

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

Between the City Of Harker Heights, Texas and
Abbott Springs, Ltd. and Earl Horn

1. **DEFINITIONS.** In this Agreement the following definitions apply unless the context clearly indicates otherwise:

A. ***Ad Valorem Tax*** means ordinary real property taxes assessed pursuant to Title 1 of the Texas Property Tax Code, but shall not in any event include any sums constituting fines; penalties; interest; rollback taxes; assessments for water, sewer or road improvements; or impact fees.

B. ***Affiliated Entity*** means, with respect to Owner, any person or entity that directly or indirectly controls, is controlled by, or is under common control with, the Owner, and includes any direct or indirect subsidiary or parent corporation of the Owner now existing or hereafter formed or acquired. For purposes of this definition, "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of another, whether through the ownership of voting securities, by contract, as trustee or executor, or otherwise.

C. ***Agreement*** means this Economic Development Incentive Agreement, together with its exhibits and addenda, as may be modified from time to time.

D. ***Base Year*** means the 2014 Ad Valorem Tax year.

E. ***Business days*** means normal working business days (i.e., Monday through Friday of each calendar week, exclusive of federal and national bank holidays).

F. ***City*** means the City of Harker Heights, Texas, a home rule municipal corporation located in Bell County, Texas.

G. ***Direct Costs*** means all actual, reasonable, necessary and essential costs directly incurred by Owner as a result of performing the Work according to this Agreement, including: (i) compensation paid to, or on account of, Owner's contractors and subcontractors engaged in the Work; (ii) transportation of all building materials, fixtures, appliances, and equipment incorporated in the Work; (iii) clearing the Property of debris resulting from the Work; (iv) rental costs for fencing, equipment and apparatus essential for performance of the Work (excluding hand tools and equipment owned by Owner); (v) utilities not furnished by the City, including temporary connection fees and use fees such as water service and electricity used at the Property; (vi) building permit fees and land use permit fees; and (vii) premiums for insurance required of the Owner by contracts for the performance of the Work. Such costs shall be at rates not higher than the standard paid in the locality of the Work, except with prior written consent of the City.

Except with City's express prior written approval, "Direct Costs" do not include: (i) any cost or expense relating to Owner's offices (including compensation and benefits to Owner's employees at such offices) or other sites not related to the Work; (ii) interest on any of Owner's capital

expended during construction; (iii) rental charges for equipment and apparatus owned by Owner, or for hand tools; (iv) Owner's profit and overhead; (v) Owner's capital and banking expenses; (vi) costs that are unreasonable or not essential to the Work; (vii) costs not directly related to the Work; (viii) costs to correct defective construction or construction not in conformity with this Agreement (including additional testing, inspections, and professional fees and expenses); (ix) overtime expenses; (x) disposal of materials or equipment improperly supplied; (xi) costs resulting from the negligence, dishonesty or infidelity of the Owner or Owner's employees, contractors, subcontractors, their respective agents and employees, or other persons performing any of the Work on behalf of or under the direction of Owner; (xii) sums that have been or will be salvaged, refunded to, or recovered by Owner; (xiii) Owner's worker's compensation and commercial general liability insurance premiums; (xiv) Owner's income or excess profits, corporation, franchise, margin, or similar taxes; and (xv) losses related to shortage or unexplained disappearance.

H. *Effective Date* means ^{December} ~~October~~ 01, 2014. 

I. *Facility* means the building and related improvements located on the Property.

J. *Force Majeure* means any cause that, despite the exercise of due diligence by the affected party, is not reasonably within the control of and could not have been avoided by that party, including without limitation: acts of God; strikes, lockouts and other labor disputes or industrial stoppages; interruption of communications or public utilities; orders or actions of any governmental or military authority; blockade or embargo; expropriation or confiscation of facilities; civil riots, commotion or disturbances; acts of war, terrorism, the public enemy, revolution, rebellion or sabotage; materials shortages; rationing; fires, floods, lightning, storms, hurricanes, tornados, epidemics, earthquakes, landslides, drought, explosions or other calamity; and unavoidable accidents or breakdowns.

K. *Incentives* means, collectively, all economic development incentives described in Paragraph 6 of this Agreement.

L. *Maximum Reimbursement Amount* means the lesser of: (i) the sum total of all Direct Costs incurred by Owner in performing the Work; or (ii) \$56,350.72.

