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Preserving Open Space

By
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Presenter's Title: City Attorney
Presenter's Office: City of Highland Village, Texas

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Dorothy Palumbo currently serves as the City Attorney and Assistant City Manager for the City of Highland Village. She received the Galen Sparks Award as the "Assistant City Attorney of the Year." Having worked for the cities of Abilene, Midland, Garland and Denton, she advised city officials, Boards and Commissions and prepared legal documents in all areas of municipal law with primary concentration in Land Use, Utility Franchise Fees, Gas Well Development and Legislation. As a Registered Lobbyist as Assistant General Counsel for the Texas Municipal League from 1994 to 2000, she was primarily responsible for drafting and passing legislation. She has litigated in State and Federal Court from inception of litigation through settlement, mediation, trial and appeal in the areas of civil rights, employment, condemnation, nuisance condemnation and injuries arising under the Texas Tort Claims Act. She is also a Board member of the Texas Coalition of Franchised Utilities and the Denton County Transportation Authority.

INTRODUCTION

Over the past decade land development has been influenced by incorporating natural features into a development by the use of open space requirements, conservation easements or purchasing land for parks and trails. The goals of these types of preservation measures are to protect open spaces, conserve natural features and to increase property values. This paper will explore laws governing open space, conservation development, and parkland or trail acquisition by focusing on case studies about two conservation developments in the City of Highland Village, the Doubletree Ranch Acquisition and the St. James Development.

THE DOUBLETREE RANCH ACQUISITION

The Doubletree Ranch was settled by the Duvall family in the 1940's, the legacy of this property is filled with colorful stories and characters that include the founding fathers of the city. The property once even served as the location for the first City Hall, the first volunteer fire department, interim police headquarters, and has hosted numerous other public meetings and events. Mr. Robert Duvall, then owner, served as a founding father of Highland Village, incorporated in 1963, and served as the city's first Mayor. Most recently, the property was operating as a "dude ranch" (circa 1959) and special events facility until it closed on January 1, 2007.

Change in ownership in 2007 brought forward a bid to convert the rolling 37 acre property into a Senior Living community, however that application was withdrawn. With the downturn of the economy in 2009, the property fell into foreclosure and the city partnered with the Trust for Public Land to acquire the property.

PARTNERING WITH THE TRUST FOR PUBLIC LAND

The Trust for Public Land (TPL), www.tpl.org, is a non profit organization that conserves land for communities to enjoy, helps structure, negotiate, and complete land transactions that create parks, playgrounds, and protected natural areas. TPL serves as an independent agent, buying land from willing landowners and then transferring it to public agencies, land trusts, or other groups for protection. TPL works with property owners seeking to sell land, and public agencies seeking to acquire it by structuring transactions that align their needs and facilitating a successful acquisition.

The City partnered with the Trust for Public Land (TPL) on the acquisition of Doubletree Ranch. TPL purchased the Doubletree Ranch at an auction held at Denton County Courthouse on June 2. The TPL purchased the Ranch for $2,866,659.04, which was one cent over the opening bid price. The City contracted with TPL to purchase the 37 acres known as Doubletree Ranch and then TPL transferred the land to the City. The City used 4B sales tax funds to purchase the property for a soccer facility, a conservation area and trail connections.

Under the Highland Village Community Development Corporation (4B) structure, funds may be expended on two projects; construction of the city trail system and a soccer facility. The Doubletree Ranch property has numerous trails planned throughout the site, as identified in the City's Comprehensive Trail System Master Plan, and it provides enough space to construct a soccer facility approved by voters. The purchase of Doubletree Ranch would also provide park property at a time when the expansion of I-35E will significantly reduce the size and use of Copperas Branch Park. The City is currently exploring grant opportunities to assist with the development.

PREDEVELOPMENT AGREEMENTS

Many developers use predevelopment regulations or meetings to create a feasibility study or period where land planners, architects, engineers and development attorneys produce preliminary development plans, and cost estimates to determine the economic requirements of the project. This can be accomplished with a memorandum of understanding or outline of the basic understanding of the development requirements.

A memorandum of understanding ("MOU") is closer to an agreement than an outline of the development requirements. These methods constitute an agreement to agree and the purpose is to spell out the responsibilities of the parties during the initial phases of the development process. The City needs to include language that the MOU is nonbinding, that there are deadlines that need to be reached and contain termination provisions. Termination provisions usually require the MOU to be terminated by either party with written notice. See TPL MOU, Exhibit "A".

PURCHASE AND SALE AGREEMENT WITH TPL

Development agreements can be used as a master agreement that establishes the overall structure of the partnership and development of the property and includes the framework for any ancillary agreements. Here, the City used a purchase and sale agreement and reimbursed TPL for its costs in acquiring Doubletree Ranch with a conservation services agreement, attached as an exhibit. See Exhibit "B".

PRESERVING OPEN SPACE IN DEVELOPMENT AGREEMENTS

Many city subdivisions follow a traditional design by cutting and scraping the land and constructing the subdivision in "cookie-cutter" developments. Open space and natural features are not protected and the result is manicured land with uniform landscaping. This type of development is commonly known as suburban sprawl. Most development regulations encourage this type of design by allowing random development characterized by poor accessibility of related land uses such as housing, jobs, and services such as hospitals or schools. Other undesirable patterns are commercial strip developments, low-density residential developments and scattered, isolated developments that leap frog over the landscape. One common problem is the lack of open space in the development.

EVALUATING OPEN SPACE IN THE DEVELOPMENT PROCESS

Communities often contain many natural landscape features that define the community. Open space is undeveloped land and often contains many natural characteristics and features. Open space can include land for passive and active recreation, ground water recharge, retention or detention of floodwaters, drinking water reservoirs, scenic preservation, wildlife habitat, land areas and facilities for public, commercial and non-profit recreation, educational areas for outdoor classrooms or university research areas, land protected for historical or community values and land protected by conservation easements or other assignment of development rights.

Open space may be used for recreational activities, recreational facilities, native habitat for wildlife or plants, or Environmentally Sensitive Areas, (ESA). An ESA is much like it sounds and is usually defined as an area that is sensitive to the surrounding environment and needs protection. Some cities take a proactive approach to protecting ESAs through regulations and ordinances that help outline the future uses available to these sensitive areas. There are four different types of ESAs that are often protected including flood plains, upland habitat, water-related habitat, and stream buffers. Flood Plains are divided into two different types, developed and undeveloped; upland habitat can include the trees and underbrush. An example of upland habit is the Eastern Cross Timbers forest formation found in Denton County; water-related habitats are wetlands and water-related vegetation; and stream buffers are vegetated strips of land that help protect the water quality of stream.

Although there are federal government regulations that protect certain types of ESAs, some cities have decided to implement additional local regulations in order to ensure that future generations are able to enjoy these areas. ESAs provide a number of benefits, including improved water quality, flood mitigation, enhanced aquatic habitats, and the preservation of open, natural space. All of these benefits increase the quality of life in cities for current and future residents.

