

**RIGHTS-OF-WAY OF PUBLIC STREETS WITHIN FALCON POINTE
LANDSCAPING MAINTENANCE LICENSE AGREEMENT**

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

This Rights-of-Way of Public Streets within Falcon Pointe Landscaping Maintenance License Agreement (this "**Agreement**") is made the date set forth below by and between the CITY OF PFLUGERVILLE, TEXAS, a home-rule city located in Travis County, Texas (the "**CITY**"), and FALCON POINTE HOMEOWNERS ASSOCIATION, INC., a Texas non-profit corporation (the "**ASSOCIATION**").

RECITALS:

WHEREAS; Falcon Pointe is a subdivision development located within the corporate limits of the CITY consisting of residential lots and associated improvements; and

WHEREAS; the "ASSOCIATION" was created to administer the affairs of Falcon Pointe pursuant to the terms of the First Amended and Restated Declaration of Protective Covenants for Falcon Pointe (the "**Restrictions**") dated effective March 1, 2002, and recorded under Document No. 2002039135 of the Official Public Records of Travis County, Texas, as amended, and has the authority to levy assessments against the lots within Falcon Pointe to provide a permanent source of funding for the ASSOCIATION to pay for mowing and maintenance of landscaping within the pocket parks dedicated to the CITY.

WHEREAS; in accordance with the Restrictions, the ASSOCIATION is authorized to maintain and irrigate all landscaping and related improvements within the rights-of-way of the public streets within Falcon Pointe;

WHEREAS, since the date of recordation of the Restrictions, public rights-of-way for streets within those portions of Falcon Pointe that are included within subdivision plats that have been, and will be, approved by the City of Pflugerville in accordance with Texas Local Government Code Section 212.005, as more particularly described on **Exhibit A** attached hereto; and

WHEREAS; the ASSOCIATION acknowledges and agrees that the CITY has exclusive jurisdiction and control of the public street rights-of-way within Falcon Pointe; and

WHEREAS; the ASSOCIATION has requested that the CITY grant it a license to install and maintain landscaping vegetation and related irrigation improvements approved by the City within the unpaved portions of the public street rights-of-way within Falcon Pointe for the beautification of Falcon Pointe; and

WHEREAS; the ASSOCIATION acknowledges and agrees that no landscaping or related irrigation improvements may be placed within any portion of the rights-of-way of public streets

within Falcon Pointe that would cause a hazard, or potential hazard to public health and safety, as determined in the sole discretion of the CITY.

NOW, THEREFORE, in consideration of the premises; in furtherance of the mutual benefits to be derived by the general public and the residents and members of the ASSOCIATION; and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the CITY and the ASSOCIATION agree as follows:

RECITALS ADOPTED

1.2 The recitals set out above in this instrument are hereby adopted in whole as each were set out herein.

2. PUBLIC STREET RIGHTS-OF-WAY

2.1. License granted subject to the CITY's approval. Subject to the review and approval requirements set out in Section 2.2, immediately below, the CITY grants the ASSOCIATION the specific license, permission, authorization and right, at the sole cost and expense of the ASSOCIATION, to construct, install, place, operate, maintain, repair, upgrade, replace and remove trees, shrubs, plants, grasses, ground cover and other landscaping, and water pipes, lines, sprinklers and other irrigation equipment, and to mow the grass and maintain the landscaping, including the right to trim and prune trees, plants and ground cover, within the rights-of-way of the streets within Falcon Pointe dedicated to the public as of the date of this Agreement and to be dedicated in the future as set forth on Exhibit A attached hereto (the "**Public Streets Rights-of-Way**").

2.2 Review and approval. The ASSOCIATION is not authorized to, and shall not install any landscaping or related irrigation improvements, within the Public Streets Rights-of-Way for any purpose under this License without submitting all plans for landscaping and related irrigation improvements to the CITY and obtaining approval of said plans. The plans shall be submitted to the CITY in such form as required by the CITY to assure that the proposed landscaping and related irrigation improvements will not pose a threat to either public safety, including but not limited to impairment of sight lines, or public infrastructure, including but not limited to water, sewer or utility lines.

