

Hem 87  
06/07/07 Council

## **DECLARATION AND AGREEMENT REGARDING ROAD CONSTRUCTION**

This Declaration and Agreement Regarding Road Construction (this Declaration ) is entered into as of the \_\_\_\_ day of \_\_\_\_\_ 2007 by and between Eastbourne Crossing Limited Partnership a Delaware limited partnership ( 'Declarant' ) and the City of Austin (the City )

### **RECITALS**

WHEREAS Declarant is the owner of two tracts of land totaling approximately 11 760 acres of real property located adjacent to FM 973 ( FM 973 ) situated in Travis County Texas and more particularly described on Exhibit A attached hereto (the Property )

WHEREAS Declarant or Declarant s successor currently intends to develop a project (the Project ) on the Property and is seeking or has obtained CS CO (Commercial Services Conditional Overlay) zoning from the City of Austin for such development pursuant to City of Austin Zoning Case No C14-06 0208 (the Zoning Case )

WHEREAS for the use and development of the Project Declarant has agreed to design construct and pay for certain construction and other improvements on FM 973 as described on Exhibit B hereto (collectively the Construction ), and

**NOW, THEREFORE** for the use and development of the Project in order to promote the health safety and welfare of the public and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged the undersigned agrees to hold sell and convey the Property subject to the following covenants conditions and restrictions which are impressed upon the Property by this Declaration

### **DECLARATION**

#### **I Covenants, Conditions, and Restrictions**

1.1 Construction Declarant acknowledges and agrees that the City of Austin (the City ) has determined that Declarant s pro rata share of the estimated cost of designing and constructing the Construction is seven percent (7%) ( Declarant s Proportionate Share ) For the furtherance of the use and development of the Project constituting good and valuable consideration Declarant or his successors and assigns will post fiscal for and pay one hundred percent (100%) of the cost of the Construction and complete the Construction prior to requesting a certificate of occupancy for the Project

In this regard Declarant recognizes that it is not required by the City to post or pay for more than Declarant's Proportionate Share of such costs that the City has not required Declarant or his successors and assigns to pay 100% of such costs or to complete the Construction and that such additional payment by Declarant or his successors and assigns is voluntary. Further, neither Declarant nor his successors and assigns shall bring suit against the City under any theory of law regarding the amount or extent of fiscal posted for the Construction.

## II Conditions on Effect, Amendment of Existing Declarations

2.1 Zoning Case Notwithstanding any other provision of this Declaration to the contrary, the agreements of Declarant reflected herein are conditioned upon final approval (i.e., third reading) of the Zoning Case by the City of Austin City Council (and no subsequent appeal) in a form acceptable to Declarant, such acceptance to be deemed if the Zoning Case is finally approved without changes from the last application by Declarant presented to the City Council.

## III Default and Remedies

3.1 Remedies In the event of a breach or threatened breach of this Declaration by Declarant, the City shall be entitled to institute proceedings at law or in equity in a court of competent jurisdiction for full and adequate relief from the consequences of said breach or threatened breach.

## IV General Provisions

4.1 No Third-Party Beneficiary The provisions of this Declaration are for the exclusive benefit of Declarant and the City and their successors and assigns and not for the benefit of any third person, nor shall this Declaration be deemed to have conferred any rights, express or implied, upon any third person or the public.

4.2 Notice All notices given in regard to this Declaration shall be in writing and the same shall be given and be deemed to have been served, given and received (a) one (1) business day after being placed in a prepaid package with a national reputable overnight courier addressed to the other party at the address hereinafter specified, or (b) if mailed, three (3) business days following the date placed in the United States mail, postage prepaid, by certified mail, return receipt requested, addressed to the party at the address hereinafter specified. Declarant may change its address for notices by giving five (5) days' advance written notice to the City in the manner provided for herein. Until changed in the manner provided herein, the Declarant's address for notice is as follows:

### Declarant

Eastbourne Crossing Limited Partnership  
Attention: Frank Egan  
300 International Drive, Suite 135  
Williamsville, New York 14221

Telephone (716) 842 6054  
Telefax (716) 842 3034

With a copy to

P Eric Davis  
Retail West Properties  
Capitol Plaza Building  
199 N Capitol Blvd Ste 301  
Boise ID 83702  
Telephone (208) 331 0110  
Telefax (208) 331-0220

and

Adam Love  
SCC Development Company LLC  
301 Congress Ave Ste 1550  
Austin TX 78701  
Telephone (512) 329 9947  
Telefax (512) 329 9948

and

Christopher Jacoby  
AMG National Trust Bank  
6501 East Belleview Avenue Suite 400  
Englewood CO 80111  
Telephone (303) 486-1408  
Telefax (303) 694-9242

and

Steven C Metcalfe  
Drenner & Golden Stuart Wolff LLP  
301 Congress Avenue Suite 1200  
Austin Texas 78701  
Telephone (512) 404-2209  
Telefax (512) 404 2244

