

**Office of the City Manager**

City of Richland Hills, Texas

## Memorandum

**To:** Honorable Mayor Bill Agan and members of the Richland Hills City Council  
**From:** Curtis E. Hawk, City Manager  
**Date:** May 7, 2013  
**Subject:** Amendment to Commercial Developer Agreement with CCR Grapevine Hwy L.L.C.

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### **City Council Action Requested:**

Consider Amendment to Commercial Developer Agreement with CCR Grapevine Hwy L.L.C. , and authorize the City Manager to prepare and execute the amendment as set out below.

### **Background Information:**

The Commercial Developer Agreement (CDA) between the City of Richland Hills and CCR Grapevine Hwy L.L.C. was approved by City Council on August 21, 2012. The Agreement sets out responsibilities for the public drainage facility improvements (Upper Hardisty Drainage Improvements) to be constructed through and along the developer's property, Lots 10R and 11R, Block 15, Richland Hills Addition, to be developed as a Family Dollar retail store. The CDA spells out the improvement to be constructed by the City in Section 1B, The City's Drainage Improvements. Exhibit "B" of the CDA shows the improvements to be constructed by the City prior to November 1, 2012. The improvements to be constructed by the developer are set out in Section 1C, Developer's Drainage Improvements. Exhibit "A" of the CDA shows the improvements to be constructed by the developer. Section 2 A of the CDA is the only section of the agreement that addresses who shall pay for the construction:

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“...both the City and Developer shall retain and contract with PC Contractors...to construct their respective drainage improvements, and shall pay the general contractor for such work...”

The drainage facility constructed through and along the developer’s property is sized to serve an area much larger than that of the development, in order to fulfill the City’s need (for the Upper Hardisty Drainage Improvements). Other than the language set out above, there is no other reference to what portion of the cost of the developer’s obligation is to be paid by the developer; however, the Texas Local Government Code limits what a municipality can require the developer to pay.

Sec. 212.904. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS. (a) If a municipality requires as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer's portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality.

The City’s design engineer for the project, Halff Associates, has preliminarily determined that

- The total area draining to the storm sewer at the rear of the Walker site is approximately 49.1 acres. Of that, the Walker site is only about 2.2 acres. The Walker site accounts for approximately 4.5 percent of the total drainage area to that point.
- The total flow for the 100-year storm at the rear of the Walker site is approximately 254 cfs. Of that the Walker site contributes approximately 17 cfs

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assuming development of the whole property. The Walker site accounts for approximately 6.7 percent of the total flow at that location. Under the CDA, the developer's contract with the City's general contractor required the developer to pay for that portion of the drainage facility depicted on Exhibit A. The language in the CDA does not address the portion of the cost to be borne by the developer upon completion of the total facility, however, following LGC Sec. 212.904 and the analysis of our engineer, the developer's share of the cost for the drainage facility is somewhere between 4.5 percent and 6.7 percent of the total cost.

In order to provide for the reimbursement to the developer, Section 2 A of the CDA could be amended by addition of the following sentence to the last paragraph: **“Upon acceptance by the City of the drainage improvements constructed by Developer as set out elsewhere in this Agreement, Developer shall be reimbursed for the cost of said construction except for that cost roughly proportionate to that required by the development.”**

**Board/Citizen Input:**

N/A

**Financial Impact:**

Funds for the City's share of the construction are available in the Drainage Utility Fund

**Staff Contacts:**

Curtis E. Hawk, City Manager  
817-616-3806  
[chawk@richlandhills.com](mailto:chawk@richlandhills.com)

Attachment: Commercial Development Agreement between City and CCR Grapevine Highway LLC.

