineer shall notify the Non-Developing Party’s Project Engineer at least 10 business days prior to the commencement of the respective Project (“**Project Commencement Date**”).

**1.1.2.2 Approval of Plans and Specifications.** Plans and specifications for the Joint Facilities (or Projects(s), as the case may be) will not be deemed final for bidding, construction and other purposes hereof until the same have been approved in all respects by the City of Austin, and such approved final plans and specifications shall be referred to for purposes hereof as the “**Plans and Specifications.**” Prior to submitting plans and specifications to the City of Austin for approval, the Developing Party shall submit them to the Project Engineer for the Non-Developing Party for review. The Developing Party shall cause the Plans and Specifications to comply with all applicable laws and regulations, including all valid requirements of the City of Austin. Material revisions to plans and specifications shall be subject to the same advance submission to the Non-Developing Party’s Project Engineer. If the Plans and Specifications are approved by the City of Austin, they shall be deemed approved by both Parties.

**1.1.2.3 Budget.** The Developing Party’s Project Engineer shall prepare a budget for the Joint Facilities (or Project(s), as the case may be) detailing all projected costs to complete the Joint Facilities (or Project(s), as the case may be) (the “**Budget**”) and shall submit the same to the Non-Developing Party for

approval (which approval shall not be unreasonably withheld, delayed or conditioned). Failure of the Non-Developing Party to disapprove the submitted Budget within 10 business days after receipt by the Non-Developing Party's Project Engineer of the Budget shall be deemed approval of such submitted Budget. Material revisions to a Budget previously submitted by the Developing Party's Project Engineer to the Non-Developing Party shall be subject to the same review and approval process.

**1.1.2.4 Bidding and Contracting.** Unless the Parties agree in writing to a different process, Developing Party shall also solicit competitive construction bids based upon the Plans and Specifications for the Joint Facilities (or Project(s), as the case may be) on a guaranteed maximum or fixed price basis from not less than 3 contractors not affiliated by way of ownership or control (unless an affiliated contractor is otherwise approved in writing in advance by the Non-Developing Party). Unless both Parties otherwise agree, Developing Party shall accept the most competitive bid having due regard for the experience of the applicable contractor and the reasonableness of such bid. The decision of the Developing Party as to the selection of the contractor shall be final. Developing Party shall provide to the Non-Developing Party copies of all bid proposals received by Developing Party and construction contracts signed by Developing Party for the construction of the Joint Facilities (or Project(s), as the case may be), including any amendments to such contract(s).

Prior to soliciting bids and thereafter prior to executing construction documents with the successful bidder, Developing Party shall submit the bid documents and construction documents to the Non-Developing Party's Project Engineer for approval by the Non-Developing Party. Approval of matters submitted to either Party by the other Party shall not be unreasonably withheld, delayed or conditioned. Failure of the Non-Developing Party to disapprove the submitted construction documents in writing within 5 business days after receipt by the Non-Developing Party's Project Engineer of the construction documents shall be deemed approval of such submitted construction documents. Material revisions to construction documents previously submitted by the Developing Party's Project Engineer to the Non-Developing Party's Project Engineer shall be subject to the same review and approval process. Unless waived in writing by the Non-Developing Party, all construction contracts shall provide for the following: (a) 10% retainage to be maintained by the Developing Party for the statutory retainage period, (b) waiver by all contractors and major subcontractors of any right to mechanic's or materialmen's liens on the Development, (c) commercial liability insurance by each contractor and major subcontractor naming the Non-Developing Party, its Project Engineer and such other persons as shall be designated by the Non-Developing Party as additional insureds with certificates of insurance delivered to the Parties prior to commencement of work, (d) waiver of subrogation by the insurers of all contractors and major subcontractors as to claims against the Parties, their respective Project Engineers, and such other persons as shall be designated by the Parties, (e) unless both Parties agree otherwise, payment and performance bonds naming the Parties as obligees, (f) not impose personal liability on the Non-Developing Party, (g) provide that the rights and benefits of the construction documents are assignable to the Non-Developing Party upon default by the Developing Party hereunder, and (h) a guaranteed outside completion date for the Joint Facilities (or Project(s), as the case may be).

**1.1.2.5 Fiscal.** If required by the City, Developing Party shall furnish fiscal surety, in the City's requisite form and amount.

**1.1.2.6 Completion.** After the Joint Facilities (or each Project, as the case may be) is/are complete, the Developing Party shall cause the Developing Party's Project Engineer to issue a written notice of completion (the "**Completion Notice**") to the Parties and the Escrow Agent. The notice shall include a statement detailing all of the actual costs of the Joint Facilities (or Project, as the case may be).

**1.1.2.7 Acceptance by Governmental Authorities.** As soon as reasonably possible after substantial completion of the Joint Facilities (or each Project, as the case may be), Developing Party shall have it accepted for maintenance by the City (or such other applicable governmental entity or utility service provider).

**1.1.2.8 Releases.** Developing Party shall obtain and file for record releases from all contractors, mechanic's, materialmen and other parties, which performed services on the Joint Facilities (or Project(s), as the case may be), to the extent a reasonably prudent developer of a similar project would obtain a release from such person(s).

**1.2 Final Platting.** Seller and Buyer may hereafter cause portions of their respective property to be finally platted, replatted or vacated as each shall determine in their respective sole discretion; provided, neither

Party shall vacate the portions of the Preliminary Plat of the Development designated as right-of-way for \_\_\_\_\_ Drive (to the extent set forth in, and subject to, Paragraph 5.4 of the Post-Closing Agreement), and \_\_\_\_\_ Blvd. Each Party shall upon request of the other Party dedicate by plat or deed the right-of-way for the portion of \_\_\_\_\_ Drive (subject to such Paragraph 5.4) and \_\_\_\_\_ Blvd. lying within their respective properties, but shall not be obligated to construct, participate in or pay any of the costs of such streets except as and to the extent set forth herein or as both Parties otherwise agree. All other prospective dedications shown on the Preliminary Plat (except for matters comprising a part of the Joint Facilities) are within the sole discretion of the Party across whose land the prospective dedication lies.

**1.3 PHT Fiscal.** At any time after \_\_\_\_\_, 2005, either Party can call for the posting of the fiscal ("PHT Fiscal") required to be posted for the Phase I improvements under the InterPort Traffic Phasing Agreement and Restrictive Covenant ("**City Phasing Agreement**") recorded in Document \_\_\_\_\_ of the Official Public Records of Travis County, Texas. Within 15 business days of such call, the Parties hereto shall deposit with the City of Austin cash (or other fiscal security acceptable to the City of Austin) in the amount set out in the PHT Fiscal Allocation Schedule attached hereto.

**1.4 Further Assurances.** Each Party will, promptly on reasonable request of the other Party, correct any defect, error or omission which may be discovered in the contents of this JFDA; execute, acknowledge, deliver, procure and record and/or file such further documents (including, without limitation, plats, permit requests, easements, dedications, ratifications, releases, affidavits and certifications) and do such further acts as may be necessary, desirable or proper to carry out more effectively the purposes of this JFDA, to more fully identify and subject to this JFDA property and interests intended to be covered hereby; and provide such certificates, documents, reports, information, affidavits and other instruments and do such further acts as may be necessary, desirable or proper in the reasonable determination of the requesting Party to enable the requesting Party to comply with the requirements or requests of any agency having jurisdiction over the Development, or any portion thereof.

**1.5 Acknowledgment of Satisfaction of Obligations.** Not more than 30 days after final completion of the Joint Facilities, including without limitation, the satisfactory completion of all inspections and tests reasonably required to insure that the Joint Facilities have been constructed in accordance with the Plans and Specifications and other construction documents the acceptance of all of the Joint Facilities for maintenance by the City (or such other applicable governmental entity or utility service provider), the Parties shall jointly (a) execute and deliver, for recordation in the Official Public Records of Travis County, Texas, an instrument reasonably acceptable to each Party acknowledging that the Parties' respective obligations under the terms of this JFDA have been fully satisfied and vacating this JFDA so as to have no further effect with respect to the Development, and (b) submit to Escrow Agent a written authorization to disburse any remaining Escrow Funds to the Parties.

**1.6 Excuses for Non-Performance.** Notwithstanding anything contained in this JFDA, a Party shall be excused from performing an obligation (other than a monetary obligation) under this JFDA, and any delay in the performance of an obligation (other than a monetary obligation) under this JFDA shall be excused, if, but only so long as, the performance of the obligation is prevented, delayed or otherwise hindered by acts of God; fire; earthquake; floods; explosion; actions of the elements; war; riots, mob violence; inability to procure or a general shortage of labor, equipment, facilities, materials or supplies in the open market; failure of transportation; lawful strikes, lockouts or actions of labor unions; condemnation; court orders; laws or orders of governmental or military authorities; or any other cause, whether similar or dissimilar to the foregoing, not within the control of such Party.

## **Article 2**

### **Funding and Payment**

**2.1 Sharing of Joint Facilities Costs.** All of the reasonable costs and expenses for design, development and construction of the Joint Facilities in accordance with the Plans and Specifications and other construction documents approved by the Parties (the "**Joint Facilities Costs**" or the "**Joint Facilities Costs**"), including without limitation, all customary costs of fiscal security and all engineering, permitting and inspection fees, but excluding either Party's Project Engineer's fees, shall be shared by Seller and Buyer, 50% by Seller and 50% by Buyer (the "**Allocable Shares**"), subject to the Roll Back Tax Credit provided for below. Pursuant to Section 9.4 of the Sales Contract, the amount required of Buyer to be deposited with the Escrow Agent to fund his Allocable Share of the Joint Facilities Costs is reduced by, and the Allocable Share of Seller shall be increased by, \$ \_\_\_\_\_, which is the amount agreed to by the Parties as satisfying the rollback tax credit to Buyer

provided for in the Section 9.4 of the Sales Contract (the “**Roll Back Tax Credit**”). Attached hereto as **Exhibit D-2** is a preliminary estimate of the Joint Facilities Costs (the “**Budgeted Joint Facilities Development Costs**”). Budgeted Joint Facilities Development Costs may be revised from time to time by agreement of the Parties to reflect the reasonable amount thereof. The Joint Facilities Costs shall be reduced by the Parties’ Project Engineers if any of the Joint Facilities are constructed by the City. The amount required to be deposited by a Party as Cash or Cash Equivalent Collateral in escrow with the Escrow Agent in connection with Partial Releases shall be likewise reduced and the depositing Party shall be entitled to a refund from the Escrow Agent of the portion of the Cash or Cash Equivalent Collateral deposited by the Party to secure its obligation as to such portion of the Joint Facilities.

**2.2 Escrows and Performance Deeds of Trust.** The Parties’ obligations to pay for and perform the obligations of this JFDA are secured by the following escrows and are additionally secured by the Performance Deeds of Trust executed contemporaneously herewith by the Parties. The Trustee under the Performance Deeds of Trust is and shall be an employee or designee of the Escrow Agent.

**2.2.1 Joint Facilities Escrow.** The Developing Party and the Non-Developing Party have executed an escrow agreement (the “**Escrow Agreement**”) with Stewart Title of Austin, Inc. (the “**Escrow Agent**”) for purposes of establishing escrow accounts into which Seller and Buyer are to deposit their Allocable Shares of the Joint Facilities (or Project, as the case may be) Costs prior to the Project Commencement Date. Additionally, prior to the Project Commencement Date the Developing Party and the Non-Developing Party shall deposit into escrow with the Escrow Agent cash or a clean and unconditional letter of credit (the “**Letter of Credit**”) in an amount equal to 55% of the Budget to complete the Joint Facilities or the Project, as may be the case (the “**Deposit Requirement**”); provided, however, the Deposit Requirement for Seller shall be increased by an amount equal to the Roll Back Tax Credit and the Deposit Requirement for Buyer shall be decreased by the Roll Back Tax Credit (as provided in Section 2.1 above). A Party’s Letter of Credit shall be issued by a national bank with assets of at least \$500,000,000 or by other issuer reasonably acceptable to the Parties. The Letters of Credit shall be drawable by, and shall be drawn upon by, the Escrow Agent from time to time in amounts necessary to pay the Joint Facilities (or Project, as the case may be) Costs. A Party may substitute cash for its Letter of Credit. The amounts so drawn by the Escrow Agent or otherwise deposited by a Party with the Escrow Agent together with any interest earned thereon are called the “**Escrow Funds**.” Escrow Funds for the Joint Facilities shall be maintained by the Escrow Agent in escrow accounts (“**Joint Facilities Accounts**”) and shall be held and disbursed under the terms of the Escrow Agreement. The Parties shall at all times keep on deposit with the Escrow Agent an amount equal to the Deposit Requirement as reduced by amounts previously disbursed. Upon a Party’s notification by either of the Project Engineers that the Joint Facilities Escrow Funds are insufficient to pay the Joint Facilities (or Project, as the case may be) Costs, each Party shall increase its deposit with the Escrow Agent by an amount sufficient to fully fund such Party’s Deposit Requirement. After completion of the Developing Party’s Responsibilities, if the Escrow Funds exceed the actual Joint Facilities (or Project, as the case may be) Costs as certified by the Developing Party’s Project Engineer, the remaining Escrow Funds for the Joint Facilities (or Project, as the case may be) shall be distributed by the Escrow Agent to the Party entitled thereto.

**2.2.2 Collateral Escrow.** As provided in the Performance Deeds of Trust, each Party may obtain the release of Partial Release Parcels from the lien and security interest of the Performance Deed of Trust by depositing Cash or Cash Equivalent Collateral with the Escrow Agent to be held pursuant to the Escrow Agreement in a Collateral Escrow Account, in the amount of 200% times the Per Acre Collateral Amount times the number of acres sought to be released. The “**Per Acre Collateral Amount**” is agreed by the Parties to be \$\_\_\_\_\_ per acre for acres to be released out of the Buyer Property and \$\_\_\_\_\_ per acre for acres to be released out of the Retained Property. The Per Acre Collateral Amount shall hereafter be adjusted by the Project Engineers in accordance with the methodology set out in the Per Acre Collateral Calculation Schedule attached hereto. Funds in a Collateral Escrow Account are pledged by the depositing Party to secure its obligations to the other Party under this JFDA.

**2.3 Draw Requests.** From time to time during the construction of the Joint Facilities (or Project, as the case may be), Developing Party shall submit draw requests to Escrow Agent and the Non-Developing Party’s Project Engineer in the form attached to the Escrow Agreement (“**Draw Request**”), along with copies of invoices for work and other supporting materials for the specific costs for which the payment is then being requested under the applicable Draw Request. If Escrow Agent receives no objection from the Non-Developing Party, as provided in the Escrow Agreement, Escrow Agent shall either (a) segregate and release Escrow Funds to Developing Party in the case cash has been deposited in the Cash or Cash Equivalent Escrow Account or (b) if a Letter of Credit

has been deposited into the Cash or Cash Equivalent Escrow Account, issue a draw request to draw down funds under the Letter of Credit and upon receipt of such funds release the Escrow Funds to Developing Party in the amount requested in each Draw Request, within 10 days after the date on which Developing Party submits such Draw Request to Escrow Agent. The existence of an unresolved dispute among the Parties concerning a current or prior Draw Request or any other issue shall not prevent Developing Party from continuing the construction of the Joint Facilities, or submitting Draw Requests pursuant to this JFDA, or prevent or affect disbursement of Escrow Funds by the Escrow Agent to Developing Party pursuant to the Escrow Agreement for Draw Requests as to amounts in dispute; provided, no such action shall be construed as a waiver by any Party of its rights under this JFDA or the Escrow Agreement.

### **Article 3** **Rights and Remedies**

**3.1 Default, Rights and Remedies.** If any Party defaults in the performance of its obligations hereunder and such default in the case of a monetary default remains uncured more than 10 days after the non-defaulting Party has provided the defaulting Party with written notice of such default or in the case of a non-monetary default remains uncured more than 30 days after the non-defaulting Party has provided the defaulting Party with written notice of such default (an “**uncured Notified Default**”), then such non-defaulting Party providing such notice shall have the right, in addition to other rights and remedies available at law or in equity, to undertake and complete the construction of the Joint Facilities (or a respective Project), and/or to enforce the specific performance by the defaulting Party of its obligations hereunder and/or to sue the defaulting Party for actual (but not consequential) damages suffered by the non-defaulting Party as a result of such default. The rights and remedies of the Parties hereunder are cumulative and not exhaustive of any rights or remedies to which they would otherwise be entitled. Any funds advanced by the non-defaulting Party towards cure of the default of the defaulting Party (e.g., the posting or payment of funds required to be posted hereunder by the defaulting Party) shall bear interest and be owing by the defaulting Party to the non-defaulting Party on demand and with interest thereon from the date the funds are advanced by the non-defaulting Party until repaid by the defaulting Party at the highest lawful contractual rate.

**3.2 Attorneys' Fees.** Any Party to this JFDA who is the prevailing Party in any legal proceeding against any other Party brought under or with relation to this JFDA or transaction shall be additionally entitled to recover court costs and reasonable attorney's fees from the non-prevailing Party.

### **Article 4** **Miscellaneous**

**4.1 Notices.** Notices and other communications provided for herein shall be in writing and shall be delivered or mailed and addressed as hereinafter provided. All notices and other communications required or permitted to be delivered under this JFDA shall be deemed received on the earlier of (i) actual receipt, (ii) if orderly delivery of the mail is not then disrupted or threatened in which event some method of delivery other than the mail must be used, 3 business days after deposit into the United States mail, postage prepaid, certified mail, return receipt requested, addressed to the authorized representative of the receiving Party at the address stated below or (iii) 1 business day after deposit with a nationally recognized overnight delivery service for next business day delivery to the address of the receiving Party at the address stated herein, or (iv) on the business day sent if sent by telecopier prior 5:00 p.m., Austin, Texas time, and the sending telecopier generates a written sending confirmation and if on such day the sender also sends such notice by a nationally recognized overnight delivery service for next business day delivery to the address of the receiving Party at the address stated herein. A Party may change its address for notice by written notice to the other Parties pursuant to the terms hereof.

[Insert addresses]

**4.2 Invalid Provisions.** In case any one or more of the provisions contained in this JFDA shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this JFDA, and this JFDA shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

**4.3 Governing Law.** This JFDA shall be deemed to be made under the laws of the State of Texas and shall for all purposes be construed and enforced in accordance with said laws except as federal law may apply. This JFDA is performable in Travis County, Texas.

