

COTTONWOOD HEIGHTS

RESOLUTION NO. 2014-03

A RESOLUTION APPROVING A REPAIR AGREEMENT
WITH OVERLOOK AT OLD MILL HOMEOWNERS ASSOCIATION, INC.
(3000 EAST WALL)

WHEREAS, the city council (the "*Council*") of the city of Cottonwood Heights (the "*City*") met in regular session on 28 January 2014 to consider, among other things, approving the City's entry into a "Repair Agreement" (the "*Agreement*") with Overlook at Old Mill Homeowners Association, Inc. concerning a retaining wall on 3000 East in the City; and

WHEREAS, the Council has reviewed the form of the Agreement, a photocopy of which is annexed hereto; and

WHEREAS, after careful consideration, the Council has determined that it is in the best interests of the health, safety and welfare of the citizens of the City to approve and ratify the City's entry into the Agreement as proposed;

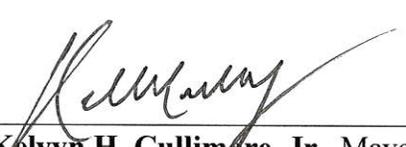
NOW, THEREFORE, BE IT RESOLVED by the city council of Cottonwood Heights that the attached Agreement is hereby approved, and that the City's mayor and recorder are authorized and directed to execute and deliver the Agreement on behalf of the City.

This Resolution, assigned no. 2014-03, shall take effect immediately upon passage.

PASSED AND APPROVED effective 28 January 2014.

COTTONWOOD HEIGHTS CITY COUNCIL

By

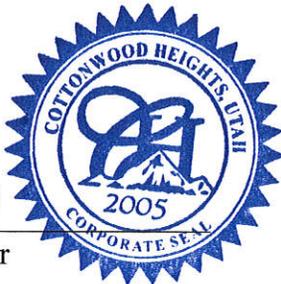


Kelvyn H. Cullimore, Jr., Mayor

ATTEST:



Kory Solerio, Recorder



VOTING:

Kelvyn H. Cullimore, Jr.	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Michael L. Shelton	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
J. Scott Bracken	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Michael J. Peterson	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Tee W. Tyler	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>

DEPOSITED in the office of the City Recorder this 28th day of January 2014.

RECORDED this 29 day of January 2014.

612463.1

AFTER RECORDING, RETURN TO:

Cottonwood Heights

Attn: City Recorder

1265 East Fort Union Blvd., Suite 250

Cottonwood Heights, UT 84047

**Repair Agreement
(3000 East Wall)**

THIS REPAIR AGREEMENT (this "*Agreement*") is made effective __ January 2014 between the **OVERLOOK AT OLD MILL HOMEOWNERS ASSOCIATION, INC.**, a Utah non-profit corporation whose address is c/o Michael F. Richards, President, 2949 Juliet Way, Cottonwood Heights, UT 84121 ("*Association*"), and the city of **COTTONWOOD HEIGHTS**, a Utah municipality whose address is 1265 East Fort Union Blvd., Suite 250, Cottonwood Heights, UT 84047 ("*City*").

RECITALS:

A. In approximately 1994, in connection with the development of the "Overlook at Old Mill" subdivision (the "*Project*"), a retaining wall (the "*Wall*") made of concrete blocks (the "*Blocks*") was installed by the Project's developer, Johansen Thackeray & Co. Inc. ("*Developer*"), behind the public sidewalk along the 3000 East side of the Project.

B. Over the intervening 19 years, the Blocks have deteriorated. The Wall's ability to retain the uphill slope appears to be gradually diminishing, and debris from the Wall falls to the sidewalk and roadway below, necessitating expenditure of public funds by City to monitor and remove that debris.

C. If the Wall is not repaired or replaced (collectively, "*repairing the Wall*"), then it is likely that the Wall eventually will fail, possibly resulting in a landslide onto the 3000 East right of way and related damage to public and private property.

D. Consequently, City has engaged in discussions concerning repairing the Wall with Association (which represents all of the owners of the 65 lots located in the surrounding Project) and the owners of the six lots that directly abut the Wall (the "*Owners*").

E. Such discussions have been complicated by the fact that the parties disagree concerning who bears legal responsibility for repairing the Wall:

(1) City believes that repairing the Wall is the responsibility of either:

(a) Association, on the theory that the Wall is part of the Project's private infrastructure because (i) over half of the composite retaining system that includes the Wall is physically located within the boundaries of Project, (ii) the Wall is private infrastructure of the Project because it was installed by Developer in order to gain approval of the Project by

Salt Lake County (which then had jurisdiction over the Project) (“*County*”), and a public dedication conveying ownership of the Wall has never been accepted by either County or City, and (iii) in any event, item 6 of an approval letter to Developer dated 24 September 1994 from County states that the streetscape along 3000 East is to be maintained by Association, which City believes includes the Wall; and/or

(b) The Owners, because the Wall is located on or adjacent to their lots, and serves to physically retain the slopes of those lots.