## COMMERCIAL DEVELOPER AGREEMENT

The City of Richland Hills, Texas (hereinafter referred to as “the City”), and CCR Grapevine Hwy L.L.C., a limited liability company organized under the laws of the State of Texas, the undersigned Developer (hereinafter referred to as the “Developer”), enter into this Agreement to facilitate the development of commercial real property owned by the Developer, specifically, the real property located at Boulevard 26, in the City, which property is more fully described as more fully described as Lots 10R and 11R, formerly known as Lots 10 through 13, Block 15, Richland Hills Addition to the City of Richland Hills, Tarrant County, Texas (hereinafter referred to as “the Property”),

In order to develop the Property, Developer is required to construct and install certain drainage facilities on the Property. The drainage facilities to be constructed on the Property (hereinafter referred to as “Developer’s drainage improvements”) are required to facilitate the planned commercial development of the Property and construction of certain commercial retail structures and improvements (hereinafter referred to as “the Commercial Project”) on the Property. Developer’s drainage improvements are part of a larger drainage project being constructed and installed by the City adjacent to the Property within property and easements already owned or to be acquired by the City (hereinafter referred to as “the City’s drainage improvements”).

### 1. DESCRIPTION OF ANTICIPATED IMPROVEMENTS

**A. The Commercial Project.** The Commercial Project is a Family Dollar retail store with approximately 8,107 square feet in enclosed space, and associated improvements, including parking lots and landscaping, as described in the Project Description and Site Plan attached hereto as Exhibit A.

**B. The City’s Drainage Improvements.** The City’s drainage improvements are the public utility improvements and other public improvements shown on the engineering plans prepared by Halff & Associates design engineers for the City dated June 6, 2012 and as identified as **Upper Hardisty Drainage Improvements** Project, except those improvements cross-hatched on Exhibit "A".

**C. Developer’s Drainage Improvements.** Developer’s drainage improvements are the public utility improvements and other public improvements cross-hatched on Exhibit "A" as shown on the engineering plans prepared by Halff & Associates design engineers for the City dated June 6, 2012.

### 2. PROVISIONS REGARDING CONSTRUCTION AND INSPECTION

**A. General Contractor.** Within 30 days of the execution of this agreement, both the City and Developer shall retain and contract with PC Contractors, LLC as general contractor to

construct their respective drainage improvements, and shall pay the general contractor for such work in accordance with their respective contracts with the general contractor. Such contracts shall require that the construction shall be conducted in a good and workmanlike manner, and, except to the extent modified hereafter by the parties in writing and approved by the City, in conformity with the approved plans and specifications, in conformity with all applicable government regulations and requirements relating to the planning, permitting and management of storm water which may be in force at the time of construction, and in such a way as to maintain and protect other public infrastructure.

**B. Prerequisites to Commencing Construction.** Developer shall obtain the permits from the City, free of charge.

**C. Utilities.** Developer shall cause the installation or adjustment of the required utilities to serve the Property and the Commercial Project at Developer's sole cost. The City shall not be responsible for any costs that may be incurred by Developer in the relocation of any utilities that are or may be in conflict with any of the Developer's drainage improvements or other improvements for the Commercial Project.

**D. Construction Scheduling.** Developer and City agree that Developer may commence construction of its obligations immediately so long as Developer temporarily ties into the thirty (30") storm drain on the south side of Property upon completion. City agrees to commence and complete the construction of the infrastructure cross-hatched on Exhibit "B" by November 1, 2012. The City agrees that if construction of the Commercial Project is completed prior to completion of Developer's drainage improvements, Developer shall be entitled to provide any required access to the Property across the location of the Developer's drainage improvements through a gravel drive or other temporary improvements, and be eligible for a temporary certificate of occupancy until the Developer's drainage improvements have been completed and accepted by the City.

**E. Change Orders.** It is understood that in every construction project a decision later may be made to modify the plans and/or specifications after construction has commenced. The Developer has agreed to advise the City Director of Public Works as quickly as possible when such a need has been identified and to work cooperatively with the City to make such changes in a manner that will be least disruptive to the construction of the City's drainage improvements. No change orders may be made to Developer's drainage improvements without the approval of the City's Director of Public Works.

**F. Easements.** Developer agrees to dedicate all necessary easements across the Property required for the dedication of Developer's drainage improvements to the City upon completion and final acceptance of such improvements by the City upon City's acceptance of the dedication.

