

ECONOMIC DEVELOPMENT AGREEMENT07 4 8 8 9
2012-06-26

THIS ECONOMIC DEVELOPMENT AGREEMENT (the "Agreement") by and between the CITY OF HOUSTON, TEXAS, a Texas home-rule municipal corporation (the "City"), and OMB HOUSTON, LP, a Delaware limited partnership (the "Developer"), is entered into as of the date the City Controller countersigns this Agreement (the "Effective Date").

RECITALS

WHEREAS, the Developer has acquired certain tracts of land totaling approximately 14.6 acres within the corporate limits of the City, as described on the property description marked as **Exhibit A** attached hereto (the "Property"), on which it intends to develop a mixed-use residential, retail and commercial development consisting of 350,000 square feet of luxury retail, entertainment, restaurant and office space, as well as approximately 278 high-end apartments (the "Project");

WHEREAS, certain public works and improvements, including water, stormwater, wastewater and drainage improvements, road improvements, utility relocation, traffic signals, and greenspace that is open to the public (the "Greenspace"), as further described in **Exhibit B** attached hereto, may be developed to serve the Project;

WHEREAS, the City recognizes the positive economic impact that the Project will bring to the City through the timely development and diversification of the economy, elimination of unemployment and underemployment through the creation and retention of new jobs, the attraction of new businesses, and the retention and growth of the sales and use tax revenues generated by the Project for the City;

WHEREAS, the City has established a program in accordance with Article III, Chapter 52-a of the Texas Constitution and Chapter 380 of the Texas Local Government Code ("Chapter 380") under which the City has the authority to use public funds for the public purposes of promoting local economic development and stimulating business and commercial activity within the City, including the authority to enter into this Agreement;

WHEREAS, consistent with Article III, Section 52-a of the Texas Constitution, Chapter 380, and other laws, the City agrees to enter into this Agreement with the Developer to advance the public purposes of developing and diversifying the economy of the state, eliminating unemployment or underemployment in the state, and developing or expanding transportation or commerce in the state;

WHEREAS, in consideration of the design, timely construction, and development of the Project, which will bring additional ad valorem tax revenues and sales and use tax revenues to the City and additional jobs resulting from the construction of the Project, the City desires to enter into this Agreement pursuant to Chapter 380 and other applicable laws as an economic incentive for the Developer to develop, finance and construct the Project;

WHEREAS, the City has determined and hereby finds that this Agreement promotes economic development in the City and, as such, meets the requirements under Chapter 380 and the City's established economic development program, and, further, is in the best interests of the City and the Developer;

WHEREAS, to ensure that the benefits the City provides under this Agreement are utilized in a manner consistent with Chapter 380 and other law, the Developer has agreed to that its receipt of such benefits shall be conditioned upon its satisfaction of certain conditions enumerated herein, including performance conditions relating to the investment of private funds for the Project, job creation and Project operations;

WHEREAS, to induce the Developer to develop and finance the construction of the Project for the public purposes of developing and diversifying the economy of the state, to create jobs, and to operate the Project in accordance with the performance measures set forth herein, which will generate Sales Tax Revenues (as defined herein) and increased ad valorem property tax revenues for the City, the City agrees to grant to the Developer the Reimbursement Amount, but not more than the Maximum Reimbursement Amount (as defined herein);

WHEREAS, consistent with Chapter 380, this Agreement advances the public purposes of developing and diversifying the economy of the state, eliminating unemployment or underemployment in the state, and developing or expanding transportation or commerce in the state; and

NOW, THEREFORE, for and in consideration of the promises and the mutual agreements set forth herein, the City and the Developer hereby agree as follows:

ARTICLE I GENERAL TERMS

A. Incorporation of Recitals. The recitals to this Agreement are hereby incorporated for all purposes.

B. Definitions and Terms. The terms "Agreement," "Chapter 380," "City," "Developer," "Effective Date," "Greenspace," "Project," and "Property," shall have the meanings given to such terms in the Recitals, and the following terms have the following meanings:

"Base Tax" shall mean the amount of sales and use tax received by the City during calendar year 2012 under Chapter 321, Texas Tax Code, as amended, derived from the Project.

"City Commitment" shall have the meaning ascribed to it in Article V, Section C of this Agreement.

"City Representative" shall mean the Mayor of the City or the Mayor's designee.

"Force Majeure" shall have the meaning ascribed to it in Article VI, Section F of this Agreement.

"Incremental Increase" shall mean, for each calendar year after the Reimbursement Date, the amount of sales and use tax received by the City under Chapter 321, Texas Tax Code, as amended, derived from the Project above the Base Tax.

"Interest" shall mean interest on funds the Developer pays for the Public Improvements that (i) accrues at a rate of 3.75% per annum, (ii) is computed annually beginning on the Reimbursement Date and ending on the day that is five (5) years from the Reimbursement Date, (iii) is computed based on a principal amount equal to the amount by which the Public Improvements Cost exceeds all payments that the City has made to the Developer pursuant to Article V, Section C of this Agreement as of the annual computation date described above, and (iv) that shall not exceed a total amount of \$3,071,014.

"Maximum Reimbursement Amount" shall mean an amount payable only from Sales Tax Revenues that is equal to the lesser of (i) the actual Public Improvements Cost plus Interest, or (ii) \$19,449,756 (\$16,378,742 of Public Improvements Cost plus \$3,071,014 of Interest), and that may be reduced pursuant to Article VI, Section B of this Agreement.

"Parties" or "Party" shall mean the City and the Developer, the parties to this Agreement.

"Project Costs" means all past and future costs of acquisition, design, engineering, development and construction of the Project, including (i) the acquisition cost of any land or rights of way on which any part of the Project will be constructed; (ii) all costs of design, engineering, planning, materials, labor, construction, testing and inspection and other services arising in connection with the design and construction of the Project; (iii) all payments arising under any contracts entered into for the design or construction of the Project; and (iv) all costs incurred in connection with obtaining governmental approvals, certificates and permits required in connection with the construction of the Project.

"Public Improvements" means those certain public works and improvements described in Exhibit B, including water, stormwater, wastewater and drainage improvements, road improvements, utility relocation, traffic signals, and the Greenspace, that are (i) actually constructed, (ii) conveyed to and accepted by the City, if applicable, and (iii) otherwise open to the public or available for public use.