M. *Owner* means Abbott Springs, Ltd., a Texas limited partnership, and Earl Horn, having a principal place of business at 3800 S. W.S. Young Dr., Ste. 101, Killeen, Texas, and their contractors, agents and representatives.

N. *Program* means the Economic Development Program adopted by the City Council on or about December 19, 2000.

O. *Property* means real property located at 750 E. Central Texas Expressway, Harker Heights, Texas, and being more particularly described as Lot One (1), Block One (1), BNG ADDITION, an subdivision in the City of Harker Heights according the map or plat of record in Cabinet D, Slide 86-C, Plat Records of Bell County, Texas.

P. **Sales Tax** means the City's 1.5% sales and use tax consisting of the municipal sales and use tax and the additional municipal sales tax adopted by the City under the authority of the Texas Tax Code, Chapter 321.

Q. **Term** means the period of time beginning on the Effective Date of this Agreement, and ending on the seventh (7th) anniversary of the Commencement Date, unless sooner terminated as provided herein.

R. **Work** means the installation of an oversized water line from the City's water main along Central Texas Expressway to the Facility, along with a riser into the building and a fire suppression sprinkler system within the building.

2. BACKGROUND.

A. The City adopted the Program as authorized by: (1) the City's broad and inherent authority as a home-rule municipality under its Charter; (2) Article XI, Section 5, of the Texas Constitution; (3) Article VIII, Section 52-a of the Texas Constitution; and (4) Chapter 380 of the Texas Local Government Code. The Program provides for the City to provide economic development incentive funds to: support the creation of new jobs or improve wage scales for existing jobs; make the City more attractive to new residents, businesses, and visitors; encourage residential and commercial growth and development; expand the City's tax base; and generally to promote local economic development.

B. Owner is attempting to lease or sell the Facility, which has been vacant for an extended period. Owner desires to perform the Work in order to make the Facility more attractive to prospective tenants and buyers.

C. The parties accordingly enter into this Agreement providing for economic incentives as an inducement for the Owner to invest its time, energy, and resources in the Work, and by extension to facilitate the goals and objectives of the Program.

3. **CITY COUNCIL FINDINGS.** By approval of this Agreement, the City Council of the City of Harker Heights finds and determines that the Work will provide substantial benefits to the City by: (i) eliminating a vacancy (and the associated potential for nuisance and blight) on a property prominently located along one of the City's most important economic corridors; (ii) improving the value of the Property and surrounding parcels; (iii) increasing revenue from future Ad Valorem Taxes and Sales Taxes; (iv) increasing the safety of the Property; (v) setting a higher standard for future development along the same corridor; and (vi) potentially bringing new jobs to the City. This Agreement provides reasonable and adequate safeguards to ensure that the public receives sufficient benefits in exchange for the Incentives. This Agreement benefits the public health, safety and welfare, and should be approved.

4. OWNER OBLIGATIONS.

A. **Perform the Work.** The Owner will proceed at its sole cost and expense and with reasonable commercial diligence to furnish all design services, bidding, contracting,

construction, superintendence, administration, licenses, permits, facilities, tools, machinery, equipment, personnel, labor, materials and supplies necessary for the completion of the Work, and to have the Facility fully operational and ready for occupancy not later than December 1, 2014, subject to events of Force Majeure. The Work shall be performed in a good and workmanlike manner in compliance with all applicable laws, rules and regulations. Thereafter, the Owner shall continuously keep the Facility in good order and condition throughout the remainder of the Term.

B. *Valuation.* From the Commencement Date through the remainder of the Term, the Property (land and improvements) shall have a value as appraised by the Bell County Tax Appraisal District of not less than \$606,565.00.

C. *Employment of Undocumented Workers.* During the Term of this Agreement, the Owner agrees not to knowingly employ any undocumented workers and if convicted of a violation under 8 U.S.C. § 1324a(f), the Owner shall repay the Incentives and any other funds received by the Owner from the City as of the date of such violation, such payment being due within 120 business days after the date the Owner is notified by the City of such violation, plus interest at the rate periodically announced by the *Wall Street Journal* as the prime or base commercial lending rate, or if the *Wall Street Journal* shall ever cease to exist or cease to announce a prime or base lending rate, then at the annual rate of interest from time to time announced by Citibank, N.A. (or by any other New York money center bank selected by the City) as its prime or base commercial lending rate, from the date of such notice until paid.

