

Memorandum

To: Honorable Mayor Bill Agan and members of the Richland Hills City Council
From: Jason Moore, Assistant to the City Manager
Date: March 15, 2016
Subject: Chapter 380 Agreement with The Paysage Group, LLC

Council Action: Consider Chapter 380 Economic Development Incentive Agreement with The Paysage Group, LLC.

Background Information: Smith Lawn and Tree would like to expand due to the success of their business at their current location on Handley Ederville; which is part of the SUP requirement also being considered tonight. As such, due to the size of the parking area, they requested assistance in the capital investment of an asphalt or concrete parking surface. This agreement provides for a performance based incentive over the next three to four years, or until they are rebated \$30,000 from a portion of their sales tax revenue that the City collects within the general fund. Funding is available for this request and with the expansion, the city expects the business to generate additional revenue to offset the rebate amount.

Board/Citizen Input: N/A

Financial Impact: N/A

Staff Contacts: Jason Moore, Assistant to the City Manager, jmoore@richlandhills.com

Attachments: 1) Chapter 380 Economic Development Incentive Agreement

**CITY OF RICHLAND HILLS, TEXAS
AND
THE PAYSAGE GROUP LLC**

**CHAPTER 380 ECONOMIC DEVELOPMENT
PROGRAM AGREEMENT**

This **CHAPTER 380 ECONOMIC DEVELOPMENT PROGRAM AGREEMENT** (hereinafter referred to as the “Agreement”) is made and entered into by and between the **CITY OF RICHLAND HILLS, TEXAS** (“hereinafter referred to as “City”), a Texas home rule municipality, and **The Paysage Group LLC, DBA Smith Lawn and Tree**, (hereinafter referred to as “Company”), each of which may be singularly referred to as “Party” and jointly referred to as “Parties”, for the purposes and considerations stated below:

WHEREAS, Company has applied to City for financial assistance to expand in the City of Richland Hills, Texas; and

WHEREAS, Company estimates a minimum of **Twenty Thousand (\$20,000)** in annual Sales and Use Tax Revenue, will be generated at the Facility, located within the City of Richland Hills, Texas; and

WHEREAS, the Company desires to enter into this Agreement pursuant to Chapter 380 of the Texas Local Government Code (hereinafter referred to as “Chapter 380”); and

WHEREAS, the City desires to provide, pursuant to Chapter 380, an incentive to Company to retain the Facility in the City of Richland Hills, Texas; and

WHEREAS, the City has the authority under Chapter 380 to make loans or grants of public funds for the purposes of promoting local economic development and stimulating business and commercial activity within the City of Richland Hills, Texas; and

WHEREAS, the City has determined that a grant of funds to Company will serve the public purpose of promoting local economic development, and enhancing business and commercial activity within the City of Richland Hills, Texas; and

WHEREAS, the City has determined that location and retention of the Facility in Richland Hills will encourage increased economic development in the City, provide significant increases in the City’s sales tax revenues, and improve the City’s ability to provide for the health, safety, and welfare of the citizens of the City of Richland Hills, Texas; and

WHEREAS, the sale of products and services at the Facility will achieve the public purpose of promoting economic development and diversity, increasing employment, reducing

unemployment and underemployment, and expanding commerce and stimulating business and commercial activity in the State, in Tarrant County, and in the City of Richland Hills, Texas; and

WHEREAS, the City has concluded and hereby finds that this Agreement clearly promotes economic development in the City of Richland Hills, and, as such, meets the requisites under Chapter 380 of the Texas Local Government Code and further, is in the best interests of the City and Company; and

WHEREAS, the City has concluded and hereby finds that this Agreement clearly promotes economic development in the City of Richland Hills, Texas, and, as such, meets the requirements of Article III, Section 52-a of the Texas Constitution by assisting in the development and diversification of the economy of the state, by eliminating unemployment or underemployment in the state, and by the development or expansion of commerce within the state.

NOW, THEREFORE, for and in consideration of the agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Company agree as follows:

SECTION 1. FINDINGS INCORPORATED.

The foregoing recitals are hereby incorporated into the body of this Agreement and shall be considered part of the mutual covenants, consideration and promises that bind the parties.

SECTION 2. TERM.

This Agreement shall be for a period of **three (3)** years from the issuance of a Certificate of Completion for the Improvements, unless terminated earlier pursuant to the terms of this Agreement, or extended pursuant to Section 5(a)(3) of this Agreement.

SECTION 3. DEFINITIONS.

The following words shall have the following meanings when used in this Agreement.

- (a) **Agreement.** The word "Agreement" means this Chapter 380 Economic Development Program Agreement, together with all exhibits and schedules attached to this Agreement from time to time, if any.

