

# **WALLER CREEK DISTRICT**

## **JOINT DESIGN, DEVELOPMENT, MANAGEMENT AND OPERATION AGREEMENT**

**BY AND AMONG**

**CITY OF AUSTIN, TEXAS**

**WALLER CREEK LOCAL GOVERNMENT CORPORATION**

**AND**

**WALLER CREEK CONSERVANCY**

\_\_\_\_\_, 2013

**EXECUTIVE SUMMARY OF**  
**JOINT DEVELOPMENT AGREEMENT**  
**BETWEEN THE WALLER CREEK CONSERVANCY (“Conservancy”), CITY OF**  
**AUSTIN (“City”), AND WALLER CREEK LOCAL GOVERNMENT CORPORATION**  
**(“LGC”)**

**Purpose of Agreement:**

- The Agreement documents a long-term relationship between the Parties to promote and expand the public use of the Waller Creek District (“District”) and to develop the District consistent with the design plan to be approved by the City (“Design Plan”).
- The Parties will design, build, operate, and maintain a series of five park projects and related infrastructure and trails.
- The City will maintain its ownership of the City-owned land and improvements within the District.
- The Agreement describes the process by which each project will be designed, funded, and constructed. It also contains related agreements, including the operating agreement, council-approved Design Standards, and council approved Design Guidelines.

**Role of Each Party:**

**Conservancy**

- The Conservancy operates as conservancies do in Houston and other cities throughout America, and it will act as the steward for the District park land, public space venues, and trails.
- The Conservancy will provide funding for certain Projects and lead the construction of some improvements.
- Ultimately, the Conservancy will operate and maintain the parks, public spaces, and venues at a high level that taxpayer funding alone cannot achieve.

**City**

- The City’s role will be to (i) provide design and construction funding for Projects consistent with the Agreement and the Design Plan, as approved by council, and (ii) fund a portion of the operation of Projects subject to approval as part of the annual budget process.
- The City will be responsible for (i) improvements within the right-of-way, (ii) drainage projects such as the Waller Creek Tunnel, and (iii) customary police, fire, and emergency services within the District.

**LGC**

- The LGC, created in April 2011, provides a formal mechanism for ongoing communication and cooperation under this long-term relationship among the Parties.

It will conduct open meetings.

- The LGC will review the work within the District that is done by the City and the Conservancy.

- To the extent that City or LGC funds are used, the LGC will approve each Project and the operations budget of the Conservancy.
- The LGC will operate with a budget approved by Council and will provide periodic updates on the status of the Projects to Council.
- The LGC may issue debt to assist with funding of projects.

### **Funding:**

#### **City**

- The City has expended funds for (i) the Design Competition, (ii) one-time costs for certain staff for the Conservancy, (iii) shared costs for a business process consultant, (iv) the Waller Creek Tunnel project, and (v) legal fees to draft the Agreement.
- The City has committed funds to be spent, such as voter approved general obligation bond funds for stream bank and trail improvement and for Waterloo Park and Palm Park.
- The Agreement will have a schedule of City funds that have been identified as a potential sources for funding Projects. Those funds not already appropriated for use in the District must be reviewed and approved by Council as part of the annual budget process.
- To the extent operating funds are needed from the City in future years, those requests will be considered by Council as part of the annual budget process.

#### **Conservancy**

- The Conservancy has expended funds for (i) the Design Competition, (ii) staff costs for the Conservancy, and (iii) special events to begin the fund-raising process and to encourage community interest in the District.
- The Conservancy will be responsible for the costs of maintaining and operating the improvements after they are completed in excess of any contribution the City may make from annually appropriations that would have funded PARD's maintenance of park land in the District.

### **Term of the Agreement:**

The Agreement will be for 20 years with options for multiple 10 year renewals.

### **Steps for Approval of Projects:**

- The Agreement has a process to approve a proposed project, and the plan for each project is called a "Phase Plan". After approval of a Phase Plan, work on a Project can commence. There may be some Projects that have more than one Phase Plan (e.g., for design, as well as construction).
- The Conservancy and the City each have the ability to propose projects that fit within the Design Plan.
- Each Phase Plan will include the budget, process for design, procurement, and implementation of a proposed project.
- A Phase Plan will not be approved unless it identifies the sources of funding to complete the phase of a proposed project.

- Before each Project moves from design to construction, the Phase Plan will contain a maintenance and operations plan where sources of funding are identified.
- Any substantial changes to the Agreement or the Design Plan will come back to Council for approval.

#### **Procurement Requirements:**

- Procurement will be done as required by State law, applicable City Code provisions, and applicable City resolutions.

#### **Construction Standards:**

- Any construction done by the Conservancy will meet or exceed the City's construction requirements for improvements.
- There are Design Guidelines for the District in the Agreement that are similar to other guidelines adopted by the City; these guidelines are not zoning. They provide guidance for compatible construction in areas adjacent to the District. They are similar to the Downtown Design Guidelines.

#### **Operation Considerations:**

- The Conservancy, in consultation with the City and the LGC, will be responsible for approving, accepting, displaying, and maintaining any public art within the District. The City will waive the requirements of the City Code related to public art.
- The Conservancy will be responsible for branding and advertising the District within guidelines in the Agreement.
- The Conservancy will be responsible for (i) obtaining donations and other funding for design and construction to the extent the costs exceed the funds available from the City, and (ii) operations and maintenance costs in excess of the contribution from the City. Fundraising will be conducted so that it does not jeopardize any tax-exempt funding used for any Projects.
- The City will waive the naming requirements of the City Code, excluding names of existing parks and facilities that are already named, and naming will comply with requirements similar to those in other public-private partnership agreements.
- The Conservancy will take over operations and maintenance of the improvements as each Project is completed and they will meet or exceed the City's standards. Any City contribution for maintenance will be made at that time.
- The Conservancy will coordinate special events within the District with the City.

#### **Fees and Charges:**

- The Conservancy will be responsible for setting fees for concessions and rentals of space within the District.
- The Conservancy will develop a proposed fee schedule, and it is contemplated PARD will review these fees on behalf of the City and approve the schedule unless PARD determines the fees are unreasonable.
- The City will have the right to review the books and records of the Conservancy. The Conservancy will have its own annual audit.

- The Conservancy and the City will set aside a certain number of days for the free use of the District by the City for public functions and City sponsored events.
- The Conservancy and the City will develop a plan for activities and use of the District by community groups, such as non-profits, children, and the elderly that includes free or reduced rates.
- All fees received by the Conservancy for use of the facilities will be used to support the operations and maintenance of improvements in the District.

**Reporting Requirements:**

- The LGC will provide written progress reports on a regular basis to Council to describe the status of all ongoing Projects.

**Dispute Resolution and Termination:**

- There will be a process for settling disagreements between the Parties that includes mediation.
- There is a mechanism for terminating the Agreement.

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## EXHIBITS

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Exhibit "E"	–	Design Plan
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Schedule 3.01C	Description of City Sources of Funds
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## JOINT DESIGN, DEVELOPMENT, MANAGEMENT AND OPERATION AGREEMENT

This JOINT DESIGN, DEVELOPMENT, MANAGEMENT AND OPERATION AGREEMENT (this “**Agreement**”) is made and entered into as of the Effective Date (as defined below) by and among the following parties: (i) **CITY OF AUSTIN, TEXAS**, a Texas home rule city and municipal corporation (the “**City**”); (ii) **WALLER CREEK LOCAL GOVERNMENT CORPORATION**, a local government corporation created pursuant to Chapter 431 of the Texas Transportation Code (the “**LGC**”); and (iii) **WALLER CREEK CONSERVANCY**, a Texas non-profit corporation (the “**Conservancy**”).

### DEFINITIONS AND INTERPRETATIONS

Each term or phrase used in this Agreement in which the first letter of each word is capitalized has the following meanings, unless the text says otherwise.

“**Affiliate**” means a Person that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the Person, or is a son, daughter, spouse, parent, sibling or in-law of the specified Person. In determining affiliation, the City shall consider all appropriate factors, including common ownership, common management, and contractual relationships. With respect to the City or the Conservancy, the LGC is expressly deemed not to be an Affiliate.

“**Agreement**” means this Joint Design, Development, Management and Operation Agreement, as it is amended, modified or supplemented from time to time after this date by a written document signed by the City, the LGC and the Conservancy, including amendments by Phase Plans.

“**Applicable Law**” means any law, statute, ordinance, rule, regulation, order or determination of any Governmental Authority, including, without limitation, all applicable zoning ordinances and building codes, flood disaster laws, health laws and environmental laws and regulations.

“**Approval**” when this Agreement states that an action or document is subject to a Party’s approval, that approval will not be unreasonably withheld unless it is stated expressly to the contrary.

“**Automatic Termination Event**” means each event described in Section 15.01.

“**Bonds**” means the term described in Section 11.06.

“**Business Day**” means any day other than a Saturday, a Sunday or a public or bank holiday or the equivalent for banks generally under the laws of the State of Texas. Use of the word “**day**,” as opposed to Business Day, means calendar day.

“**Capital Repair Funds**” means the funds described in Section 11.02.

“**City**” means the term described in the introductory paragraph of this Agreement.

**“City Code”** means the ordinances of the City of Austin, Texas, as codified in the City Code.

**“City Contribution”** means the payments required to be made by the City to the Project Disbursement Fund Account pursuant to Section 3.01C of this Agreement and any Phase Plans executed and delivered by the Parties after the Effective Date.

**“City Council”** means the City Council of the City of Austin, Texas.

**“City Improvements”** means the improvements and facilities in the District, other than public utilities, that the City would undertake in the normal course to provide and which will not be less than what is essential to ensure such function.

**“City Ordinance”** means Ordinance No. \_\_\_\_\_ authorizing this Agreement, adopted \_\_\_\_\_, 2013.

**“City Representative”** means the term described in Section 19.03.

**“Code”** means the Internal Revenue Code of 1986, 26 U.S.C.S §101, et seq., as amended.

**“Common Goals”** means the term described in Section 2.01A.

**“Conceptual Design Documents”** means drawings based on the Design Plan that establish the conceptual design of a Public Improvement Project illustrating the scale and relationship of the components of the Public Improvement Project. The Conceptual Design Documents shall include a site plan, schematic drawings, and preliminary building plans, sections and elevations. At the Parties’ option, the Conceptual Design Documents may include study models, perspective sketches, electronic modeling or combinations of these media. Preliminary selections of major building systems and construction material shall be noted on the drawings or described in writing.

**“Conservancy”** means the term described in the introductory paragraph of this Agreement.

**“Conservancy Contribution”** means the payments required to be made by the Conservancy to the Project Disbursement Fund Account pursuant to Section 3.01B of this Agreement and any Phase Plans executed and delivered by the Parties.

**“Conservancy Representative”** means the term described in Section 19.01.

**“Construction Contract”** means each contract for construction of a Public Improvement Project that is in accordance with the Contract Documents for that Public Improvement Project and that has a total contract price with appropriate contingency reserves permitted by the approved Project Budget.

**“Construction Manager at Risk”** means the construction manager with whom the City, the LGC, or the Conservancy executes a contract for construction of each Public Improvement Project and any replacement of such construction manager.

**“Contract Documents”** means the architectural, engineering and other drawings, project manual, addenda, change orders, construction cost estimate, and other documents for the design and construction of a Public Improvement.

**“Contracts”** means all contracts entered into by the City, the LGC, or the Conservancy relating to the Projects, including all Construction Contracts.

**“Contractors”** means the contractors, design and engineering professionals, and vendors selected and engaged by the City, the LGC, or the Conservancy, whichever is the Managing Party, relating to a Project.

**“Contributions”** means the City Contributions and the Conservancy Contributions.

**“Core Project”** means the term described in Section 3.04D.

**“Cost Overruns”** means the amount of additional funds required to complete a Project that exceed the approved Project Budget for that Project.

**“Current M/WBE Program Ordinance”** means the applicable standards and principles of Chapters 2-9A through 2-9D of the City’s ordinance for M/WBEs in effect as of the Effective Date.

**“Design Plan”** means the concept design plan for the Public Improvement Projects prepared by the Project Architect dated \_\_\_\_\_ and which has been approved by the Council, the City, the LGC, and the Conservancy pursuant to Resolution \_\_\_\_\_ and shown on **Exhibit “E”** attached to this Agreement.

**“District”** means the area of the City referred to as the Waller Creek District, which is shown on **Exhibit “A”** attached to this Agreement.

**“District ROWs”** means the total surface area, and the area above and below the surface, between property lines that is dedicated, deeded, reserved by plat or otherwise owned or controlled by the City, for use by the public for right of way for pedestrian, rail, or vehicular travel (including bicycle travel) within the District, but shall not include trails and sidewalks that are not a part of a transportation system and trails and sidewalks whose purpose is for recreation or to tie together Projects only.

**“Effective Date”** means the last date on which this Agreement has been duly executed on behalf of one of the Parties.

**“Environmental Condition”** means any Environmental Event that occurs after the Effective Date.

**“Environmental Event”** means (i) the spill, discharge, leakage, pumpage, drainage, pourage, interment, emission, emptying, injecting, escaping, dumping, disposing, migration or other release of any kind of Hazardous Materials which may cause a threat or actual injury to human health, the environment, plant or animal life, (ii) the occurrence of any Environmental Proceedings pursuant to any Environmental Laws arising out of any of the foregoing, and

(iii) any claims, demands, actions, causes of actions, remedial and/or abatement response, remedial investigations, feasibility studies, environmental studies, damages, judgments or settlements arising out of an Environmental Proceeding.

