

**WHISPER VALLEY AND INDIAN HILLS**  
**ANNEXATION AND DEVELOPMENT AGREEMENT**  
**Effective as of June 18, 2009**



- Natural drainage areas, including headwaters and the 100 year floodplain, will be preserved, as described herein.
- Development of the area (save and except single family housing) will adhere to Grow Green requirements.
- Development of the area will adhere to the PUD Green Builder Program.
- Development of the area will meet the City’s PUD affordable housing requirements.
- A schedule for consensual full purpose annexation of the area after certain events occur, as well as a means of ensuring that, in the interim, adequate community facilities and services are provided for.

**NOW, THEREFORE,** for and in consideration of the mutual agreements, covenants, and conditions contained in this Agreement, and other good and valuable consideration, the City and Developer agree as follows:

**ARTICLE I.**

**DEFINITIONS**

**Section 1.01 Terms Defined in this Agreement.** In this Agreement, each of the following terms shall have the meanings indicated:

“**Applicable Requirements**” shall have the meaning set forth in Section 3.04(a).

“**Arbitrable Dispute**” shall have the meaning set forth in Section 12.01.

“**Arbitration Remedy**” shall have the meaning set forth in Section 12.03.

“**C**” shall mean the commercial land use category for property within Whisper Valley, which includes commercial uses, including retail, office, high quality light industrial uses, convenience storage, and mixed-use commercial / residential uses, as further described in Article III.

“**C Site Development Regulations**” shall mean the site development regulations for those portions of Whisper Valley designated as C, and which will be more particularly set forth in the Whisper Valley PUD.

“**City**” shall have the meaning set forth in the recitals to this Agreement.

“**City Code**” shall mean the City Code of Austin, together with all its related

administrative rules and technical criteria manuals in effect as of the Effective Date.

**“City Council”** shall mean the City Council of the City or any successor governing body.

**“Civic”** shall mean the civic land use category for property within Whisper Valley which includes school, fire station, library, transit center, or other civic uses, including the performance of utility, educational, recreational, cultural, medical, protective, and governmental functions and other uses that are strongly vested with public or social importance.

**“Dedicated Review Team”** shall have the meaning set forth in Section 3.11.

**“Designated Successors and Assigns”** shall mean an entity to which WV Developer or IH Developer, as applicable, assigns (in writing) all or a portion of its rights and obligations contained in this Agreement pursuant to Section 13.07(a).

**“Developers”** shall have the meaning set forth in the recitals to this Agreement.

**“Development”** shall have the meaning set forth in Section 3.03.

**“Director”** shall mean the Director of the Planning and Development Review Department of the City.

**“Effective Date”** and similar references shall mean the date defined in Section 13.01.

**“ECM”** shall mean the Environmental Criteria Manual, as set forth in the Land Development Code.

**“ETJ”** shall have the meaning set forth in the recitals to this Agreement.

**“IH Developer”** shall have the meaning set forth in the recitals to this Agreement.

**“IH Open Space”** shall have the meaning set forth in Section 3.08(d).

**“IH PID”** shall have the meaning set forth in Section 2.02.

**“IH PID Agreement”** shall have the meaning set forth in Section 2.02.

**“IH Property”** shall have the meaning set forth in the recitals to this Agreement.

**“Indian Hills”** shall have the meaning set forth in the recitals to this Agreement.

**“Indian Hills Zoning Ordinance”** shall have the meaning set forth in Section

3.01(b).

**“Land Development Code”** shall mean the Land Development Code of the City, codified as Titles 25 and 30 of the City Code.

**“Land Use Category”** or **“Land Use Categories”** shall mean the land use categories for property within Whisper Valley, specifically R, C, MU, Civic, or OS.

**“Limited Purpose Annexation”** shall have the meaning set forth in Section 5.01(a).

**“Manville”** shall mean Manville Water Supply Corporation.

**“M&O Assessment”** shall have the meaning set forth in Exhibit “H”.

**“MU”** shall mean the land use category for property within Whisper Valley which may include any use allowed within R Land Use Category other than single family detached, or any use allowed in the C Land Use Category, as set forth in Article III.

**“MU Site Development Regulations”** shall mean the site development regulations for those portions of Whisper Valley designated MU, which will be more particularly set forth in the Whisper Valley PUD.

**“Notice”** shall have the meaning set forth in Section 13.09.

**“Ordinances”** shall mean the ordinances of the City in effect as of the Effective Date.

**“OS”** shall mean the open space land use category for property within Whisper Valley as further described in Article III, which category shall include, notwithstanding anything in the City Code to the contrary, any wet pond or any detention pond generally accessible to the public.

**“OS Site Development Regulations”** shall mean the site development regulations for those portions of Whisper Valley designated as OS, and which will be set forth in the Whisper Valley PUD.

**“PARD”** shall mean the City’s Parks and Recreation Department.

**“Party”** means WV Developer, IH Developer, or City, as Parties to this Agreement, and **“Parties”** means collectively the Developers and the City.

**“PID Agreement”** shall mean, collectively, the WV PID Agreement and the IH PID Agreement.

**“Planning Area”** shall mean the planning districts in Whisper Valley generally

depicted on “Exhibit C-2”.

**“Private Open Space”** shall have a meaning set forth in Section 3.08(a).

**“Projects”** shall have the meaning set forth in the recitals to this Agreement.

**“R”** shall mean the residential land use category for property within Whisper Valley, which includes single family detached residential, single family attached residential, multi-family residential, neighborhood-scale retail or office uses, as further described in Article III.

**“R Site Development Regulations”** shall mean the site development regulations for those portions of Whisper Valley designated as R, and which will be more particularly set forth in the Whisper Valley PUD.

**“Signature Park”** shall have the meaning set forth in Section 3.08(a).

**“Term”** and similar references shall have the meaning set forth in Section 13.02.

**“Whisper Valley”** shall have the meaning set forth in the recitals to this Agreement.

**“Whisper Valley PUD”** shall have the meaning set forth in Section 3.01(a).

**“Whisper Valley PUD Ordinance”** shall mean the ordinance by the City of Austin approving the Whisper Valley PUD.

**“WV Developer”** shall have the meaning set forth in the recitals to this Agreement.

**“WV Open Space”** shall have the meaning set forth in Section 3.08(a).

**“WV Property”** shall have the meaning set forth in the recitals to this Agreement.

**“WV PID”** shall have the meaning set forth in Section 2.01.

**“WV PID Agreement”** shall have the meaning set forth in Section 2.01.

**Section 1.02 Other Definitions.** All capitalized terms used but not defined in this Agreement shall have the meaning given to them in the City Code.

## Article II.

### **PUBLIC IMPROVEMENT DISTRICT**

**Section 2.01 Whisper Valley PID.** Subject to Section 9.01 below, before or concurrently with limited purpose annexation, approval of the Whisper Valley PUD, and the formation of the Whisper Valley Public Improvement District (“**WV PID**”) and subject to the City’s receipt of a feasibility study, the Parties intend to enter into the Whisper Valley Public Improvement District Financing Agreement (“**WV PID Agreement**”), in accordance with the terms set forth on Exhibit “**B**” attached hereto.

**Section 2.02 Indian Hills PID.** Subject to Section 9.01 below, before or concurrently with limited purpose annexation, approval of the Indian Hills Zoning Ordinance, and the formation of the Indian Hills Public Improvement District (“**IH PID**”) and subject to the City’s receipt of a feasibility study, the City and IH Developer intend to enter into the Indian Hills Public Improvement District Financing Agreement (“**IH PID Agreement**”), in accordance with the terms set forth on Exhibit “**B**” attached hereto.

**Section 2.03 Other Financing Tools.** In addition, if the City makes available any other tools or forms of financing for infrastructure (other than a PID) available to establish the goals discussed in Recital C above, then the conditions precedent (or other requirements regarding PIDs or PID bonds) in the Agreement may be satisfied by the additional tools and/or forms of financing approved by the City in lieu of or in addition to the WV PID and IH PID.

## Article III.

### **SITE DEVELOPMENT, APPLICABLE ORDINANCES AND RELATED MATTERS**

#### **Section 3.01 Ordinances**

(a) **Whisper Valley Planned Unit Development.** The Parties acknowledge that this Agreement, along with the Development Assessment previously filed, shall be the basis for the consideration of the Whisper Valley Planned Unit Development (“**Whisper Valley PUD**”). In connection therewith, this Agreement shall constitute WV Developer’s request for Limited Purpose Annexation of Whisper Valley. In addition, the Parties acknowledge and agree that the annexation of Whisper Valley by the City for limited purposes and the application of related City land use regulations are conditioned upon the formation of the WV PID and approval of the PUD in accordance with this Agreement.

(b) **Indian Hills Development.** This Agreement shall constitute IH Developer’s request for Limited Purpose Annexation of Indian Hills in compliance with Texas Local Government Code Sections 43.121 and 43.129 and other applicable law, and as is provided for in this Section 3.01(b). In addition, the Parties acknowledge and agree that the annexation of Indian Hills by the City for limited purposes and the application of

related City land use regulations are conditioned upon the formation of the IH PID and approval of the Indian Hills Zoning Ordinance (herein so called) in accordance with this Agreement. The locations of zoning categories allowed within Indian Hills in accordance with the Indian Hills Zoning Ordinance are generally shown on Exhibit "C-1" (*IH Zoning Map*). The Parties agree that it is intended that the portions of the IH Property, as shown on Exhibit "C-1", shall be used in a manner that is compliant with uses and as allowed by the City in the "LI", "CS", and "MF-3" classifications, as applicable, as such terms are defined in the current land use Code of the City, or an equivalent successor category, if applicable, which category shall not be materially more restrictive than the uses allowed in the foregoing "LI", "CS", or "MF-3" classification, as applicable, as of the Effective Date of this Agreement. Therefore, the Parties agree that it is intended that upon approval of all site development standards and requirements for use of property located in the "LI", "CS", or "MF-3" classification shall apply to Indian Hills in the locations designated on Exhibit "C-1", unless specifically superseded by the standards and requirements of this Agreement.