**4.4 Covenants Running With Land/Successors and Assigns.** The rights and obligations created by this JFDA shall run with the land and shall become the rights and obligations of any subsequent owner(s) of the Buyer Property and the Retained Property, as applicable. Parties to this JFDA may assign the rights and benefits derived by such Party to assignees without obtaining the prior consent of the other Party; provided, however, both the assignor and assignee shall be liable for the performance of the assignor's obligations to the non-assigning party under this JFDA.

**4.5 Amendments.** This JFDA may be amended or otherwise modified from time to time, but only by a writing signed and acknowledged by all of the Parties, which consent shall not be unreasonably withheld, delayed or conditioned.

**4.6 Exhibits.** Each reference herein to an exhibit refers to the applicable exhibit that is attached to this JFDA, which exhibit may be amended by the Parties from time to time in accordance with the provisions of this JFDA. All such exhibits constitute a part of this JFDA and are expressly made a part hereof.

**4.7 Waivers.** A waiver by a Party of any provision of this JFDA or of any default by any Party must be in writing and no such waiver shall be implied from any omission by a Party to take any action in respect of such default if such default continues or is repeated. No express written waiver of any default shall affect any default or cover any period of time other than the default and period of time specified in such express waiver. One or more written waivers of any default in the performance of any term, provision, covenant or condition contained in this JFDA shall not be deemed to be a waiver of any subsequent default in the performance of the same term, provision, covenant or condition contained in this JFDA. The consent or approval by a Party to or of any act or request by another Party requiring consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent similar acts or requests. No failure by a Party to insist upon or to enforce any provision of this JFDA, shall constitute or be interpreted as a waiver thereof and no provision of this JFDA shall be interpreted as waived, modified or amended by the acts or conduct of the Parties except as specifically expressed to be such in writing.

**4.8 No Partnership.** Neither anything in this JFDA nor any acts of the Parties shall be construed or deemed by the Parties, or by any third person, to create the relationship of principal and agent, or of partnership, or of joint venture.

**4.9 Exclusive Benefit of Parties.** The provisions of this JFDA are for the exclusive benefit of the Parties hereto and owners of the Development and not for the benefit of any third person. None of the provisions of this JFDA are intended to make any person a third party beneficiary hereof. This JFDA shall not be deemed to have conferred any rights upon any third person.

**4.10 Time of Essence.** Time is of the essence with respect to the performance of the terms, provisions, covenants, and conditions contained in this JFDA, provided, however, if any date specified herein or it the last date of any time specified herein is a Saturday, Sunday or national bank holiday, such date shall be extended to the next following date that is not a Saturday, Sunday or national bank holiday.

**4.11 Gender.** Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, and vice versa, unless the context requires otherwise.

**4.12 Counterparts.** This JFDA may be executed in several counterparts, all of which are identical and all of which counterparts together shall constitute one and the same instrument.

The Parties have executed this JFDA to be effective on the date shown on the first page of this JFDA.

[Signatures and Acknowledgments]



**D.9**

**Wire Transfer Instructions**

**Party:** \_\_\_\_\_

**BANK NAME:** \_\_\_\_\_

**ABA ROUTING NUMBER:** \_\_\_\_\_

**CREDIT TO:** Account No. \_\_\_\_\_

**ACCOUNT NAME:**

**NOTIFY:** \_\_\_\_\_

Telephone: (\_\_\_\_) \_\_\_\_\_

**D.10****Sellers' Certificate**

1. \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, as Sellers, and \_\_\_\_\_, as Buyer, entered into a Sales Contract dated \_\_\_\_\_, 2004, as amended from time to time (the "**Sales Contract**").

2. \_\_\_\_\_, one of the Sellers, assigned her interest in the Contract to \_\_\_\_\_ ("**Seller**").

3. \_\_\_\_\_ has or will assign its interest in the Contract to \_\_\_\_\_ ("**Buyer**").

NOW, THEREFORE, each of the undersigned certifies to Buyer that all of Sellers' representations and warranties set forth in the Sales Contract are true and correct as of this date. As of the date hereof, each Seller owns only an undivided 1/3rd interest in and to the property, rights, interests and obligations to which this document pertains, and each such person is bound and obligated hereunder severally, and not jointly, only as to the undivided interest owned by such person at the time such obligation arises.

[signature blocks and date]

**D.11**

**1099-S REQUEST FOR TAXPAYER IDENTIFICATION  
NUMBER AND CERTIFICATION AND ACKNOWLEDGMENT**

Section 6045(e) of the Internal Revenue Code of 1986, as amended, requires the reporting of certain information with respect to every "real estate transaction," as defined in Treasury Regulations Section 1.6045-4. You are required by law to provide your correct taxpayer identification number. If you do not provide your correct taxpayer identification number, you may be subject to civil or criminal penalties imposed by law.

From the information you provide below, a Form 1099-S is being produced, and a copy of it will be furnished to the Internal Revenue Service (the "**IRS**") within the times provided under the applicable provisions of the Internal Revenue Code of 1986, and the regulations promulgated thereunder.

Closing Date: \_\_\_\_\_, 2004

Seller's Names: (1) \_\_\_\_\_  
(2) \_\_\_\_\_  
(3) \_\_\_\_\_

Seller's Street Address: Set out below.

Property Sold: Described on **Exhibit A** attached hereto and incorporated herein.

Gross Proceeds from Sale: \$ \_\_\_\_\_

Seller's Taxpayer Identification Number: Set out below.

Respective Seller's Share: Set out below.

Have Sellers received, or will Sellers receive, property or services as part of the consideration for this sale?

YES \_\_\_\_\_ NO X

By signing this instrument, the undersigned acknowledge receipt of the Transferor's copy of the completed 1099-S prepared in connection with the sale of the property described above. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if this item is required to be reported and the IRS determines that it has not been reported.

Under penalties of perjury, the undersigned hereby certifies on this \_\_\_\_ day of May, 2004 that all of the above information, specifically including the Seller's taxpayer identification number, is correct.

#	Seller	Seller's Address	SSN/ID No.	Seller's Share	Signature
(1)				1/3	
(2)				1/3	
(3)				1/3	

**D.12****Closing Agreement**

This Closing Agreement is entered into by and between \_\_\_\_\_, a \_\_\_\_\_ (herein referred to as "Seller"), and \_\_\_\_\_, a \_\_\_\_\_ (herein referred to as "Buyer"), for and in consideration of the following recitals and agreements, and Ten Dollars (\$10.00) and other valuable considerations.

**A. Background**

1. **Sale.** Seller is the owner of an apartment project (the "**Property**") in Austin, Texas, known as "**\_\_\_\_\_ Apartments**" located on and including the land described in Schedule A attached hereto (the "**Land**"). Seller and \_\_\_\_\_ have entered into a Commercial Earnest Money Contract (the "**Contract**") dated \_\_\_\_\_, 200\_\_, which was escrowed with \_\_\_\_\_ Title Company (the "**Title Company**"). The Contract was subsequently extended to provide for a closing date on or about the date of this Closing Agreement (the \_\_\_\_\_ Contract as extended and amended is referred to herein as the "**Sales Contract**").

2. **Closing Documents.** In connection with the closing of the sale of the Property from Seller to Buyer, the parties have executed and/or delivered the following documents to each other (the "**Closing Documents**"):

2.1 a General Warranty Deed executed by Seller conveying the Land, improvements and appurtenances thereto to Buyer;

2.2 an Assignment and Assumption Agreement for Leases and Security Deposits executed by Seller and Buyer assigning certain apartment leases listed on a rent roll certified by the Seller to Buyer, and the rents and security deposits thereunder and laundry leases to Buyer;

2.3 a Tax Payment Agreement concerning post closing verification and adjustment of ad valorem taxes for 200\_\_ that had to be estimated at closing;

2.4 an All Bills Paid Affidavit executed by Seller as to the payment of its bills, including bills for services and taxes, and as to other matters therein specified;

2.5 a Certificate of Non-Foreign Status to be Completed Upon Transfer of United States Real Property Interests executed by Seller;

2.6 Closing Statements prepared by the Title Company; and

2.7 this Closing Agreement whereby each party acknowledges certain matters concerning the sale to Buyer.

**B. Agreement**

NOW, THEREFORE:

1. **Buyer.** \_\_\_\_\_ is referred to as "**Buyer**" or "**Grantee**" in the Closing Documents and as "**Buyer**" or "**Purchaser**" in the Sales Contract.

2. **Reaffirmation of Sales Contract Representations and Warranties.** Seller and Buyer reaffirm to each other the representations and warranties made to each other, as Seller or Buyer, as the case may be, to the Sales Contract, subject as to Seller to the time limit for survival contained in Paragraph \_\_\_\_ of the Sales Contract.

3. **AS IS.** BUYER HEREBY ACKNOWLEDGE AND AGREE THAT (I) THE PROPERTY IS BEING TRANSFERRED "AS IS" WITH ALL FAULTS AND WITHOUT WARRANTY OR REPRESENTATION, EXPRESSED OR IMPLIED, AS TO THE PHYSICAL CONDITION OF THE PROPERTY; WITH BUYER ASSUMING ALL RISK OF UNSUITABLE CONDITIONS ON THE PROPERTY, INCLUDING THE STRUCTURAL AND/OR MECHANICAL FITNESS OF THE PROPERTY; THERE ARE NO WARRANTIES OR REPRESENTATIONS AS TO THE HABITABILITY, SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR AS TO COMPLIANCE OF THE PROPERTY WITH LAWS AND REGULATIONS; AND (II) SELLER HAS NO KNOWLEDGE OF BUYER'S ASSUMPTIONS OR BELIEFS CONCERNING THE PROPERTY.

4. **Waiver of DTPA.** To the extent permitted by law, Buyer waives the provisions of the Texas Deceptive Trade Practices Act, Chapter 17, subchapter 17.41 through 17.63, inclusive, Vernon's Texas Codes Annotated, Business and Commerce Code.

5. **Title Commitment and Survey.** Seller has caused to be furnished to Buyer a Commitment for Title Insurance issued by the Title Company as GF # \_\_\_\_\_ committing to insure the title to the Property as being in Buyer, subject only to the matters and exceptions set forth therein, and which has been issued and down dated to the closing date and a Survey prepared by \_\_\_\_\_ Engineering as Job No. \_\_\_\_\_ certified as of \_\_\_\_\_, 200\_ depicting the Property, including its property lines and set back lines and the placement of improvements in relation thereto. Subject to the satisfaction of the requirements of the Title Company noted in Schedule C of the Commitment for Title Insurance, Buyer acknowledges acceptance of the Commitment for Title Insurance and the Survey and the matters and exceptions reflected therein.

[Execution and date]

**D.13****Post-Closing Agreement**

This Post-Closing Agreement ("**Agreement**") is entered into effective as of \_\_\_\_\_, 200\_\_, by ("**Seller**") and \_\_\_\_\_ ("**Buyer**").

**A. Background**

1. **Sales Contract.** Buyer and Seller entered into a Sales Contract dated effective \_\_\_\_\_, 2004, which was amended ten times by the First through Tenth Amendments to Agreement of Purchase and Sale (as amended, the "**Sales Contract**") covering approximately \_\_\_\_\_ acres of real property located \_\_\_\_\_ of the intersection of \_\_\_\_\_ and \_\_\_\_\_, in or near the \_\_\_\_\_ Planned Unit Development and Conceptual Land Use Plan, City of Austin Case No. \_\_\_\_\_ (the "**PUD**").

2. **Post-Closing Actions.** Buyer and Seller desire to close the purchase of the Property described in the Purchase Agreement and to set forth herein their agreement with regard to the handling of certain matters after the Closing takes place.

**B. Agreement**

1. **Defined Terms.** Except as specified to the contract in this Agreement, all defined terms in the Purchase Agreement have the same meanings in this Agreement.

2. **PUD Amendments.** Seller has no obligation to take further action but hereby agrees to reasonably cooperate with Buyer to (i) obtain clarification as to the applicability of critical environmental features, (ii) administratively correct the zoning of the research and development tract to include less intense uses, and (iii) administratively correct the PUD to provide mixed parking on Lot \_\_, Block \_\_ and Lot \_\_, Block \_\_ of the Non-Preserve Property.

3. **TNRCC Letter.** Seller has no obligation to take further action but hereby agrees to reasonably cooperate with Buyer to obtain a "no further action" letter from the Texas Commission on Environmental Quality with respect to the removal of the underground storage tank from the Property.

4. **Plats.** Seller has no obligation to take further action but hereby agrees to reasonably cooperate with Buyer to process the final subdivision plats and related documents for final approval from the City of Austin.

5. **10(a) Permit.** Seller agrees to reasonably cooperate with Buyer and perform all acts required or reasonably necessary under Federal regulations to effect the transfer of the Permit, including but not limited to preparing and filing a joint submission of Buyer and Seller with the U.S. Fish and Wildlife Service.

6. **City Approvals.** Seller agrees to reasonably cooperate with Buyer in obtaining approval from the City of Austin for the assignment of the Right of Way Encroachment License Agreement No. \_\_\_\_\_ and the assignment of the Subdivision Construction Agreement adopted December 10, 2003, between the City of Austin, Texas, and Assignor, as recorded at Volume \_\_\_\_\_, Page \_\_\_\_ in the Real Property Records of Travis County, Texas.

7. **PHTs.** The Retained Property and the Buyer Property are subject to the Traffic Phasing Agreement and Restrictive Covenant ("**City Phasing Agreement**") and the Phasing Agreement ("**County Phasing Agreement**") recorded, respectively, in Document 20041111 and Document 20042222, Official Public Records of Travis County, Texas. New InterPort hereby allocates and assigns to Buyer and the Buyer Property the first 2503 PHTs available under and as contemplated in the City Phasing Agreement, and shall diligently pursue and obtain the consent of the City of Austin to such assignment. Except to the extent expressly provided otherwise in the Restrictive Covenant and/or the JFDA, New InterPort shall arrange for and

deposit all fiscal security as provided for in the City Phasing Agreement, shall be solely responsible for all requirements under the City Phasing Agreement and the County Phasing Agreement, and shall indemnify and hold harmless Buyer and the Buyer Property from and against all damages, claims, costs and expenses (including attorneys fees and court costs) arising in connection with the City Phasing Agreement and the County Phasing Agreement. Once Buyer has received a final plat as to the Buyer Property, this indemnity shall expire.

8. **LUEs.** Seller has obtained from the City of Austin approval of a Water and Wastewater Service Extension Request ("**SER**") for water (SER No. 2004), a copy of which is attached hereto. The parties agree and confirm that each party may at any time and from time to time request and obtain water and/or wastewater service from the City of Austin, based on the SER and subject to and in compliance with all applicable rules and regulations. Except to the extent expressly provided otherwise in the Restrictive Covenant and/or the JFDA, Seller shall be solely responsible for any and all requirements and conditions under the SER, and shall indemnify and hold harmless Buyer and the Buyer Property from and against all damages, claims, costs and expenses (including attorneys fees and court costs) arising in connection with the SER. Seller hereby assigns and transfers to Buyer all rights and entitlements relating to the Buyer Property arising under the SER. Neither party shall take any actions which result in a material adverse effect on the SER. Once Buyer has received a final plat as to the Buyer Property, this indemnity shall expire.

9. **Preliminary Plan and Flood Plain Matters.** The Retained Property and the Buyer Property are subject to the Preliminary Plan of InterPort ("**Preliminary Plan**") subdivision plan approved by the City of Austin (COA Case No. C2004). Seller has submitted to the Federal Emergency Management Agency ("**FEMA**") a request for revision to the Flood Insurance Rate Map ("**FIRM Request**") relating to the development project (FEMA Case No.2003). Except to the extent expressly provided otherwise in the Restrictive Covenant and/or the JFDA, Seller shall diligently pursue and complete the FIRM Request, shall be solely responsible for any and all requirements and conditions under the Preliminary Plan and the FIRM Request, and shall indemnify and hold harmless Buyer and the Buyer Property from and against all damages, claims, costs and expenses (including attorneys fees and court costs) arising in connection with the Preliminary Plan and/or the FIRM Request. Once Buyer has received a final plat as to the Buyer Property, this indemnity shall expire.

10. **Escrow.** The parties have arranged an escrow of funds and/or other fiscal surety pertaining to certain obligations and provisions of this Agreement, as set forth in the Escrow Schedule attached hereto.

11. **Default, Rights and Remedies.** If any party defaults in the performance of its obligations hereunder and such default remains uncured more than thirty (30) days after any non-defaulting party has provided the other party with written notice of such default, then such non-defaulting party providing such notice shall have all rights and remedies available at law or in equity, including the right to enforce the specific performance by the defaulting party of its obligations hereunder or to sue the defaulting party for actual (but not consequential) damages suffered by the non-defaulting party as a result of such default.

12. **Miscellaneous.**

12.1 **Notices.** Notices and other communications provided for herein shall be in writing and shall be delivered or mailed and addressed as hereinafter provided. All notices and other communications required or permitted to be delivered under this Agreement shall be deemed received on the earlier of (i) actual receipt, (ii) if orderly delivery of the mail is not then disrupted or threatened in which event some method of delivery other than the mail must be used, 3 business days after deposit into the United States mail, postage prepaid, certified mail, return receipt requested, addressed to the authorized representative of the receiving party at the address stated below or (iii) 1 business day after deposit with a nationally recognized overnight delivery service for next business day delivery to the address of the receiving Party at the address stated herein, or (iv) on the business day sent if sent by telecopier prior 5:00 p.m., Austin, Texas time, and the sending telecopier generates a written sending confirmation and if on such day the sender also sends such notice by a nationally recognized overnight delivery service for next business day delivery to the address of the receiving Party at the address stated herein. A party may change its address for notice by written notice to the other parties pursuant to the terms hereof.

12.2 **Reasonable Cooperation.** For purposes of this Agreement, Seller's obligation to reasonably cooperate with Buyer shall in no event require Seller to expend any material amounts of money, whether to third parties, regulatory entities or professionals assisting Seller in connection therewith.

12.3 **Counterparts.** This Agreement may be executed in several counterparts, all of which are identical and all of which counterparts together shall constitute one and the same instrument. To facilitate execution of this Agreement, the parties may execute and exchange by telephone facsimile counterparts of the signature pages of this Agreement.

12.4 **Texas Law to Apply.** This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Travis County, Texas.

12.5 **Legal Construction.** In case any one or more of the provision contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if the invalid, illegal, or unenforceable provision had never been contained herein.

12.6 **Prior Agreement Superseded.** This Agreement constitutes the sole and only agreement of the parties and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter hereof. This Agreement may only be amended by a written document, signed by both Seller and Buyer, and it may not be amended orally.

12.7 **Time of Essence.** Time is of the essence in this Agreement.