2.3 Construction and Operation. The ASSOCIATION shall be solely responsible for constructing or installing, or causing to be constructed and installed, such landscaping and/or irrigation equipment as it may determine within the Public Streets Rights-of-Way, and shall be solely responsible for the operation, maintenance, repair, removal and/or replacement of the landscaping and irrigation equipment that it may elect to construct and install within the Public Streets Rights-of-Way from time to time.

2.4 Maintenance. The ASSOCIATION shall be solely responsible for the maintenance of the landscaping improvements and irrigation systems installed by the ASSOCIATION as provided in this Agreement. If damages to the public infrastructure occur as a result of poorly constructed and maintained irrigation systems, the ASSOCIATION shall make payment to the City

for full reimbursement of all reasonable costs the City incurs repairing such damages to the public infrastructure. Between the dates December 1st and February 28th of the following year and any time there is a possibility of freezing temperatures, the ASSOCIATION shall turn off the irrigation systems timers and shall only operate the irrigation system manually in order to prevent the icing of roadways and sidewalks.

3. CITY RIGHTS WITH RESPECT TO THE PUBLIC STREETS RIGHTS-OF-WAY

3.1 This Agreement is expressly subject and subordinate to the present and future right of the CITY, its successors, assigns, lessees, grantees, and licensees, to construct, install, establish, maintain, use, operate, and renew the pavement, curbs, gutters of the public streets within Public Streets Rights-of-Way and any public utility facilities, or franchised public utilities, beneath or above the surface of the Public Streets Rights-of-Way.

3.2 The CITY shall take reasonable measures to prevent damage to any landscaping and irrigation improvements installed by the ASSOCIATION within the Public Streets Rights-of-Way, however, any damage to or destruction of the ASSOCIATION's property by the CITY in the exercise of the above-described rights shall be at no charge, cost, claim or liability to the CITY, its agents, contractors, officers or employees.

3.3 Nothing in this Agreement shall be construed to limit in any way the power of the CITY to alter or improve the public streets within the Public Streets Rights-of-Way pursuant to official action by the governing body of the CITY or its successors. The CITY shall endeavor to provide the ASSOCIATION with notice of proposed improvements, but shall be under no obligation to do so prior to commencement of work on such improvements.

3.4 NOTWITHSTANDING ANY PROVISIONS IN THIS AGREEMENT TO THE CONTRARY, THE CITY RETAINS THE ABSOLUTE RIGHT TO ENTER UPON THE PUBLIC STREETS RIGHTS-OF-WAY, AT ANY TIME AND WITHOUT NOTICE, ASSUMING NO OBLIGATION TO THE ASSOCIATION, TO REMOVE ANY OF THE LANDSCAPING AND/OR IRRIGATION SYSTEMS INSTALLED BY THE ASSOCIATION WHENEVER SUCH REMOVAL IS DEEMED NECESSARY FOR: (A) EXERCISING THE CITY'S RIGHTS OR DUTIES WITH RESPECT TO THE PUBLIC STREETS RIGHTS-OF-WAY; (B) PROTECTING PERSONS OR PROPERTY; OR (C) PROTECTING THE PUBLIC HEALTH OR SAFETY WITH RESPECT TO THE PUBLIC STREETS RIGHTS-OF-WAY. SHOULD THE CITY INVOKE THE REMEDIES PROVIDED IN THIS SECTION, THE CITY MAY IMMEDIATELY TERMINATE THIS AGREEMENT WITH RESPECT TO ALL OR ANY PORTION OF THE LANDSCAPING AND/OR IRRIGATION SYSTEMS INSTALLED BY THE ASSOCIATION UPON A DETERMINATION, IN THE CITY'S SOLE DISCRETION, THAT SUCH LANDSCAPING AND/OR IRRIGATION IMPROVEMENTS CONSTITUTE A DANGER TO THE PUBLIC WHICH CANNOT TO BE REMEDIABLE BY ALTERATION OR MAINTENANCE THEREOF.

