

NO. GNO-01372

AUSTIN 360 ASSOCIATES, LP

V.

CITY OF AUSTIN

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IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

261st JUDICIAL DISTRICT

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

THE STATE OF TEXAS

COUNTY OF TRAVIS

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§
§**KNOW ALL MEN BY THESE PRESENTS:**

"City" whenever used herein shall mean City of Austin and all of its officers, directors, agents, servants, employees, predecessors in interest, successors in interest, and their heirs, successors and assigns.

~~"AUSTIN 360" whenever used herein shall mean Austin 360 Associates, LP and all of its~~
officers, members, principals, agents, employees, servants, predecessors in interest, successors in interest, and successors and assigns, as well as its attorneys and legal representatives.

WHEREAS, AUSTIN 360 is the owner of a certain tract of land, hereafter "the Property", consisting of approximately 9.9 acres, generally known as "Lot 15, Block X, Great Hills Phase B, Preliminary Plan", and located near the intersection of Loop 360 and Bluffstone Dr. in Austin, Travis County, Texas and more particularly described in the attached Exhibit "A."

WHEREAS, AUSTIN 360 submitted to the City a final plat application for development on the Property;

WHEREAS, the City in reviewing the application imposed then current regulations applicable to the development proposed by the application for the Property;

WHEREAS, disputes arose between the City and AUSTIN 360 concerning which development regulations were to be imposed on the final plat application for the Property;

WHEREAS, AUSTIN 360 filed the instant suit seeking, among other things, declaratory and injunctive relief pertaining to the matters in dispute;

WHEREAS, the City has answered the suit and discovery was conducted, but the parties remain in dispute about which development regulations were to be imposed on the final plat application for the Property;

WHEREAS, in order to avoid further time, expense and the uncertainties of litigation, the City and AUSTIN 360 desire to enter into this Mutual Release and Settlement Agreement (the "Agreement") as a final compromise and settlement of any and all claims and controversies between the parties with respect to Plaintiff's application for final plat approval on the Property or arising out of the matters at issue in this lawsuit.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

1. For and in consideration of the mutual covenants and agreements to be performed as set out below, and in consideration of the mutual covenants and agreements to be performed as set out in the Term Sheet attached hereto as Exhibit "B" and incorporated herein for all purposes, which the City of Austin and Austin 360 expressly agree to be bound by as part of the terms of this Agreement, City and AUSTIN 360, for themselves and their directors, officers, affiliates, shareholders, agents, counsel, employees, servants, subsidiaries, partners, insurers, sureties, underwriters, administrators, executors, representatives, predecessors in interest, successors in interest, subrogees, successors and assigns, attorneys and legal representatives, and each of them, hereby fully and finally RELEASE, ACQUIT, AND FOREVER DISCHARGE each other, and each and all of their respective directors, officers, affiliates, shareholders, agents, counsel, employees, servants, subsidiaries, partners, insurers, sureties, underwriters, heirs, administrators, executors, representatives, predecessors in interest, successors in interest, subrogees, successors, assigns, attorneys and legal representatives and each of them of and from any and all claims, debts, liabilities, demands, causes of action, damages, common law and statutory

penalties or recompense, liens, attorneys' fees, costs, judgment and expenses of any type whatsoever, which were or could have been asserted in this litigation and which in any manner arise out of or are in any way connected with, directly or indirectly, Plaintiff's application for final plat approval on the Property, or arising out of the matters at issue in this lawsuit.

2. This release shall release the parties from any further obligations with respect to the matters alleged in this lawsuit, **SAVE AND EXCEPT** the obligations set out in the attached Term Sheet that the Parties expressly agree to and promise and covenant to comply with, specifically including, but without limitation, any claims for injury or damage to Plaintiff's interests in the Property, or any claims arising out of Defendant's prior acts or failures with respect to the Property or any prior filings or applications made which pertain to the Property.

3. It is further agreed and understood that the above-numbered civil action shall be dismissed with prejudice upon the earlier of the following to occur: a) Plaintiff or its assigns obtains an approved site development permit for the Property; or b) three years from the effective date of this Agreement. Plaintiff or its assigns agree to notify the City Attorney when an approved site development permit for the Property is received, and the City agrees to present a joint motion and agreed order to that end.