Developments that preserve open space can provide the community with larger recreation areas and parks that increase land values. The environment is benefited by preserving habitat, naturally filtering stormwater, reducing storm water runoff from impervious surfaces and protecting natural features of a development site. Linking developments with trail connections can create effective environmental corridors between cities. The cost of site development is often less and the market price of individual lots is often increased over traditional subdivision lots.

UPDATING DEVELOPMENT REGULATIONS TO PRESERVE OPEN SPACE

Many cities will update the city's comprehensive plan to encourage the preservation of open space. Preservation Development Standards can be detailed in overlay zone ordinances, planned development ordinances or a separate zoning classification that protects an environmentally sensitive area of the city. The regulations should address density, minimum land area per dwelling unit, open space standards including the natural

features that shall be preserved, open space dedications and consistency with parkland dedications and improvements. Requirements for alternatives and variations from the requirements should be allowed that meet or exceed the preservation development standards. Incentives can be considered in the form of waiving permit fees, waiving inspection fees, reduction of parkland dedication fees, expedited development approval.

INFILL, HARD TO DEVELOP NATURAL AREAS

The City of Highland Village entered into a Development Agreement with a Developer who had purchased an area known as "Marauder Park". The initial site plan for the development completely eliminated any natural features of the property. The property abutted a planned Farm to Market road, FM 2499, which had become controversial.

The Developer intended to develop the Property for single family, detached dwellings and through the development agreement entered into a Real Estate Sales Contract for the sale to the City of Highland Village of two lots in the development. The Developer as part of the overall development of the property conveyed a lot with a pond and fountain to be constructed by the Developer to the Highland Village Parks Foundation. The Development Agreement also required the Developer to design, construct and install, on behalf of the City, certain improvements in a form that the City could participate in pursuant to Texas Local Government Code, Section 212.071 *et. seq.* This statute allows a city to participate in the cost of the design and construction of the improvements in a development for an amount not to exceed the thirty percent (30%) of the total cost of the public improvements related to the project.

CONSERVING OPEN SPACE USING CONSERVATION EASEMENTS

Conservation easements are effective tools available for the permanent conservation of private lands in the United States. The use of conservation easements have protected millions of acres of wildlife habitat and open space, keeping land in private hands and generating significant public benefits. Conservation Easements are typically used to conserve wildlife areas, areas or natural features of historical significance, trails or scenic views. A conservation easement is a voluntary, legally binding agreement that limits certain types of uses or prevents development from taking place on a piece of property now and in the future, while protecting the property's ecological or open-space values. Restrictions on the use of land are enforced by a nonprofit or a government agency. See, www.epa.gov/nps/ordinance/documents/A2e-ModelLand.pdf, for a model conservation easement; www.tpl.org for the Conservation Easement Handbook; and the Nature Conservancy, www.nature.org for more information on conservation methods.

UNIFORM CONSERVATION EASEMENT ACT

The Uniform Conservation Easement act is a model act upon which many states, including Texas, have based their own enabling laws for the establishment of state conservation easement programs. The Act was created and recommended for use by all states by the National Conference of Commissioners on Uniform State Laws, a non-governmental body that drafts many forms of uniform laws for use by state and local

governments. The Act enables the attachment of obligations and restrictions to real property to protect historic sites and natural resources.

In Texas Chapter 183 of the Texas Natural Resources Code protects and preserves land areas as follows:

Natural, scenic or open space values
Agricultural, forest, recreational or open space use
Natural resource protection
Protection of Air or Water Quality
Historical, architectural, archeological or cultural aspects

TAX BENEFITS FOR GIFTS OF CONSERVATION EASMENTS

Tax benefits for gifts of conservation easements were first provided by Congress to promote conservation in the United States in the Tax Reform Act of 1976 and the Tax Reduction and Simplification Act of 1977. In 1980, when the easement donation provisions in those laws were about to expire, Congress passed the Tax Treatment Extension Act (creating IRC section 170(h)), which made permanent the income tax charitable deduction benefits for gifts of qualified conservation contributions. More recently, in 1997, Congress passed the Taxpayer Relief Act, which created a new estate tax benefit (IRC section 2031(c)) for landowners who donate conservation easements.

Internal Revenue Code Section 170(h) protects and preserves land areas as follows:

Outdoor recreation by the general public
Education of the general public
Natural habitats of fish, wildlife, plants or similar ecosystems
Scenic enjoyment of the general public
Open space pursuant to federal state or local conservation policy
Historical or certified historical structure

In addition to the federal tax benefits, some 12 states have enacted laws providing for state income tax credits for gifts of conservation easements or exempting the sale of conservation easements from state income tax. Finally, other countries, notably Australia and Canada, have enacted laws to create tax benefits for conservation easements.

CONCLUSION

Developers and cities have many opportunities to conserve open space, natural areas and create parkland and trail systems. Cities can encourage open space preservation through the use of development agreements and conservation easements. To encourage open space preservation, development regulations may need to be amended, incentives may be offered and partnering with land trusts or park foundation should be explored. Even as cities redevelop and extend, these preservation methods will become an important way to preserve open space and natural features of the community.

EXHIBIT A

SAMPLE NON-BINDING LETTER OF INTENT AND MEMORANDUM OF UNDERSTANDING

This Non-Binding Letter of Intent and Memorandum of Understanding, (MOU) is entered into between the _____ and the _____ pursuant to (cite any statutes).

It is the intent of _____ and _____to establish a (State Purpose and Intent- For example, this letter is intended to be a first draft of a Non-Binding Letter of Intent and Memorandum of Understanding to set forth the general business terms which will eventually lead to a purchase agreement for the Property).

_____ intends to convey the Property to the _____on the following basic terms and conditions, which are not to be considered all inclusive:

Property Description:

Purchase Price:

Earnest Money:

Due Diligence:

Closing:

Possession:

Reimbursement for Services and Fees:

Period of Performance:

Duties of the Parties:

Independent Contractor:

Ownership of Documents:

Modification/Termination:

Assignment:

Choice of Law and Venue:

Waiver:

Notifications:

Special Terms and Conditions:

Disputes:

If acceptable:

Signatures

EXHIBIT B
PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT ("Agreement") with an Effective Date as provided below between **THE TRUST FOR PUBLIC LAND**, a nonprofit California public benefit corporation authorized to do business in Texas as TPL-Texas, Inc. ("Seller") and **THE CITY OF HIGHLAND VILLAGE**, a Texas municipal corporation ("Buyer").

RECITALS:

A. The addresses and telephone numbers of the parties to this Agreement are as follows. Telephone numbers are included for information only.

