

RECORDING REQUESTED BY:

WHEN RECORDED, MAIL TO:

Attn:

(SPACE ABOVE FOR RECORDER'S USE)

APNs:

**AGREEMENT AFFECTING REAL PROPERTY FOR CENTRIA WEST (APEX) DEVELOPMENT**

THIS AGREEMENT AFFECTING REAL PROPERTY FOR CENTRIA WEST (APEX) DEVELOPMENT (“**Agreement**”) is made and entered into as of the \_\_\_\_ day of October 2013 by and between Milpitas Centria West, LLC, a Delaware limited liability company (“**Developer**”) and CITY OF MILPITAS, a municipal corporation of the State of California (the “**City**”). Developer and the City may collectively be referred to herein as the “**Party**” or the “**Parties**”.

RECITALS:

A. Developer is the owner of certain real property located in the City of Milpitas, County of Santa Clara, State of California, more particularly described on Exhibit “A” attached hereto and incorporated herein by reference (the “**Developer Property**”). Developer has or intends to construct residential dwelling units on the Developer Property for the purposes of leasing and operating apartments. For purposes hereof, Developer Property shall mean and refer to the real property described in Exhibit “A”.

B. Pursuant to that certain Subdivision Public Improvement Agreement between the Developer and the City dated as of August 19, 2011, the City and Developer have agreed that the Developer will construct certain improvements on a parcel owned by the City, which is immediately adjacent to Developer Property which as shall serve as a public park, as shown on Exhibit “B”, attached hereto and incorporated herein (the “**Park Land**”).

C. City seeks Developer to provide maintenance obligations and establish certain rights incidental to such efforts on the improvements that will be constructed on the Park Land, as further described herein.

NOW, THEREFORE, for value consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. Grant of License. City grants Developer a non-exclusive license to maintain those improvements to be constructed on the Park Land as further described on Exhibit "C" attached hereto and incorporated herein by reference (the "**Park Improvements**"). The parties acknowledge that the Park Improvements once completed will be dedicated to the City. To the extent the description of the Park Improvements set forth in Exhibit C varies from the actual Park Improvements constructed and dedicated to the City, then Exhibit C shall be modified upon mutual consent of City and Developer.
2. Party Status. For purposes of this Agreement, Developer shall be considered solely as a licensee and not as an agent or subsidiary of the City; no possessory interest or right to own, lease, occupy or control the Park Improvements or the Park Land is granted herein.
3. Developer Defined. For purposes of this Agreement, the term "Developer" shall include any current owner of the Developer Property or successor in interest, including any Homeowner's Association or other common interest organization exercising control of or maintenance responsibility over all or a portion of Developer Property.
4. Maintenance Obligations of Park.
  - (a) Upon completion of the Park Improvements and dedication of the Park Improvements from Developer to City, Developer shall, at Developer's sole cost and expense, fully and timely perform and satisfy any and all terms, conditions, and maintenance obligations of this Agreement. Developer shall, at Developer's sole cost and expense, provide labor, supervision, supplies, materials, equipment, and any and all other tools and manpower necessary to clean, preserve, maintain and repair the Park Improvements, as further set forth herein. The maintenance services required herein is referred to as the "**Maintenance Services**" and shall be subject to City review and approval.
  - (b) Developer agrees and acknowledges that the Park Land will be a public park and open to the public during certain hours as determined by City. Nothing herein gives Developer the right to restrict or to exclude any person or entity from the Park Land. If Developer believes that any portion of the Park Land needs to be restricted or closed for public safety purposes to perform the Maintenance Services described herein, Developer shall obtain City's prior written approval of any restriction on access and also obtain City's prior written approval of the method of providing notice to the public.
  - (c) Developer shall ensure that all employees of Developer performing work under this Agreement pass a criminal background check and receive "live-scan" clearance through the database of the California Department of Justice, and an FBI criminal database or equivalent national database, as allowed by Federal, State and local laws. Developer shall cause that its contracts with its contractors and agents performing the Maintenance Services contain the same obligation upon such contractors and agents as set forth in the immediately preceding sentence in this Section 4(c). No employees, contractors, or agents shall perform any Maintenance Services unless each of those individuals meets the requirement

of this Agreement and all applicable local, state and federal requirements. Developer shall also require all employees, contractors, or agents performing work under this Agreement are at least eighteen (18) years of age on the first day of their employment.