12.8 **Attorney's Fees and Costs.** In the event of litigation related to this Agreement, the non-prevailing party shall be obligated and agrees to pay reasonably attorney's fees and expenses to the prevailing party, whether at the trial or appellate level.

12.9 **Successors and Assigns.** This Agreement shall be binding on and shall inure to the benefit of the parties hereto and their respective successors and assigns.

[signature block]



**D.14****Closing Binder****A.        *Title Company Documents***

<b>Tab</b>	<b>Document</b>
A.1	Closing Statements
A.2	Updated Title Commitment
A.3	Insured Closing Services Letter
A.4	Joint Escrow Instructions
A.5	Buyer's Title Approval Letter
A.6	Written authorization from Seller and from Buyer to pay closing costs or charges allocated to each party pursuant to Instructions
A.7	Invoice from broker
A.8	Seller's Affidavit of Debts and Liens
A.9	Non-Foreign Certificate
A.10	Seller's Certificate
A.11	Lender's Partial Release
A.12	Lender's Consent to , JFDA, Detention Pond Participation and Sheltered Owner Designations

**B.        *Pre-Closing Documents***

<b>Tab</b>	<b>Document</b>
B.1	Pond Declaration
B.2	Designation of Additional Participating Property in Regional Storm Water Detention Pond
B.3	Designation of Sheltered Owner under CC&Rs
B.4	Side Letter Agreement

**C. Closing Documents**

<b>Tab</b>	<b>Document</b>
C.1	Deed
C.2	Assignments
C.2.1	Assignment of Development Rights and Appurtenances
C.2.2	Assignment of Subdivision Construction Agreement
C.2.3	Partial Assignment and Assumption of BCCP Agreement and Participation Agreement
C.2.4	Assignment of ADTs
C.2.5	Assignment of Seller's Interest In Buyer's Consultant's Work Product
C3	Performance Deed of Trust
C4	Assumption of Subdivision Construction Agreement
C5	Memorandum of Post-Closing Agreement and JFDA

**D. Post-Closing**

<b>Tab</b>	<b>Document</b>
D.1	Post-Closing Agreement
D.2	Joint Facilities Development Agreement ("JFDA")
D.3	Escrow Agreement
D.4	Each party listed as Additional Insureds on each other's CGL and on Contractor's CGL

### III. Chart of Development Documents - Condominium MOB

The following is a chart of documents that will need to be prepared by us in connection with your proposed condominium conversion project. Included are documents at the following Tabs: (A) Checklists, (B) a Condominium Document Package, (C) a Sales Package, (D) a Sales Closing Package, (E) a Condominium Association Formation Package, and (F) an Association Formation Package.

#### (A) Statute and Checklists.

#	Document Title	Comments
A.1	Texas Uniform Condominium Act (" <b>TUCA</b> ")	<p>Attached is a copy of TUCA. I suggest that you furnish each Buyer with a copy of TUCA. In order to draft the Declaration for your Project, you will need to furnish us with certain information required by TUCA. TUCA contains both mandatory provisions and provisions that apply in the absence of a contrary provision in the Declaration establishing the Condominium Regime.</p> <p>Your attention is specifically called to the following provisions of TUCA:</p>
		<ol style="list-style-type: none"> <li>1. <b><u>Developer Rights.</u></b> §§ 82.003(a)(12) and (22); 82.055(14) and (15); 82.060; 82.065; 82.103(c), (d) and (e); 82.105; 82.112(c).</li> <li>2. <b><u>Plan or Plat.</u></b> §§ 82.003(a)(18) and (19); 82.059.</li> <li>3. <b><u>Unit Boundaries.</u></b> § 82.052 including 82.052(4).</li> <li>4. <b><u>Condominium Information Statements.</u></b> §§ 82.152, 82.153.</li> <li>5. <b><u>Promotional Materials.</u></b> §§ 82.162 and 82.163.</li> </ol> <p>§82.152 permits parties to a non-residential condominium project to waive the application of the purchaser protection provisions contained in Subchapter D of TUCA (§82.151-.164). Although we have provided in the Sales Contract for waiver of this Subchapter as to your sales program, it will be helpful for you to review and be familiar with these provisions of TUCA as the set out types of information that we suggest be delivered to prospects. We have drafted an alternative form of disclosure certificate, a Commercial Condominium Information Statement, for delivery to prospects (see <b>Tab 3</b> below).</p>
A.2	Checklist of Provisions and Questions for Preparation of the Declaration	You will need to provide us with the information requested in this Checklist in order for us to draft the Declaration.

#	Document Title	Comments
A.3	Checklist of Sales Contract Provisions	This is a preliminary Checklist as to provisions to be included in the Sales Contract (See <b>Tab C.1</b> for a preliminary form of Sales Contract). Based on information provided to us in connection with our preparation of the various document packages, we will periodically revise the Sales Contract.

**(B) Condominium Documents Package.**

#	Document Title		Comments
B.1	<b>Declaration of Covenants, Conditions and Restrictions</b> (04/15/04 ed.)		Once the Declaration is drafted it should be furnished to the Title Company handling the closing of the sales for its review and approval prior to initiating sales of units. Also, the Title Company should be requested to file the Condominium Declaration and issue a <i>pro forma</i> title commitment for your use in connection with marketing of units. The recording information will be used in the Commercial Condominium Information Statement delivered to buyers prior to their execution of a Sales Contract (see <b>Tab ____</b> ). You will also need to have the Declaration reviewed and approved by the existing lender prior to filing. This lender will need to approve converting the units to condominiums and agree to release its lien as to each unit on closing of a sale of such unit.
B.2	<b>Exhibit A - Legal Description</b> (04/15/04 ed.)		The legal description contained in the deed into the Declarant will be used for this purpose, unless there has been a subsequent re-platting of the Property or other action affecting the description.
B.3	B.3.1	<b>Exhibit B - Plat and Plan of the Property</b>	See §§ 82.003(a)(18) and (19); and 82.059 of TUCA for requirements to be addressed in the Plat. The Plat will need to be prepared and certified by a surveyor or engineer and the Plans certified by an architect.
	B.3.2	<b>Certificates</b> (04/15/04 ed.)	Attached are forms of a Surveyor's Certificate and an Architect's Certificate for completion by the surveyor and architect and attachment to the Declaration to be included in the Commercial Condominium Information Statement. These certificates will need to be provided to the Title Company for their approval prior to undertaking the sales program. Exhibit B and the certificates will need to be updated prior to filing of the Declaration.
B.4	<b>Exhibit C - Percentage of Ownership of Common Elements</b> (04/15/04 ed.)		See § 82.057(c)(1) of TUCA permits the units to have different schemes for ownership percentages and votes. It is typical to allocate 1 vote to each unit, but to allocate to each unit a % allocation of the common elements based on relative square footage of the units. The enclosed chart contemplates 1 vote per unit and an allocation of interests in the common elements based on square footage ratios.

#	Document Title	Comments
B.5	<b>Exhibit D - Encumbrances</b> (04/15/04 ed.)	This Exhibit is to contain a listing of all encumbrances affecting the Property (e.g., recorded restrictions, easements, and liens; and unrecorded management agreements). This Exhibit will be based on the Schedule B exceptions contained in a Title Commitment to be obtained from the Title Company handling the closings of the sales.
B.6	<b>Exhibit E - Articles of Incorporation of the Association</b> (04/15/04 ed.)	This Exhibit is the form of Articles of Incorporation to be executed by the incorporator of the property owners' association and filed of record with the Secretary of State prior to the conveyance of the first condominium unit. See <b>Tab</b> ___ below. For filing convenience I will execute the Articles as Incorporator and cause them to be filed with the Secretary of State. Please confirm that the persons I have designated the right persons as the initial Directors to organize the Association and to serve until replaced by election of the Unit Owners. Depending on Unit sales and exercise by the Declarant or successor Declarant of the reserved Special Declarant Rights, one or more or all of these initial Directors may continue as the elected Directors.
B.7	<b>Exhibit F - Bylaws</b> (04/15/04 ed.)	This Exhibit is the form of Bylaws to be adopted by the initial Board of Directors of the Association. The initial Board of Directors is named in the Articles of Incorporation. See <b>Tab</b> ___ below.
B.8	<b>Exhibit G - Management Certificate</b> (04/15/04 ed.)	This Exhibit is a document required by §82.116 of TUCA to be completed and filed of record by the Declarant prior to the closing of sales of units in the Project.
B.9	<b>Exhibit H - Consent of Declarant's Mortgagee</b> (04/15/04 ed.)	Several completed executed originals of the Declaration will need to be provided to the Project's construction lender for its review and approval prior to filing of the Declaration. This Exhibit is the form of Consent that your lender will need to execute prior to filing of the Declaration.
B.10	<b>Exhibit I - Rules and Regulations</b> (04/15/04 ed.)	This Exhibit is a form of Rules and Regulations to be adopted by the initial Board of Directors of the Association at its Organizational Meeting. See <b>Tab</b> ___ below.
B.11	<b>Exhibit J - Notice of Substantial Completion</b>	
B.12	<b>Exhibit K - Notice of Rev</b>	
B.13	<b>Exhibit L - Architectural Guidelines</b>	

#	Document Title	Comments
B.14	Notice of Dedicatory Instrument	

(C) Sales Package.

#	Document Title	Comments
C.1	<b>Sales Contract</b> (04/15/04 ed.)	<p>The Sales Contract is patterned after (but not identical to) the TREC form of Condominium Sales Contract used in connection with the sale of residential condominiums. The TREC form is familiar to brokers.</p> <p>Under <b>Tab</b> __ is a Checklist of Provisions addressed in the Sales Contract. Based on information yet to be provided and decisions yet to be made, the Sales Contract likely will need to be revised prior to its use in the sales program. It is possible that the Project's construction lender will want for the Seller's rights under the Sales Contract to be collaterally assigned to the lender in connection with its construction loan.</p> <p>You will need to give consideration to whether you will make arrangements with a conventional lender to commit to make financing available on the Project. If so, you will need for the take-out/finish-out lender to review and approve the condominium documentation and issue a loan commitment for you to provide to your buyers.</p> <p>The Sales Contract is set up for alternative "check the box" types of sales: (1) sale of a Building Site Only if the Buyer is to construct the Building Shell and Finish-Out; (2) sale of a Building Shell if the Buyer is to construct the Finish-Out; and (3) sale of a Finished-Out Unit for cases where the Seller is selling a completed Unit on a turnkey basis for the Buyer.<sup>1</sup></p>
	<b>Attachments to Sales Contract</b>	<p>Accompanying the Sales Contract are various documents required or advisable to be furnished to a condominium unit purchaser. TUCA permits parties to waive the delivery to a buyer before its execution of a sales contract of a Condominium Information Statement (CIS) in connection with the sale of non-residential condominium projects. We have included a waiver in the Sales Contract of the TUCA provision requiring you to deliver a CIS to each buyer. A CIS is a relatively complicated document. Its elimination will simply your sales literature. However, we have incorporated into the Sales Contract some of the disclosure items otherwise contained in a CIS to assist in educating the buyer as to what it is buying. These disclosures are included in a Commercial Condominium Information Statement form which we are providing ("<b>CCIS</b>").</p> <p>To be attached to the Sales Contract are the following documents (the "<b>Attachments</b>").</p>

#	Document Title		Comments
C.2	<b>CCIS</b>		
	C.2.1	<b>Site Plan</b>	This Attachment is to be prepared by you and depicts/describes the Unit being sold.
	C.2.2	<b>Allocations (04/15/04 ed.)</b>	This Attachment sets out the allocation of voting and assessment % to the Unit.
	C.2.3	<b>Budget</b>	This Attachment is a pro forma budget for the 1 <sup>st</sup> year of operations.
	C.2.4	<b>Title Exceptions</b>	This Attachment is a listing of all title exceptions (a copy of a <i>pro forma</i> title commitment issued by the Title Company can be this exhibit). I recommend that the Title Commitment be issued as of a date after the recording of the Declaration so that is reflected in the Title Commitment.
	C.2.5	<b>Condo Doc.s</b>	This Attachment is copy of the Declaration, including the Articles of Incorporation of the Association, the Bylaws, Rules and Regulations, Architectural Guidelines. See <b>Tabs B6, 7, 10 &amp; 13</b> . You may wish to package this Attachment along with the attachments <b>2.1 - 2.4</b> into a separate booklet to be delivered along with the Sales Contract and receipted for by the Buyer.
C.3	<b>Buyer's Receipt (04/15/04 ed.)</b>		¶ 2 of the Buyer's receipt contains 3 blanks to be marked as appropriate. By checkmarking the first 2 blanks, the Buyer certifies that it received the Attachments before the Buyer signed the Sales Contract and certifies that it received the Sales Contract signed by the Buyer.
C.4	<b>"Check-the-Box" Addenda</b>		
	C.4.1	<b>Bldg. Site Only</b>	<b>Building Site Only Addendum.</b> This Addendum is for use in cases where the Seller is selling only a Building Site to the Buyer and the Buyer is constructing the Building Shell and Finish-Out with its own contractor other than the Seller.
	C.4.2	<b>Shell</b>	<b>Unfinished-Out Shell Space Addendum.</b> This Addendum is for use in cases where the Seller is selling an unfinished out Building Shell to the Buyer and the Buyer is completing the Building Shell with its own contractor other than the Seller.
	C.4.3	<b>Turnkey</b>	<b>Sale of a Finished-Out Unit.</b> This Addendum is for use in cases where the Seller is selling a Unit on a turnkey basis (completed Building Shell with Finish-Out).
C.5	<b>Addendums and Schedules to Accompany C4 Addenda</b>		For Use With:  C.5.1—Use <b>C.5.1.1-3.5.1.5</b> with <b>C.4.1</b> and <b>C.4.2</b> where Buyer is undertaking construction of Shell or Shell and Finish-Out.  C.5.2—Use with <b>C.4.3</b> if Seller is constructing Unit on a Cost Plus Basis as opposed to a Fixed Fee Basis.

#	Document Title		Comments	
	C.5.1	<b>Buyer Construction</b>	C.5.1.1	<b>Insurance Schedule and Construction Contract Addendum.</b> This Addendum permits Seller to require the Buyer to meet certain minimum standards for insurance, including requiring that the Buyer and/or its contractor designate the Association and the Seller/Declarant as additional insureds on the Buyer's and/or its contractor's CGL policy and requiring them to provide Certificates of Insurance proving coverage. Additionally, this Addendum permits the Seller to require Buyer and its contractor to waive and indemnify as to claims against the Association and the Seller/Declarant for construction related accidents.
			C.5.1.2	<b>Insurance Schedule.</b> This schedule needs to be reviewed by the Seller's insurance agent and limits and coverages approved or revised.
			C.5.1.3	<b>Certificate of Liability Insurance.</b> This certificate needs to be reviewed by the Seller's insurance agent and limits and coverages approved or revised.
			C.5.1.4	<b>Certificate of Property Insurance.</b> This certificate needs to be reviewed by the Seller's insurance agent and limits and coverages approved or revised.
			C.5.1.4	<b>Attachment to Contractor's Certificate of Insurance.</b> This is an attachment to accompany <b>C. 5.1.3</b> and <b>C.5.1.4</b> . It may need to be split into separate attachments depending on whether the same agent issues on behalf of each of the carriers providing the respective Liability and Property Insurance. The Attachment and the Certificates call for the agent to provide a copy of the Additional Insured and other forms of requested endorsements. These endorsements must be reviewed as part of the Association's approval of the proffered insurance to assure that insurance specifications are being met.
			C.5.1.5	<b>Schedule of Provisions for Construction Contracts.</b>
	C.5.2	<b>Seller Construction</b>	<b>Sale of a Finished-Out Unit – Cost Plus Addendum.</b> This Addendum is for use with <b>C4.3</b> if Seller is providing a completed Unit on a Turnkey Basis and if the Finish-Out is on a Cost Plus Basis.	



#	Document Title		Comments
	C.5.3	<b>Pre-Closing Walk-Through Inspection</b>	
C.6	<b>TREC Form</b>		<b>Agreement for Mediation; Information About Brokerage Services.</b> This form is required by the Texas Real Estate Commission (TREC) to be signed by the parties in transactions involving real estate agents.
C.7	<b>Addendum</b>		

**(D) Closing Package.**

#	Document Title	Comments
D.1	<b>Deed</b> (04/15/04 ed.)	The deed will be completed at the time of sale based on an updated Title Commitment and after recording of the Declaration.
D.2	<b>Management Certificate</b> (04/15/04 ed.)	The manager of the Project will need to execute and deliver to each buyer at closing a <i>Management's Certificate</i> as required by § 82.116 of TUCA.
D.3	<b>Seller's Assignment of Manufacturer's Limited Warranties</b> (04/15/04 ed.)	The Sales Contract contemplates an assignment by the Seller to Buyer of any manufacturer's warranties incorporated into the units.
D.4	<b>Seller's Limited Warranty</b> (04/15/04 ed.)	This form sets out limits as to the warranty of workmanship that otherwise would be implied in connection with the sale of the units. Texas law permits parties to contract as to the terms of the warranty of workmanship. This form identifies what the developer will do post closing under its limited warranty of workmanship.

**(E) Condominium Association Formation Package.**

#	Document Title	Comments
E.1	<b>Reservation of Corporate Name for Association</b>	I have reserved the name, "_____ Office Park Condominium Owners' Association, Inc." with the Secretary of State.
E.2	<b>Directors' Meetings</b> (04/15/04 ed.)	Attached are sample documents for Directors meetings. The Articles of Incorporation will name initial directors appointed by you to organize the Association. Thereafter following the First Meeting of the Members, the Directors elected at the First Meeting of Members will conduct the First Annual Meeting of Elected Directors.