SELLER:

The Trust for Public Land
11006 Walden Court
Frisco, Texas 75034
Attn: Niels Brown
Tel: (214) 223-1771
Fax: (866) 966-0388
Niels.Brown@tpl.org

With a copy to:

The Trust for Public Land
306 North Monroe Street
Tallahassee, Florida 32301
Attn: J. Alex Ghio
Tel: (850) 222-7911
Fax: (850) 222-8909

BUYER:

City of Highland Village
City Manager's Office
Attn: Michael Leavitt
1000 Highland Village Road
Highland Village, Texas 75077
Tel: (972) 899-5131
Fax: (972) 317-0237

With a copy to:

City of Highland Village
City Attorney's Office
Attn: Dottie Palumbo
1000 Highland Village Road
Highland Village, Texas 75077
Tel: (972) 899-5131
Fax: (972) 317-0237
Kevin B. Laughlin
Nichols, Jackson, Dillard,
Hager & Smith, LLP
500 N Akard, Suite 1800
Dallas, Texas 75201
Tel: (214) 965-9900
Fax: (214) 965-0010

B. Doubletree Partners, L.P., a Texas limited partnership ("Current Owner"), is the owner of certain real property located in the City of Highland Village, County of Denton, State of Texas legally described on **Exhibit A** attached hereto and made a part hereof. Said real property together with any and all improvements, fixtures, timber, water and/or minerals located

thereon and any and all rights appurtenant thereto shall be referred to in this Agreement as the "Property."

C. The Current Owner has been sent a demand letter for the balance of the Note and unless said demand is satisfied, the Property will be sold to the highest bidder at a non-judicial foreclosure sale ("Foreclosure Sale") on June 2, 2009 ("Foreclosure Date"). Seller's intent is to acquire the Property at the time of the Foreclosure Sale. The possible acquisition of the Property at the Foreclosure Sale will be "as-is" as to the condition of the Property. The Buyer acknowledges that the Seller will only be able to convey the Property to the Buyer in "as is" condition.

D. Buyer wishes to purchase the Property from Seller and Seller wishes to sell the Property to Buyer upon Seller's acquisition of the Property from Current Owner in accordance with the terms and conditions set forth in this Agreement.

NOW THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION THE PARTIES AGREE AS FOLLOWS:

1. **Purchase and Sale**. Seller agrees to sell to Buyer and Buyer agrees to buy from Seller the Property on the terms and conditions set forth herein.

2. **Purchase Terms**.

(a) The purchase price for the Property shall be the amount paid by the Seller for the Property at the Foreclosure Sale up to and including, but not to exceed, Three Million Two Hundred Thousand and No/100 Dollars ($3,200,000.00) (the "Purchase Price"). Seller and Buyer agree:

(i) Seller will not bid an amount at the Foreclosure Sale of more than Three Million Two Hundred Thousand and No/100 Dollars ($3,200,000.00) inclusive of any fees charged at the Foreclosure Sale;

(ii) Seller will have placed sufficient funds, not less than Three Million Two Hundred Thousand and No/100 Dollars ($3,200,000.00) (the "Escrow Money"), in escrow with the Escrow Holder as defined in Section 5, subsection (b), below; and

(iii) in the event that the Seller does not obtain the Property at the Foreclosure Sale, Seller will direct the Escrow Holder to unconditionally return the Escrow Money to Seller within twenty-four (24) hours of the termination of the Foreclosure Sale.

(b) Method of Payment. The Purchase Price shall be payable in cash or electronic wire transfer, at Closing (as hereinafter defined), subject to any credits, prorations and adjustments provided elsewhere in this Agreement.

3. **Buyer's Deposit**. [This Section is intentionally omitted.]

4. **Condition of the Property**.

(a) Buyer agrees that Buyer has:

(i) made an independent investigation of the physical condition of the Property including, but not limited to, the presence of hazardous materials or contaminants, other physical characteristics, and compliance with any statutes, ordinances or regulations;

(ii) studied all aspects or circumstances of the Property which Buyer deems material or relevant;

(iii) requested and received from Seller all other documents and materials which Buyer deems material or relevant with respect to the transaction contemplated under this Agreement;

(iv) had full, complete and satisfactory access to the Property, and all records relating to the same which Buyer has requested and/or deemed material or relevant; and

(vi) had the opportunity to make all inspections and verifications which Buyer deemed necessary for the completion of Buyer's due diligence review for the transactions covered by this Agreement.

Before entering upon the Property on or after the Effective Date, Buyer shall notify Seller and Seller shall have obtained Current Owner's permission for Buyer to enter upon the Property.

To the extent permitted and without waiving any government immunity under Texas law, Buyer does hereby indemnify and hold Current Owner and Seller, their officers, directors, principals, and employees, as the case may be, harmless from and against any and all liability, loss, cost, claim, action, suit and/or expense (including but not limited to attorneys' fees and litigation expenses) which Current Owner or Seller may suffer or incur by reason of Buyer's or its agents' presence on the Property.

(b) Buyer agrees that:

(i) Seller has made no representations or warranties with respect to the Property except as set forth in this Agreement;

(ii) Seller shall not be responsible for any statements, representations or warranties of any kind furnished to Buyer by any real estate broker or any other person, unless the same are specifically set forth in this Agreement;

(iii) no materials, brochures, or documents delivered by Seller to Buyer or any other person shall be, or be deemed, a representation, warranty, or agreement of Seller under, or with respect to, this Agreement; and Buyer has, and shall have, the exclusive responsibility for verifying any facts or conditions set forth or described in any such materials, brochures, or documents; and

(iv) Buyer has not undertaken any activity and will not undertake any activity which will knowingly jeopardize Seller's efforts to acquire the Property.

(c) Buyer agrees to accept the Property including any structures or improvements, "as is, where is", subject to all faults of every kind and nature whatsoever, whether latent or patent and whether now or hereafter existing. Buyer waives any and all objections to or claims or causes of action against Seller including, but not limited to federal, state or common law actions and any private right of action under state and federal law to which the Property is or may be subject (including, but not limited to CERCLA and RCRA) regarding the physical characteristics and existing structural, geologic, subsurface, soil, water and environmental conditions on, under, adjacent to or otherwise affecting the Property.

5. **Closing**.

(a) Final settlement of the obligations of the parties hereto relating to the Property shall occur on or before June 16, 2009 (the "Closing").

(b) Method of Closing. The transaction contemplated by this Agreement shall be closed in escrow with Lawyers Title Insurance Corporation, 3360 Long Prairie Road, Suite 200, Flower Mound, Texas 75022, telephone: (972) 221-3521, facsimile: (972) 724-9519 or another title insurance agent with an office in Denton County, Texas (the "Escrow Holder") in accordance with the general provisions of the usual form of deed and money escrow agreement then in use by Escrow Holder, with such additional special provisions inserted in said escrow agreement as may be required to conform with the terms and conditions of this Agreement. Seller shall pay the cost of the escrow and closing fee for the Closing.