"Public Improvements Cost" means all past and future costs of acquisition, design, engineering, development and construction of the Public Improvements, including (i) the acquisition cost of any land or rights of way on which any part of the Public Improvements will be constructed; (ii) all costs of design, engineering,

planning, materials, labor, construction, testing and inspection and other services arising in connection with the design and construction of the Public Improvements; (iii) all payments arising under any contracts entered into for the design or construction of the Public Improvements; and (iv) all costs incurred in connection with obtaining governmental approvals, certificates and permits required in connection with the construction of the Public Improvements.

"Reimbursement Amount" shall mean the amount of Sales Tax Revenues, which amount shall not exceed the Maximum Reimbursement Amount.

"Reimbursement Date" shall mean the earlier of (i) the date the Developer certifies that seventy percent (70%) of the Retail Portion of the Project is leased and open to the public or (ii) the date the Developer receives from the City a temporary certificate of occupancy for the Retail Portion of the Project.

"Retail Portion of the Project" shall mean the gross leasable area of the Project available for retail use, which excludes the gross leasable area of the Project available for residential and office use.

"Sales Tax Revenue(s)" shall mean 100% of the amount of Incremental Increase in sales and use tax revenues generated by the Project and collected by or for the City and remitted to the City by the State Comptroller, pursuant to Chapter 321 of the Texas Tax Code, as amended, during the Term of this Agreement.

"State Comptroller" shall mean the Comptroller of Public Accounts for the State of Texas, or such other agency responsible for collecting sales and use taxes within the State of Texas and remitting them to the City.

"Term" shall mean the term of this Agreement, which shall commence on the Effective Date and shall continue until the earlier of: (i) the payment to the Developer of the Maximum Reimbursement Amount, or (ii) ten (10) years from the Reimbursement Date.

C. Singular and Plural. Words used herein in the singular, where the context so permits, also include the plural and vice versa. The definitions of words in the singular herein also apply to such words when used in the plural where the context so permits and vice versa.

ARTICLE II THE PROJECT AND THE PUBLIC IMPROVEMENTS

A. The Project. The Project is a mixed use residential, retail and commercial development consisting of 350,000 square feet of luxury retail, entertainment restaurant and office space, as well as approximately 278 high-end apartments, as further described in the site plan attached hereto as **Exhibit C** (the "Project Site Plan"). The Project Site Plan may be modified at any time by the Developer, provided that the Developer certifies to the City that the Project, as modified shall (i) maintain its

character as a mixed-use residential, retail and commercial development and (ii) meet the commitments set forth in Article IV, Sections A and B hereof. The Developer agrees to abide by all City permitting requirements, including, but not limited to, Chapter 9 of the City's Department of Public Works and Engineering Infrastructure Design Manual and building permitting requirements.

B. The Public Improvements. **Exhibit B** sets forth the Public Improvements which may be developed to serve the Project. The Developer may modify or remove any Public Improvements or modify or change the estimated cost of the Public Improvements, provided however, that the Developer must provide notice of any proposed modification, removal or change to the Public Improvements to the City Representative for his review and comment. The City Representative shall have fourteen days to review the proposed modification, removal or change and provide comments to the Developer. Thereafter, the modification, removal or change shall become effective once the Developer certifies to the City that after the modification, removal or change, the Developer will still meet its commitments set forth in Article IV, Sections A and B hereof. No such modification, removal or change will entitle the Developer to reimbursement for costs which exceed the Maximum Reimbursement Amount.

C. Standards and Approvals. The Developer agrees that the plans and specifications for the Public Improvements shall be subject to the review and approval of all governmental entities with jurisdiction, including, without limitation, the City. The Developer agrees to comply with all applicable legal requirements from such jurisdictions. Before commencing construction of any Public Improvements, the Developer will submit to the City's Director of the Department of Public Works and Engineering, or his or her designee (the "Public Works Director"), all plans and specifications for the construction of the Public Improvements and obtain the Public Works Director's approval of the plans and specifications. All water wells, water meters, flushing valves, valves, pipes, and appurtenances thereto, will conform to the City's specifications. All water service lines, sewer service lines, lift stations, sewage treatment facilities, road facilities, and appurtenances thereto, will comply with the City's standard plans and specifications as amended from time to time. Prior to construction of any Public Improvements, the Developer or its engineer will give written notice to the Public Works Director stating the date that construction will be commenced. Upon review and approval of the plans and specifications of the Public Improvements by the City (which approval shall not be unreasonably withheld), such plans and specifications shall be deemed the final plans and specification (hereafter the "Final Plans and Specifications"). Construction of the Public Improvements will be in accordance with the Final Plans and Specifications, and with the City's applicable standards and specifications, and, during the progress of the construction and installation of the Public Improvements, the Public Works Director may conduct periodic, on-the-ground inspections.

**ARTICLE III
REPRESENTATIONS**

A. Representations of the City. The City hereby represents to the Developer that as the date hereof:

The City is a duly created and existing municipal corporation and home rule municipality of the State of Texas under the laws of the State of Texas and is duly qualified and authorized to carry on the governmental functions and operations as contemplated by this Agreement.

The City has the power, authority and legal right under the laws of the State of Texas and the City Charter to enter into and perform this Agreement and the execution, delivery and performance hereof (i) will not, to the best of its knowledge, violate any applicable judgment, order, law or regulation, and (ii) do not constitute a default under, or result in the creation of, any lien, charge, encumbrance or security interest upon any assets of the City under any agreement or instrument to which the City is a party or by which the City or its assets may be bound or affected.

This Agreement has been duly authorized, executed and delivered by the City and constitutes a legal, valid and binding obligation of the City, enforceable in accordance with its terms except to the extent that (i) the enforceability of such instruments may be limited by bankruptcy, reorganization, insolvency, moratorium or other similar laws of general application in effect from time to time relating to or affecting the enforcement of creditors' rights and (ii) certain equitable remedies including specific performance may be unavailable.

The execution, delivery and performance of this Agreement by the City do not require the consent or approval of any person that has not been obtained.

B. Representations of the Developer. The Developer hereby represents to the City that as of the date hereof:

The Developer is duly authorized and existing and in good standing under the laws of the State of Delaware, and is qualified to do business in the State of Texas.

The Developer has the power, authority and legal right to enter into and perform its obligations set forth in this Agreement, and the execution, delivery and performance hereof, (i) have been duly authorized, and will not, to the best of its knowledge, violate any judgment, order, law or regulation applicable to the Developer, and (ii) do not constitute a default under or result in the creation of, any lien, charge, encumbrance or security interest upon any assets of the Developer under any agreement or instrument to which the Developer is a party or by which the Developer or its assets may be bound or affected.