#	Document Title	Comments
E.2.1	<b>Organizational Meeting</b> (04/15/04 ed.)	An organizational meeting of the directors needs to occur after the Articles of Incorporation are filed with the Secretary of State and before the First Meeting of the Members. The Directors appointed by the Declarant serve until the First Annual Meeting of the Members.
	<b>Agenda</b>	<p>Enclosed is the Agenda for the Organizational Meeting of the Directors. At this meeting of the Directors, the following business could be undertaken:</p> <p>(1) <b><u>Management Agreement</u></b>. Item 12 - Approval of the management agreement with the management service.</p> <p>(2) <b><u>Budget</u></b>. Item 14 - Approval of the Budget and assessments of the Members.</p> <p>(3) <b><u>Third Party Services</u></b>. Item 13 - Approval of other third party service contracts (e.g., cable system, security system).</p> <p>(4) <b><u>Bank Account</u></b>. Item 9 - Establishment of bank account.</p> <p>(5) <b><u>Insurance</u></b>. Approval of insurance program.</p> <p>(6) <b><u>Community Policies</u></b>. Item - 15 - Adoption of Community Policies.</p>
	<b>Minutes</b>	Enclosed is a draft of the Minutes of the Organizational Meeting of the Board of Directors
E.2.2	<b>First Annual Meeting of Elected Directors</b> (04/15/04 ed.)	The First Annual Meeting of the Board of Directors occurs after the First Annual Meeting of the Members, as new Directors are to be elected at the First Annual Meeting of the Members to succeed to the Board of Directors appointed by the Declarant in the Articles of Incorporation. Until the expiration of the Declarant Control Period, as long as the Declarant controls a majority of the votes, it can control the election of the Directors.
	<b>Agenda</b>	Enclosed is an Agenda for the First Annual Meeting of the Board of Directors. The Agenda will include such items as election of officers and approval of the Budget and Assessments.
	<b>Minutes</b>	Enclosed is a draft of the Minutes of the First Annual Meeting of the Board of Directors.
E.3	<b>Members' Meetings</b>	

#	Document Title	Comments
E.3.1	<b>First Annual Meeting</b> (04/15/04 ed.)	
	<b>Agenda</b>	Enclosed is an Agenda for First Annual Meeting of Members.
	<b>Affidavit of Notice</b>	Enclosed is an Affidavit to be executed in connection with the giving of notice of Annual Meetings of the Members.
	<b>List of Mortgagees</b>	Enclosed is a List of Mortgagees entitled to notice of meetings of the Association as permitted by § 7.2 of the Declaration. Some lenders require that they be provided with notice of meetings or at least that the Condominium Documents provide that lenders be provided with notice of Meetings, if the lender requests that it be notified. Unless a lender has requested that it be notified of Meetings, no notice is required.
	<b>Minutes</b>	Enclosed is a draft of Minutes of First Annual Meeting of the Members. Attached as Exhibit A to the Minutes is a List of Members Entitled to Notice of Annual Meeting and Members Present in Person or by Proxy.

(F) **Association Operation Forms.**

#	Document Title	Comments
F.1	<b>Resale Certificate</b> (04/15/04 ed.)	Enclosed is a form of Resale Certificate required to be delivered by the Association to a buyer upon request pursuant to TUCA §82.157.
F.2	<b>Condominium Lien Affidavit</b> (04/15/04 ed.)	Enclosed is a form for use by the Association in the event of non-payment of assessments.

### **Checklist of MOB Condominium Sales Contract Provisions**

The following is a Checklist of provisions in the MOB Condominium Sales Contract and its Attachments

#### **Sales Contract**

<b>¶</b>	<b>Paragraph Heading</b>	<b>Comments</b>
2A	<b>Property</b>	The Sales Contract calls for there to be attached as Addenda a Site Plan depicting the layout of the Building on the Property and a Floor Plan of the Unit. Attached to the Sales Contract are cover sheets for these Addenda containing various disclaimers. The Sales Contract contemplates an assignment without recourse of any manufacturer's warranties on "consumer products" incorporated into the Units.
2B	<b>Condominium Documents</b>	The Sales Contract provides alternative boxes as to whether Buyer has received a copy of the Condominium Documents prior to executing the Sales Contract. The Texas Uniform Condominium Act permits parties to a nonresidential condominium sales contract to waive the Purchaser Protections set out in Subchapter D of TUCA. These protections include a requirement that the Buyer be provided with a copy of the Condominium Documents and a comprehensive Condominium Information Statement prepared in accordance with TUCA. I have added a provision to Paragraph 2C whereby Buyer waives the provisions of Subchapter D of TUCA. Despite having done so, I have drafted the Contract to provide by contract some of the protections of Subchapter D of TUCA, such as providing the Buyer before or after execution of the Contract with the Condominium Documents and a Commercial Condominium Information Statement. This approach will avoid the rigors of preparing a Condominium Information Statement meeting and continuing to comply with the rigors of Subchapter D of TUCA, but affording the Buyer with these documents. This approach also allows for full disclosure. Buyer should sign the separate Receipt for the Condominium Documents signifying that it received and reviewed the Condominium Documents. I have provide a form of Receipt in the Sales Package.
2C	<b>Commercial Condominium Information Statement</b>	The Sales Contract states that the Buyer has received a copy of the Commercial Condominium Information Statement prior to executing the Sales Contract. The Buyer should sign the separate Receipt for the CCIS signifying that it received and reviewed the CCIS prior to executing the Sales Contract. As noted above, the Sales Contract provides for waiver by Buyer of application of the provisions of Subchapter D of TUCA to the transaction. I have provided in the Sales Contract this waiver. However, I have included in the Sales Contract an alternative form of disclosure document (the CCIS) so that this type of information is provided to a Buyer in connection with its decision to buy a Unit.

3 & 4	<b>Sales Price</b>	
5	<b>Earnest Money</b>	The Sales Contract provides for an initial amount of Earnest Money payable at contract execution and an optional additional amount to be deposited "within ____ days" after contract execution. The Title Company selected by the Seller acts as the escrow agent.
6	<b>Title Policy</b>	<p>The Sales Contract contains alternative choices as to who pays for the Title Insurance. The Sales Contract differs from the TREC approach as the Buyer is not afforded the opportunity to review a title commitment and to object to matters reflected therein. The Buyer is protected by the Title Policy to be issued at closing. The Title Company probably will proceed as it normally does in providing the Buyer with a title commitment, but the step of affording the Buyer the right to terminate the Sales Contract based on its review of the title commitment and its exceptions is eliminated. The standard list of Title Exceptions is revised to include the following exceptions:</p> <p>(a) <b>Matters in Progress.</b> ¶ 6A(5) (also see ¶ 11A(2)) is an exception for any easements reserved or granted by Seller in connection with the development of the Condominium or in developing adjacent property, and for management agreements, service contracts and other agreements not of record executed by the Seller prior to the formation of the Association or by the Association after its formation.</p> <p>(b) <b>Construction.</b> ¶ 6A(11) is an exception for any pre-closing work that may be requested or undertaken by Buyer.</p>
7A	<b>Inspection</b>	¶ 7A provides the Buyer the right to inspect the Unit prior to closing. But, Buyer is not afforded an out based on its post contract inspection of the Unit. Buyer is to make an appointment with Seller at least 2 days in advance.
7B	<b>As Is</b> <b>Limited Warranty</b>	¶ 7B provides that the sale is "as is: except for tghe limited warranties to be provided by the Seller as set out in the Limited Warranty and Service Procedures Agreement to be provided by Seller in connection with each sale.. Seller also assigns its interest in any manufacturer warranties. If you are not providing a post-closing warranty, then this provision will need to be revised.
8	<b>Broker's Fees</b>	¶ 8 is the standard TREC provision requiring any commission agreements to be in writing.
9	<b>Closing</b>	This provision permits the Title Company to be designated by the Seller. This form has alternate provisions addressing determination of the Closing Date, depending on whether or not the sale contract is executed before or after construction of improvements of the Project. The Contract will need to be revised prior to its use.

11	<b>Special Provisions</b>	<p>(a) <b>Reserved Rights.</b> ¶ 11A(1) provides that Seller may impose additional covenants, agreements and easements on the Project after execution of the Sales Contract but prior to the closing of the first sale, so long as they do not substantially or materially affect the use of the property as a residential condominium.</p> <p>(b) <b>Seller's Rights.</b> ¶ 11A(2) provides that the Seller reserves certain rights to assist it in marketing the unsold Units.</p> <p>(c) <b>Financial Information.</b> ¶ 11B requires the Buyer to submit financial information to Seller, if requested by Seller. Seller is also permitted to make credit inquiries.</p>
12 & 13	<b>Closing</b>	<p>(a) <b>Association Reserve.</b> ¶ 12B(2) provides for Buyer to post with the Association 4 months' reserve.</p> <p>(b) <b>Utilities.</b> ¶ 12B(5) provides for Buyer to make all utility continuance arrangements.</p> <p>(3) <b>Insurance.</b> ¶ 13 provides for tax proration and for Buyer to reimburse Seller for any prepaid insurance paid by Seller on the Association's master policy.</p>
14	<b>Casualty Loss</b>	¶ 14 provides that in the event that the Project is damaged or destroyed prior to closing (fire, <i>etc.</i> ), Seller may elect to terminate the Sales Contract or may elect to continue the contract for up to 90 days if the damage may be repaired within 90 days.
15	<b>Default</b>	
16	<b>Dispute Resolution</b>	¶ 16 provides for mediation and binding arbitration of disputes.
25A	<b>No Oral Agreements</b>	¶ 25A provides that there are no oral agreements or understandings and provides specific disclaimers (e.g., investment potential or resale potential, tax advice, and square footage).
25E	<b>Performance</b>	¶ 25E provides that time is of the essence.

26	<b>Releases, Waivers, and Indemnities</b>	¶ 26 contains various releases, waivers and indemnities not contained in the standard TREC form, including waiver by the Buyer of its rights to seek damages under the DTPA (Buyer can still seek recourse for misrepresentation), waiver by both parties of jury trial (dispute resolution is to be by arbitration not lawsuits), waiver of rights to punitive damages by either party, and a release and indemnity by the Buyer as to claims arising out of injuries due to Buyer or Buyer's invitees being on site prior to closing. The nature of these provisions requires that they be in conspicuous type and be worded in the manner they are worded.
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### Attachments to Sales Contract

The Sales Contract has attached to it the following Addenda (the CCIS can be a separate booklet due to its length).

	<b>Document Title</b>	<b>Comments</b>
A & B	<b>Site and Floor Plans</b>	This document is a cover sheet to the Site Plan and Floor Plan you are preparing. This document contains various disclaimers applicable to properties under construction where variances may occur between graphic depictions of a unit and the as-built unit and project.
C	<b>CCIS and Buyer's Receipt</b>	Three separate originals of these documents need to be signed by Seller and Buyer at the time of execution of the Sales Contract.
D	<b>TREC Form Agreement for Mediation</b>	This form should be completed by the designation of a mediator acceptable to you. I would be glad to suggest a list of mediators for your consideration. Three separate originals of these documents need to be signed by Seller and Buyer at the time of execution of the Sales Contract.
E	<b>TREC Form Information About Brokerage Services</b>	Three separate originals of these documents need to be signed by Seller and Buyer at the time of execution of the Sales Contract.
F	<b>Shell Space Finish-Out Addendum</b>	This Addendum sets out Buyer's obligation to complete the Finish-Out in accordance with Specifications to be contained in the CCIS

**E.3****COMMERCIAL CONDOMINIUM SALES CONTRACT**

1. **PARTIES:** \_\_\_\_\_ **Office Park, L.P.**, a Texas limited partnership ("**Seller**") agrees to sell and convey to the undersigned Buyer ("**Buyer**") and Buyer agrees to buy from Seller the Property described below. This Commercial Condominium Sales Contract together with all addenda and exhibits attached hereto, floor plans and specifications, all written consents, written selections executed or initialed by the parties pursuant hereto and all written amendments hereto executed by the parties are collectively called the "**Contract**." All capitalized terms in this Contract, not otherwise defined herein, have the meaning given to such term in the Condominium Documents.

2. **PROPERTY AND CONDOMINIUM DOCUMENTS:**

- A. **PROPERTY. (Select one):**
- ☐ Building Site (Building Site Only Addendum attached)
  - ☐ Shell Building on Building Site (Unfinished-Out Shell Space Addendum attached)
  - ☐ Finished-Out Shell Building on Building Site (Turnkey Addendum attached)

For Suite \_\_\_\_\_ in Building \_\_\_\_\_, of \_\_\_\_\_ Office Park, A Condominium, located at \_\_\_\_\_ Street, \_\_\_\_\_, \_\_\_\_\_ County, Texas 785\_\_\_\_, described in the Condominium Documents and Plat and any amendments thereto of record or to be recorded in \_\_\_\_\_ County, Texas as of Closing (preliminary copies of the Condominium Documents are being provided to Buyer); together with such Suite's undivided interest in the Common Elements designated by the Declaration, including those areas reserved as Limited Common Elements appurtenant to the Suite and such other rights to use the Common Elements which have been specifically assigned to the Suite in any other manner ("**Unit**"). The Condominium is being constructed or is constructed upon and includes as Common Elements the land (the "**Project Property**") depicted in the Condominium Documents and CCIS.

All property sold or assigned by this Contract is called the "**Property**."

- B. **CONDOMINIUM DOCUMENTS.** Seller is in the process of constructing a commercial condominium project, which is to consist of 10 commercial units, subject to expansion if additional land is added to the project (together, the "**Condominium**"). The Condominium is to be a condominium regime created by filing for record prior to Closing of the sale to Buyer of a Declaration and other Condominium Documents referenced in Paragraph **2B** pursuant to the Texas Uniform Condominium Act ("**TUCA**"). The Condominium Declaration, Bylaws, Community Policies, and Rules of the Association are called "**Condominium Documents**."

- ☒ (1) Buyer has received a copy of the Condominium Documents. Buyer is advised to read the Condominium Documents before signing the Contract.
- ☐ (2) Buyer has not received a copy of the Condominium Documents. Seller shall deliver the Documents to Buyer within \_\_\_\_\_ days after the effective date of the contract. Buyer may cancel the contract before the sixth day after Buyer receives the Condominium Documents by hand-delivering or mailing written notice of cancellation to Seller by certified United States mail, return receipt requested.

- C. **COMMERCIAL CONDOMINIUM INFORMATION STATEMENT.** The Commercial Condominium Information Statement is called the "**CCIS**." The CCIS provided by Seller to Buyer is not in the form provided by Section 82.153 of the Texas Property Code for residential and other condominium projects where the Buyer has not waived Subchapter D of TUCA. As permitted by Subchapter D of



TUCA for nonresidential condominium projects, Buyer waives the requirements, application and protections afforded by Subchapter D of TUCA.

- ☒ (1) Buyer has received the CCIS. Attached as an **Addendum** is a copy of the CCIS and is incorporated herein by this reference as part of the Contract. Buyer is advised to read the CCIS before signing the Contract.
- ☐ (2) Buyer has not received a copy of the CCIS. Seller shall deliver the CCIS to Buyer within \_\_\_\_\_ days after the effective date of this contract. Buyer may cancel this contract before the 6<sup>th</sup> day after Buyer receives the CCIS by hand-delivering or mailing, by certified United States mail, return receipt requested, a written notice of the cancellation to Seller.

Attached to the CCIS is a preliminary Budget of the proposed Condominium owners' association (the "**Association**") based upon Seller's good faith estimate of the common expense charges, capital reserves, insurance premiums and ad valorem taxes for the initial year of operation of the Condominium (the budget as revised from time to time by Seller or upon formation of the Association the budget, as adopted by the Association, is called the "**Budget**"). Buyer acknowledges that the Budget has been based upon the Seller's good faith estimate of such costs and does not constitute a representation or warranty on the part of the Seller as to accuracy thereof, and in the event the actual costs are greater than those which were projected in the Budget, Buyer shall have no recourse against Seller.

D. MODIFICATION OF CONDOMINIUM DOCUMENTS. Seller reserves the right to modify the Condominium Documents as required or permitted by law, or by the Condominium Documents.

### 3. SALES PRICE:

A. Cash portion of Sales Price payable by Buyer at Closing .....	\$	<u>All cash</u>
B. Sum of all financing described below .....	\$	<u>                    </u>
C. Sales Price .....	\$	<u>                    </u>

The Sales Price shall not be subject to adjustment based upon square footage, net floor area or otherwise. Seller shall not be liable to Buyer as a result of any discrepancies in the actual measurements or square footage of the Property from those depicted in the Addenda, the Condominium Documents or otherwise. By accepting the Deed to the Property, Buyer waives any such claim or cause of action against Seller.

4. **FINANCING:** Buyer's purchase of the Property ☐ is ☐ is not conditioned upon Buyer obtaining financing. If Buyer's purchase of the Property is conditioned upon Buyer obtaining financing, the provisions of this Paragraph 4 apply.

If Buyer needs to obtain financing to close the purchase of the Property, within \_\_\_\_\_ days after the Effective Date of this Contract ("**financing application deadline**"), Buyer shall apply for all third party financing and make every reasonable effort to obtain financing. Buyer shall make application therefor to the lending institution designated by Seller ("**Lender Designated by Seller**") or to a lending institution selected by Buyer which is reasonably acceptable to Seller (the "**Lender Approved by Seller**," which in the case of either Lender is called herein the "**Buyer's Lender**"), and shall give Seller notice of the filing of such application. In the event that Buyer's application for financing is not submitted by the financing application deadline, Buyer shall be considered to be in default hereunder. If Seller notifies Buyer that Buyer has failed to timely furnish the financial or credit information required by the Buyer's Lender, or has otherwise failed to diligently pursue the loan application, and Buyer fails for 5 days to cure such deficiency, then Buyer shall be deemed to be in default hereunder, and Seller may terminate this

Contract and retain the earnest money, any interest accrued thereon, and any Change Order Payment as liquidated damages. Financing will be deemed to have been obtained when the Buyer's Lender determines that Buyer has satisfied all of lender's financial requirements (those items relating to Buyer's net worth, income and creditworthiness) and Seller is notified thereof by Buyer. If financing (including any financed PMI premium) is not obtained within 30 days after the financing application deadline and Seller is not notified thereof by Buyer ("**financing approval deadline**"), at Seller's election at any time thereafter this Contract will terminate and the earnest money and any interest accrued thereon and any Change Order Payment paid by Buyer to Seller will be refunded to Buyer. Seller is neither providing such financing nor paying any of the costs associated therewith.

## 5. EARNEST MONEY:

A. EARNEST MONEY. Buyer shall deposit \$\_\_\_\_\_ as initial earnest money with the escrow agent, immediately upon execution of this Contract by Buyer.

☐ Additional earnest money of \$\_\_\_\_\_ in the form of cash or certified or cashier's check payable to the escrow agent must be deposited by Buyer with escrow agent on or before\_\_\_\_ days after the Effective Date of this Contract.

