

AN ORDINANCE 2014 - 10 - 16 - 0787

**AUTHORIZING THE TRANSFER OF 86 IMPERVIOUS COVER CREDITS TO FORESTAR (USA) REAL ESTATE GROUP L.L.C THROUGH AN IMPERVIOUS COVER CREDIT AND VARIANCE AGREEMENT.**

\* \* \* \* \*

**WHEREAS**, City staff and Forestar (USA) Real Estate Group L.L.C. (“Forestar”) have negotiated a Funding Agreement with The Nature Conservancy and Bat Conservation International for the purchase of 1,521 acres of land located in Comal County and known as “Crescent Hills”; and

**WHEREAS**, under the terms of the Funding Agreement, the City and Forestar shall each contribute \$5 million; and

**WHEREAS**, for its contribution the City shall receive an aquifer-protection conservation easement across the entirety of Crescent Hills; and

**WHEREAS**, the City has agreed to provide Forestar with 86 impervious cover credits for its contribution which can be used to mitigate impervious cover limitations on other projects; and

**WHEREAS**, the City and Forestar have negotiated the terms and conditions of an Impervious Cover Credit and Variance Agreement (the “Agreement”) which sets out the terms and conditions under which the 86 impervious cover credits may be used; **NOW THEREFORE:**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** The terms and conditions of an Impervious Cover Credit and Variance Agreement (the “Agreement”) with Forestar (USA) Real Estate Group L.L.C. that provides for the transfer of 86 impervious cover credits to Forestar to be used in accordance with the terms and conditions of the Agreement, are hereby approved.

**SECTION 2.** The City Manager or her designee is authorized to execute the Agreement in accordance with this Ordinance. A copy of the Agreement, in substantially final form, is set out in **Attachment I**. The final Agreement shall be filed with this Ordinance upon execution.

**SECTION 3.** This Ordinance shall become effective immediately upon its passage by eight (8) votes or more and upon ten (10) days following its passage if approved by fewer than eight (8) votes.

PASSED AND APPROVED this 16<sup>th</sup> day of October, 2014.



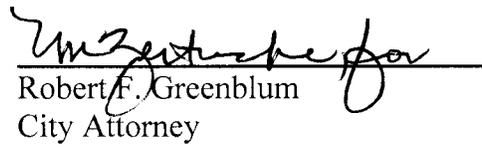
*for* M A Y O R  
Ivy R. Taylor

ATTEST:



Patricia M. Vacek  
City Clerk

APPROVED AS TO FORM:



Robert F. Greenblum  
City Attorney

<b>Agenda Item:</b>	<b>4B ( in consent vote: 4A, 4B, 4C )</b>						
<b>Date:</b>	10/16/2014						
<b>Time:</b>	10:43:37 AM						
<b>Vote Type:</b>	Motion to Approve						
<b>Description:</b>	An Ordinance authorizing the transfer of 86 impervious cover credits to Forestar (USA) Real Estate Group L.L.C through an Impervious Cover Credit Agreement.						
<b>Result:</b>	Passed						
<b>Voter</b>	<b>Group</b>	<b>Not Present</b>	<b>Yea</b>	<b>Nay</b>	<b>Abstain</b>	<b>Motion</b>	<b>Second</b>
Ivy R. Taylor	Mayor		x				
Diego Bernal	District 1		x				
Keith Toney	District 2		x				
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x			x	
Joe Krier	District 9		x				
Michael Gallagher	District 10		x				x

# **ATTACHMENT I**

STATE OF TEXAS

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§  
§  
§

**IMPERVIOUS COVER  
CREDIT AND VARIANCE  
AGREEMENT**

COUNTY OF BEXAR

This Impervious Cover Credit and Variance Agreement (this “Agreement”) is entered into by and between the City of San Antonio, a Texas Municipal Corporation (hereinafter referred to as “City”), acting by and through its City Manager and Forestar (USA) Real Estate Group, Inc. (“Forestar”), both of which may be referred to herein collectively as the “Parties.”

The Parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance of the obligations hereinafter described.