**G. Assignment of right to enforce contracts.** Upon completion of all work associated with the construction of Developer's drainage improvements, Developer will assign to the City all

warranties and bonds given by the general contractor and/or sub-contractors, whether express or implied, and a non-exclusive right to enforce the contracts entered into by the Developer with the general contractor. Developer shall insert in the contract with the general contractor a provision granting to the City the right to enforce such contract as an express intended third party beneficiary of such contract, and requiring the general contractor to insert in all its sub-contracts a provision granting to the City the right to enforce such contracts as an express intended third party beneficiary of such contracts.

**H. Permits and Inspections.** In constructing the Developer's drainage improvements and the Commercial Project, Developer shall obtain the required permits to conduct construction activities in public rights-of-way, including those required by the Texas Department of Transportation. The City will issue the permits free of charge. Bureau Veritas or other agent of the City will inspect the Developer's drainage improvements and the Commercial Project during and after completion of construction. The City anticipates arranging for a special inspector to conduct inspections of the Developer's and the City's drainage improvements. The City will be responsible for paying for all inspections of the Developer's drainage improvements and the Commercial Project during and after completion of construction. The City will be responsible for paying for all inspections for the City's drainage improvements.

**I. Acceptance by the City.** Until the City finally accepts such improvements, the City shall have no liability or responsibility for any aspect of the Developer's drainage improvements. Upon final acceptance by the City, Developer shall dedicate to the City the Developer's drainage improvements and easements across the Property permitting the City to maintain the Developer's drainage improvements on the Property, and the Developer shall relinquish any right, title, or interest in and to Developer's drainage improvements or any part thereof to the City. Final acceptance of Developer's drainage improvements shall occur at such time that the City, through its City Manager or his duly appointed representative, has completed inspection of Developer's drainage improvements and determines in writing that all Developer's drainage improvements are complete and constructed in accordance with the City's specifications and in compliance with all applicable ordinances and regulations. Prior to final acceptance of the Project, the Developer shall provide to the City electronic copies in a format requested by the City and three (3) paper copies of Record Drawings of Developer's drainage improvements, showing them as actually constructed. Such drawings will be stamped and signed by a registered professional civil engineer, and shall show the grading plan and drainage area map; the plan and profile of the sanitary sewer, storm drain, roadway and waterline; all lot lines, and tie into the state Plane Coordinate System.

### **3. BOND, SECURITY, INSURANCE AND INDEMNITY REQUIREMENTS**

**A. Maintenance Bond.** The Developer shall require the general contractor to provide a bond acceptable to the City guaranteeing and agreeing to pay all costs of maintenance of the Developer's drainage improvements for a period of two (2) years from the date of final acceptance by the City, up to an amount equal to fifty percent (50%) of the amount paid by the

Developer to the general contractor, naming the City as the beneficiary if the general contractor fails to perform such maintenance. This security shall be in addition to any maintenance bond or other security required by the City in its contract with the general contractor to construct the City's drainage improvements. Such security shall be presented to the City prior to the final acceptance of the Project by the City. All bonds shall be issued by a bonding company licensed in the State of Texas and acceptable to the City, with a rating issued by A.M. Best of A- or better.

**B. Indemnification.**

**DEVELOPER COVENANTS AND AGREES TO INDEMNIFY AND DOES HEREBY INDEMNIFY, HOLD HARMLESS AND DEFEND THE CITY, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES,** from and against any and all claims or suits for property damage or loss and/or personal injury, including death, to any and all persons, of whatsoever kind or character, whether real or asserted, (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and other consultants), arising from Developer's acts or omissions, however, Developer shall not be responsible for any acts or omissions of the general contractor.

**4. GENERAL PROVISIONS**

**A. No Waiver of City Requirements.** Nothing contained in this Agreement shall be construed as the granting of any permit or permission required by any City ordinance or regulation, or the waiver of any requirement of any City ordinance or regulation.

**B. Assignment.** This Agreement or any part herein, or any interest herein, shall not be assigned by the Developer without the express written consent of the City Manager, which shall not be unreasonably withheld or delayed.