**“Environmental Laws”** means any and all federal, state and local statutes, laws (including common law tort law, common law nuisance law and common law in general), regulations, ordinances, rules, judgments, orders, decrees, permits, concessions, grants, franchises, licenses, agreements or other governmental restrictions relating to the environment, or to handling, storage, emissions, discharges, releases or threatened emissions, discharges or releases of Hazardous Materials into the environment, including ambient air, surface water, ground water or land, or otherwise relating to the manufacture, processing, distribution, use, treatment or disposal of any Hazardous Materials, including, but not limited to, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Federal Solid Waste Disposal Act (including, but not limited to, the Resource Conservation and Recovery Act of 1976), CERCLA, the Toxic Substances Control Act, the Hazardous Materials Transportation Act, the Federal Insecticide, Fungicide and Rodenticide Act and the Emergency Planning and Community Right-to-Know Act, and any other federal, state or local laws, ordinances, rules, regulations and publications and similar restrictions now or hereafter existing relating to any of the foregoing.

**“Environmental Proceeding”** means (i) any notice of any investigation, response action, spill, proceeding, whether executive, administrative or judicial, or litigation or litigation threatened in writing relating to Environmental Laws or other environmental matters concerning property insofar as such investigation, response action, spill, litigation, litigation threatened in writing or proceeding relates to such property; or (ii) receipt of any notice from any Person of: (a) any violation or alleged violation of any Environmental Law relating to any portion of any property in the District or any activity at the time conducted on any such property, or (b) the commencement of any clean-up, abatement or control pursuant to or in accordance with any Environmental Law of any Hazardous Materials on or about any such property or (c) any violation of any Applicable Laws or any harm to a Person or property in each case with respect to worker safety at or in connection with such property.

**“Event of Default”** means those events described in Section 15.02.

**“Fiscal Year”** means the City fiscal year – October 1<sup>st</sup> to September 30<sup>th</sup>.

**“Force Majeure Event”** means the occurrence and continuance of any of the following: labor disputes; casualties; acts of God, including all days of rainy weather in excess of the normal number of days of rainy weather for Austin, Texas, as reflected in the most recent publication of “Local Climatological Data” by the National Climatic Data Center; unusual delays in transportation or shipping; acts of war or terrorism; act of military authority; sabotage; or shortages of fuel, labor or building materials which could not reasonably have been avoided by anticipatory action by the affected party or its respective subcontractors, agents, or employees; or other delays due to causes beyond its or their control.

**“Foundational Articles”** means the term described in Section 3.03B.

**“Governmental Authority”** means the City and any federal, state and/or local agency, department, commission, board, bureau, administrative or regulatory body or other instrumentality having jurisdiction over the Projects or on which such an instrumentality relies for standards.

**“Governmental Function”** means any regulatory, legislative, permitting, zoning, enforcement (including police power), licensing or other functions which a Governmental Authority is authorized or required to perform.

**“Hazardous Materials”** means (i) any substance, emission or material, defined, listed or specified in an Applicable Law as a “regulated substance,” “hazardous substance,” “toxic substance,” “pesticide,” “hazardous waste,” “hazardous material”, asbestos, or any similar or like classification or categorization under any Environmental Law, including for the following reasons: ignitability, corrosivity, reactivity, carcinogenicity or reproductive or other toxicity of any kind, or (ii) any products or substances containing petroleum, asbestos, or polychlorinated biphenyls.

**“Impasse”** means any disagreement between the City and the Conservancy under this Agreement as to any matter requiring their approval or agreement under this Agreement. However, an Impasse expressly shall not include any disagreement by the City and the Conservancy to enter into any Phase Plans.

**“Indemnitee”** means the term described in Section 14.02A.

**“Indemnitor”** means the term described in Section 14.02A.

**“LGC”** means the term described in the introductory paragraph of this Agreement.

**“LGC Representative”** means the term described in Section 19.02.

**“Limitations”** means the term described in Section 8.01.

**“Managers”** means any Persons retained by the Conservancy with respect to any O&M Projects.

**“Managing Party”** means the Party or Parties in the Phase Plan that is designated to be responsible for managing all or a portion of the work described in the Phase Plan.

**“Managing Party Indemnitees”** means the term described in Section 3.06O.

**“MBE”** has the meaning set forth in City Code Section 2-9A-4(31), as such meaning is amended, modified or replaced.

**“MOU”** means the term described in Recital G.

**“MVVA”** means the term described in Section 3.01A.

**“MVVA Contract”** means the term described in Section 3.01A

**“M/WBE”** means MBE and WBE business enterprises.

**“M/WBE Program Ordinance”** means the Current M/WBE Program Ordinance, as it may be amended or modified or replaced and which is in effect at the time of a Phase Plan and work on a Project commences.

**“Naming Parameters”** means the guidelines for naming rights for Public District Sites described in Section 12.03.

**“O&M Projects”** means, collectively, the operation and management of the Public District Sites.

**“Operating Expenses”** means the expenses and costs from the operation of the District, including, without limitation, expenses and costs paid to Managers; provided, however, that Operating Expenses shall not include the expenses and costs incurred by the Conservancy in connection with the development and construction of Public Improvement Projects or in connection with Private District Projects.

**“Operating Revenues”** means the revenues and income from the use or operation of the District, including, but not limited to, rents, ticket sales, and concessions. Operating Revenues do not include the revenues and income received in connection with the development and construction of Public Improvement Projects or in connection with Private District Projects, including, without limitation, any Contributions received by the City or the Conservancy with respect to either type of Project.

**“Parties”** means, collectively, the City, the LGC and the Conservancy and their respective successors and permitted assigns and in the singular, any one of them, but not third parties.

**“Party Proposing Project”** means the term described in Section 3.04A.

**“Payment/Reimbursement Request”** means the term described in Section 10.04A of this Agreement.

**“Payment Bond”** means a bond of a corporate surety licensed in the State of Texas, issued solely for the protection and use of those payment beneficiaries who have a direct contractual relationship with the LGC or the Conservancy or the City, the contractor, a subcontractor or a material supplier engaged in the construction of a Public Improvements Project, or their contractual assignees, in a penal sum equal to the penal sum of the related Performance Bond. A Payment Bond shall authorize payment for (A) labor used to carry out the work under the Construction Contract(s), (B) materials used or ordered, delivered for use, directly to carry out such work, (C) specially fabricated material, (D) rental and running repair costs for construction equipment used or required and delivered for use, directly to carry out the work at the worksite, and (E) power, water, fuel and lubricants used, or ordered and delivered for use, directly to carry out the work if such payments are authorized under the Construction Contracts(s). The form of the Payment Bond shall be in the form set forth in the City of Austin Public Works standard bid documents or such other form approved by the City.

**“Performance Bond”** means a bond of a corporate surety licensed in the State of Texas, issued for the benefit of the LGC, the City and the Conservancy in form acceptable to the Conservancy and the City, in an amount equal to the amount of the Construction Contract and being sufficient to fund the costs of substantial completion of the work described in such Construction Contract. The form of the Performance Bond shall be in the form set forth in the City of Austin Public Works standard bid documents or such other form approved by the City.

**“Permits”** means all permits, consents, approvals, authorizations, variances, waivers, certificates and approvals from all Governmental Authorities, quasi-Governmental Authorities, utility companies and insurance rating agencies.

**“Person”** means an individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity .

**“Phase Plan”** means the term described in Section 3.03A.

**“Phifer”** means the term described in Section 3.01A.

**“Phifer Contract”** means the term described in Section 3.01A.

**“Pledge”** means the written agreement of a private-sector donation by a Person to be paid to the Conservancy, at a later date, or in installments, permitted by this Agreement and described in the written agreement with the Person making the pledge.

**“Private District Projects”** means, collectively, the development of land use rules, regulations and ordinances that govern the development, construction, zoning and use of the Private District Sites as described in Article 6.

**“Private District Sites”** means those portions of the District that are not Public District Sites or District ROWs.

**“Project”** means collectively, Public Improvement Projects, Private District Projects and O&M Projects or any work performed under this Agreement or a Phase Plan that are consistent with the Design Plan.

**“Project Agreement Period”** means the term described in Section 3.04C.

**“Project Architect”** means the architectural firm selected by the Parties as the primary architect for the Public Improvement Projects, it being understood that with approval by the City other firms may be selected for the design and site planning of the Public Improvement Projects, including any local design firms retained by the primary architect or the Managing Party on an as-needed basis.

**“Project Budget”** means a budget of all Project Costs for a Project.

**“Project Contract Documents”** means the term described in Section 4.01A.



**“Project Costs”** means all costs and expenses incurred, or to be incurred, for a Project, including, expenses for architects, engineers, legal, accounting, financial and other third party consultants, land acquisition, preconstruction, permitting, construction, inspection and acceptance of work, furniture, fixtures and equipment, site development, onsite infrastructure and drainage, environmental remediation, utility relocation, construction oversight and management, pre-opening expenses, interest, Project contingencies for design, permitting, land acquisition and other components of the Project and capitalized costs such as procurement and debt cost of issuance. The Project Budget attached to the Phase Plan for the Project shall include an estimate of all Project Costs, and actual Project Costs may not exceed the Project Budget without the written consent of the City and the Conservancy.

**“Project Director”** means the term described in Section 2.01.

**“Project Disbursement Fund Account”** means the account established pursuant to Section 10.01.

**“Project Engineer”** means an engineer that is required by Applicable Law to perform engineering work or to supervise civil improvements or public works projects that affect the public health or safety.

**“Project Landscape Architect”** means the architectural firm selected by the Parties as the primary landscape architect for the Public Improvement Projects, it being understood that with approval by the City other firms may be selected.

**“Project Proposal”** means the term described in Section 3.04A.

**“Projects”** means one or more Project.

**“Public District Sites”** means those portions of the District that are either (i) owned by the City, including park lands, (ii) leased by the City as the tenant on a long-term ground lease basis, (iii) park land or conservation easements granted to the City, or (iv) designated by the Parties as Public District Sites pursuant to Phase Plans; provided, however, that the Public District Sites do not include the District ROWs.

**“Public Improvement Projects”** means the entire design, planning, development and construction of improvements on Public District Sites.

**“Public Purpose”** means as defined by Applicable Laws.

**“Quality Standard”** means a standard mutually acceptable to the Parties and generally of similar standard of quality used in the design, construction and capabilities of a premier public amenity with a high level of design excellence consistent with the following premier public amenities (and any additions or replacements designated by the City): Atlanta’s Piedmont Park; Brooklyn’s Prospect Park; Chicago’s Millennium Park; Detroit’s Campus Martius Park; Houston’s Discovery Green Park; New York’s Central Park; Pittsburgh’s Forest Park; Portland’s Courthouse Square; and St. Louis’s Forest Park; provided, however, that in no event shall the Quality Standard be less than the standard adopted by the City.

**“Reserve Funds”** means an endowment fund maintained by the Conservancy to address potential funding deficits incurred in the operation and maintenance of the Public District Sites pursuant to this Agreement and which amounts shall be for the anticipated cost for a 24 month period for the applicable Project.

**“Responding Parties”** means the term described in Section 3.04A.

**“Response Notice”** means the term described in Section 3.04C.

**“Review and Approval or Consent Rights”** means the term described in Section 3.02A.

**“Reviewing Party”** means the term described in Section 3.02A.

**“ROWS”** see District ROWs.

**“Schedule”** means the written schedule that is a part of the Design Plan reflecting the agreed milestone dates for the completion of phases of the Design Plan and the schedule that is adopted as a part of a Phase Plan for deliverables from the Managing Party at critical times during design and construction phases of a Project, the funding, commencement and completion of Projects then subject to the terms of this Agreement (as supplemented by Phase Plans), as such schedule may be updated from time to time by the City and the Conservancy.

**“Significant Event Report”** means the term described in Section 20.04.

**“SMBR”** means the City’s Small and Minority Business Resources Department.

**“SMBR Compliance Period”** means the term described in Exhibit “G”.

**“Submitting Party”** means the term described in Section 3.02A.

**“Term”** means the term described in Section 2.02.

**“Tunnel”** means the flood control tunnel along Waller Creek being constructed by the City as of the commencement of the Term.

**“Waller Creek”** means that creek partially located in the District commonly referred to as Waller Creek.

**“Waller District Design Guidelines”** means the standards described in Section 6.02.

**“WBE”** has the meaning set forth in City Code Section 2-9A(47) ), as such meaning is amended, modified or replaced.

**“Work”** means the physical construction work to be performed to complete the Public Improvement Projects.

## ARTICLE 1 RECITALS

A. The District is located in the City and is a prominent geographic feature that has helped to shape the historical evolution of the City.

B. The City is currently constructing the Tunnel within the District along Waller Creek, which when completed is expected to remove approximately 28 acres of property from the 100 year floodplain and facilitate the enhancement and revitalization of the District and the surrounding area to allow the reclaimed area to be developed.

C. Certain portions of the District have been blighted through years of being in the 100 year floodplain and not having sustained use or development.

D. The City is interested in seeking support to assist the City with the necessary work to design, develop, construct, operate and maintain the Public Improvement Sites in the District as a premier public amenity with a high level of design excellence and in the future to adopt land use regulations with respect to the Private District Sites consistent with the anticipated uses of the Public District Sites.