This Agreement has been duly authorized, executed and delivered and constitutes a legal, valid and binding obligation of the Developer, enforceable in accordance with its terms except to the extent that the enforceability of such

instruments may be limited by bankruptcy, reorganization, insolvency, moratorium or other similar laws of general application in effect from time to time relating to or affecting the enforcement of creditors' rights.

ARTICLE IV DEVELOPER COMMITMENTS

In consideration of the City's agreeing to pay the Developer the Reimbursement Amount in accordance with the terms, provisions and conditions of this Agreement, the Developer agrees to fulfill the following conditions in order to receive the Reimbursement Amount:

A. Project and Public Improvements Funding. Within twelve months after the Effective Date of this Agreement, the Developer shall certify to the City that private funds and sources totaling approximately Two Hundred Ten Million Dollars (\$210,000,000.00) are available or have been expended towards the Project Costs and the Public Improvements Cost; provided, however, that the availability of such funds and sources may be conditioned upon the satisfaction of applicable pre-leasing, market and financing conditions. Failure of the Developer to timely provide such certification to the City shall constitute a breach of this Agreement.

B. Job Creation. The Developer agrees that jobs will be created by the development of the Project. The Parties acknowledge that the Developer may not directly provide all the jobs created by the Project, and that jobs will be created and retained by tenants and others occupying or managing the Project. As used herein, the term "jobs" shall mean all full-time positions in management, retail, restaurant and service (including but not limited to valets, janitors and landscapers) which provide a regular work schedule of at least 35 hours per week; provided that two positions providing part-time work schedules shall be equivalent to one job. In order to assure the City that the Project will produce sufficient job creation, the Developer agrees to make the following certifications on an annual basis (the "Job Creation Certification"): (i) at least two-hundred seventy-five (275) jobs will have been created and retained on the first anniversary of the Reimbursement Date, (ii) at least three hundred thirty (330) jobs, in the aggregate, will have been created and retained on the second anniversary of the Reimbursement Date, (iii) at least three hundred eighty-five (385) jobs, in the aggregate, will have been created and retained on the third anniversary of the Reimbursement Date, and (iv) at least four hundred seventy-five (475) jobs, in the aggregate, will have been created and retained on the fourth anniversary of the Reimbursement Date and every anniversary thereafter during the term of this Agreement. To the extent the number of jobs created or retained by the Project for any year exceeds the minimum required for such year (as set forth above), the Developer will (i) certify the number of excess jobs in its Job Creation Certification for that year and (ii) count the number of excess jobs in its Job Creation Certification for the following year in order to meet the minimum required for that year. For purposes of the Job Creation Certification, the Developer may rely upon reports of the Project's tenants and others occupying or managing the Project and may also estimate the number of jobs created by using the International Council of Shopping Centers' standard that every five hundred square feet

(500 ft²) of gross leasable retail area is the equivalent of one full-time job. Such certification shall include a description of the data the Developer used to determine the number of jobs created by the Project. Payment of the Reimbursement Amount is subject to the Developer's timely certification as described in this section.

On each anniversary of the Reimbursement Date, the Developer shall submit documentation as reasonably necessary to satisfy the Job Creation Certification, which documentation shall include a sworn statement from a corporate officer of the Developer, or the corporate officer's designee, attesting to the number of jobs created or retained and indicating the source of the information.

C. Operational Condition. The Developer shall continuously operate (or cause to be operated) the Project on the Property during the Term of this Agreement, subject only to (i) events of Force Majeure, (ii) reasonable periods of closing actually required for repair or restoration following casualty or condemnation, and (iii) temporary closings (not to exceed 270 days, and not more frequently than once each five (5) years) for repair, renovations and/or alterations of the Property.

D. Ownership, Operation, and Maintenance of Public Improvements Other than Greenspace; Bettis Street. Subject to the Developer's right to modify or remove a Public Improvement in accordance with the provisions of Article II, Section B, except as otherwise provided herein for the Greenspace, as the acquisition and construction of each integral stage of the Public Improvements is completed and each integral stage of the Public Improvements becomes operational, the Developer shall convey all such Public Improvements to the City (including rights-of-way). As construction of each integral stage of the Public Improvements is completed, City representatives shall inspect the same and, if the City finds that the Public Improvements have been completed in accordance with the Final Plans and Specifications, or any modifications thereof, and in accordance with all applicable laws, rules, and regulations, the City will accept the Public Improvements, whereupon such portion of the Public Improvements shall be operated and maintained by the City at its sole expense.

The parties acknowledge that (i) a 20-foot strip of real property (the "Bettis 20-Foot Strip") and a 40-foot strip of real property (the "Bettis 40-Foot Strip") must be dedicated to the City by their respective owners of record in conjunction with the construction of Bettis Street as a public right-of-way as contemplated by this Agreement, (ii) the Bettis 40-Foot Strip is currently owned by a third party, and (iii) Bettis Street shall not be considered a Public Improvement eligible for reimbursement under this Agreement unless the Bettis 40-Foot Strip and the Bettis 20-Foot Strip are dedicated to the City by their respective owners of record and all other applicable terms and conditions of this Agreement have been met.

E. Greenspace. Subject to the provisions of Article II, Section B, upon completion of the construction of the Greenspace, City representatives shall inspect the same and, upon the City's determination that the construction has been completed in accordance with the Final Plans and Specifications, or any modifications thereof, and in

accordance with all applicable laws, rules, and regulations, the Developer shall grant to the City an easement for public use of the Greenspace, in substantially the form attached hereto as **Exhibit D**, which shall be recorded in the Real Property Records of Harris County, Texas, provided, further, that the Greenspace shall be operated and maintained by the Developer at its sole expense for the benefit of the public.

F. Reserved.

G. Reserved.

H. Competitive Bidding. Construction contracts for the Public Improvements shall be let on a competitive bidding basis. After preparation of the Final Plans and Specifications and their approvals as required by this Agreement, the Developer shall advertise for or solicit bids (as required by law applicable to the City) for construction as described in the Final Plans and Specifications. The City Representative shall be notified of, and invited to attend when applicable, pre-bid conferences, bid openings, and the award of contracts in accordance with the notice provision of Article VII, Section B of this Agreement.

I. Performance Bonds. The Developer shall require each contractor constructing the Public Improvements to furnish a performance bond in an amount equal to the full cost of Developer's construction contract with that contractor, conditioned on the contractor's full and timely performance under the construction contract. The Developer and the City shall be dual obligees for each performance bond. The performance bond(s) must be in a form approved by the City Attorney and issued by a corporate surety authorized and admitted to write surety bonds in Texas. If the amount of the bond exceeds \$100,000, the surety must be listed on the current list of accepted sureties on federal bonds published by the United States Treasury Department or reinsured for any liability in excess of \$100,000 by a reinsurer listed on the U.S. Treasury list.