**C. Amendment.** Any agreement hereafter made between the parties shall be ineffective to modify, release, or otherwise affect this Agreement, in whole or in part, unless such agreement is in writing and executed by both parties. Amendment by electronically signed documents shall not be permitted, provided, however, that manually executed amendments may be transmitted electronically.

**D. Severability.** If any term or provision of this Agreement shall to any extent be held invalid or unenforceable, the remaining terms and provisions (including the unaffected portion of the invalid or unenforceable provision) of this Agreement shall not be affected thereby and shall be valid and enforceable to the fullest extent permitted by law.

**E. Waiver.** The failure of either party to this Agreement to complain of any action, non-action, or default of the other party shall not constitute a waiver of any of such party's rights under this Agreement. Waiver by either party to this Agreement of any right for any default of

the other party shall not constitute a waiver of any right for either a prior or subsequent default of the same obligation or for any prior or subsequent default of any other obligation. No right or remedy of either party under this Agreement or covenant, duty, or obligation of either party under this Agreement shall be deemed waived by the other party to this Agreement unless such waiver is in writing and signed by the waiving party.

**F. Parties and successors.** Subject to the limitations and conditions set forth elsewhere herein, this Agreement shall bind and inure to the benefit of the respective heirs, legal representatives, successors, and assigns of the parties hereto.

**G. Notice.** All notices, requests and communications under this Agreement shall be given in writing, addressed to the parties at their respective address set forth below and sent by one of the following methods of delivery: (i) hand delivery, with signed receipt, (ii) telecopy, (3) a nationally- recognized overnight courier service, or (iii) United States mail, certified mail, return receipt requested, postage prepaid.

To Developer:

CCR Grapevine Hwy L.L.C.  
Attn: Joey Walker  
37303 Florry Street  
North Richland Hills, Texas 76180

To the City:

City of Richland Hills  
Attention: City Manager  
3200 Diana Drive  
Richland Hills, Texas 76118  
Telecopy: (817) 616-3806

with a copy to:

Betsy Elam  
Taylor, Olson, Adkins, Sralla & Elam, L.L.P.  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107  
Telecopy: (817) 332-4740

Any notice under or pursuant to this Agreement and given in accordance with this Section shall be deemed received upon the earlier of (1) actual receipt, (2) if mailed, three (3) days after deposit in an official depository of the United States Postal Service, (3) if sent by a nationally recognized overnight courier service, the first business day after delivery to such service, and (4)

if sent by telecopy, the day of the telecopy. Any party may change its address for notice purposes by sending the other party a notice of the new address.

**H. Captions.** The captions in this Agreement are inserted only as a matter of convenience and for reference and they in no way define, limit, or describe the scope of this Agreement or the intent of any provision hereof.

**I. Number and gender.** All genders used in this Agreement shall include the other genders, the singular shall include the plural, and the plural shall include the singular, whenever and as often as may be appropriate.

**J. Governing law and venue.** The validity, enforceability, interpretation, and construction of this agreement shall be governed by the substantive laws of the State of Texas (without regard to conflict of law rules) and the laws of the United States applicable to transactions in Texas. All obligations of the parties created hereunder are to be performed, and exclusive venue shall lie, in Tarrant County, Texas.

**K. Entire agreement.** This Agreement, including all exhibits which may be attached hereto (which exhibits are hereby incorporated herein and shall constitute a portion hereof), contains the entire agreement between the parties with respect to the subject matter hereof.

**L. Rules of construction.** All parties to this transaction are represented by legal counsel, and have had the opportunity to discuss the terms of this Agreement with their legal counsel and to negotiate regarding the terms of this Agreement. It is the intent of the parties that the terms and provisions of this Agreement shall be construed neutrally, and not against or in favor of a party hereto regardless of whether such party is the drafter of this Agreement.