6. **Title**. Seller shall deliver to Buyer a copy of the commitment for title insurance issued by Escrow Holder committing the company to issue an Owner's Policy insuring title to the Property in Seller. Buyer may at Buyer's sole cost and expense obtain a title commitment from Escrow Holder committing the company to issue an Owner's Policy insuring title to the Property in Buyer (the "Title Commitment"). Seller shall by Special Warranty deed convey to Buyer its interest in the Property, subject to the matters contained in **Exhibit B** attached hereto and incorporated herein by reference (the "Permitted Exception"), and subject further to the

Leases and Contracts described in Section 30. "Title Commitment" means a Commitment for Issuance of an Owner Policy of Title Insurance by Title Company stating the condition of title to the Land. "Title Policy" means an Owner Policy of Title Insurance issued by Title Company in conformity with the last Title Commitment delivered to and approved by Buyer. Seller must deliver a Title Commitment that reflects the terms of this Agreement to Buyer. Buyer does not have the right to object to any matters of title or survey. Seller and Buyer understand and agree that the Title Company will delete from the Title Policy (as defined herein):

(a) the standard printed exceptions to the Title Commitment to the extent permitted by applicable law, and

(b) all items shown on Schedule C of the Title Commitment, without the necessity of Buyer objecting thereto under the Title Objection Notice.

7. **Title Insurance**. Buyer may, at its option, and Buyer's sole cost and expense procure a standard owner's policy of title insurance from the Escrow Holder insuring that title to the Property is vested in Buyer upon Closing.

8. **Seller's Promise not to Further Encumber**. (a) Seller shall not, without the prior written consent of Buyer, make any leases, contracts, options or agreements whatsoever affecting the Property which would in any manner impede Seller's ability to perform hereunder and deliver title as agreed herein. Seller shall not undertake any activity on the Property which will impair Buyer's use and enjoyment of the Property in accordance with the terms and conditions of this Agreement.

(b) Notwithstanding anything to the contrary contained in this Agreement, Buyer acknowledges that during Current Owner's ownership of the Property, Current Owner has the right, with respect to the Property, to make or permit to be made, extend or permit to be extended leases to third parties (the "Tenants"), and any leases made, extended or permitted to be extended by Current Owner shall be assigned to Buyer at Closing.

9. **Seller's Representations**. Seller makes the following representations:

(a) At Closing, Seller will have the power to sell, transfer and convey all right, title and interest in and to the Property.

(b) Seller represents and warrants that it is not a "foreign corporation" as defined in Section 1445 of the Internal Revenue Code. Seller's United States Taxpayer Identification Number is 23-7222333.

10. **Prorations, Closing Expenses and Fees**. Real property taxes on the Property shall be prorated as of the date of Closing based upon an equitable pro-ration of the latest available tax bill. Special assessments, levied, pending or constituting a lien against the Property, if any, shall

be paid by Buyer. Buyer shall be responsible for paying any additional taxes, penalties and interest, including but not limited to compensatory or roll back taxes, on the Property arising from the termination of a preferential tax classification of the Property payable as a result of the conveyance to Buyer. Any documentary tax or real property transfer tax arising out of the conveyance of the Property shall be paid by Buyer. Buyer shall pay the premium for any title insurance policy required by Buyer. Other fees and charges not otherwise allocated in this Agreement shall be paid by Buyer. Buyer shall pay at or before Closing all ad valorem taxes, plus any penalties, interest, court costs, and attorneys' fees, if any, due on delinquent amounts not paid, for tax years prior to the year in which Closing occurs. Buyer will pay at Closing the pro-rated amount of ad valorem taxes for the Property for the calendar year of Closing in accordance with Texas Tax Code §26.11. BUYER IS A POLITICAL SUBDIVISION OF THE STATE OF TEXAS AND EXEMPTS FROM PAYMENT OF AD VALOREM TAXES ON PROPERTY OWNED BY IT FROM AND AFTER THE DATE OF ITS CONVEYANCE TO BUYER. Buyer agrees to reimburse Seller for Seller's cost in acquiring Property appraisal, Survey, Phase I Environmental Study and the Foreclosure Title Policy obtained by Seller with respect to Seller's purchase of the Property at the Foreclosure Sale. In addition, Buyer shall pay Seller an amount equal to 4.25 % annual interest on the amount of Seller's purchase price of the Property from date of the Foreclosure Sale to the date of closing.

11. **Notices**. All notices pertaining to this Agreement shall be in writing delivered to the parties hereto personally by hand, telecopy, courier service or Express Mail, or by first class mail, postage prepaid, at the addresses set forth in Recital A. All notices shall be deemed given when deposited in the mail, first class postage prepaid, addressed to the party to be notified; or if delivered by hand, telecopy, courier service or Express Mail, shall be deemed given when delivered. The parties may, by notice as provided above, designate a different address to which notice shall be given.

12. **Attorneys' Fees**. If any legal action is brought by either party to enforce any provision of this Agreement, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees and court costs in such amounts as shall be allowed by the court.

13. **Remedies Upon Default**. In the event Buyer defaults in the performance of any of Buyer's obligations under this Agreement, Seller shall, in addition to any and all other remedies provided in this Agreement, or at law or in equity, have the right of specific performance against Buyer. In the event Seller defaults in the performance of any of Seller's obligations under this Agreement, Buyer shall, in addition to any and all other remedies provided in this Agreement, or at law or in equity, have the right of specific performance against Seller.

14. **No Broker's Commission**. Each party represents to the other that it has not used a real estate broker in connection with this Agreement or the transaction contemplated by this Agreement. In the event any person asserts a claim for a broker's commission or finder's fee against one of the parties to this Agreement, the party on account of whose conduct the claim is asserted will hold the other party harmless from said claim.

15. **Time of the Essence**. Time is of the essence of this Agreement.

16. **Binding on Successors**. This Agreement shall be binding not only upon the parties hereto, but also upon their heirs, personal representatives, assigns, and other successors in interest.

17. **Additional Documents**. Seller and Buyer have entered into a Conservation Services Agreement for the acquisition of clear title to the Property, shown as **Exhibit C** and attached hereto. Seller and Buyer agree to execute such additional documents, including escrow instructions, as may be reasonable and necessary to carry out the provisions of this Agreement.

18. **Assignment**. Neither Buyer nor Seller shall assign its interest under this Agreement without the prior, express written consent of the other party, which consent shall be in the sole discretion of the party to whom such request is made.

19. **Entire Agreement; Modification; Waiver**. This Agreement constitutes the entire agreement between Buyer and Seller pertaining to the subject matter contained in it and supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by all the parties. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

20. **Counterparts**. This Agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute one and the same agreement.

21. **Severability**. Each provision of this Agreement is severable from any and all other provisions of this Agreement. Should any provision(s) of this Agreement be for any reason unenforceable, the balance shall nonetheless be of full force and effect.

22. **Governing Law**. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Denton County, Texas, wherein exclusive venue of any action to enforce any provision hereof shall lie.

23. **Acceptance of Deed**. The acceptance by Buyer of a deed to the Property shall be deemed to be full performance by Seller of, and shall discharge Seller from, all obligations hereunder and Seller shall have no further liability hereunder with respect to the portion of the Property affected.

24. **Risk of Loss.** All risk of loss shall be with Buyer until Closing. In the event the Property is destroyed or damaged prior to Closing, Buyer shall not have the right to terminate this Agreement.

25. **Condemnation**. In the event of a taking of all or any part of the Property under the power of eminent domain prior to the Closing, Buyer shall either (i) proceed to Closing with the Purchase Price reduced by the total of any awards or other proceeds received or to be received by Seller as a result of such proceedings, or (ii) proceed to Closing with an assignment by Seller of all Seller's right, title and interest in and to any and all such awards and proceeds.