### **Section 3.02 Whisper Valley Land Uses.**

(a) **Locations.** The locations of the Land Use Categories intended to be allowed within Whisper Valley are generally shown on Exhibit "C-2" (*Whisper Valley Land Use Plan*). The final version of the Whisper Valley Land Use Plan will be set forth in the Whisper Valley PUD. The Whisper Valley Land Use Plan may be modified from time to time in accordance with City Code, as adjusted by the Whisper Valley PUD. Modifications to the Whisper Valley Land Use Plan shall not require an amendment to this Agreement.

(b) **Site Development Regulations.** Site Development Regulations (including compatibility standards) applicable to each Land Use Category in Whisper Valley will be detailed in the Whisper Valley PUD. The Site Development Regulations set forth in the Whisper Valley PUD are intended to permit (i) vertical mixed-use buildings in the C and MU Land Use Categories to be constructed in accordance with the density regulations applicable to vertical mixed use buildings in the City Code (i.e. exceptions to FAR or site area requirements) and (ii) improvements in the C Land Use Category up to ninety feet (90') in height, subject to compatibility standards contained in the Whisper Valley PUD ordinance. In the event any provision of the City Code or any law, ordinance, or regulation applicable to Whisper Valley is based on a zoning district and is not specifically addressed in the Whisper Valley PUD, then for purposes of interpreting such law ordinance or regulation it is intended that the base zoning district applicable in each Land Use Category is as follows: (i) the base zoning district applicable in the C Land Use Category shall be CS-V; (ii) the base zoning district applicable to the MU Land Use Category shall be GR-V; and (iii) the base zoning district applicable to the R Land Use Category shall be LR-MU.

(c) **Zoning Uses.** Permitted, conditional and prohibited uses applicable to each Land Use Category in Whisper Valley will be set forth in the Whisper Valley PUD; provided, however, it is intended that (i) certain retail and other commercial uses will be



permitted in the R Land Use Category, subject to certain size and scale limitations to be detailed in the Whisper Valley PUD, and (ii) residential uses (other than single-family detached) will be permitted in the C Land Use Category, as further detailed in the Whisper Valley PUD.

**Section 3.03 Continuation of Existing Uses and Activities.** Those land uses and activities described below that currently exist within Whisper Valley or Indian Hills shall be allowed to continue operating in the same manner, upon limited purpose annexation of Whisper Valley or Indian Hills, as applicable, into the City: (i) agricultural (including, without limitation, ranching and farming uses); and (ii) hunting. Hunting on the WV Property shall be prohibited after issuance of the first building permit for any part of the WV Property. Hunting on the IH Property shall be prohibited after issuance of the first building permit for any part of the IH Property. All other uses and development of Whisper Valley or Indian Hills shall be “**Development**” (herein so called) for purposes of this Agreement.

**Section 3.04 Applicable Requirements.**

(a) **Controlling Ordinances, Manuals, and Rules.** For a period of fifteen (15) years commencing upon the adoption of the Whisper Valley PUD Ordinance or Indian Hills Zoning Ordinance, as applicable, all of City’s applicable laws, ordinances, manuals, and administrative rules, (including the Land Development Code) as they regard land development as they exist as of the Effective Date of this Agreement shall apply to Development within Whisper Valley or Indian Hills, as applicable, except as otherwise specified in this Agreement. Any reference to any City Code, Ordinance, regulation, manual or any other law shall mean those City Codes, Ordinances, regulations or manuals, design criteria, or other law in effect as of the Effective Date of this Agreement, including, without limitation, commercial design standards (the “**Applicable Requirements**”), without reference to subsequent amendments or supplements thereto. Notwithstanding the above, the City’s Utility Criteria Manual shall be considered an Applicable Requirement regardless of the water or wastewater utility service provider, and such manual and its subsequent amendments or modifications shall apply to this Agreement. In the event of any conflict between the terms or provisions of this Agreement and the Applicable Requirements, this Agreement shall control. Notwithstanding the foregoing, subject to the terms of this Agreement, any Development within the Projects shall comply with subsequently adopted municipal regulations described in §245.004, Local Government Code, unless any such subsequent regulations conflict with an express term or provision of this Agreement, in which event this Agreement controls. Developers do not waive any of their rights provided by Chapter 245 of the Texas Local Government Code, provided that this Agreement shall constitute a permit under Section 212.172(g), Local Government Code, only so long as it remains in effect and is not terminated or superseded. WV Developer or IH Developer may, in each of their sole discretion, choose to comply with any amendment or supplement to the Applicable Requirements or other City rule promulgated after the Effective Date hereof. Notwithstanding any other term or provision of this Agreement to the contrary, permanent structures constructed with the Projects shall comply with the then (at time of application for building permit) current building code adopted by the City.

(b) **No Special Fees.** In no event will the City impose any special fees for administering the terms of this Agreement.

**Section 3.05 Civic Use.**

(a) **Type and Location.** Subject to the conditions and limitations described in this Section 3.05, Developer intends to include the following civic uses within Whisper Valley, approximately in the locations shown on Exhibit “C-2” (*Whisper Valley Land Use Plan*) attached hereto:

- i. Public Safety facilities (Fire, EMS, Police Sheriff);
- ii. Schools;
- iii. Library; and
- iv. Transit Center.

The locations shown on Exhibit “C-2” are approximate. WV Developer has the right in its reasonable discretion to relocate such uses as may be necessary to accommodate other Development within Whisper Valley. The final locations and any subsequent relocations of any and all of the sites is subject to City approval, such approval not to be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, the terms and conditions concerning the Public Safety Site shall be determined in accordance with the terms in Subsection (e) below.

(b) **Site Development Regulations.** Civic Use Development shall comply with the Site Development Regulations for the Land Use Category applicable to the district in which such Civic Use Development is located (e.g., a civic use in an R Planning Area shall comply with Site Development Regulations applicable to the R Planning Area set forth in the Whisper Valley PUD).

(c) **Transit Center.** The City may reserve for development of a Transit Center of not more than five (5) acres, in one of the approximate alternative locations shown on Exhibit “C-2” attached hereto, or other location approved by WV Developer. In any event, the final location of the Transit Center shall be subject to approval by the WV Developer, such approval not to be unreasonably withheld, conditioned or delayed. In the event all or any portion of the Transit Center will be located within Whisper Valley on land outside the WV Open Space, the City shall purchase such land from WV Developer at fair market value as determined by an appraiser mutually agreeable to Developers and the City within five (5) years after the later of limited purpose annexation of or approval of a preliminary plan for the WV Property where the Transit Site would be located .

(d) **Schools.** The Parties acknowledge that Whisper Valley is located within the Del Valle Independent School District (“**DVISD**”). WV Developer intends to provide up to two (2) sites for schools to DVISD. Exhibit “C-2” shows the approximate

location of potential school sites. Nothing in this Agreement shall be construed to prevent WV Developer from negotiating with or receiving compensation from DVISD for the purchase of land within Whisper Valley for the purpose of constructing schools, including, without limitation, in locations generally designated on Exhibit "C-2" hereto.

(e) **Public Safety Site.** The Parties acknowledge that Whisper Valley and Indian Hills are currently located within the jurisdiction of Travis County Emergency Services District #12 ("**TCESD #12**") Upon request by the City at any time after a preliminary plan for any portion of the WV Property has been filed, WV Developer shall convey to the City at no expense to the City one (1) site of no more than two (2) net developable acres for the purpose of constructing a Public Safety Facility ("**Initial Public Safety Facility Site**") at a location to be determined by the WV Developer and the City before adoption of the Whisper Valley PUD ordinance. Pursuant to a separate agreement, the City and TCESD #12 will outline the terms and conditions of TCESD #12 use of the Initial Public Safety Facility Site. The Parties intend that the City will be able to exchange the Initial Public Safety Facility Site for an alternate site for first responder facilities ("**Alternative Site**") within the WV Property or sell the Initial Public Safety Site for private development and use the proceeds to establish an Alternate Site outside the WV Property, provided it shall be in a location permitting the City to provide fire protection and emergency response service to the WV Property. The Parties will address the location criteria for the Alternative Site and the mechanisms for addressing the service provider transition from TCESD #12 to the City during the PUD process.

(f) **Library.** In the event the City intends to construct a library within Whisper Valley, the WV Developer will provide a site for such library in one of the approximate locations shown on Exhibit "C-2". If the City so elects, then (i) the City shall pay fair market value for the land as determined by an appraiser mutually agreeable to Developers and the City, (ii) such election and payment shall occur within five (5) years after the later of limited purpose annexation of or approval of a preliminary plan for the WV Property where the library will be located, and (iii) the actual location and size of the site shall be subject to the WV Developer's approval, such approval not to be unreasonably withheld, conditioned or delayed. WV Developer and IH Developer agree that no library district may be created for the WV Property or IH Property and shall not petition for creation of a library district.