J. Utilization of Local Contractors and Suppliers. The Developer agrees to exercise commercially reasonable efforts to utilize local contractors and suppliers in the construction of the Project and the Public Improvements, with a goal of at least 30% of the total dollar amount of all construction contracts and supply agreements being paid to local contractors and suppliers. A contractor or supplier shall be considered as local if it has maintained an office within the City for at least one year.

K. Affirmative Action. The Developer shall demonstrate good faith efforts to comply with the City's Affirmative Action program in the design and construction of the Project and the Public Improvements.

L. Maintenance of Records. The Developer shall be responsible for maintaining records of all costs incurred and payments made for the Project and the Public Improvements and records evidencing compliance with all of the Developer commitments required by this Article IV and shall make such records available to the

City for examination at the City's reasonable request. The City shall have the right to review and audit such records upon five (5) days prior written notice to the Developer.

ARTICLE V REIMBURSEMENT

A. Calculation of Reimbursement Amount. For each calendar year during the Term of this Agreement, the City shall determine the amount of the Sales Tax Revenues received by the City from the State Comptroller in cooperation with the Developer and the State Comptroller. The City and the Developer hereby designate this Agreement as a Revenue Sharing Agreement, and therefore, pursuant to Section 321.3022, Texas Tax Code, as amended ("Section 321.3022"), the State Comptroller is required to provide to the City, upon request of the City, information relating to the amount of sales and use tax paid to the City generated by the Project. In the event that the State Comptroller determines that the authority granted to the City pursuant to Section 321.3022 is insufficient for the City to receive the necessary information to calculate and determine the amount of the Sales Tax Revenues received by the City, the City may request that the Developer provide an executed release form, in substantially the form attached hereto as **Exhibit E**, from each tenant of the Project.

B. Confidential Information. Unless determined otherwise by the Texas Attorney General in writing, any information received relating to the Sales Tax Revenues shall be considered confidential proprietary financial information not subject to immediate release to the public. The City shall seek a written opinion from the Texas Attorney General, raising any applicable exception to release, prior to any release to a third party under the Texas Public Information Act.

C. Payment of Reimbursement Amounts. Beginning on the Reimbursement Date and continuing through each calendar year throughout the Term of this Agreement and so long as the Developer is in compliance with its commitments set forth of Article IV of this Agreement (subject to the provisions of Article II, Section B), the City shall pay the Reimbursement Amount due to the Developer within 45 days following receipt of the Sales Tax Revenues for the fourth quarter of the previous calendar year from the State Comptroller, pursuant to this Agreement (the "City Commitment"). The City Commitment is an unconditional obligation of payment by the City (but solely from the Sales Tax Revenues generated by the Project), if the Project generates Sales Tax Revenues. Except as otherwise expressly set forth in this Agreement, such payments are not subject to any reduction, whether offset or otherwise. The City shall never be obligated to make any payment to the Developer from any funds other than the Sales Tax Revenues generated by the Project. Notwithstanding anything to the contrary set forth in this Agreement, if, following the construction of any Public Improvement (including, without limitation, the Greenspace), Developer fails to comply with its obligations with respect to such Public Improvement set forth in Article IV, Sections D or E, as applicable (including but not limited to the Developer's obligation to convey such Public Improvement to the City), then the City shall remain obligated to pay to Developer the Reimbursement Amount in accordance with the first sentence of this Section; provided, however, that (i) the Maximum Reimbursement Amount shall be

reduced by an amount equal to the total cost allocated to such Public Improvement set forth on **Exhibit B** (as the same may be modified from time to time as set forth in Article II, Section B of this Agreement), and further, that (ii) if the Developer has not acquired the Bettis 40-Foot Strip prior to its dedication to the City for public right-of-way, (a) the City shall in no circumstance be obligated to pay to the Developer the land value of the Bettis 40-Foot Strip, and (b) the Maximum Reimbursement Amount shall be reduced by an amount equal to the land value of the Bettis 40-Foot Strip.

ARTICLE VI DEFAULT AND REMEDY

A. Payment Default. The City agrees that its failure to pay the Reimbursement Amount when due is an event of default (a "Payment Default") and that the Developer shall be entitled to any and all of the remedies available in this Article or otherwise at law or equity.

B. Job Creation Default. If the Developer does not satisfy the Job Creation Certification for any year during the Term of this Agreement (commencing on the date that is the first anniversary of the Reimbursement Date) and if such failure continues for thirty (30) days after written notice to the Developer (a "Job Creation Default"), the City may, as its sole and exclusive remedy, beginning on the date which is thirty (30) days after such written notice, until the Developer has provided evidence that it has satisfied the Job Creation Certification, reduce the Maximum Reimbursement Amount to be paid to the Developer by the percentage by which the Developer does not satisfy the Job Creation Certification. A reduction in the Maximum Reimbursement Amount as a result of the Developer's failure to satisfy the Job Creation Certification in a calendar year is irrevocable and may not be recouped by the Developer at any time, regardless of whether the Developer satisfies the Job Creation Certification in a subsequent calendar year.

C. General Events of Default. A party shall be deemed in default under this Agreement (which shall be deemed a breach hereunder) if such party fails to materially perform, observe or comply with any of the commitments, covenants, agreements or obligations set forth in Article IV of this Agreement or if any of its representations contained in Article III of this Agreement are false. The Developer's failure to construct any portion of the Public Improvements in **Exhibit B**, including but not limited to the Greenspace, shall not constitute an event of default so long as the Developer has modified the list of Public Improvements in accordance with Article II, Section B of this Agreement.

D. Notice. Before the failure of any party to perform its obligations under this Agreement, except a Payment Default or a Job Creation Default, is deemed to be a breach of this Agreement, the party claiming such failure shall notify, in writing, the party alleged to have failed to perform of the alleged failure and shall demand performance. No breach of this Agreement, except a Payment Default, may be found to have occurred if performance has commenced to the reasonable satisfaction of the complaining party within 30 days of the receipt by the defaulting party of such notice.

E. Remedies. Except as otherwise set forth herein, upon a breach of this Agreement, the non-defaulting party, in any court of competent jurisdiction, by an action or proceeding at law or in equity, may secure the specific performance of the covenants and agreements herein contained, may be awarded damages for failure of performance, or both. Except as otherwise set forth herein, no action taken by a party pursuant to the provisions of this Article or pursuant to the provisions of any other Article of this Agreement shall be deemed to constitute an election of remedies; and all remedies set forth in this Agreement shall be cumulative and non-exclusive of any other remedy either set forth herein or available to any Party at law or in equity. Each of the parties shall have the affirmative obligation to mitigate its damages in the event of a default by the other party.