If Buyer fails to deposit the earnest money, including both the initial earnest money and any additional earnest money specified herein (collectively the "**earnest money**"), as required by this Contract, Buyer will be in default and Seller may terminate this Contract without notice to Buyer or otherwise pursue Seller's other remedies against Buyer. Buyer and Seller agree that the damages flowing from Buyer's breach of this Contract are difficult to estimate, and that the earnest money represents a fair and reasonable estimate of those damages. Seller's retention of the earnest money is not intended by Seller and Buyer as a penalty. If Seller elects to terminate this Contract and retain the earnest money as liquidated damages as specified in this Contract, those liquidated damages retained by Seller shall be in lieu of all other damages, claims and remedies (except those provided for in Section 16, 17 and 26D(2) of this Contract), to which Seller may be entitled by reason of Buyer's breach of this Contract. Escrow agent immediately upon receipt of notice from Seller of such termination due to Buyer's failure to deposit with the escrow agent the additional earnest money shall deliver the initial earnest money deposit together with all accrued interest thereon with the necessity of notice to Buyer or consent of Buyer.

B. ESCROW AGENT. The escrow agent is the Title Company ("**escrow agent**") or such other financial institution or title company selected by Seller. If the escrow agent is the Title Company, Seller may select the financial institution that is the depository for the earnest money. The escrow agent may be the Seller's Lender.

C. ACCOUNT TYPE.

(1) The earnest money shall be placed in escrow and held in this state in an account designated for that purpose and shall be held in an institution whose accounts are insured by a governmental agency or instrumentality.

(2) The earnest money is not required to be deposited in an interest bearing account.

## 6. TITLE POLICY:

A. TITLE POLICY: Seller shall furnish to Buyer at ☐ Seller's expense ☐ Buyer's expense an owner policy of title insurance (the "**Title Policy**") issued by such Title Company as may from time to time be selected by Seller (the "**Title Company**") in the amount of the Sales Price, dated at or after Closing, insuring Buyer against loss under the provisions of the Title Policy, subject to the

promulgated exclusions (including existing building and zoning ordinances) and the following exceptions ("**Title Exceptions**"):

- (1) Restrictive covenants applicable to the platted subdivision in which the Property is located.
- (2) The standard printed exception for standby fees, taxes and assessments.
- (3) Liens created as part of any financing by Buyer.
- (4) Utility easements created by the Condominium Documents or plat of the subdivision in which the Property is located.
- (5) Any and all other covenants, conditions, easements, agreements, reservations, rights-of-way and restrictions affecting the Project Property and of record as of the Closing Date, including easements reserved or granted by Seller in connection with the development of the Condominium or developing adjacent property, and management agreements, service contracts and other agreements not of record executed by the Seller prior to the formation of the Association or by the Association after its formation, including by the Association during the Declarant Control Period.
- (6) The standard printed exception as to discrepancies, conflicts, shortages in area or boundary lines, encroachments or protrusions, or overlapping improvements, including any matter that would be disclosed by a current survey of the Property.
- (7) The standard printed exception as to marital rights.
- (8) The standard printed exception as to waters, tidelands, beaches, streams, and related matters.
- (9) Rights of parties in possession of portions of the Project Property other than the Suite being purchased by Buyer.
- (10) Such zoning or other restrictions upon the use of the Property as may be imposed by governmental authorities having jurisdiction thereof.
- (11) Liens for work done or materials furnished at the request of Buyer.
- (12) Taxes and assessments on the Property becoming due and payable after the Closing Date.

The Title Policy which is to be issued hereunder is to be delivered as soon as practicable after Closing. The Title Policy shall be in the form prescribed by the State Board of Insurance of the State of Texas, shall be dated as of the Closing Date, shall be issued to Buyer in the amount of the Sales Price and shall guarantee Buyer's title to be good and indefeasible subject only to the Title Exceptions. It is hereby agreed that, by the Title Company's commitment to issue Buyer the Title Policy and thereafter the delivery to Buyer of the Title Policy conforming to the forgoing provisions, all duties of Seller as to the sufficiency of title required hereunder shall be deemed to be fully performed by Seller; provided, however, that Seller shall not thereby be released from the warranties of its deed. Seller shall have the option, but not the obligation, at Seller's sole cost and expense, to cure or remove any defect in title. Seller may cure such defect by direct action or payment or by providing title insurance coverage against the defect or to pay Buyer at Closing (by credit toward the Sales Price) an amount of money which Seller reasonably estimates to be sufficient to fully discharge the defect. If Seller elects not to cure or is unable to cure the defect, Seller shall so notify Buyer prior to the Closing Date (or any extension thereof), and Buyer's sole and exclusive remedy shall be either (a) to terminate this Contract by giving Seller written notice thereof, in which event \$100 of the earnest money shall be paid to Seller as consideration for the execution of this Contract and the balance of the earnest money shall be returned to Buyer, and neither party thereafter shall have any further rights or obligations hereunder (except for the obligations of Buyer that this Contract expressly provides survives termination of this Contract), or (b) to elect to purchase the Property subject to the defect not so removed or cured, in which event the defect not removed or cured shall be deemed to be a permitted defect, and the Sales Price shall not be reduced by any amount. In the event Buyer fails to notify Seller of its election to terminate within 2 days after Seller's notice to Buyer that Seller has elected not to cure or is unable to cure, Buyer shall be deemed to have elected to accept such title as Seller can deliver. Buyer shall not be entitled to request or demand that any monies for construction liens be withheld from

any part of the Sales Price, if the Title Company is willing to issue the Title Policy without exception to any such construction liens. In the event any portion of the Project Property is taken by eminent domain, all awards pursuant thereto shall belong solely to Seller, in which event this Contract shall terminate and the earnest money shall be refunded to Buyer only if the area taken prohibits the construction of the Suite in the judgment of the Seller.

**B. NOTICES TO SELLER AND BUYER:**

- (1) Seller advises Buyer to have an abstract of title covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a Title Policy. If a Title Policy is furnished, the Commitment for Title Insurance should be promptly reviewed by an attorney of Buyer's choice due to the time limitations on Buyer's right to object.
- (2) Buyer is advised that the presence of wetlands, toxic substances, including asbestos and wastes or other environmental hazards or the presence of a threatened or endangered species or its habitat may affect Buyer's intended use of the Property. If Buyer is concerned about these matters, an addendum either promulgated by TREC or required by the parties should be used.
- (3) Seller may continue to show the Property for sale and to receive, negotiate and accept back-up offers.
- (4) If the Property is situated in a utility or other statutorily created district providing water, sewer, drainage, or flood control facilities and services, Chapter 49 of the Texas Water Code requires Seller to deliver and Buyer to sign the statutory notice relating to the tax rate, bonded indebtedness, or standby fee of the district prior to final execution of this Contract.
- (5) If the Property abuts the tidally influenced waters of the state, Section 33.135, Texas Natural Resources Code, requires a notice regarding coastal area property to be included in the Contract. An addendum either promulgated by TREC or required by the parties should be used.
- (6) If the Property is located outside the limits of a municipality, Seller notifies Buyer under §5.011, Texas Property Code, that the Property 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. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the Property is located within a municipality's extraterritorial jurisdiction or is likely to be located within a municipality's extraterritorial jurisdiction, contact all municipalities located in the general proximity of the Property for further information.

**7. PROPERTY CONDITION:**

- A. **INSPECTION.** If Buyer desires to inspect, examine or survey the Property after the Effective Date of this Contract, Buyer may do so until Closing, at Buyer's sole expense and risk, but this Contract is in no way contingent upon any such inspection, examination or survey. Inspections, examinations or surveys of the Property must be scheduled with Seller by appointment made at least 2 days in advance of the day approved by Seller. Buyer will not have access at any time to the Property except upon having scheduled an appointment at a time approved by Seller. This provision shall survive termination of the Contract.
- B. **WARRANTIES: EXCEPT AS EXPRESSLY CONTAINED HEREIN, SELLER MAKES NO, AND DISCLAIMS ALL, REPRESENTATIONS OR WARRANTIES IN CONNECTION WITH THE PROPERTY AND THE CONDOMINIUM PROJECT AND BUYER AGREES THAT BUYER IS ACQUIRING THE PROPERTY "AS IS" AND "WHERE IS."**

*Nothing herein shall limit the special warranty of title contained in the Deed.*

8. **BROKERS' FEES:** All obligations of the parties for payment of brokers' fees are contained in separate written agreements.

9. **CLOSING:** The Closing of the sale (the "**Closing**") shall occur on or before the Closing Date at the office of the Title Company or at such other location as shall be selected by Seller. The address of the Title Company designed in Paragraph 6A is Title Company, \_\_\_\_\_ Street, Suite \_\_\_\_\_, Texas 78\_\_\_\_, Attn: \_\_\_\_\_, (\_\_\_\_) \_\_\_\_\_ and Fax (\_\_\_\_) \_\_\_\_\_.

Seller shall notify Buyer of the date of closing (referred to herein as the "**Closing Date**"). The Closing Date selected by Seller shall be not more than \_\_\_\_ days after the Effective Date of this Contract. The Closing may at Seller's election be extended to permit Seller to cure any objections to the title to be conveyed by Seller as raised by the attorneys for the Title Company or to complete construction of all or part of the Project. The notice from Seller to Buyer shall specify the time and date of the Closing. Buyer waives any claim Buyer may have against Seller due to the Closing Date being outside of an interest rate lock in period selected by Buyer. If Buyer locks in, Buyer does so at Buyer's own risk. It is Buyer's responsibility, and not Seller's responsibility, to cause Buyer's Lender to process Buyer's loan in time to close by the Closing Date, including processing of the appraisal, survey, and loan closing document preparation. If either party fails to close this sale by the Closing Date, the non-defaulting party will be entitled to exercise the remedies contained in Paragraph 15.

10. **POSSESSION:** Seller shall deliver possession of the Property to Buyer on delivery of the Sales Price to Seller.

# 11. **SPECIAL PROVISIONS:**

## A. **RESERVED RIGHTS.**

- (1) Seller reserves the right to impose upon the Property and the Association, prior to Closing, restrictive covenants, agreements, and easements, so long as the same do not substantially or materially affect the use of the Property as a commercial condominium.
- (2) Until such time as all of the Units in the Condominium have been sold, Seller reserves the right to make such use of the unsold Units and the Common Elements as are necessary for its sales and marketing program. Such use, however, shall not unreasonably interfere with the enjoyment of the Condominium by the owners of the Condominium Units including Buyer. Seller reserves the right to lease or rent all remaining unsold Units to such persons and upon such terms as Seller may determine in its sole discretion, subject to the terms and provisions of the Condominium Documents and applicable laws.

B. **SUBMISSION OF INFORMATION TO SELLER.** By executing this Contract Buyer authorizes Seller to make credit inquiries concerning Buyer. Buyer shall cooperate fully with Seller to facilitate Seller's credit inquiries. Within 5 days after Buyer signs this Contract ("**financial information submission period**"), Buyer agrees to deliver to Seller's interim construction loan lender or other lender loaning funds to Seller ("**Seller's Lenders**") and to Seller evidence of Buyer's ability to finance the Sales Price by third party financing or pay all cash, if third party financing is not to be obtained by Buyer. In the event Buyer does not submit Buyer's financial information to Seller and Seller's Lenders during the financial information submission period, Seller may terminate this Contract and receive the earnest money and any interest accrued thereon and retain any Change Order Payment paid to Seller as liquidated damages. If Buyer fails to obtain Seller's Lenders' approval to purchase the Property within 30 days after the financial information submission period, this Contract at Seller's election may be terminated and all sums theretofore paid by Buyer hereunder shall be returned to Buyer without interest. Buyer releases and waives any claim it may have against Seller and Seller's Lenders, if Seller's Lenders do not approve Buyer to purchase the Property. Buyer represents that the financial information submitted in connection with this Contract is true and accurate.

**12. SETTLEMENT AND OTHER EXPENSES:****A. SELLER'S ACTIONS.**

- (1) **TAX STATEMENTS.** Seller shall furnish tax statements or certificates showing no delinquent taxes.
- (2) **DEED.** Seller shall furnish Buyer a special warranty deed conveying good and indefeasible title showing no additional exceptions to those permitted in Paragraph 6 and such matters as would be disclosed by a current survey of the Property. Buyer, upon the acceptance of the Deed, agrees to assume and to perform all of the obligations of Seller under the Title Exceptions applicable to the Property, agrees to pay ad valorem taxes for the current and subsequent years and agrees to perform and to assume all of the obligations, conditions and covenants under the Condominium Documents applicable to the Property.

**B. BUYER'S ACTIONS.**

- (1) **SALES PRICE.** Buyer shall pay Seller the Sales Price in cash on or before 11:00 A.M. on the Closing Date, subject to the credits, adjustments and prorations herein provided.
- (2) **ASSOCIATION RESERVE.** Buyer shall pay 4 months of estimated common expense charges in advance to the Association.
- (3) **SURVEY.** Buyer shall pay for any survey, survey update or re-certification ordered by Buyer.
- (4) **PRORATIONS.** Buyer shall pay Buyer's share of any prorated items as determined in accordance with Paragraph 13.
- (5) **UTILITIES.** Buyer shall make all arrangements for continuing utility service as of Closing, including making standard utility deposits with the utility providers.

**13. PRORATIONS:** Taxes for the current year, maintenance fees, Condominium assessments, insurance, dues and rents will be prorated through the Closing Date. If taxes for the current year vary from the amount prorated at Closing, the proration made at Closing shall be final and shall not be later adjusted or corrected. Cash reserves from regular Condominium assessments for deferred maintenance or capital improvements established by the Association will not be credited to Seller. Buyer shall reimburse Seller for the Property's prorata share of insurance policies of the Association and of insurance policies covering the Property prepaid by Seller. Buyer shall pay the premium for any additional insurance policies required by Buyer's Lender or the Association. If taxes are not paid at or prior to Closing, Buyer will be obligated to pay taxes for the current year. Buyer shall be responsible for all utility charges of the Unit from and after Closing and Buyer shall reimburse Seller within 2 days of request by Seller for any utility charges billed to the Seller for the Unit for the day of Closing and thereafter.

**14. CASUALTY LOSS:** In the event that any part of the Property should be damaged or destroyed before the consummation of this transaction, Seller may at Seller's election, cancel and terminate this Contract, in which event the earnest money shall be refunded to Buyer; or, if Seller shall elect to repair such damage, this Contract shall remain in full force and effect. No title shall pass to Buyer prior to Closing. Notwithstanding anything contained in this Contract to the contrary, in the event Buyer cannot take possession of Buyer's Unit or any part thereof by reason of any casualty damage thereto, Seller shall not be responsible or liable for reimbursing Buyer for any costs, expenses, or damages suffered or incurred by Buyer as a result of such delay or damage, and specifically shall not be responsible for any costs and expenses incurred by Buyer in obtaining alternate accommodations pending the repair of the damage, nor

for any costs incurred in having to store or move Buyer's furniture or other belongings pending completion of such repair work.

**15. DEFAULT:** If Buyer fails to comply with this Contract, Buyer will be in default, and Seller may either (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this Contract and receive the earnest money and any interest accrued thereon as liquidated damages, thereby releasing both parties from this Contract, except for liability for the provisions of this Contract that specifically state that they survive termination of this Contract. If Seller shall default in the performance of this Contract, Buyer, at Buyer's option, after giving Seller notice of such default and a reasonable opportunity to cure such default and upon failing to cure such default, may, subject to the arbitrating any disputes as herein provided, either (1) enforce specific performance hereof, seek such other relief as may be provided by law, or both, or (2) terminate this Contract, by notice in writing to Seller, and all sums paid by Buyer hereunder shall thereupon be returned to Buyer on demand with any accrued interest, thereby releasing both parties from this Contract, except for liability for the provisions in this Contract that specifically state that they survive termination of this Contract. Upon Buyer's election to terminate this Contract due to Seller's default, return of the earnest money with any accrued interest shall be Buyer's sole remedy. Failure by Buyer to so elect in writing and to deliver such election to Seller before Seller tenders performance of any omitted act or cure for its default shall constitute a waiver by Buyer of Seller's default.

**16. DISPUTE RESOLUTION:** If a dispute arises between Seller and Buyer or their successors and assigns (the "**parties**") as to whether a party has defaulted or as to any other matter relating in any manner to the Property or this Contract or the obligations arising out of this Contract and the Closing Documents, including claims of misrepresentation, warranty claims, fraud, fraudulent inducement, deceptive trade practice, construction defects, and/or in the event the Buyer claims that any personal injury, survival, wrongful death or damage to goods was caused by any defect in the design or construction of the Property (a "**dispute**"), then the dispute must proceed to a binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association as set out in the Condominium Documents, which are incorporated herein for this purpose, unless Seller waives specifically waives arbitration as the means of dispute resolution. If Seller does not waive arbitration as the means of dispute resolution, Buyer is bound to resolve the dispute by arbitration and hereby waives Buyer's legal right to file a lawsuit to resolve the dispute; this means that in such case, the final decision as to a dispute will be made by an arbitrator and not by a judge or jury. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. All meetings, arbitration hearings and other proceedings shall be in the county of the location of the Property. The costs of the arbitration shall be allocated by the arbitrator. The parties waive any right for the arbitrator to award punitive damages. Seller may join as parties to the arbitration other persons with which it has a contractual relationship whose contracts provide for arbitration of disputes, if the dispute between Seller and Buyer may involve liability of such third parties.

In rendering the award, the arbitrator shall state the reasons, therefor, including any computations of actual damages or offsets, if applicable. The parties agree to abide by and perform the award rendered by the arbitrator. If the non-prevailing party fails to comply with all aspects of the award within 30 days' following issuance of the award, then the prevailing party shall be entitled to seek enforcement of the award in any court of competent jurisdiction. If such enforcement becomes necessary, the prevailing party in such proceeding shall recover its reasonable attorney's fees, in addition to any other relief as to which that party may be entitled.

The provisions of this Paragraph **16** survive Closing of the sale to Buyer and also apply to any disputes, either before or after the Closing of the sale of the Property to Buyer.

**17. ATTORNEYS' FEES:** The prevailing party in any legal proceeding brought under or with respect to the transaction described in this Contract is entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorneys' fees.

**18. ESCROW:** The earnest money is deposited with escrow agent with the understanding that escrow agent is not (a) a party to this Contract and does not have any liability for the performance or nonperformance of any party to this Contract, (b) liable for interest on the earnest money and (c) liable for any loss of earnest money caused by the failure of any financial institution in which the earnest money has been deposited unless the financial institution is acting as escrow agent. At Closing, the earnest money must be applied first to any cash down payment, then to Buyer's closing costs and any excess refunded to Buyer. If both parties make written demand for the earnest money, escrow agent may require payment of unpaid expenses incurred on behalf of the parties and a written release of liability of escrow agent from all parties. If one party makes written demand for the earnest money, escrow agent shall give notice of the demand by providing to the other party a copy of the demand. If escrow agent does not receive written objection to the demand from the other party within 30 days after notice to the other party, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursal of the earnest money. Escrow agent's notice to the other party will be effective when deposited in the U.S. Mail, postage prepaid, certified mail, return receipt requested, addressed to the other party at such party's address shown below. Notice of objection to the demand will be deemed effective upon receipt by escrow agent.