**Section 3.06 Green Builder.** The WV Developer and IH Developer will be required to comply with the City PUD Green Builder Program.

**Section 3.07 Impervious Cover.**

(a) Notwithstanding any provisions of the City Code to the contrary, impervious cover limits for Whisper Valley in the C and MU Land Use Categories, with respect to both watershed and zoning limitations, are intended to be 70% for multifamily and 90% for commercial.

(b) Notwithstanding any provisions of the City Code to the contrary, impervious cover limits for Whisper Valley in the R Land Use Category, with respect to

both watershed and zoning limitations, are intended to be 55% for single family detached, 65% for multifamily and single family attached and 85% for commercial.

(c) Such impervious cover limits will be further detailed in the Whisper Valley PUD.

### **Section 3.08 Open Space.**

(a) **Categories of WV Open Space.** The portion of Whisper Valley designated as Land Use Category OS (the “**WV Open Space**”) shall consist of the two (2) following categories:

(1) **Signature Park.** WV Developer shall convey to the City at no expense to the City, in compliance with City regulations and policies on the dedication of parkland, the portion of Whisper Valley depicted in green on Exhibit “F” hereto (the “**Signature Park**”) to the City or to any other entity directed by the City upon request at any time after a plat for any portion of the WV Property has been filed. Before or concurrently with the formation of the Whisper Valley PUD, the City and WV Developer shall mutually agree on whether all of the Signature Park will be dedicated at one time or if portions of the Signature Park will be dedicated to the City over time as adjacent land within Whisper Valley is platted. Based on WV Developer’s agreement to so dedicate the Signature Park and the Private Open space as provided below, WV Developer will fulfill its parkland dedication requirement for nine thousand twenty eight (9028) units in the development of Whisper Valley and Indian Hills pursuant to Section 25-1-601 *et seq.* of the City Code, therefore no parkland dedication fees will be required in Whisper Valley or Indian Hills unless that number of units is exceeded. Before or concurrently with the formation of the Whisper Valley PUD, WV Developer and the City shall enter into a **License and Development Agreement** (herein so called) covering the ownership, improvement and maintenance of the Signature Park, and at the City’s option the Private Open Space, in accordance with the terms set forth on Exhibit “H” attached hereto. Since the Signature Park (or portions thereof) will be conveyed prior to WV Developer’s development of the portions of the property adjacent to Signature Park, the City shall grant to WV Developer in the License and Development Agreement temporary access, maintenance and construction easements over portions of the Signature Park as may be necessary to allow WV Developer to complete its development work and to install the improvements set forth in Section 3.08(f) hereof. Public access to and use of the Signature Park shall be provided in accordance with the City Code, City park rules, and other applicable law.

(2) **Private Open Space.** Subject to Section 3.08(c) below, WV Developer shall reserve a portion of Whisper Valley as “**Private Open Space**” (herein so called) for the benefit of some or all of the residents, tenants and invitees of the owners of Whisper Valley. WV Developer may develop the Private Open Space only as pocket parks, neighborhood parks, and open space corridors. General descriptions and illustrations of these are generally depicted on Exhibit “G” (*Open Space and Neighborhood Parks Improvements Illustrations*) attached hereto, as well as the brown areas depicted on Exhibit “F” attached hereto; provided, however, the descriptions and

illustrations depicted on Exhibit "G" are set forth for illustrative purposes only and Developer shall not be required to build any neighborhood park exclusively in conformity with any such specific description or illustration. Subject to Section 3.08(c) below, Developer shall maintain the Private Open Space.

(b) **Required WV Open Space Acreage.** In no event will the portion of Whisper Valley designated as WV Open Space, including the Signature Park and Private Open Space, be less than seven hundred (700) acres, in the aggregate.

(c) **Transfer / Maintenance of Private Open Space.** Pursuant to the terms of this Agreement, WV Developer shall be required to sell, gift, lease, or otherwise convey (collectively, "**transfer**") the Private Open Space to the City, a Home Owner's Association, Open Space Owners Association, non-profit organization, conservancy organization or other similar type entity reasonably acceptable to the City. In connection with the transfer of the Private Open Space, WV Developer shall file deed restrictions reasonably acceptable to the City against the Private Open Space in the Official Records of Travis County, Texas that are consistent with the provisions contained in Section 3.08(e) and (f). Notwithstanding the above, if at any time during the term of this Agreement, WV Developer intends to transfer all or a portion of the Private Open Space, WV Developer shall first offer to transfer (at no charge to the City) such portion of the Private Open Space to the City (the "**Offer**"). The City shall have a period of ninety (90) days from the date of its receipt of the Offer to notify WV Developer in writing of its intent to accept a transfer of the Private Open Space pursuant to the terms and conditions of the Offer. If the City fails to respond to such offer within such 90-day period, the City shall be deemed to have refused such Offer. In the event any portion of the Private Open Space is transferred to the City, City will negotiate in good faith the terms of an agreement with WV Developer for the maintenance of such Private Open Space for a term of not less than 20 years, and maintenance of such Private Open Space may be funded by the proceeds of by a maintenance and operation PID if approved by the City at the City's discretion or through proceeds that are funded through a homeowner's association.

(d) **IH Open Space.** Any open space requirements for Indian Hills will be detailed in the Indian Hills Zoning Ordinance.

(e) **Prohibited Uses.** Any activity on or use of the WV Open Space or IH Open Space (collectively, the "**Open Space**") inconsistent with the purposes of this Section or the License and Development Agreement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited within the Open Space:

(1) Biocides. There shall be no use of pesticides or biocides, including, but not limited to insecticides, fungicides, rodenticides, and herbicides, except as permitted by the approved PARD Integrated Pest Management System.

(2) Dumping. There shall be no storage or dumping of ashes, trash, garbage or hazardous materials, except for waste attributable to normal park usage.

(3) Storage Tanks. There shall be no placement or use of any underground storage tanks for petroleum products within the Open Space, unless approved in advance by the City.

(4) License and Development Agreement. There shall be no development before execution of the License and Development Agreement.

(f) **Permitted Activities**. The following activities shall be permitted within the Open Space:

(1) Water Quality and Detention Controls. Developers shall have the right to construct and maintain water quality and detention controls in the Open Space to serve the Projects, provided such improvements must be designed, constructed and maintained as aesthetic amenities and in accordance with the Applicable Requirements and, if part of the Signature Park, must be integrated into the park development plan in the License and Development Agreement to ensure compatibility with recreational features.

(2) Nature Trails. Developer shall have the right to construct nature trails and related improvements within the Open Space, provided that if located in the Signature Park their location and design must be integrated into the park development plan in the License and Development Agreement.

(3) Other Utilities and Improvements. Developer (or any applicable utility company [subject to agreed upon easements or use agreements]) shall have the right to place landscaping, utilities, road crossings and drainage discharge points within the Open Space to serve the Projects, provided such improvements must be designed, constructed and maintained in accordance with the Applicable Requirements and, if part of the Signature Park, must be integrated into the park development plan in the License and Development Agreement.

(4) Recreational Amenities. Developer shall have the right to construct pedestrian trails/path/bridges, sports fields, community swimming pools and related facilities, fitness facilities, playgrounds, equestrian facilities, amenity centers or other recreational amenities within the Open Space, provided that if located on the Signature Park, or on any Private Open Space the City has accepted under Section 3.08(c), such improvements must be open to the public and approved by the City, such approval not to be unreasonably withheld, conditioned or delayed.

(5) Signage. Developer shall have the right to install and maintain project identity signage within the Open Space, subject to any conditions or limitations provided in the Whisper Valley PUD, and if applicable, the park development plan in the License and Development Agreement.

(6) Notwithstanding anything to the contrary contained herein, in no event shall the WV Developer use more than twenty seven and four tenths (27.4) acres of the surface of the Open Space for a private use described in subsections (3) and (5) above

without the prior written consent of the City.

**Section 3.09 Signage within Whisper Valley.** Commercial developments within portions of Whisper Valley (i) designated “C” shall be governed by the requirements set forth in the Commercial Sign District of the City Code and (ii) designated as MU or R shall be governed by the requirements set forth in the Neighborhood Commercial Sign District of the City Code.

**Section 3.10 Transportation Analysis.** In recognition of the major transportation corridors that surround and bisect the Projects, Developers will provide the City with (i) a Traffic Impact Analysis covering Whisper Valley (“**WV TIA**”) and (ii) a Traffic Impact Analysis covering Indian Hills (“**IH TIA**”). The WV TIA shall be in accordance with the Traffic Impact Analysis Scope and Study Area issued by the City dated October 31, 2008 and the WV TIA shall be deemed to satisfy the submittal requirements for the Whisper Valley PUD. The IH TIA shall be in accordance with the Traffic Impact Analysis Scope and Study Area issued by the City dated November 7, 2008 and the IH TIA shall be deemed to satisfy the submittal requirements for the Indian Hills Zoning Ordinance. Thereafter, in connection with proposed Development in the Projects that generates 2000 trips or more per day, a subsequent traffic impact analysis (“**Subsequent TIA**”), limited in scope, may be required if the Director determines a Subsequent TIA is reasonably necessary for the purposes of determining the need for and analyzing streets within the Projects, driveways, traffic signals, turn lanes, or other traffic improvements in the vicinity of such proposed Development. Before approval of the Whisper Valley PUD, the City and the Whisper Valley Developer shall agree on improvements to Taylor Lane to be constructed or funded by the Whisper Valley Developer to accommodate the development densities on the WV Property.