D. *Legal Compliance.* The Owner shall at all times strictly comply with this Agreement and all rules, orders, laws and regulations (as the same may be amended from time to time) that relate in any way to the Work, the Property, the Facility, and the activities conducted by or on behalf of the Owner thereon.

E. *Owner Restrictions.* During the Term, the Owner and its principal parties shall not, without the City's prior written consent: (1) change its name or jurisdiction of organization; (2) amend its capital structure, liquidate or dissolve, or become a party to any merger, conversion or consolidation, or otherwise transfer control or ownership of the Owner, or form or acquire any subsidiary; (3) make any substantial change to its present executive or management personnel; or (4) change the state in which its place of business (or chief executive office if the Owner has more than one place of business) is located.

F. *Notice Required.* The Owner shall notify the City immediately of any event of default hereunder and of any: (1) change in the Owner's name or mailing address, (2) material adverse change in the Owner's financial condition; (3) material adverse change in the ability of the Owner to perform its obligations hereunder; or (4) representation or warranty made by the Owner in this Agreement that is no longer true and correct.

G. *Refund of Overpayment.* The payment or delivery of any Incentives hereunder shall not be an admission of the Owner's unqualified entitlement to same, but the City retains the right to review the Owner's entitlement and to require such corrective action as may be supported by this Agreement, including without limitation requiring the Owner to refund any overpayment to the City upon demand.

H. *Reimbursement of Legal Fees.* Owner agrees to pay reasonable and necessary fees incurred by the City for the legal services associated with preparation of this Agreement. The payment of legal fees is contingent upon the execution of this Agreement by both Parties. Upon presentation of reasonably detailed itemized legal bills for fees associated with this Agreement, Owner will reimburse the City for these costs within thirty (30) days following the Effective Date.

5. REPORTS AND INSPECTIONS.

A. To demonstrate compliance with its obligations hereunder, the Owner shall (i) prepare and maintain systematic and complete records in compliance with good business and accounting practices consistently applied; (ii) cause its contractors and agents to do the same; and (iii) upon request furnish such information and records to the City without cost. Owner shall retain all records relating to this Agreement for a period of at least four (4) years after the expiration or termination of this Agreement, with any extensions thereof, or for such longer period(s) as may otherwise be required by applicable law. If any such records are or may be required to resolve any then threatened or pending claim or proceeding relating to this Agreement, the period of retention shall continue until final disposition of such claim or proceeding.

B. By April 30 of each year during the Term hereof, Owner will provide the City with a copy of any Sales Tax returns filed or received by it and any other business located on the Property (together with any other correspondence related to the returns that may affect the amounts paid to the Comptroller) relating to the collection and payment of Sales Tax required to be filed with the Comptroller. Copies of any Sales Tax returns shall be provided to the City within ten days of the date filed with the Comptroller. In addition, Owner will certify to the City that it has complied with the terms of this Agreement in the preceding year. Together with each certification of compliance, the Owner shall submit such written information, records, and documents as the City may in its discretion require to verify the Owner's certification of compliance.

C. All information required to be provided by the Owner to the City shall be sent to the attention of the City's Finance Director at the address specified for giving notice in this Agreement.

D. The City's authorized representatives shall have the right to enter the Property and the Facility at reasonable times to conduct site visits, meet with Owner's personnel, view and copy any records or other evidence relating to performance of this Agreement, to audit and verify costs under this Agreement, and evaluate and test Owner's systems of internal controls, practices, and procedures.

E. If the City notes any deficiencies based upon the reports and inspections required by this section, it shall provide written notice thereof to the Owner together a statement of the measures required to correct such deficiencies.

F. Nothing herein shall be construed to require the Owner to disclose information that it is prohibited by law from disclosing.

6. INCENTIVES TO OWNER.

A. *Incentives Provided.* As consideration for Owner's contractual obligations hereunder and subject to Owner's strict, faithful and timely performance thereof, the City agrees to provide the following incentives to the Owner during the Term hereof:

1. *Sales Tax Refund.* The City will make economic incentive payments to Owner in an amount equal to one hundred percent (100%) of the new Sales Tax received by the City from sales attributed to all businesses operating on the Property as provided in this Agreement, based on the actual amount of Sales Tax actually distributed to the City by the Comptroller (net of any discounts, taxpayer refunds, and administrative fees).
2. *Ad Valorem Tax Refund.* The Ad Valorem Taxes levied against the Property in the Base Year and received by the City total \$4,106.44 ("*Base Amount.*") The City will make economic incentive payments to Owner in an amount equal to one hundred percent (100%) of the Ad Valorem Taxes actually distributed to the City by the Bell County Tax Assessor-Collector (net of any discounts, taxpayer refunds, and administrative fees) in excess of the Base Amount.

