

DEVELOPMENT AGREEMENT
BETWEEN STARWOOD HOMEOWNER'S ASSOCIATION, INC. AND THE CITY OF
FRISCO, TEXAS
(Legacy Drive Starwood HOA Repair)

THIS DEVELOPMENT AGREEMENT (the "Agreement") is made and entered into as of this _____ day of _____, 2010, by and between, **STARWOOD HOMEOWNER'S ASSOCIATION, INC.**, a Texas non-profit corporation ("HOA") and the **CITY OF FRISCO, TEXAS**, a Texas home-rule municipality ("City"), on the terms and conditions hereinafter set forth.

W I T N E S S E T H:

WHEREAS, HOA owns property adjacent to Legacy Drive located north of Lebanon Road and south of the Burlington Northern railroad, within the Starwood Village subdivision in Frisco, Texas, identified as Lot 1, Block D on the Final Plat, Starwood Village Phase Four, Village No. 13, Frisco, Denton County, Texas ("HOA Property") and filed for record under Clerk's File No. 2001-R0095001, Denton County Land Records, a copy of which is attached hereto as *Exhibit "A"* and incorporated herein for all purposes ("Plat"); and

WHEREAS, Roland N. and Dorothy E. Hamilton owns property adjacent to the HOA Property within the Starwood Village subdivision in Frisco, Texas known as Lot 16, Block A, 5143 Stillwater Trail ("Hamilton Property"); and

WHEREAS, Christian T. and Melanie M. Royer owns property adjacent to the HOA Property within the Starwood Village subdivision in Frisco, Texas known as Lot 15, Block A, 5159 Stillwater Trail ("Royer Property"); and

WHEREAS, Stephen C. and Catherine K. Raffaele, Trustees of the Raffaele Trust, owns property adjacent to the HOA Property within the Starwood Village subdivision in Frisco, Texas known as Lot 13, Block A, 5185 Lago Vista Lane ("Raffaele Property"); and

WHEREAS, City finds that maintenance and operation of Legacy Drive is a governmental function; and

WHEREAS, City and HOA agree that work is necessary to repair the earthen embankment and/or slope situated on the Hamilton Property, the Royer Property, the Raffaele Property and a portion of the HOA Property adjacent to Legacy Drive north of Lebanon Road, south of the Burlington Northern railroad, including repair of a portion of the brick screening wall located on the HOA Property (collectively, "Slope"); and

WHEREAS, the Slope is an integral component of Legacy Drive and is necessary for the maintenance and property function of Legacy Drive; and

WHEREAS, the Slope is one of several embankment and/or slope failures of similar nature on private property adjacent to Legacy Drive and Lebanon Road; and

WHEREAS, City has investigated and determined that the scope and magnitude of repair necessary for these embankment and/or slope failures is beyond the capability of the respective owners of the underlying properties; and

WHEREAS, City has further investigated and determined that in the absence of City participation, the respective property owners will be unable to properly repair the embankments and/or slopes in a timely manner, ultimately resulting in damage to and loss of use of public roadways in the City; and

WHEREAS, City has further investigated and determined that it would be in the best interest of City, its citizens, public safety and the preservation of public roadway infrastructure to assist the respective owners in repair efforts of the failed embankments and/or slopes in the City, including but not limited to, monetary participation; and

WHEREAS, City and HOA disagree as to the cause(s) and/or condition(s) which occurred, necessitating repairs to the Slope ("Starwood HOA Repair"); and

WHEREAS, City and HOA, respectively, deny any fault and/or liability with regard to the cause(s) and/or condition(s) necessitating the Starwood HOA Repair; and

WHEREAS, notwithstanding the disagreement between the parties hereto, the respective denial of liability/fault and in consideration for HOA agreeing to, among other things, tender its prorata share of the costs related to the construction of the Starwood HOA Repair in escrow, City has agreed to construct the Starwood HOA Repair as set forth herein; and

WHEREAS, City finds that the construction of the Starwood HOA Repair as set forth herein constitutes a public purpose.