- (d) Developer shall perform the Maintenance Services in substantial compliance with maintenance standards set forth by the City for the City's parks located in the City containing similar improvements as the Park Improvements (the "**City Standards**"). All maintenance performed under this Agreement shall be subject to City review and approval. After completion of the Park Improvements, City and Developer shall immediately meet to establish such maintenance obligations. Thereafter, City and Developer shall meet annually to confirm the scope of the maintenance obligations being performed by the Developer is consistent with City Standards. The costs of such maintenance shall be exclusively borne by Developer, provided, however, any costs associated with Capital Repairs for the Park Improvements shall be borne and paid by the City except as provided in Section 4(f) below. Subject to Section 4(f) below, Capital Repairs is defined for purposes of this Section as any repair or replacement above and beyond the standard monthly Maintenance Services required of the City's vendors pursuant to a fixed price landscape maintenance service contract in accordance with City Standards. In addition, if the City elects to change or modify any aspect of the design of the Park Improvements or the landscaping of the Park Improvements after completion and dedication of the Park Improvements, the costs associated with such changes or modifications shall be borne and paid by the City. In no way, shape, or form will Developer get any payments or tax credits from City for the performance of such maintenance.
  - (e) Service Requests. Developer shall respond to all special service requests within seven (7) days. Special service requests can include any aspect of duty under the Maintenance Services, including graffiti abatement and the repair of vandalism (e.g., turf damage and the scattering of broken glass). All potential safety hazards or dangerous condition as determined solely by City shall be addressed within the same day; all other repairs shall be worked within the regular maintenance schedule as soon as possible and within a maximum of seven (7) days.
  - (f) Developer acknowledges and agrees the Park Improvements will be constructed within existing third party utility and other easement areas. Developer shall be fully responsible for the cost, expense, and performing any repair and/or replacement of any turf, walkway, hardscape, asphalt, landscaping, tot lot or other Park Improvements that may be damaged or otherwise require repair and/or replacement arising from a third party exercising its existing easement rights, provided that the cost of such or repair and/or replacement work does not exceed \$2,500 for any single occurrence, or \$5,000 in any calendar year. Existing easement rights shall mean any easement, whether recorded or unrecorded, as of the date of this Agreement.
5. Insurance of Developer.
- (a) Before beginning any work under this Agreement, Developer shall procure "occurrence coverage" insurance against claims for injuries to persons or damages

to property that may arise from or in connection with the performance of the work consisting of the construction of the Park Improvements and the ongoing maintenance of the Park Improvements hereunder by the Developer and its agents, representatives, employees, and subcontractors. Developer shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the City. Developer shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce copies of said policies to the City upon demand. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution.

- (b) **Workers' Compensation.** Developer shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Developer. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than ONE MILLION DOLLARS (\$1,000,000.00) per accident. The insurer shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

An endorsement shall state that coverage shall not be suspended, voided, canceled, except after thirty (30) days' prior written notice has been given to the City.

- (c) **Commercial General and Automobile Liability Insurance.**

- (1) General requirements. Developer, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than TWO MILLION DOLLARS (\$2,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from Developer's performance, or failure to perform, its obligations under this Agreement, including the use of owned and non-owned automobiles.

- (2) Minimum scope of coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.

- (d) Additional requirements. Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:
- (1) City and its officers, officials, agents, and employees (the “City Additional Insureds”) shall be covered as additional insureds with respect to each of the following: liability arising out of activities performed pursuant to this Agreement by or on behalf of Developer, including the insured’s general supervision of Developer; products and completed operations of Developer with respect to the Park Improvements; premises owned, occupied, or used by Developer to the extent the same pertain to Developer’s obligation under this Agreement; and automobiles owned, leased, or used by the Developer to the extent the same pertains to the Developer’s obligation under this Agreement.
  - (2) The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
  - (3) An endorsement must state that coverage is primary insurance with respect to the City and its officers, officials, agents, and employees, and that, except as otherwise provided herein, no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.
  - (4) Any failure of Developer to comply with reporting provisions of the policy shall not affect coverage provided to City and its officers, officials, agents, and employees.
  - (5) An endorsement shall state that coverage shall not be suspended, voided, or canceled except after thirty (30) days' prior written notice has been given to the City.
- (e) Insurance coverage levels under this Agreement may be modified by the City, in its sole discretion, upon one (1) year’s advance notice to the Developer.
- (f) Developer shall provide to the City certificates of insurance upon acquisition and renewal of insurance coverage.
- (g) In no event shall Developer be obligated to insure the City Additional Insureds with respect to any loss to the extent such loss is caused by the sole negligence or willful misconduct of the City, its employees, representatives, or agents.

