




MEMORANDUM

March 18, 2012

To: Board of Mayor and Alderman

From: Eric Stuckey, City Administrator 
Vernon Gerth, ACA-Community & Economic Development

Subject: Median Maintenance Agreement between the City of Franklin and the Creekstone Subdivision HOA – Contract Number 2011-0173

Purpose

The purpose of this memorandum is to provide the Board of Mayor and Aldermen (BOMA) with information to consider contract number 2011-0173 which establishes and formalizes maintenance expectations for the Creekstone Subdivision Homeowners Association for the median located within the public right-of-way at the intersection of Creekstone Boulevard and Royal Oaks Boulevard.

Background

Approximately two years ago Pulte Homes took over the fledging Creekstone residential subdivision located on Creekstone Boulevard south of Royal Oaks Boulevard. Noticing the subdivision did not have any frontage on Royal Oaks Boulevard and presence on a major right-of-way, representatives from Pulte inquired about placing a ground-mounted, masonry entrance sign within the median and having the Creekstone Homeowners Association accept future maintenance responsibilities for the median and landscaping.

The City of Franklin, in partnership with several other developers and property owner associations, has entered into similar agreements for the purpose of maintaining expensive landscaping located within the public right-of-way. These agreements insure public areas within and adjacent to privately-owned subdivisions are maintained in accordance with approved plans, development agreements, and development standards.

The Creekstone Subdivision agreement is similar to agreements with other associations and formalizes the maintenance expectations, the type of subdivision entrance sign, and provisions for a small temporary marketing sign.

Financial Impact

This agreement appears to be beneficial to both the City and the private property owners. Property owner associations who take over the responsibility of maintaining landscaping located within the public right-of-way take satisfaction in knowing their neighborhoods are being well-maintained by professional landscaping maintenance companies and contributing to the overall beautification of the community. Additionally, by reducing the amount of public area maintained by the City, operational expenses are kept to a minimum and allow the City's landscaping crews to focus their efforts and resources to other areas of City maintenance responsibility.

Recommendation

Approval of contract number 2011-0173 is recommended.

**AGREEMENT
BETWEEN THE CITY OF FRANKLIN AND THE
CREEKSTONE HOMEOWNERS ASSOCIATION
COF CONTRACT NO 2011-0173**

THIS AGREEMENT, (hereinafter "AGREEMENT"), made and entered into this ___ day of March, 2012 by and between THE CITY OF FRANKLIN, TENNESSEE (hereinafter "City") and THE CREEKSTONE HOMEOWNERS ASSOCIATION (hereinafter "CHOA").

WITNESSETH

WHEREAS, the City Administrator of the City has requested authorization to execute this AGREEMENT regarding improvements within the City right-of-way to be made by the CHOA, within City right-of-way located near the intersection of Royal Oaks Boulevard and Creekstone Boulevard (the "Intersection"); and

WHEREAS, the CHOA is the governing association of homeowners for the subdivision commonly known as "Creekstone" (the "Subdivision"); and

WHEREAS, the City and the CHOA have agreed on an improvement plan, as described in detail below, which is consistent with the intent expressed in policy adopted by the City; and

WHEREAS, the improvement plan encompasses part of a City right-of-way, specifically a 1,400 +/- square foot median area (the "Improved Area") within the City right-of-way along Creekstone Boulevard at the Intersection; and

WHEREAS, the CHOA agrees to purchase, install and maintain the landscaping (the "Landscaping") within the Improved Area including but not limited to an approved list by the City of shrubs, flowers and trees to be installed within the Improved Area, which will contribute to the general appearance of the entrance to the Subdivision; and

WHEREAS, the City has agreed to allow the CHOA to install a permanent, masonry ground-monument type subdivision identification / entrance sign ("Signage") not to exceed the dimensions of six feet (6') in height by twelve feet (12') in width. The Signage shall be located in the Improved Area, and following installation, the Landscaping and Signage and routine replacement of Landscaping shall not be materially changed or modified by the CHOA without prior written consent of the City, and the Improved Area shall not be altered, expanded, or in any way modified by the CHOA with respect to the nature and intensity of its use as contemplated by this AGREEMENT, without the written consent of the City; and

WHEREAS, the CHOA may authorize the developer/builder, Pulte Homes, to temporarily affix to the masonry monument sign a "Lots Available" or similar marketing sign not to exceed four square feet (4 SF) until such time Pulte Homes has sold the last buildable lot or three (3) years from the date of execution of this Agreement, whichever occurs first.