26. **Possession**. Seller shall deliver possession of the Property concurrently with Closing in accordance with Sections 4, 6, and 30.

27. **Buyer's Representations**. Buyer represents that it has full power and authority to enter into this Agreement and the person signing this Agreement for Buyer has full power and authority to sign for Buyer and to bind it to this Agreement.

28. **Miscellaneous**. In the event that any of the deadlines set forth herein end on a Saturday, Sunday or legal holiday, such deadline shall automatically be extended to the next business day which is not a Saturday, Sunday or legal holiday. The term "business days" as may be used herein shall mean all days which are not on a Saturday, Sunday or legal holiday.

29. **Contingency**. Buyer acknowledges that Seller does not presently own the Property and that Seller's duties hereunder and Buyer's rights hereunder are both expressly contingent upon the acquisition by Seller of the Property. In the event Seller does not acquire the Property from Current Owner, this Agreement shall terminate all funds placed by Seller in the Escrow Account shall be returned to Seller, and thereafter neither party shall have any further obligations hereunder.

30. **Leases and Contracts**. (a) The Property is subject to Tenants occupying portions of the Property. Seller will notify Buyer of any changes in the tenancy during the term of this Agreement. Seller agrees not to make, extend or permit to be extended any leases without prior approval from the Buyer in the event Seller has obtained clear title to the Property. No later than the date which is five (5) days prior to Closing, Seller shall provide Buyer with a Lease from each Tenant which Seller has received. At Closing, Seller shall assign and Buyer shall assume Seller's right, title and interest as landlord under the leases, including any security deposit, and the parties will prorate any rents as of the date of Closing.

(b) [This Section is intentionally omitted.]

31. **Mineral Reservation and Surface Waiver**. [This Section is intentionally omitted.]

32. **Signage**. The parties agree that permanent signage on the Property shall provide for recognition of the role of Seller in this acquisition, said signage being subject to the approval of Seller and Buyer. This section shall survive the delivery of the deed to the Property.

33. **Confidentiality**. The parties will keep confidential this Agreement, this transaction, and all information learned in the course of this transaction, except to the extent

disclosure is required by law or court order or to enable third parties to advise or assist Buyer to investigate the Property or either party to close this transaction.

IN WITNESS of the foregoing provisions the parties have executed and delivered this Agreement as of the date set forth below. The effective date (the "Effective Date") of this Agreement shall be the last date of execution by either of the parties to this Agreement. If a party returns this Agreement by facsimile machine, the signing party intends the copy of its authorized signature printed by the receiving facsimile machine to be its original signature.

SELLER:

THE TRUST FOR PUBLIC LAND, a nonprofit California public benefit corporation authorized to do business in Texas as TPL-Texas, Inc.

By:_____

Name:_____

Title:_____

Date:_____

BUYER:

CITY OF HIGHLAND VILLAGE,
a Texas municipal corporation

By:_____
Michael Leavitt
It's City Manager

ATTEST:

_____
Alicia Richardson, City Secretary

APPROVED AS TO FORM AND LEGALITY:

_____
Dorothy Palumbo, City Attorney

Exhibit A

(Property Description)

The following real property in the City of Highland Village, County of Denton, State of Texas, legally described as follows:

Exhibit B

(Permitted Exceptions)

1. The standard printed exceptions contained in the title commitment which are not deleted at Closing.
2. Federal, state or local laws, ordinances, regulations and/or orders whatsoever.
3. Liens for real estate taxes not yet due and payable and other taxes and assessments of any kind or nature assessed (not yet due and payable) with respect to the Property.
4. All matters set forth in Schedule B of the Title Commitment.
5. Any and all matters which may be shown on a survey.

Exhibit C

(Conservation Services Agreement)

CONSERVATION SERVICES AGREEMENT
(Double Tree Ranch Highland Village 85224-850)

This Agreement, made and entered into this ____ day of _____, 2009 by and between **THE CITY OF HIGHLAND VILLAGE, a Texas municipal corporation,** which shall be referred to as "City", and **THE TRUST FOR PUBLIC LAND**, a nonprofit California public benefit corporation authorized to do business in Texas as **TPL-Texas, Inc.**, which shall be referred to as "TPL":

WITNESSETH

I. PURPOSE.

For the purpose and subject to the terms and conditions hereinafter set forth and in consideration of the payments and covenants set forth herein, the City hereby contracts for the services of TPL, and TPL agrees to provide the services described in Section III below to the City in accordance with the terms of this Agreement. The purpose of this Agreement is to implement the intent of the parties that TPL shall carry out land protection and implementation for the City.

II. GENERAL TERMS.

a) The address and telephone number of TPL is 11006 Walden Court, Frisco, Texas, 75034 Tel: (214) 223-1771, Fax: (866) 966-0388.

b) The address and telephone number of the City is 1000 Highland Village Road, Highland Village, Texas 75077, Tel: (972) 899-5131, Fax: (972) 317-0237.

c) The City primary liaison shall be Michael Leavitt, City Manager, and the TPL employee responsible for administering this Agreement shall be Niels Brown, Project Manager, provided that the City and TPL reserve the right to substitute personnel at any time.

d) It is agreed that TPL is solely responsible for the payment of unemployment insurance, social security, income and any other taxes on the payments made under this Agreement to employees and subcontractors, as provided by law.

III. SERVICES.

In consideration of the payment by City to TPL of the professional services fee, TPL agrees to carry out the following:

a) TPL shall plan a strategy for assembling the Doubletree Ranch consisting of three legal parcels plus improvements on approximately 37 acres in Denton County, Texas (the "Property").

b) TPL shall endeavor to acquire the Property and hold it for resale to the City at TPL's risk, provided that the City first adopts a resolution in substance acceptable to TPL indicating its intent to purchase the Property from TPL. TPL does not warrant or represent that it will be successful in acquiring the Property.

c) TPL agrees to provide the City with copies of all due diligence obtained by TPL relating to the Property.

IV. PROFESSIONAL FEES.

City agrees to pay to TPL, as professional fees, an amount not greater than twenty-five thousand dollars ($25,000), for its work in acquiring the Property. The fee shall be paid as authorized and appropriated by resolution of the City Council of the City of Highland Village, Texas, but in no event shall the fee be paid later than the conveyance of the Property to the City. Any additional professional fees for TPL's grant assistance after the date of closing, shall be paid as agreed in writing by the parties in an amount not to exceed twenty-five thousand dollars ($25,000).

V. ENTIRE AGREEMENT.

This Agreement constitutes the entire agreement between TPL and the City pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representation and understandings. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by all the parties.

VI. WAIVER OF RIGHTS.

Neither the failure of either party to exercise any power given such party hereunder or to insist upon strict compliance by the other party with its obligations hereunder, nor any custom or practice of the parties at variance with the terms hereof shall constitute a waiver of either party's right to demand exact compliance with the terms hereof.

VII. APPLICABLE LAW.

This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Texas , and all obligations of the parties created hereunder are performable in Denton County, Texas, wherein exclusive venue of any action to enforce any provision hereof shall lie.