**19. REPRESENTATIONS:** Seller represents that as of the Closing Date there will be no liens, assessments, or security interests against the Property which will not be satisfied out of the sales proceeds.

**20. FEDERAL TAX REQUIREMENT:** If Seller is a "**foreign person**," as defined by applicable law, or if Seller fails to deliver an affidavit that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service together with appropriate tax forms. IRS regulations require filing written reports if cash in excess of specified amounts is received in the transaction.

**21. AGREEMENT OF PARTIES:** This Contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this Contract are (*list*):

- ☒ A. Select One: ☐ Building Site Only Addendum  
☐ Unfinished-Out Shell Space Addendum  
☐ Turnkey Addendum
- ☒ B. Buyer's Receipt for CCIS.
- ☒ C. TREC Form Information About Brokerage Services.
- ☐ D. Other Addenda delivered at the time of execution of the Contract:

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**22. CONSULT YOUR ATTORNEY:** Real estate licensees cannot give legal advice. This Contract is intended to be legally binding. READ IT CAREFULLY. If you do not understand the effect of this Contract, consult your attorney BEFORE signing.

**23. CONSTRUCTION OF AGREEMENT:** The parties agree that this Contract shall be construed in accordance with the laws of the State of Texas; the parties hereto have chosen the law of the State of Texas to govern all aspects of this transaction even though Buyer may reside in a state other than Texas; and venue for all causes of action or lawsuits shall lie exclusively in the county of the location of the Property.



**24. NOTICES:** Except as otherwise herein expressly provided as another means of notice, all notices from Buyer to Seller must be in writing and are effective when received and by the Seller at Seller's address below, and in the case of notice to Seller pertaining to a Seller's default, disputes with Seller or the exercise of remedies when notice is additionally received by Seller's counsel in Paragraph 22.

Notices from Seller to Buyer are effective when mailed to, hand-delivered at, or transmitted by email or facsimile machine to Buyer at the address of Buyer as follows or to such other address of which Seller is aware.

**To Buyer at:**

**To Seller at:**

\_\_\_\_\_  
\_\_\_\_\_  
Telephone: (\_\_\_\_) \_\_\_\_\_  
Facsimile: (\_\_\_\_) \_\_\_\_\_  
Email: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
Telephone: (\_\_\_\_) \_\_\_\_\_  
Facsimile: (\_\_\_\_) \_\_\_\_\_  
Email: \_\_\_\_\_  
\_\_\_\_\_

**25. MISCELLANEOUS:**

- A. **NO ORAL AGREEMENTS OR REPRESENTATIONS.** There are no collateral understandings, representations or agreements other than those contained herein. No salesperson, employee, or agent of the Seller has the authority to modify the terms herein nor any authority whatsoever to make any reference, representation or agreement not contained in this Contract. No reference, representation or agreement contained herein shall be binding upon Seller or in any way affect the validity of this Contract or form any part hereof. Buyer acknowledges that no representations have been made by Seller, its agents or employees, in order to induce the Buyer to enter into this Contract, other than as expressly stated herein. Without limiting the generality of the foregoing, Buyer acknowledges that neither Seller nor its agents or employees have made any representations or statements to Buyer of the investment potential or resale potential at any future date, at a profit or otherwise, of the Property; nor has Seller, its agents or employees rendered any advice or expressed any opinions to Buyer regarding deductibility of depreciation on the Property or any other tax consequences of ownership of the Property (other than the customary real property taxes and interest deductions available to Buyer as a result of home ownership and financing); nor has Seller, its agents or employees made any representations as to the exact square footage of the Property.
- B. **CONTRACT ENTIRE AGREEMENT.** The Contract constitutes the sole and entire agreement between the parties. All prior agreements, whether oral or written, are hereby superseded. The provisions of this Contract may not be changed, altered or modified except in writing and signed by the Buyer and an officer of the Seller. Waiver by the Seller of any terms, conditions or provisions of this Contract shall not be construed as a waiver of any other or subsequent term, condition or provision of this Contract.
- C. **SEVERABILITY.** In any term, condition or provision of this Contract is declared illegal or invalid for any reason by a court or competent jurisdiction, the remaining terms, conditions and provisions of this Contract shall, nevertheless, remain in full force and effect.
- D. **GENDER.** Whenever the context of this Contract so requires, the masculine gender includes the feminine and the neuter, and the singular number includes the plural.

- E. **PERFORMANCE.** Buyer acknowledges and agrees that notwithstanding any rights at law or in equity arising out of this Contract, Buyer shall not assert any such rights, nor have any claim or cause of action (as a result of any matter or thing arising under or in connection with this Contract) against any person, firm, corporation or other legal entity, other than the person, person, firm, corporation or legal entity specifically named or defined as Seller herein, even though Seller may be found to be a nominee or agent of another person, firm, corporation or other legal entity, and this acknowledgment and agreement may be pleaded as an estoppel and bar against Buyer in any action or proceeding brought by Buyer to assert any of such rights, claims or causes of action. This Contract and the obligations of the parties hereto are performable in the county where the Property is located. The parties have chosen the law of the State of Texas to govern all aspects of this transaction even though Buyer may reside in a state other than Texas; and venue for all causes of action shall lie exclusively in Hidalgo County, Texas. If the expiration of any time period set forth herein falls on a Saturday, Sunday or legal holiday, such time period shall be deemed to expire on the next day which is not a Saturday, Sunday or legal holiday. The last day of any period of time described herein shall be deemed to end at 5:00 p.m., local time. **TIME IS OF THE ESSENCE IN THIS CONTRACT, AND FAILURE TO PERFORM WITHIN THE TIME SPECIFIED THEREFOR SHALL CONSTITUTE A BREACH OF THIS CONTRACT ON THE PART OF THE PARTY WHO FAILS TO PERFORM.**
- F. **ASSIGNMENT.** Buyer may not assign or pledge ("**assign**") this Contract or Buyer's rights hereunder including Buyer's interest in the earnest money without the prior written consent of Seller, and any attempt to do so is void and of no effect. It is the responsibility of Buyer to furnish Seller with satisfactory financial information regarding any proposed assignee. Any assigning Buyer is not released from liability arising by virtue of an assignment until after the Closing of the sale. Seller's failure to give its consent to an Assignment by Buyer shall not give rise to any claims or damages against Seller. Furthermore, neither this Contract nor a notice of this Contract may be recorded by Buyer. Seller's rights under this Contract are freely assignable without notice or consent of the Buyer. Seller shall have the right to assign this Contract to any person or entity which acquires the Project Property from the Seller, and upon such assignment all rights and obligations of Seller hereunder shall inure to and be assumed by the assignee and thereafter Buyer agrees to look solely to said assignee for performance of the Seller's obligations hereunder and not to Seller. Seller shall also have the right to collaterally assign this Contract as security for any loan obtained by Seller or Seller's assignee or successor.

## **26. RELEASES, WAIVERS AND INDEMNITIES:**

- A. **BUYER'S WAIVER OF CONSUMER RIGHTS.** Buyer knowingly, voluntarily and intentionally waives Buyer's rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 *et seq.*, Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of Buyer's own selection, Buyer voluntarily consents to this waiver. This provision shall survive Closing or termination of this Contract.

Buyer: \_\_\_\_\_

- B. **BUYER'S AND SELLER'S WAIVER OF JURY TRIAL.** To the maximum extent permitted by law, Seller and Buyer hereby knowingly, voluntarily and intentionally waive the right to a trial by jury in respect of any litigation based hereon, arising out of, under or in connection with this Contract, Buyer's entry on the Property prior to Closing, the conveyance of the Property to Buyer, or any course of conduct, course of dealing, statement (whether verbal or written) (including, without limitation, any action to rescind or cancel this Contract, and

any claim or defense asserting that this Contract was fraudulently induced or is otherwise void or voidable). This waiver is a material inducement for Seller to enter this Contract. This provision shall survive Closing or termination of this Contract.

Buyer: \_\_\_\_\_

Seller: \_\_\_\_\_

- C. **BUYER'S AND SELLER'S WAIVER OF PUNITIVE DAMAGES.** Seller and Buyer hereby knowingly, voluntarily and intentionally waive all punitive or exemplary damages which may arise out of the sale of the Property to Buyer, including arising out of any breach or other default by any party hereto. Neither punitive nor exemplary damages may be awarded by the arbitrator. This provision shall survive Closing or termination of this Contract.

Buyer: \_\_\_\_\_

Seller: \_\_\_\_\_

- D. **RELEASE AND INDEMNITY BY BUYER.** Buyer releases the released persons and indemnifies the indemnified persons for liabilities arising out of the acts or omissions of Buyer or of Buyer's agents, employees, contractors and invitees being on the Project Property prior to Closing at any time other than Scheduled Appointments ("Periods other than Scheduled Appointments") as follows:

- (1) **RELEASE BY BUYER.** Buyer hereby releases Seller, Seller's partners, employees, agents, contractors, and invitees, and their respective successors and assigns (the "released persons"), from and against all claims, causes of action, liabilities, costs, damages, and expenses (including attorneys' fees and court costs) arising prior to Closing of the sale of the Property to Buyer, which result from Buyer's or Buyer's agents', employees', contractors' or invitees' presence on the Project Property, including but not limited to the Property, at Periods Other than Scheduled Appointments, which released liabilities include but are not limited to liabilities by the released persons for bodily injury, disease, death or damage to property of Buyer and which released liabilities include liabilities arising in whole or in part out of the negligence of the released persons or their agents, employees, contractors or invitees. This provision shall survive Closing or termination of this Contract.

Buyer: \_\_\_\_\_

- (2) **INDEMNITY BY BUYER.** Buyer *indemnifies*, holds harmless, and defends Seller, Seller's partners, employees, agents, contractors, and invitees, and their respective successors and assigns (the "indemnified persons") from and against all liens, claims, causes of action, liabilities, costs, damages, and expenses (including attorneys' fees and court costs) arising prior to Closing out of Buyer's or Buyer's agents', employees', contractors' or invitees' presence on the Project Property, including but not limited to in the Property, resulting from or relating to the acts or omissions Buyer's or Buyer's agents, employees, contractors or invitees, including but not limited to liabilities for bodily injury, disease, death or damage to property, and including but not limited to liabilities arising in whole or in part out of the negligence or willful misconduct of Buyer or of Buyer's agents, employees, contractors or invitees, and including but not limited to liabilities arising in part out of the concurrent negligence of Seller or Seller's agents, employees, contractors or invitees. This provision shall survive Closing or termination of this Contract.

**Buyer:** \_\_\_\_\_

EXECUTED the \_\_\_\_\_ day of \_\_\_\_\_, 2004 (the "**Effective Date**"). The Effective Date of this Contract shall be the date on which the last to sign of Seller or Buyer shall execute this Contract. This Contract may be executed in multiple original counterparts, each of which shall be original for all purposes.

**SELLER:**

\_\_\_\_\_ Office Park, L.P.  
By: \_\_\_\_\_ Office Park, L.L.C.

By: \_\_\_\_\_  
\_\_\_\_\_, President

**BUYER:**

\_\_\_\_\_  
Buyer  
Buyer's SSN: \_\_\_\_\_

\_\_\_\_\_  
Buyer  
Buyer's SSN: \_\_\_\_\_

### BROKER INFORMATION AND RATIFICATION OF FEE

Seller has agreed to pay Other Broker \_\_\_\_\_ of the total sales price when Seller's Broker's fee is received. Escrow Agent is authorized and directed to pay Other Broker from Seller's Broker's fee at Closing.

\_\_\_\_\_  
Other Broker License No.  
represents ☐ Seller as Seller's Broker's subagent  
☐ Buyer only as Buyer's agent

\_\_\_\_\_  
Selling Associate Telephone

\_\_\_\_\_  
Broker Address

\_\_\_\_\_  
Telephone Facsimile

Listing Broker:

\_\_\_\_\_  
License No. \_\_\_\_\_ Listing Broker  
\_\_\_\_\_  
\_\_\_\_\_, Texas 78\_\_\_\_  
Telephone: (\_\_\_\_) \_\_\_\_\_ Local  
Fax: (\_\_\_\_) \_\_\_\_\_  
Email: \_\_\_\_\_

represents ☐ Seller and Buyer as an  
Intermediary  
☒ Seller only as Seller's Agent

By: \_\_\_\_\_

\_\_\_\_\_

## **Addendum to Commercial Condominium Contract**

### **Building Site Only Addendum**

This Addendum is incorporated into and amends the Commercial Condominium Contract between the undersigned Seller and Buyer. In the event of any conflict between the provisions of this Addendum and the Contract, the provisions of this Addendum control. The provisions of this Addendum shall survive Closing.

**1. BUILDING SITE AND SHELL PLANS.** The Property being sold by Seller to Buyer consists of (a) a building site for Buyer's construction of the Building, including exterior and interior finish out, and (b) basic plans and specifications for the shell of the Building (the "**Shell**"). The building site provided by Seller includes water, sewer, electrical and telephone utilities extended to the boundary of the building site.

**2. CONSTRUCTION.** Buyer will be solely responsible for all items required for the construction of the Shell and the finishing of the interior and exterior of the Building (the "**Finish-Out**") on the Building Site, including obtaining and paying for all required permits and other governmental approvals, connection to utilities, including tap fees (collectively, the "**Construction**"). Buyer agrees that the Construction shall be constructed in a good and workmanlike manner. All of Buyer's Construction must comply with any applicable rules and regulations of the Association, including those provided to Buyer with the Condominium Documents. Buyer acknowledges that the Construction must be designed and constructed in compliance with all applicable federal and state accessibility laws, including the Architectural Barriers Law (Art. 9102, Texas Revised Civil Statutes) and the Americans with Disabilities Act. Buyer's Construction plans and specifications for construction of the Unit ("**Construction Plans and Specifications**") must be reviewed and approved by the Seller, which consent shall not be unreasonably withheld, and by the Association pursuant to the procedures and provisions in the Condominium Documents, each at Buyer's sole cost, and prior to commencement of Construction. All contracts to be entered into by Buyer for Construction of the Unit ("**Construction Contracts**") must be reviewed and approved by the Seller, which consent shall not be unreasonably withheld, and by the Association pursuant to the procedures and provisions in the Condominium Documents, each at Buyer's sole cost, and prior to commencement of Construction. Buyer's Construction Contract shall contain the following provisions, compliance with which is a condition to contractors entry and presence on the Condominium Project: (1) Contractors shall obtain and furnish to the Association and Seller prior to commencement of construction and maintain throughout Construction insurance complying with the requirements of the Insurance Schedule attached hereto ("**Insurance Schedule and Contract Provisions**"). (2) Contractors are to furnish to the Association and to Seller a certificate of insurance complying with the requirements of the Insurance Schedule. (3) Contractors shall expressly acknowledge in a writing in form and substance delivered to the Association and to Seller that (a) the Construction is being completed for and on behalf of Buyer, and not on behalf of the Association, Declarant or Seller; (b) Buyer is not the agent or contractor for the Association, Declarant or Seller; (c) Contractor waives, and will obtain waivers from all of its subcontractors and suppliers, any lien against the Condominium Project except for Buyer's right, title and interest in Buyer's Unit; (d) the Construction is to be done in a good and workmanlike manner in accordance with the Construction Plans and Specifications approved by the Association; (e) All Construction shall comply with applicable governmental laws, rules and regulations and all permits and approvals shall be obtained and a copy thereof furnished to the Association; (f) if required by the Association, Declarant or Seller, the contractor shall furnish payment and performance bonds covering faithful performance of the Construction, with the payment bond being a Texas Hardeman Act Bond recorded with the County Clerk prior to commencement of the Construction, issued by a corporate surety authorized to do business in Texas and licensed by the State of Texas to execute bonds a surety, in an amount at least equal to 100% of the contract sum of the Construction Contract, and shall name the Association as an additional obligee in addition to Buyer; and (g) the Construction Contract shall contain the Contract Provisions set out in the Schedule attached hereto, including a broad form indemnity indemnifying the Association, Declarant and Seller from all liability arising out of the contractor's work.

## **Addendum to Commercial Condominium Contract**

### **Unfinished-Out Shell Space Addendum**

This Addendum is incorporated into and amends the Commercial Condominium Contract between the undersigned Seller and Buyer. In the event of any conflict between the provisions of this Addendum and the Contract, the provisions of this Addendum control.

**1. UNFINISHED-OUT SHELL SPACE.** The Property being sold by Seller to Buyer consists of (a) a building site for Buyer's construction of the Building, including exterior and interior finish out, and (b) an unfinished-out shell of the Building (the "**Shell**") constructed in substantial accordance with the Declaration and the Plans and Specifications for the Project. The building site provided by Seller includes water, sewer, electrical and telephone utilities extended to the boundary of the building site.

**2. CONSTRUCTION.** Buyer will be solely responsible for all items required for the finishing of the interior and exterior of the Shell of the Building (the "**Finish-Out**") on the Building Site, including obtaining and paying for all required permits and other governmental approvals, connection to utilities, including tap fees (collectively, the "**Construction**"). Buyer agrees that the Construction shall be constructed in a good and workmanlike manner. All of Buyer's Construction must comply with any applicable rules and regulations of the Association, including those provided to Buyer with the Condominium Documents. Buyer acknowledges that the Construction must be designed and constructed in compliance with all applicable federal and state accessibility laws, including the Architectural Barriers Law (Art. 9102, Texas Revised Civil Statutes) and the Americans with Disabilities Act. Buyer's Construction plans and specifications for construction of the Unit ("**Unit's Construction Plans and Specifications**") must be reviewed and approved by the Seller, which consent shall not be unreasonably withheld, and by the Association pursuant to the procedures and provisions in the Condominium Documents, each at Buyer's sole cost, and prior to commencement of Construction. All contracts to be entered into by Buyer for Construction of the Unit ("**Construction Contracts**") must be reviewed and approved by the Seller, which consent shall not be unreasonably withheld, and by the Association pursuant to the procedures and provisions in the Condominium Documents, each at Buyer's sole cost, and prior to commencement of Construction. Buyer's Construction Contract shall contain the following provisions, compliance with which is a condition to contractors entry and presence on the Condominium Project: (1) Contractors shall obtain and furnish to the Association and Seller prior to commencement of construction and maintain throughout Construction insurance complying with the requirements of the Insurance Schedule attached hereto ("**Insurance Schedule and Contract Provisions**"). (2) Contractors are to furnish to the Association and to Seller a certificate of insurance complying with the requirements of the Insurance Schedule. (3) Contractors shall expressly acknowledge in a writing in form and substance delivered to the Association and to Seller that (a) the Construction is being completed for and on behalf of Buyer, and not on behalf of the Association, Declarant or Seller; (b) Buyer is not the agent or contractor for the Association, Declarant or Seller; (c) Contractor waives, and will obtain waivers from all of its subcontractors and suppliers, any lien against the Condominium Project except for Buyer's right, title and interest in Buyer's Unit; (d) the Construction is to be done in a good and workmanlike manner in accordance with the Unit's Construction Plans and Specifications approved by the Association, Declarant and Seller; (e) All Construction shall comply with applicable governmental laws, rules and regulations and all permits and approvals shall be obtained and a copy thereof furnished to the Association; (f) if required by the Association, Declarant or Seller, the contractor shall furnish payment and performance bonds covering faithful performance of the Construction, with the payment bond being a Texas Hardeman Act Bond recorded with the County Clerk prior to commencement of the Construction, issued by a corporate surety authorized to do business in Texas and licensed by the State of Texas to execute bonds a surety, in an amount at least equal to 100% of the contract sum of the Construction Contract, and shall name the Association as an additional obligee in addition to Buyer; and (g) the Construction Contract shall contain the Contract Provisions set out in the Schedule attached hereto, including a broad form indemnity indemnifying the Association, Declarant and Seller from all liability arising out of the contractor's work.