6. Duration. This contract is perpetual but can be terminated by agreement of both Parties.

7. Right of City to Remedy Failure of Maintenance Obligation. If Developer fails to comply with the provisions of this Agreement, then the City may deliver written notice to Developer identifying the specific defects regarding the maintenance of the Developer Maintained Improvements. Subject to this Section 6, Developer shall have fifteen (15) business days to correct the City’s concerns, provided that if such correction cannot be completed within such fifteen (15) business day time period, then Developer shall be afforded a reasonable amount of additional time to correct such City’s concerns provided Developer commences such correction during such fifteen (15) business day time period

and diligently pursues such correction. Notice provided by the City shall specify the date Developer must remedy the City's concerns in order to avoid action by the City. If the Developer disagrees in good faith with the City's concerns, Developer shall notify the City of such disagreement within seven (7) business days of receipt of such notice and the parties shall discuss in good faith the City's concerns and Developer's disagreement with such concerns. Notwithstanding the foregoing, if the City determines an emergency situation exists which must be remedied immediately, then the City will provide written notice to Developer specifying the emergency situation must be remedied within twenty-four (24) hours.

If after notice from the City, Developer fails to correct the specific defects identified in the City's notice within the specified time period set forth above, the City shall have the right to remedy the defects. The City may retain, at its election its own contractors, or the Developer's contractors, or other appropriate third party company to complete the work. Any costs incurred by the City for maintenance of the Park shall be solely borne by the Developer. The City shall provide an invoice for the maintenance cost incurred by the City to Developer. Developer shall remit payment to the City within thirty (30) days from receipt of the invoice. The Parties agree that any maintenance undertaken by the City under this section shall not terminate the maintenance obligation of Developer. In the event of non-compliance with the City's notice more than twice in any twelve (12) month period, or lack of prompt reimbursement, the City retains the right to terminate the contract in addition to any collection remedies it may have according to law.

8. Utilities. City shall be responsible for all utilities in connection with the operation of the Park and the Park Improvements. All utilities that are the responsibility of the City shall be metered separately and such utilities shall be in the account name of the City and the cost of the replacement of any such utilities shall be the responsibility of the City, subject to Section 4(f) above.
9. Indemnification.
  - a. Developer hereby covenants and agrees to indemnify, defend, and hold City, its officers, agents, and employees harmless from and against any and all claims, damages (including damage to property and injury to persons), demands, losses, obligations, judgments, liabilities, costs and expenses (including, without limitation, attorneys' and other fees) (collectively, "Losses") arising from or in any way connected with or related to any of the following: (i) any lawsuit, arbitration, administrative proceeding or other legal action directly concerning Developer's and/or its agents' maintenance or construction of the Park Improvements and, (ii), any breach by Developer of any of its obligations under this Agreement. However, in no event shall Developer be obligated to defend or indemnify the City with respect to Losses to the extent caused by the sole negligence or willful misconduct of the City, its employees, representatives, or agents.
10. Assignment. Developer may, upon written notification to the City and approved by City, such approval not to be unreasonably withheld, assign all of its rights and obligations set forth in this Agreement only to successors in interest to the ownership of the Developer Property. Developer hereby covenants and warrants for itself and its successors and assigns, that, except as otherwise provided for herein, conveyance of any interest in the

Developer Property to a common interest association, such as a homeowners' association, shall constitute an assumption by any successors, assigns or transferees of Developer, of the obligation under this Agreement. Upon a City-approved assignment, the successor or assign shall have all rights and obligations of Developer set forth in this Agreement, and Developer shall thereafter have no further rights, liabilities or obligations under the Agreement and shall be released from all such liability hereunder.

11. Notices. Unless otherwise provided in this Agreement, all notices, demands, or other communications given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been given upon personal delivery or as of the second business day after mailing in the United States registered or certified mail, return receipt requested, postage prepaid, addressed as follows or to such other address or to such other person as either party may designate:

If to Developer:

Milpitas Centria West, LLC  
c/o Lyon Realty Advisors, Inc.  
4901 Birch Street  
Newport Beach, California 92660  
Attention: Frank T. Suryan, Jr.

With a copy to:

Lyon Management Group, Inc  
4901 Birch Street  
Newport Beach, California 92660  
Attention: General Counsel

If to City:

City Engineer  
City of Milpitas  
455 East Calaveras Boulevard  
Milpitas, CA 95035

12. Headings. The titles or headings of the sections of this Agreement are not a part of the Agreement and shall have no effect upon the construction of or interpretation of this Agreement.
13. Exhibits. This Agreement includes the following Exhibits that are attached hereto and incorporated herein:
  - Exhibit A Developer Property
  - Exhibit B Park Land
  - Exhibit C Park Improvements
14. General Provisions.