VIII. NO PARTNERSHIP RELATIONSHIP.

This Agreement does not create any partnership relationship between the City and TPL, and is intended solely to establish the relationship of Contractor and Client.

IX. OTHER TERMS.

a) TPL shall operate as an independent contractor, and the City shall not be responsible for any of TPL's acts or omissions. TPL agrees to hold the City harmless from and against any and all claims, expenses (including attorney fees), costs or liability for acts or omissions of TPL in connection with the performance of its obligations under this Agreement.

b) TPL shall not be treated as an employee or agent with respect to the services performed hereunder for federal or state tax, unemployment, or worker's compensation purposes. TPL understands that neither federal, nor state, nor shall payroll tax of any kind be withheld or paid by the City on behalf of TPL or the employees of TPL. TPL further understands and agrees that TPL is fully responsible for the payment of any and all taxes arising from the payment of monies under this Agreement.

c) TPL agrees that it is familiar with the IRS regulations and laws pertaining to independent contractor status and that it is providing the aforementioned services as an independent contractor.

d) TPL shall not be treated as an employee with respect to the services performed hereunder for purposes of eligibility for, or participation of, any employee pensions, health or other fringe benefit plan of the City.

e) The City shall not be liable to TPL for any expenses paid or incurred by TPL unless otherwise agreed in writing, except as provided herein.

f) The City and TPL acknowledge that TPL is not performing any real estate brokerage services or legal services on behalf of or for the City under this Agreement.

g) TPL declares that it shall comply with all federal, state and local laws regarding business permits, certificates, and licenses that may be required to carry out the services to be performed under this Agreement.

(h) All notices pertaining to this Agreement shall be in writing delivered to the parties hereto personally by hand, telecopy, courier service or Express Mail, or by first class mail, postage prepaid, at the addresses set forth in Recital A. All notices shall be deemed given when deposited in the mail, first class postage prepaid, addressed to the party to be notified; or if delivered by hand, telecopy, courier service or Express Mail, shall be deemed given when delivered. The parties may, by notice as provided above, designate a different address to which notice shall be given.

(i) This Agreement shall be binding not only upon the parties hereto, but also upon their heirs, personal representatives, assigns, and other successors in interest.

(k) Neither TPL nor City shall assign its interest under this Agreement without the prior, express written consent of the other party, which consent shall be in the sole discretion of the party to whom such request is made.

(j) This Agreement constitutes the entire agreement between City and TPL pertaining to the subject matter contained in it and supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by all the parties. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

(k) This Agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute one and the same agreement.

(l) Each provision of this Agreement is severable from any and all other provisions of this Agreement. Should any provision(s) of this Agreement be for any reason

IN WITNESS of the foregoing provisions the parties have executed and delivered this Agreement as of the date set forth below. The effective date (the "Effective Date") of this Agreement shall be the last date of execution by either of the parties to this Agreement. If a party returns this Agreement by facsimile machine, the signing party intends the copy of its authorized signature printed by the receiving facsimile machine to be its original signature.

SEE FOLLOWING PAGES FOR SIGNATURES

IN WITNESS WHEREOF, the City and TPL have set their hands and seals as of the day and year first above written.

TPL:

THE TRUST FOR PUBLIC LAND, a nonprofit California public benefit corporation authorized to do business in Texas as TPL-Texas, Inc.

By:_____

Name:_____

Title:_____

Date:_____

CITY:

CITY OF HIGHLAND VILLAGE,
a Texas municipal corporation

By:_____
Michael Leavitt
It's City Manager

ATTEST:

_____
Alicia Richardson, City Secretary

APPROVED AS TO FORM AND LEGALITY:

_____
Dorothy Palumbo, City Attorney

EXHIBIT C

STATE OF TEXAS §

§ **St. James Place Development Agreement**

COUNTY OF DENTON §

This Development Agreement ("Agreement") is made by and between the City of Highland Village, Texas (the "City"), and Aven Williamson Construction, Inc. a Texas corporation, (the "Developer"), acting by and through their duly authorized representatives.

R E C I T A L S:

WHEREAS, the Developer is the owner of the real property known as St. James Place, an addition to the City of Highland Village, Texas and being described in **Exhibit "A"** (the "Property"); and

WHEREAS, the Developer intends to develop the Property for single family, detached dwellings (the "Project"); and

WHEREAS, the parties have entered into that certain Real Estate Sales Contract for the purchase of Lots 50 and 57 of the St. James Place Addition in the City of Highland Village, Texas; and

WHEREAS, the Developer intends as part of the overall development of the property to convey Lot 58 to the Highland Village Parks Foundation; and

WHEREAS, the Developer intends as part of overall development of the Property, to design, construct and install, on behalf of the City certain improvements on Lot 57 and Lot 58 (the "Improvements"); and

WHEREAS, the Improvements shall be approved by the City prior to construction; and

WHEREAS, the City agrees pursuant to Texas Local Government Code, Section 212.071 *et. seq.* to participate in the cost of the design and construction of the Improvements for an amount not to exceed $35,000.00, which is less than thirty percent (30%) of the total cost of the Public Improvements related to the project; and

WHEREAS, the parties desire to enter into an agreement pursuant to Texas Local Government Code, Section 212.071 *et. seq* relating to the Improvements.

NOW THEREFORE, in consideration of the premises and the mutual covenants contained herein and other valuable consideration the sufficiency and receipt of which, are hereby acknowledged by the parties agree as follows:

Article I
Term

The term of this Agreement shall commence on the "Effective Date" and shall continue until all parties have fully satisfied all terms and conditions of this Agreement, unless sooner terminated as provided herein.

Article II
Definitions

"City" shall mean the City of Highland Village, Texas.

"Commencement of Construction" shall mean that: (i) the plans have been prepared and all approvals thereof required by applicable governmental authorities have been obtained for construction of the respective improvements; (ii) all necessary permits for the construction of the respective improvements pursuant to the respective plans therefore have been issued by all applicable governmental authorities; and (iii) grading of the land has commenced.

"Completion of Construction" shall mean: (i) the respective improvements have been substantially completed in accordance with the respective Construction Documents; and (ii) the respective improvements have been accepted by the City.

"Construction Documents" shall mean the plans and specifications submitted for the design, installation and construction of the respective improvements, as approved by the City Engineer and Parks Director, as applicable.

"Developer" shall mean Aven Williamson Construction, Inc., a Texas corporation.

"Effective Date" shall mean the last date of execution of this Agreement.

"Fountain Improvements" shall mean aeration system, including fountain and other amenities related thereto to be designed and subsequently constructed by the Developer on Lot 58 pursuant to this Agreement and approved by the City Manager or his designee.

"Parking Improvements" shall mean parking and other amenities related thereto to be designed and subsequently constructed by the Developer on Lot 57 pursuant to this Agreement and approved by the City Manager or his designee.

"Property" shall mean the real property described in Exhibit "A".