**Section 3.11 Dedicated Review Team.** The City will establish and maintain until full buildout of the WV Property and IH Property a dedicated permit review team in the Watershed Protection Department, Planning and Development Review Department, and Austin Water Utility, or their successor departments, who will be responsible for the review, processing and approval of all subdivision plats, site development permits and all other permits for development within the Projects which are normally processed by such departments, or their successor departments (the “**Dedicated Review Team**”). The Dedicated Review Team will be familiar with the terms and provisions of this Agreement, and other issues particular to Whisper Valley and Indian Hills and, accordingly, will be in a position to more efficiently process and expedite applications for permits, subdivision plat approvals and site development permit approvals for projects within the Projects. The initial Dedicated Review Team will be designated to Developers by the City Manager in writing within thirty (30) days after the approval of the Whisper Valley PUD. All development review, although conducted by Dedicated Review Team, will be subject to the then current City development review processes and procedures.

**Section 3.12 Conditions.** The provisions of Article III are subject to the conditions described in Section 9.01 below.

**Section 3.13 Phased Development.** The City acknowledges that when and if

the Projects develop, they will likely develop, and infrastructure and amenities will be constructed, over an extended period of time in numerous phases which will be more clearly defined in the Whisper Valley PUD and the Indian Hills Zoning Ordinance, as applicable.

**Section 3.14 Affordable Housing.**

(a) At least ten percent (10%) of the rental housing on the WV Property and the IH Property must be affordable to a household whose income is equal or less than sixty percent (60%) of the median family income in the Austin metropolitan statistical area (“Affordable Rental Requirement”). At least ten percent (10%) of the owner occupied housing on the WV Property and the IH Property must be affordable to a household whose income is equal or less than eighty percent (80%) of the median family income in the Austin metropolitan statistical area (“Affordable Ownership Requirement”). Affordable housing provided under this section cannot be used to meet affordable housing requirements for a Vertical Mixed Use bonus or exception, and vice-versa.

**(b) Rental.** The Rental Requirement shall be based on number of units and calculated on an apartment project-by-apartment project basis. The number of single and multi-bedroom units that are affordable shall coincide with the ratio of total single and multi-bedroom units for the applicable project. For example, if you have a three hundred (300) unit apartment complex and one hundred (100) units are multi-bedroom units, then thirty (30) units will be required to meet the Affordable Rental Requirement and ten (10) units out of those thirty (30) units must be multi-bedroom units. The affordable units within any given apartment project shall be interspersed with market rate units.

**(c) Ownership.** The Affordable Ownership Requirement for condo-style projects shall be based on number of units and calculated on a condo project-by-condo project basis. Condo style projects shall follow the same multi-bedroom unit requirements as are set forth for apartments in subparagraph (b) above. For other forms of single family housing (either attached or detached), affordability shall also be calculated based on the number of units and, to the extent economically feasible, shall be spread across the various product types within Whisper Valley and Indian Hills. Notwithstanding the foregoing, if the WV Developer provides more affordable rental units in any given apartment project than the ten percent (10%) required per subparagraph (b) above, then the number of units required to meet the Affordable Ownership Requirement in Whisper Valley shall be reduced (i) on a 1.5:1 ratio for up to three percent (3%) of the ten percent (10%) Affordable Ownership Requirement for Whisper Valley; and (ii) on a 4:1 ratio for up to an additional two percent (2%) of the ten percent (10%) Affordable Ownership Requirement for Whisper Valley. Provided, however, in no event shall the number of units required to meet the Affordable Ownership Requirement in Whisper Valley be reduced below five percent (5%) of total ownership units through the method described above.



## Article IV.

### AMENDMENTS

**Section 4.01 Amendment to Agreement.** This Agreement may be amended only by a written agreement signed by the City, the WV Developer, and the IH Developer. In addition, as long as WV Developer owns any portion of Whisper Valley, WV Developer and the City may amend those Sections of this Agreement applicable only to Whisper Valley without the joinder of the IH Developer or any other landowner. In addition, as long as IH Developer owns any portion of Indian Hills, IH Developer and the City may amend those Sections of this Agreement applicable only to Indian Hills without the joinder of the WV Developer or any other landowner. Notwithstanding the foregoing, any amendment to this Agreement affecting only a portion of the Projects requires the consent and joinder only of the City and any owner of the land within such portion of the Projects. Notwithstanding the foregoing, minor modifications to this Agreement may be made by administrative amendment entered into by the Director and any owner so requesting, including, without limitation, in accordance with Section 3.02. Administrative amendments may include minor deviations from the provisions hereof in order to protect natural features, address unusual site conditions, compensate for some practical difficulty or some unusual aspect of the Projects, or due to the fact that the type of use makes compliance with applicable standards or requirements in the Code or this Agreement unreasonable or impractical.

## Article V.

### ANNEXATION

#### **Section 5.01 Annexation.**

(a) **Limited Purpose Annexation.** By the execution and in consideration of the mutual covenants of this Agreement, WV Developer agrees to and requests the annexation of Whisper Valley into the City for the limited purposes of planning and zoning only and IH Developer agrees to and requests the annexation of Indian Hills into the City for the limited purposes of planning and zoning only (collectively, “**Limited Purpose Annexation**”). The City agrees to cause the Limited Purpose Annexation to occur concurrently with the effective date of the Whisper Valley PUD and the Indian Hills Zoning Ordinance but in no event prior to the formation of the WV PID pursuant to the WV PID Agreement and the formation of the IH PID pursuant to the IH PID Agreement.

(b) **Whisper Valley Full Purpose Annexation.** Pursuant to Section 43.127(a) of the Texas Local Government Code, WV Developer hereby waives the City’s obligation to annex Whisper Valley for full purposes within three (3) years of the date Whisper Valley is annexed for limited purposes pursuant to Section 5.01(a) above. WV

Developer requests that after Whisper Valley is annexed for limited purposes that the City, at its option but not obligation, annex for full purposes all or portions of the WV Property under the following terms and according to the following schedule, but in no event prior to the date which is fifteen (15) years following the date of the WV Limited Purpose Annexation:

(1) For parts of the WV Property for which PID bonds have been issued to pay for public improvements, or for which the Developer has in good faith requested that the City issue PID bonds to pay for public improvements, as evidenced by the Developer's expenditure of necessary amounts for market studies, financial analysis, legal counsel, and other professional services and due diligence necessary to support the request to the full degree that the City Council may act on it and issue PID bonds, the City may full purpose the area upon the retirement of all outstanding PID bonds and the release of all WV PID assessments (other than any M&O Assessments) against the portion of the WV Property to be annexed;

(2) Concurrent with the annexation of any land pursuant to Section 5.01(b)(1), the City may annex any portions of Whisper Valley necessary to establish contiguity between the land annexed and the then-existing full purposes City limits, provided, however, unless otherwise required by law or authorized in writing by WV Developer or the owner of the property affected the maximum width annexed for such contiguity purposes shall be no greater than, at the City's option, either (a) fifty (50) feet in width whether over land or adjacent to existing right of way, or (b) the width of an existing right of way if the City elects to annex right of way to establish contiguity. The City shall negotiate with WV Developer regarding the location of land annexed to establish contiguity. In the event the City and WV Developer do not reach agreement on the location of such land annexed for contiguity, the City first shall attempt to establish contiguity along or adjacent to existing public rights of way, rather than annexing over land, to the extent feasible in the City's reasonable determination; or

(3) The City may annex for full purposes any portion of Whisper Valley which remains unannexed forty-four (44) years and six (6) months from the Effective Date of this Agreement.

During the period which is fifteen (15) years following the date of the WV Limited Purpose Annexation, the City shall not annex any part of Whisper Valley for full purposes except as provided in any one of subsections 5.01(b)(1) through (3) above. Thereafter, this Agreement does not prohibit the City from exercising its authority under law to annex for full purposes any part of the WV Property for which PID bonds have not been issued to pay for public improvements or for which the Developer has not in good faith requested that the City issue PID bonds to pay for public improvements.

(c) **Indian Hills Full Purpose Annexation.** Pursuant to Section 43.127(a) of the Texas Local Government Code, IH Developer hereby waives the City's obligation to annex Indian Hills for full purposes within three (3) years of the date Indian Hills is annexed for limited purposes pursuant to Section 5.01(a) above. IH Developer requests after Indian Hills is annexed for limited purposes that the City, at its option but not

obligation, annex for full purposes all or portions of the IH Property under the following terms and according to the following schedule, but in no event prior to the date which is fifteen (15) years following the date of the IH Limited Purpose Annexation:

(1) For parts of the IH Property for which PID bonds have been issued to pay for public improvements, or for which the Developer has in good faith requested that the City issue PID bonds to pay for public improvements, as evidenced by the Developer's expenditure of necessary amounts for market studies, financial analysis, legal counsel, and other professional services and due diligence necessary to support the request to the full degree that the City Council may act on it and issue PID bonds, the City may full purpose the area upon the retirement of all outstanding PID bonds and the release of all IH PID assessments (other than any M&O Assessments, if any) against the portion of the IH Property to be annexed;

(2) Concurrent with the annexation of any land pursuant to Section 5.01(c)(1), the City may annex any portions of Indian Hills necessary to establish contiguity between the land annexed and the then-existing full purposes City limits, provided, however, unless otherwise required by law or authorized in writing by IH Developer or the owner of the property affected the maximum width annexed for such contiguity purposes shall be no greater than, at the City's option, either (a) fifty (50) feet in width whether over land or adjacent to existing right of way, or (b) the width of an existing right of way if the City elects to annex right of way to establish contiguity. The City shall negotiate with IH Developer regarding the location of land annexed to establish contiguity. In the event the City and IH Developer do not reach agreement on the location of such land annexed for contiguity, the City first shall attempt to establish contiguity along or adjacent to existing public rights of way, rather than annexing over land, to the extent feasible in the City's reasonable determination; or

(3) The City may annex for full purposes any portion of Indian Hills which remains unannexed forty-four (44) years and six (6) months from the Effective Date of this Agreement.