F. Force Majeure. Notwithstanding anything in this Agreement which is or may appear to be to the contrary, if the performance of any covenant or obligation to be performed hereunder by any party (except for a Payment Default) is delayed as a result of circumstances which are beyond the reasonable control of such party (which circumstances may include, without limitation, pending or threatened litigation, acts of God, war, acts of civil disobedience, fire or other casualty, shortage of materials, adverse weather conditions [such as, by way of illustration and not limitation, severe rain storms or below freezing temperatures, hurricanes or tornadoes] labor action, strikes or similar acts) the time for such performance shall be extended by the amount of time of such delay ("Force Majeure").

ARTICLE VII GENERAL PROVISIONS

A. Time of the essence. Time is of the essence of this Agreement. The parties will make every reasonable effort to expedite the subject matters hereof and acknowledge that the successful performance of this Agreement requires their continued cooperation, including, without limitation, subject to the Developer's compliance with all applicable laws, expeditiously processing permits and approvals to facilitate the Developer's timely procurement of all entitlements required for the Project and the Public Improvements.

B. Notices. Any notice sent under this Agreement (except as otherwise expressly required) shall be written and mailed or sent by rapid transmission confirmed by mailing written confirmation at substantially the same time as such rapid transmission, or personally delivered to an officer of the receiving party at the following addresses:

If to the Developer:

Dene Oliver
OliverMcMillan
733 8th Avenue
San Diego, California 92101

With a copy to:

Barron F. Wallace
Bracewell & Giuliani LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002

If to the City:

Chief Development Officer
City of Houston, Texas
P.O. Box 1562
Houston, Texas 77002

With a copy to:

City Attorney
City of Houston, Texas
900 Bagby, 4th Floor
City Hall Annex
Houston, Texas 77002

Notice shall be deemed to have been received on the date such notice is personally delivered or three days from the date such notice is mailed or sent by rapid transmission. Either party may change its address by written notice in accordance with this Section. Any communication addressed and mailed in accordance with this Section shall be deemed to be given when so mailed, any notice so sent by rapid transmission shall be deemed to be given when receipt of such transmission is acknowledged, and any communication so delivered in person shall be deemed to be given when received for by, or actually received by, an authorized officer of the Developer or the City, as the case may be.

C. Amendments and waivers. Any provision of this Agreement may be amended or waived if such amendment or waiver is in writing and is approved by the Developer and the City. No course of dealing on the part of the Developer or the City nor any failure or delay by the Developer or the City with respect to exercising any right, power or privilege pursuant to this Agreement shall operate as a waiver thereof, except as otherwise provided in this Section.

D. Invalidity. In the event that any of the provisions contained in this Agreement shall be held unenforceable in any respect, such unenforceability shall not affect any other provisions of this Agreement and, to that end, all provisions, covenants, agreements or portions of this Agreement are declared to be severable.

E. Successors and assigns. Neither Party shall have the right to assign its rights under this Agreement or any interest herein, without the prior written consent of the other Party, except that the Developer may assign its rights and responsibilities

hereunder to (i) a lending institution of all of the Developer's rights hereunder as security for repayment of one or more loans to finance the construction or ownership of any component of the Property, (ii) any related, affiliated or subsidiary entity to which substantially all of its assets, liabilities and its rights to proceed with development of the Project and the Public Improvements are transferred or (iii) any person or entity to which the Developer assigns, subleases, or otherwise conveys its interest in the Property, provided that any assignee under (ii) or (iii) agrees in writing to assume the Developer's obligations under this Agreement. The City shall not unreasonably withhold its written consent. The City's Director of the Finance Department, or the Director's designee, may consent to a qualifying assignment under this Section on behalf of the City.

F. Exhibits, titles of articles, sections and subsections. The exhibits attached to this Agreement are incorporated herein and shall be considered a part of this Agreement for the purposes stated herein, except that in the event of any conflict between any of the provisions of such exhibits and the provisions of this Agreement, the provisions of this Agreement shall prevail. All titles or headings are only for the convenience of the parties and shall not be construed to have any effect or meaning as to the agreement between the parties hereto. Any reference herein to a section or subsection shall be considered a reference to such section or subsection of this Agreement unless otherwise stated. Any reference herein to an exhibit shall be considered a reference to the applicable exhibit attached hereto unless otherwise stated.

G. Applicable law. This Agreement is a contract made under and shall, be construed in accordance with and governed by the laws of the United States of America and the State of Texas, and any actions concerning this Agreement shall be brought in either the State Courts of Harris County, Texas, or the United States District Court for the Southern District of Texas.

H. Entire agreement. This Agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

I. Approval by the parties. Whenever this Agreement requires or permits approval or consent to be hereafter given by any of the parties, the parties agree that such approval or consent shall not be unreasonably withheld or delayed.

J. Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same agreement.

K. Interpretation. This Agreement has been jointly negotiated by the parties and shall not be construed against a party because that Party may have primarily assumed responsibility for the drafting of this Agreement.

L. Conflicts with Ordinances. The City and the Developer agree that, in the event of a conflict between the provisions of this Agreement and any City ordinance or regulation by any other agency over which the City has control, whether heretofore or hereafter adopted, the provisions of this Agreement shall govern matters addressed by this Agreement.

[EXECUTION PAGE FOLLOWS]

IN TESTIMONY OF WHICH this instrument has been executed in multiple counterparts, each of equal dignity and effect, on behalf of the Developer and the City, effective as of the Effective Date defined herein.