(2) On the other hand, Association believes that repairing the Wall is the responsibility of either:

(a) The Owners, because the Wall is located on or adjacent to their lots, and serves to physically retain the slopes of those lots, and/or

(b) City, on the theory that the Wall is public infrastructure.

(3) And finally, the Owners believe that repairing the Wall is the responsibility of either:

(a) Association, on the theory that the Wall is private infrastructure of the entire Project because it was installed by Developer in order to gain County’s approval of the Project, and/or

(b) City, on the theory that the Wall is public infrastructure.

F. Given the fundamental disagreement concerning who is legally responsible for repairing the Wall, and to avoid the delay, expense and uncertainty of litigation, City and Association (each, a “*Party*,” and collectively, the “*Parties*”) desire to resolve the impasse as specified in this Agreement.

G. This Agreement constitutes the entire agreement between the Parties concerning its subject matter, and supersedes any and all prior negotiations and/or agreements between them concerning such matters, including, without limitation, a letter of intent between the Parties dated 30 November 2013.

AGREEMENT:

NOW THEREFORE, in consideration of the premises, the mutual covenants and undertakings of the Parties, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

Section 1. **New Wall.** Before 31 December 2014, City shall cause the Wall to be removed and replaced with a new, block retaining wall. Such work (the “*Work*”) shall be performed by licensed, bonded contractors/subcontractors reasonably selected by City, pursuant to plans and specifications prepared by City’s engineer. Although City shall contract for and oversee all aspects of repairing the Wall, City shall have no obligation to contract for, commence or otherwise undertake repairing the Wall until this Agreement has been mutually executed and

delivered by City and Association and Association has executed and delivered the Note (defined below) to City.

As part of the Work, City will be responsible for substantially repairing any damage to the landscaping, fencing, irrigation, exterior lighting and similar aspects of Owners' lots caused by the City's work in repairing the Wall.

Section 2. **Allocation of Cost.** The total estimated cost of the Work is \$187,500. Association shall pay \$90,000 of the final cost (the "*Cost*") of repairing the Wall and City shall pay the balance, provided that City's share of the Cost shall be at least equal to Association's share. How Association's \$90,000 share is allocated to and paid by its members (the "*HOA Members*," which include the Owners) is entirely in Association's discretion.

Section 3. **Payment.** Association's share of the Cost will be evidenced by a promissory note from Association to the City (the "*Note*"). The Note will be in the principal amount of \$90,000 (less any prior payment by Association against that amount); will bear interest at the Utah "Public Treasurer's Investment Fund" rate (also called the "*PTIF rate*," which currently is less than 1% per annum), adjusted annually on each anniversary of the Note; and will be payable in ten annual amortized installments. The balance due under the Note may be prepaid in whole or in part.

If any HOA Members elect to prepay their assessed portions of Association's share of the Cost, then Association promptly shall pay over such funds to City, and the balance due under the Note shall be reduced accordingly.

Section 4. **Future Repair, Replacement and Maintenance.** Future repair or replacement responsibilities for the repaired Wall shall be equally shared by City and Association or their successors. Routine maintenance (if any is advisable) of the repaired Wall, the uphill slope retained by the Wall, etc. shall be performed by Association at its cost. City shall continue to provide snow removal from the abutting public sidewalk in accordance with City policies and procedures and at City's cost.

Section 5. **Constructive Notice.** Record notice of Association's repair, replacement and maintenance responsibilities concerning the repaired Wall shall be publicly given as follows: (a) by recording this Agreement as an encumbrance against the common areas of the Project, which common areas are described on the exhibit that is annexed hereto; and (b) by including an advisory note on the subdivision plat of the Project concerning Association's responsibilities concerning the Wall. Association hereby consents, on behalf of all of the HOA Members, to such modification of the plat of the Project, and Association promptly shall cooperate with City to so provide recorded, constructive notice concerning Association's responsibilities under the Agreement.

Section 6. **Additional Provisions.** The following provisions are also an integral part of this Agreement:

(a) **Binding Agreement.** This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

(b) Captions. The headings used in this Agreement are inserted for reference purposes only and shall not be deemed to define, limit, extend, describe, or affect in any way the meaning, scope or interpretation of any of the terms or provisions of this Agreement or the intent hereof.

(c) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures upon any counterpart were upon the same instrument. All signed counterparts shall be deemed to be one original.