During the period which is fifteen (15) years following the date of the WV Limited Purpose Annexation, the City shall not annex any part of Indian Hills for full purposes except as provided in any one of subsections 5.01(c)(1) through (3) above. Thereafter, this Agreement does not prohibit the City from exercising its authority under law to annex for full purposes any part of the IH Property for which PID bonds have not been issued to pay for public improvements or for which the Developer has not in good faith requested that the City issue PID bonds to pay for public improvements.

(d) The Parties stipulate that the prerequisites for the City's annexation of the Projects under Section 43.035, Local Government Code, have been met.

## Article VI.

### UTILITIES

#### **Section 6.01 Water Service.**

(a) Whisper Valley is currently located within the area covered by Manville's Certificate of Convenience and Necessity ("**Manville CCN**"). It is anticipated that the City and Manville may enter into an Agreement for Joint Water Service and Other Matters (including any similar or substitute agreement, collectively referred to herein as the, "**Joint Water Agreement**") which will, among other things, provide for the transition of retail water service over time from Manville to the City for Whisper Valley, and potentially other areas within the City's ETJ. Subject to the execution of the Joint Water Agreement or the decertification or other release of the Manville CCN to the City, the City agrees to provide retail water service to Whisper Valley in accordance with its service, rate and extension policies applicable to similarly situated properties within the City's service area (as such may be modified in the Joint Water Agreement).

(b) Subject to execution of the Joint Water Agreement by the City and Manville, the Parties intend to enter into a Water Infrastructure and Cost Reimbursement Agreement ("**Water Agreement**") generally in accordance with the terms set forth on Exhibit "M" attached hereto.

(c) If the City and Manville do not execute the Joint Water Agreement on or before the limited purpose annexation of Whisper Valley, then (1) retail water service for Whisper Valley will be provided by Manville (unless otherwise agreed to by the City and Developer) and (2) the Parties intend to enter into the Water Agreement generally in accordance with the terms set forth on Exhibit "L" attached hereto.

(d) The City agrees to provide retail water service to Indian Hills in accordance with Service Extension Request Number 2615, subject to final approval by the City and as it may be modified by or subject to the terms of the Water Agreement.

(e) Developer agrees to build all water infrastructure in accordance with design criteria and specifications of the City, and pay all associated inspection fees with respect to the applicable utility provider and the City.

(f) WV Developer agrees if the City is not the retail water service provider for any portion of the WV Property, then any assessments or any other funding mechanisms approved by the City for the WV PID shall not be used for funding or subsidizing any water service or water infrastructure for such portion of the WV Property not served by the City. Notwithstanding the above, if WV Developer determines it is in the best interest of the development of the WV Property to pursue civil remedies or Texas Commission of Environmental Quality administrative procedures to have the WV Property decertified from Manville and have the City become the permanent retail water

service provider, the City shall allow all reasonable and associated legal and engineering costs of the WV Developer to be reimbursed by the WV PID, subject to approval by the Attorney General's office as an eligible expense.

**Section 6.02 Wastewater Service.** The City agrees to provide retail wastewater services to Whisper Valley in accordance with that certain Cost Reimbursement Agreement by and between the City and Developer dated effective June 21, 2007, as the same may be amended from time to time. The City agrees to provide retail wastewater services to Indian Hills in accordance with Service Extension Request Number 2630.

**Section 6.03 Electric Service.** For those portions of the Projects within the City's service area, the City agrees to provide electric service to the Projects in accordance with its service, rate and extension policies applicable to similarly situated properties within the City's service area. The City acknowledges that portions of the Projects are within a dual electric service area and that electric service may be provided to those portions of the Projects by other providers.

**Section 6.04 Fees.** The City agrees to provide utility services to the Projects in accordance with rates and other policies applicable to all other similar situated properties and City utility customers.

## Article VII.

### ENVIRONMENTAL PROTECTION

**Section 7.01 Environment Goals.** The WV Developer and IH Developer shall ensure Development within Whisper Valley or Indian Hills, as applicable, meets the goals described on Exhibit "J" (*Environmental Goals*).

**Section 7.02 Critical Environmental Features.**

(a) Protection of bluffs, canyon rimrock, springs, wetlands and other critical environmental features ("CEF's") within the Projects will be in accordance with the Land Development Code as of the Effective Date. Notwithstanding the foregoing, the Parties agree and acknowledge that an environmental assessment of Whisper Valley has been conducted by Developer and submitted to and approved by the City (the "ESA"). Pursuant to the ESA, the following CEF's were indentified and the parties have agreed to the following prescribed treatments of such CEF's.

- CEF 1 (pond 1) - preserve with full 150ft setback
- CEF 2 (pond 2) - preserve with full 150ft setback
- CEF 3 (pond 3) - appropriate to mitigate according to ECM 1.3.0(B)(1)(f)(3, 4, 5 or 6)
- CEF 4 (pond 4) - preserve with full 150ft setback
- CEF 5 (pond 6) - preserve with full 150ft setback
- CEF 6 (pond 8) - appropriate to mitigate according to ECM 1.3.0(B)(1)(f)(3, 4, 5 or 6)
- CEF 7 (pond 9) - preserve with full 150ft setback
- CEF 8 (pond 11) - preserve with full 150ft setback

CEF 9 (wetland 1) - preserve with full 150ft setback  
CEF 10 (wetland 2) - appropriate to mitigate according to ECM 1.3.0(B)(1)(f)(3, 4, 5 or 6)  
CEF 11 (pond 5) - appropriate to mitigate according to ECM 1.3.0(B)(1)(f)(3, 4, 5 or 6)  
CEF 12 (wetland 3) - appropriate to mitigate according to ECM 1.3.0(B)(1)(f)(3, 4, 5 or 6)  
CEF 13 (wetland 4) - appropriate to mitigate according to ECM 1.3.0(B)(1)(f)(3, 4, 5 or 6)

Notwithstanding the above, as project plans become further defined, the setbacks referenced above may (at the City's discretion) be further reduced provided that appropriate mitigation is made by Developer.

(b) Notwithstanding anything in the ECM or herein to the contrary, pedestrian facilities (i.e. trails and associated facilities) may be allowed within the required setbacks set forth above if approved by the City at its discretion. Additionally, fencing of setbacks shall not be required.

(c) The CEF's referenced in this Section 7.02 are more particularly described and/or depicted on Exhibit "D" attached hereto.

**Section 7.03 IPM.** The Projects will include an Integrated Pest Management plan as approved by the Director.

**Section 7.04 Pavement Sealants.** Notwithstanding Section 3.04, the use of tar sealants or other pavement sealants at the Projects may be prohibited or regulated when such regulations are incorporated into the City Code.

**Section 7.05 Grow Green Program.** All landscaping in open space [and commercial and multi family projects] within the Projects shall comply with the City's Grow Green Program.

## **Article VIII.**

### **ROADWAYS AND DRIVEWAYS**

**Section 8.01 Roadways.** The following will apply with regard to roadways platted and/or constructed within Whisper Valley or Indian Hills:

(a) Upon approval from the provider of fire protection and emergency medical service stating no objection to the contrary for proposed roadway facilities, the Planning and Development Review Department of the City, or its successor department, may grant administrative waivers without review by any City board, commission or council to the provisions of the City Code with regard to: private street provisions in Section 25-4-17(A) (Access to Lots), prohibitions on block lengths exceeding the limitations in Sections 25-4-152 (Dead-End Streets) and 25-4-153 (Block Length) of the Land Development Code, taking into consideration topography, traffic circulation and access to pedestrian and transit facilities.

(b) Any private street developed within Whisper Valley will be treated as a “roadway” for purposes of Sections 25-8-341 (Cut Requirements) and (Fill Requirements) of the Land Development Code. Street design and construction of streets, alleys and pedestrian paths may be designed and constructed in accordance with the Standards Criteria Manual, the Standard Specifications Criteria Manual or the standards to be set forth in the Whisper Valley PUD.

(c) The WV Developer has provided alternate street standards proposed for portions of Whisper Valley. The Director may approve alternate street standards under Section 25-6-171 (Standards for Design and Construction) of the Land Development Code.

(d) The Parties recognize and intend that Travis County is responsible for maintaining roadways within Whisper Valley until full purpose annexation.

(e) The City’s agreement to the provisions of this Section 8.01 is subject to corresponding approvals or waivers from Travis County to the extent applicable or required.

**Section 8.02 Driveway and Access.** It is intended that driveways and curb cuts shall be permitted from every lot within a single-family residential area. Notwithstanding the foregoing, Developer acknowledges that certain driveways and curb cuts to public rights-of-way maintained by the State of Texas may be subject to driveway and access standards established by the Texas Department of Transportation. In addition, Developer acknowledges and agrees that the City may prohibit certain driveways and curb cuts if such driveways or curb cuts create a traffic safety hazard.