NOW, THEREFORE, in consideration of the covenants and conditions contained in this Agreement, City and HOA agree as follows:

1. **Findings Incorporated**. The findings set forth are made a part of this Agreement as is set forth herein verbatim.

2. **Land Subject to Agreement**. The land that is subject to this Agreement is: (i) a portion of the HOA Property ; (ii) the Hamilton Property; (iii) the Royer Property; and (iv) the Raffaele Property, Frisco, Denton County, Texas, as more particularly described in the Plat, and as further delineated in *Exhibit "D"*, attached hereto and incorporated herein for all purposes, as "Starwood HOA Repair". Starwood HOA represents that it is the sole owner of the HOA Property.

3. **Location/Construction of the Starwood HOA Repair**. The location of the Starwood HOA Repair is generally depicted on *Exhibit "D"*, attached hereto, however, the exact location of the Starwood HOA Repair is subject to change, as solely determined by City, but reasonably related to the scope of work contemplated solely for the Slope and Starwood HOA Slope Repair in the agreement by and between City and Craig Olden, Inc., dated July _____,

2010, a copy of which is attached hereto as *Exhibit "B"* and incorporated herein for all purposes, for the Starwood HOA Repair ("Contractor Agreement"). Generally, the Starwood HOA Repair include dirt work and replacement of approximately two hundred (200) linear feet of the screening wall located on the HOA Property and restoration of grade and slope on the Hamilton Property, Royer Property and the Raffaele Property. City will construct, or cause to be constructed, the Starwood HOA Repair in accordance with the Contractor Agreement. HOA and City agree to City's use of the Contractor Agreement in its construction of the Starwood HOA Repair. HOA agrees to maintain the existing chain link, temporary fencing located on the Hamilton Property, Royer Property and the Raffaele Property until such time as the Starwood HOA Repair are complete, as solely determined by City. Additionally, City shall not be responsible for the repair and/or restoration of the landscaping and irrigation located on the Hamilton Property, Royer Property and Raffaele Property which are damaged, destroyed and/or in any way affected during the construction of the Starwood HOA Repair.

4. **Estimated Construction Costs of Starwood HOA Repair.** City will construct the Starwood HOA Repair in accordance with the Contractor Agreement provided all terms and conditions of this Agreement are satisfied. City has provided HOA with the estimate of the costs to construct the Starwood HOA Repair, which amount is anticipated to be FOUR HUNDRED EIGHTEEN THOUSAND, THREE HUNDRED EIGHTY-EIGHT AND 25/100 DOLLARS (\$418,388.25), as more particularly described in *Exhibits "B" and "E"* as "Starwood HOA", both of which are attached hereto and incorporated herein for all purposes ("Estimated Construction Costs"). The phrase "construction costs" as used herein shall mean engineering and design costs, the actual construction costs and the geotechnical materials testing and inspection fees generated by third-party contractors associated with the Starwood HOA Repair and Contractor Agreement, but not including the City or HOA. The phrase "construction cost overruns" shall mean all construction costs which are over and above the Estimated Construction Costs.

5. **Authority to Access Properties/Release, Hold Harmless and Right of Entry Agreement.** HOA grants City unfettered access to the HOA Property for the purpose of constructing the Starwood HOA Repair in accordance with this Agreement. Additionally, as a condition precedent to this Agreement, HOA shall make a reasonable attempt to cause the respective record owners of the Hamilton Property, Royer Property and the Raffaele Property to execute the Release, Hold Harmless and Right of Entry Agreement in the same form attached hereto as *Exhibit "C"* and incorporated herein for all purposes or any other form approved by City ("Releases"). The parties agree that the original, fully executed Releases must be delivered to City on or before the date City executes this Agreement.