4.3 Severability If any provision of this Declaration shall be declared invalid illegal or unenforceable in any respect under any applicable law by a court of competent jurisdiction the validity legality and enforceability of the remaining provisions shall not be affected or impaired thereby It is the further intention of the parties that in lieu of each covenant provision or agreement of this instrument that is held invalid illegal or unenforceable that be added as a part hereof a clause or provision as similar in terms to such illegal invalid or unenforceable clause or provision as may possible and be legal valid and enforceable

4.4 Rights of Successors The restrictions, benefits and obligations hereunder shall create benefits and servitudes running with the land. Subject to the other provisions hereto, this Declaration shall bind and inure to the benefit of the parties and their respective heirs, representatives, lessees, successors and assigns. Reference to Declarant includes the future owners of their respective portions of the Property, including any portions of the Property that may in the future be created as separate tracts pursuant to a resubdivision of any portion of the Property. The singular number includes the plural and the masculine gender includes the feminine and neuter.

4.5 Counterparts, Multiple Originals This Declaration may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

4.6 Modification and Cancellation Any changes to the standards and requirements of this Declaration must be approved in writing by the Director of the City of Austin Watershed Protection and Development Review Department (or successor department).

**DECLARANT**

EASTBOURNE CROSSING  
LIMITED PARTNERSHIP  
a Delaware limited partnership

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

STATE OF TEXAS       §  
                                  §  
COUNTY OF TRAVIS   §

This instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_  
2007 by \_\_\_\_\_ of Eastbourne Crossing Limited Partnership a  
Delaware limited partnership

\_\_\_\_\_  
Notary Public State of Texas

**ACCEPTED CITY OF AUSTIN**

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

**APPROVED AS TO FORM**

By \_\_\_\_\_

11 760 ACRES  
EASTBOURNE CROSSING

*EXHIBIT A*

FN NO 07-180(KWA)  
APRIL 3, 2007  
BPI JOB NO 1673-01 91

**DESCRIPTION**

OF 11 760 ACRES OF LAND OUT OF THE SANTIAGO DEL VALLE LEAGUE GRANT, ABSTRACT NO 24, SITUATED IN TRAVIS COUNTY, TEXAS, BEING A PORTION OF THAT CERTAIN 389 447 ACRE TRACT CONVEYED TO EASTBOURNE CROSSING LIMITED PARTNERSHIP BY DEED OF RECORD IN DOCUMENT NO 2006107114 OF THE OFFICIAL PUBLIC RECORDS OF TRAVIS COUNTY, TEXAS SAID 11 760 ACRES BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS

**BEGINNING**, at a 1/2 inch iron rod found in the easterly right-of-way line of F M Highway No 973 (Right-of-Way varies), being the southwesterly corner of that certain 5 0 acre tract of land conveyed to J V Gregg, Arvid Johnson and Joe Pearson by deed of record in Volume 1787, Page 399 of the Deed Records of Travis County, Texas for an angle point in the westerly line hereof

**THENCE**, leaving the easterly right-of-way line of F M Highway No 973 and the westerly line of said 389 447 acre tract, along the common line of said 5 0 acre tract and said 389 447 acre tract, for a portion of the westerly line hereof, the following two (2) courses and distances

- 1) S47°33'42 E, a distance of 394 96 feet to a found monument at the southeasterly corner of said 5 0 acre tract for an angle point hereof
- 2) N42°35'07'E, a distance of 584 43 feet to a 1/2 inch iron rod found at the northwesterly corner of said 389 447 acre tract and hereof, being an angle point in the easterly line of said 5 0 acre tract, also being the southwesterly corner of that certain 74 790 acre tract (Parcel 359) conveyed to the State of Texas by deed of record in Document No 2005169200 of said Official Public Records, from which a found iron pipe in the common line of said 5 0 acre tract and said 74 790 acre tract bears N42°37'14"E, a distance of 160 80 feet

**THENCE**, S62°04'47 E, along the northerly line of said 389 447 acre tract and hereof, being the southerly line of said 74 790 acre tract, a distance of 119 10 feet to the northeasterly corner hereof, from which a found 1/2 inch iron rod in the common line of said 389 447 acre tract and said 74 790 acre tract bears S60°04'47 E, a distance of 1168 19 feet,

**THENCE**, leaving the northerly line of said 389 447 acre tract and the southerly line of said 74 790 acre tract, over and across said 389 447 acre tract, for the easterly and southerly lines hereof, the following four (4) courses and distances


- 1) S44°23'04 W, a distance of 68 53 feet to an angle point

- 2) S43°50'16"W, a distance of 976 12 feet to an angle point,
- 3) S44°41'31"W, a distance of 431 29 feet to the southeasterly corner hereof,
- 4) N62°12'01 W, a distance of 489 30 feet to a point on the easterly right-of-way line of F M 973, same being a point on the northwesterly line of the said 389 447 acre tract for the southwesterly corner hereof

**THENCE**, N42°43'03"E, along the easterly right-of-way line of F M 973, being the northwesterly line of the said 389 447 acre tract, for a portion of the westerly line hereof, a distance of 984 66 feet to the **POINT OF BEGINNING**, containing an area of 11 760 acres (512,276 square feet) of land, more or less, within these metes and bounds