- (b) **Certificate of Completion.** The words “Certificate of Completion” mean the determination by the City, in the exercise of the City’s reasonable discretion, that the Improvements have been constructed according to approved plans.
- (c) **City.** The word “City” means the City of Richland Hills, Texas, a Texas home-rule municipality, whose address for the purposes of this Agreement is 3200 Diana Drive, Richland Hills, TX 76118
- (d) **Company.** The word “Company” means The Paysage Group LLC, DBA Smith Lawn and Tree, a Commercial Enterprise, its successors and assigns, whose address for the purposes of this Agreement is 3200 Handley Ederville Road, Richland Hills, Texas 76118.
- (e) **Effective Date.** The words “Effective Date” mean the date this Agreement is signed by both parties.
- (f) **Event of Default.** The words “Event of Default” mean and include any of the Events of Default set forth below in the section entitled “Default”.
- (g) **Facility.** The word “Facility” means the tree and plant nursery located at 3200 Handley Ederville Road, Richland Hills, Texas 76118 operated by the Company.
- (h) **Improvements.** The word “Improvements” means the construction of an asphalt parking lot in conjunction with the expansion of the Facility.
- (i) **Program Grant or Program Grant Payment.** The words “Program Grant” or “Program Grant Payment” mean the economic development grants paid by the City to Company in accordance with this Agreement, computed with reference to sales and use taxes generated by the Company and received by the City from the State Comptroller. The Program Grant Payment shall be based upon reports filed by the Company with the State Comptroller’s office, and the Program Grant Payment shall be confirmed by the Area Report provided by the State Comptroller to the City for the Facility.
- (j) **Sales and Use Tax.** The words “Sales and Use Tax” or “Sales and Use Taxes” mean the City’s municipal sales and use tax, currently at the rate of one percent (1.0%), pursuant to section 321.103(a) of the Texas Tax Code, as amended, attributable to the general fund; provided, should the Texas Legislature amend the applicable Tax Code provision to increase or decrease the amount of allowed municipal sales and use tax or the citizens of Richland Hills vote to reallocate the sales and use tax, then in the event of a decrease, Sales and Use tax shall mean the actual amount of sales and use tax received by the City attributable to the general fund, and in the event of an

increase, the Sales and Use Tax shall mean one percent (1.0%). The words "Sales and Use Tax Revenue" means the Sales and Use Tax revenue generated by the Facility and received by the City.

- (k) **State Comptroller.** The words "State Comptroller" mean the Office of the Texas Comptroller of Public Accounts, or any successor agency.
- (l) **Term.** The word "Term" means the term of this Agreement as specified in Section 2 of this Agreement.

SECTION 4. OBLIGATIONS OF COMPANY.

Company covenants and agrees with the City that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Certificate of Completion.** Company covenants and agrees to obtain or cause to be obtained a Certificate of Occupancy (if applicable) from the City for the Improvements by August 1st, 2016, which Certificate of Occupancy shall be deemed the Certificate of Completion for all purposes under this Agreement. Company shall promptly notify the City when it believes the Improvements to be complete, and upon receipt of such notice the City shall promptly (i) inspect the Improvements and (ii) either issue the Certificate of Completion or notify Company of the basis for the City's refusal to issue a Certificate of Completion. Upon completion of any curative work reasonably required by the City, Company shall promptly notify the City of same, and the City shall respond in the manner set forth in the immediately following sentence.
- (b) **Operate the Facility.** Operate the Facility for the term of this Agreement in full compliance with the laws and ordinances of the City.
- (c) **Reporting of Sales and Use Taxes.** Company will provide City, on a monthly basis, a copy of the financial report that is being submitted to the State Comptroller relating to the remission of sales and use taxes collected in the City as a result of the operation of the Facility ("Sales Tax Report"). Additionally, Company will deliver a written consent for the State Comptroller's office to release the monthly reported figures along with any State audit adjustments to the City.
- (d) **Payment of Ad Valorem Taxes.** All ad valorem taxes shall be paid prior to the delinquency date of each tax year on the Facility, unless being protested in accordance with Texas law.

- (e) **Performance.** Company agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements between Company and City, and any related agreements between Company and City.

- (f) **Access to Information.** Company agrees to provide the City, upon reasonable notice, access to information related to the Facility, and access to information necessary to fulfill this Agreement, throughout the term of this Agreement.

SECTION 5. OBLIGATIONS OF CITY.

