

EXHIBIT 2

INTERIM CONSENT AGREEMENT RIO DE VIDA MUNICIPAL UTILITY DISTRICT NO. 1

THE STATE OF TEXAS §

§

COUNTY OF TRAVIS §

This Interim Consent Agreement (this “Agreement”) is entered into between the **City of Austin, Texas**, a home-rule municipality located in Travis, Hays, and Williamson Counties, Texas (“the City”) and **TXI Operations, LP**, a Texas limited partnership (the “Developer”), effective as of _____, 20____ (the “Effective Date”). At the organizational meeting of **Rio de Vida Municipal Utility District No. 1** (the “District”), a municipal utility district conditionally created under the authority of Chapter 8379, Subtitle F, Title 6, Texas Special District Local Laws (the “Enabling Legislation”) and City Ordinance No. 120823-____ (the “Consent Ordinance”), as contemplated by this Agreement, the District will join in and agree to be bound by this Agreement.

INTRODUCTION

The Enabling Legislation became effective June 17, 2011, and created the District, subject to the consent of the City to the creation. The Enabling Legislation provides that if the city does not consent to the creation of the district under this section before September 1, 2012, the district is dissolved September 1, 2012.

The City’s MUD policy, adopted in Resolution No. 20110217-030, provides that a MUD will be created only if the water, wastewater, and reclaimed water provider is the City. The Developer has been unable to resolve water and wastewater utility issues that are currently in litigation involving Hornsby Bend Utility Company’s parent company, SWWC Utilities, Inc. Terms and conditions of a consent agreement have not been negotiated.

This Agreement between the Parties is intended to avoid the District being dissolved on September 1, 2012, and to allow additional time for the Developer to address the utility and other matters, and for the Parties to negotiate a Permanent Consent Agreement.

City staff and board and commission review of District proposal have been waived by City ordinance No. 120823-____ for the purposes of this Agreement. City staff and board and commission review will be required for the Permanent Consent Agreement, and the City Council will conduct another public hearing to consider the Permanent Consent Agreement.

Pursuant to Consent Ordinance No. 120823-____, the City Council has granted its interim consent to the creation of the District over the 2,132 acre tract or parcel of land that is more fully described on the attached **Exhibit A** (the “Land”).

As a condition to its consent, the City has required that the Developer and, at the organizational meeting of its Board of Directors, the District, enter into this Agreement in order to set forth certain understandings between the City, the Developer, and the District.

Therefore, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

ARTICLE I. DEFINITIONS

Section 1.01 Definitions. In addition to the terms defined above in this Agreement, the following terms and phrases, when used in this Agreement, will have the meanings set out below:

Agreement: This Consent Agreement between the City, the Developer, and the District.

Board: The duly qualified and acting Board of Directors of the District.

City Charter: The City Charter of the City.

City Code: The Austin, Texas Code of Ordinances.

City Council: The City Council of the City.

City Manager: The City Manager of the City, or his designee.

Developer: TXI Operations, LP, a Texas limited partnership, or its successor or assignee.

Development Application: A site plan, preliminary subdivision plan, or final plat.

Effective Date: The date this Agreement has been signed by the City and the Developer.

Land: The land contained within the boundaries of the District, currently consisting of approximately 2,132 acres of land located in the City's extraterritorial jurisdiction and described by metes and bounds on **Exhibit A**, as such boundaries may be revised from time to time in accordance with the terms of this Agreement or otherwise with the consent of the City.

Parties: The entities that have executed this Agreement.

PDRD Director: The director of the City's Planning and Development Review Department, or its successor department within the City.

Utility Director: The director of the Austin Water Utility, or its successor department within the City.

ARTICLE II. INTERIM CONSENT ORDINANCE; ANNEXATION

Section 2.01 Interim Consent Ordinance; Conditions to Effectiveness. The City has approved the Interim Consent Ordinance, which consents to the inclusion of the Land within the District. Anything herein to the contrary notwithstanding, the Interim Consent Ordinance and this Agreement will be void and of no force or effect if an original of this Agreement, executed by the District and the Developer, is not returned to the City on or before August 31, 2012. Other provisions relating to the Term of the Agreement and Conditions to its effectiveness are contained in Article IV of this Agreement.

Section 2.02 Public Hearing. The parties confirm that, prior to the execution of this Agreement, the City has conducted a public hearing for the purpose of considering the adoption of this Agreement.