"Real Estate Sales Contract" shall mean that certain Real Estate Sales Contract by and between the parties for the purchase of Lots 50 and 57 of the Property, dated of approximate even date herewith.

Article III

Parking Improvements

3.1 **Design of Parking Improvements**. (a) The Developer has prepared Schematic Design Plans and Construction Documents for the Parking Improvements, in consultation with the Parks Director, in accordance with Ordinance No. 97-748, as amended, and the City's Comprehensive Trail System Master Plan and Parks and Open Space Master Plan. The Parking Improvements shall consist of approximately thirteen (13) parking spaces with a two foot, (2') retaining wall with a landscaped area with steps to access Lot 57 and open spaces and trail connections within the Property. The Developer shall prepare preliminary construction documents for the Parking Improvements (the "Preliminary Construction Documents") and submit the same to the City for review and approval after the Effective Date. The City shall review the Preliminary Construction Documents and provide comments to the Developer after submission. If the parties mutually approve the Preliminary Construction Documents and Schematic Design Plans the Developer shall, after City review and approval of the Preliminary Construction Documents, prepare final construction documents for the Parking Improvements (the "Final Construction Documents") for review and final approval by the City.

3.2 **Project Construction.** Subject to the parties closing the purchase and sale of the Property and the approval of the Schematic Design Plan and Final Construction Documents for the Parking Improvements, the Developer agrees to provide the Parking Improvements subject to the reimbursement provided in Section 3.4 hereof. The Developer agrees to cause Commencement of Construction of the Parking Improvements to occur within a reasonable time after the date of City approval of the Final Construction Documents, and shall cause Completion of Construction of the Parking Improvements to occur.

3.3 **Construction Phase Responsibilities**. (a) The City shall be responsible for: (i) construction inspection services, excluding TDLR inspection for compliance with the Texas Accessibility Standards; (ii) utility billings upon Completion of Construction and acceptance of property of the Improvements; and (iii) review and approval of Construction Documents, plans, submittals and change orders.

(b) The Developer shall be responsible for: (i) construction contract management for the Parking Improvements; (ii) obtaining the survey for design and staking; (iii) the cost of all utilities for the Parking Improvements during construction thereof until Completion of Construction of the Parking Improvements, unless otherwise provided herein; (iv) maintenance of all Parking Improvements until Completion of

Construction thereof; and (v) TDLR inspection of the Parking Improvements for compliance with the Texas Accessibility Standards.

3.4 **Reimbursement to Developer**. Upon Completion of Construction of the Parking Improvements, the Developer shall provide the City with copies of all invoices and records showing the total cost of the design and construction of the Parking Improvements, and such other information as may be reasonably requested by the City to verify such costs. The City shall reimburse the Developer for the actual cost of the purchase, design and construction of the Parking Improvements not to exceed Twenty Five Thousand Dollars, ($25,000), (the "City Participation Amount") upon verification of the actual cost of the design and construction of the Parking Improvements.

3.5 **Maintenance of Parking Improvements.** From and after the Completion of Construction of the Parking Improvements, and acceptance of the Parking Improvements, the City shall at its sole expense: (i) repair and maintain the Parking Improvements (including irrigation systems, landscaping, amenities and equipment) and make all necessary replacements thereto, including replacement of dead trees, shrubs, ground cover and grass, and shall keep the same in a neat, clean, attractive and sanitary condition. The Developer shall cause its contractor and subcontractors to provide the City a maintenance bond for a period of two (2) years following Completion of Construction of the Improvements for the materials and workmanship for all Improvements and shall assign all manufacturers' standard warranties for all equipment, irrigation or other installed facilities.

Article VI

Fountain Improvements

4.1 **Design of Fountain Improvements**. (a) The Developer shall prepare Schematic Design Plans and Construction Documents for the Fountain Improvements, in consultation with the Parks Director, in accordance with Ordinance No. 97-748, as amended, and the City's Comprehensive Trail System Master Plan and Parks and Open Space Master Plan. The Fountain Improvements shall consist of an aeration system, including a fountain, sufficient to service the approximately one and one half (1.5) acre pond located on Lot 58. Pond Elevation attached as Exhibit "B". The Developer shall prepare construction documents for the Fountain Improvements (the "Fountain Construction Documents") and submit the same to the City for review and approval after the Effective Date. The City shall review the Fountain Construction Documents and provide comments to the Developer after submission. If the parties mutually approve the Fountain Construction Documents and any necessary Schematic Design Plans the Developer shall prepare final construction documents for the Fountain Improvements reflecting the agreed upon revisions for review and final approval by the City.

(b) In the event the parties do not agree upon the Fountain Construction Documents, the Developer is not obligated to construct the Fountain Improvements as provided in Section 4.2 hereof.

4.2 **Project Construction.** Subject to the parties closing the purchase and sale of the Property and the approval of the Fountain Construction Documents for the Fountain Improvements, the Developer agrees to provide the Fountain Improvements subject to the reimbursement provided in Section 4.4 hereof. The Developer agrees to cause Commencement of Construction of the Fountain Improvements to occur within a reasonable time after the date of City approval of the Fountain Construction Documents, and shall cause Completion of Construction of the Fountain Improvements to occur.

4.3 **Construction Phase Responsibilities**. (a) The City shall be responsible for: (i) construction inspection services, excluding TDLR inspection for compliance with the Texas Accessibility Standards; (ii) utility billings upon Completion of Construction and acceptance of property of the Fountain Improvements; and (iii) review and approval of Construction Documents, plans, submittals and change orders.

(b) The Developer shall be responsible for: (i) construction contract management for the Fountain Improvements; (ii) obtaining the survey for design and staking; (iii) the cost of all utilities for the Fountain Improvements during construction thereof until Completion of Construction of the Fountain Improvements, unless otherwise provided herein; (iv) maintenance of all Fountain Improvements until Completion of Construction thereof; and (v) TDLR inspection of the Fountain Improvements for compliance with the Texas Accessibility Standards.

4.4 **Reimbursement to Developer**. Upon Completion of Construction of the Fountain Improvements, the Developer shall provide the City with copies of all invoices and records showing the total cost of the design and construction of the Fountain Improvements, and such other information as may be reasonably requested by the City to verify such costs. The City shall reimburse the Developer for the actual cost of the purchase, design and construction of the Fountain Improvements not to exceed Ten Thousand Dollars, ($10,000), (the "City Participation Amount") upon verification of the actual cost of the design and construction of the Fountain Improvements as long funds are budgeted and available in the City of Highland Village's 08/09 Fiscal year.

4.5 **Maintenance of Fountain Improvements.** From and after the Completion of Construction of the Fountain Improvements, and acceptance of the Fountain Improvements, the City shall at its sole expense: (i) repair and maintain the Fountain Improvements (including utilities, irrigation systems, landscaping, amenities and equipment) and make all necessary replacements thereto, including replacement of any parts and equipment, and shall keep the same in a neat, clean, attractive and sanitary condition. The Developer shall cause its contractor and subcontractors to provide the City a maintenance bond for a period of two (2) years following Completion of Construction of the Improvements for the materials and workmanship for all

Improvements and shall assign all manufacturers' standard warranties for all equipment, irrigation or other installed facilities.

