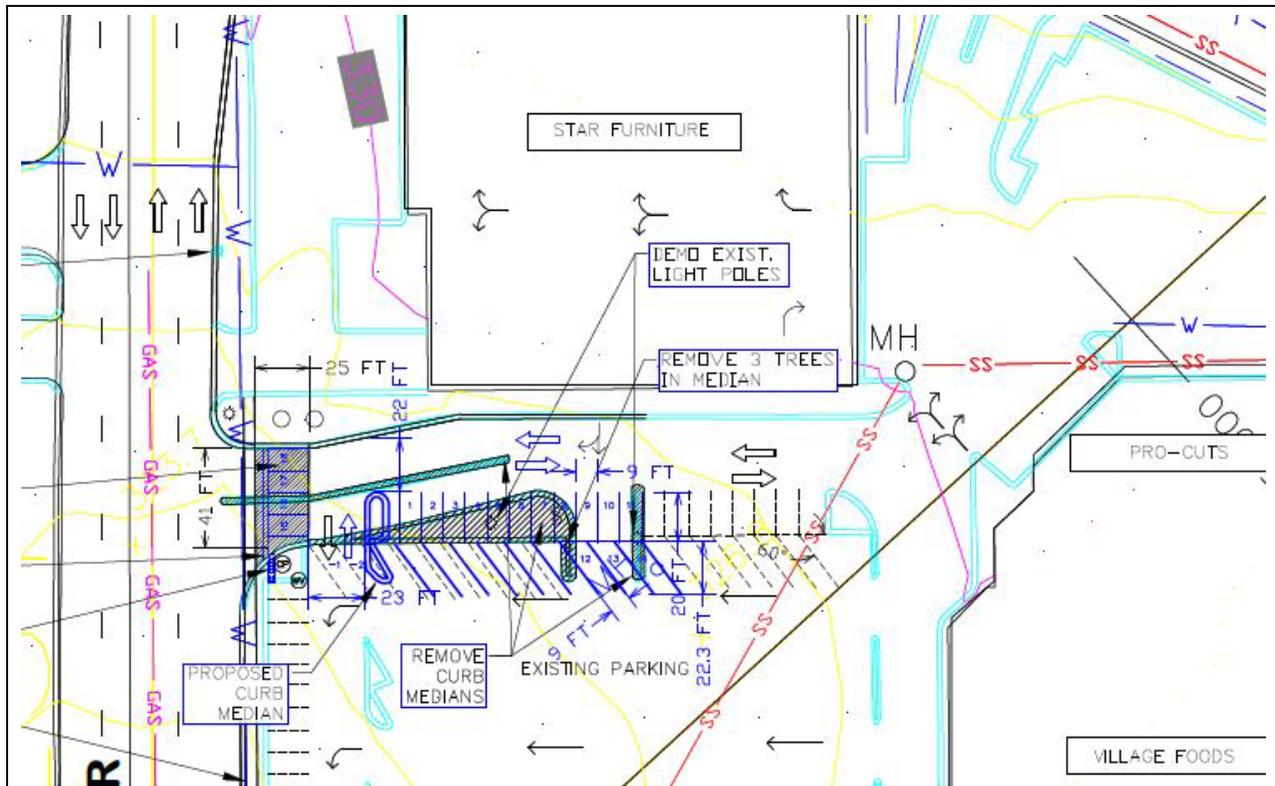


## ACTION FORM BRYAN CITY COUNCIL

<b>DATE OF COUNCIL MEETING:</b> December 30, 2013		<b>DATE SUBMITTED:</b> December 19, 2013	
<b>DEPARTMENT OF ORIGIN:</b> Development Services		<b>SUBMITTED BY:</b> Kevin Russell	
<b>MEETING TYPE:</b>	<b>CLASSIFICATION:</b>	<b>ORDINANCE:</b>	<b>STRATEGIC INITIATIVE:</b>
<input type="checkbox"/> BCD	<input type="checkbox"/> PUBLIC HEARING	<input type="checkbox"/> 1ST READING	<input checked="" type="checkbox"/> PUBLIC SAFETY
<input type="checkbox"/> SPECIAL	<input type="checkbox"/> CONSENT	<input type="checkbox"/> 2ND READING	<input type="checkbox"/> SERVICE
<input checked="" type="checkbox"/> REGULAR	<input checked="" type="checkbox"/> STATUTORY		<input checked="" type="checkbox"/> ECONOMIC DEVELOP.
<input type="checkbox"/> WORKSHOP	<input type="checkbox"/> REGULAR		<input type="checkbox"/> INFRASTRUCTURE
			<input checked="" type="checkbox"/> QUALITY OF LIFE
<b>AGENDA ITEM DESCRIPTION:</b> Consider authorizing the Mayor to execute the First Amendment to the Economic Development Agreement with Village Foods, Ltd. Pursuant to Chapter 380 of the Texas Local Government Code adding a not to exceed reimbursement of \$35,000 for parking lot circulation improvements necessitated by the closure of the main driveway to Briarcrest Drive by TXDOT, which was an inadvertent omission from the original Agreement.			
<b>SUMMARY STATEMENT:</b> This amendment to the existing economic development agreement will allow the Developer (Village Foods, Inc) to engage a contractor to perform the reconfiguration of the parking lot necessitated by the closure of the Briarcrest Drive driveway nearest to Star Furniture. The closure of the driveway next to Star Furniture has created a traffic hazard in the Developer's parking lot that has currently required Village Foods to close the now defunct entrance and exit lanes from this driveway.			
<p>The Developer seeks to restore the highest and best use of that portion land by reconfiguring the drive aisles to adjoin the existing parking lot by removing the existing raised medians and reconfiguring the parking spaces and creating a drive aisle connection to the remainder of the parking lot. This reconfiguration process gains approximately 18 parking spaces and eliminates the onsite traffic hazard (see image below). The developer will be reimbursed for the documented costs associated with the reconfiguration upon completion of the construction.</p>			