4. AUSTIN 360 and City understand, represent and warrant this Agreement to be a final compromise of disputed claims and not an admission of liability by or on the part of either party, nor an admission by either party with regard to the other's positions in the lawsuit on the particular regulations applicable to development of the Property. It is contracted that neither this Agreement nor any evidence relating thereto, will ever be admissible as evidence against AUSTIN 360 or City in any suit, claim or proceeding of any nature save and except any suit or proceeding to enforce the terms and obligations of this Agreement. However, this Agreement is and may be asserted by AUSTIN 360 or the City as an absolute and final bar to any claim or proceeding now pending or hereafter brought.

5. By the signatures below, each party represents that it understands that this Agreement constitutes a final and complete release of all claims regardless of their kind or character, which were or could have been asserted in this litigation and which arise out of or are in any way connected with, directly or indirectly, Plaintiff's application for final plat approval on the Property, or arising out of the matters at issue in this lawsuit. AUSTIN 360 acknowledges that it relies solely upon its own knowledge and information, and that of its attorneys, as to the nature and extent of its legal rights, as well as those of the City, and freely acknowledges that it has not been influenced by any representations made by or on behalf of the City, save those written covenants and representations set forth in and/or incorporated into this Agreement. Likewise, City acknowledges that it relies solely on its own knowledge and information, and that of its attorneys, as to the nature and extent of its legal rights, as well as those of AUSTIN 360, and City freely acknowledges that it has not been influenced by any representations made by or on behalf of AUSTIN 360, save those written covenants and representations set forth in and/or incorporated into this Agreement.

6. Should any provision of this Agreement, including any provision of the Term Sheet incorporated herein, be held unenforceable for any reason, then this Agreement, including the Term sheet, shall become voidable by any Party hereto. This agreement shall be construed under the laws of the State of Texas, where it is deemed performable.

7. The Effective Date of this Mutual Release and Settlement Agreement shall be the date on which both the City and Austin 360 Associates have executed this document

SIGNED this the 28th day of APRIL, 2003.

AUSTIN 360 ASSOCIATES,
A California limited partnership
Acting by and through its general
Partner, Lewis E. Cook, Jr.

By: 

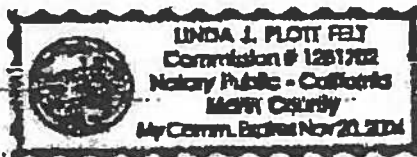
Lewis E. Cook, Jr.

General Partner

STATE OF CALIFORNIA §
§
COUNTY OF MARIN §

BEFORE ME, the undersigned authority, on this day personally appeared Lewis E. Cook, Jr., general partner of Austin 360 Associates, L.P., a California limited partnership, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of Austin 360 Associates, L.P., that he is authorized to sign this instrument and that he executed same for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 30th day of April, 2003.




Notary Public - State of California

SIGNED this the 21st day of April, 2003.

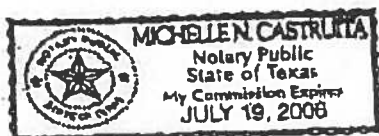
CITY OF AUSTIN

By: Dana K. Johnson
Dana K. Johnson, Asst. City Attorney

STATE OF TEXAS §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Dana K. Johnson, Assistant City Attorney for the City of Austin, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of the City of Austin, that she is authorized to sign this instrument and that she executed same for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 21st day of April, 2003.



Michelle N. Castruita
Notary Public - State of Texas

THE STATE OF TEXAS :
COUNTY OF TRAVIS :

A FIELDNOTE DESCRIPTION of a 9.932 acre tract of land out of the James Coleman Survey No. 25, Travis County, Texas; the said 9.932 acre tract of land being all of a 0.196 acre tract of land called an 0.20 acre Tract 1 in a deed from Great Hills, Ltd. to Austin 360 Associates, and all of an 0.623 acre tract of land called 0.62 acre Tract 2 in the said deed from Great Hills, Ltd. to Austin 360 Associates as recorded in Volume 10166, Page 373 of the Deed Records of Travis County, Texas; and being all of a 9.799 (9.80) acre tract of land called 9.80 acres in a deed from Great Hills, Ltd. to Austin 360 Associates as recorded in Volume 10064, Page 83 of the Deed Records of Travis County, Texas; the said 9.799 (9.80) acre tract of land contains all of the 0.623 acre Tract 2 and a portion of the 0.196 acre Tract 1; the said 9.932 acre tract of land being more particularly described by metes and bounds as follows:

BEING at an iron rod found in the northwest line of Capital of Texas Highway, North (Loop 360); the said iron rod being in the southeast line of a 7.93 acre tract of land called Tract Two in a deed to Great Hills, Ltd. as recorded in Volume 8238, Page 174 of the Deed Records of Travis County, Texas; the said iron rod being also the southeast corner of the said 9.799 acre tract; the said iron rod being N 35° 28' 43" E, a distance of 19.80 feet from a concrete monument found 150 feet north of Loop 360 centerline station 226+98.61;

THENCE, leaving the said northwest line of Loop 360 and crossing the said 7.93 acre Tract Two with the southwest line of the 9.799 acre tract, the following three (3) courses and distances:

- 1) N 25° 05' 17" W, a distance of 10.17 feet to an iron rod found for the beginning of a curve;
- 2) a distance of 41.25 feet with the arc of a non-tangent curve to the right having a central angle of 07° 30' 00", a radius of 315.10 feet and a chord which bears N 22° 24' 07" W, a distance of 41.22 feet to an iron rod found for the end of curve; and
- 3) N 18° 39' 36" W, a distance of 186.32 feet to an iron rod found in the southeast line of the said 0.196 acre tract of land; the said iron rod being an angle point in the southwest line of the said 9.799 acre tract; the said point being in the southwest line of the said Great Hills, Ltd. 7.93 acre Tract Two;

THENCE, with the said southwest line of the Great Hills, Ltd. 7.93 acre tract being the southeast line of the 0.196 acre Tract 1, the following three (3) courses and distances:

- 1) S 45° 00' 00" W, a distance of 33.50 feet to an iron rod found for the northeast corner of a 0.111 acre tract of land called an 0.11 acre Tract One, dedicated as a 20' wide strip of additional right-of-way to Forsythia Drive (Arterial B) as recorded in Volume 9400, Page 849 of the Deed Records of Travis County, Texas;
- 2) S 44° 49' 48" W, a distance of 21.31 feet to an iron rod found for an angle point; and
- 3) S 29° 16' 37" W, a distance of 1.18 feet to an iron rod found in the east line of Forsythia Drive, 70 foot wide right-of-way as shown dedicated by the Subdivision Plat, Forsythia Drive Street Dedication as recorded in Book 83, Pages 149C and 149D of the Plat Records of Travis County, Texas; the said iron rod being the southwest corner of the said 0.196 acre Tract 1;

EXHIBIT "A"

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THENCE with the east line of Forsythia Drive being the west line of the said 0.196 acre Tract 1, N 18° 41' 07" W, a distance of 33.90 feet to an iron rod found for the northwest corner of the said 0.196 acre Tract 1; being also the southwest corner of a 0.073 acre, 20 foot wide strip of land dedicated as additional right-of-way to Forsythia Drive by the Subdivision Plat, "Owen II Subdivision", as recorded in Book 83, Pages 1408 and 1409 of the Plat Records of Travis County;

THENCE, leaving the said east line of Forsythia Drive with the north line of the said 0.196 acre Tract 1, N 43° 01' 23" E, a distance of 22.91 feet to an iron rod found for the southeast corner of the said 0.073 acre 20' wide strip of dedicated additional right-of-way, being also the southwest corner of Lot 1 of the said "Owen II Subdivision";

THENCE, continuing with the north line of the said 0.196 acre Tract 1, being the south line of Lot 1, "Owen II Subdivision", the following two (2) courses and distances:

- 1) N 43° 00' 53" E, a distance of 113.15 feet to an iron rod found for an angle point; and
- 2) N 21° 34' 26" E, a distance of 74.33 feet to an "X" found in a concrete bridge for the most easterly corner of the said Lot 1, "Owen II Subdivision"; being also an angle point in the southwest line of the said 9.799 acre tract;