BEARING BASIS TEXAS COORDINATE SYSTEM, CENTRAL ZONE, NAD 83(93),  
UTILIZING CITY OF AUSTIN AND LCRA PROVIDED MONUMENTS

BURY & PARTNERS, INC  
ENGINEERING SOLUTIONS  
221 WEST SIXTH STREET  
SUITE 600  
AUSTIN, TEXAS 78701

  
\_\_\_\_\_  
JOHN T. BILNOSKI  
NO 4998  
STATE OF TEXAS

4/3/07  
\_\_\_\_\_  
DATE



**STATE HIGHWAY NO 71**  
(ROW VARIES)

74 790 ACRES (PARCEL 359)  
STATE OF TEXAS  
DOCUMENT NO 2005169200  
S62 04 47 E 1168 19

50 ACRES  
JV GREGG ARVID JOHNSON  
& JOE PEARSON TRUSTEES  
COLORADO COMMON SCHOOL  
DISTRICT NO 36  
VOL 1787 PG 399

POB

S47 33'42 E  
394 96

**11760 ACRES**  
(512 276 SQ FT)

**FM HIGHWAY NO 973**  
(ROW VARIES)

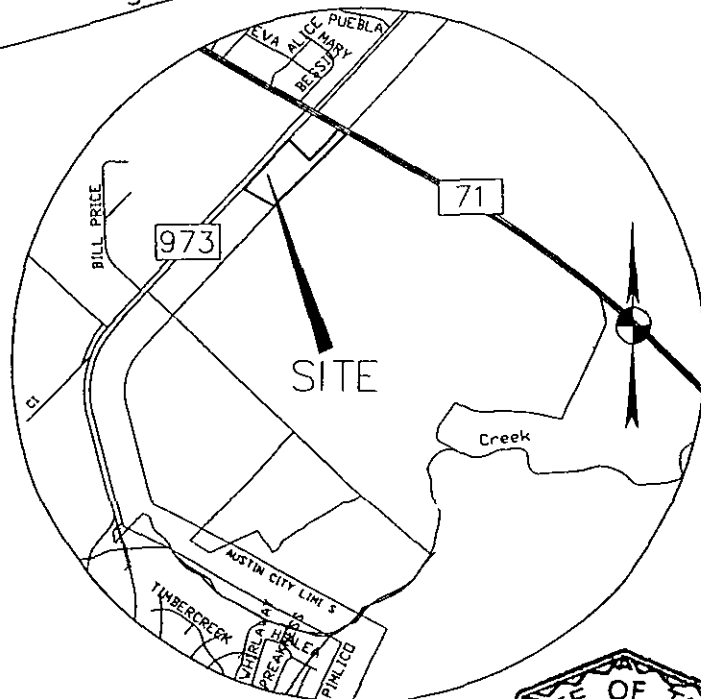
N42 43'03 E 984 66

CITY LIMIT LINE

CITY OF AUSTIN  
S44 41 31 W TRAVIS COUNTY  
431 29

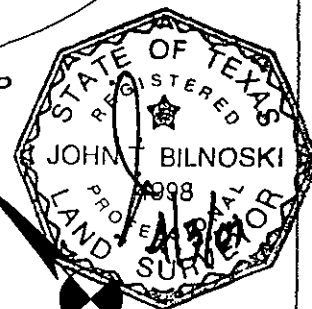
N62 12 01 W 489 30

S42 43 03 W  
1540 73



**VICINITY MAP**  
NTS

389 447 ACRES  
EASTBOURNE CROSSING  
LIMITED PARTNERSHIP  
DOC NO 2006107114

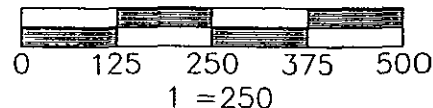


**LINE TABLE**

LINE	BEARING	LENGTH
L1	N42 37 14 E	160 80
L2	S62 04 47 E	119 10
L3	S44 23 04 W	68 53

**LEGEND**

- 1/2 IRON ROD FOUND (UNLESS NOTED)
- MONUMENT FOUND
- IRON PIPE FOUND
- P O B POINT OF BEGINNING



**Bury+Partners**  
ENGINEERING SOLUTIONS  
221 West Sixth Street, Suite 600  
Austin Texas 78701  
Tel (512)328 0011 Fax (512)328 0325  
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**SKETCH TO ACCOMPANY DESCRIPTION**  
OF 11 760 ACRES OF LAND OUT OF THE SANTIAGO DEL VALLE  
LEAGUE GRANT ABSTRACT NO 24 SITUATED IN TRAVIS  
COUNTY TEXAS BEING A PORTION OF THAT CERTAIN 389 447  
ACRE TRACT CONVEYED TO EASTBOURNE CROSSING LIMITED  
PARTNERSHIP BY DEED OF RECORD IN DOCUMENT NO  
2006107114 OF THE OFFICIAL PUBLIC RECORDS OF TRAVIS  
COUNTY TEXAS

**EASTBOURNE  
DEVELOPMENT**



EXHIBIT B

Road Construction

CONSTRUCTION

Intersection/Street	Improvement
FM 973	Provide for 1 Southbound shared through/left turn lane on FM 973