B. *Funding.* The foregoing Incentive payments shall be payable on an annual basis during the Term hereof within thirty (30) days after the City verifies the amounts due for that year. The Incentives shall be paid from current revenues in the City's General Fund. All Incentive payments shall be payable to JWC Rentals, as trustee for Owner, at 3800 South W. S. Young Dr., Ste. 101, Killeen, TX 76542.

C. *Suspension or Offset of Incentives.* If the Owner or any Affiliated Entity is delinquent in payment to the City of any sums (including without limitation any fees, fines, assessments, taxes, and charges for water, sewer, garbage, drainage improvements, or otherwise), and regardless of whether the amount due has been reduced to judgment by a court, the City may: (i) suspend all Incentives provided under this Agreement until such sums are paid in full; and (ii) deduct any such sums or the value thereof from the Incentives.

D. *Termination of Incentives.* Payment of the Incentives shall terminate upon the earlier of: (1) payment to the Owner of the Maximum Reimbursement Amount; or (2) expiration of the Term of this Agreement. Further, should any legal impediment arise during the Term of this Agreement, including a change in law, that prevents or limits the City's ability to lawfully comply with this Agreement or to provide the Incentives required hereby, the City may without further liability to Owner terminate the Incentives to the extent (but only to the extent) of such impediment.

7. DEFAULT, TERMINATION, AND REMEDIES.

A. *Default.* The Owner shall be in default if, during the Term hereof: (1) a receiver is appointed for the Facility, the Property, the Owner, or an Affiliated Entity; (2) a bankruptcy or insolvency proceeding is commenced against or by the Owner, and the Owner fails to have the proceedings dismissed within sixty (60) days; (3) the Owner is dissolved; (4) the Owner fails to

comply with any term, condition, or covenant of this Agreement that is binding on the Owner, and such failure continues beyond any period provided herein for cure of such failure; (5) any warranty, covenant, or representation of the Owner in this Agreement or in any other written agreement between the City and the Owner is materially false when made; (6) the Property or the Facility is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly restored to its former condition; or (7) the City reasonably determines that the Owner's ability to strictly perform its obligations under this Agreement is threatened by reason of a material adverse change in financial condition or credit of the Owner.

B. *Notice of Default.* The party alleging a default hereunder will give the other party not less than fifteen (15) days' written notice specifying the nature of the alleged default and, when appropriate, the manner in which the alleged default may be satisfactorily cured. Notwithstanding the preceding sentence, if the nature of the alleged default is such that the giving of such written notice is impractical due to a threat of harm to life or property then the party alleging the default or breach shall give the other party such notice as may be reasonable under the circumstances.

C. *City's Remedies.* Upon the occurrence of a default by the Owner which is not timely cured, the City may (but shall not be obligated to): (1) terminate this Agreement and seek recovery of any damage suffered by the City; (2) enter on the Property or the Facility without fear of trespass, remedy such default on behalf and at the expense of the Owner, and obtain reimbursement from the Owner of all sums expended or expenses incurred by the City in effecting such cure; (3) discontinue performance of this Agreement until the default is cured; (4) seek specific performance of this Agreement by the Owner; (5) withhold further Incentives until the default is cured; (6) exercise any other remedy granted by this Agreement or by applicable law; or (7) any combination of the foregoing, such rights and remedies being cumulative, and the exercise of any particular right or remedy shall not preclude the exercise of any other right or remedy.

D. *Owner's Remedies.* Upon the occurrence of a default by the City which is not timely cured, the Owner may (but shall not be obligated to): (1) terminate this Agreement and seek recovery of any actual damages suffered by the Owner; (2) seek specific performance of this Agreement by the City; (3) exercise any other remedy granted by this Agreement or by applicable law; or (4) any combination of the foregoing, such rights and remedies being cumulative, and the exercise of any particular right or remedy shall not preclude the exercise of any other right or remedy.