In exchange for this assistance, the Developer agrees to employ a minimum of fifteen (15) employees who will work a minimum of 30 hours per week at this location and will provide employment records as requested by the City. If the developer fails to employ the minimum number of employees for longer than 60 days during the agreement term, the developer must return 50% of the reimbursement paid by the City. If the store should close during the term of the agreement, 100% of the reimbursement would be returned to the City by the Developer. The new agreement will expire upon reimbursement payment from the City to the Developer.

**STAFF ANALYSIS AND RECOMMENDATION:** In the interest of supporting the success of this continued economic development project and promoting public safety, staff recommends approval of the First Amendment to the Economic Development Agreement with Village Foods, Inc. for a not to exceed reimbursement of \$35,000 for parking lot reconfiguration to eliminate the traffic hazard created when the Briarcrest Drive driveway was closed. The Developer has complied with the terms of the original Economic Development Agreement for the past year and alleviating this onsite traffic safety hazard will restore the full utilization of the property.

**OPTIONS (In Suggested Order of Staff Preference):**

1. Approve the Amendment to the Economic Development Agreement
2. Do not Approve the amendment and not reimburse the Developer

**ATTACHMENTS:**

1. Amendment to the Development Agreement (word)
2. Original Economic Development Agreement (PDF)

**FUNDING SOURCE:** 2010 Bond Funds – Fund 368

**APPROVALS:** Jayson E Barfknecht 12/18/13; Hugh R. Walker, 12/19/2013

**APPROVED FOR SUBMITTAL: CITY MANAGER** Kean Register 12-19-2013

**APPROVED FOR SUBMITTAL: CITY ATTORNEY** Janis K. Hampton, 12/23/13

**FIRST AMENDED DEVELOPMENT AGREEMENT BETWEEN  
CITY OF BRYAN AND VILLAGE FOODS, LTD.**

This First Amended Development Agreement (“Amendment”) is executed on this the 30<sup>th</sup> day of December 2013, by the CITY OF BRYAN, a home-rule municipal corporation organized under the laws of Texas (“City”) and Village Foods, Ltd., hereafter collectively referred to as “DEVELOPER”.