## Addendum to Commercial Condominium Contract

### Turnkey Addendum

This Addendum (the "**Finish-Out Contract**") is incorporated into and amends the Commercial Condominium Contract between the undersigned Seller and Buyer. In the event of any conflict between the provisions of this Addendum and the Contract, the provisions of this Addendum control. Seller may assign the obligation to construct the Finish-Out to a third party contractor. Upon assignment, Seller is released of the obligation of this Finish-Out Contract. This Addendum survives Closing.

**1. FINISHED-OUT UNIT.** The Unit is being sold by Seller to Buyer prior to completion of its construction. Seller and Buyer shall cause the Unit to be completed in an expeditious manner in substantial accordance with the Declaration, the Plans and Specifications for the Project, and the Unit's Construction Plans and Specifications. The building site provided by Seller includes water, sewer, electrical and telephone utilities extended to the boundary of the building site.

**2. CONSTRUCTION.** After commencement of construction of the Finish-Out, Seller will diligently proceed with the construction of the interior and exterior of the Shell of the Building (the "**Finish-Out**") on the Building Site, including obtaining and paying for all required permits and other governmental approvals, connection to utilities, including tap fees (collectively, the "**Construction**") and make all reasonable efforts to substantially complete the Finish Out (*select one*) ☐ within \_\_\_ calendar days or ☐ on or before \_\_\_\_\_ (the "**Projected Completion Date**"), subject to permitted delays as defined below. Seller shall commence construction of the Finish-Out within 10 days after the later to occur of the following: (a) Closing of the sale to Buyer of the Shell has occurred; (b) the Construction Documents have been approved and initialed by both Seller and Buyer; (c) Buyer has obtained a construction loan or other financing acceptable to Seller; (d) building permits have been issued; and (e) Buyer has executed and delivered to Seller for recording any required mechanic's lien contract required by Buyer's Finish-Out lender, and Seller has received written notice from the lien holder and/or the title company insuring lien holder's security interest in the Property that all documents required to be recorded prior to the commencement of the Finish-Out have been properly recorded. The Projected Completion Date may be extended for one or more of the following causes: (a) Changes by Owner or Owner's representatives; (b) Failure of Owner to make selections as directed below, (c) Failure of Owner to make timely progress payments; (d) Prohibitive weather; (e) Fire or casualty loss; (f) Non-availability of labor or materials; (g) Delays caused by the applicable governmental entity's delay in issuing necessary permits; and (h) Other events beyond the Seller's reasonable control. Seller, within 30 days of a delay, shall give Buyer written notice of any extensions to the Projected Completion Date. The Construction shall comply with any applicable rules and regulations of the Association, including those provided to Buyer with the Condominium Documents. Buyer acknowledges that the Construction must be designed and constructed in compliance with all applicable federal and state accessibility laws, including the Architectural Barriers Law (Art. 9102, Texas Revised Civil Statutes) and the Americans with Disabilities Act. Seller shall prepare Construction plans and specifications for construction of the Unit ("**Construction Plans and Specifications**"), a construction schedule, and a budget, with allowances (the "**Budget**") (collectively together with this Contract, the "**Construction Documents**") to be reviewed and approved by the Buyer, which consent shall not be unreasonably withheld, delayed or conditioned, and by the Association pursuant to the procedures and provisions in the Condominium Documents, each at Buyer's sole cost, and prior to commencement of Construction. If the Construction Documents permit selections by Buyer, Buyer's selections will conform to Seller's normal standards as set out in the Construction Documents. Buyer will make required selections within 5 days after receipt of written notice from Seller ("**selection period**"). If Buyer does not make the selections within the selection period, Seller may at its election terminate this Finish-Out Contract. Allowance items ("**Allowances**") are any Finish-Out components shown in the Construction Documents for which a specified dollar amount is allotted to cover unknown material or labor selections, such as fixtures, floor coverings, appliances, etc. Allowances include, without limitation, tax, material, shipping charges, and labor where applicable. In some cases, additional labor charges could be incurred. Selections of allowance items should be made at suppliers typically used by Seller to limit the possibility of unusual costs, delays, or



lack of appropriate service. All overages in expenditures from allowance amounts will be treated as a Change Order as defined below. The Projected Completion Date, as set forth above, will be automatically extended if allowance items are not selected according to the Seller's selection schedule. Buyer will verify all selections with the supplier and provide Seller with the proper information for ordering. Buyer understands that some materials selected will have a wide variation in color, pattern, and texture. Natural materials such as wood and stone, etc. should be selected with care and be approved by Buyer for use before shipment to the job site. The additional material or labor cost for any waste, spoilage, breakage, or culling shall be applied to the allowance for that item and a change order for any overages will be executed by Buyer and Seller. No alterations, additions or deletions will be made in the Finish-Out, unless agreed to in writing by Buyer and Seller. Buyer shall have the right to make changes in the Finish-Out, including, but not limited to, changes which either decrease, increase, or modify the Finish-Out or extend or otherwise change the Completion Date, by giving Seller a written change order request ("**Change Order Request**"), setting forth in reasonable detail the nature of the change. To approve a proposed change, both Buyer and Seller shall sign a written agreement referred to as a Change Order. Upon receiving, from Buyer, a written request for such change, detailing the nature of the changes to be made, Seller shall present Buyer with a proposal for the changes including any additional costs of construction, additional Seller's fee of \_\_\_\_\_ and any extensions to the Completion Date. If Buyer accepts, in writing, Seller's proposal for changes, this Change Order will become a binding attachment to the Finish-Out Contract Documents. Any Buyer if more than one Buyer or officer or agent for a Buyer may sign the Change Order as agent for the other, and that signature of one Buyer shall be binding on the other. Failure of Buyer to approve Seller's proposal for changes within 3 days after receipt shall constitute a rejection of the proposal. Seller shall be reimbursed at \$\_\_\_\_\_ per Hr., with a minimum fifty dollars, for all expenses and effort incurred in the production of any Change Order proposal not accepted by the Buyer. Buyer shall pay for all agreed upon Change Orders including the additional Seller's fee to Seller within 3 business days after Buyers acceptance of the proposal. Seller will not be obliged to proceed with any Finish-Out until any such amounts have been paid as agreed. Seller has no obligation to stop Finish-Out while change orders are being discussed. Notwithstanding the foregoing, Buyer agrees to execute Change Orders prepared by Seller for Changes in the Finish-Out (including any necessary increases to the Finish-Out Price) that may be necessary to: (1) Comply with applicable Governmental Requirements. (2) Provide structural integrity to the Improvements. (3) Route electrical, mechanical, or other systems included in the Finish-Out. (4) Avoid or correct any conditions which might result in defects or other warranty claims. (5) Correct or cure any omissions in the Construction Documents or any conditions not completely or correctly represented in the Construction Documents. (6) Notwithstanding the foregoing, Buyer agrees to execute Change Orders prepared by Seller for Changes in the Finish-Out (including any necessary increases to the Contract Price) that may be necessary to address overages in expenditures from Allowance amounts.

**3. SCHEDULED INSPECTIONS.** Buyer may have the Property inspected by an inspector selected by Buyer, licensed by TREC or otherwise permitted by law to make such inspections, at the following 3 milestones ("**Scheduled Inspections**"):

3.1 DRY WALL INSPECTION. Buyer is to inspect the Property upon completion of the interior dry wall partitioning for the Unit (the "**Dry Wall Inspection**"). Seller shall give Buyer at least 5 days' notice of dry wall completion. Buyer shall thereafter schedule Buyer's inspection with Seller for a time and date convenient for Seller within 7 days after dry wall completion. Buyer and Buyer's inspector must be accompanied by Seller during the Dry Wall Inspection.

3.2 SUBSTANTIAL COMPLETION. "**Substantial Completion**" is completion by Seller of the Finish-Out such that the city can issue a certificate of occupancy for Buyer's occupancy of the Finish-Out, but not necessarily free of minor punch list items ("**Substantial Completion**"). Buyer is to inspect the Finish-Out within 5 days of Seller notifying Buyer of Substantial Completion. Buyer must schedule the inspection ("**Substantial Completion Inspection**") for a time and date convenient for Seller. Buyer's inspector must be accompanied by Seller during the Substantial Completion Inspection. At such time as Buyer is entitled to occupy the Unit, Seller shall be released from any further obligation or duty for the maintenance of insurance coverage with respect to the Property and/or the care, repair, maintenance and condition of the Property, except as outlined in the Limited Warranty.

3.3 FINAL WALK THROUGH. Seller and Buyer shall schedule a final inspection of the Finish-Out as soon as reasonably practicable after Seller's notice to Buyer of Seller's completion of the punch list items identified in the Substantial Completion Inspection (the "**Final Walk Through**").

Attached to this Finish-Out Contract as an Exhibit are a Substantial Completion Inspection Worksheet and a Final Walk Through Acceptance which will be used by the parties for the Substantial Completion Inspection. Buyer is not to visit the or inspect Construction at any time other than at the Scheduled Inspections. A construction site is a dangerous place and Buyer is prohibited from entering the construction site before Closing except a the time of the Scheduled Inspections.

**4. FINISH-OUT PRICE.** *Select One:* ☐ Buyer agrees to pay Seller the sum of \$\_\_\_\_\_ or ☐ Buyer agrees to pay Seller a contract price equal to the sum of the "**Construction Costs**" (as defined in the Cost-Plus Addendum), plus a fee (the "**Builder's Fee**") as set out in the Cost-Plus Addendum (either, the "**Finish-Out Price**") as consideration for the construction and completion of the Finish-Out, subject to adjustment as allowed by this Addendum.

4.1 PAYMENTS. Should Buyer fail to make payment to Seller of the Finish-Out Price in any partial or final payment, when payment is due, then Buyer shall pay to Seller, in addition to the sum shown as due by such statement, interest at the maximum rate allowed by applicable federal and state law.

A. INITIAL PAYMENT - Prior to the commencement of the Work, Buyer shall pay to Seller \_\_\_\_\_% of the Finish-Out Price or \$\_\_\_\_\_ as a portion of the Finish-Out Price (the "**Initial Payment**"). Seller may use the Initial Payment for, among other things, initial Construction or pre-construction expenses, and as a portion of the Seller's fee. Notwithstanding anything herein to the contrary, the sum of \$\_\_\_\_\_ out of the Initial Payment shall be retained by the Seller if this Contract is terminated for any reason other than Seller's default.

B. PROGRESS PAYMENTS - During construction, as often as every other week, the Seller shall present Buyer with requests for payment ("**Progress Payment Request**"). Each payment ("**Progress Payment**") shall be made in normal construction phases or according to a draw schedule ("**draw schedule**") approved by Buyer, Seller, and interim lender, if any, and attached to this contract as an Exhibit, or provided by Seller after execution of this contract, Buyer shall cause these payments to be made to Seller within 2 business days following the receipt of the Progress Payment Request. In the event of a payment delay, Seller shall have the right to stop work progress until payment is made. Buyer and Seller agree that there will be no retainage of funds.

C. FINAL PAYMENT - The Final Payment (that portion of the Finish-Out Price not paid by previous payments as well as any Change Orders and Allowance variances) will be due and payable upon Final Completion of the Finish-Out.

4.2 ADJUSTMENTS. Increases in costs resulting from change orders or items selected by Buyer which exceed the Allowances, if any, specified in the Construction Documents will be paid by Buyer as follows. If Buyer desires any additions to or changes in the finish-out of the Buyer's Unit, then Buyer shall notify Seller in writing of such additions or changes. Seller shall have the right, in Seller's sole discretion, to approve or disapprove any such additions or changes and no such additions or changes shall be commenced until Buyer has approved, or been deemed to have approved the Condominium Documents and has obtained third party financing approval to purchase the Property. If Seller approves such changes, Seller shall notify Buyer in writing of the estimated cost thereof and Buyer shall deposit with Seller an amount equal to such estimate (the "**Change Order Deposit**") within 5 days after the receipt of Seller's notice. Seller may commingle the Change Order Deposit with other funds of Seller. Seller shall not owe Buyer interest on the Change Order Deposit. The actual cost of such approved additions or changes shall be paid out of the Change Order Deposit. In the event the actual cost of such additions or changes exceeds the amount of the Change Order Deposit, then Buyer shall pay such excess to Seller within 5 days after receipt from Seller of notice of such excess or anticipated excess. In the event Seller has commenced such approved changes or additions and the Contract is thereafter terminated for any reason whatsoever, except Seller's default, then Seller shall be entitled to retain the

balance of the Change Order Deposit as liquidated damages, and not as a penalty, due to such termination. Buyer acknowledges that the actual amount of Seller's damages would be impossible to determine. A decrease in costs resulting from change orders and unused allowances will reduce the Sales Price and loan amount accordingly.

**5. WARRANTIES.** Seller shall transfer to Buyer all manufacturers' warranties received by the Seller or any subcontractor. Seller will not be required to warrant, repair or correct any of the Work provided by any party other than the Seller or the Seller's subcontractors or employees. Seller shall not be obligated under any warranty given to Buyer until Seller has been paid in full. Seller shall correct any of the Finish-Out which is defective or which does not comply with the Construction Documents for a period of one year from the date of Substantial Completion of the Finish-Out. Buyer acknowledges that Buyer has received a copy of the "Limited Warranty and Service Procedures Agreement" (the "**Limited Warranty**") which is attached hereto as an Addendum and is incorporated herein by reference for all purposes. Buyer has accepted the limited warranty in lieu of any other warranties, expressed or implied, and all other warranties, including those of merchantability, habitability or fitness for a particular purpose, are waived by Buyer.

### **Schedule of Provisions for Construction Contracts**

References to "**Association**" is to \_\_\_\_\_ Office Park Condominium Owners' Association, Inc., the property owners' association governing \_\_\_\_\_ Office Park, and to "**Declarant**" is to \_\_\_\_\_ Office Park, L.P., the Declarant forming the Association, each of whom are to be contacted at \_\_\_\_\_, \_\_\_\_\_, Texas 78\_\_\_\_.

1. **Evidence of Insurance.** Evidence of the insurance coverage required to be maintained by the Contractor under this Contract, represented by Certificates of Insurance issued by the insurance carrier, must be furnished to the Owner, Association and Declarant prior to Contractor starting Work. Certificates of Insurance shall specify the insured status required herein, as well as the waivers of subrogation. All policies shall be issued by corporate insurers licensed to do business in the state of Texas and rated Policyholder's Rating of "A" and a Financial Size Rating of "7" or better by A. M. Best Company. Contractor shall evidence such insurance coverage by delivering to Owner, Association and Declarant Certificates of Insurance issued by the insurance companies underwriting such risks or their agency. The Certificates of Insurance shall be on an ACORD Form 27 for Property Insurance and an ACORD Form 25-S for Liability Insurance, provided Owner, Lessee and Lessor have been provided with a certified copy of all insurance policies, including all required endorsements, including endorsements dealing with additional insureds, loss payees, and waivers of subrogation, and such insurance policies and endorsements are in compliance with the requirements of the Contract Documents and provided (a) there is attached to the Certificate of Insurance a valid and binding Revised Cancellation Endorsement specifying the requirement of the carriers to give 30 day advance notice of cancellation or material change in the policies and the words "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives" shall be deleted from the certificate form's cancellation provision; and (b) Owner, Association and Declarant are authorized to contact the issuing insurance agency and the insurance carriers to confirm the existence of the coverages. Attached hereto as Exhibit A is the form of Certificate of Insurance which is to be provided by Contractor to Owner, Association and Declarant. Timely renewal certificates will be provided to Owner, Association and Declarant as the coverage renews.

2. **RELEASE AND WAIVER.** Contractor hereby releases, and shall cause its Subcontractors to release, Owner, Association, Declarant and the other Indemnitees from any and all claims or causes of action whatsoever which Contractor and/or its Subcontractors might otherwise possess resulting in or from or in any way connected with any loss covered or which should have been covered by insurance, including the deductible portion thereof, maintained and/or required to be maintained by Contractor and/or its Subcontractors pursuant to the Contract Documents.

### **3. INDEMNIFICATION.**

3.1. **Scope.** To the fullest extent permitted by applicable law, Contractor shall and does agree to indemnify, protect, defend and hold harmless the Owner, Association and Declarant, and their invitees, agents, successors and assigns, and their respective officers, directors, shareholders, employees and agents (collectively the "Indemnitees") from and against all claims, damages, losses, liens, fines, causes of action, suits, judgments, and expenses, including attorney fees, of any nature, kind or description of any person or entity, directly or indirectly arising out of, caused by, or resulting from (in whole or in part), (1) the Work performed hereunder, or any part thereof, (2) the Contract Documents, or (3) any act, omission, negligence, gross negligence, willful misconduct, or breach of warranty, express or implied of Contractor, any Subcontractor, anyone directly or indirectly employed by them, or anyone that they control or exercise control over, (collectively the "Liabilities"). Such Liabilities include but are not limited to injuries to or death of any person (including Contractor's or any subcontractor's employees) or damage to or loss of property occurring in, on or about the job site. The obligations of Contractor under this indemnification shall apply to Liabilities even if such Liabilities are caused in part by the negligence or strict liability of any Indemnitee. Contractor shall promptly advise Owner, Owner, Association, Declarant and the other Indemnitees in writing of any action, administrative or legal proceeding or investigation as to which this indemnification may apply, and Contractor, at Contractor's expense, shall assume on behalf of Owner, Association, Declarant and the other Indemnitees and conduct with due diligence and in good faith the defense thereof with counsel satisfactory to

Owner, Association, and Declarant; provided, however, that Owner, Association, Declarant and the other Indemnitees shall have the right, at their respective expense, to be represented therein by advisory counsels of their own selection and at their own expense. In the event of failure by the Contractor to fully perform in accordance with this indemnification paragraph, Owner and/or the other Indemnitees, at their respective option, and without relieving Contractor of its obligations hereunder, may so perform, but all costs and expenses so incurred by Owner and/or the other Indemnitees in that event shall be reimbursed by Contractor to Owner and the other Indemnitees, together with interest on the same from the date any such expense was paid by Owner or the other Indemnitees until reimbursed by Contractor, at the rate of interest provided to be paid on judgments under the laws of the State of Texas. This indemnification shall not be limited to damages, compensation or benefits payable under insurance policies, workers' compensation acts, disability benefit acts or other employees' benefit acts.