<p>CITY:</p> <p>CITY OF HOUSTON, a Texas home-rule municipal corporation</p> <p><u>Annise D. Parker</u> Mayor <u>Madeline D. Appel</u></p> <p>Date: <u>8-13-12</u></p> <p>ATTEST/SEAL:</p> <p><u>Christine Russell</u> City Secretary Date: <u>8/13/12</u></p> <p>COUNTERSIGNED:</p> <p><u>Ronald C. Shaw</u> City Controller <u>Ch. Shaw</u></p> <p>Date: <u>8-16-12</u></p> <p>APPROVED AS TO FORM:</p> <p><u>[Signature]</u> Assistant City Attorney</p>	<p>DEVELOPER:</p> <p>OMB HOUSTON, LP, a Delaware limited partnership</p> <p>By: OliverMcMillan River Oaks, LLC, a Delaware limited liability company, its general partner</p> <p>By: OliverMcMillan Holding Company, LLC, a Delaware limited liability company, its manager</p> <p>By: <u>[Signature]</u></p> <p>Name: <u>Richard Paul Buss</u></p> <p>Title: <u>President</u></p>
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EXHIBIT A

DESCRIPTION OF PROPERTY

TRACT 1

METES AND BOUNDS DESCRIPTION
5.4475 ACRES (237,295 SQUARE FEET)
WESTCREEK APARTMENTS, SECTION TWO
WILLIAM WHITE SURVEY, ABSTRACT NUMBER 836
HARRIS COUNTY, TEXAS

Being a tract or parcel containing 5.4475 acres (237,295 square feet) of land situated in the William White Survey, Abstract Number 836, Harris County, Texas; being all of Westcreek Apartments, Section Two, a subdivision of record in Volume 145, Page 39, of the Harris County Map Records (H.C.M.R.), Harris County, Texas, save and except that portion lying westerly of Westcreek Lane (60 feet wide), and being all of that certain called 5.4475 acre tract conveyed to Houston-Westcreek Partners, L.P., as recorded under Harris County Clerk's File (H.C.C.F.) Number Y872964; said 5.4475 acre tract being more particularly described as follows (bearings are based on said recorded plat of Westcreek Apartments, Section Two):

BEGINNING at a 5/8-inch iron rod found marking the common southeast corner of said Westcreek Apartments, Section Two, the southeast corner of said 5.4475 acre tract and the southwest corner of the Savannah Club Apartments of record in Volume 169, Page 135, H.C.M.R., and being in the north right-of-way (R.O.W.) line of Westheimer Road (80 foot wide R.O.W.);

THENCE, South 86°11'35" West, along said north R.O.W. line of Westheimer Road and the south line of said Westcreek Apartments, Section Two, a distance of 244.59 feet to a 3/4-inch iron rod found marking the southwest corner of said 5.4475 acre tract, located in the east R.O.W. line of Westcreek Lane (60 foot wide R.O.W.), and the beginning of a non-tangent curve to the left;

THENCE, Northerly, along said east R.O.W. line, a distance of 114.53 feet along the arc of said curve to the left, having a central angle of 19°53'02", a radius of 330.00 feet, and a chord which bears North 13°40'03" West, 113.95 feet to a PK nail with shiner found marking a point of reverse curvature to the right, from which a found PK nail bears North 55°57'20" West, 1.05 feet;

THENCE, Northerly, continuing along said east R.O.W. line, a distance of 109.15 feet along the arc of said curve to the right, having a central angle of 23°09'46", a radius of 270.00 feet and a chord which bears North 12°01'41" West, 108.41 feet to a PK nail with shiner found marking a point of tangency;

THENCE, North 00°26'48" West, continuing along said east R.O.W. line, at a distance of 571.88 feet passing a found PK nail, continuing a total distance of 621.78 feet to a 5/8-inch iron rod with cap found marking the common southwest corner of a 7.4124 acre tract as recorded under H.C.C.F. Number R736984 and the northwest corner of said 5.4475 acre tract, being in the common south line of Westcreek Apartments, Section One, as recorded in Volume 145, Page 32, H.C.M.R., and in the north line of said Section Two;

THENCE, North 89°21'08" East, along the south line of said Section One and said 7.4124 acre tract and along the north line of said Section Two and said 5.4475 acre tract, a distance of 289.42 feet to a PK nail with shiner found marking the southeast corner of said Section One, the southeast corner of said 7.4124 acre tract, the northeast corner of said 5.4475 acre tract and the northeast corner of said Section Two, located in the west line of the aforementioned Savannah Club Apartments;

THENCE, South 00°37'33" East, along the common line of said subdivisions, at a distance of 20.00 feet passing a found railroad spike, continuing a total distance of 825.60 feet to the POINT OF BEGINNING and containing 5.4475 acres (237,295 square feet) of land. This tract is subject to the rights of the general public and/or governmental authorities in and to the portion of the property lying within the right-of-way of Bettis Drive.

TRACT II
METES AND BOUNDS DESCRIPTION
9.1743 ACRES (399,632 SQUARE FEET)
SAVANNAH CLUB APARTMENTS
WILLIAM WHITE SURVEY, ABSTRACT NUMBER 836
HARRIS COUNTY, TEXAS

Being a tract or parcel containing 9.1743 acres (399,632 square feet) of land situated in the William White Survey, Abstract Number 836, Harris County, Texas; being all of the Savannah Club Apartments, a subdivision of record in Volume 169, Page 135, Harris County Map Records (H.C.M.R.), Harris County, Texas, and being all of that certain called 9.1743 acre tract conveyed to Houston-Westcreek Partners, L.P., as recorded under Harris County Clerk's File (H.C.C.F.) Number Y872964; said 9.1743 acre tract being more particularly described as follows (bearings are based on said recorded plat of Savannah Club Apartments):

BEGINNING at a 5/8-inch iron rod found marking the common southeast corner of Westcreek Apartments, Section Two, a subdivision of record in Volume 145, Page 39, H.C.M.R., the southeast corner of a 5.4475 acre tract as recorded under H.C.C.F. Number R736984, the southwest corner of said 9.1743 acre tract and the herein described Savannah Club Apartments, and being in the north right-of-way (R.O.W.) line of Westheimer Road (80 foot wide R.O.W.);

THENCE, North 00°40'52" East, along the common line of said subdivisions, at a distance of 825.60 feet passing the common northeast corner of said Westcreek Apartments, Section Two, and the southeast corner of Westcreek Apartments, a subdivision of record in Volume 145, Page 32, H.C.M.R., continuing in all a total distance of 919.00 feet to a 1/2-inch iron rod found marking the common southwest corner of Harrison Plaza, Section One, a subdivision of record in Volume 360, Page 6, H.C.M.R., and the northwest corner of said 9.1743 acre tract;

D

THENCE, South 89°15'00" East, along the common line of said Savannah Club Apartments and said Harrison Plaza, Section One, a distance of 442.00 feet to a 5/8-inch iron rod with cap found marking the common southeast corner of said Harrison Plaza, Section One and the northeast corner of said 9.1743 acre tract, and in the west line of the Partial Replat of a Replat of Parrett Subdivision, of record in Volume 42, Page 67, H.C.M.R.;