**RECITALS**

WHEREAS, the Texas Constitution prohibits any city, or other political subdivision, from lending its credit or granting public money to any individual, association or corporation whatsoever without a valid public purpose for doing so; and

WHEREAS, the Texas Constitution specifically states that economic development programs created pursuant to Chapter 380 of the Texas Local Government Code serve the public purpose of alleviating poverty, joblessness, economic blight, and provide other intangible benefits incidental to the development of the local economy; and

WHEREAS, the City is authorized by Texas law to aid in local economic development and stimulate business and commercial activity within the geographic boundaries of the City by offering economic and other incentives under Local Government Code Chapter 380; and

WHEREAS, in 2008 the City entered into such an agreement to promote local economic development and stimulate business and commercial activity in the City of Bryan with Village Foods, Ltd. (“Developer”); and

WHEREAS, the Village Foods grocery store was a new business located on a tract consisting of 5.4149 acres located in the Richard Carter League and a redevelopment of the AppleTree Store located at 1760 Briarcrest Drive, Bryan, Texas (“STORE”); and

WHEREAS, the Agreement provided for a refund up to 50% of the City of Bryan’s portion of the sales tax collected at the store by the State of Texas to assist Developer to more quickly move forward with plans to upgrade, reconfigure and purchase new equipment for the store; and

WHEREAS, in 2005, the Texas Department of Transportation (“TxDOT”) was proceeding with plans to widen FM 1179 (Briarcrest Drive) and was purchasing property from adjoining landowners for the purpose of doing so; and

WHEREAS, at the request of the City, Developer’s Landlord agreed to sell land needed by TxDOT so that the project could proceed forward resulting in reduced congestion at the intersection of Briarcrest Drive and 29<sup>th</sup> Street as well as increased traffic flow to new developments in northeast Bryan; and

WHEREAS, TxDOT’s plans required the closing of one of Developer’s two entrances onto Briarcrest Drive, which has resulted in a loss of business for Developer as well as a loss of the use of a significant portion of the Developer’s parking lot; and

WHEREAS, the resulting closure created a traffic hazard on Developer’s parking lot requiring the closure of the now defunct exit lane, and the closure of the driveway and the lane require reconfiguration in order to be put to their highest and best use; and

WHEREAS, in the interest of supporting the success of this economic development project as well as promoting public safety, the City desired to assist with the reconfiguration resulting in a safer

traffic flow as well as turning the obsolete exit lane into increased parking in exchange for Developer's compliance with TxDOT's request to widen Briarcrest Drive, however the assistance was inadvertently omitted from the original agreement; and

WHEREAS, the City Council finds that the Developer has complied with the requirements of the original Agreement, as well as assisting TxDOT with their project, and wants to amend the agreement to include the additional assistance to account for the impact of the TxDOT entrance closure; and

WHEREAS, the City Council finds that both public safety as well as sustainable economic growth will be benefitted by providing funding for a reconfiguration of Developer's parking lot and therefore determines that this economic development agreement is in the best interests of the City; and

NOW THEREFORE, for the consideration recited herein and the mutual benefits to parties accruing in connection with the proposed Project, the receipt and sufficiency being acknowledged herein, the parties agree as follows:

### **AGREEMENT**

1. The parties will continue to abide by all terms and conditions of the original Agreement, up through the expiration of same on December 31, 2013. The parties further agree that beginning January 1, 2014 the terms contained herein will be the sole remaining portion of the agreement.
2. Developer shall, within six (6) months of execution of this Amendment, engage a contractor to perform the reconfiguration of the parking lot substantially as shown in **Exhibit A**. Developer may, in consultation with the City Engineer, modify the plans for the reconfiguration in order to maximize the best use of the property while at the same time improving traffic flow and ensuring public safety.
3. The City will reimburse Developer up to \$35,000.00 for the documented costs associated with the reconfiguration. Upon completion of construction and payment of the contractor, the Developer may submit a request for reimbursement accompanied by documentation (e.g. invoices, purchase orders, etc.) of the costs of the reconfiguration construction. Payment will be made within thirty (30) days following receipt of the request for reimbursement along with the required documentation.
4. Developer will continuously employ a minimum of fifteen (15) employees who work a minimum of 30 hours per week at this location. For purposes of this Amendment, the minimum number shall be determined by a quarterly review of payroll records to determine the minimum number of employees who worked during each month of that quarter, and whatever number is determined to be the lowest during that time shall constitute the number of employees who worked that quarter. Any employee who is on paid sick leave, worker's comp or other paid leave shall be counted towards the monthly minimum.
5. Developer will keep records of employment and produce copies of same upon request by the City on a quarterly basis beginning January 1, 2014 and extending through the end of the amended term of this Agreement. In the event the Developer employs less than the required minimum number of employees for a period longer than sixty (60) days during the term of this Amendment, the Developer must return fifty percent (50%) of the reimbursement paid by the City pursuant to this Amendment. In the event the Store closes during the term of this Amendment, the Developer must return one-hundred percent (100%) of the reimbursement paid by the City pursuant to this Amendment.
6. The term for this Amendment will begin at execution and will end following payment of reimbursement by the City, unless terminated sooner.
7. **Default and No waiver of Governmental or Sovereign Immunity of the CITY.** If either party should default ("Defaulting Party") with respect to any of its obligations under this Agreement and should

fail, within sixty (60) days after delivery of written notice of such default from the other party (“Complaining Party”) to cure such default, the Complaining Party, by action or proceeding at law or in equity, shall be entitled to pursue remedies, as may be appropriate to cure such default under the Agreement, but this Amendment shall not waive governmental or sovereign immunity nor be considered to be a waiver of governmental or sovereign immunity of the CITY as to any of the Parties to this Agreement or as to any other person or entity, **AND THE CITY SHALL HAVE NO LIABILITY FOR ANY CONSEQUENTIAL, INCIDENTAL, EXEMPLARY, PERSONAL INJURY OR INDIRECT DAMAGES, (including, but not limited to, loss of profits or revenue, downtime costs, loss of use of any property, cost of substitute equipment or facilities, whether arising in tort, contract or otherwise) FOR ANY DEFAULT UNDER THIS AGREEMENT AND ALL SUCH PRESENT OR FUTURE CLAIMS FOR ANY SUCH DAMAGES ARE WAIVED AND EXCLUDED.** Further, this written Notice is not necessary to terminate this Agreement or for DEVELOPER to lose any entitlement to any rebates under this Agreement.

8. **Representations.**

**Developer hereby represents that:**

It is duly authorized, created and existing in good standing under the laws of the State and is duly qualified and authorized to carry out its obligations described in this Amendment.

It has the power, authority and legal right to enter into and perform this Amendment and the execution, delivery and performance hereof (i) have been duly authorized, (ii) will not, to the best of its knowledge, violate any applicable judgment, order, law or regulation, and (iii) does not constitute a default under, any lien, charge, encumbrance or security interest upon any assets of the Developer under any agreement or instrument to which the Developer is a party or by which the Developer or its assets may be bound or affected.

This Amendment has been duly authorized, executed and delivered by the Developer and, constitutes a legal, valid and binding obligation of the Developer, enforceable in accordance with its terms.

The execution, delivery and performance of this Amendment by the Developer do not require the consent or approval of any person which has not been obtained.

**City hereby represents that:**

The City is duly authorized, created and existing under the laws of the State and is duly qualified and authorized to carry on the governmental functions and operations as contemplated by this Amendment.

The City has the power, authority and legal right to enter into and perform this Amendment and the execution, delivery and performance hereof (i) have been duly authorized, (ii) will not, to the best of its knowledge, violate any applicable judgment, order, law or regulation, and (iii) does not constitute a default under, or result in the creation of, any lien, charge, encumbrance or security interest upon any assets of the City under any agreement or instrument to which the City is a party or by which the City or its assets may be bound or affected.