**I. DEFINITIONS**

As used in this Agreement, the following terms shall have meanings as set out below:

1.1 “City” is defined in the preamble of this Agreement and includes its successors and assigns.

1.2 “City Manager’s Designee” is defined as a member or members of City staff designated by the City Manager’s Office to oversee this Agreement.

1.3 “Forestar” is defined in the preamble of this Agreement and includes its successors and assigns.

1.4 “SAWS” is defined as the San Antonio Water System and includes its successors and assigns.

1.5 “TNC” is defined as the Texas Nature Conservancy and includes its successors and assigns.

Forestar will request that the San Antonio Water System (“SAWS”) grant a variance from certain requirements of the Aquifer Recharge Zone and Watershed Protection Ordinance that is found in Ch. 34, Art. VI, Div. 6 of the City of San Antonio Code of Ordinances (the “Ordinance”). Forestar will request that a variance from the provisions of Sec. 34-930 and Sec. 34-935 of the Ordinance be granted to permit the increase of impervious cover limits in a given area of a project by compensating for the increase in another area of a project when the overall project is not dedicated on a simultaneous basis. SAWS will grant the variance on the following terms and conditions:

- A. Forestar shall execute the Funding Agreement (**Exhibit “A”**) which commits Forestar to contribute FIVE MILLION DOLLARS AND 0 CENTS (\$5,000,000.00) to the Texas Nature Conservancy (“TNC”), as part of a consortium of contributors who are funding the purchase of 1,521.259 acres real property located in Comal County and commonly

known as “Crescent Hills” (**Exhibit “B”**). Forestar shall take no interest in the Crescent Hills tract which shall be owned in fee simple by the Texas Nature Conservancy (“TNC”) and/or another non-profit conservation entity, such as Bat Conservation International (“BCI”). TNC and BCI shall be referred to collectively as the “Conservation Entity”).

- B. The City shall execute the Funding Agreement which commits the City to contribute FIVE MILLION DOLLARS AND 0 CENTS (\$5,000,000.00) to TNC as part of a consortium of contributors who are funding the purchase of Crescent Hills. For its contribution, the City is receiving a Conservation Easement (**Exhibit “C”**).
- C. Upon the purchase of the Crescent Hills tract, the Conservation Entity shall file a Notice of Conservation Easement and a Notice of Funding Agreement in the real property records of Comal County, Texas (collectively referred to as the “Notices”). The Notices shall apply to the entire Crescent Hills tract and shall provide that the Crescent Hills tract shall be managed in accordance with the Conservation Easement. The Conservation Easement shall provide that future development of the Crescent Hills Tract is prohibited and shall provide that the Crescent Hills tract shall be maintained and managed in perpetuity under the terms of the Conservation Easement.
- D. For Forestar’s contribution, Forestar shall receive EIGHTY-SIX (86) impervious cover credits, with each credit being the equivalent of one-acre or 43,560 square feet of impervious cover and the corresponding 573.33 acres of open space on the Crescent Hills tract for an equivalent 15% impervious cover value. Such credits can be utilized by Forestar or can be conveyed or assigned by Forestar to another person or entity. Forestar and any person or entity that has received an assignment or conveyance of impervious cover credits may request a variance of the impervious cover limitations provided in the Ordinance for projects and properties that any of them desire to develop in the future. To receive a variance from the impervious cover requirements of the Ordinance for such properties or projects, the person or entity requesting the variance must satisfy all of the variance requirements provided in Sec. 34-980 of the Ordinance. No variance may be granted until the Conservation Entity has acquired Crescent Hills and all of the actions, terms, conditions and requirements that are provided in the Funding Agreement have been performed. Crescent Hills is located in Comal County, Texas in the extra-territorial jurisdiction of the City of San Antonio and is subject to the requirements of the Ordinance.
- E. Forestar agrees that the 86 credits it derives from the Crescent Hills tract may be used to increase the amount of impervious cover for other properties and projects that are the subjects of variance requests made pursuant to this Agreement. If a property and project that is the subject of a variance request complies with the variance requirements of Sec. 34-980, then in that event an amount not to exceed 86 acres of impervious cover credit derived from the Crescent Hills tract may be used to increase the amount of impervious cover for the property and project that is the subject of a variance request. The property and project that are the subjects of a variance request made pursuant to this Agreement and the 86 impervious cover credits that are derived from the Crescent Hills tract, or the portion thereof that is designated in a variance request as part of a project, shall be

considered by SAWS as within the same overall project, although not dedicated on a simultaneous basis.