E. The Conservancy was formed on July 30, 2010 and raised a significant portion of the necessary funds to develop a comprehensive design of the District which has resulted in the approved Design Plan for the District. The Conservancy has volunteered to support the City's efforts and is using the time and talent of its board to increase the community's awareness and backing for this vital amenity for the City. Specifically among other things, the Conservancy will endeavor to (i) facilitate and aid the City with respect to its enhancement and development of the District, (ii) raise funds from the community to help implement the Design Plan, (iii) defray costs of the landscaping and other amenities within the District, (iv) assist the City with developing proposed zoning and land use rules to be adopted to ensure the achievement and maintenance of the Quality Standards of the District, and (v) facilitate and aid the City with respect to the operation and maintenance of the District.

F. City Council approved and adopted Resolution No. 2010923-090 on September 23, 2010, directing the City Manager to explore a public-private partnership with the Conservancy for the financing, design, development, construction, management and operation of the District, including Waterloo Park and Palm Park located within the District, and recommend to City Council a structure of the potential roles and responsibilities of the City and the Conservancy, including an implementation schedule.

G. The City and the Conservancy entered into a Memorandum of Understanding dated April 28, 2011 ("**Original MOU**"), as amended May 26, 2011 ("**MOU Amendment**") and as amended effective March 21, 2013 by City Council approval on December 6, 2012 and February 14, 2013 ("**Amendment No. 1 and 2**") (collectively, the "**MOU**"), which governs the Parties' relationship to the day immediately preceding the Effective Date. The City provided a significant portion of the necessary funds to develop a comprehensive design of the District which has resulted in the approved Design Plan for the District.

H. City Council approved and adopted Resolution No. 20110428-014 on April 28,

2011, pursuant to which the City authorized the creation of the LGC in accordance with Chapter 431 of the Texas Transportation Code. The LGC was created to oversee the improvement of the District and the day to day operations of the District.

I. Pursuant to the MOU, the Parties are entering into this Agreement to memorialize the roles and responsibilities of the City and the Conservancy, including an implementation schedule of improvements for the District and to describe their respective rights and responsibilities with respect to the financing, design, development, construction, management and operation of the District. In addition this Agreement will memorialize the termination of the MOU and MOU Amendment as being superseded by this Agreement (but not Amendment No. 1 and 2 as contemplated by Section 2.03 and Section 3.01C).

J. The health, safety and general welfare of the people of the City are directly dependent upon the continual encouragement, development, growth and expansion of business, commerce, and tourism in the City. Attraction of business, commerce and tourism to the City as a result of the development of the District and its ancillary uses will be an important factor in the continued encouragement, promotion, attraction, stimulation, development, growth and expansion of business, commerce and tourism within the City. The development and promotion of the District will provide significant benefits to the general public.

K. In view of the foregoing, the City has determined that entering into this Agreement is in the best interests of the City and the welfare of its residents, and in accord with valid public purposes, and the Conservancy has determined that entering into this Agreement furthers its pursuit of its charitable purposes.

L. Due to the efforts of the Conservancy significant benefits to the general public will be realized from the development and operation of the District under the Design Plan. The ongoing cooperation of the City and the Conservancy under this Agreement will promote the health, safety and general welfare of the people of the City from the development and promotion of the District.

**NOW, THEREFORE**, for and in consideration of the mutual obligations of the Parties described in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

## **ARTICLE 2 PURPOSE; TERM; MOU**

### **Section 2.01      Purpose; Roles of Parties.**

A. Purpose. The purpose of this Agreement is to continue the beneficial and cooperative working relationship between the Parties with respect to the District and the Projects, to establish the role of each Party in that relationship, to further the Parties' common goal of preserving, restoring designing, developing, enhancing, rehabilitating, repairing, improving, managing, operating and maintaining the District, promoting and expanding the use of the District by the public, and to govern the implementation of the Projects to achieve these results (collectively, the "Common Goals"). To that end, the City will work with the Conservancy when it negotiates existing agreements for use within the District to ensure consistency of

operations and the Common Goals.

B. The City's Role. The City's role in the Projects is generally that of (i) being the owner of most of the Public District Sites, which ownership shall be retained unless changed in accordance with Applicable Law, (ii) being the active Governmental Authority involved in the Projects, (iii) being a sponsor of the Common Goals to foster the Public Purpose, (iv) improving the District ROWs, (v) ensuring public funds spent for a public purpose, (vi) providing public money for the design and construction of City Improvements from the City Contribution, (vii) approving any budget for the LGC, and (viii) providing customary police, fire and emergency services within the District.

C. The Conservancy's Role. The Conservancy's role in the Projects, unless delegated to the City or to the LGC in a Phase Plan, (i) is the management of certain design, construction, operation, maintenance, community and public relations activities approved in a Phase Plan, and as set forth in the Operating and Management Agreement, (ii) to fundraise from the community and other available sources to support the Common Goals and to achieve the Public Purpose and (iv) to provide insight and information to the City and the LGC from the community and experts. The Conservancy shall employ a project director (the "**Project Director**") to manage the implementation of improvements in the District and to provide reports to the City on its efforts.

D. The LGC's Role. The LGC's role in the Projects is to: (i) oversee the improvement of the District, the Work under Phase Plans, the use of City or LGC funds for Projects, the use of City funds in the operations budget for the Conservancy, and the day to day operations of the District, (ii) carry out the decisions made by the City and the Conservancy generally with respect to the Common Goals and Public Purpose, (iii) be a Managing Party when designated in a Phase Plan, (iv) issue, from time to time, debt to assist with funding of Projects, (v) provide City Council with periodic updates on the status of Projects, and (vi) have open meetings as required by Applicable Law.

E. Good Faith. The City, the LGC and the Conservancy agree to work together in good faith and in a commercially reasonable manner. The Parties agree to not unreasonably withhold, condition or delay giving any approval or consent under this Agreement. The Parties agree to attempt to resolve expeditiously any disputes under this Agreement. Any decision reached under this Agreement and any Phase Plan shall be presumed to have been made in good faith and in a commercially reasonable manner.

**Section 2.02** **Term.** The "**Term**" of this Agreement starts on the Effective Date and terminates on January 31, 2033, unless this Agreement is terminated sooner as permitted in this Agreement. However, the Term will automatically renew for eight consecutive terms of 10 years each, unless the City or the Conservancy give 180 days' prior written notice to the other party of its election for the Term not to renew and for the Term to expire on the expiration of the term then in effect. The Conservancy shall give the City prior written notice 60 days before any date that the City or the Conservancy has the right to elect any such termination. If this Agreement is terminated by mutual agreement of the Parties, or other event, the Parties upon request shall promptly execute a document confirming the termination of this Agreement and such other documents as may be reasonable under the circumstances.

**Section 2.03 Memorandum of Understanding.** As of the Effective Date, the MOU, as amended (excluding Amendment No. 1 and 2) is superseded and replaced by this Agreement.

### **ARTICLE 3 DESIGN PLAN; APPROVALS; PHASES**

#### **Section 3.01 Project Architect; Initial Contributions; Design Plan.**

A. Project Architect. Pursuant to the MOU and a public process, the Parties have selected Michael Van Valkenburgh Associates, Inc. ("**MVVA**") as the Project Landscape Architect to produce the Design Plan, and Thomas Phifer & Partners ("**Phifer**") as the Project Architect. The Conservancy has negotiated and executed a contract between the Conservancy and MVVA (the "**MVVA Contract**") and the Conservancy and Phifer (the "**Phifer Contract**"). Any replacement of the Project Landscape Architect or the Project Architect shall be selected by the Conservancy, subject to the prior written approval of the City, and shall be an architect and landscape architect who is qualified and experienced in the design of facilities that are similar in nature and size as the Public Improvement Project. The Conservancy shall provide a copy of the MVVA Contract and the Phifer Contract and all amendments to the City and the LGC. The MVVA Contract and the Phifer Contract shall be assignable in whole or in part automatically to the LGC and the City upon the request of the LGC or the City, and both the LGC and the City shall have the right to approve any amendments to the MVVA Contract and the Phifer Contract.

B. Conservancy Contributions. The Conservancy is committed to having the financial strength to help support the District and has retained a development team to aid the Conservancy in raising funds from the community. The Conservancy will use its good faith efforts to raise sufficient funds as needed for its portion of the various phases of development of Projects approved by a Phase Plan. Any funds received by the Conservancy for work under a Phase Plan shall be placed into the Conservancy Account until such time as funds from the Conservancy Account are allocated to pay for work under a Phase Plan and are due to be deposited into the Project Disbursement Fund Account at the various phases of development under the Phase Plan.

Any payments from the Conservancy Account of the Conservancy to the Project Disbursement Fund Account shall be made payable to the Project Disbursement Fund Account, and shall bear the notation "Waller Creek District Project Disbursement Fund Account".

C. City Contributions. The City will make payments as contemplated by and subject to, the Amendment No. 1 and 2 to the MOU, to the extent such payments have not been fully paid as of the Effective Date. The City will endeavor to provide funding sources to complete the City Improvements in the Design Plan from lawfully available and otherwise unencumbered funds and these sources may include funds from bond proceeds and other sources of funds. As of the Effective Date, the City has identified sources of funds it contemplates can be used for City Improvements in the District which are described on Schedule 3.01C attached to this Agreement. On Schedule 3.01C, the City has identified as one possible source of such funding the bonds authorized in Proposition 14 of the November 6, 2012 bond election which principally allows for the planning, designing, engineering, acquiring, constructing, renovating, improving

and equipping public parks and recreation centers and other park buildings, natural area and other related facilities, but does not include costs for operating and maintaining these improvements. The City may elect to issue bonds authorized by Proposition 14 and use the proceeds of those bonds to fund all or a portion of the costs of such City Improvements. Any City bond funds used in this project will be used in a manner consistent with the voter-approved purpose for those funds. As a part of the City's annual budget process, the City contemplates that it will identify other sums of money that may be used for the District, including, but not limited to, money that may be allocated on a pro rata or other basis to the District from the budget of the City, which amounts will be subject to annual appropriation and approval pursuant to Applicable Law. In addition Operating Revenue from the District and park dedication fees may be available for use in the District.

D. Design Plan. The Design Plan for the Public Improvement Projects for the District has been developed and approved by the City and the Conservancy. It is contemplated that revisions to the Design Plan must be approved by City Council and the Conservancy, provided, that minor adjustments to the Design Plan may be made from time to time which singularly and in the aggregate do not cause the Design Plan to vary from the inherent scope, nature, capacities and capabilities of the then approved Design Plan, and if requested by the Conservancy, the City will deliver to the Conservancy a letter on which the Conservancy may rely that any such adjustments are minor.

### **Section 3.02            Review, Approvals and Objections.**

A. Review, Approvals or Consent Rights. The provisions of this Section 3.02 shall apply to all instances under this Agreement where the City, the LGC or the Conservancy has Review and Approval or Consent Rights (defined below); provided, however, that if the provisions of this Section 3.02 specify time periods for exercise of Review and Approval or Consent Rights that conflict with other express time periods in this Agreement for Review and Approval or Consent Rights, then the other express time periods shall control. As used in this Agreement, the term "**Review and Approval or Consent Rights**" shall include all instances in which one Party (the "**Submitting Party**") submits to another Party any document, notice or determination of the Submitting Party to which the other Party (the "**Reviewing Party**") has a right or duty under this Agreement to review, comment, consent, approve, disapprove, object, dispute or challenge; provided, however, permitting by the City and approval of any Phase Plans pursuant to Section 3.04 below expressly is not governed by this Section 3.02.

B. Standard for Review. The Submitting Party shall use reasonable efforts to submit to the Reviewing Party with a cover letter that states (i) in all capital letters that are in bold face type of at least 12 point in size on the top of the first page of the notice "**TIME SENSITIVE REQUEST FOR REVIEW/APPROVAL OR CONSENT**", (ii) the date of submission, (iii) the date by which a response is required under the terms of this Agreement or is requested by the Submitting Party if this Agreement does not specify a required response date, and such date shall not be unreasonable, (iv) the provision of this Agreement pursuant to which such review and approval or consent is sought (by document or drawing title, identifying number and revision date, or other clear description), which must include all documents and materials relevant to the request. The Reviewing Party shall review the request and shall timely give the Submitting Party notice of the Reviewing Party's comments and describe in detail the Reviewing

Party's reasons for any disapproval. The Reviewing Party shall have the right to extend the time period for its response as reasonably needed, unless this Agreement or a relevant Phase Plan mandates a hard deadline for the response and there is no Force Majeure Event. All submissions to the City, the Conservancy and/or the LGC shall be delivered to the City Representative, the Conservancy Representative and the LGC Representative.

C. Deemed Approval or Consent. If no response from the Reviewing Party is delivered to the Submitting Party within 15 Business Days after the complete submission of a particular matter (or the extended date reasonably requested) and if the City is the Reviewing Party, so long as the project manager for the City has received such submission, such matters shall be deemed approved or consented to by the Reviewing Party; provided, that no deemed approval or consent under this Section 3.02C is applicable to the submission of a Phase Plan or an amendment to a Phase Plan. There shall not be any implied or imputed approval or consent, except as expressly described in this Section 3.02C.