This Amendment has been duly authorized, executed and delivered by the City and, constitutes a legal, valid and binding obligation of the City, enforceable in accordance with its terms.

The execution, delivery and performance of this Amendment by the City do not require the consent or approval of any person which has not been obtained.

9. **No Third Party Beneficiary.** There are to be no third party beneficiaries to this Amendment.

10. **Invalidity.** If any provision of this Amendment shall be held to be invalid, illegal or unenforceable by a court or other tribunal of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. The parties shall use their best efforts to replace the respective provision or provisions of this Amendment with legal terms and conditions approximating the original intent of the parties.

11. **Written Notice.** All notices required by this Amendment (i) shall be in writing, (ii) shall be addressed to the parties as set forth below unless notified in writing of a change in address, and (iii) shall be deemed to have been delivered either when personally delivered or, if sent by mail, in which event it shall be sent by registered or certified mail, return receipt requested, three (3) business days after mailing. The addresses of the parties are as follows:

**To DEVELOPER:**

Village Foods, Ltd.  
Attn: Jim A. Lewis  
1716 Briarcrest Drive, Suite 300  
Bryan, Texas 77802-2777

**To CITY:**

City of Bryan  
Attn: City Manager  
P.O. Box 1000  
Bryan, Texas 77805

12. **Entire Agreement and No Assignment.** It is understood that this Amendment contains the entire agreement between the parties and supersedes any and all prior agreements, arrangements, or understandings, written or oral, between the parties relating to the subject matter. No oral understandings, statements, promises or inducements contrary to the terms of this Amendment exist. This Amendment cannot be changed or terminated orally. No verbal agreement or conversation with any officer, agent or employee of the City, either before or after the execution of this Agreement, shall affect or modify any of the terms or obligations hereunder. No future amendment shall be effective and binding unless and until it is reduced to writing and signed by duly authorized representatives of City and Developer. This Amendment and the rights and obligations under this Amendment shall be binding on the heirs, successors and assigns of the parties. This Agreement cannot be assigned or transferred to any other person or entity without the written consent of all parties to the Amendment.

13. **Texas Law.** This Amendment has been made under and shall be governed by the laws of the State of Texas. Venue for any dispute arising out of this Amendment or the original Agreement shall be in any court having jurisdiction in Brazos County, Texas.

14. **Place of Performance.** Performance and all matters related thereto shall be in Brazos County, Texas, United States of America.

15. **Waiver.** Failure of any party, at any time, to enforce a provision of this Agreement, shall in no way constitute a waiver of that provision, nor in any way affect the validity of this Agreement, any part hereof, or the right of the party thereafter to enforce each and every provision hereof. No term of this Agreement shall be deemed waived or breach excused unless the waiver shall be in writing and signed by the party claimed to have waived. Furthermore, any consent to or waiver of a breach will not constitute consent to or waiver of or excuse of any other different or subsequent breach.

16. **Representation.** DEVELOPER represents and warrants that no member of the Bryan City Council has an interest in the Property, and that the same are not owned or leased by any member of the Bryan City Council. DEVELOPER further represents and warrants that no member of the Bryan City Council is under contract either directly or indirectly with DEVELOPER, or their respective agents, contractors or subcontractors. This representation and warranty shall be in effect for the full term of this Agreement.

17. **Construction.** This Amendment is not to be construed more or less favorably between the Parties by reason of authorship or origin of language.

**EXECUTED** to be effective on the date approved by the City Council of the City of Bryan, Texas.

**CITY OF BRYAN:**

**VILLIAGE FOODS, LTD.**

\_\_\_\_\_  
Jason P. Bienski, Mayor

\_\_\_\_\_  
James A. Lewis, President

**ATTEST:**

\_\_\_\_\_  
Mary Lynne Stratta, City Secretary

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Janis K. Hampton, City Attorney