(d) Severability. The provisions of this Agreement are severable, and should any provision hereof be void, voidable, unenforceable or invalid, such void, voidable, unenforceable or invalid provision shall not affect the other provisions of this Agreement.

(e) Waiver of Breach. Any waiver by either party of any breach of any kind or character whatsoever by the other, whether such be direct or implied, shall not be construed as a continuing waiver of, or consent to any subsequent breach of this Agreement.

(f) Amendment. This Agreement may not be modified except by an instrument in writing signed by the parties hereto.

(g) Interpretation. This Agreement shall be interpreted, construed and enforced according to the substantive laws of the state of Utah. This Agreement is the result of arms-length negotiations between the parties, each of whom has had substantive input regarding the various provisions of this Agreement. Accordingly, each of the parties affirms its desire that this Agreement be interpreted in an absolutely neutral fashion with no regard to any rule of interpretation (or the like) requiring that the provisions of this Agreement be construed to favor one party (such as, for example, the party that did not draft this Agreement) over the other.

(h) Attorneys' Fees. If any action or proceeding is brought by either party concerning this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees, whether such sums are expended with or without suit, at trial, on appeal, or in any bankruptcy or insolvency proceeding.

(i) Notice. Any notice or other communication required or permitted to be given hereunder shall be deemed to have been received (i) upon personal delivery or actual receipt thereof by hand delivery or by facsimile transmission, (ii) upon acceptance or refusal of delivery by Federal Express or a similarly reputable guaranteed overnight delivery service, or (iii) within three days after such notice is deposited in the United States mail, postage prepaid and certified and addressed to the respective addresses set forth above or to such other address(es) as may be supplied by a party to the other from time to time in writing.

(j) Time of Essence. Time is the essence of this Agreement.

(k) Assignment. Neither party may assign its rights or delegate its duties under this Agreement without the prior written consent of the other party, which consent shall not be withheld, conditioned or delayed unreasonably.

(l) Survival. All of the parties' respective representations, covenants and warranties and obligations (including, without limitation, any obligation to indemnify) set forth herein shall survive any closings and the delivery of any deeds, bills of sale or the like contemplated herein.

(m) Force Majeure. Each date by which a condition or obligation set forth herein must be satisfied shall be extended by the number of days during which satisfaction of such condition or obligation is necessarily delayed by strikes; lockouts; civil strife; war; natural disasters; acts of God; unavailability of materials or supplies; delays by governmental authorities or any lender in giving any required approvals; or any other events beyond the control of the party required to perform, so long as the party charged with performance in that situation diligently pursues such performance.

(n) Default. If a party defaults hereunder and such default continues following at least 20 days' prior written notice and opportunity to cure from the non-defaulting party to the defaulting party, the non-defaulting party may pursue any and all remedies that are available in equity or at law.

[Signature page follows.]

CITY:

COTTONWOOD HEIGHTS,
a Utah municipality

Attest: _____
Kory Solorio, Recorder

Kelvyn H. Cullimore, Jr., Mayor

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

On __ January 2014, personally appeared before me **Kelvyn H. Cullimore, Jr.** and **Kory Solorio**, who duly acknowledged to me that they executed the foregoing instrument as the mayor and the recorder, respectively, of **COTTONWOOD HEIGHTS**, a Utah municipality.

Notary Public

ASSOCIATION:

**OVERLOOK AT OLD MILL
HOMEOWNERS ASSOCIATION, INC.,**
a Utah non-profit corporation

Attest: _____
Keith Wallace, Secretary

By: _____
Michael F. Richards, President

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

On __ January 2014, personally appeared before me **Michael F. Richards** and **Keith Wallace**, who duly acknowledged to me that they executed the foregoing instrument as the president and the secretary, respectively, of **OVERLOOK AT OLD MILL HOMEOWNERS ASSOCIATION, INC.**, a Utah non-profit corporation.

Notary Public

Exhibit to Repair Agreement

(Legal description of Project's Common Areas)

3000 East Wall location and Easement

PARCEL #'s

22-23-181-010

22-23-181-011

22-23-329-014

22-23-329-013

22-23-329-012

22-23-329-011

A 10 foot wide Wall and Wall location Easement located in the Northwest and the Southwest Quarter of Section 23, Township 2 South Range 1 East, Salt Lake Base and Meridian; Two (2) feet to the East and Eight (8) feet West of the below described centerline. The centerline and centerline of said wall being described as follows.

Beginning at a the Northeast corner of lot 20 and 21 Overlook at Old Mill Subdivision as recorded in book 95 page 59 of the Salt Lake County Recorder's office and running thence Southerly along the East lot line of lots 21, 22, 23, 24, and 35 to the point of ending