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**DECLARATION AND AGREEMENT
REGARDING ROAD CONSTRUCTION**

This Declaration and Agreement Regarding Road Construction (this "Declaration") is entered into as of the ____ day of _____, 2004, by and between Gene C. Payne ("Declarant") and the City of Austin (the "City").

RECITALS

WHEREAS, Declarant is the owner of two tracts of land totaling approximately 2.18-acres located at 2409 South Lamar Boulevard at or near the southeast corner of South Lamar Boulevard ("Lamar") and Bluebonnet Lane ("Bluebonnet"), Austin, 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 LR (Neighborhood Commercial) and LO (Limited Office) zoning from the City of Austin for such development pursuant to City of Austin Zoning Case No. C14-04-0060 (the "Zoning Case");

WHEREAS, to address the concerns of the South Lamar Neighborhood Association ("SLNA"), Declarant has agreed to design, construct, and pay for (i) certain construction, restriping, and other improvements on Lamar and Bluebonnet, as described on Exhibit "B" hereto (collectively, the "Construction"), and (ii) certain signal modifications, also as described on Exhibit "B" hereto (the "Modifications"); and

WHEREAS, pursuant to all of the terms and conditions of this Declaration, Declarant shall not seek a certificate of occupancy for the Project unless and until the Construction and Modifications are completed,

NOW, THEREFORE, to address the concerns of the SLNA, 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 and Modifications. 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 (i) the Construction is seventeen percent (17%), and (ii) the Modifications is four percent (4%) (collectively, "Declarant's Proportionate Share"). The City requires that Declarant's Proportionate Share of the cost of the Construction and Modifications be posted as fiscal surety as a condition precedent to issuance by the City of a certificate of occupancy for the Project. For his own reasons, constituting good and valuable consideration, including, without limitation, in order to keep a promise made to SLNA, Declarant or his successors and assigns will post fiscal for and pay one hundred percent (100%) of the cost of the Construction and Modifications, and complete the Construction and Modifications, 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 or Modifications, 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 and Modifications.

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:

Gene C. Payne
809 Newport Avenue
Austin, Texas 78753

with a copy to:

The Place
Attn.: David Darr
12050 Vance Jackson, Suite 102
San Antonio, Texas 78230
Telecopy: (210) 525-0131
Telephone: (210) 366-0571

and

Drenner Stuart Wolff Metcalfe von Kreisler, LLP
301 Congress Avenue, Suite 1200
Austin, Texas 78701
Attn: Stephen O. Drenner
Telecopy: (512) 404-2244
Telephone: (512) 404-2200

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

Gene C. Payne

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

This instrument was acknowledged before me this ____ day of _____,
2004, by Gene C. Payne.

Notary Public, State of Texas

ACCEPTED: CITY OF AUSTIN

By: _____
Name: _____
Title: _____

APPROVED AS TO FORM:

By: _____

EXHIBIT "A"

Description of Property

EXHIBIT "B"

Road Construction and Signal Modifications

MODIFICATIONS

| <u>Intersection</u> | <u>Improvement</u> |
|-------------------------------------|---|
| Bluebonnet Lane and Lamar Boulevard | Signal Modifications including design and construction (above and below ground) |

CONSTRUCTION

| <u>Intersection/Street</u> | <u>Improvement</u> |
|--|---|
| Bluebonnet Lane (East) | Installation of sidewalks along both sides of Bluebonnet Lane for the length of the upgrade on Bluebonnet Lane. Increase of pavement width from 20' to 40' from Lamar Boulevard to the site driveway; the street will then be transitioned east from the site driveway to the existing pavement width. |
| Bluebonnet Lane (West) | Re-striping Bluebonnet west of Lamar to match the eastbound striping with the new westbound striping pattern (an exclusive left-turn lane and a shared through/right-turn lane). |
| Bluebonnet Lane (East) @ Lamar Boulevard | Provide for 1 Eastbound lane, 1 Westbound left turn lane, and 1 Westbound shared through/right turn lane. |
| Lamar Boulevard | Remove on street parking to improve site distance and overall safety along Lamar Boulevard. |