6. **HOA's Payment of the Starwood HOA Repair Escrow Funds/Cost Overruns/Review of Records.** (a) Simultaneously with the execution of this Agreement, HOA will pay into an escrow account, at the location solely determined by City, funds equal to its proportionate share of the cost of the Starwood HOA Repair, totaling TWO HUNDRED TWENTY-TWO THOUSAND, ONE HUNDRED NINETY-THREE THOUSAND AND 74/100 DOLLARS (\$222,193.74), as more particularly described in *Exhibit "E"*, attached hereto ("Escrow Funds"). The Escrow Funds will be available to City to pay for the construction costs associated with the Starwood HOA Repair, and City shall, in its sole discretion, be entitled to use, at any time, all or a portion of the Escrow Funds in connection with the construction of the

Starwood HOA Repair in accordance with the Contractor Agreement. City shall further be entitled to, as its sole property, any and all interest earned on the Escrow Funds, and HOA hereby waives and relinquishes any and all rights or claim to interest earned, if any, on the Escrow Funds. In addition, if any amount of the Escrow Funds remains in the account after City has completed the Starwood HOA Repair in accordance with the Contractor Agreement, as solely and reasonably determined by City ("Remaining Escrow Funds"), HOA shall be entitled to, as its sole property, the Remaining Escrow Funds within thirty (30) days of City's determination of completion of the Starwood HOA Repair. City may, in its sole discretion, utilize the interest earned on the Escrow Funds, if any, for any purpose. Further, HOA shall, within thirty (30) days of receiving written notice from City, tender to City its proportionate share of any and all construction cost overruns associated with the construction of the Starwood HOA Repair and which are reasonably related to the Contractor Agreement and the Slope. City and HOA agree that HOA's proportionate share shall be seventy percent (70%) of any and all construction cost overruns which are attributable to the area described as "Starwood HOA Repair" in *Exhibit "D"*. HOA's obligation for cost overruns, unless further agreement is reached between the HOA and City, shall be capped at \$50,000.00 ("Cap"). Any cost overruns exceeding the Cap shall be shared proportionately as described herein based on the approval of the HOA, such approval shall not be unreasonably withheld, delayed, conditioned or denied.

(b) City agrees that at any time during normal business hours and as often as HOA may deem necessary, City shall make available to representatives of HOA examination of all of its accounting/payment records with respect to all matters covered by this Agreement and will permit such representatives of HOA to examine and copy such records for a period of four (4) years from the date of final settlement of this Agreement or for such other or longer period, if any, as may be required by applicable statute or other lawful requirement.

7. Disclaimer/Waiver of Damages/Liability. (a) HOA acknowledges and agrees that City is not providing any guarantee, representation and/or warranty, and City hereby disclaims any guarantee, representation and/or warranty, of any work performed by City, its agents, employees, representatives, contractors, subcontractors and/or designees, in connection with the design, construction and/or completion of the Starwood HOA Repair, in whole or in part, save and except any enforceable bonding obligations, indemnity and insurance provided by the Contractor to "Owner" in the Contractor Agreement. As set forth in the Contractor Agreement, and as consideration for HOA's willingness to enter into this Agreement and the specific waiver provisions contained in this Paragraph, City agrees that it will require Contractor to name HOA as an additional beneficiary of any bonding, indemnity and insurance obligation provided by the Contractor, including additional insured status and waiver of subrogation rights granted to City by Contractor.

(b) HOA HEREBY RELEASES CITY, ITS COUNCIL MEMBERS, OFFICERS, AGENTS, REPRESENTATIVES AND EMPLOYEES, FROM AND AGAINST, AND WAIVES ANY AND ALL RIGHTS TO, ANY AND ALL CLAIMS AND/OR DEMANDS FOR DAMAGES (PERSONAL OR PROPERTY), INJURY (INCLUDING DEATH), OR OTHERWISE, IT MAY HAVE WITH REGARD TO THE DESIGN, CONSTRUCTION, COMPLETION AND/OR MAINTENANCE OF THE STARWOOD HOA REPAIR AND/OR OR ANY OTHER ACT AND/OR OMISSION RELATING, DIRECTLY OR INDIRECTLY, TO THE STARWOOD HOA REPAIR, IN WHOLE OR IN PART, AS APPROVED IN THIS AGREEMENT.