**M. Time of Essence.** Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

**N. Attorney's Fees.** In the event either party defaults in the performance of any of the terms, agreements or conditions contained in this Agreement and the enforcement of this Agreement, or any part thereof, is placed in the hands of any attorney who files suit upon the same, the non-prevailing party shall pay the reasonable attorney's fees, expenses and costs of the prevailing party.

**O. Force Majeure.** If either party is unable to perform any obligation under this Agreement due to unavailability of materials or equipment, strikes or other labor difficulties, governmental restrictions, casualties or other causes beyond such party's reasonable control, such obligation shall be stayed for the duration of such condition.

**P. Independent Parties.** Nothing herein shall be construed as creating a partnership or joint enterprise between the parties. Furthermore, the parties hereto acknowledge and agree that

the doctrine of respondeat superior shall not apply between them.

**Q. Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be considered an original, but all of which shall constitute one instrument.

**R. No Third Party Beneficiaries.** Except as expressly provided herein, nothing herein is intended to confer upon any person other than the parties hereto any rights, benefits or remedies under or because of this Agreement, provided, however, that the described beneficiaries of the indemnity provisions of this Agreement are expressly intended third-party beneficiaries of this Agreement.

**S. Mutual Assistance.** The parties hereto agree to take all reasonable measures which are necessary or appropriate to carry out the terms and provisions of this Agreement and to aid and assist each other in carrying out such terms and provisions.

**T. No Waiver of Governmental Immunity.** Nothing contained in this Agreement shall be construed as a waiver of the City's governmental immunity, or of any damage caps or limitations imposed by law, or any other legal protections granted to the City by law, except to the extent expressly provided or necessarily implied herein.

**U. Exhibits.** All exhibits to this Agreement are incorporated herein by reference for all purposes wherever reference is made to the same.

**REMAINDER OF PAGE LEFT BLANK INTENTIONALLY**

Signed on the 10th day of September, 2012.

CITY OF RICHLAND HILLS, TEXAS

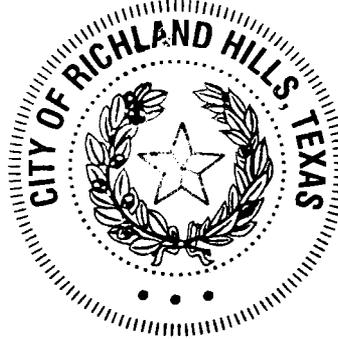
By: Bill Agan  
The Honorable Bill Agan, Mayor

ATTEST:

Linda Cantu  
Linda Cantu, City Secretary

APPROVED:

Betsy Elam  
Betsy Elam, City Attorney



Signed on the 10th day of September, 2012.

CCR Grapevine Hwy., LLC

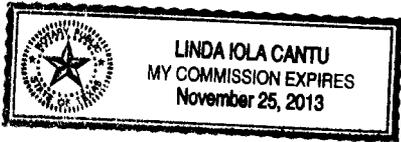
By: Joey Walker  
Name: JOEY WALKER  
Title: MANAGER