THENCE, South 00°33'35" West, along the common line of said Savannah Club Apartments and said Partial Replat of a Replat of Parrett Subdivision, a distance of 174.06 feet to a 5/8-inch iron rod found for the common southwest corner of Lot 1, Block 2, of said Partial Replat of a Replat of Parrett Subdivision, and the northwest corner of a 2.48011 acre tract of record under H.C.C.F. Number H011793, in the east line of said Savannah Club Apartments marking an angle point;

THENCE, South 00°58'15" West, along the common line of said 2.48011 acre tract, and the herein described tract, a distance of 720.02 feet to a point in a power pole for the common southeast corner of said 9.1743 acre tract and said Savannah Club Apartments, the southwest corner of said 2.48011 acre tract, and being in the north R.O.W. line of the aforesaid Westheimer Road;

THENCE, South 87°30'00" West, along the north R.O.W. line of said Westheimer Road, a distance of 439.40 feet to the POINT OF BEGINNING and containing 9.1743 acres (399,632 square feet) of land. This property is subject to the rights of the general public and/or governmental authorities in and to the portion of the property lying within the right-of-way of Bettis Drive.

EXHIBIT B

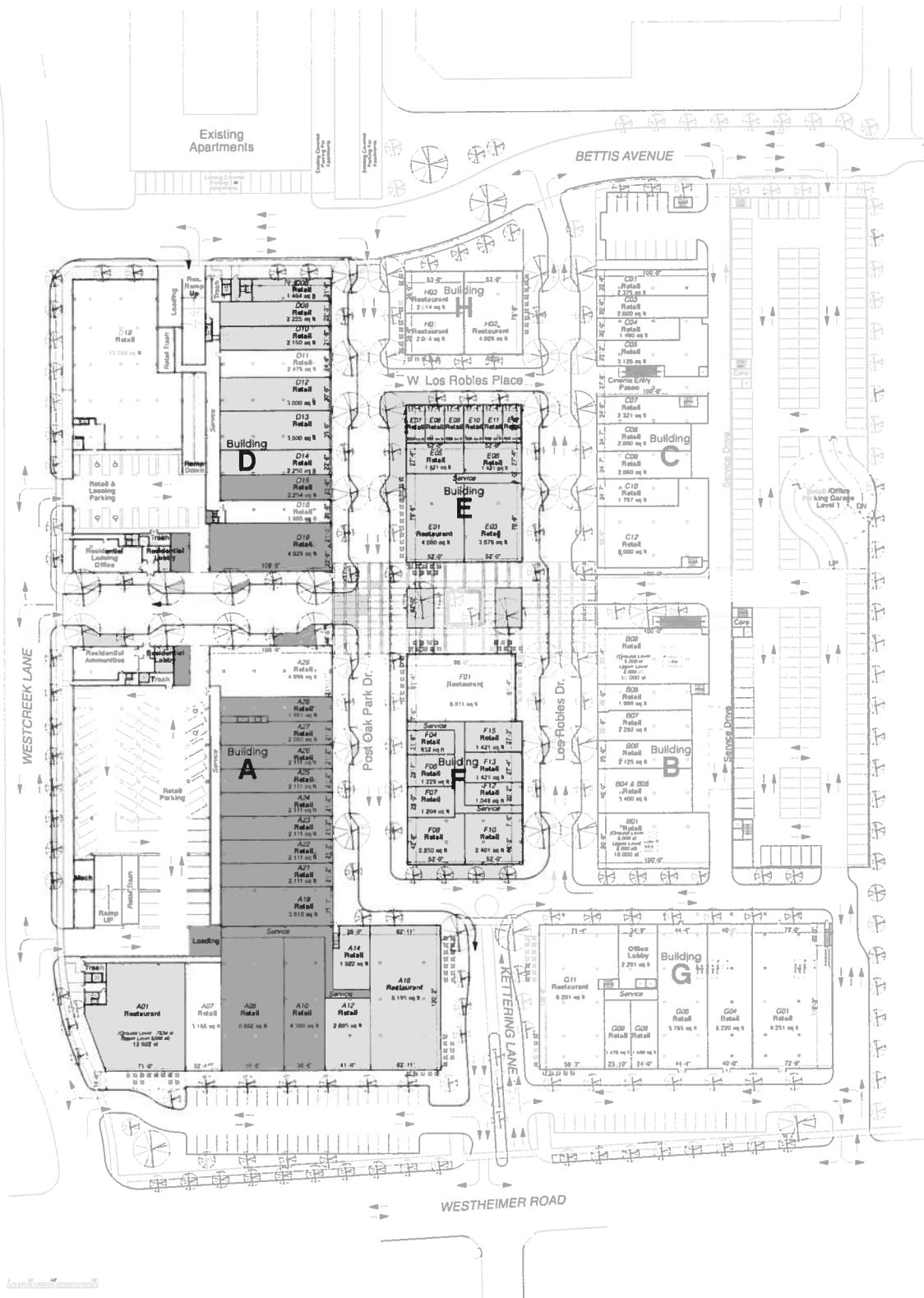
LIST OF PUBLIC IMPROVEMENTS

Item	Total
<u>Public Right-of-Way and Utilities @ \$115/sq ft*</u>	
Bettis Street Right-of-Way Dedication (17,498 SF) based on \$115/sq ft*	
= Bettis Street 20' foot strip (5,706 SF)	\$ 656,190
= Bettis Street 40' foot strip (11,792 SF) if owned by Developer at time of dedication	\$ 1,354,930
Bettis Street Public Greenspace Area @ \$115/sq ft* (3,946 SF)	\$ 453,790
Bettis Street Roadway and Utility Construction	\$ 1,649,203
Bettis Street Public Greenspace Construction Improvements	\$ 60,000
Westheimer Road Improvements, signalization/pedestrian crossing to Afton Oaks/Kettering	\$ 479,603
Westcreek Drive Improvements Sidewalks, lighting and street furniture	\$ 300,000
Westheimer Road Dedication 12 feet x 683.64 feet @115/sq ft*	\$ 943,423
The Value of JRC Easements and Utilities to Be Abandoned as a part of JRC process within the 380 @ \$115/sq ft* @ 50%	
= Onsite water line easement (25,929 SF) based on 50% of value	\$ 1,490,918
= Onsite fire hydrant easement (575 SF) based on 50% of value	\$ 33,063
= Onsite water line add (1,177 LF 6" WL & 1,128 LF 8" WL)	\$ 132,538
= Onsite wastewater line easement (4,981 SF) based on 50% of value	\$ 286,408
= Onsite wastewater line (505 LF 8" San Swr)	\$ 29,038
Estimated Underground electric power lines (1,300+/- LF) along Westheimer, Westcreek and Bettis	\$ 2,810,791
Estimated Underground telecommunications utilities (750+/- LF) along Westheimer	\$ 1,413,983

Environmental Remediation at 50% of Actual Cost of \$3,000,000	\$ 1,500,000
Offsite Public Storm Sewers (24" to 66") Westcreek & Westheimer serves project & remainder of COH Drainage Area W0709 (actual costs to be determined by PWE)	\$ 2,784,866
Sub-Total of Public Improvements, Infrastructure and Benefit	\$ 16,378,742
Financing Cost -Based on 5 years at agreed upon fixed rate of 3.75%	\$ 3,071,014
Total of Public Improvements, Infrastructure and Benefit	\$ 19,449,756

*The value per square foot indicated on this list is an approximation based upon recent comparable land sales. The actual value per square foot shall be based upon appraisals of market value during the Joint Referral Committee (JRC) process for abandonment of easements and utilities within the Property.