City covenants and agrees with the Company that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Program Grant Payment.** The City agrees to make payments to Company upon the satisfaction of the following conditions:
 - (1) For the one (1) percent City Sales and Use Tax Revenue generated by and attributed solely to the Facility's sales during the first twelve months, or in any subsequent calendar year and received from the State Comptroller by the City, the City covenants and agrees to pay Company 50% of all collections as set forth in this Section 5.
 - (2) An annual Program Grant Payment equal to a percentage of the amount of Sales and Use Tax Revenue generated by and attributed solely to the Facility's sales, as provided for and as set forth below, beginning on or before the first December 31st to occur after the issuance of a Certificate of Completion and continuing to be paid on or before December 31st of each year thereafter that the Facility is open for business, and ending when the total Program Grant Payment sales tax rebate has equaled Thirty Thousand Dollars (\$30,000). It is anticipated that based on the following schedule, the Sales and Use Tax Revenue generated shall equal or exceed Twenty Thousand Dollars (\$20,000) annually and the Program Grant Payment shall be fully paid within three (3) years after the Opening Date.

YEAR	PROGRAM GRANT PAYMENT
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a.

1	50% of the 1% Sales Tax Revenue
2	50% of the 1% Sales Tax Revenue
3	50% of the 1% Sales Tax Revenue

- (3) In the event that the annual Program Grant Payments as set out in 2(a) above must be extended beyond Year 3 in order to reach the total agreed upon \$30,000 Program Grant Payment award, the rebate percentage (%) shall be 25% each year thereafter until fully paid.
- (4) Under no circumstances shall the Program Grant Payments as set out in 2(a) above exceed a total of \$30,000.00
- (5) In the event the State Comptroller or a court of competent jurisdiction determines that the City received Sales and Use Tax Revenue, or that the amount of the Sales and Use Tax Revenue exceed the correct amount of the Sales and Use Tax Revenue, for a prior period of time from which the Company has received any payment, Company shall, at the City's sole option, either:(i) repay the City for any overpayment within 30 days of notification of the overpayment, or (ii) City may offset any overpayment from any future overpayment until such overpayment is repaid.

SECTION 6. DEFAULT.

Each of the following shall constitute an Event of Default under this Agreement:

- (a) **Default.** In the event of failure of Company or City to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement and Company or City fails to cure such failure within thirty (30) days after written notice from the City or Company, as the case may be, describing such failure, or if such failure cannot be cured within such thirty (30) day period in the exercise of all due diligence, City or

Company shall be in default.

- (b) **False Statements.** Any written warranty, representation or statement made or furnished to the receiving Party under this Agreement or any document(s) related hereto furnished to the receiving Party is/are false or misleading in any material respect, either now or at the time made or furnished, and the furnishing Party fails to cure same within thirty (30) days after written notice from the receiving Party describing the violation, or if such violation cannot be cured within such thirty (30) day period in the exercise of all due diligence, then if the furnishing Party fails to commence such cure within such thirty (30) day period or fails to continuously thereafter diligently prosecute the cure of such violation, or if the furnishing Party obtains actual knowledge that any such warranty, representation or statement has become false or misleading after the time that it was made, and the furnishing Party fails to provide written notice to the receiving Party of the false or misleading nature of such warranty, representation or statement within ten (10) days after the furnishing Party learns of its false or misleading nature.

- (c) **Insolvency.** The dissolution or termination of Company's existence as a going business or concern, Company's insolvency, appointment of receiver for any part of Company's property, any assignment of all or substantially all of the assets of Company for the benefit of creditors of Company, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Company unless, in the case of involuntary proceedings, such proceedings are discharged within sixty (60) days after filing.

- (d) **Effect of Default.** In the event of default under this Agreement, the non-defaulting Party shall give written notice to the defaulting Party of any default, and the defaulting Party shall have thirty (30) days to cure said default. Should said default remain uncured as of the last day of the applicable cure period and the non-defaulting Party is not otherwise in default, the non-defaulting Party shall have the right to immediately terminate this Agreement. In the event the City terminates this Agreement as a result of the foregoing, the Program Grant Payment will be immediately abolished. Additionally, Company will owe City repayment of the Program Grant Payments made to Company for the entire calendar year in which the termination occurs, plus interest at the rate of the prime rate per annum. Furthermore, no Program Grant Payment shall accrue for all tax years thereafter. Company shall pay such funds to City within sixty (60) days of termination.