THENCE, leaving the north line of the said 0.196 acre Tract 1, with the northeast line of the said Lot 1, Owen II Subdivision being the southwest line of the 9.799 acre tract, S 88° 13' 22" W, a distance of 128.25 feet to an iron rod found for an angle point;

THENCE, leaving the said northeast line of Lot 1, Owen II Subdivision and crossing a 0.68 acre tract of land described in a deed from John Joseph to Great Mills, Ltd. as recorded in Volume 9056, Page 108 of the Deed Records of Travis County, Texas, being the southwest line of the said 9.799 acre tract, the following three (3) courses and distances:

- 1) N 18° 40' 52" W, a distance of 36.58 feet to an iron rod found for the beginning of a curve;
- 2) passing at an arc distance of 78.48 feet an iron rod set in the north line of the said 0.68 acre tract being the south line of a 956.78 acre tract of land called Tract One in a deed to Great Mills, Ltd. as recorded in Volume 8238, Page 174 of the Deed Records of Travis County, Texas; in all for a total distance of 230.09 feet with the arc of a non-tangent curve to the left having a central angle of 21° 06' 53", a radius of 625.32 feet and a chord which bears N 29° 13' 19" W, a distance of 228.79 feet to an iron rod found for a point of reverse curvature, and
- 3) a distance of 38.40 feet with the arc of a non-tangent curve to the right having a central angle of 88° 11' 38", a radius of 25.00 feet and a chord which bears N 04° 10' 01" E, a distance of 34.79 feet to an iron rod found in the southeast line of Simmons Road, having a 60' wide right-of-way as shown dedicated by the said Subdivision Plat, "Forsythia Drive Street Dedication", and being the most easterly corner of the herein described tract;

THENCE, with the said southeast line of Simmons Road, being the northwest line of the herein described tract, the following three (3) courses and distances:

- 1) N 48° 18' 39" E, a distance of 197.00 feet to an iron rod found for a point of curvature;
- 2) a distance of 346.24 feet with the arc of a curve to the left having a central angle of 43° 40' 00", a radius of 434.31 feet and a chord which bears N 26° 29' 00" E, a distance of 337.92 feet to an iron rod found for a point of tangency in the south line of Simmons Road, a 50' wide right-of-way dedicated by a deed recorded in Volume 2050, Page 93 of the Deed Records of Travis County, Texas; the said iron rod being an angle point in the said Subdivision Plat, "Forsythia Drive Street Dedication"; and

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James Coleman Survey No. 25
June 18, 1987
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- 3) N 84° 38' 57" E, with the south line of Simmons Road a distance of 258.55' to an iron rod found for the most northerly corner of the herein described tract; the said point being an angle point in the west line of Lot 1, Block A, The Meadows of Great Hills, a subdivision recorded in Book 85, Pages 197B and 197C of the Plat Records of Travis County;

THENCE, leaving the said southeast line of Simmons Road with the northeast line of the said 9.799 acre tract being the west line of the said Lot 1, Block A, The Meadows of Great Hills, the following two (2) courses and distances:

- 1) S 27° 38' 23" E, a distance of 176.75 feet to an iron rod found for an angle corner and being the southwest corner of the said Lot 1, Block A, The Meadows of Great Hills;
- 2) S 67° 13' 45" E, a distance of 173.25 feet to an iron rod found for an angle point and being also the northwest corner of Lot 57-A, The Bluffs of Great Hills 1-A, a subdivision recorded in Book 83, Pages 202B and 202C of the Plat Records of Travis County;

THENCE, leaving the south line of Lot 1, Block A, The Meadows of Great Hills with the west line of the said Lot 57-A, The Bluffs of Great Hills 1-A, S 04° 01' 47" E, a distance of 439.60 feet to an iron rod found in the southeast line of the said 9.799 acre tract and being in the said northwest line of Loop 360; the said iron rod being the southeast corner of the said Lot 57-A, The Bluffs of Great Hills 1-A, and being also S 35° 18' 01" W, a distance of 129.78 feet from a concrete monument found 330.00 feet north of centerline station 218+00.00 for the said Loop 360;

THENCE, with the southeast line of the 9.799 acre tract being the northeast line of Loop 360, S 35° 28' 43" W, a distance of 746.95 feet to the POINT OF BEGINNING of the herein described tract and CONTAINING 9.952 acres of land.