- F. Any project or property that is the subject of a variance request made pursuant to this Agreement shall be considered as a multi-use project, with the Crescent Hills tract considered as part of the same overall project (under the methodology provided in City Code Section 34-930 (d)(1)) whereby within a multi-use project impervious cover limits may be exceeded in a given area if compensated for in another area. The impervious cover will be prorated over the area of the project or property that is the subject of a variance request and the Crescent Hills tract and will collectively be considered a multi-use project as provided in Section 34-930 (d)(1) of the Ordinance. The impervious cover constructed on the Crescent Hills tract shall be zero and the 86 acres of impervious cover credit derived from the Crescent Hills tract shall be applied to the other projects or properties subject to the variance. The property or project that is the subject of a variance request shall be classified as Category 1, 2 or 3 as provided by the Ordinance as of the date that a request for a variance is submitted to SAWS. The maximum impervious cover permitted for the entire multi-use project shall be as provided in Secs. 34-930 (a), (b) and (c) of the Ordinance. All other provisions of the Ordinance that apply to Category 2 projects or property shall apply to any project or property that is the subject of a variance request. Nothing herein will limit impervious cover on individual tracts within the multi-use project provided that impervious cover is applied in accordance with this Agreement. For the purposes of this Agreement, impervious cover shall be as defined by the Ordinance.
- G. Only projects on land located north and east of the westernmost boundary of the IH-10 Hill Country Corridor (as described in San Antonio City Council Ordinance Number 97656) that are located on the Edwards Aquifer Recharge Zone are eligible to be considered for a variance. Up to FORTY-THREE (43) impervious cover credits that are derived from the Crescent Hills tract may be used within the Cibolo Canyons development that is described in **Exhibit "D"**. The use of the 43 acres of impervious cover within Cibolo Canyons shall be in accordance with the Third Amendment to the Declaration of Restrictive Covenants and the Amended and Restated Agreement for Services in Lieu of Annexation. The use of the 43 acres impervious cover within Cibolo Canyons will not require an additional variance from SAWS but will be subject to SAWS approval of site specific Water Pollution Abatement Plan(s).
- H. The 86 impervious cover credits that may be used as additional impervious cover and that are derived from the Crescent Hills tract may be assigned or conveyed to another person or entity by Forestar, subject to approval by SAWS that will not be unreasonably withheld, delayed, or conditioned. Any person or entity that receives an assignment or conveyance of impervious cover rights from Forestar shall be subject to all of the terms and conditions of this Agreement and shall be required to execute an agreement with SAWS in which the person or entity receiving the assignment or conveyance expressly agrees to the terms, conditions and provisions of this Agreement. No assignments or conveyances of impervious cover credits derived from the Crescent Hills tract other than as provided in this paragraph are permitted.