- (a) Hazardous Materials. Developer covenants and agrees that it shall not cause or permit any Hazardous Material (as defined by “Laws” below) to be brought upon, kept, used, stored, generated or disposed of in, on or about the Park Land except in compliance with applicable environmental laws.
- (b) Waiver. The waiver by one Party of any breach by any other Party of any of the provisions of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach either of the same or of another provision of this Agreement.
- (c) Entire Agreement. This Agreement, including all exhibits attached hereto, represents the entire understanding of the Parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Agreement may be modified only by a written amendment duly executed by the Parties to this Agreement.
- (d) Partial Invalidity. If any provision of this Agreement is held by a court of competent jurisdiction to be either invalid, void or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect and unimpaired by the holding.
- (e) Compliance with Laws. Developer shall each comply with all applicable laws, ordinances, codes, and regulations (collectively “laws”) of the federal, state, and local governments, including without limitation, any and all laws specified elsewhere in this Agreement.
- (f) Governing Law. This Agreement shall be governed by and in accordance with the laws of the State of California.
- (g) Venue. In the event that suit shall be brought by either Party to this Agreement, the Parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.
- (h) Time is Essence. Time is of the essence with respect to the performance of each and every provision of this Agreement.
- (i) Counterparts. This Agreement may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement. A copy, original or facsimile with all signatures appended together shall be deemed a fully executed Agreement.
- (j) Prevailing Wage. Maintenance Services performed under this Agreement are subject to the payment of prevailing wage in accordance with State Law. Developer shall comply and cause its contractors and agents to comply with all prevailing wage requirements under City and State Laws.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as set forth below.

Dated: \_\_\_\_\_

MILPITAS CENTRIA WEST, LLC,  
a Delaware limited liability company

By: Colony – LCV Venture, LLC, a Delaware  
limited liability company, its Sole Member

By: Lyon Housing (Horton Portfolio) XXXIX,  
LLC, a Delaware limited liability company, its  
Managing Member

By: \_\_\_\_\_

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

Its: \_\_\_\_\_  
“DEVELOPER”

CITY OF MILPITAS,  
a municipal corporation

\_\_\_\_\_  
Thomas C. Williams  
City Manager

**[INSERT NOTARY]**

**EXHIBIT "A"**

**DEVELOPER PROPERTY**

Legal Description

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF MILPITAS, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

Lot 1, as shown on that certain Map entitled "Tract No. 9773 Centria" which was filed in the office of the Recorder of the County of Santa Clara, State of California, on July 24, 2006 in Book 804 of Maps, Pages 9 through 14.

APN: 086-12-021

**EXHIBIT "B"**

**PARK LAND**

**Legal Description**

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF MILPITAS, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

**PARCEL ONE:**

All of that certain parcel of land designated and delineated as "Parcel B" upon that certain Map entitled "Record of Survey, being a portion of the Los Esteros and Milpitas Ranchos in the County of Santa Clara, California", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on October 24, 1968 in Book 244 of Maps at Page 3.

Excepting therefrom that portion described as Parcel 506776-A in the Deed from the County of Santa Clara to the City of Milpitas, Recorded May 4, 1994 in Book N428, Page 657, Instrument No. 12481692, Official Records.

**PARCEL TWO:**

That portion of Parcel A as shown on the Record of Survey, being a portion of Los Esteros and Milpitas Ranchos, filed October 24, 1968 in Book 244 of Maps, Page 3, in the office of the Santa Clara County Recorder, lying Southwesterly of the Southwesterly line of Parcel 506776-A as described in the Deed from the County of Santa Clara to the City of Milpitas Recorded May 4, 1994 in Book N428, Page 657, Instrument No. 12481692, Official Records.

APN: 086-12-010

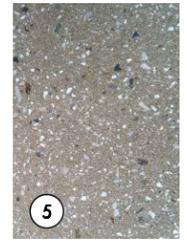


**HARDSCAPE LEGEND**

- 1. Water Feature with uplights.
- 2. Bench with center arm.
- 3. Tot Lot
- 4. Low Fence/Wall
- 5. Field Paving
- 6. Paving Bands
- 7. Vehicular Bollards
- 8. Street Trees per Offsite Streetscape Plans
- 9. Backdrop/Screening Trees
- 10. Tree Bosque
- 11. Hedge
- 12. Turf Panel
- 13. Shrub Planting
- 14. Underground Gas Lines in Gas Easement
- 15. Pole Lighting
- 16. Park Signage with uplights.
- 17. Light Bollards
- 18. Game Tables.