E. *Waivers in Writing.* All waivers must be in writing and signed by the party to be bound. Failure or delay in giving notice of default shall not constitute a waiver of any default, nor shall it change the time of default. Except as otherwise expressly provided in this Agreement, any failure or delay by either party to assert any of its rights or remedies as to any default shall not operate as a waiver of the default, nor shall it deprive the party of the right to institute and maintain any actions or proceedings it deems necessary to protect or enforce its rights or remedies. The waiver, in one instance, of any act, condition, or requirement stipulated in this Agreement shall not constitute a continuing waiver or a waiver of any other act, condition, or

requirement, or a waiver of the same act, condition, or requirement in other instances, unless specifically so stated.

F. *Mediation.* Any dispute between the parties related to this Agreement which is not resolved through informal discussion will be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall initially bear the mediation costs equally, subject to adjustment as part of any mediated settlement. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.

G. *Waiver of Jury.* EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT OR IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES IN RESPECT OF THIS AGREEMENT OR THE TRANSACTIONS RELATED HERETO, WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE. THIS WAIVER HAS BEEN FULLY NEGOTIATED BY THE PARTIES AND WILL NOT BE SUBJECT TO ANY EXCEPTIONS. ANY PARTY MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS AGREEMENT WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY. EACH PARTY WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

H. *Waiver and Certain Relief.* NOTWITHSTANDING ANY CONTRARY PROVISION HEREIN, THE PARTIES EACH WAIVE ALL CLAIMS FOR SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES.

I. *Attorney's Fees & Court Costs.* The prevailing party in any legal proceeding related to this Agreement is entitled to recover reasonable attorney's fees and all costs of such proceeding incurred by the prevailing party. The term "prevailing party" means the party most substantially obtaining the relief sought in the proceedings, whether by the other party abandoning its claims or defenses, or by final resolution through compromise, settlement, arbitration award, or judgment.

J. *Interest.* All sums payable to either party by the other hereunder shall bear interest at the then-current Judgment Rate of interest published by the Office of Consumer Credit Commissioner from the 30th day after the date due until paid.

8. OWNER'S REPRESENTATIONS. As a material inducement to the City to enter into this Agreement, the Owner warrants and represents to City that the following are true as of the Effective Date, and will be true throughout the Term hereof:

A. The Owner has full power and authority to execute and deliver this Agreement and to perform its obligations under it. This Agreement constitutes the valid and legally binding obligation of the Owner, and all requisite action has been taken to make this Agreement valid and binding on the Owner in accordance with its terms.

B. Neither the execution and delivery of this Agreement by Owner, nor the performance by the Owner of its obligations hereunder, will violate any statute, regulation, rule, judgment, order, decree, stipulation, injunction, charge or other restriction of any government, governmental agency, or court to which Owner is subject, or any provision of the governing instruments of the Owner.

C. There are no attachments, executions, or assignments for the benefit of creditors or voluntary or involuntary proceedings in bankruptcy or under any other debtor-in-relief laws pending against the Owner.

D. There are no other legal actions, suits, arbitrations, or other legal administrative or other governmental proceedings pending or threatened against the Owner, its properties, assets, or business that, if adversely determined, could have a material adverse effect on the Owner's ability to perform its obligations hereunder, and the Owner is not aware of any facts which to its knowledge might result in any such action, suit, arbitration, or other proceedings.

E. The Owner is a partnership duly organized, validly existing, and in good standing under the laws of the State of Texas, and having authority to do business in Texas, and with full power to carry on its business as now being conducted.

F. The Owner possesses or will acquire all permits, registrations, approvals, consents, licenses, trademarks, trademark rights, trade names, trade name rights, and copyrights needed to conduct its business in the manner contemplated by this Agreement.

G. The Owner has the expertise, experience, and resources necessary to perform its obligations hereunder with the highest degree of skill, diligence, efficiency and professionalism normally demonstrated by others engaged in performing similar activities throughout the State of Texas.

H. Neither Owner nor any of its principals is aware of any related past, present, or planned interest, financial or otherwise, that may impair its objectivity in performing the Work.

I. Neither Owner nor any of its principals has within a ten-year period preceding this Agreement been convicted of or had a civil judgment rendered against it for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

J. Neither Owner nor any of its principals is under indictment for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in the preceding subparagraph.

K. Neither Owner nor any of its principals has within a ten-year period preceding the Effective Date had a contract with a governmental entity terminated for cause or default.

