

RIGHT-OF-WAY MAINTENANCE AGREEMENT

This Agreement made and entered into the ____ day of _____, 20__, by and between _____, its successors and assigns ("Owner"), and the **City of Overland Park, Kansas** ("City").

WITNESSETH:

WHEREAS, Owner is the owner of a parcel of land located within the corporate boundaries of the City of Overland Park, Kansas, and legally described on Exhibit A attached hereto (the "Property"); and

WHEREAS, Owner desires to install the following features: landscaping, street trees, hardscaping and irrigation systems (the "Amenity" or "Amenities") within or adjacent to the public right-of-way within the Property as depicted in Exhibit B; and

WHEREAS, the City has raised certain concerns regarding the responsibility for and future maintenance of the Amenities; and

WHEREAS, Owner, in order to satisfy the concerns of the City, so as to receive permission to install and maintain the Amenities in the public right-of-way, has agreed to the terms, conditions and requirements set forth in this Agreement.

NOW THEREFORE, Owner and the City agree as follows:

ARTICLE I - OWNER COVENANTS

Owner agrees:

- 1.1 To cause the Amenities to be operated and maintained in good condition and repair. Such maintenance shall include but not be limited to upkeep of the landscaping and hardscaping; pruning of healthy street trees and replacement of dead street trees; and repair, replacement or removal of irrigation systems.

All such maintenance shall comply with any applicable Overland Park Municipal Code ("O.P.M.C.") provisions, including, but not limited to, O.P.M.C. Chapters 7.16 – Trees and Shrubs and 7.20 – Weeds, 13.12 - Construction on Rights-of-Way, and 13.24 - Dumping Materials on Streets, as amended. Any replacement of dead trees shall be coordinated with and comply with any species recommendations or request of the City Forester.

- 1.2 That in the event the condition of the Amenities creates a situation that threatens the health, safety and welfare of the public, to immediately take whatever measures are reasonably necessary to restore the Amenities to a safe condition (the "Emergency Restoration Work").
- 1.3 To notify the City Engineer as soon as possible after first learning of the need for Emergency Restoration Work that involves a threat to health, safety and welfare of the public.
- 1.4 That in the event the Owner fails in its duty and obligation to perform Emergency Restoration Work, the City shall have the right to take whatever action is necessary to remove the threat to the public safety or welfare. If the City exercises such right, Owner shall reimburse the City for all actual expenses associated with the City's performance of the Emergency Restoration Work, such reimbursement to occur within thirty (30) days of invoice from the City. If the Owner fails to reimburse the City as provided hereunder, the parties agree that the City may take any action permitted by law including but in no way limited to levying assessments or placing a lien on the Property.
- 1.5 That in the event the Owner fails in its duty and obligation to properly operate, maintain and/or repair the Amenities, and such failure is not a threat to the public safety and welfare, the City shall provide notice to the Owner of the deficiency in operation, maintenance and/or repair of the Amenities. If, after thirty (30) days of such notice to the Owner, the Owner fails to remedy the deficiency, the City may perform all necessary work to bring the Amenities into the proper operation, maintenance and/or repair. The Owner shall reimburse the City for all actual expenses associated with the City's performance of such work within thirty (30) days of invoice from the City. If the Owner fails to reimburse the City as provided hereunder, the parties agree that the City may take any action permitted by law including but in no way limited to levying assessments or placing a lien on the Property.
- 1.6 That should the City, in the City's sole discretion, determine that the Amenities, or any individual Amenity, is endangering the public health, safety or welfare, or has become unsightly or a nuisance, or unreasonably interferes in any way with the City's use of the right-of-way, then upon request of the City, the Owner will remove or cause to be removed the Amenity or Amenities from the right-of-way and the Owner shall repair any damage caused thereby at the Owner's expense. Should the Owner fail to comply with the City's removal request, the City may remove the same and the Owner shall reimburse the City for the removal of the Amenity or Amenities and repair the right-of-way within thirty (30) days of receipt of invoice from the City. If the Owner fails to reimburse the City as provided hereunder, the parties agree that the City may take any action permitted by law including but in no way limited to levying assessments or placing a lien on the Property.
- 1.7 To release the City, the Mayor and the members of the City Council (collectively the "Governing Body"), and employees of the City from any and all past, present or future liability for any damage that may be caused at any time by the City permitting the Amenities to be located within the public right-of-way. Owner shall not be required to release the City, Governing Body, or employees of the City for the gross negligence or willful misconduct of the City, Governing Body, or employees of the City.
- 1.8 To indemnify and hold harmless the City, members of the Governing Body and employees of the City from and against any and all losses incurred or suffered by any person or to any real or personal property as a result of or in connection with the City permitting an Amenity or the Amenities to be located within the public right-of-way or with any negligent acts or omissions or intentional misconduct of the Owner relative to its obligations under this Agreement.
- 1.9 Prior to the consummation of the sale of any lot located within the Property, Owner will cause to be recorded with the Office of Johnson County, Kansas Register of Deeds, a Homes or Business Owner's Association (the "Association") declarations (the "Association Declaration") covering all of the platted lots located within the Property and containing in addition to other matters normally found therein, the following provisions regarding the Amenities:

- 1.9.1 The Association Declarations shall acknowledge that, from and after the date the Association Declarations are filed, the Amenities are and shall be the responsibility of the Association, and the owners of real property within the Property (the "Property Owners") shall maintain the Association to be used as the vehicle by which to fulfill the obligations of this Agreement.
- 1.9.2 The Association Declarations shall provide that one of the duties and obligations of the Association will be to properly maintain the Amenities and keep the Amenities in good condition and repair as provided in 1.1 through 1.6, above.
- 1.9.3 The Association Declarations shall require that the Association release, indemnify and hold harmless the City, members of the Governing Body and employees of the City as set forth in 1.7 and 1.8, above.
- 1.9.4 The Association Declarations will provide for the Association and the City's levy of assessments against the lots located within the Property sufficient to pay for the maintenance of the Amenities and for any costs incurred by reason of obligations under this Agreement. The Association and the City shall have an enforceable lien on any lot, parcel, or unit in the subdivision in the event that the Property Owner fails to pay an assessment.
- 1.9.5 The Association Declarations shall give the City, its successors, assigns, and designees the right to enforce all restrictions, obligations and other provisions regarding the Amenities.
- 1.9.6 The Association Declarations shall provide that each Property Owner shall be responsible for the maintenance of all street trees adjacent to the Property Owner's real property; and the Association shall be responsible for the maintenance of all other Amenities, including but not limited to Amenities in the median islands.
- 1.10 That in the event that the Association fails in any of its duties under the Association Declaration relative to the Amenities, the Owner is ultimately responsible for those obligations.
- 1.11 Owner shall carry and shall cause the Association to carry (through the Association Declarations or otherwise) commercial general liability insurance covering bodily injury or property damage to a third party arising out of or resulting from the failure to properly repair and/or maintain the Amenities as required herein in an amount of no less than \$500,000 per occurrence, naming the City as an additional insured.
- 1.12 To comply with all applicable law in the performance of this Agreement, including but in no way limited to the requirement of obtaining a right-of-way work permit to accomplish installation, maintenance and/or repairs related to the Amenities when required.
- 1.13 That it will not consent to the termination of the Association or the Association Declaration, or to any amendment, modification or termination of any provision therein regarding the maintenance and repair of the Amenities, without the consent of the City.

ARTICLE II – OWNER ACKNOWLEDGEMENTS

- 2.1. As between the Owner and the City, Owner acknowledges that, subject to the provisions of this Agreement, the maintenance, repair and replacement of the Amenities is the sole responsibility of Owner.
- 2.2. As between the Owner and the City, Owner acknowledges that the cost of maintenance, repair, or reconstruction of the Amenities is the sole responsibility of Owner.
- 2.3. It is fully understood by Owner that the City is under no past, present or future obligation to expend any public funds or to take any other action to maintain or improve the Amenities.

ARTICLE III - CITY ACKNOWLEDGEMENTS

- 3.1 City agrees, upon approval of plans submitted to and approved by the City and upon a showing of compliance with this Agreement, to permit the Amenities shown on the approved plans to be constructed, maintained, repaired and replaced in the public right-of-way, subject to the terms and conditions of this Agreement and the Owner obtaining any right-of-way permit required by the O.P.M.C. and the Owner's compliance with other applicable laws.

ARTICLE IV – MISCELLANEOUS

- 4.1 This Agreement shall be binding upon the parties and their respective successors and assigns. It is the intention of the parties hereto that this Agreement shall be a covenant running with the land and shall bind all successive owners of any interest in the property subject to this Agreement.
- 4.2 This Agreement shall be governed by and construed in accordance with the laws of the State of Kansas.
- 4.3 This Agreement shall be filed of record with the Johnson County, Kansas Register of Deeds.
- 4.4 This Agreement may only be altered or amended by written, mutual agreement of the parties. Such amendment to be filed with the Johnson County, Kansas Register of Deeds and may include a change in the type or location of the Amenities.

ARTICLE V – RECORDING OF DOCUMENT

- 5.1 The City, at Owner's cost, shall cause this Agreement to be filed with the Johnson County, Kansas Register of Deeds. The City and Owner shall each receive a duly executed copy of this Agreement for its official records.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

[OWNER]

CITY OF OVERLAND PARK, KANSAS

By: _____
Print Name: _____
Title: _____

By: _____
Jack Messer
Director, Planning and Development Services

ATTEST:

By: _____
Elizabeth Kelley
City Clerk

APPROVED AS TO FORM:

By: _____
Stephen B. Horner
Senior Assistant City Attorney

MUNICIPAL CORPORATE ACKNOWLEDGEMENT

STATE OF KANSAS)
)
COUNTY OF JOHNSON)

BE IT REMEMBERED, That on this ____ day of _____ 20__, before me, the undersigned, a Notary Public in and for the County and State aforesaid, Jack Messer, Director of Planning and Development Services of the City of Overland Park, a municipal corporation duly organized, incorporated and existing under and by virtue of the laws of Kansas, and Elizabeth Kelley, City Clerk of said municipal corporation, who are personally known to me to be the same persons who executed as such officials the within instrument on behalf of said municipal corporation, and such persons duly acknowledged the execution of the same to be the act and deed of said municipal corporation.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal the day and year last above written.

Notary Public

My appointment expires:

LIMITED LIABILITY COMPANY ACKNOWLEDGEMENT

STATE OF _____)
) ss.
COUNTY OF _____)

BE IT REMEMBERED, That on this ____ day of _____, 20____, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came _____ (name/s), member(s) of _____ (name of company), a Limited Liability Company duly formed under the provisions of the _____ (state) Limited Liability Company Act, who is/are personally known to me to be the such member(s) and who is/are personally known to me to be the same person(s) who executed as such member(s) the foregoing instrument on behalf of said company, and such person(s) duly acknowledged the execution of same to be the act and deed of said company.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal the day and year last above written.

My Appointment Expires _____

Notary Public

EXHIBIT A

Legal Description