4. INSURANCE

4.1 Prior to the commencement of any work under this Agreement, the ASSOCIATION shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the CITY's City Manager, which shall be clearly labeled with the legal name of the Falcon Pointe Public Streets project in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept Memorandum of Insurance or Binders as proof of insurance. The Certificate(s) or form must have the agent's signature, including the signer's company affiliation, title and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to perform under this Agreement until such Certificate and endorsements have been received and approved by the CITY's City Manager. No officer or employee, other than the CITY's City Manager, shall have authority to waive this requirement.

4.2 Notwithstanding the provisions of Section 4.3 below, the CITY reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by CITY's City Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will the CITY allow modification at the request of the ASSOCIATION whereupon the CITY may incur increased risk.

4.3 A licensee's financial integrity is of interest to the CITY; therefore, subject to the ASSOCIATION's right to maintain reasonable deductibles in such amounts as are approved by the CITY, the ASSOCIATION shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at the ASSOCIATION's sole expense, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and with an A.M. Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed:

<u>TYPE</u>	<u>AMOUNTS</u>
1. Workers' Compensation	Statutory
2. Employers' Liability	\$1,000,000 / \$1,000,000 / \$1,000,000
3. Commercial General Liability Insurance to include coverage for the following: a. Premises operations *b. Independent Contractors c. Products/completed operations d. Personal Injury e. Contractual Liability *f. Environmental Impairment/ Impact – sufficiently broad to cover disposal liability. *g. Broad form property damage, to include fire legal liability	For Bodily Injury and Property Damage of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage

4. Business Automobile Liability a. Owned/leased vehicle b. Non-owned vehicle c. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence
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* May be waived by City Manger if not applicable to activities performed by Licensee

4.4 The CITY shall be entitled, upon request and without expense, to receive copies of the policies, declaration page and all endorsements thereto as they apply to the limits required by the CITY, and may require the deletion, revision, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies) as may be required to comply with the terms of this Agreement. The ASSOCIATION shall be required to comply with any such requests and shall submit a copy of the replacement Certificate of insurance to the CITY at the address provided below within 30 days of the requested change. The ASSOCIATION shall pay any costs incurred resulting from said changes.

City of Pflugerville
Attn. City Manager
P.O. Box 589
Pflugerville, TX 78691

4.5 The ASSOCIATION agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:

- Name the CITY, its officers, officials, employees, volunteers, and elected representatives as additional insured's by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY, with the exception of the workers' compensation and professional liability policies;
- Provide for an endorsement that the "other insurance" clause shall not apply to the CITY when the CITY is an additional insured shown on the policy;
- Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the CITY.

4.6 The ASSOCIATION agrees to give the City written notice of any suspension, cancellation, non-renewal or material change in coverage of any of the insurance policies required to be obtained and maintained by the ASSOCIATION under the terms of this Agreement. Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, the ASSOCIATION shall provide a replacement Certificate of Insurance and applicable endorsements to the CITY. The CITY shall have the option to suspend the ASSOCIATION's authorization and liability under this Agreement should there be a lapse in coverage at any time during this Agreement. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

4.7 Nothing herein contained shall be construed as limiting in any way the extent to which the ASSOCIATION may be held responsible for payments of damages to persons or

property resulting from the ASSOCIATION's performance of the work covered under this Agreement.

4.8 It is agreed that the ASSOCIATION's insurance shall be deemed primary and non-contributory with respect to any insurance or self-insurance carried by the CITY for liability arising out of operations under this Agreement.

4.9 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement.