**3. Payment and Performance Bonds.** Contractor shall furnish bonds ("**Performance and Payment Bonds**") covering faithful performance of the Construction Documents and payment of obligations arising thereunder. The payment bond shall be a Texas Hardeman Act Bond, and sufficient for recording with the County Clerk (including the notarization of the signatures of the contractor and the Owner by a notary public) and by a corporate surety authorized and admitted to do business in Texas and licensed by the State of Texas to execute bonds as surety. The payment bond shall **NOT** be on an AIA bond form. The Performance and Payment Bonds shall name Owner as the "Owner" and insured and shall have attached thereto a Multiple Obligatee Rider naming the Association and any mortgagee as co-obligees. The amount of each bond shall be equal to at least 100% of the contract sum of the construction contract. The Contractor shall deliver the executed original required bonds to the Owner with copy to the Association before commencement of construction and shall not commence construction until after the bonds are filed for record. Contractor shall require the attorney-in-fact who executes the required bonds on behalf of the surety to affix thereto a certified and current copy of the power of attorney.

## **Addendum to Commercial Condominium Contract**

### **Sale of a Finished-Out Unit - Cost Plus Addendum**

This Addendum is incorporated into and amends the Commercial Condominium Contract between the undersigned Seller and Buyer. In the event of any conflict between the provisions of this Addendum and the Contract, the provisions of this Addendum control.

**1. CONSTRUCTION COSTS.** For the purposes of this Contract, "**Construction Costs**" are defined as those cost categories listed in the attached Schedule of Estimated Construction Costs. Any amounts shown on the Schedule of Estimated Construction Costs are estimates only and do not guarantee or set any sum as the actual cost of any listed category. In the absence of a Schedule of Estimated Construction Costs, Construction Costs are defined as all costs incurred by the Seller as a result of the Work, except for the following costs, which shall be paid by the Seller from the Builder's Fee: (1) Salaries, wages, and other compensation for the Seller or the Seller's personnel stationed at the Seller's offices or at other sites not related to the Finish-Out. (2) Expenses and operating cost of the Seller's offices. (3) General overhead expenses of the Seller. (4) Marketing and promotional expenses of the Seller. (5) Capital and bank expenses of the Seller. (6) Any costs not related to the Finish-Out.

**2. BUILDER'S FEE.** The Builder's Fee is \$\_\_\_\_\_.

**3. PAYMENTS.** Final Payment shall also include all those costs projected or anticipated by the Seller for invoices not yet received, however, additional costs may be incurred for those items, if any, listed in the Certificate of Substantial Completion. Buyer agrees to pay any additional costs or expenses incurred after Substantial Completion, promptly upon request of Seller.

		Date (MM/DD/YY)
<div>ACORD™ PRODUCER</div> <div>CERTIFICATE OF LIABILITY INSURANCE</div>		
		<div>THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, ALTER, SUPPLEMENT OR OTHERWISE MODIFY THE COVERAGE AFFORDED BY THE POLICIES BELOW, EXCEPT AS SPECIFIED.</div> <div>MM/DD/YY</div>
		<div>INSURERS AFFORDING COVERAGE</div> <div>INSURER A:</div>
		NAIC #
<div>INSURED</div> <div>[Contractor]</div>		<div>INSURER B:</div> <div>INSURER C:</div> <div>INSURER D:</div> <div>INSURER E:</div>

COVERAGES
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.

INSR	ADD'L		POLICY	POLICY EFFECTIVE	POLICY EXPIRATION		
LTR	INSRD	TYPE OF INSURANCE	NUMBER	DATE (MM/DD/YY)	DATE (MM/DD/YY)	LIMITS	
-----	Y	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY  <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR  <input checked="" type="checkbox"/> <u>Contractual</u>  <input checked="" type="checkbox"/> <u>XCU Included</u>  GEN'L AGGREGATE LIMIT APPLIES PER:  <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC	CLP _____	mm/dd/04	mm/dd/05	EACH OCCURRENCE	\$1,000,000
						DAMAGE TO RENTED	\$ 50,000
						PREMISES (Ea occurrence)	
						MED EXP (Anyone person)	\$ 5,000
						PERSONAL & ADV INJURY	\$1,000,000
						GENERAL AGGREGATE	\$
						PRODUCT-COMP/OPAGG	\$2,000,000

_____	<b>Y</b>	<b>AUTOMOBILE LIABILITY</b>  <input checked="" type="checkbox"/> ANY AUTO  <input type="checkbox"/> ALL OWNED AUTOS  <input type="checkbox"/> SCHEDULED AUTOS  <input checked="" type="checkbox"/> HIRED AUTOS  <input checked="" type="checkbox"/> NON-OWNED AUTOS  <input type="checkbox"/> _____	<b>CAP</b> _____	<b>mm/dd/04</b>	<b>mm/dd/05</b>	COMBINED SINGLE LIMIT  (Ea accident)		\$	
						BODILY INJURY  (Per person)		\$	
						BODILY INJURY  (Per accident)		\$	
						PROPERTY DAMAGE  (Per accident)		\$	
___	<b>Y</b>	<b>EXCESS LIABILITY</b>  <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE  <input type="checkbox"/> DEDUCTIBLE  <input type="checkbox"/> RETENTION \$ _____	<b>CUP</b> _____  <b>Umbrella Liability</b>	<b>mm/dd/04</b>	<b>mm/dd/05</b>	EACH OCCURRENCE		\$ __,000,000	
						AGGREGATE		\$ __,000,000	
								\$	
								\$	
								\$	
___	<b>N</b>	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b>  ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?  If yes, describe under  SPECIAL PROVISIONS below	<b>WC</b> _____	<b>mm/dd/04</b>	<b>mm/dd/05</b>	<b>X</b>	WC STATUS-  TORY LIMITS	OTHER  	\$
						E.L. EACH ACCIDENT		\$1,000,000	
						E.L. DISEASE-EAEMPLOYEE		\$1,000,000	
						E.L. DISEASE-POLICY LIMIT		\$1,000,000	
		<b>OTHER</b>							
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLESEXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS (See Attachment.)									
<b>CERTIFICATE HOLDER</b>									
<b>CANCELLATION</b>									



<p>_____ Office Park Condominium Owners' Association, Inc.</p> <p>_____</p> <p>_____, Texas 78_____</p> <p>Attn: _____</p>	<p>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.</p>
	<p>AUTHORIZED REPRESENTATIVE</p>
<p>ACORD 25 (2001/08) <span style="float: right;">© ACORD CORPORATION 1988</span></p>	

**Attachment To Contractor's Certificate of Insurance**

This Attachment is to Contractor's Certificate of Insurance that is:

**Dated** (MM/DD/YY): mm/dd/04.

**Issued By:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Insured:** \_\_\_\_\_ ("Contractor")

**Certificate Holders:** \_\_\_\_\_ ("Owner")

\_\_\_\_\_ Office Park Condominium Owners' Association, Inc.  
 ("Association")

**Policy Types:**

**Liability Insurance:**

- A. Commercial General Liability
- B. Automobile Liability
- C. Workers Compensation and Employer's Liability

**Property Insurance:**

- D. Builder's Risk - Causes of Loss - Special Form

**As to Policies Issued By:**

Company A: \_\_\_\_\_

Company B: \_\_\_\_\_

Company C: \_\_\_\_\_

Company D: \_\_\_\_\_

**Policy Nos.:**

Company A:	<u>CLP</u>	(Commercial General Liability)
Company B:	<u>CAP</u>	(Automobile Liability)
Company C:	<u>WC</u>	(Worker's Compensation/Employer's Liability for Texas)
Company D:	<u>                    </u>	(Builder's All Risk - Causes of Loss - Special Form)

**1. In Force.** The insurance policies are currently in force.

**2. Notification.** None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificate holders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.

3. **Additional Insureds and Loss Payees.** As to Policies A and B, the following persons: (a) \_\_\_\_\_, and its successors and assigns as owner of the Property (Owner), and its directors and employees, (b) \_\_\_\_\_ Office Park Condominium Owners' Association, Inc., and its directors and employees, and \_\_\_\_\_ Office Park, L.P., and its successors and assigns, Declarant of the Condominium Project, and its partners and employees (collectively, "**Additional Insureds**"), have been added as additional insured under Endorsements making the coverage available to the Additional Insureds primary over insurance available to the Additional Insureds or any self-insurance program of the Additional Insureds. As to Policy D, \_\_\_\_\_ Office Park Condominium Owners' Association, Inc. has been added as a Loss Payees together with the Owner and Contractor and its subcontractors.

**4. Texas Licensees.** The issuers of the described insurance policies are licensed to do business in Texas.

**5. Waiver of Subrogation.** As to Policies A-D, the issuers of the insurance policies have waived subrogation against (a) \_\_\_\_\_, and its successors and assigns as owner of the Property (Owner), and its directors and employees, (b) \_\_\_\_\_ Office Park Condominium Owners' Association, Inc., and its directors and employees, and \_\_\_\_\_ Office Park, L.P., and its successors and assigns, Declarant of the Condominium Project, and its partners and employees (the "**Released Persons**").

**6. Contribution Not Required.** The Insurance program of the Additional Insureds shall be excess of this insurance and shall not contribute with it.

7. **Severability of Interest.** This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.

**8. Property and Project.** For Policies A - C, the Premises is the Condominium Project located at \_\_\_\_\_ Martin St., McAllen, TX. For Policy D, the Premises is Suite \_\_\_\_\_.

**9. Endorsements.** Attached are the following Endorsements to the insurance policies:

Policy (Identify by Co. Ltr.)

Endorsement Form Nos.

- |    |   |  |
|----|---|--|
| A. | _____   | Additional Insured No. <u>GL</u>               |
|    | (Commercial General Liability)                      | Waiver of Subrogation No. <u>GL</u>            |
| B. | _____   | Additional Insured No. <u>TE 99 01 B</u>       |
|    | (Automobile Liability)                              | Waiver of Subrogation No. <u>TE 20 46 A</u>    |
| C. | _____   | Additional Insured No. <u>(not applicable)</u> |
|    | (Worker's Compensation/<br>Employer's Liability)    | Waiver of Subrogation No. <u>WC</u>            |
| D. | _____   | Loss Payee No. _____                           |
|    | (Builder's Risk - Causes of<br>Loss - Special Form) | Ordinance/Law Coverage No. _____               |

I certify to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate.

\_\_\_\_\_  
Authorized Representative



CERTIFICATE HOLDER	CANCELLATION
<div>_____ Office Park Condomi niums Owners' Association, Inc.</div> <div>_____</div> <div>_____</div>	<div>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.</div> <div>AUTHORIZED REPRESENTATIVE</div>

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## **Addendum to Commercial Condominium Contract**

### **Sale of a Finished-Out Unit - Cost Plus Addendum**

This Addendum is incorporated into and amends the Commercial Condominium Contract between the undersigned Seller and Buyer. In the event of any conflict between the provisions of this Addendum and the Contract, the provisions of this Addendum control.

1. **CONSTRUCTION COSTS.** For the purposes of this Contract, "**Construction Costs**" are defined as those cost categories listed in the attached Schedule of Estimated Construction Costs. Any amounts shown on the Schedule of Estimated Construction Costs are estimates only and do not guarantee or set any sum as the actual cost of any listed category. In the absence of a Schedule of Estimated Construction Costs, Construction Costs are defined as all costs incurred by the Seller as a result of the Work, except for the following costs, which shall be paid by the Seller from the Builder's Fee: (1) Salaries, wages, and other compensation for the Seller or the Seller's personnel stationed at the Seller's offices or at other sites not related to the Finish-Out. (2) Expenses and operating cost of the Seller's offices. (3) General overhead expenses of the Seller. (4) Marketing and promotional expenses of the Seller. (5) Capital and bank expenses of the Seller. (6) Any costs not related to the Finish-Out.

2. **BUILDER'S FEE.** The Builder's Fee is \$\_\_\_\_\_.

3. **PAYMENTS.** Final Payment shall also include all those costs projected or anticipated by the Seller for invoices not yet received, however, additional costs may be incurred for those items, if any, listed in the Certificate of Substantial Completion. Buyer agrees to pay any additional costs or expenses incurred after Substantial Completion, promptly upon request of Seller.



_____	<b>Y</b>	<b>AUTOMOBILE LIABILITY</b>  <input checked="" type="checkbox"/> ANY AUTO  <input type="checkbox"/> ALL OWNED AUTOS  <input type="checkbox"/> SCHEDULED AUTOS  <input checked="" type="checkbox"/> HIRED AUTOS  <input checked="" type="checkbox"/> NON-OWNED AUTOS  <input type="checkbox"/> _____	<b>CAP</b> _____	<b>mm/dd/04</b>	<b>mm/dd/05</b>	COMBINED SINGLE LIMIT  (Ea accident)		\$	
						BODILY INJURY  (Per person)		\$	
						BODILY INJURY  (Per accident)		\$	
						PROPERTY DAMAGE  (Per accident)		\$	
___	<b>Y</b>	<b>EXCESS LIABILITY</b>  <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE  <input type="checkbox"/> DEDUCTIBLE  <input type="checkbox"/> RETENTION \$ _____	<b>CUP</b> _____  <b>Umbrella Liability</b>	<b>mm/dd/04</b>	<b>mm/dd/05</b>	EACH OCCURRENCE		\$ __,000,000	
						AGGREGATE		\$ __,000,000	
								\$	
								\$	
								\$	
___	<b>N</b>	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b>  ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?  If yes, describe under  SPECIAL PROVISIONS below	<b>WC</b> _____	<b>mm/dd/04</b>	<b>mm/dd/05</b>	<b>X</b>	WC STATUS-  TORY LIMITS	OTHER  	\$
						E.L. EACH ACCIDENT		\$1,000,000	
						E.L. DISEASE-EAEMPLOYEE		\$1,000,000	
						E.L. DISEASE-POLICY LIMIT		\$1,000,000	
		<b>OTHER</b>							
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLESEXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS (See Attachment.)									
<b>CERTIFICATE HOLDER</b>									
<b>CANCELLATION</b>									



	<div>_____ <b>Office Park Condominium Owners' Association, Inc.</b></div> <div>_____</div> <div>_____, Texas 78 _____</div> <div>Attn: _____</div>	<div>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL <del>ENDEAVOR</del> TO MAIL <u>30</u> DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, <del>BUT FAILURE TO DO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.</del></div> <div>AUTHORIZED REPRESENTATIVE</div>
	<div>ACORD 25 (2001/08)<div>© ACORD CORPORATION 1988</div></div>	

Company D: \_\_\_\_\_ (Builder's All Risk - Causes of Loss - Special Form)

1. **In Force.** The insurance policies are currently in force.

2. **Notification.** None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificate holders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.

3. **Additional Insureds and Loss Payees.** As to Policies A and B, the following persons: (a) \_\_\_\_\_, and its successors and assigns as owner of the Property (Owner), and its directors and employees, (b) \_\_\_\_\_ Office Park Condominium Owners' Association, Inc., and its directors and employees, and \_\_\_\_\_ Office Park, L.P., and its successors and assigns, Declarant of the Condominium Project, and its partners and employees (collectively, "**Additional Insureds**"), have been added as additional insured under Endorsements making the coverage available to the Additional Insureds primary over insurance available to the Additional Insureds or any self-insurance program of the Additional Insureds. As to Policy D, \_\_\_\_\_ Office Park Condominium Owners' Association, Inc. has been added as a Loss Payees together with the Owner and Contractor and its subcontractors.

4. **Texas Licensees.** The issuers of the described insurance policies are licensed to do business in Texas.

5. **Waiver of Subrogation.** As to Policies A-D, the issuers of the insurance policies have waived subrogation against (a) \_\_\_\_\_, and its successors and assigns as owner of the Property (Owner), and its directors and employees, (b) \_\_\_\_\_ Office Park Condominium Owners' Association, Inc., and its directors and employees, and \_\_\_\_\_ Office Park, L.P., and its successors and assigns, Declarant of the Condominium Project, and its partners and employees (the "**Released Persons**").

6. **Contribution Not Required.** The Insurance program of the Additional Insureds shall be excess of this insurance and shall not contribute with it.

7. **Severability of Interest.** This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.

8. **Property and Project.** For Policies A - C, the Premises is the Condominium Project located at \_\_\_\_\_ Martin St., McAllen, TX. For Policy D, the Premises is Suite\_\_\_\_\_.

9. **Endorsements.** Attached are the following Endorsements to the insurance policies:

Policy (Identify by Co. Ltr.)

Endorsement Form Nos.

A. \_\_\_\_\_  
(Commercial General Liability)

Additional Insured No. GL  
Waiver of Subrogation No. GL

B. \_\_\_\_\_  
(Automobile Liability)

Additional Insured No. TE 99 01 B  
Waiver of Subrogation No. TE 20 46 A

C. \_\_\_\_\_ Additional Insured No. (not applicable)

(Worker's Compensation/

Waiver of Subrogation No. WC

Employer's Liability)

D. \_\_\_\_\_ Loss Payee No. \_\_\_\_\_

(Builder's Risk - Causes of

Ordinance/Law Coverage No. \_\_\_\_\_

Loss - Special Form)

I certify to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate.

\_\_\_\_\_

Authorized Representative



CERTIFICATE HOLDER	CANCELLATION
<div>_____ Office Park Condomi niums Owners' Association, Inc.</div> <div>_____</div> <div>_____</div>	<div>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.</div> <div>AUTHORIZED REPRESENTATIVE</div>

ACORD 24 (1/95)

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