NOW, THEREFORE, in consideration of the terms, conditions and mutual agreements by and between the parties as hereinafter set forth in detail, the parties do hereby mutually agree as follows:

I. AGREEMENT OF IMPROVEMENTS IN THE CITY RIGHT-OF-WAY

1. The foregoing recitals are incorporated into this Agreement and made a part hereof as if stated fully herein.
2. The City hereby grants to the CHOA permission to enter upon and to utilize the Improved Area, more particularly shown on the drawing attached hereto as Exhibit "A" for the purposes of removal and installation, maintenance, and repair of Landscaping and Signage in accordance with the terms of this AGREEMENT and as more particularly described in Exhibit "A" (the Landscaping and Signage are hereinafter collectively referred to as the "Improvements").
3. The installation, maintenance and utilization of the Improvements shall at all times comply with the policies established by the Zoning Ordinance of the City of Franklin, Tennessee and the terms and conditions of the AGREEMENT.
4. The CHOA assumes all responsibility for the maintenance and, if necessary, replacement of the Improvements except however, in the event of termination of this AGREEMENT or other express assumption of such responsibility by the City.
5. The CHOA agrees, upon thirty (30) days prior written notice from the City ("Notice of Action"), to perform any reasonably required maintenance, repair or replacement of the Improvements; it being understood, however, that if the CHOA reasonably believes that the requested or required maintenance, repair or replacement described in the Notice of Action is not reasonably necessary, the CHOA shall have an opportunity to request reconsideration by the City prior to the CHOA performing the requested or required maintenance, repair or replacement. If the CHOA fails to commence the action described under the Notice of Action following the latter of (i) thirty (30) days after the Notice of Action or (ii) thirty (30) days after the CHOA's request for reconsideration, then the City shall have the right to remove the Improvements without further notice to the CHOA at the sole cost and expense of the CHOA. The CHOA shall submit payment for the reasonable cost and expense incurred by the City within fourteen (14) days of the date of the invoice.
6. The City shall have the right to require the CHOA's removal of all or a portion of the Improvements in the event that the City determines a public need for utilization of the Improved Area (herein, a "Public Use Termination"), such as a determination by the City to use the Improved Area for additional road improvements, greenway, bike path, public utility installation or maintenance, drainage improvement, or other similar public uses; or the safety of the general public, such as for vehicular sight distance concerns at the Intersection. The City shall give the CHOA at least thirty

(30) days prior notice in the event that COF determines that it will exercise a Public Use Termination hereunder. In the event of a Public Use Termination, the City shall be responsible for the removal of the Improvements provided the CHOA shall be given an opportunity to remove the Improvements for its own uses should the CHOA desire to relocate all or any portion of the Improvements to another location within the Subdivision. Notwithstanding the foregoing, any Improvements that the CHOA desires to retain but which the CHOA fails to remove within the time specified by the City, or in cases where emergency work by the City becomes necessary, the City may remove or cause to be removed the Improvements without any liability to the CHOA or obligation to replace same upon completion of the work by the City.

7. The CHOA agrees that no improvements shall be made except for the Improvements depicted in Exhibit "A", except as otherwise expressly approved in writing by the City as an amendment to this AGREEMENT. Notwithstanding the foregoing, all of the Improvements may be maintained, repaired, replaced or removed as may be reasonably necessary in the ordinary course of business.
8. The permission granted by the AGREEMENT shall be effective during the period from the date of execution by both parties until terminated in accordance with the provisions specified herein.
9. The CHOA may terminate this AGREEMENT upon giving thirty (30) days prior written notice to the City at which time this AGREEMENT shall be of no force or effect, and upon termination by the CHOA, the City shall have the option of either (i) requiring that the Improvements be removed at CHOA's expense, requiring that the Improvements be abandoned, in which case the City shall thereafter be responsible for maintaining the Improvements without further right or obligation by the CHOA. If the CHOA is voluntarily or involuntarily dissolved or ceases to function in accordance with its articles of incorporation and by-laws, or if the CHOA terminates this AGREEMENT or otherwise fails to remain in good standing and in compliance with this AGREEMENT, the City shall not be obligated to either maintain or repair the Improvements and may seek remedy from the members of the CHOA at the time the CHOA was dissolved or terminates this AGREEMENT. The City shall not be liable for either undertaking or failing to maintain or repair the Improvements.
10. This AGREEMENT is made and executed for good and valuable consideration, and the CHOA acknowledges that the City has legal title to the Improved Area, subject to the permission created by this AGREEMENT.
11. This AGREEMENT is personal to the CHOA and shall not be transferable to the successors or assigns of the CHOA except with the prior written consent of the City. Further, the rights, privileges and permission granted herein shall not be assignable by the CHOA in whole or in part without the prior written consent of the City. In the event of any transfer or assignment in violation of this provision, the City shall

have the immediate right to remove the Improvements; subject, however, to the City's right to accept an application, at the City's sole discretion, made by the CHOA's successor or assignee for the right to maintain and operate the Improvements, subject to terms and conditions acceptable to the City and memorialized in a new written agreement.