## **Article IX.**

### **ANTICIPATED SCHEDULE; REPRESENTATIONS AND WARRANTIES**

#### **Section 9.01 Anticipated Schedule.**

If the City (i) does not initiate annexation the Projects for the limited purposes of planning and zoning only (as applicable) and successfully limited purpose annex the Project within the time allowed by law, (ii) fails to approve the Whisper Valley PUD or Indian Hills Zoning Ordinance, (iii) fails to enter into the License and Development Agreement substantially in accordance with the terms set forth on Exhibit “H” attached hereto, or (iv) fails to form the WV PID or IH PID, substantially in accordance with the terms hereof on or before May 1, 2010, this Agreement shall automatically terminate and the request for annexation of Whisper Valley and Indian Hills and the planned unit development land use application for Whisper Valley submitted pursuant to this Agreement shall automatically be withdrawn.

The Parties agree in fact and law that this Agreement does not bind the legislative discretion of the City Council to approve or disapprove any proposed annexation

ordinance, the proposed Whisper Valley PUD, the proposed Indian Hills Zoning Ordinance, the proposed WV PID, or the proposed IH PID. If the City Council does not timely approve the proposed annexation ordinance, the proposed Whisper Valley PUD, the proposed Indian Hills Zoning Ordinance, the proposed WV PID, or the proposed IH PID, or if the City Council approves any of the foregoing in a manner inconsistent with this Agreement without the Developers' consent, the Developers' consent for annexation is withdrawn and this Agreement terminates as the Developers' sole remedy.

**Section 9.02 Representations and Warranties of WV Developer.**

(a) **Organization and Good Standing.** WV Developer consists of individuals and multiple partnerships and trusts, each of which is duly organized and validly existing in good standing under the laws of the State of Texas, with full power and authority to conduct its business as it is now being conducted, to own or use the properties and assets that it purports to own or use, and to perform all its obligations under this Agreement.

(b) **Authority, No Conflict.** This Agreement constitutes the legal, valid and binding obligation of WV Developer, enforceable against WV Developer in accordance with its terms. WV Developer has the absolute and unrestricted right, power, authority, and capacity to execute and deliver this Agreement and to perform its obligations under this Agreement.

**Section 9.03 Representations and Warranties of IH Developer.**

(a) **Organization and Good Standing.** IH Developer consists of individuals and multiple partnerships and trusts, each of which is duly organized and validly existing in good standing under the laws of the State of Texas, with full power and authority to conduct its business as it is now being conducted, to own or use the properties and assets that it purports to own or use, and to perform all its obligations under this Agreement.

(b) **Authority, No Conflict.** This Agreement constitutes the legal, valid and binding obligation of IH Developer, enforceable against IH Developer in accordance with its terms. IH Developer has the absolute and unrestricted right, power, authority, and capacity to execute and deliver this Agreement and to perform its obligations under this Agreement.

**Section 9.04 Representations and Warranties of the City.**

(a) **Organization and Good Standing.** The City is duly organized and validly existing municipal corporation in good standing under the laws of the State of Texas, with full power and authority to conduct its business as it is now being conducted, to own or use the properties and assets that it purports to own or use, and to perform all its obligations under this Agreement.

(b) **Authority, No Conflict.** This Agreement constitutes the legal, valid and binding obligation of the City, enforceable against the City in accordance with its terms. The City has the absolute and unrestricted right, power, authority and capacity to execute



and deliver this Agreement and to perform its obligations under this Agreement.

## **Article X.**

### **FRUSTRATION OF PURPOSE**

#### **Section 10.01 Frustration of Purpose.**

(a) If any part of this Agreement is effected or modified in whole or in part as a result of modifications, changes, or amendments to the legal authority for or affecting this Agreement, either by a final judicial decree for which all appeals have expired or been exhausted or the Texas Legislature modifying or amending state law, then the Parties agree and understand that the purpose of this Agreement may be frustrated.

(b) If any Party contends that a frustration of purpose has occurred, that Party shall notify all other Parties in writing of the alleged frustration of purpose and the factual and legal basis for that claim.

(1) The Parties agree that upon receipt of Notice of an alleged frustration of purpose, they will meet and confer and attempt to amend or revise the Agreement to accomplish to the greatest degree practical the same purpose and objective of the part of this Agreement effected by the frustration of purpose.

(2) If the Parties cannot agree within ninety (90) days of one such Party notifying the other Parties in writing of an alleged frustration of purpose to a mutually agreeable amendment or revision to this Agreement, any Party may thereafter file a court action, or as provided in Article XII a Notice of Arbitration, seeking a declaration that a frustration of purpose has occurred. If no such Party files an action within thirty (30) days of the 90-day period just described, then no frustration of purpose will have occurred, and this Section 10.01 will be inapplicable unless and until a Party sends another notification pursuant to Section 10.01b. If a court of competent jurisdiction or an arbitration panel provided for in Article XII issues an order, which becomes final because of the exhaustion of all appellate rights, (“final order”) which final order adjudicates that the Agreement has had its purpose frustrated, the Parties agree to again attempt for ninety (90) days to amend or modify this Agreement to the extent necessary to address the frustration of purpose declared by the final order. The Parties agree that they will attempt to amend or revise this Agreement to the greatest degree practical to accomplish the same purpose and objective of the part of this Agreement that has been frustrated as declared by the court or arbitration panel. If the Parties cannot agree on any such amendment or revision within ninety (90) days from the date of the final order, then any Party may submit the issue to arbitration under Article XII.

## Article XI.

### **DEFAULT AND REMEDIES FOR DEFAULT**

**Section 11.01 Preventative Default Measures.** The Parties presently enjoy a good working relationship and understand the meaning and intent of this Agreement; however, the Parties recognize that individual representatives of each of the Parties will likely change over the course of this Agreement, particularly those of the City. The City accordingly agrees that oversight of the implementation of this Agreement shall at all times during its term be assigned directly to an Assistant City Manager (or equivalent). In the event of a dispute involving an interpretation of any other aspect of this Agreement, upon either WV Developer's or IH Developer's request, such Assistant City Manager shall convene a meeting of the applicable Parties as soon as reasonably practical and use all reasonable efforts to avoid processing delays and to resolve the dispute and carry out the spirit and purpose of this Agreement.

**Section 11.02 Default.** It shall be a default under this Agreement by a Party, if such Party shall fail to perform any of its obligations under this Agreement and such failure shall remain uncured following the expiration of thirty (30) business days after written notice of such failure. However, in the event the default is not monetary in nature, and of a nature that cannot be cured within such thirty (30) day period, the defaulting Party shall have a period of time as long as reasonably necessary in which to cure the default in question, so long as such defaulting Party is diligently pursuing cure of the default. Notwithstanding the foregoing, a default by WV Developer or the City under this Agreement with respect to Whisper Valley that does not affect or involve IH Developer shall not constitute a default by IH Developer with respect to Indian Hills, and in such event, the terms of this Agreement shall remain in full force and effect and bind the City and IH Developer in all respects as this Agreement affects Indian Hills, including, without limitation, the Indian Hills Zoning Ordinance and the IH PID; a default by IH Developer or the City under this Agreement with respect to Indian Hills that does not affect or involve WV Developer shall not constitute a default by WV Developer with respect to Whisper Valley, and in such event, the terms of this Agreement shall remain in full force and effect and bind the City and WV Developer in all respects as this Agreement affects Whisper Valley, including, without limitation, the Whisper Valley PUD and the WV PID.

**Section 11.03 City's Default.** In addition, the City shall be in default under this Agreement if the City unreasonably withholds the approval or release of any proposed development, development permit, utility service extension request and/or development application with respect to Development on any portion of Whisper Valley or Indian Hills that complies with the terms of this Agreement. The City shall also be in default if it imposes any requirements, standards, moratoria, or interim development controls upon Whisper Valley or Indian Hills that are in conflict with or limit the express provision of this Agreement. The City shall not, however, be in default based upon the imposition of

temporary moratoria due to an emergency constituting an imminent threat to the public health or safety, provided that any such moratorium will continue with respect to the Projects only during the duration of the emergency.

**Section 11.04 Remedies between the City and Developers.** Should any default remain uncured after notice to the defaulting party as provided in Section 11.02 the non-defaulting Party, whether WV Developer, IH Developer, or the City, may pursue any remedy that is available at law or in equity at the time of the breach, including, but not limited to: damages, including damages for delays in development approval caused by a City default, code enforcement, mandamus, injunctive relief, termination of the remaining term of the Agreement, rescissions, reverter, and/or specific performance. The remedies listed in this paragraph are cumulative. For purposes of this Section 11.04 only, “WV Developer” and “IH Developer” refer only to the signatories to this Agreement, both the individuals and the entities, but not the individuals or the entities that constitute or comprise the signatories that are entities.

**Section 11.05 Remedies between the City and Third Parties.** Should any default between a third party (that is, any individual or entity other than WV Developer or IH Developer, as such terms are defined in Section 11.04), and the City remain uncured after notice to the other as provided in Section 11.02, the City may pursue the remedies listed in Section 11.04 against the third party, and the third party may pursue all remedies listed in Section 11.04 against the City except that a third party shall not be able to pursue the remedies of termination, rescission, or reverter, such remedies belonging exclusively to WV Developer and IH Developer (as such terms are defined in Section 11.04).