EXHIBIT C
SITE PLAN OF PROJECT



4444 Westheimer
Houston, Texas

Site Plan

3/13/12

Prepared by Pappageorge Haymes Partners

Gensler

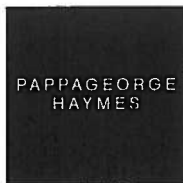


EXHIBIT D

FORM OF EASEMENT OF PUBLIC USE FOR GREENSPACE

EASEMENT CONVEYANCE

THE STATE OF TEXAS §

COUNTY OF HARRIS §

GRANTOR:

OMB Houston, LP, a Delaware limited partnership

GRANTOR'S MAILING ADDRESS:

733 8th Avenue, San Diego, San Diego County, CA 92101

GRANTEE:

The City of Houston, a municipal corporation situated in Harris, Fort Bend and Montgomery Counties, Texas

GRANTEE'S MAILING ADDRESS:

P.O. Box 1562, Houston, Harris County, TX 77251

CONSIDERATION:

Ten and no/100 dollars (\$10.00) and other good and valuable consideration

EASEMENT PROPERTY:

The parcel of land being more particularly described by metes and bounds on **Exhibit "A"** attached hereto and made a part hereof.

EASEMENT PURPOSE:

For green space, park and recreational use and enjoyment, including use as a park, by the public.

GRANT OF EASEMENT:

Grantor, for the Consideration, grants, sells, and conveys to Grantee and Grantee's successors and assigns a permanent and perpetual easement over, under, upon and across the Easement Property for the Easement Purpose, together with all and singular the rights and appurtenances thereto in any way belonging (collectively, the "Easement"), to have and to hold the Easement to Grantee, subject to the terms hereof. Grantor binds Grantor and Grantor's successors and assigns to warrant and forever defend all and singular the property interests herein conveyed to Grantee and Grantee's successors and assigns against every person whomsoever lawfully claiming or to claim the same or any part of thereof by, through, or under Grantor.

TERMS AND CONDITIONS:

The following terms and conditions apply to the Easement:

1. Grantor may install on the Easement Property only such complementary structures and improvements as are necessary and appropriate for the Easement Purpose.

2. Grantor shall maintain the Easement Property in a good and orderly condition for the Easement Purpose. Grantor may not use the Easement Property in any manner that would interfere with the Easement Purpose, including regular mowing and maintenance of the grass and landscaping, trash removal, and sanitation.

3. Grantor shall not impose any cost or fee for the public to use the Easement Property for the Easement Purpose. Grantor shall make the Easement Property open to the public for the Easement Purpose on a daily basis; however, Grantor may restrict access during nighttime hours.

4. If Grantor fails to operate and maintain the Easement Property for the Easement Purpose, Grantee, after giving Grantor thirty (30) days' written notice, may perform the required maintenance and receive reimbursement from Grantor for expenses related thereto. Alternatively, Grantee may enforce this Easement by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to this Easement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

5. This conveyance is not a conveyance of a fee estate in the Easement Property or of any interest in the oil, gas and other minerals in, on or under the Easement Property, but is a grant solely of the Easement in and to the Easement Property. This conveyance of the Easement in and to the Easement Property is made

subject to all restrictions, covenants, conditions, rights-of-way, easements, mineral reservations and royalty reservations of record, if any, in the office of the County Clerk of Harris County, Texas, but only to the extent that the same are valid and subsisting, are binding upon municipalities, and affect the Easement Property.

IN WITNESS WHEREOF, these presents have been executed by Grantor to become effective on the ____ day of _____, 20__.

OMB HOUSTON, LP, a Delaware limited partnership

By: OliverMcMillan River Oaks, LLC, a Delaware limited liability company, its general partner

By: OliverMcMillan Holding Company, LLC, a Delaware limited liability company, its manager

By: _____

Name: _____

Title: _____

THE STATE OF TEXAS §

COUNTY OF HARRIS §

This instrument was acknowledged before me on the _____ day of _____, 20__, by _____, _____ of OliverMcMillan Holding Company, LLC, a Delaware limited liability company, the manager of OliverMcMillan River Oaks, LLC, a Delaware limited liability company, the general partner of OMB Houston, LP, a Delaware limited partnership, on behalf of said limited liability companies and limited partnership.

Notary Public, State of Texas

(Notary Seal)

Approved as to Form:

Assistant City Attorney

EXHIBIT "A"
EASEMENT PROPERTY

[Legal description of greenspace area to be inserted prior to conveyance]

EXHIBIT E

SAMPLE AGREEMENT TO RELEASE SALES AND USE TAX INFORMATION

This Agreement is entered into between the City of Houston, Texas ("City"), and _____ (business name) ("Taxpayer") for the purposes indicated herein.

I, _____, _____ (title), the duly authorized agent of _____ (business name), a vendor doing business at _____ (name and address of facility), do hereby stipulate and agree as follows:

I hereby authorize the Texas Comptroller's Office to release and disclose any and all Sales and Use tax information relating to the operation of Taxpayer's business location to the City. I understand and agree that this release will be made by the Comptroller's Office to the City on an ongoing monthly basis beginning on the date this Agreement is executed. This Agreement waives any and all rights with respect to the parties regarding the confidentiality of tax information under Sections 111.006 and 151.027, Texas Tax Code, or other state law.

This Agreement is entered into in or with regard to property located in Houston, Harris County, Texas, and Texas law will apply to its interpretation and enforcement.

SIGNED AND AGREED TO on the _____ day of _____, 20__.

Name
Title
On behalf of the City

Name
Title
On behalf of the Taxpayer

Texas Taxpayer Identification No.