12. The CHOA shall exercise the rights, privileges and permission granted herein at CHOA's own risk. The CHOA shall not claim any damages from the City for any injuries or damages in connection with or on account of the exercise of such rights, privileges or permission; or the use of the Improved Area by CHOA except in the event of any gross negligence or willful misconduct by the City or the City's officers, agents, representatives, employees, or contractors. CHOA shall indemnify and hold harmless the City, its Mayor, Aldermen, officers, employees and agents, from and against all claims, damages, losses and expenses, including reasonable attorney's fees and costs, arising out of, resulting from, or in any way connected with the CHOA's exercise of rights under this AGREEMENT, the CHOA's use of the Improved Area or failure on the part of the CHOA to comply with any of the terms and conditions of this AGREEMENT. The City shall not be liable to the CHOA should the CHOA's use of the property be hindered or disturbed as a result of any circumstance or condition that is not within the control of the City.
13. All notices required to be given by any party shall be in writing, addressed to all other parties, and delivered by certified mail or in person to:

In the case of the City:

City of Franklin
Attn: Vernon Gerth, ACA
109 Third Ave. South
P.O. Box 305
Franklin, TN 37065-0305

In the case of the CHOA:

Creekstone Homeowners' Association
c/o Ghertner & Company
50 Vantage Way, Suite 100
Nashville, TN 37228

And

PulteGroup – Tennessee Division
Attn: Matthew Scrivener, P.E. Director of Land Development
370 Mallory Station Road, Suite 500
Franklin, TN 37067

14. This AGREEMENT shall be recorded in the Williamson County Register of Deeds ("ROWC") with a copy maintained in the City Recorder's office in City Hall, Franklin, TN. The CHOA agrees to pay all costs of recording this AGREEMENT at the ROWC, to the extent that this AGREEMENT is recorded in the ROWC.

15. This AGREEMENT constitutes the entire agreement between parties. There are no further or other agreements or understandings, written or oral, in effect between the parties, relating to the subject matter hereof. This AGREEMENT may be amended or modified only by an instrument of equal formality signed by the respective parties.

II. GENERAL TERMS AND CONDITIONS

1. **Personal Liability.**
No member, Mayor, Aldermen, official or employee of the City shall be personally liable to the CHOA, or any successor in interest, in the event of any default or breach by the COF, or for any amount which may become due to the CHOA or successor or on any obligations hereunder.

2. **Warranties/Limitation of Liability/Waiver.**
The CHOA agrees to defend, indemnify, protect and hold the COF and its agents, officers, contractors, and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to City's employees, agents or officers which rise from or are connected with or are caused or claimed to be caused by the acts or omissions of CHOA, its agents, officers, or employees, in performing the work or services set forth in this agreement, and all expenses of investigating and defending against same.

The City reserves all rights afforded to local governments under law for all general and implied warranties. The City does not waive any rights it may have to all remedies provided by law and therefore any attempt by the CHOA to limit its liability shall be void and unenforceable.

3. **Severability.**
If any term or provision of the AGREEMENT is held to be illegal or unenforceable, the validity or enforceability of the remainder of the AGREEMENT will not be affected.

IN WITNESS WHEREOF the said parties have hereunto set their signatures, on this day and date first above written.

CITY OF FRANKLIN

CREEKSTONE HOMEOWNER'S OWNERS ASSOCIATION

Dr. Ken Moore, Mayor

President

Date: _____

Date: _____

ATTEST:

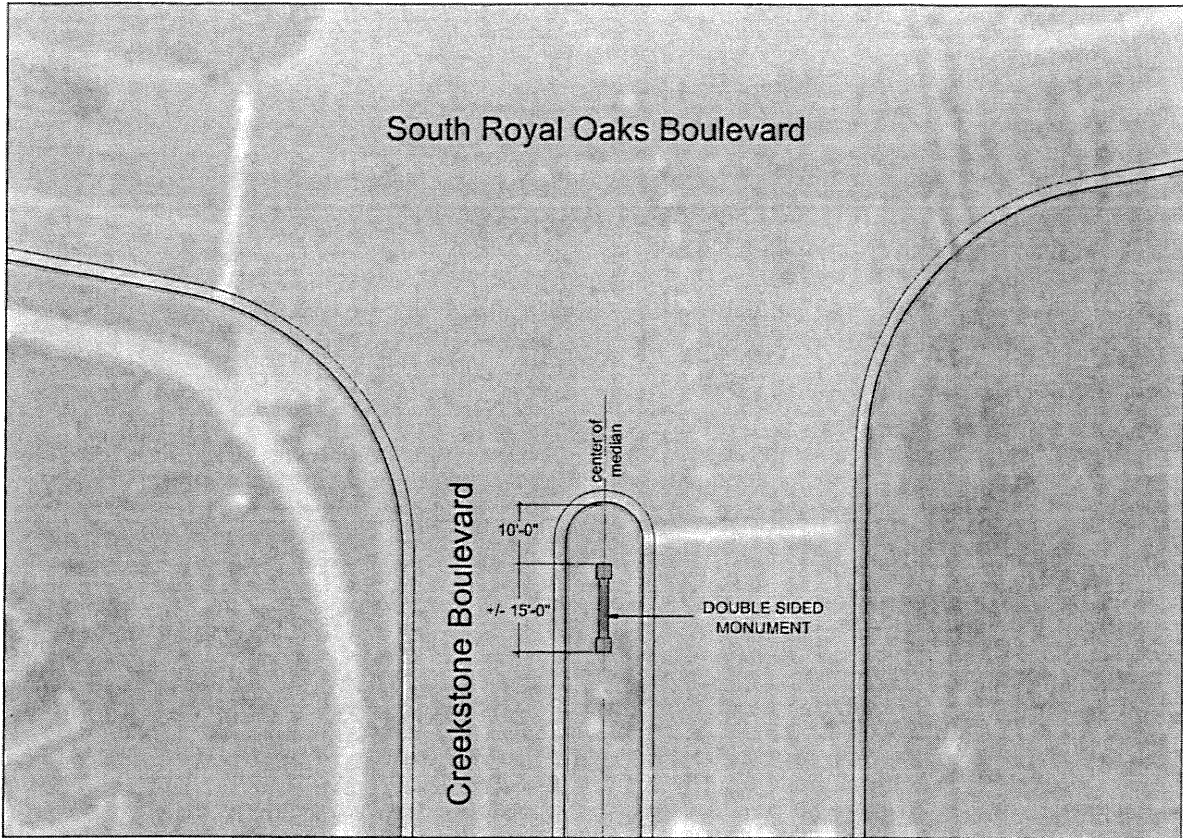
Eric S. Stuckey, City Administrator

Date: _____

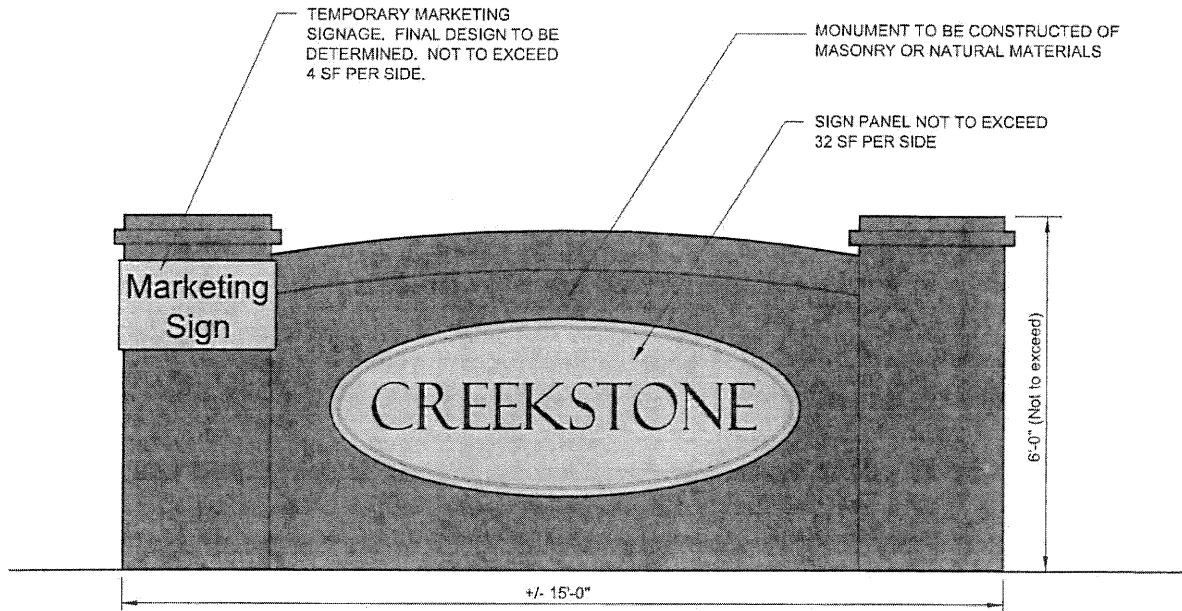
Approved as to form by:

Kristen L. Corn, Staff Attorney

EXHIBIT A – Creekstone HOA Agreement



All dimensions from back of curb.



CREEKSTONE BOULEVARD
SIGNAGE EXHIBIT
3-15-12