D. Duties, Obligations and Responsibilities Not Affected. An approval or consent by the Reviewing Party shall not, (i) relieve the Submitting Party of its obligations under this Agreement with respect to the matter so submitted, unless specifically so stated so in the submission and the submission is approved (or deemed approved), and (ii) shift the obligations of the Submitting Party with respect to the submitted matter to the Reviewing Party.

E. Prior Submissions. The Parties acknowledge that the communications or submissions by and among the Parties before the Effective Date shall not constitute a submission nor constitute approval by any Party of any matter requiring approval pursuant to this Agreement.

F. Exclusion of Phase Plans. In no event will a Party's agreement to a Phase Plan or an amendment to a Phase Plan be deemed approved.

### **Section 3.03            Phases, Phase Plans and Foundational Articles**

A. Phases and Phase Plans. The implementation of the Projects shall occur in phases based on written agreements reached by the Parties subsequent to this Agreement. The agreements reached by the Parties with respect to each phase of a Project shall be in the form of a written agreement that supplements this Agreement (each, a "**Phase Plan**").

B. Foundational Articles. The Parties agree that it is their intent to establish in this Agreement the process and basic agreement for the Phase Plans so that each Phase Plan may be approved, executed and delivered expeditiously once the Parties have agreed on the subject matter of a Phase Plan. Accordingly, the Parties have established the following foundational articles (collectively these Articles are referred to as the "**Foundational Articles**"): (i) Articles 4 and 5 which describe the process and agreements with respect to Public Improvement Projects; (ii) Article 6 which describes the process and agreements with respect to Private District Projects; (iii) Article 7 which describes the agreements with respect to O&M Projects; (iv) Article 8 which describes the Limitations on LGC Decisions of the LGC; (v) Article 9 which describes insurance requirements; (vi) Articles 10 and 11 which describe general guidelines for financing and disbursement of funds; (vii) Article 12 which describes naming rights; (viii)



Article 13 which describes the agreements with respect to representations, warranties and covenants of the Parties; and (ix) Article 14 which describes the agreements with respect to the indemnification obligations by the Conservancy. The Parties are not obligated to pursue any phase of any Projects or spend any funds on any Projects until a Phase Plan for a Project has been approved, executed and delivered by all the Parties. The Foundational Articles have been negotiated by the Parties in anticipation of phased implementation of Projects under the Design Plan that will be agreed upon and implemented over a number of years. As such, some of the Foundational Articles may not apply or adequately address the scope of all phases of the Projects. It is contemplated that the Foundational Articles may be modified with respect to any phase of any Project by the applicable Phase Plan.

### **Section 3.04            Phase Plan Process**

A. Project Proposal. If a Party (such Party, a “**Party Proposing Project**”) wishes to have a Phase Plan executed by the Parties to implement a Project, it will first notify the other Parties (such Parties, the “**Responding Parties**”) of the proposed Project in writing (a “**Project Proposal**”) and the Project Proposal will describe the Project and contain the following information:

(1) The general parameters of the proposed Project, including a general outline of the Project, a proposed schedule of commencement, milestones for commencement and completion of the Project and a narrative of how the Project will be implemented;

(2) If the Project is a Public Improvement Project, then (i) the identity of the architect, and any Contractors desired to be used for the Public Improvement Project and proposal to satisfy terms of any oversight required by Applicable Law, (ii) a description of the proposed contracting method to construct the Public Improvement Project (e.g., construction manager at risk, project manager, design-build, cost plus, stipulated sum, guaranteed maximum, etc.), and (iii) copies of any preliminary site plans, architectural plans, elevations, and other design materials prepared for the Public Improvement Project;

(3) The portion of the District to be covered by the proposed Project and a map showing the limits of construction for the proposed Project;

(4) A Project Budget showing the planned expenditures for the Project from the commencement of the Project to the completion of the Project, cost overrun contingencies, and the capital repair and operating and maintenance expenses reasonably anticipated to be incurred during the first 24 months after the Project is completed. It is the intention of the Parties that each phase of a Project be fully funded and monies be deposited in the Project Disbursement Fund Account (or applicable subaccount) on or before the commencement of each phase of a Project;

(5) The proposal for how the Project and any cost overruns will be funded, including any Contributions of the City and the Conservancy and other sources of funding;

(6) Any proposed modifications to the Foundational Articles for the Project;

(7) Any third-party consents or agreements that will be required to be

obtained in connection with the Project;

(8) The proposed process for procurements to comply with City Code and other Applicable Law, including the requirements of Sections 252 and 271 Local Government Code and Chapter 431 of the Texas Transportation Code;

(9) The proposed plan for the participation by M/WBEs, including, the awarding of contracts, subcontracts and other opportunities in connection with the proposed Project shall meet the requirements set forth in **Exhibit “G”**;

(10) If the Project is a Public Improvement Project, the division of responsibility for coordinating and obtaining approvals and permits from Governmental Authorities for design and construction;

(11) The proposed plan for obtaining and paying for any approvals or permits necessary to operate and maintain the proposed Project and the cost of operation and maintenance of the proposed Project, including using any Operating Revenue derived from operation of the proposed Project;

(12) Identification and mapped location of easements and other real property interests in connection with the Project;

(13) Any requirements that may apply due to the use of tax-exempt obligations or grants or other funds from governmental sources to fund the Project;

(14) Provision of insurance and bonding as required by Article 9;

(15) Identification of terms for exclusive free use of the Project by the City for public functions and City sponsored events;

(16) Identification of terms for a plan for activities and use of the District by community groups, such as non-profits, children and the elderly that includes free or reduced rates;

(17) Identification of maintenance of District ROWs to the extent not to be performed by the City and the applicable standards for such maintenance;

(18) Identification of how utilities will be provided, the cost of these services and any allocation or metering or sub metering;

(19) Identification of the operations and maintenance standards to be used by the Conservancy with respect to any Project;

(20) Identification of the revenue and fees that the Conservancy or the City will receive from the Project and identification of any proposed licensing;

(21) Identification of whether commercial design standards may be waived for a Project;

(22) Identification of any applicable license requirements for a Project or Project facilities;

(23) Identification of license agreements for the naming rights for any portion or component parts of the Project;

(24) Identification of any proposed change in ownership of a Public District Site; and

(25) Any other relevant information that the Proposing Party wishes to include.

B. Party Proposing Project. After delivery of a Project Proposal, the Party Proposing Project will take all reasonable steps necessary to cooperate with the Responding Parties with respect to questions, requests for additional information and other matters related to the Project Proposal that the Responding Parties reasonably decide is necessary for their review of the Project Proposal. The Party Proposing Project will endeavor to schedule a meeting with the Responding Parties to make a presentation of the Project Proposal. The Party Proposing Project will also make access available to the Responding Parties all consultants, architects and other third parties engaged by the Party Proposing Project to respond to questions and requests that the Responding Parties may have.

C. Response. Within a reasonable time after receipt of a Project Proposal, not to exceed 30 days, the Responding Parties will respond in writing to the Party Proposing Project (a “**Response Notice**”) indicating whether the Responding Parties are interested in pursuing the Project described in the Project Proposal, and giving any comments the Responding Parties may have to the Project Proposal. Failure of a Responding Party to send a Response Notice with such 30 day period shall be deemed to be the Party’s delivery of a Response Notice indicating that the Party is not interested in pursuing the proposed Project described in the Project Proposal. If all Parties are interested in pursuing the proposed Project, then they shall work together to agree to a Phase Plan with respect to such proposed Project within 30 days after delivery of the Response Notice of the Responding Parties (such period, the “**Project Agreement Period**”). If all of the Parties are not (or are deemed not to be) interested in pursuing the proposed Project or the Parties are not able to agree on a Phase Plan for the proposed Project within the Project Agreement Period, then there shall be no further obligation to continue to meet and confer and to seek to reach agreement on a Phase Plan for the proposed Project, but the Proposing Party may revise its Project Proposal and re-submit the same to begin the process described in this Section 3.04 again. Once the Parties agree on any phase of a proposed Project if there are necessary additional approvals, including a vote of City Council, such approvals shall be obtained before a Phase Plan is executed, delivered or effective.

D. Core Projects and Termination. If a Proposing Party has sent a Project Proposal for a proposed Project and the time period stated in Section 3.04C above has expired for the Parties to be obligated to work on a Phase Plan for the proposed Project, then the Proposing Party may resubmit a Project Proposal for the same proposed Project for one additional time and send it with a separate written notice to the Responding Parties that contains the following language, in all capital letters that are in bold face type of at least 12 point in size on the top of the first page of the notice: “**WARNING: THIS PROJECT PROPOSAL IS FOR A**

**PROPOSED PROJECT THAT IS CONSIDERED A CORE PROJECT AND, THEREFORE, IF A PHASE PLAN IS NOT AGREED UPON BY THE PARTIES, THE PROPOSING PARTY MAY TERMINATE THE JOINT DESIGN, DEVELOPMENT, MANAGEMENT AND OPERATION AGREEMENT WITH RESPECT TO ALL FUTURE PROJECTS.”** (any Project for which such notice is sent constitutes a “**Core Project**”). It is intended that a Core Project be a Project the Proposing Party in good faith believes is material and integral to achieving the Common Goals without which the Proposing Party is unwilling to continue working under this Agreement for future development of Projects. If after receiving a notice under this Section 3.04D designating a Core Project and completing the process described in Section 3.04C, the Parties are unable to agree on a Phase Plan for the Core Project, then the Proposing Party, as its sole recourse for the determination by one or more of the Responding Parties to reject all proposals by the Submitting Party to develop the Core Project, may elect to terminate this Agreement by giving written notice to the other Parties within 60 days after the Parties are no longer obligated to pursue such Phase Plan pursuant to Section 3.04C. This Agreement shall terminate as of the date of the termination notice and neither Party shall have any further rights, duties or obligations under this Agreement as to (and only as to) the future development of Projects, including such Core Project, and any amounts in a Project Disbursement Fund Account shall be disbursed to the City, and any assets in the District that are owned by the Conservancy shall be transferred without cost to the City. In case of termination, this Agreement shall remain in full force and effect for all Projects for which a Phase Plan has been executed and delivered by the Parties.

### **Section 3.05            Implementation by Managing Party.**

It is contemplated that a Phase Plan will specify which Parties are the Managing Party for all or portion of the work specified in the Phase Plan. In some instances the City and the Conservancy shall specify that the LGC is the Managing Party with respect to all or a portion of the work in a Phase Plan. It is the intent of the Parties that the LGC will not have any paid staff, unless the City and the Conservancy agree otherwise as a decision under Article 8, and the work of the LGC will be performed on behalf of the LGC by the Conservancy and the City. A Managing Party will have the following duties (subject to the terms of this Agreement, including the approval of Phase Plans with respect to Projects, the funding of Contributions in accordance with Phase Plans, and the fact that one or more Party may be tasked each with one or more of the obligations listed below pursuant to Phase Plans, and in the event that more than one Party is the Managing Party for work under the Phase Plan, the following duties may be divided among the Managing Parties as set forth in the Phase Plan):

A.     The Managing Party (i) shall undertake and assume responsibility to implement those Projects as to which all the Representatives of the other Parties agree in the relevant Phase Plan are to be the responsibility of the Managing Party; (ii) shall pay from the Project Disbursement Fund Account all costs in connection with the implementations of the Projects; and (iii) confirm in writing to the Representatives of the other Parties that funds deposited in the Project Disbursement Fund Account will only be disbursed by the Managing Party for the purposes described in this Agreement (as supplemented by the applicable Phase Plan); and

B.     The Managing Party shall coordinate the work of all Persons involved in Projects for which it is responsible. The Managing Party shall meet with the Project Architect,

Contractors, and other Persons providing services on a regular basis as is necessary in the Managing Party's sole judgment to assure the implementation of the Projects in accordance with the terms of this Agreement. To the extent the Managing Party has rights under any Contract pertaining to the Projects, the Managing Party will exercise such rights in accordance with this Agreement.

**Section 3.06 Services to be Performed by the Managing Party.** Subject in all instances to funding of the Contributions as provided in this Agreement and the Phase Plans, the Managing Party shall cause the Projects to be implemented in an orderly, expeditious and efficient manner in accordance with the Applicable Laws and this Agreement. Subject to the provisions of a Phase Plan, the Managing Party:

A. Shall provide the Schedule and reports required by Article 20 within the time periods prescribed.

B. May utilize the services of consultants (including City employees) and coordinate the design of the Public Improvement Projects as more specifically described in Article 4.

C. Shall direct, coordinate, and supervise the preparation of all submissions necessary under Applicable Law to obtain the Permits required in connection with the Public Improvement Projects, and negotiate with and act as liaison to the Governmental Authorities in connection with obtaining such Permits.

D. Shall use good faith, commercially reasonable efforts to obtain the best price and quality of goods and services in connection with all Projects and comply with applicable procurement requirements.

E. May negotiate agreements from time to time to retain the services of a Contractor (to the extent they are not directly retained by the LGC, the City or the Conservancy), who shall, among other things, execute the construction of the Public Improvement Projects, or, in the case of a construction manager, manage, supervise and direct construction activities related to the Public Improvement Projects.