Section 2.03 Annexation and Development Application. During the term and effectiveness of this Agreement, the City agrees not to annex the Land unless the Developer files with the City or Travis County a Development Application. If the Developer files a Development Application during the term and effectiveness of this Agreement without City Manager approval, the Developer agrees to City annexation of the Land. In such case, the City and the Developer also agree that Local Government Code Section 43.035(b) will not apply.

Section 2.04 Annexation and Applicable Law. Except as otherwise specified in this Agreement, any City annexation of the Land will be pursuant to and consistent with applicable statutory requirements.

ARTICLE III. GOVERNANCE

Section 3.01 Board Members. Permanent Board members may not be elected until a Permanent Consent Agreement is executed by the Parties. Other than convening organizational meetings and conducting organizational business, temporary Board members may not take any action without prior written approval of the City Manager or his designee.

Section 3.02 District Information to be Provided to City.

(a) **Agendas.** The District agrees to provide a copy of the agenda for each meeting of its Board to the PDRD and Utility Directors, in the manner provided in Section 5.01, concurrently with the posting of the agenda at the Travis County Courthouse.

(b) **Minutes.** The District will provide a copy of the minutes of all meetings of its Board to the PDRD and Utility Directors, in the manner provided in Section 5.01, within 15 business days of the date of approval of such minutes by the Board.

(c) **Financial Dormancy Affidavit, Financial Report or Audit.** The District agrees to file a copy of its annual financial dormancy affidavit, annual financial report or annual audit of its debt service and general fund accounts, whichever is required under the Texas Water Code, with the PDRD Director, in the manner provided in Section 5.01, within 30 days after approval of each financial dormancy affidavit, financial report or audit by the Board. Any required audit must be prepared by an independent certified public accountant.

(d) **Budgets.** The District agrees to file a copy of its approved budget for each fiscal year with the PDRD Director, in the manner provided in 5.01, within 30 days after approval of each budget by the Board.

ARTICLE IV.
TERM, EFFECTIVENESS; ASSIGNMENT AND REMEDIES

Section 4.01 Term. The term of this Agreement will commence on the Effective Date and will end upon the execution of a Permanent Consent Agreement approved by City Council, or September 1, 2013, whichever occurs first. The City may at its discretion extend the expiration date to September 1, 2014.

Section 4.02 Effectiveness. The District and the Developer acknowledge that this Agreement relates to the City's interim consent to the creation of the District and, as provided in the Enabling Legislation, the provisions of this Agreement are valid and enforceable.

Section 4.03 Execution by City, Developer, and District. The City and the Developer agree that this Agreement will be effective upon its execution by the City and the Developer, and District execution will be required at the District's first organizational meeting. The Agreement will remain effective unless the District conducts an organizational meeting and does not execute the agreement at the meeting.

Section 4.04 Termination and Amendment by Agreement. This Agreement may be terminated or amended as to all of the Land at any time by mutual written agreement of the City and the Developer (and, after its first organizational meeting and execution of this Agreement, the District) or may be terminated or amended only as to a portion of the Land by the mutual written agreement of the City and the owners of a majority of the portion of the Land affected by the amendment or termination and, subject to the aforementioned conditions, the District. At such time as the Developer no longer owns land within the District, this Agreement may be amended by mutual written agreement of the District and the City, and the joinder of the Developer will not be required.

Section 4.05 Termination for NonCity Contract. If the Developer enters into a nonCity contract for water or wastewater service to any portion of the District, the City may terminate this Agreement.

Section 4.06 Unilateral Termination. The City or the Developer may unilaterally terminate this Agreement, without cause, upon 30 days' written notice to the other.

Section 4.07 Dissolution of the District.

(a) If the District is dissolved without the prior written approval of the City, this Agreement will automatically terminate and the City will have the right to annex all of the territory within the District for full purposes. If the District is dissolved, the City, as the successor to the District, will have the authority to execute any documents and to do any and all acts or things necessary to transfer the District's assets, obligations, indebtedness, and liabilities to the City.

(b) If the consent agreement is terminated for any reason, the District is dissolved, except as provided in Section 8378.004(b)(1) of the Enabling Legislation.

Section 4.08 Agreement Running with the Land; Assignment.

(a) The terms of this Agreement will run with the Land and will be binding upon the Developer and its successors and assigns. This Agreement, and the

rights of the Developer hereunder, may be assigned by the Developer to a purchaser of all or a portion of the Land. Any assignment must be in writing, specifically set forth the assigned rights and obligations without modification, hypothecation, or amendment, and be executed by the proposed assignee and a copy of the assignment must be provided to the City.