**Section 11.06 Mediation.** In order to avoid unnecessary litigation, in the event that any Party fails to cure an alleged default within the cure period set out in Section 11.02 above, then if requested by another Party, prior to seeking any form of relief from a court of law or agency of competent jurisdiction, each Party agrees to enter into mediation concerning the alleged default for a period of not more than thirty (30) days prior to the filing of any court action. Nothing in this Agreement shall be construed to limit the Parties from mediating a default after any court or agency action may have been filed.

**Section 11.07 No Liability for Action of Others.** Except as expressly set forth: (a) the liabilities, obligations and responsibilities of each owner, including WV Developer or IH Developer, their successors and assigns, under this Agreement are several, and not joint; and (b) no owner, or successor or assign, of any portion of Whisper Valley or Indian Hills will be in default under this Agreement or otherwise liable or responsible for any default which is not caused by such landowner or by any person acting by, through or under such owner or successor or assign. No officer, agent, or employee of the City shall be charged personally with any liability nor held liable to the Developers under any term or provision of this Agreement or because of the execution or attempted execution of this Agreement or any breach or alleged breach of this Agreement.

## Article XII.

### ARBITRATION

**Section 12.01 Agreement to Arbitrate.** The Parties agree that certain disputes that may arise between or among Developers, their successors and assigns, and the City may be submitted to binding arbitration (an “**Arbitrable Dispute**”). An Arbitrable Dispute may be resolved by binding arbitration solely and exclusively in Austin, Travis County, Texas.

(a) **Meaning of Arbitrable Dispute.** Only certain disputes may be the subject of binding arbitration. The Parties agree that the arbitration panel shall not have jurisdiction to determine the arbitrators’ jurisdiction or to determine arbitrability. Accordingly, if the Parties do not agree that a dispute is an Arbitrable Dispute, a state district court in Travis County, Texas shall determine the arbitrators’ jurisdiction and/or arbitrability in a summary proceeding. Disputes concerning the following issue, and no others, are an Arbitrable Dispute under this Agreement: whether a frustration of purpose has occurred as described in Article X of this Agreement and the appropriate modifications to this Agreement to fulfill its purpose to the greatest degree practicable. All other disputes shall be resolved only in state district court in Travis County, Texas. The Parties also expressly agree, without limiting the variety of non-Arbitrable Disputes, that the City shall not be compelled to arbitrate any claim for prohibitive or compulsory injunctive relief by the City against WV Developer or IH Developer, as applicable, seeking to enforce such Developer’s compliance with the terms of this Agreement.

**Section 12.02 Binding Arbitration.** Upon the request of any Party, whether made before or after the institution of any legal proceeding, any Arbitrable Dispute between or among the Parties must be resolved by binding arbitration in accordance with the terms and provisions of this Article XII. Any Party may by summary proceeding bring an action in court to compel arbitration of any Arbitrable Dispute.

**Section 12.03 Arbitration Remedy.** The Parties agree that the arbitration panel’s remedy powers are limited. The arbitration panel may only issue a declaratory judgment (the “**Arbitration Remedy**”) with regard to an Arbitrable Dispute. The arbitration panel may not award money damages, grant injunctive relief, or issue any other form of legal or equitable relief that is not expressly provided for in this Section 12.03.

**Section 12.04 Governing Rules.** This Agreement is governed by the Federal Arbitration Act. All Arbitrable Disputes between the Parties may be resolved by binding arbitration in accordance with the terms of this Agreement and the commercial arbitration rules of the American Arbitration Association (the “**Arbitration Rules**”). In the event of any inconsistency between this Agreement and the Arbitration Rules, this Agreement shall control. Judgment upon this Arbitration Remedy rendered by the arbitrator shall be binding and may be entered in state district court in Travis County, Texas. Such judgment on an Arbitrable Dispute shall not be subject to appeal.

**Section 12.05 Exceptions to Arbitration; Preservation of Remedies.** As described in this Article XII, the arbitration rights of the Parties to this Agreement are limited. Additionally, even for an Arbitrable Dispute, no provision of, or any exercise of any arbitration rights shall limit the right of any Party, and the Parties shall have the right during any Arbitrable Dispute to see, use and employ ancillary or preliminary remedies, judicial or otherwise, including without limitation, rights and remedies relating to (a) exercising otherwise lawful self-help remedies or (b) obtaining provisions or ancillary remedies such as injunctive relief, sequestration or attachment from a state district court in Travis County, Texas, during or after the pendency of any arbitration.

**Section 12.06 Statute of Limitation.** All statutes of limitation that would otherwise be applicable shall apply to any arbitration proceeding under this Agreement.

**Section 12.07 Exhaustion of Remedies.** The agreement to arbitrate Arbitrable Dispute reflected in this Article XII shall not in any way alter any otherwise existing requirement that a Party exhaust its remedies with the City prior to seeking judicial relief.

**Section 12.08 Appointment of Arbitrators; Scope of Remedy.** All arbitration proceedings shall be submitted to an arbitrator. The Parties agree to select a mutually agreeable and neutral arbitrator. The arbitrator shall resolve any Arbitrable Dispute in accordance with the applicable substantive law and this Agreement. The arbitrator may not grant any remedy other than an Arbitration Remedy.

**Section 12.09 Other Arbitration Manners.** To the maximum extent practicable, an Arbitrable Dispute shall be concluded within ninety (90) days of the filing of the Arbitrable Dispute. The Texas Rules of Civil Procedure and the Texas Rules of Evidence will apply in any arbitration of an Arbitrable Dispute. The provisions of this agreement to arbitrate Arbitrable Disputes shall survive the termination, amendment or expiration of the Term of this Agreement, unless the Parties otherwise expressly agree in writing.

**Section 12.10 Arbitration Expenses.** Each of the Parties to any arbitration of any Arbitral Dispute shall pay their respective share of the arbitration fees and any costs of the arbitration as those fees and costs come due.

## **Article XIII.**

### **MISCELLANEOUS PROVISIONS**

**Section 13.01 Effective Date.** The “**Effective Date**” of this Agreement shall be June 18, 2009.

**Section 13.02 Term.** This Agreement shall commence and bind the Parties on the Effective Date and continue in three fifteen (15) year periods, which second and third (15) year period are hereby agreed to and are automatically renewing without any further

actions of the Parties until a date which is forty-five (45) years from the Effective Date, unless sooner terminated by express written agreement executed by both Parties (the “Term”).

**Section 13.03 Termination.** This Agreement may be terminated as to all of Whisper Valley only by express written agreement executed by the City and WV Developer. This Agreement may be terminated as to all of Indian Hills only by express written agreement executed by the City and IH Developer. In the event this Agreement is terminated by mutual agreement of such Parties or by its terms, the Parties shall promptly execute and file a record in the Official Public Records of Travis County, Texas, a document confirming the termination of this Agreement with respect to the WV Property or the IH Property, as applicable, and such other documents as may be appropriate to reflect the basis upon which such termination occurs.

**Section 13.04 Intentionally Deleted.**

**Section 13.05 Agreement Binds Successors and Runs with the Land.** This Agreement shall bind and inure to the benefit of the Parties, their successors and assigns. Subject to Section 13.07 below, the terms of this Agreement shall constitute covenants running with the lands comprising WV Property and the IH Property and shall be binding on all future developers and owners of the property within the Projects. A memorandum of this Agreement, in the form attached as Exhibit “K” shall be recorded in the Official Public Records of Travis County, Texas only after the conditions precedent in Section 9.01 above are satisfied. Nothing in this Agreement is intended to impose obligations on individual owners of platted single family duplex, townhouse or attached single family residential lots, except as set forth in Section 13.06.

**Section 13.06 Restrictive Covenant.** Upon the transfer of any portion of the WV Property prior to Limited Purpose Annexation, WV Developer, its successors or assigns, shall execute and record a restrictive covenant expressly restricting the conveyed property to the applicable terms of this Agreement; provided, however, with respect to a fully developed and improved lot within Whisper Valley acquired by an end-buyer, the restrictive covenant shall only restrict such lot to the land use and development regulations set forth in this Agreement, which shall include, without limitation, a restriction that the end-buyer consents to full purpose annexation by the City. Upon the transfer of any portion of the IH Property prior to Limited Purpose Annexation, IH Developer, its successors or assigns, shall execute and record a restrictive covenant expressly restricting the conveyed property to the applicable terms of this Agreement; provided, however, with respect to a fully developed and improved lot within Indian Hills acquired by an end-buyer, the restrictive covenant shall only restrict such lot to the land use and development regulations set forth in this Agreement, which shall include, without limitation, a restriction that the end-buyer consents to full purpose annexation by the City.

**Section 13.07 Assignment.** Subject to Section 13.07(a) and (b), below, WV Developer may assign this Agreement with respect to all or part of Whisper Valley from time to time to any Party, and IH Developer may assign this Agreement with respect to

all or part of Indian Hills from time to time, so long as the assignee has demonstrated that the assignee has the financial and managerial capacity, the experience, and expertise to perform any duties or obligations so assigned and so long as the assigned rights and obligations are assumed without modifications to this Agreement. WV Developer or IH Developer, as applicable, shall provide the City thirty (30) days prior written notice of any such assignment. Upon such assignment or partial assignment, WV Developer or IH Developer, as applicable, shall be fully released from any and all obligations under this Agreement and shall have no further liability with respect to this Agreement for the part of the Projects so assigned.