F. Shall investigate, hire, contract with, train, pay, supervise and, when necessary, discharge the personnel reasonably required to be employed or engaged by the Managing Party in order to properly complete the Projects. Except as described in any Phase Plans addressing the same, such personnel shall in every instance be deemed independent contractors, agents or employees, as the case may be, of the LGC or the Conservancy and not of the City, unless the City is the Managing Party and has agreed in writing that such Persons are employees of the City for such work, and all matters pertaining to the employment, engagement, supervision, compensation, promotion and discharge of such independent contractors, agents or employees shall be the sole responsibility of the Managing Party. These expenses that are Project Costs will be allowed as set forth in the Phase Plan. All salaries, wages, commissions and other compensation or expense of personnel employed by the Managing Party, including so-called fringe benefits, medical and health insurance, pension plans, social security, taxes, workers' compensation insurance and all other expenses of the Managing Party are and shall be the responsibility of and paid by the Managing Party. The Managing Party shall use reasonable

efforts to cause all personnel used by the Managing Party, the Project Landscape Architect, the Project Architect, and any Contractor in the performance of their responsibilities to implement the Projects to be qualified by training and experience to perform their assigned tasks.

G. Provided that (i) the City and/or the Conservancy is obligated to make payments for such Project Costs, and has funded fully its share of such Project Costs as set forth in the Phase Plan and has authorized disbursements for amounts due and payable as costs and expenses of a Project from the Project Disbursement Fund Account, (ii) disbursements are made in such proportions and (iii) the disbursement procedures for that Project have been approved by the City and the Conservancy and are being followed, shall cause such disbursements to be made regularly and punctually to the Persons entitled to such disbursements pursuant to the requisition procedure established in this Agreement (as supplemented by the applicable Phase Plan).

H. Shall maintain separate, true and complete books, records, accounts, journals and files regarding the Projects, which shall contain Contracts, agreements, all design documents (including, without limitation, Contract Documents), shop drawings, change orders, applications for payment, Permits, rental agreements and records, insurance policies, non-proprietary correspondence directly related to the Projects, receipts, bills, vouchers and any audits obtained by the Managing Party. At the request of the LGC, the City or the Conservancy, provide the LGC, the City or the Conservancy with access to and one copy of this information, and if needed, the Parties may charge for these copies.

I. Shall promptly furnish to the Parties copies of all legal notices received by the Managing Party affecting the District, including, without limitation, notices from Governmental Authorities and all notices from any Party claiming any default in any financing or payment obligation, and any other notice not of a routine nature.

J. Shall promptly notify the Parties of any suit, proceeding or action that is initiated or threatened in connection with the District or against the Managing Party in connection with the Projects.

K. Shall provide the City, as soon as reasonably practicable, but in no event later than 60 days after the completion date of the applicable Public Improvement Project as set forth in the Phase Plan, with an original and three sepia prints of as-built drawings substantially reflecting and depicting the applicable Public Improvement Project as constructed and indicating the changes in and deviations from the Contract Documents and an electronic version as such version exists following the completion date. The as-built drawings will be an assembled set prepared by the various Contractors, suitable for use by the City.

L. Shall cooperate with the City in pursuing specified goals for M/WBE participation in performing work for all Public Improvement Projects and implementation of the O&M Projects.

M. Shall keep the Representatives of the other Parties that are not the Managing Party apprised of the progress of the implementation of all Projects and permit such Representative the right to attend, for informational purposes, the regularly scheduled Project status meetings with the Managing Party, Project Architect and Contractor(s).

N. Shall advise the Representatives of the other Parties that are not the Managing Party with respect to Environmental Conditions known by the Managing Party to exist in the District and all requirements imposed by, and the Managing Party's negotiations with, any Governmental Authority concerning any such Environmental Condition.

O. Shall, if the Managing Party is the Conservancy, indemnify and hold harmless the directors of the other Parties that are not the Managing Party and their respective elected officials, agents, employees, officers, directors and representatives, individually and collectively (all such parties being the, "**Managing Party Indemnitees**") from any liability that may be imposed on them due to the activities of the Managing Party. If the Conservancy is the Managing Party, it expressly agrees that the Managing Party Indemnitees shall have no liability whatsoever on behalf of the Conservancy as the Managing Party.

If the Managing Party is not the City, the Managing Party shall obtain the consent of the City before commencing, defending or settling legal actions and proceedings concerning the design and construction of the Public Improvement Project and retaining counsel in connection with such legal action or proceeding. In lieu of the Managing Party performing the services described in this Section 3.06, the Managing Party may use commercially reasonable efforts to cause one or more services to be performed by another Person; provided, however, in no event shall the Managing Party be relieved of such services or create any obligation of the other Parties to pay for such services where such other Parties are not the Managing Party.

**Section 3.07 Services to be Performed by the Conservancy.** In addition to the services the Conservancy may perform as the Managing Party and under Article VII and the Operating and Management Agreement, the Conservancy shall do the following:

A. Retain a design assurance manager to advise the City, the LGC and the Conservancy as the Design Plan is implemented. The design assurance manager shall be subject to the prior written approval of the City.

B. Coordinate with the City in discussions with the State of Texas, the University of Texas System, Travis County, and other governmental entities, private landowners, the University of Texas at Austin, Seton Hospital, and other stakeholders with respect to easements, acquisition of property, development issues, and other matters related to the District.

C. Collaborate with the City on the development and implementation of a reasonable ongoing public outreach program with respect to the District with regular meetings and updates provided to the City and the LGC.

D. Promote, preserve and encourage the public use of the District.

E. Assure that no public funds contributed will be spent on improvements to private land and that no funds received by the Conservancy will be spent for any purposes outside of the design, development, operation and management of the District in accordance with this Agreement.

F. Assist with the development of the Project Budgets for anticipated Projects.

G. Assist with periodic updates to City Council regarding the condition of the District and the status of each Project to which the City and the Conservancy have agreed and any proposed Projects.

H. Use its reasonable efforts to maximize Pledges of funds for the design, development, management and operation of the District. All Pledges shall be in a written form.

I. Create operational, management and maintenance guidelines and procedures for the overall management of the District.

J. Perform such obligations and duties under an approved Phase Plan where the Conservancy is a Managing Party.

**Section 3.08 Services to be Performed by the City.** In addition to the services the City may perform as the Managing Party, the City shall do the following:

A. Designate one or more project managers to represent the City's interest in the District to the extent the City desires to do so.

B. Use its reasonable efforts to continue the public-private partnership between the City, the LGC and the Conservancy to accomplish the Common Goals.

C. Assist with the development of the Project Budgets for anticipated Projects.

D. Coordinate with the Conservancy in discussions with the State of Texas, the University of Texas System, Travis County, and other governmental entities, private landowners, the University of Texas at Austin, Seton Hospital, and other stakeholders with respect to easements, acquisition of property, development issues, and other matters related to the District.

E. Assure that no public funds contributed will be spent on improvements to private land and that no funds contributed will be spent for any purposes outside of the design, development, operation and management of the District in accordance with this Agreement.

F. Review the Project to make sure that the construction exceeds City's construction requirements.

G. Perform its obligations and duties under an approved Phase Plan where the City is a Managing Party.

**Section 3.09 Services to be Performed by the LGC.** In addition to the services the LGC may perform as the Managing Party, the LGC shall do the following:

A. Use its reasonable efforts to continue the public-private partnership between the City, the LGC and the Conservancy to accomplish the Common Goals.

B. Oversee the improvement of the District and the day to day operations of the District.



C. Carry out the decisions made by the City and the Conservancy generally with respect to the Common Goals and Public Purpose.

D. Assist with the development of the Project Budgets for anticipated Projects.

E. Assure that no public funds contributed will be spent on improvements to private land and that no funds contributed will be spent for any purposes outside of the design, development, operation and management of the District in accordance with this Agreement.

F. Aid in financing Projects for the District.

G. Perform its obligations and duties under an approved Phase Plan where the LGC is a Managing Party.

**Section 3.10 Impasse.** In settling any Impasse, each of the Parties, subject to Article 18, shall act in accordance with the following procedures:

A. In the event of an Impasse, either Party may make a written request for a meeting between representatives of each Party within 14 days after receipt of the request or such later period as agreed by the Parties. Each Party shall include, at a minimum, one senior level individual. The purpose of this and any subsequent meeting is to attempt in a good faith, commercially reasonable manner to negotiate a resolution of the Impasse. If, within 30 calendar days after such meeting, the Parties have not succeeded in negotiating a resolution of the Impasse, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by all Parties, in which event the Parties may proceed directly to mediation as described below.

B. If the efforts to resolve the Impasse through negotiation fail, or the Parties waive the negotiation process, the Parties may select, within 30 calendar days, a mediator trained in mediation skills to assist with resolution of the Impasse. Should they choose this option, the Parties agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in this Agreement prevents the Parties from relying on the skills of a person who is trained in the subject matter of the Impasse or a contract interpretation expert. If the Parties fail to agree on a mediator within 30 calendar days after initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center. The mediation shall be terminated by on the earlier of: (i) the execution of a settlement agreement or similar statement by the parties; (ii) a declaration of the mediator that mediation is terminated; (iii) a written declaration by any of the Parties to the effect that the mediation process is terminated at the conclusion of five Business Days; or (iv) 30 calendar days after the date of the first mediation session. The City and the Conservancy shall share the costs of mediation equally.

C. In the event that the mediation is terminated without settlement of the Impasse, then any Party may terminate this Agreement on no less than 90 days' notice, such termination to be effective on the date described in such notice which shall not be less than 90 days after the date of such notice as to (and only as to) the future development of Projects; provided, however, that this Agreement shall not terminate if the Impasse is resolved before the early termination

date. In the event this Agreement is terminated pursuant to the immediately preceding sentence as to future Projects, this Agreement shall remain in full force and effect for all Projects for which a Phase Plan has been executed and delivered by the Parties.

**Section 3.11 Conflicts of Interest Policy.** The LGC and Conservancy shall adopt and maintain during the Term of this Agreement a policy concerning conflicts of interest that is approved by the City and complies with policies or practices adopted by the City from time to time applicable to public-private partnerships to which the City is a party.

## **ARTICLE 4 DESIGN OF INDIVIDUAL PUBLIC IMPROVEMENT PROJECTS**

### **Section 4.01 Development.**

A. Once the Parties have executed and delivered a Phase Plan with respect to a Public Improvement Project, the Managing Party shall (to the extent not already included and approved in the Phase Plan) cause the Project Architect to have a sufficient number of informal reviews of plans as mutually agreed upon and following the completion of these reviews to prepare and deliver to the Representatives of the other Parties for their respective review and approval a copy of the Contract Documents for that Public Improvement Project (“**Project Contract Documents**”).

B. Any objections to the Contract Documents shall be delivered to the Managing Party within 15 Business Days after receipt of complete and correct copies of such documents. The response shall contain, in reasonable detail, the reasons for objections. Further, in the event that the City Representative disapproves, objects or comments, as applicable, because of a failure to meet the Quality Standard, it shall meet on an expeditious basis with the Managing Party to resolve any items of Impasse to the reasonable satisfaction of the City and Managing Party. To the extent that a portion of the Contract Documents have been deemed approved, such approval may not be withdrawn, and the Managing Party shall not be required to obtain re-approval of such portion deemed approved except to the extent that there is a subsequent change to such portion. Any resubmission by the Managing Party of any proposed Contract Documents that was disapproved or objected to by the Representatives of the other Parties within 10 Business Days after receipt of a complete resubmission which shall be approved or objected to in the same manner as an original submission under this section. The Project Contract Documents approved pursuant to this Section 4.01 may not be changed or altered without prior notice to the Representatives of the other Parties and approval as described in this Section 4.01B.

C. During the design process, the LGC shall establish, and update as necessary, the milestone dates in the Schedule for delivery of the various design documents and other necessary components of the development process.

D. The LGC shall retain control of the design process and all aspects of the design and specifications of the Public Improvement Project (other than District ROWs) provided, however, the City Representative shall have the right to review and approve the Contract Documents for applicable permits to be obtained.

**Section 4.02 Design Standards.** The Contract Documents for any Public Improvement Project shall comply with all Applicable Laws, the Quality Standard, and the requirements of the Design Plan.

**Section 4.03 District ROWs.** The City retains approval and control over all District ROWs, and no Project shall include the District ROWs unless the City consents to such inclusion in a Phase Plan, which consent the City may withhold in its sole and absolute discretion.

**Section 4.04 Use of Plans and Contract Documents.** Without the prior written consent of the City, neither the LGC nor the Conservancy shall use the Contract Documents, drawings, models, samples and the like produced or developed in connection with the design and construction of any Public Improvement Projects for any purpose other than as contemplated by this Agreement. All Contract Documents shall be certified to, and jointly owned by, the LGC and the City, and the Contract Documents shall be expressly assignable to the City upon request of the City.

## **ARTICLE 5 CONSTRUCTION OF PUBLIC IMPROVEMENT PROJECTS**

### **Section 5.01 Construction Methods and Construction Manager at Risk.**

A. A Public Improvement Project may be delivered by various construction methods, such as Construction Manager at Risk, Design Build, Job Ordering Contracting, Competitive Sealed Proposals and other methods as determined by the Managing Party, provided that the method selected is consistent with Applicable Law. The remainder of this Article 5 is written based on the Construction Manager at Risk delivery method.

B. The Managing Party shall conduct a comprehensive selection process to select a Construction Manager at Risk from at least three qualified and experienced firms.

C. The Managing Party shall use commercially reasonable efforts to cause the Construction Manager at Risk to diligently pursue and prosecute to final completion the construction of the applicable Public Improvement Project in accordance with the Project Budget, the Schedule and the Contract Documents for that Public Improvement Project.