(b) If the Developer assigns its rights and obligations hereunder as to a portion of the Land, then the rights and obligations of any assignee and the Developer will be severable, and the Developer will not be liable for the nonperformance of the assignee and vice versa. In the case of nonperformance by one developer, the City may pursue all remedies against that nonperforming developer, but will not impede development activities of any performing developer as a result of that nonperformance.

(c) This Agreement is not intended to be binding upon, or create any encumbrance to title as to, any ultimate consumer who purchases a fully developed and improved lot within the Land.

Section 4.09 Cooperation; Agreement Not to Contest or Support Negative Legislation.

(a) The City, the District, and the Developer each agree to execute such further documents or instruments as may be necessary to evidence their agreements hereunder and provide to the other parties any other documents necessary to effectuate the terms of this Agreement.

(b) The City agrees to cooperate with the Developer in connection with any waivers or approvals the Developer may desire from Travis County in order to avoid the duplication of processes or services in connection with the development of the Land.

(c) Neither the Developer nor the District will engage in any litigation or legislative processes to challenge the terms of this Agreement, or to resolve any disputes related to the annexation process established by this Agreement or any related service plan. If any future legislation would have the effect of prohibiting the annexation of the District or requiring further approval of the District's residents to the annexation of the District as contemplated by this Agreement, it is the intent of the parties that annexation of the District be governed by the provisions of this Agreement notwithstanding such legislation. Neither the Developer nor District will seek or support legislation to incorporate all or any part of the District as a municipality. Neither the Developer nor the District will contest any efforts of the City to assure that future legislation does not prohibit or impose additional requirements on the City's right and ability to annex the District in accordance with this Agreement.

(d) In the event of any third party lawsuit or other claim relating to the validity of this Agreement or any actions taken hereunder, the Developer, the District, and the City agree to cooperate in the defense of such suit or claim, and to use their respective best efforts to resolve the suit or claim without diminution of their respective rights and obligations under this Agreement.

Section 4.10 Default and Remedies.

(a) **Notice of Default; Opportunity to Cure.** If a party defaults in the performance of any obligation under this Agreement, the nondefaulting party may give written notice to the other parties to this Agreement, specifying the alleged event of

default and extending to the defaulting party 30 days from the date of the notice in order to cure the default complained of or, if the curative action cannot reasonably be completed within 30 days, 30 days to commence the curative action and a reasonable additional period to diligently pursue the curative action to completion.

(b) Dispute Resolution. If any default is not cured within the curative period specified above, the parties agree to use good faith, reasonable efforts to resolve any dispute among them by agreement, including engaging in mediation or other non-binding alternative dispute resolution methods, before initiating any lawsuit to enforce their respective rights under this Agreement. The parties will share the costs of any mediation or arbitration equally. The parties further agree that the City is not obligated to resolve any dispute based on an arbitration decision under this Agreement if the arbitration decision compromises the City's sovereign immunity.

(c) Other Legal or Equitable Remedies. If the parties are unable to resolve their dispute through mediation or arbitration, the nondefaulting party will have the right to enforce the terms and provisions of this Agreement by a suit seeking specific performance or such other legal or equitable relief as to which the nondefaulting party may be entitled. Any remedy or relief described in this Agreement will be cumulative of, and in addition to, any other remedies and relief available to such party.

ARTICLE V. MISCELLANEOUS PROVISIONS

Section 5.01 Notice. Any notice given under this Agreement must be in writing and may be given: (i) by depositing it in the United States mail, certified, with return receipt requested, addressed to the party to be notified and with all charges prepaid; or (ii) by depositing it with Federal Express or another service guaranteeing "next day delivery", addressed to the party to be notified and with all charges prepaid; (iii) by personally delivering it to the party, or any agent of the party listed in this Agreement; or (iv) by facsimile or email with confirming copy sent by one of the other described methods of notice set forth above. Notice by United States mail will be effective on the earlier of the date of receipt or three days after the date of mailing. Notice given in any other manner will be effective only when received. For purposes of notice, the addresses of the parties will, until changed as provided below, be as follows:

The City:

City of Austin
P.O. Box 1088
Austin, Texas 78767-1088
Attn: City Manager

With Required Copy to:

City of Austin
P.O. Box 1088
Austin, Texas 78767-1088
Attn: City Attorney

The Developer:

TXI Operations, LP
1341 W Mockingbird Lane
Dallas, Texas 75247
Attn: Barry Bone

With Required Copy to:

TXI Operations, LP
1341 W Mockingbird Lane
Dallas, Texas 75247
Attn: Mark Cleveland

The District:

Rio de Vida Municipal Utility District No. 1
PO Box _____
City, State, Zip Code] _____
Attn: _____

Each of the parties may change its respective address to any other address within the United States of America by giving at least five days' written notice to the other parties. The Developer may, by giving at least five days' written notice to the City, designate additional parties to receive copies of notices under this Agreement. At such time as the Developer no longer owns land within the District no further notice to the Developer under this Agreement will be required.

Section 5.02 Frustration of Purpose. If any part of this Agreement is modified as a result of amendments to the underlying State law and statutory authority for this Agreement, the parties agree that such modification may frustrate the purpose of this Agreement. The parties agree that, in such event, they will attempt to amend or revise this Agreement to accomplish to the greatest degree practical (i) the same purpose and objective of the part of this Agreement affected by the modification of the underlying State law and statutory authority and (ii) the original intent and purpose of this Agreement. If the parties cannot agree on any such amendment or revision within 90 days from the effective date of amendment of the State law and statutory authority for this Agreement, then this Agreement will terminate, unless the parties agree to an extension of time for negotiation of the modification.

If this Agreement is to be terminated as a result of the operation of this Section, the City will have the right, in its sole discretion, to annex the District for full purposes and dissolve the District.

Section 5.03 Nonwaiver. Any failure by a party to insist upon strict performance by another party of any material provision of this Agreement will not be deemed a waiver thereof or of any other provision, and such party may at any time thereafter insist upon strict performance of any and all of the provisions of this Agreement.

Section 5.04 Applicable Law and Venue. The interpretation, performance, enforcement and validity of this Agreement is governed by the laws of the State of Texas. Venue will be in a court of appropriate jurisdiction in Travis County, Texas.

Section 5.05 Entire Agreement. This Agreement contains the entire agreement of the parties. There are no other agreements or promises, oral or written, between the parties regarding the subject matter of this Agreement. This Agreement may be amended only by written agreement signed by the authorized representatives of the parties. This Agreement supersedes all other agreements between the parties concerning the subject matter. Upon execution of this Agreement, the Developer is deemed to have withdrawn any petition or application to create a MUD that has been submitted to the City. Accordingly, the Parties agree that the Developer's agreement to an extension of the time period contemplated by Texas Water

Code Section 54.016, Texas Local Government Code Section 42.042, and City Code Sections 25-9-158 and 25-9-159, is no longer applicable, and that this time period would be triggered anew upon the submission of any petition or application to create a MUD to the City.

Section 5.06 Time. Time is of the essence of this Agreement. In computing the number of days for purposes of this Agreement, all days will be counted, including Saturdays, Sundays and legal holidays; however, if the final day of any time period falls on a Saturday, Sunday or legal holiday, then the final day will be deemed to be the next day that is not a Saturday, Sunday or legal holiday.

Section 5.07 Authority for Execution. The City certifies, represents, and warrants that the execution of this Agreement has been duly authorized in conformity with its City Charter and City ordinances. The Developer certifies, represents, and warrants that the execution of this Agreement has been duly authorized in conformity with the articles of incorporation and bylaws or partnership agreement of each entity executing on its behalf. The District certifies, represents and warrants that this Agreement has been duly authorized in conformity with all applicable laws and regulations.

IN WITNESS WHEREOF, the undersigned parties have executed this Agreement on the dates indicated below.

CITY:

CITY OF AUSTIN, TEXAS

By: _____
Name: _____
Title: City Manager
Date: _____

APPROVED AS TO FORM:

By: _____
Name: _____
Title: Assistant City Attorney
Date: _____

DEVELOPER:

TXI Operations, LP

By: TXI Operating Trust, its General Partner

By: _____

Name: Barry Bone

Title: Vice President – Real Estate

Date: _____

DRAFT

DISTRICT:

**RIO DE VIDA MUNICIPAL UTILITY
DISTRICT NO. 1**

By: _____
Name: _____
Title: President, Board of Directors
Date: _____

ATTEST:

By: _____
Name: _____
Title: Secretary, Board of Directors
Date: _____

DRAFT

EXHIBIT A

DRAFT