(a) This Agreement shall run with the land; provided however, that the provisions contained in Article II (PID), Sections 3.01 (Whisper Valley PUD, Indian Hills Development), 3.08 (Open Space), Articles V (Annexation) and VI (Utilities) of this Agreement shall be the individual requirement of or benefit to (as the case may be) of WV Developer or IH Developer, as applicable, and their Designated Successors and Assigns. Upon any assignment to its Designated Successors and Assigns, WV Developer or IH Developer, as applicable, may request the City to approve the release of such developer from the rights and obligations assigned to any Designated Successor and Assigns, such approval not be unreasonably withheld, conditioned or delayed. Upon such approval by the City, WV Developer or IH Developer, as applicable, shall no longer be liable for the assigned rights and obligations and the City shall look solely to such developer's Designated Successors and Assigns for performance timing. Any sale of a portion of the Projects or assignment of any right hereunder shall not be deemed a sale or assignment to a Designated Successor or Assign unless the conveyance or transfer instrument effecting such sale or assignment expressly states that the sale or assignment is to a Designated Successor or Assign.

(b) Except as provided in the subpart (a) above, Developers and all future owners of all or any portion of the Projects, including, without limitation, any affiliates of WV Developer or IH Developer to which all or any portion of the property is conveyed or contributed, shall have the benefits of this Agreement, and the property may be developed as set forth herein without notice or approval to the City (except as provided in subparagraph (a) above); provided, however, that this Agreement may be amended as otherwise set forth herein. In the case of nonperformance by one owner, the City may pursue all remedies against that nonperforming owner, but will not impede development activities of any performing owner as a result of that nonperformance unless and to the limited extent that such non performance pertains to a City requirement that also is necessary for the performing owner's project, which performing owner may also pursue remedies against the nonperforming owner.

**Section 13.08 Entire Agreement.** This Agreement and the agreements between the Parties referenced in this Agreement, contain the entire agreement of the Parties. There are no other agreements or promises, oral or written, between the Parties regarding the subject matter of this Agreement. This Agreement can be amended only by written agreement signed by the Parties as provided for in this Agreement. This Agreement and the agreements between the Parties referenced in this Agreement, supersede all prior agreements between the Parties concerning the subject matter of this Agreement.

**Section 13.09 Notice.** It is contemplated that the Parties will engage in informal communications with respect to the subject matter of this Agreement. However, any formal notices or other communications (“**Notice**”) required to be given by one Party to another by this Agreement shall be given in writing addressed to the Party to be notified at the address set forth below for such Party (i) by delivering same in person, (ii) by depositing the same in the United States Mail; certified or registered, return receipt requested, postage prepaid, addressed to the Party to be notified, (iii) by depositing the same with Federal Express or another nationally recognized courier service guaranteeing “next day delivery” addressed to the Party to be notified; or (iv) by sending same by telefax with confirming copy sent by mail. Notice deposited in the United States mail in the manner described above shall be deemed effective from and after the earlier of the date of actual receipt or three (3) days after the date of such deposit. Notice given in any other manner shall be effective only if and when received by the Party to be notified. For the purposes of notice, the addresses of the Parties shall, until changed as provided below, be as follows:

WV Developer: Club Deal 120 Whisper Valley, Limited Partnership  
c/o Douglas H. Gilliland  
9285 Huntington Square  
North Richland Hills, Texas 76180  
Fax: 817-788-1670

With copy to: Drenner & Golden Stuart Wolff, LLP  
301 Congress Avenue, Suite 1200  
Austin, Texas 78701  
Attn: Steven C. Metcalfe  
Fax: 512-404-2244

IH Developer: Club Deal 116 Indian Hills Tx, Limited Partnership  
c/o Douglas H. Gilliland  
9285 Huntington Square  
North Richland Hills, Texas 76180  
Fax: 817-788-1670

With copy to: Drenner & Golden Stuart Wolff, LLP  
301 Congress Avenue, Suite 1200  
Austin, Texas 78701  
Attn: Steven C. Metcalfe  
Fax: 512-404-2244

City: City of Austin  
PO Box 1088  
Austin, Texas 78767  
Attn: City Manager  
Fax: 512-974-2833



With copy to: City of Austin  
PO Box 1088  
Austin, Texas 78767  
Attn: City Attorney  
512-974-6490

The Parties shall have the right from time to time to change their respective addresses and each shall have the right to specify as its address any other address within the United States of America by at least five (5) days written notice to the other Party. If any date or any period provided in this Agreement ends on a Saturday, Sunday or legal holiday, the applicable period for calculating the notice shall be extended to the first business day following such Saturday, Sunday or legal holiday.

**Section 13.10 Standards Not Binding On Other Governmental Entity.** The Parties acknowledge that some of the standards, variances, waivers or other provisions set forth in this Agreement may require the approval of a governmental entity other than the City to implement. Developers agree that the City is not responsible for obtaining such approval.

**Section 13.11 Estoppel Certificate.** Within thirty (30) days after the receipt of a written request by either WV Developer or IH Developer or a current owner of a tract in the Projects, the City will certify in a written instrument duly executed and acknowledged to any person, firm or corporation specified in such request as to (i) the validity and force and effect of this Agreement in accordance with its terms, (ii) modifications or amendments to this Agreement and the substance of such modification or amendments; (iii) the existence of any default to the best of the City's knowledge; and (iv) such other factual matter that may be reasonably requested.

**Section 13.12 No Joint Venture.** It is acknowledged and agreed by the Parties that the terms of this Agreement are not intended to and shall not be deemed to create any partnership or joint venture among the Parties. The City, its past, present and future officers, elected officials, employees and agents of the City, do not assume any responsibilities or liabilities to any third Party in connection with the development of the Projects.

**Section 13.13 Time.** Time is of the essence in all things pertaining to the performance of this Agreement.

**Section 13.14 Severability.** If any provision of this Agreement is illegal, invalid, or enforceable under present or future laws, then, and in that event, it is the intention of the Parties that the remainder of this Agreement shall not be affected.

**Section 13.15 Waiver.** Any failure by a Party hereto to insist upon strict performance by the other Party of any material provision of this Agreement shall not be deemed a waiver of such provision or of any other provision of this Agreement, and such

Party shall have the right at any time(s) thereafter to insist upon strict performance of any and all of the provisions of this Agreement.

**Section 13.16 Applicable Law and Venue.** THE CONSTRUCTION AND VALIDITY OF THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS (WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES). Venue for any dispute arising from or related to this Agreement shall be in Travis County, Texas.

**Section 13.17 Reservation of Rights.** To the extent not inconsistent with this Agreement, each Party reserves all rights, privileges and immunities under applicable laws.

**Section 13.18 Further Assurances.** Both Parties agree that any time after execution of this Agreement, they will, upon request of the other Party, execute and deliver such further documents and do such further acts and things as may be reasonably necessary or desirable to effectuate the terms of this Agreement.

**Section 13.19 Incorporation of Exhibits and Other Documents by Reference.** All Exhibits and other documents attached to or referred to in this Agreement are incorporated by reference for the purposes set forth in this Agreement.

**Section 13.20 Exhibits.**

Exhibit "A-1" – Description of Whisper Valley  
Exhibit "A-2" – Description of Indian Hills  
Exhibit "B" – PID Term Sheet  
Exhibit "C-1" – Indian Hills Zoning Map  
Exhibit "C-2" – Whisper Valley Land Use Plan  
Exhibit "D" – Critical Environmental Features  
Exhibit "E" – Intentionally Deleted  
Exhibit "F" – Signature Park  
Exhibit "G" – Open Space and Neighborhood Parks Improvements Illustrations  
Exhibit "H" – License and Operation Agreement Term Sheet  
Exhibit "I" – Intentionally Deleted  
Exhibit "J" – Environmental Goals  
Exhibit "K" – Memorandum of Development Agreement  
Exhibit "L" – Water Agreement Term Sheet (Indian Hills Only)  
Exhibit "L-1" – Phasing Map for Indian Hills Only  
Exhibit "M" – Water Agreement Term Sheet (Whisper Valley and Indian Hills)  
Exhibit "M-1" – Phasing Map for Whisper Valley and Indian Hills

COUNSEL FOR CITY:

APPROVED AS TO FORM BY:

By:


  
Tom Nuckols  
Assistant City Attorney

EXECUTED in multiple counterparts, each of which shall constitute an original,  
this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

CITY:

CITY OF AUSTIN,  
a home rule city and Texas municipal corporation

By:

  
Sue Edwards  
Assistant City Manager

EXECUTED in multiple counterparts, each of which shall constitute an original,  
this <sup>8~~th~~</sup> 11 day of August, 2009.

WV DEVELOPER:

CLUB DEAL 120 WHISPER VALLEY,  
LIMITED PARTNERSHIP, a Delaware  
limited partnership qualified to do business  
in Texas

By: CD120 GP, LLC, a Delaware limited  
liability company

Its: General Partner

By:   
Douglas H. Gilliland, Manager

IH DEVELOPER:

CLUB DEAL 116 INDIAN HILLS TX,  
LIMITED PARTNERSHIP, a Delaware  
limited partnership qualified to do business  
in Texas

By: CD116 Indian Hills Tx, LLC, a  
Delaware limited liability company

Its: General Partner

By:   
\_\_\_\_\_  
Douglas H. Gilliland, Manager