D. The Managing Party shall negotiate and execute the Construction Contract between the Managing Party and the Construction Manager at Risk and other Contractors for the applicable Public Improvement Project, which form of contract shall be determined by the Managing Party and approved as a part of the applicable Phase Plan or otherwise approved by the Representatives of the other Parties before execution. Except as otherwise provided, amounts owing under Contracts and other such agreements, including costs, fees and expenses of Contractors, entered into by the Managing Party in connection with the construction of the applicable Public Improvement Project, shall be funded as described in the applicable Phase Plan through the Project Disbursement Fund Account. The Managing Party shall require the Construction Manager at Risk and others performing the Work on a Public Improvement Project to obtain and maintain and provide copies of all Permits and any bonds and insurance required by this Agreement (as supplemented by the applicable Phase Plans).

**Section 5.02 Supervision of Construction.** The Managing Party shall cause the construction of each Public Improvement Project in accordance with the Phase Plan for the Public Improvement Project. The Managing Party shall cause the Construction Manager at Risk to supervise and coordinate the construction of the Public Improvement Project so that the Public Improvement Project is constructed, equipped, furnished and completed with materials in a good and workmanlike manner and in accordance with the terms of this Agreement. To the extent that the Project is a public works project, the Managing Party shall cause such work to be directly supervised by a Project Engineer. The Managing Party shall use commercially reasonable efforts to enforce substantial compliance with the terms of the Contract Documents and to require that work be continuously and diligently performed to achieve substantial completion on or before the completion date described in the Schedule, subject to Force Majeure Events. Without limiting the foregoing, the Managing Party shall use commercially reasonable efforts to cause the Construction Manager at Risk to do the following:

A. Coordinate the Work for the Public Improvement Project as it progresses, cooperate with regulatory agencies' and consultants' inspections, review inspection reports, schedule and conduct preconstruction and construction meetings, implement courses of action when requirements of Contracts are not being fulfilled, and review and revise estimates of construction costs.

B. Negotiate or prepare bid packages for any portion of the Work for the Public Improvement Project necessary for the award of sub contracts as required under their agreement, coordinate selections and procedures, maintain harmonious labor relations, and encourage participation by M/WBE as required by **Exhibit "G"**.

C. Prepare all applications for payment with supporting documentation and evidence of all payments as required by law and specified within each Construction Contract for each Public Improvement Project. Prepare all requests for change orders with supporting documentation for consideration by the Managing Party.

D. Subject to the consent of the Managing Party negotiate final payments and/or final settlements with all parties involved in the construction of the Public Improvement Project

E. Cause any known defects in the construction of the Public Improvement Project or in the installation or operation of any equipment or fixtures to be corrected during construction and applicable warranty periods.

F. Hold regular job meetings with all job-site personnel, including contractors and subcontractors and the Project Landscape Architect and/or Project Architect, as appropriate and necessary, during the construction of the Public Improvement Project to review the progress and the completion of the Work.

G. Prepare a comprehensive, detailed construction schedule for the review and acceptance of the Managing Director. Provide an update to this schedule on a regular basis as described in the Construction Contract. Advise the Managing Party of any necessary changes (described in **Section 5.04**) or any delays or anticipated delays in meeting the Schedule for the Public Improvement Project and of the actual dates on which the various stages of construction

indicated on the Schedule for the Public Improvement Project are started and completed.

H. Supervise and coordinate the completion of “punch list” items and warranty work following substantial completion of the Public Improvement Project.

If construction of the Public Improvement Project does not progress in accordance with the milestone dates required by the Schedule, as it may be adjusted pursuant to the terms of this Agreement, or if it is unlikely that such dates will be met based on the progress of the Work, the Managing Party shall give the Representatives of the other Parties timely notice of such fact and may, but is not required to, cause an acceleration of such Work by all available means including utilization of overtime, additional work crews and alternate material suppliers so long as the cost of the Project Budget is not exceeded.

**Section 5.03 Correction of Work.** If during construction, the Managing Party becomes aware that construction is not in accordance with the Contract Documents, the Managing Party shall cause any such nonconforming work to be corrected by the responsible party, at no expense to the other Party, and without adjustment to the Project Budget or Schedule. If, however, the Managing Party determines it to be inexpedient to require the correction of such Work, then so long as the Quality Standard is maintained, the Managing Party may require an equitable deduction under the applicable Contract or other remedy acceptable to the Managing Party. To the extent the Project Landscape Architect or Project Architect determines the same to be reasonably necessary consistent with sound construction practices, the Managing Party will engage the services of independent testing agencies to verify construction compliance with the contract specifications and drawings and to monitor the Construction Manager at Risk’s quality control program.

**Section 5.04 Changes to Contract Documents.** The Managing Party shall have the right to make changes to the Contract Documents for a Public Improvement Project, provided that any such changes conform to the Quality Standard and the Managing Party receives the prior written approval of the other Parties. The costs of any such changes shall not result in any increase to the Project Budget for the Public Improvement Project, without the written approval from the Representatives of the other Parties and an agreement on the proposed source of funding. If the costs are less than the Project Budget, then the Managing Party shall make recommendations as to the use of any excess funds and an amendment to the Phase Plan shall be agreed upon with respect to any use of such excess funds.

**Section 5.05 Sales Tax.** As permitted by Applicable Law, the Parties will structure the purchase of materials for the construction of a Public Improvement Project to be exempt from all state and local sales and use taxes. The LGC, the City and the Conservancy shall cooperate as may be reasonably necessary to accomplish this result.

**Section 5.06 Bonding, Liens and Claims.** Each Construction Contract for any Public Improvement Project shall require the Construction Manager at Risk to provide a Payment Bond and a Performance Bond in favor of the City and the Managing Party, as co-obligees, which satisfies the requirements of Chapter 2253 of the Texas Government Code, as amended, and if applicable, those laws relating to the construction of public works. If any claim is made against the Payment Bond, with respect to public land, by reason of any Work supplied

or claimed to have been supplied under a Construction Contract for construction of public works on public land, the Managing Party shall take such actions as are necessary to defend against the claim made and protect the Parties, subject to any reimbursement by the Conservancy and/or City in accordance with the Phase Plan, including causing the same to be satisfied or effectively preventing the enforcement of this claim against anything other than the Payment Bond, by injunction, payment, deposit, bond, court order or otherwise. If any claim is made with respect a portion of the District which is not public land, by reason of any Work supplied or claimed to have been supplied under a Construction Contract, the Managing Party shall take such actions as are necessary to defend against the claim made and protect the other Parties and the portion of the District which is not public land, subject to any reimbursement by the Conservancy and/or City in accordance with the Phase Plan, including causing the same to be satisfied or effectively preventing the enforcement of this claim against the other Parties and the portion of the District which is not public land by injunction, payment, deposit, bond, court order or otherwise.

**Section 5.07 Development Fees.** Unless expressly described otherwise in the applicable Phase Plan, all development, review, and inspection fees for a Public Improvement Project required by the land development portions of the City Code or under other agreements related to the Public Improvement Project shall be included as part of the Project Budget and paid out of the Project Disbursement Fund Account.

**Section 5.08 Permits.** Unless expressly described otherwise in the applicable Phase Plan, the City shall cooperate, in its usual and customary manner, with the Managing Party and its contractors in connection with any required platting or replatting of the Public District Sites in connection with a Public Improvement Project, street closures, applications for the issuance of all building permits, plans of development, easements, requests for certificates of occupancy, and such other documents as may be reasonably required by the Managing Party to obtain building permits, licenses, approvals, certificates and other permits and authorization as may be necessary for the development, construction and operation of a Public Improvement Project.

## **ARTICLE 6 ENTITLEMENTS**

**Section 6.01 Commissions.** The City and the LGC will be responsible for approving, accepting, displaying and determining the maintenance of any public art for the District to ensure consistency with the Design Plan. The City waives the requirements of the City Code related to public art, including the requirements of City Code Chapter 7-2 for a separate approval of public art by the Arts Commission.

**Section 6.02 Rules.** All applicable City Code and zoning, land use rules, and regulations shall govern the development and construction of the Private District Sites. In addition the “Waller District Design Guidelines” attached to this Agreement as **Exhibit “F”** (“**Waller District Design Guidelines**”) shall guide development and construction of the Private District Sites, and the LGC shall have the right to amend the Waller District Design Guidelines from time to time so long as such amendments are consistent with the Design Plan. After approval of the Design Plan, the City will assess the need to amend Ordinance 20100624-151 to reflect any changes required by the Design Plan.

**Section 6.03 Project Architect.** If the Conservancy funds the necessary Conservancy Contributions, the LGC shall retain the Project Architect to work with the City and the Conservancy in the Phase Plans.

**Section 6.04 Review.** A Phase Plan may describe the review process for such Project as to facilitate the anticipated completion schedule consistent with the review for other City projects.

**Section 6.05 District ROWs.** The City retains ownership, approval and control over all District ROWs, and no Project shall include the District ROWs unless the City's Public Works Director consents to such inclusion in a Phase Plan, which consent the City Public Works Director may withhold in his or her sole and absolute discretion.

**Section 6.06 Effect of the City Approvals.** The City's approval of the Design Plan or other approvals under the terms of this Agreement does not reflect any approval, representation or warranty with respect to the sufficiency, accuracy, completeness or integrity of the Design Plan or the matters so approved by the City, all of which are expressly disclaimed by City. Each approval required of City under the terms of this Agreement is in addition to the usual and customary approvals required for construction or development under the City Code, unless provided otherwise in a Phase Plan.

**Section 6.07 City Development Fees and Inspection Costs.** The Managing Party shall pay to the City from the applicable Project Disbursement Fund Account all applicable fees associated with the implementation of the Projects, including, but not limited to, application, review, filing, oversight, inspection, street closure, and other fees applicable to each Project at the times and in the amounts described in the City Code, unless provided otherwise in a Phase Plan.

## **ARTICLE 7 OPERATION AND MANAGEMENT**

**Section 7.01 Operation and Management of the District.** It is contemplated that the Conservancy will commence operation and management of the District (but excluding the District ROWs) on the terms set forth in the Operating and Management Agreement attached to this Agreement as **Exhibit "D"** (the "**Operating and Management Agreement**").

**Section 7.02 Marketing Plan.** The Parties shall work together to develop, implement and monitor signage, marketing, advertising and promotions for the Public District Sites. The Conservancy shall have the primary responsibility for marketing, advertising and promoting the Public District Sites in accordance with the Quality Standard or shall cause such responsibilities to be undertaken by Managers of a O&M Project. Nevertheless, the City shall have the right to approve all signage, marketing, advertising and promotional material related to the Public District Sites.

**Section 7.03 Catering.** The Conservancy may, in its discretion but subject to approval by the LGC, develop a catering policy for the Public District Sites that will allow for the utilization of caterers who meet certain quality and service standards and who also otherwise

comply with the catering policy (including insurance requirements, deposit requirements and other applicable fees and charges) approved by the Parties.

**Section 7.04 Rates.** The Conservancy may establish from time to time minimum rental rates for use or admission to any Public District Site, subject to the review and approval by the City or a department of the City, which approval shall not be withheld so long as such rates are reasonable.

## **ARTICLE 8 LIMITATIONS ON LGC DECISIONS**

**Section 8.01 Limitations on LGC Decisions.** The governing documents for the LGC shall describe the actions that may not be made by the LGC without the consent of the City or both the City and the Conservancy, these actions being set forth on **Exhibit “B”** which is attached to this Agreement and incorporated by this reference (such actions individually and collectively referred to as a “**Limitations**”). In no event shall the LGC take any action which modifies or deletes these Limitations provisions of the governing documents of the LGC unless otherwise provided in a Phase Plan which specifically references that it is intended to make such modification or deletion.

## **ARTICLE 9 INSURANCE**

**Section 9.01 Insurance.** The Managing Party and the Conservancy shall provide, or shall cause Contractors or licensees of the resources or facilities within the District to provide, evidence of insurance with responsible companies as is recommended by the City’s Risk Management Office. This shall be done for each Project and each part of the operations and licensed use of the resources and facilities within the District. They shall maintain this coverage throughout their Work, operations or licensed use. This evidence of coverage shall be submitted to the City before commencement of any Work or such operations and licensed use. The Managing Party shall require that any professionals or other persons under the Contract Documents or other contracts maintain bonds required by the City.

**Section 9.02 Waiver of Subrogation.** All insurance policies required to be obtained and maintained by the Managing Party and the Conservancy pursuant to the terms of this Agreement shall provide that neither Conservancy, the City nor the LGC shall be liable to the other Parties or to any insurance company (by way of subrogation or otherwise) insuring any other Party for any loss or damage to property or injury to persons, or any resulting loss of income, or losses under workers’ compensation laws and benefits, even though such loss or damage might have been occasioned by the negligence (whether ordinary or gross) of such Party, its agents or employees, to the extent any such loss or damage is actually covered by insurance benefitting the Party suffering such loss or damage. The provisions of this Section 9.02 are not intended to limit the claims of any Party to the face amount or coverage of insurance policies provided for or to evidence a waiver by a Party of any claim for damages in excess of the face amount or coverage of any such insurance policies. Neither the issuance of any insurance policy required under this Agreement, nor the minimum limits specified in this Agreement with respect to a Party’s insurance coverage, shall be deemed to limit or restrict in any way a Party’s liability



arising under or out of this Agreement. The failure of a Party to maintain any required insurance shall be a defense for the other Parties to any claim asserted by the Party against either of the other Parties by reason of any loss sustained by the Party that would have been covered by the required insurance. The City expressly shall have no liability for the activities of the LGC or the Conservancy.