L. All information furnished by or on behalf of the Owner to the City is true and correct in all material respects.

The Owner acknowledges that the City has justifiably relied upon the foregoing representations and warranties, and that City would not have entered into this Agreement but for the Owner's representations as to the truthfulness and accuracy of the same.

9. FORCE MAJEURE. If a party shall be delayed, hindered, or prevented from performance of any of its obligations by reason of Force Majeure, and such party is not otherwise in default, the time for performance of such obligation shall be extended for the period of such delay, provided that the affected party shall: (i) give prompt written notice to the other party; (ii) diligently attempt to remove, resolve, or otherwise eliminate such event, keep the other party advised with respect thereto; and (iii) commence performance of its obligations hereunder immediately upon such removal, resolution, or elimination. Nothing contained in this paragraph shall be applied so as to: (i) permit any delay or time extension due to shortage of funds; or (ii) excuse any nonpayment or delay in payment of money when due; or (iii) limit either party's right (if any) to cure the other's default as if this paragraph were not contained in this Agreement.

10. COOPERATION IN THE EVENT OF LEGAL CHALLENGE. The parties agree to cooperate in defending any legal action instituted by a third party or other governmental entity or official challenging: (a) the validity of one or more provisions of this Agreement; (b) the state and local legislation authorizing the City to enter into this Agreement; or (c) any discretionary action and approvals of the City regarding permits or other entitlements issued pursuant to this Agreement.

11. DOCUMENT CORRECTION; FURTHER ASSURANCES. From time to time, at the request of the City, the Owner will: (a) promptly correct any defect, error or omission which may be discovered in the contents of this Agreement or in any other document executed by the Owner or in the execution or acknowledgment thereof; (b) execute, acknowledge, deliver and record or file (or cause to be executed, acknowledged, delivered and recorded or filed) such further documents and instruments and perform such further acts and provide such further assurances as may be necessary, desirable, or proper, in City's reasonable opinion, to: (i) to carry out more effectively the purposes of this Agreement and the and the transactions contemplated hereunder, (ii) confirm the rights created under this Agreement and any related documents, (iii) protect and further the validity, priority and enforceability of this Agreement and any related documents, and any liens and security interests created thereby.

12. MISCELLANEOUS PROVISIONS.

A. *Signatories.* Each person signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement and any related documents. Each party represents and warrants to the other that the execution and delivery of the Agreement and the performance of such party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.

B. *Owner's Undertaking.* The Owner's efforts to perform the Work and its obligations hereunder constitute a private undertaking. The Owner shall have full power over, and exclusive control of, the specific details of its undertaking, subject only to the general

limitations and obligations under this Agreement and applicable local, state and federal statutes and regulations. Nothing contained in this Agreement or in any related document shall be construed as making the City and the Owner joint venturers or partners, nor shall the Owner be or represent itself to be a contractor, agent or employee of the City.

C. *Memorandum of Record.* The City, at its option, may record a memorandum of this Agreement, which memorandum the Owner agrees to properly execute within ten (10) days after a request to do so from the City. Any such memorandum shall be executed in a recordable form, shall set forth a summary of the Owner's obligations and such other terms of this Agreement as the City deems necessary, shall expressly state that it is executed pursuant to the provisions contained in this Agreement, and that is not intended to vary the terms and conditions of this Agreement.

D. *Notices.* All notices under this Agreement shall be in writing, and (i) delivered personally to the person to whom the notice is to be given, (ii) given by certified or registered mail, return receipt requested, (iii) delivered via Federal Express or any other nationally recognized courier service that provides a return receipt showing the name of the recipient and the date of actual delivery, or (iv) given by e-mail or facsimile transmission. Notice given by mail shall be effective three (3) days (exclusive of Saturdays, Sundays and postal holidays) after the same is deposited in the United States Postal Service, properly post-paid and certified and addressed to the party to be notified. Notice given by e-mail or facsimile transmission shall only be deemed received if the transmission thereof is confirmed and such notice is followed by written notice as provided in subparts (i) through (iii) within three (3) business days following the e-mail or facsimile notice. Notice given in any other manner shall be effective only if and when actually delivered to the party to be notified or at such party's address for purposes of notice as set forth herein. A change in the notice address of any party may be effected by serving written notice of such change and of such new address upon the other party in the manner provided herein. Initially, notices shall be addressed to:

If to the City: City of Harker Heights
 ATTN.: City Manager
 P.O. Box 2518
 Harker Heights, TX 76548
 Fax: (254) 953-5605
 Email: dmitchell@ci.harker-heights.tx.us

If to Owner: Abbott Springs, Ltd., a Texas limited partnership, and Earl Horn
 ATTN.: Jim Wright
 3800 S. W.S. Young Dr.
 Killeen, TX 76542
 Fax: (254) 526-6951
 Email: jim@jwcrentals.com

E. *Law Governing and Venue.* The laws of the State of Texas govern this Agreement without regard to any conflict of laws provision and no lawsuit may be prosecuted on this Agreement except in a court of competent jurisdiction located in Bell County, Texas. The Owner

specifically consents to and waives any objections to *in personam* jurisdiction in Bell County, Texas.

F. *Assignment.* The Owner may not assign this Agreement to any other person or entity unless the City consents in writing to the assignment, and any attempted or purported assignment in the absence of such consent shall be void.

G. *Severability.* If any provision hereof shall be finally declared void or illegal by any court or administrative agency having jurisdiction, the entire Agreement shall not be void, but the remaining provisions shall continue in effect as nearly as possible in accordance with the original intent of the parties.

H. *Binding Effect.* This Agreement shall be binding upon, and shall inure to the benefit of, the parties' respective successors and permitted assigns.

I. *Third Party Beneficiaries.* There are no third-party beneficiaries of this Agreement.

J. *Survival.* All provisions of this Agreement (including, without limitation, the sections regarding record retention and audit rights, refund of overpayments, liability and indemnification, and dispute resolution) that by their terms require any performance following termination or expiration of this Agreement shall survive such termination or expiration.

K. *Interpretation.* Each party has carefully read this entire Agreement, understands the meaning and effect of each and every provision contained herein, and acknowledges that it has relied on its own judgment in entering into this Agreement. Each party executes this Agreement only after first having obtained, or having had the opportunity to obtain, competent legal advice. The use of the masculine or neuter genders herein shall include the masculine, feminine and neuter genders. The singular form shall include the plural when the context requires. Headings used throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held to explain, restrict, modify, amplify or aid in the interpretation or construction of the meaning of the provisions of this Agreement. The terms "hereof," "hereunder" and "herein" shall refer to this Agreement as a whole, inclusive of all exhibits, except as otherwise expressly provided. This Agreement represents the result of extensive discussion between the parties, and thus should not be construed strictly for or against either party.

L. *Time; Business Days.* Time is of the essence with respect to this Agreement. In the event that any time period expires or any event is to occur pursuant to the terms of this Agreement on a date which is not a business day, then such time period shall expire or such event shall occur on the first business day following such scheduled date.

M. *Entire Agreement; Modification.* This Agreement, including all exhibits, constitutes the sole and entire agreement between the parties relating to the subject matter hereof and supersedes all previous understandings and agreements between the parties (whether oral or written) relating to its subject matter. The parties have not relied upon any statement, promise or representation except those specifically set forth herein, and any other statements or representations that may have been made are void and of no effect. Each party hereby waives all

claims for fraudulent inducement and disclaims any duty of another party to make any disclosures except as set forth herein. This Agreement may be cancelled or amended by mutual consent of the parties, and to be effective an amendment or agreed cancellation must be in writing and signed by each party in a form suitable for recording in the official records of Bell County.

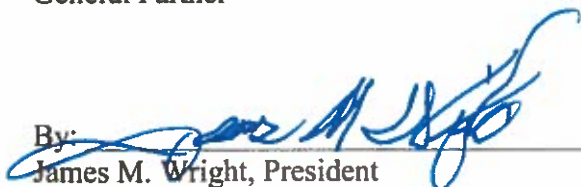
N. *Multiple Counterparts.* To facilitate execution, this Agreement may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature or acknowledgment of, or on behalf of, each party, or that the signature of all persons required to bind any party, or the acknowledgment of such party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. It shall not be necessary in making proof of this Agreement to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, and the respective acknowledgments of, each of the parties hereto. Any signature or acknowledgment page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures or acknowledgments thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature or acknowledgment pages.


City of Harker Heights

Abbott Springs, Ltd.


By: Abbott Springs Management, L.C., its
General Partner

By: 
David Mitchell, City Manager

By: 
James M. Wright, President


Earl Horn

ATTEST:


Patricia Brunson, City Secretary