(c) Except as provided in subparagraph (a) above, HOA agrees that City shall not, under any circumstance, be liable and/or responsible for any claim, demand and/or judgment for damages (personal or property), injury (including death), or otherwise, which may, directly or indirectly, in whole or in part, result from the design, construction, completion and/or maintenance of the Starwood HOA Repair and/or any other act and/or omission relating, directly or indirectly, to the Starwood HOA Repair, in whole or in part.

8. **Default.** If HOA fails to comply with the provisions of this Agreement, City shall have all of the following remedies, in addition to City's other rights and remedies:

a. to file this instrument in the Land Records of Denton County as a lien and/or encumbrance on the HOA Property; and/or

b. to seek specific enforcement of this Agreement.

In the event City fails to comply with the terms and conditions of this Agreement, HOA may seek specific enforcement of this Agreement as its sole and exclusive remedy.

9. **Covenant Running with the Land.** This Agreement shall be a covenant running with the HOA Property and shall be binding upon HOA. In addition, the parties shall cause this Agreement to be filed in the Land Records of Denton County, Texas.

10. **Notices.** Any notice provided or permitted to be given under this Agreement must be in writing and may be served by depositing same in the United States Mail, addressed to the party to be notified, postage pre-paid and registered or certified with return receipt requested, or by delivering same in person to such party via facsimile or hand-delivery service, Federal Express or any courier service that provides a return receipt showing the date of actual delivery of same to the addressee thereof. Notice given in accordance herewith shall be effective upon receipt at the address of the addressee. For purposes of notice, the addresses of the parties shall be as follows:

If to City, addressed to it at:

City of Frisco
Attention: City Manager
6101 Frisco Square Boulevard; 3rd Floor East
Frisco, Texas 75034
Telephone: (972) 292-5100
Facsimile: (972) 292-5122

If to HOA, addressed to it at:

Starwood Homeowner's Association, Inc.
Attention: Robert Hamilton or current Property Manager
6550 Starwood Drive
Frisco, Texas 75034
Telephone: (972) 335-3661
Facsimile: (972) 335-7077

11. **Attorney's Fees.** In any legal proceeding brought to enforce the terms of this Agreement, the prevailing party may recover its reasonable and necessary attorney's fees from the non-prevailing party as permitted under Section 271.153 of the Texas Local Government Code, as it exists or may be amended.

12. **Incorporation of Recitals.** The representations, covenants and recitations set forth in the foregoing recitals of this Agreement are true and correct and are hereby incorporated into the body of this Agreement and adopted as findings of City, the authorized representative of HOA.

13. **HOA's Warranties/Representations.** All warranties, representations and covenants made by HOA in this Agreement or in any certificate or other instrument delivered by HOA to City under this Agreement shall be considered to have been relied upon by City and will survive the satisfaction of any fees under this Agreement, regardless of any investigation made by City or on City's behalf.

14. **Entire Agreement.** This Agreement contains the entire agreement of the parties with respect to the matters contained herein and may not be modified or terminated except upon the provisions hereof or by the mutual written agreement of the parties hereto.

15. **Venue.** This Agreement shall be construed in accordance with the laws of the State of Texas and shall be performable in Collin County, Texas.

16. **Consideration.** This Agreement is executed by the parties hereto without coercion or duress and for substantial consideration, the sufficiency of which is forever confessed.

17. **Counterparts.** This Agreement may be executed in a number of identical counterparts, each of which shall be deemed an original for all purposes. A facsimile signature will also be deemed to constitute an original if properly executed.

18. **Authority to Execute.** This individuals executing this Agreement on behalf of the respective party below represent to each other and to others that all appropriate and necessary action has been taken to authorize the individual who is executing this Agreement to do so for and on behalf of the party for which his or her signature appears, that there are no other parties or entities required to execute this Agreement in order for the same to be an authorized and binding agreement on the party for whom the individual is signing this Agreement and that each individual affixing his or her signature hereto is authorized to do so, and such authorization is valid and effective on the date hereof.

19. **Savings/Severability.** In case one or more of the provisions contained in this agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

20. **Representations.** Each signatory represents this Agreement has been read by the party for which this Agreement is executed and that such party has had an opportunity to confer with its counsel.