**Section 9.03 Notice of Claims.** The Conservancy or the Managing Party (as applicable) shall use its reasonable efforts to investigate and make a full timely written report to the insurance carriers as to any accident at the Public District Sites, claim for damages relating to the design and/or construction of the Public Improvement Projects, and material damage to or destruction of the Public District Sites or any improvements located on the Public District Sites (and the estimated cost of repair), and prepare and file any and all reports required by any insurance carriers and provide copies to the City and the Conservancy.

**Section 9.04 Additional Insurance.** The Parties may agree on additional insurance requirements for each Project pursuant to the applicable Phase Plan.

## **ARTICLE 10**

### **PROJECT DISBURSEMENT FUND ACCOUNT; PROJECT BUDGETS; PAYMENT/REIMBURSEMENT REQUESTS**

**Section 10.01 Project Disbursement Fund Account.** The Conservancy shall establish a Project Disbursement Fund Account as an account separate and apart from any other accounts of the City, the LGC, and the Conservancy and dedicated solely for the District. Subaccounts shall be established as directed by the City reserved for revenue collection, construction, operation, capital repair reserves, and other subaccounts. Unless expressly provided otherwise in this Agreement, the City Contribution and the Conservancy Contribution shall be deposited into the Project Disbursement Fund Account, from time to time, and in the amounts necessary to pay timely their respective portion of the costs of the Projects and in accordance with this Agreement (as supplemented by Phase Plans). The City will fund its portion based upon completed Work and its review of invoices submitted to the City to support its payment. It is understood that the cost of administrations, meetings and document preparation will be borne individually by the City and the Conservancy as individual separate costs that will not be reimbursed from the Project Disbursement Fund Account unless specified in writing in a Phase Plan or otherwise.

**Section 10.02 Disbursements from the Project Disbursement Fund Account.** The money in the Project Disbursement Fund Account shall be deposited into and disbursed to the Managing Party (or on its behalf) only to pay the costs of the Projects upon receipt of a properly completed Payment/Reimbursement Request submitted by the Managing Party, all pursuant to the procedures outlined in this Agreement (as supplemented by the applicable Phase Plans). Reimbursements or payments for the Project Costs shall be made no sooner than as provided in the applicable Phase Plan, and only if the conditions described in this Agreement and the applicable Phase Plan have been satisfied, and shall be disbursed only for the Project Costs reflected in the Project Budget for the Project or otherwise permitted under this Agreement or the applicable Phase Plan.

**Section 10.03 Project Budget.** The Managing Party will submit a Project Budget at the time the Phase Plan is proposed for a Project. The City and the Conservancy will review and approve the proposed Project Budget, which approval may not be unreasonably withheld, conditioned or delayed. The approved Project Budget will be attached to the Phase Plan. The Managing Party shall have the right, from time to time, subject to the review and approval of the Representatives of the other Parties, to reallocate budgeted amounts from one category to any other category of a Project Budget, subject to any restrictions on funding sources.

**Section 10.04 Payment/Reimbursement Request.**

A. For each Project that is the subject of a Phase Plan, the Managing Party will submit a Project Costs payment request (“**Payment/Reimbursement Request**”) in the sample form of **Exhibit “C”** attached, as this form may be revised from time to time, to the Representatives of the other Parties. Any such submission may contain reference to information available for inspection by the City or the Conservancy. The Representatives of the other Parties will promptly review the Payment/Reimbursement Request, and if all or part of the Payment/Reimbursement Request is approved, the Representatives of the other Parties shall forward the Payment/Reimbursement Request to all Parties, indicating its approval or the approval of a portion. If there is a rejection of all or part of the Payment/Reimbursement Request by any of the Representatives of the other Parties, the accepted portion of the Payment/Reimbursement Request shall be processed only if permitted in writing by all the Representatives of the other Parties as provided in this Agreement and the rejected portion will be returned to all Parties within 10 Business Days after the date of submission to all the Representatives of the other Parties with a reasonable and detailed explanation of the rejection.

B. Upon approval of the Payment/Reimbursement Request or any approved portion, the Managing Party shall pay, from the Project Disbursement Fund Account, to the Contractors or, at the election of the Managing Party, jointly to both the Contractor(s) and the Managing Party, the amounts approved in the Payment/Reimbursement Request, with such payments being made proportionally based on the proportion paid by the City and the Conservancy.

C. Payment/Reimbursement Requests submitted for payment or reimbursement of Project Costs paid for or incurred for any Public Improvement Projects shall include (i) an unconditional waiver or partial waiver, as the case may be, of liens for the Contractors and a conditional waiver of liens, with the only condition being payment of the amount requisitioned, for each subcontractor, or other appropriate evidence of full payment indicating that the party has fully paid for all items invoiced for which reimbursement is requested, and (ii) an invoice for services rendered for all items invoiced for which payment is requested. Accompanying each new requisition for any Public Improvement Project shall be unconditional waivers of lien or partial waivers, as the case may be, of all subcontractors paid from the prior requisition. No waiver of lien shall be required from parties who do not have the ability to place a lien on any portion of the District or the funds of the LGC, the Conservancy or the City.

## **ARTICLE 11 FINANCING OF THE PROJECTS**

**Section 11.01      Determination of the City Contribution and the Conservancy Contribution.** Funding for each Project shall be provided by the LGC, the Conservancy and/or the City in accordance with the terms of the Phase Plan for the Project.

**Section 11.02      Capital Repair Funds.** Upon substantial completion of each Public Improvement Project, or at such earlier date as may be described in the applicable Phase Plan, the Conservancy shall establish a Capital Repair Fund with respect to each Public Improvement Project and the Conservancy shall deposit into a Capital Repair Fund (i) the initial amount, if any, to establish the Capital Repair Fund as indicated in the applicable Phase Plan, plus (ii) all Operating Revenues derived from the Public Improvement Project remaining after payment of all Operating Expenses for the Public Improvement Project until the Capital Repair Fund for the Public Improvement Repair equals the required amount to be described in the applicable Phase Plan. The Capital Repair Fund will be a funding source for the maintenance, repair, refurbishment and replacement of the Public Improvement Project and the associated Public District Site. It is permitted to have a master Capital Repair Fund for some or all Projects so long as each Public Improvement Project has been separately allocated funds from the master Capital Repair Fund and allocated funds are not counted more than once. The Conservancy shall maintain books and records reflecting the sources and uses of all Capital Repair Funds, including (but not limited to) the manner in which it has allocated any portion of a master Capital Repair Fund to individual Public Improvement Projects.

**Section 11.03      Reserve Funds.**

A.      Reserve Fund Deposit. The Conservancy shall create Reserve Funds. The Phase Plan shall identify sources of funding and deposit requirements for Reserve Funds. Unless otherwise stated in a Phase Plan, Managing Party shall make quarterly deposits into the Reserve Funds equal to the positive difference, if any, of (i) all Operating Revenues, minus (ii) the sum of (1) all Operating Expenses, plus (2) deposits into the Capital Repair Funds made by the Managing Party pursuant to Section 11.02 above.

B.      Use of the Reserve Funds. The Reserve Funds may be utilized by the Managing Party solely for:

(1)      Expense shortfalls due to Cost Overruns, provided that expenditures for Cost Overruns shall not cause the balance of the Reserve Funds to be less than the dollar amount designated in the Phase Plans;

(2)      To provide funding for the Operating Expenses, to the extent that Operating Revenues and any Contributions required by the Parties pursuant to Phase Plans are insufficient for such purpose; and

(3)      To provide funding for repair and restoration of the Public District Sites and improvements located on the Public District Sites, to the extent that Operating Revenues (after paying Operating Expenses), the Capital Repair Fund and any Contributions required by the City or the Conservancy pursuant to a Phase Plan.

**Section 11.04      Audit of the Conservancy.** The Conservancy shall maintain complete books and records and shall perform an annual audit. The City, the LGC, and their authorized representative(s) may examine, and audit such records as necessary to determine the Conservancy's compliance with the terms of this Agreement. Such examinations, inspections and audits shall be made during normal business hours at the offices of the Conservancy, upon not less than three Business Days' prior notice to all Parties. Any Party may copy all or part of such books and records and may retain such copies. The cost and expense of such examinations and audits will be the sole responsibility of the Party conducting the same; provided, however, if an audit reflects that the Conservancy has expended either more than \$1,000.00 or more than 10 percent of any reserved fund or a Pledge in a manner not authorized by this Agreement, the reasonable cost and expense of the audit by the LGC or the City will be borne by the Conservancy. Such audits and records will be made available to the public, subject to requests for confidentiality by specific donors and with respect to legal, employment, strategic planning for donor outreach and development and other similar matters.

**Section 11.05      Financing Limitations.** Notwithstanding anything to the contrary that may be described in this Agreement, any third party financing obtained by the Conservancy or the LGC to secure funding for Cost Overruns, if any, shall not be secured by any part of the District, the City Contributions, the Conservancy Contributions or any guarantee, obligation or agreement of the City or the Conservancy. The LGC and the Conservancy covenant and agree not to permit the encumbrance, whether voluntary or involuntary, on any part of the District, the City Contributions or the Conservancy Contributions, for any purpose whatsoever. The Parties agree that, as a condition to making a loan to the LGC or the Conservancy, as permitted in this Agreement, any third-party lender may require reasonable assurances from the City and the Conservancy with respect to their satisfaction of their respective funding obligations under this Agreement, and the City and the Conservancy agree to provide, to the extent permitted under Applicable Law, such reasonable assurances as may be so requested, provided that the same does not increase their respective obligations or liabilities under this Agreement.

**Section 11.06      City Contribution Limitations.** The City may obtain and secure a portion of the City Contributions from a combination of net proceeds of tax-exempt obligations and taxable obligations (collectively, the "**Bonds**"), plus any earnings on or from any other legally available funds of the City which the City decides to use. Any Bonds issued by the City will be issued on such terms and conditions as the City determines, in its sole discretion. The City Contributions for a Project will be dependent upon (i) if Bonds are used, no material adverse change in the City's bonding capacity, (ii) if Bonds are used, the City's ability to sell the anticipated amount of Bonds described in the applicable Phase Plan upon terms acceptable to the City, and (iii) the Conservancy having received Pledges sufficient to fund the Conservancy Contribution for the Project. Any Project funded in part or in whole by City Contributions shall be subject to the terms and conditions of the sources of such City Contributions and shall not adversely affect the tax-exempt status of any Bonds. The sources of such City Contributions will be described in the Phase Plan for the Project. Notwithstanding anything in this Agreement to the contrary, any and all amounts payable by the City under this Agreement (as supplemented by Phase Plans) are payable solely from funds appropriated by City Council for such purpose, if any, and no claim for payment of any amount of the City Contribution shall be made, claimed or permitted against any other funds, properties, assets or the general credit of the City.

## **ARTICLE 12 NAMING RIGHTS**

**Section 12.01 Naming Authority.** Subject to obtaining the prior consent of the City, the Conservancy will have the sole and exclusive right to grant license agreements for the naming rights to the Public District Sites and each of their component parts.

**Section 12.02 Exception to Approval Requirement.** The Conservancy will not be required to obtain the City's approval of any name to be used or the terms of a naming rights license agreement if:

A. the naming right is on a list of permitted naming right items previously approved in writing by the City or other governmental entity;

B. there are no tax-exempt bond funds used in connection the portion of the Project that is subject to the license agreement (and such fact has been confirmed in writing by the City prior to execution of the license agreement);

C. the license agreement provides that, if such amount is not fully funded, the license agreement will terminate;

D. the license agreement and the permitted names comply with the Naming Parameters in Section 12.03 below;

E. the license agreement provides that if there is ever a violation of the Naming Parameters as determined by the City, in the City's sole discretion, then after notice and 30 days for cure, the Conservancy shall terminate the license agreement and remove all names associated with the license agreement with no obligation to refund any amounts funded under the license agreement if the violation is not cured in the 30 days;

F. the license agreement evidences a legally binding and enforceable obligation of the licensee; and

G. the design of the naming rights licensed are consistent with the Design Plan and any other design requirements for signage approved for the District.

**Section 12.03 Naming Parameters.** The Conservancy shall prepare and adopt pursuant to its bylaws naming parameters for the Public District Sites and each of their component parts, but excluding existing parks and facilities that are named as of the Effective Date (the "**Naming Parameters**"), which may (but not necessarily will) contain the following restrictions, limitations and conditions:

A. The licensed name shall:

(1) Include the name of a facilitator or benefactor of the District;

(2) Honor a person, place, institution, group, entity or event, whether now

existing or that existed in the past;

- (3) Recognize events or affairs of historic or civic significance; or
- (4) Embrace civic ideals or goals.