5. INDEMNIFICATION

5.1 THE ASSOCIATION COVENANTS AND AGREES TO FULLY INDEMNIFY AND HOLD HARMLESS, THE CITY AND THE ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS, AND REPRESENTATIVES OF THE CITY, INDIVIDUALLY OR COLLECTIVELY, FROM AND AGAINST ANY AND ALL COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES, FINES, PENALTIES, PROCEEDINGS, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY AND SUITS OF ANY KIND AND NATURE, INCLUDING BUT NOT LIMITED TO, BODILY INJURY OR DEATH AND PROPERTY DAMAGE, MADE UPON THE CITY, DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO THE ASSOCIATION'S ACTIVITIES UNDER THIS AGREEMENT, INCLUDING ANY ACTS OR OMISSIONS OF THE ASSOCIATION, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, CONSULTANT OR SUBASSOCIATION OF ASSOCIATION, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES WHILE IN THE EXERCISE OR PERFORMANCE OF THE RIGHTS OR DUTIES UNDER THIS AGREEMENT, ALL WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. THE PROVISIONS OF THIS INDEMNIFICATION ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY. ASSOCIATION SHALL PROMPTLY ADVISE THE CITY IN WRITING OF ANY CLAIM OR DEMAND AGAINST THE CITY OR THE ASSOCIATION KNOWN TO THE ASSOCIATION RELATED TO OR ARISING OUT OF THE ASSOCIATION'S ACTIVITIES UNDER THIS AGREEMENT AND SHALL SEE TO THE INVESTIGATION AND DEFENSE OF SUCH CLAIM OR DEMAND AT THE ASSOCIATION'S COST. THE CITY SHALL HAVE THE RIGHT, AT ITS OPTION AND AT ITS OWN EXPENSE, TO PARTICIPATE IN SUCH DEFENSE WITHOUT RELIEVING THE ASSOCIATION OF ANY OF ITS OBLIGATIONS UNDER THIS PARAGRAPH.

5.2 IT IS THE EXPRESSED INTENT OF THE PARTIES TO THIS AGREEMENT, THAT THE INDEMNITY PROVIDED FOR IN THIS ARTICLE,

SHALL APPLY ONLY WHEN THE NEGLIGENT ACT OF THE ASSOCIATION IS THE SOLE OR CONTRIBUTORY CAUSE OF THE RESULTANT INJURY, DEATH OR DAMAGE, AND SHALL HAVE NO APPLICATION TO THE EXTENT A NEGLIGENT ACT OF THE CITY IS A SOLE OR CONTRIBUTORY CAUSE OF THE RESULTANT INJURY, DEATH OR DAMAGE. IN THE EVENT THE INJURY, DEATH OR DAMAGE IS THE RESULT OF THE CONTRIBUTORY NEGLIGENCE OF BOTH THE CITY AND THE ASSOCIATION, THIS INDEMNITY SHALL APPLY ONLY TO THE EXTENT OF THE ASSOCIATION'S CONTRIBUTORY NEGLIGENCE. THE ASSOCIATION FURTHER AGREES TO DEFEND, AT ITS OWN EXPENSE AND ON BEHALF OF THE CITY AND IN THE NAME OF CITY, ANY CLAIM OR LITIGATION BROUGHT AGAINST THE CITY AND ITS ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS AND REPRESENTATIVES, IN CONNECTION WITH ANY SUCH INJURY, DEATH OR DAMAGE FOR WHICH, AND TO THE EXTENT TO WHICH, THIS INDEMNITY SHALL APPLY AS SET FORTH ABOVE.

6. TERMINATION

6.1 Termination by the ASSOCIATION. This Agreement may be terminated by the ASSOCIATION no sooner than ten (10) years after the effective date of this Agreement by delivering written notice of termination to the CITY not later than 30 days before the effective date of termination.

6.2 Termination by the CITY. This Agreement may be revoked at any time by the CITY, if such revocation is reasonably required by the public interest, after providing at least 30 days prior written notice to the ASSOCIATION. Circumstances under which the CITY may revoke this Agreement, pursuant to this subsection include, but are not limited to the following:

- (a) The landscaping and/or irrigation improvements installed by the Association within the Public Streets Rights-of-Way, or a portion of them interfere with the CITY's use of the Public Streets Rights-of-Way.
- (b) Use of the Public Streets Rights-of-Way becomes necessary for a public purpose, in which event the CITY may remove landscaping installed by the Association within a portion of the Public Streets Rights-of-Way without terminating this Agreement as to the remainder of the Public Streets Rights-of-Way pursuant to Section 3.4 herein.
- (c) Despite 30 days written notice, the ASSOCIATION fails to maintain or make necessary alterations to prevent deterioration of the aesthetic integrity of the landscaping installed by the ASSOCIATION within the Public Streets Rights-of-Way; or
- (d) The ASSOCIATION fails to comply with the terms and conditions of this Agreement, including but not limited to, the insurance requirements specified herein.