SECTION 7. MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- (a) **Amendments.** At any time, City and Company may determine that this Agreement should be amended for the mutual benefit of the Parties, or for any other reason, including an amendment to induce Company to maintain its operations in the City when this Agreement could otherwise be terminated. City and Company agree to consider reasonable requests for amendments to this Agreement which may be made by any of the Parties hereto, lending institutions, bond counsel or financial consultants. Any amendments to this Agreement must be in writing and signed by the appropriate authorities of both City and Company.
- (b) **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Tarrant County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Tarrant County, Texas..
- (c) **Assignment.** This Agreement may not be assigned without the express written consent of the other Party.
- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. City warrants and represents that the individual executing this Agreement on behalf of City has full authority to execute this Agreement and bind City to the same. Company warrants and represents that the individual executing this Agreement on Company's behalf has full authority to execute this Agreement and bind it to the same.
- (e) **Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of the Agreement.
- (f) **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- (g) **Effective Date.** The effective date (the "Effective Date") of this Agreement shall be the date of the later to execute this Agreement by Company and City.
- (h) **Entire Agreement.** This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No other understanding, oral or otherwise, in direct conflict with this Agreement shall be deemed to exist or to bind any of the Parties hereto. All prior written or oral offers, counteroffers, memoranda of understanding,

proposals and the like are superseded by this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the Party or Parties sought to be charged or bound by the alteration or amendment. Neither Party is relying on any statement, representation, nor warranty of the other Party not expressly set out in this Agreement. Each of the undersigned authorized representatives of the Parties warrants and represents and does hereby state and represent that no promise or agreement which is not herein expressed has been made to him or her in executing this Agreement, and that none of us is relying upon any statement or representation of any agent of the Parties. Each of us is relying on his or her own judgment and each of us has been represented by independent counsel of our choosing. This Agreement shall not be construed against the drafter hereof, but shall be construed as if all parties drafted the same.

- (i) **Force Majeure.** It is expressly understood and agreed by the parties to this Agreement that if the performance of any obligations hereunder is delayed by reason of war, civil commotion, acts of God, inclement weather, fire or other casualty, or court injunction, the Party so obligated or permitted shall be excused from doing or performing the same during such period of delay, so that the time period applicable to such obligation or requirement shall be extended for a period of time equal to the period such Party was delayed.
- (j) **Further Acts and Releases.** City and Company each agrees to take such additional acts and execute such other documents as may be reasonable and necessary in the performance of their obligations hereunder.
- (k) **Governmental Powers; Waiver of Immunity.** By execution of this Agreement, the City does not waive or surrender any of its governmental powers, immunities or rights.
- (l) **No Third Party Beneficiaries.** The performance of the respective obligations of City and Company under this Agreement are not intended to benefit any party other than City or Company, except as expressly provided otherwise herein. No person or entity not a signatory to this Agreement shall have any rights or causes of action against any Party to this Agreement as a result of that Party's performance or non-performance under this Agreement, except as expressly provided otherwise herein.
- (m) **Notices.** Any notice or other communication required or permitted by this Agreement (hereinafter referred to as the "Notice") is effective when in writing and (i) personally delivered either by facsimile (with electronic information and a mailed copy to follow) or by hand or (ii) three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified with return receipt requested, and addressed as follows:

if to Company: The Paysage Group LLC

 3200 Handley Ederville Road

 Richland Hills, Texas 76118

if to City: City of Richland Hills

 3200 Diana Drive

 Richland Hills, TX 76118

 ATTN: _____

- (n) **Ordinance Applicability.** The City represents to Company that this Agreement meets all existing applicable ordinances of the City, and to the extent legally permissible, commits to ensure no future ordinances impair its operation. This Agreement shall confer no vested rights on the Facility unless specifically enumerated herein.

- (o) **Relationship of Parties.** The Parties shall not be deemed in a relationship of partners or joint ventures by virtue of this Agreement, nor shall either Party be an agent, representative, trustee or fiduciary of the other. Neither Party shall have any authority to bind the other to any agreement.

- (p) **Severability.** City and Company declare that the provisions of this Agreement are severable. If it is determined by a court of competent jurisdiction that any term, condition or provision hereof is void, voidable, or unenforceable for any reason whatsoever, then such term, condition or provision shall be severed from this Agreement and the remainder of the Agreement enforced in accordance with its terms.

- (q) **Time is of the Essence.** Time is of the essence in the performance of this Agreement.

- (r) **Undocumented Workers.** Company certifies that Company does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Company is convicted of a violation under 8 U.S.C. § 1324a(f), Company shall repay the amount of the public subsidy provided under this Agreement plus interest, at the rate of the prime rate plus two percent (2%) per annum, not later than the 120th day after the date the City notifies Company of the violation.

CITY:

City of Richland Hills
a Texas home rule municipality

Dated: _____

By: _____
City Manager

ATTEST:

By: _____
City Secretary

APPROVED AS TO LEGAL FORM:

By: _____
City Attorney

COMPANY:

The Paysage Group, LLC
a Texas limited liability company

Dated: _____

By: _____
Its: Managing Member