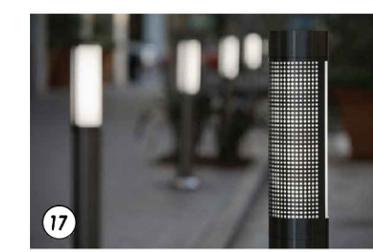
Option A



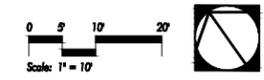
Option B



Option C



**City of Milpitas Approval Notes**  
 1. Up light on-site Maple Trees, specifications subject to Staff approval.  
 2. Number thirteen listed under "Hardscape Legend" shall be areas for special tile artwork reflecting the historic significance of the park name.  
 3. Park sign design subject to Staff approval.



Concept Construction Plan

# CITY OF MILPITAS PARK

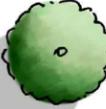
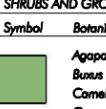
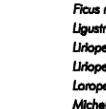
Lyon Communities

LAC01  
August 29, 2013



**PLANT LEGEND**

**PROPOSED TREES**

Symbol	Botanical Name	Common Name	Size
	<i>Laurus nobilis</i>	Sweet Bay	36" Box Min.
	<i>Podocarpus gracilior</i>	Fern Pine	36" Box Min.
	<i>Prunus Caroliniana</i>	Carolina Laurel Cherry	36" Box Min.
	<i>Acer rubrum</i>	Red Maple	36" Box Min.
	<i>Olea europaea</i>	Olive (fruitless variety)	36" Box Min.
	<i>Ulmus parvifolia</i>	Chinese Elm	36" Box Min.

**SHRUBS AND GROUNDCOVERS**

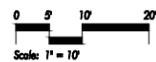
Symbol	Botanical Name	Common Name	Size
	<i>Agapanthus 'Tinkerbell'</i>	Dwarf Variegated Agapanthus	1 gal.
	<i>Buxus japonica</i>	Japanese Boxwood	5 gal.
	<i>Camellia sp.</i>	Camellia	15 gal.
	<i>Carex divulsa</i>	Berkeley Sedge	5 gal.
	<i>Dietes bicolor</i>	Fortnight Lily	5 gal.
	<i>Fatsia japonica</i>	Japanese Aralia	15 gal.
	<i>Ficus nitida</i>	Indian Laurel Fig	15 gal.
	<i>Ligustrum j. 'Texanum'</i>	Texas Privet	5 gal.
	<i>Liriope gigantea</i>	Giant Lily Turf	1 gal.
	<i>Liriope muscari</i>	Big Blue Lily Turf	5 gal.
	<i>Loropetalum chinense 'Razzleberry'</i>	Razzleberry Loropetalum	15 gal.
	<i>Mitchella repens</i>	Banana Shrub	15 gal.
	<i>Ophiopogon japonicus 'Nigra'</i>	Mondo Grass	1 gal.
	<i>Rhaphiolepis l. 'Clara'</i>	Clara Indian Hawthorn	5 gal.
	<i>Rhaphiolepis umbellata 'Minor'</i>	NCN	5 gal.
	<i>Rhododendron sp.</i>	Azalea	5 gal.
	<i>Rosa floribunda 'Iceberg'</i>	Iceberg Rose	5 gal.
	<i>Sarcococca hookerana</i>	Sweet Box	5 gal.
	<i>Strelitzia reginae</i>	Bird of Paradise	5 gal.
	<i>Trachelospermum jasminoides</i>	Star Jasmine	1 gal.

Note: Sizes shown are minimums.

	Marathon Fescue II	Turf
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**City of Milpitas Approval Notes**

1. The selected trees are Sweet Bay, Red Maple, and Chinese Elm.
2. The selected hedges around the perimeter of the park are Japanese Boxwood and maintained 3' tall minimum.



Scale: 1" = 10'



*Olea s. 'Swan Hill'*  
(Fruitless Swan Hill Olive)



*Acer rubrum*  
(Red Maple)



*Laurus nobilis*  
(Sweet Bay)



*Podocarpus gracilior*  
(Fern Pine)



*Ulmus parvifolia*  
(Chinese Elm)



*Buxus japonica*  
(Japanese Boxwood)



*Ligustrum j. 'Texanum'*  
(Texas Privet)



*Trachelospermum jasminoides*  
(Star Jasmine)