**ACKNOWLEDGMENT**

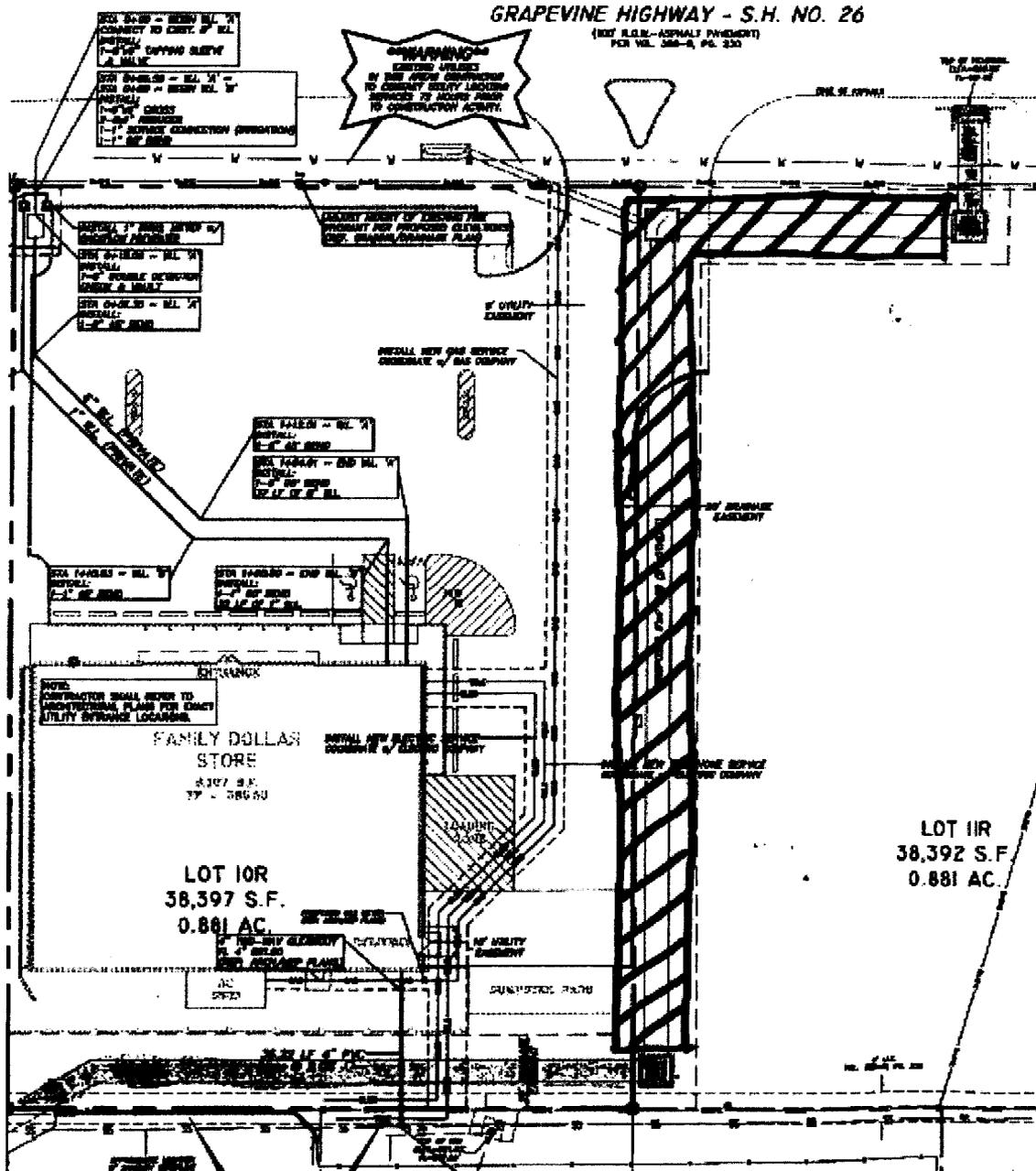
STATE OF TEXAS §  
COUNTY OF TARRANT §

Before me, the undersigned authority, on this day personally appeared Joey Walker, who after first being by me duly sworn, acknowledged and stated the witness has executed the above and foregoing document for the purposes and consideration therein expressed, and in the capacity therein expressed, and with full authority to so act, on this, 10th day of September, 2012.

Linda J. Cantu  
Notary Public in and for the State of Texas  
My commission expires: 11-25-2013



### EXHIBIT "A" DEVELOPER'S OBLIGATIONS





Development Agreement Clarification

Between the City of Richland Hills and CCR Grapevine Hwy L.L.C.

Under Section D. Construction Scheduling the City of Richland Hills wanted to clarify that the construction of a temporary tie-in from the developer portion of the new drainage system to the existing drainage system will require the completion of the inlet that is the city's responsibility of the cost share agreement.

Under Section I. Acceptance by the City the City of Richland Hills wanted to clarify that the "shown as completed" documents refers to the third party inspection service, Bureau Veritas, and that the city is not asking for a post-completion engineering study to be completed.



Matt Shaffstall

City of Richland Hills Economic Development

CCR Grapevine Hwy, L.L.C.

BY Bob Walker, mgr.