6.3 In the event that this Agreement is terminated by either party, the CITY shall assume all rights, title and ownership to the landscaping and irrigation improvements installed by the ASSOCIATION within the Public Streets Rights-of-Way unless the CITY gives the

ASSOCIATION written notice within 30 days after the termination to remove such landscaping and irrigation improvements.

6.4 Once this Agreement has been terminated by either party, the CITY will perform maintenance of the landscaping within the Public Streets Rights-of-Way consistent with the level of maintenance of other public street rights-of-way by the City, consisting of, but not limited to, no irrigation of grass areas.

7. ASSIGNMENT

7.1 The ASSOCIATION shall not assign, sublet or transfer its interest in this Agreement without the prior written consent of the CITY, which may be withheld for any reason. If such consent is granted, it shall then be the duty of the ASSOCIATION, its successors and assigns, to give prompt written notice to the CITY of any assignment or transfer of any of the ASSOCIATION's rights in this Agreement.

8. MISCELLANEOUS PROVISIONS

8.1 Laws Observance. The ASSOCIATION shall not do, nor suffer to be done, anything on the Public Streets Rights-of-Way during the term of this Agreement in violation of the laws of the United States, the State of Texas, or any of the ordinances of the CITY.

8.2 Attorney's fees. If either party is required to file suit to collect any amount owed under this Agreement for the use of the Public Streets Rights-of-Way, the prevailing party shall be entitled to seek reasonable attorney's fees.

8.3 No Waiver. No waiver by the CITY of any default or breach of any covenant, condition, or stipulation herein contained shall be treated as a waiver of any subsequent default or breach of the same or any other covenant, condition, or stipulation hereof.

8.4 Severability. In case any 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 thereof, and this Agreement shall be considered as if such invalid, illegal, or unenforceable provision had never been contained herein.

8.5 Notice. Any notices required or appropriate under this Agreement shall be given in writing to the ASSOCIATION at the address shown below, and to the CITY at City of Pflugerville; Attn. City Manager; P.O. Box 589, Pflugerville, TX 78691

8.6 Headings. The paragraph headings contained herein are for convenience of reference and are not intended to define, extend, or limit any provisions of this Agreement.

8.7 Jurisdiction and Venue. This Agreement will be interpreted according to the Constitution and laws of the State of Texas. Venue of any court action brought directly or

indirectly by reason of this Agreement shall be in Travis County, Texas. This Agreement is made and is to be performed in Travis County, Texas, and is governed by the laws of the State of Texas.

8.8 Authorization. The signers of this Agreement each hereby represents that he or she has full authority to execute this Agreement on behalf of the party for which he or she is acting.

8.9 Entire Agreement. This Agreement and addenda contain the final and entire agreement between the parties hereto and contains all of the terms and conditions agreed upon, and supersedes all other agreements, oral or otherwise, regarding the maintenance of the Public Streets Rights-of-Way, none of which shall hereafter be deemed to exist or to bind the parties hereto; it being the intent of the parties that neither shall be bound by any term, condition, or representation not herein written.

EXECUTED effective as of this ____ day of _____, 2013.

CITY OF PFLUGERVILLE, TEXAS,
a Texas home-rule municipality

By: _____
Brandon E. Wade, City Manager

ASSOCIATION:

FALCON POINTE HOMEOWNERS ASSOCIATION, INC.

By: _____
Name: _____
Title: _____

Address: _____
City: _____
St/Zip: _____

EXHIBIT A



The information shown is based on the best available and is subject to change without notice.
 File: 022242-FalconPointeNorth & South Tract-FP Sales Map.dwg
 Date: 02/04/2013 09:00:00 AM



by
 Newland COMMUNITIES

North & South Tracts

February 4, 2013

The developer has reserved the right, without notice, to make changes to this map and other aspects of the development to comply with governmental requirements and to fulfill its marketing objective.