I, Sam Long, a Registered Public Surveyor, do hereby certify that the above description is true and correct to the best of my knowledge and that the property described herein was determined by a survey made on the ground under my direction and supervision.

WITNESS MY HAND AND SEAL at Austin, Travis County, Texas this the _____ day of _____, 1987, A.D.

Sam Long
Registered Public Surveyor
No. 4331 - State of Texas

SETTLEMENT TERM SHEET

In further consideration of the Mutual Release and Settlement Agreement ("Agreement"), which this Settlement Term Sheet is attached and incorporated into by reference and vice versa, the City and Austin 360 Associates, a California limited partnership ("Austin 360 Associates"), agree, acknowledge, covenant and/or promise as follows:

1. The "Project" shall mean commercial development of the Property that complies with:
 - a. the July 16, 1997 Neighborhood Agreement between Austin Great Hills Homeowners Association, Inc., Spicewood Springs Associates and Austin 360 Associates, or any amendments thereto;
 - b. applicable zoning, defined as zoning as of the date of the Agreement, or any lawfully adopted re-zoning;
 - and
 - c. this Term sheet.
2. The Property shall mean the 9.9354 acre tract also described as Lot 15, Block X, Great Hills Phase B Preliminary Plan, as described in the Exhibit "A." attached to the Agreement.
3. The City and Austin 360 Associates agree that the rules and regulations in effect on May 25, 1988 shall govern all applications and approvals necessary for the construction and occupation of the Project except as specifically modified or clarified herein. The parties further agree that, except as specifically modified or clarified herein, the Project will be subject to those rules and regulations that would be exempt from Chapter 245, Texas Local Government Code, including but without limitation, those regulating downstream flood impacts, building safety, health and temporary erosion and sedimentation controls.
4. The City's CWO (Ordinance No. 860508-V) will be the base development ordinance governing all applications and approvals necessary for the construction and occupation of all aspects the Project, subject to such modifications and clarifications as are contained in this Term Sheet. Development of the Project qualifies for an exemption under Subsection 13-2-502(b)(1) & (d), Austin Land Development Code and, except as otherwise provided in this Term Sheet and/or Agreement, platting and the development of the Project will be subject to the applicable Lake Austin Watershed Ordinance, subject to such modifications and clarifications as are contained in this Term Sheet.
5. Austin 360 Associates will provide an integrated Pest Management Plan as described in Section 1.62 of the City's Environmental Criteria Manual.

EXHIBIT "B"

6. Development of the Property is limited to a maximum of 77,902 square feet of impervious cover. The term "development" shall have the meaning as set forth by the City of Austin Land Development Code as of the effective date of this Term Sheet.
7. Austin 360 Associates will provide structural water quality controls for the development of the Project designed and constructed to capture the first 1.25 inches of stormwater run-off from the drainage area to the control. If other applicable regulations of the City reduce the area available for irrigation or otherwise prevent Austin 360 Associates from meeting the above-stated 1.25 inches standard, the Director of the City's Watershed Protection Development Review Department, or successor department, will approve a reduced capture volume requirement to the minimum extent necessary, but in no event to a capture volume of less than 1 (one) inch.

The above-stated structural water quality controls shall be a retention/re-irrigation water quality control system that recaptures stormwater runoff from the irrigation areas.
8. The adjoining roadway shall not be included in the calculation of impervious cover allowed on or attributed to the Property or included in the drainage area.
9. Development of the Project shall comply with the Hill Country Roadway Ordinance, but site plans will be administratively reviewed and approved.
10. The final plat application for the Property will be reactivated by the City and no new fees will be required for the review of the final plat application, so long as the final plat is consistent with this Term Sheet.
11. The one hundred year flood plain on the Property shall be considered a critical water quality zone under the Land Development Code of the City.