21. **Sovereign Immunity.** The parties agree that City has not waived its sovereign immunity by entering into and performing its obligations under this Agreement, except to the extent authorized by Section 271.152, *et. seq.*, of the Texas Local Government Code.

22. **No Third Party Beneficiaries.** Nothing in this Agreement shall be construed to create any third party not a signatory to this Agreement, and the parties do not intend to create any third party beneficiaries by entering into this Agreement.

23. **Assignment/Binding Effect.** This Agreement may not be assigned without the prior written consent of all of the parties hereto.

24. **Waiver.** Waiver by either party of any breach of this Agreement, or the failure of either party to enforce any of the provisions of this Agreement, at any time, shall not in any way affect, limit or waive such party's right thereafter to enforce and compel strict compliance.

25. **Reference to HOA.** When referring to "HOA" herein, this Agreement shall refer to and be binding upon HOA, and its officers, directors, partners, employees, representatives, agents, successors, assignees, grantees, trustees and/or any other third parties for whom such HOA is legally responsible.

26. **Miscellaneous Drafting Provisions.** This Agreement shall be deemed drafted equally by all parties hereto. The language of all parts of this Agreement shall be construed as a whole according to its fair meaning, and any presumption or principle that the language herein is to be construed against any party shall not apply. Headings in this Agreement are for the convenience of the parties and are not intended to be used in construing this document.

IN WITNESS WHEREOF, the parties have executed this Agreement and caused this Agreement to become effective on the latest day as reflected by the signatures below.

CITY:

CITY OF FRISCO, TEXAS

By: _____
George Purefoy, City Manager

Date: _____

HOA:

STARWOOD HOMEOWNERS,
ASSOCIATION, a Texas
non-profit corporation

By: Doug Beldon

Printed Name: Doug Beldon

Its: Boardmember

Date: 7/14/2010

STARWOOD HOMEOWNERS,
ASSOCIATION, a Texas
non-profit corporation

By: Charles G. Daniel

Printed Name: Charles G. Daniel

Its: Board Member

Date: July 13, 2010

STATE OF TEXAS: §
 §
COUNTY OF COLLIN: §

BEFORE ME, the undersigned authority, on this day personally appeared George Purefoy, known to me to be one of the persons whose names are subscribed to the foregoing instrument; he acknowledged to me that he is the duly authorized representative for the **CITY OF FRISCO, TEXAS**, and he executed said instrument for the purposes and considerations therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this ____ day of _____, 2010.

Notary Public in and for the State of Texas
My Commission Expires: _____

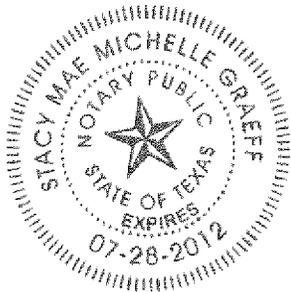
STATE OF TEXAS: §
 §
COUNTY OF Collin: §

BEFORE ME, the undersigned authority, on this day personally appeared Doug Beldon, Board member of **STARWOOD HOMEOWNER'S ASSOCIATION, INC.**, a Texas non-profit corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and who acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated on behalf of said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 14th day of July, 2010.

Jacyn M. Graeff

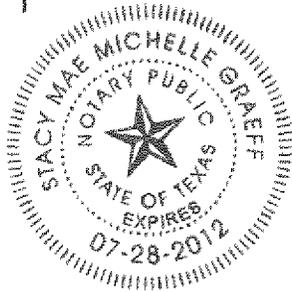
Notary Public in and for the State of Texas
My Commission Expires: 07-28-2012



STATE OF TEXAS: §
COUNTY OF Collin: §

BEFORE ME, the undersigned authority, on this day personally appeared Charles Daniel, Board Member of **STARWOOD HOMEOWNER'S ASSOCIATION, INC.**, a Texas non-profit corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and who acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated on behalf of said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 13th day of July, 2010.



Stacy Mae Michelle Graeff
Notary Public in and for the State of Texas
My Commission Expires: 07-28-2010