Article V
Termination and Default

5.1 **Termination.** This Agreement may be terminated by the mutual written agreement of the parties. Either party may terminate this Agreement if the other party breaches any of the terms and conditions of this Agreement, and such breach is not cured by such party within thirty (30) days after receipt of written notice thereof. This Agreement shall terminate if the parties do not close the purchase and sale of the Park Property pursuant to the Real Estate Sales Contract.

5.2 **Default by Developer.** In the event the Developer breaches or fails to close the sale of Lots 50 and 57 of the Property to the City pursuant to the Real Estate Sales Contract, other than for breach by the City, the Developer shall pay a sum to the City as liquidated damages in the amount of $24,945.00.

Article VI

Miscellaneous

6.1 **Release**. Construction of the Project pursuant to this Agreement and the approved plans shall satisfy all obligations of the Developer and the City with regard to the requirements of Section 212.904 of the Texas Local Government Code. In other words, the City and the Developer agree that the construction of the improvements and associated costs born by the parties to this Agreement are roughly proportional to the benefits to be derived by the development under this Agreement. Both the City and the developer agree to waive and release all claims one may have against the other related to any and all rough proportionality and individual determination requirements mandated by the United States Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1974), and its progeny; under Section 212.904 of the Texas Local Government Code, as amended; and under any other requirements of a nexus between the improvements and the development conditions and the projected impact of the terms of this Agreement. Upon the full and final satisfaction by the City and Developer of their respective obligations contained herein, the City and Developer shall execute and record in the Deed Records of Denton County, a release of the City and the Developer from their obligations set forth herein.

6.2 **Bonds**. Developer agrees provide a payment bond and a performance bond for any actual construction of Improvements undertaken by the Developer to ensure completion of the Project in accordance with Chapter 2253, Texas Government Code, or to cause its contractors and subcontractors to provide such performance bonds, and payment bonds in forms reasonably satisfactory to the City for the construction of any

Improvements to ensure completion of such Improvements and payment of the contractors and subcontractors performing the work.

6.3 **Books and Records**. Developer and the City agree to make their respective books and records relating to the construction of the Park Improvements available for inspection by the other party, until acceptance of the Park Improvements by the City.

6.4 **Indemnification/Hold Harmless.** Developer does hereby release, indemnify and hold harmless the City, its officers, agents, employees, and third party representatives (collectively referred to as "City") from any and all claims, damages, causes of action of any kind whatsoever, statutory or otherwise, due to personal injury (including death) or property damage, including court cost, expenses and attorney's fees, and all other expenses arising directly or indirectly from the Developer's construction of the parking lot and aeration of the pond.

6.5 **Notice**. All notices required by this Agreement shall be in writing and addressed to the following, or such other party or address as either party designates in writing, by certified mail, postage prepaid or by hand delivery.

If intended for Developer, to:	With copy to:
Aven Williamson Construction, Inc. a Texas Corporation	Night Keyes Attorney
Aven Williamson Construction, Inc. 5940 Summerhill Rd. Texarkana, Texas 75503	Aven Williamson Construction, Inc. 5940 Summerhill Rd. Texarkana, Texas 75503
If intended for City, to:	With copy to:
Michael Leavitt, City Manager City of Highland Village 1000 Highland Village Road Highland Village, Texas 75077 Facsimile No. (972) 317-0237	Dorothy G. Palumbo, City Attorney City of Highland Village 1000 Highland Village Road Highland Village, Texas 75077 Facsimile No. (972) 317-0237

6.6 **Project Plans**. Except as otherwise provided, the Construction Documents for all Improvements shall be submitted to the City Engineer for review and approval prior to Commencement of Construction.

6.7 **Other Public Improvements.** All other public improvements, including streets, utilities, drainage, sidewalks, street lighting, street signage and all other required improvements, shall be provided by the Developer at no cost to the City, (except as provided for in this agreement), in accordance with Subdivision Ordinance No. 95-711.

6.8 **NCTCOG Standards**. Except as otherwise provided in this Agreement, the construction of the Improvements by Developer shall be in accordance with the Standard Specifications for Public Works Construction published by the North Central Texas Council of Governments, as amended, and as modified by the City, and to the extent applicable are hereby incorporated by reference.

6.9 **Compliance with Laws**. Developer shall fully comply with all local, state and federal laws, including all codes, ordinances and regulations applicable to this Agreement and the work to be done thereunder, which exist or which may be enacted later by governmental bodies having jurisdiction or authority for such enactment.

6.10 **Successors and Assigns.** All obligations and covenants of the Developer under this Agreement shall be binding on the Developer, its successors and permitted assigns. The Developer may not assign this Agreement without the prior written consent of the City.

6.11 **Severability**. In the event any section, subsection, paragraph, sentence, phrase or word herein is held invalid, illegal or unconstitutional, the balance of this Agreement shall be enforceable and shall be enforced as if the parties intended at all times to delete said invalid section, subsection, paragraph, sentence, phrase or word.

6.12 **Governing Law**. The validity of this Agreement and any of its terms and provisions, as well as the rights and duties of the parties, shall be governed by the laws of the State of Texas; and venue for any action concerning this Agreement shall be in State District Court of Denton County, Texas. The parties agree to submit to the personal and subject matter jurisdiction of said court.

6.13 **Entire Agreement**. This Agreement embodies the complete agreement of the parties hereto, superseding all oral or written, previous and contemporary agreements between the parties and relating to the matters in this Agreement, and except as otherwise provided herein cannot be modified without written agreement of the parties to be attached to and made a part of this Agreement.

6.14 **Recordation of Agreement**. A certified copy of this Agreement shall be recorded in the Deed Records of Denton County, Texas.

6.15 **Incorporation of Recitals**. The determinations recited and declared in the preambles to this Agreement are hereby incorporated herein as part of this Agreement.

6.16 **Exhibits**. All exhibits to this Agreement are incorporated herein by reference for all purposes wherever reference is made to the same.

6.17 **Counterparts**. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument.

6.18 **Conditions Precedent.** This Agreement is conditioned on and subject to the parties entering into the Real Estate Sales Contract, Exhibit "C".

EXECUTED in duplicate originals this the ____ day of _____, 2008.

City of Highland Village, Texas

By: _____
Michael Leavitt, City Manager

Attest:

By: _____
Alicia Richardson, City Secretary

Approved As To Form and Legality:

By: _____
Dorothy G. Palumbo, City Attorney

DEVELOPER

Aven Williamson Construction, Inc.
a Texas Corporation

BY:_____
Aven C. Williamson, President

STATE OF TEXAS §
§
COUNTY OF DENTON §

This instrument was acknowledged before me on the ___ day of _____, 2008 by Aven Williamson, President, of Aven Williamson Construction, Inc. a Texas corporation, on behalf of said corporation.

_____
Notary Public, State of Texas

My Commission Expires:_____

Exhibit A
Legal Description of the Property

Exhibit “B”
Pond Elevation

Exhibit “C”
Real Estate Sales Contract