- I. Forestar and any person or entity receiving an assignment or conveyance of impervious cover from Forestar shall provide SAWS with an accounting of the additional impervious cover used for each project at the time that a variance request is submitted. Upon the granting of a variance, the amount of additional impervious cover requested in the variance that must be satisfied by impervious cover credit acreage derived from the Crescent Hills tract shall be assigned to the project that is the subject of the variance and the balance of the impervious cover credit acreage available as additional impervious cover credit acreage from the Crescent Hills tract shall be reduced by that amount. Forestar and any person or entity receiving an assignment or conveyance of impervious cover from Forestar shall provide SAWS with a current accounting of the use and remaining balance of impervious cover credit that is derived from the Crescent Hills tract upon request by SAWS.
- J. Forestar and any person or entity receiving an assignment or conveyance of impervious cover from Forestar must apply for one or more variances that use the additional impervious cover that is derived from the Crescent Hills tract within fifteen (15) years after the Effective Date of this Agreement. No requests for a variance that include the use of acreage derived from the Crescent Hills tract shall be permitted after that date.
- K. Forestar and any person or entity receiving an assignment or conveyance of impervious cover from Forestar may not use the Crescent Hills tract for any other green space, park dedication, mitigation, or set aside purposes other than as expressly provided in this Agreement.
- L. Forestar and any person or entity receiving an assignment or conveyance of impervious cover from Forestar shall agree that SAWS approval is necessary to any Water Pollution Abatement Plan that is submitted to the Texas Commission on Environmental Quality for the development of any tract that is the subject of a variance request.
- M. In the event that a Water Pollution Abatement Plan has not been submitted at the time of or prior to the variance request for the development of any tract that is the subject of a variance request, a Geologic Assessment prepared in accordance with the Texas Commission on Environmental Quality's guidelines and a site plan must be approved by SAWS prior to approval of the variance request.
- N. No property that is the subject of a variance request may be used for light industrial, general industrial, or heavy industrial uses as those terms are used in the zoning provisions of the City Unified Development Code and may not be used for any use that is prohibited within the "ERZD" Edwards Recharge Zone District, an overlay district that is described in the zoning provisions of the City Unified Development Code.
- O. Each non single-family residential property or project that is located on a tract of land that is larger than 10 acres shall comply with the 2010 City of San Antonio Tree ordinance, Ordinance Number 2010-05-06-0376, found in Sec. 35-523, Unified Development Code.

- P. The City shall provide Forestar with written notice of any lawsuit concerning this Agreement within fifteen (15) days after the date of service of process upon City. Written notice shall be given to Forestar by mailing of such notice to:

General Counsel  
Forestar (USA) Real Estate Group  
6300 Bee Cave Road, Building 2, Suite 500  
Austin, Texas 78746-5149

with copy to:

John K. Pierret, Executive Vice President  
Forestar (USA) Real Estate Group  
14755 Preston Road, Suite 710  
Dallas, Texas 75254

City agrees that it will not object to Forestar intervening as a party in any such lawsuit.

- Q. Except where the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof, shall be effected by amendment, in writing, executed by both City and Forestar, and subject to approval by the City Council, as evidenced by passage of an ordinance.
- R. If any clause or provision of this Agreement is held invalid, illegal or unenforceable under present or future federal, state or local laws, including but not limited to the City Charter, City Code, or ordinances of the City of San Antonio, Texas, then and in that event it is the intention of the Parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of the Parties hereto that in lieu of each clause or provision of this Agreement that is invalid, illegal, or unenforceable, there be added as a part of the Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.
- S. Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option.
- T. THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE

WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.

- U. The signers of this Agreement for City and Forestar represent, warrant, assure and guarantee that they have full legal authority to execute this Agreement on behalf of their respective entity and to bind such entity all of the terms, conditions, provisions and obligations herein contained.
- V. The exhibits listed below are an essential part of the Agreement, which govern the rights and duties of the Parties, and are incorporated herein for all purposes:

- Exhibit A : Funding Agreement
- Exhibit B: Crescent Hills Tract
- Exhibit C: Conservation Easement
- Exhibit D: Cibolo Canyons Development Tract

- W. This Agreement, together with its authorizing ordinance and its exhibits, if any, constitute the final and entire agreement between the Parties hereto and contain all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the Parties hereto, unless same be in writing, dated subsequent to the date hereto, and duly executed by the Parties.

**EXECUTED** and **AGREED** to this the \_\_\_\_\_ day of \_\_\_\_\_, 2014.

**CITY OF SAN ANTONIO**

**FORESTAR (USA) REAL ESTATE GROUP, INC.**

\_\_\_\_\_  
Sheryl L. Sculley  
City Manager

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

ATTEST (if required):

\_\_\_\_\_  
Leticia M. Vacek  
City Clerk

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Approved as to Form:

\_\_\_\_\_  
City Attorney

SAWS has determined that this Variance Agreement complies with the requirements of Sec. 34-980 of the Ordinance.

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Scott R. Halty  
Director  
Resource Protection and Compliance Department  
SAWS