B. The licensed name shall not include a name or reference that:

- (1) Is defamatory, libelous, obscene, vulgar or offensive to the general public;
- (2) May violate the rights of any person, institution, group or entity;
- (3) Identifies or is identified with distilled liquor or spirits, habit-forming drugs, tobacco products, illegal drugs, adult-only entertainment, sexually-oriented businesses or publications, pornography, massage parlors, erectile dysfunction, birth control or sexually transmitted diseases, firearms or firearm ammunition, tattoo parlors, pawn shops, check-cashing establishments, or any product or service which is prohibited by Applicable Law or any entities that produce or sell such items;
- (4) Advocates or opposes any political or social issue, cause, movement or belief, including, without limitation, a political party, public official, candidate, religion or religious establishment or movement;
- (5) Advocates criminal activity, violence, unethical conduct or immorality;
- (6) Refers to any proper geographic name unless such reference is to Austin or the City of Austin or is a part of the proper name of a person or entity otherwise permitted under this Article 12; or
- (7) The City believes is inappropriate because it identifies or is identified with a person or organization that has been convicted of a criminal offense, fined by a recognized global regulatory body or subpoenaed by a Governmental Authority in connection with criminal activity, violence, unethical conduct, or immorality.

## **ARTICLE 13**

### **REPRESENTATIONS, WARRANTIES AND COVENANTS**

**Section 13.01 By the Conservancy.** The Conservancy makes the following representations, warranties and covenants to the City and the LGC as of the Effective Date:

- A. Existence. The Conservancy is a non-profit corporation duly incorporated and legally existing under the laws of the State of Texas, and is exempt from taxation under Section 501(c)(3) of the Code, as amended.
- B. Authorization. The Conservancy is duly and legally authorized to enter into this Agreement and has complied with all laws, rules, regulations, charter provisions and bylaws relating to its corporate existence and authority to act, and the undersigned representative is authorized to act on behalf of and bind the Conservancy to the terms of this Agreement. The

Conservancy has provided to the City and the LGC, on or before the Effective Date, a certified copy of a resolution of its Board of Directors authorizing the Conservancy's execution of this Agreement through the undersigned representative, together with documents evidencing the Conservancy's good standing and authority to transact business in the State of Texas. The Conservancy has all requisite power to perform all of its obligations under this Agreement. The execution of this Agreement by the Conservancy does not require any consent or approval which has not been obtained, including, without limitation, the consent or approval of any Governmental Authority.

C. Enforceable Obligations. Assuming due authorization, execution and delivery by the other Parties with respect to this Agreement, this Agreement, all documents executed by the Conservancy pursuant to this Agreement and all obligations of the Conservancy under this Agreement are enforceable against the Conservancy in accordance with their terms, except as such enforcement may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditor's rights generally and by general equity principles (regardless of whether such enforcement is considered in a proceeding in equity or at law).

D. No Legal Bar. The execution and delivery of this Agreement and the performance of its obligations under this Agreement by the Conservancy will not conflict with any provision of any Applicable Laws to which the Conservancy is subject or conflict with, or result in a breach of, or constitute a default under any of the terms, conditions or provisions of any agreement or instrument to which the Conservancy is a party or by which it is bound or any order or decree applicable to the Conservancy.

E. Litigation. There are no legal actions or proceedings pending or, to the knowledge of the Conservancy, threatened against the Conservancy which, if adversely determined, would materially and adversely affect the financial condition, charitable capacity or prospects of the Conservancy or its ability to fulfill its obligations under this Agreement.

F. Knowledge. The Conservancy has no knowledge of any facts or circumstances which presently evidence, or with the passage of time would evidence, that any of the representations made by the Conservancy or any other Party under this Agreement are in any way inaccurate, incomplete or misleading.

G. Documents. All documents made available by the Conservancy to the City and/or the City's agents or representatives and/or to the LGC and/or the LGC's agents or representatives before the Effective Date, including, without limitation, all financial documents relating to the Conservancy, are true, correct and complete copies of the instruments which they purport to be and accurately depict the subject matter addressed.

**Section 13.02 By the LGC.** The LGC represents, warrants and covenants to the City and the Conservancy as of the Effective Date that the LGC has been duly created under the laws of the State of Texas.

**Section 13.03 By the City.** The City represents, warrants and covenants to the LGC and the Conservancy as of the Effective Date that the City is a municipal corporation and home rule city of the State of Texas principally situated in Travis County.

**Section 13.04 Disclaimer by the City.** THE CONSERVANCY AND THE LGC ACKNOWLEDGE THAT, EXCEPT FOR THE REPRESENTATIONS CONTAINED WITHIN THIS AGREEMENT, NEITHER THE CITY NOR ANY OF ITS EMPLOYEES, OFFICERS, REPRESENTATIVES OR ELECTED OFFICIALS HAS MADE ANY REPRESENTATION OR WARRANTY WHATSOEVER (WHETHER EXPRESS OR IMPLIED) REGARDING THE DISTRICT, THE PROJECTS, THE SUBJECT MATTER OF THIS AGREEMENT, PHASE PLANS OR ANY EXHIBIT, OTHER THAN THE EXPRESSED OBLIGATIONS CONTAINED IN THIS AGREEMENT. THE CONSERVANCY AND THE LGC AGREE THAT NEITHER THE CITY NOR ANY OF ITS EMPLOYEES, OFFICERS, REPRESENTATIVES OR ELECTED OFFICIALS WILL HAVE ANY RESPONSIBILITY FOR (AND HAVE MADE NO REPRESENTATIONS OR WARRANTIES WHATSOEVER AS TO) ANY OF THE FOLLOWING:

A. THE ACCURACY OR COMPLETENESS OF ANY INFORMATION SUPPLIED BY ANY PERSON OTHER THAN THE CITY REPRESENTATIVE PURSUANT TO THIS AGREEMENT.

B. THE COMPLIANCE OF THE PROJECTS, PHASE PLANS, THE DESIGN PLAN OR ANY FEATURE THEREOF AND ANY PROPOSED IMPROVEMENT WITH ANY APPLICABLE LAWS.

C. THE ACCURACY OR COMPLETENESS OF ANY FINANCIAL PROJECTIONS, COST ESTIMATES, SCHEDULES OR OTHER MATTERS RELATING TO THE DISTRICT, THE PROJECTS, PHASE PLANS OR ANY IMPROVEMENTS REQUIRED TO BE CONSTRUCTED OR FUNDED UNDER THE TERMS OF THIS AGREEMENT (AS SUPPLEMENTED BY PHASE PLANS).

IT IS UNDERSTOOD AND AGREED BY THE CONSERVANCY AND THE LGC (FOR THEMSELVES AND FOR ANY PERSON CLAIMING BY, THROUGH OR UNDER THE CONSERVANCY OR THE LGC, AS THE CASE MAY) THAT EACH OF THEM HAS BEEN AND WILL CONTINUE TO BE SOLELY RESPONSIBLE FOR MAKING THEIR OWN INDEPENDENT APPRAISAL OF AND INVESTIGATION INTO ALL SUCH MATTERS.

**Section 13.05 Reliance.** Each Party agrees and acknowledges that, in entering into this Agreement,

A. Each Party is expressly and primarily relying on the truth and accuracy of the foregoing representations, warranties and covenants of each other Party, without any obligation to investigate the accuracy or completeness thereof;

B. Notwithstanding any investigation thereof by any Party, each Party may continue to rely on the foregoing representations, warranties and covenants of each other Party until this Agreement is terminated according to its terms;

C. Such representations, warranties and covenants are a material inducement to each Party in making this Agreement and agreeing to undertake and accept its terms; and



D. Each Party would not be willing to do so in the absence of any of such representations, warranties and covenants.

**Section 13.06 Additional Covenants of the Conservancy.** The Conservancy further covenants and agrees with the City and the LGC:

A. Capital Repair Funds and Reserve Funds. The Conservancy shall use good faith, commercially reasonable efforts to preserve and protect the Capital Repair Funds and Reserve Funds and expend the Capital Repair Funds and the Reserve Funds solely for the purposes described in this Agreement. The Conservancy shall adopt from time to time investment guidelines for all reserve accounts that are approved in writing by the City.

B. Expenditures. The Conservancy shall expend funds advanced to it by the City or the LGC solely in accordance with this Agreement, as described in the then applicable Project Budget and Phase Plans.

C. Enforcement. The Conservancy shall use commercially reasonable efforts to diligently enforce its rights, and seek remedies available to it (i) upon any default under the terms of any Contracts, and (ii) as necessary to preserve and protect its right, title and interests in and to any portion of the District.

D. Notices. The Conservancy shall promptly furnish to the LGC and the City, upon receipt by the Conservancy, copies of all legal notices received by the Conservancy affecting the Projects, including, without limitation, notices from Governmental Authorities, notices from any party claiming any default in any financing or payment obligation, and any other notice not of a routine nature.

E. Proceedings. The Conservancy shall promptly notify the LGC and the City of any suit, proceeding or action that is initiated or threatened in connection with the Projects or against the LGC, the City or the Conservancy in connection with the Projects.

F. Cooperation. The Conservancy shall cooperate with the LGC and the City in all aspects of the Projects, and, except as expressly authorized by this Agreement, not unreasonably hinder, delay or interfere with the Projects.

## **ARTICLE 14 INDEMNITY; LIMITATION OF LIABILITY**

### **Section 14.01 INDEMNIFICATIONS.**

THE CONSERVANCY COVENANTS AND AGREES TO FULLY INDEMNIFY, DEFEND AND HOLD HARMLESS THE CITY, THE LGC AND THEIR RESPECTIVE ELECTED OFFICIALS, AGENTS, EMPLOYEES, OFFICERS, DIRECTORS, AND REPRESENTATIVES, INDIVIDUALLY AND COLLECTIVELY, FROM AND AGAINST ANY AND ALL COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES, FINES, PENALTIES, PROCEEDINGS, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY AND SUITS OF ANY KIND AND NATURE, INCLUDING, BUT NOT LIMITED TO, INFRINGEMENT OR ALLEGED INFRINGEMENT OF ANY UNITED

STATES PATENT OR COPYRIGHT THAT ARISE OUT OF ANY OF THE WORK PERFORMED BY, OR ON BEHALF OF, THE CONSERVANCY, PERSONAL INJURY OR DEATH AND PROPERTY DAMAGE, DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO THE CONSERVANCY'S BREACH OF THIS AGREEMENT, INCLUDING ANY ACTS OR OMISSIONS OF THE CONSERVANCY, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE OR PERSONNEL, CONSULTANT, CONTRACTOR OR SUBCONTRACTOR, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, PERSONNEL, DIRECTORS AND REPRESENTATIVES IN BREACH OF THE PERFORMANCE OF DUTIES OF THE CONSERVANCY UNDER THIS AGREEMENT. THE CONSERVANCY SHALL PROMPTLY ADVISE EACH OTHER PARTY IN WRITING OF ANY CLAIM OR DEMAND AGAINST SUCH PARTY KNOWN TO THE CONSERVANCY RELATED TO OR ARISING OUT OF THE CONSERVANCY'S ACTIVITIES RELATED TO THIS AGREEMENT AND SHALL INVESTIGATE AND DEFEND SUCH CLAIM OR DEMAND AT THE CONSERVANCY'S EXPENSE TO THE EXTENT THE SAME IS COVERED BY THE CONSERVANCY'S INDEMNITY UNDER THIS SECTION. EACH PARTY WILL HAVE THE RIGHT, AT ITS OPTION AND AT ITS OWN EXPENSE, TO PARTICIPATE IN SUCH DEFENSE WITHOUT RELIEVING THE CONSERVANCY OF ANY OF ITS OBLIGATIONS UNDER THIS SECTION.

#### **Section 14.02      Indemnification Procedures.**

A. If any Person indemnified pursuant to Section 14.01 (an "**Indemnitee**") shall discover or have actual notice of facts giving rise or which may give rise to a claim for indemnification under this Article 14, or shall receive notice of any claim or demand, with respect to any matter for which indemnification may be claimed, the Indemnitee shall, within 20 days following service of process (or within such shorter time as may be necessary to give the Person obligated to indemnify the Indemnitee (the "**Indemnitor**") a reasonable opportunity to respond to such service of process) or within 20 days after any other such notice, notify the Indemnitor in writing together with a statement of the information as the Indemnitee has; it being understood and agreed that any failure or delay of the Indemnitee to notify the Indemnitor shall not relieve the Indemnitor from liability except and solely to the extent that the failure or delay shall have adversely affected the Indemnitor's ability to defend against, settle, or satisfy any such claim or demand. Following notice, the Indemnitor shall have the right, at its sole cost and expense, to contest or defend such claim or demand through attorneys, accountants, and others of its own choosing (the choice of such attorneys, accountants, and others being subject to the approval of the Indemnitee) and in the event it elects to do so, it shall promptly notify the Indemnitee of its intent to contest or defend such claim or demand. If within 20 days following the notice from the Indemnitee (or within such shorter time as may be necessary to give the Indemnitor a reasonable opportunity to respond to service of process or other judicial or administrative action), the Indemnitee has not received notice from the Indemnitor that the claim or demand will be contested or defended by the Indemnitor, the Indemnitee shall have the right to (i) authorize attorneys satisfactory to it to represent it, or (ii) subject to the approval of the Indemnitor, at any time settle, compromise, or pay such claim or demand, in either of which events the Indemnitee shall be entitled to indemnification subject to this Section 14.02.

B. In the event and so long as the Indemnitor is actively contesting or defending

against a claim or demand as provided above, the Indemnitee shall cooperate with the Indemnitor and its counsel in such contest or defense, shall join in making any appropriate counterclaim or cross-claim in connection with the claim or demand, and shall provide such access to the books and records of the Indemnitee as shall be necessary in connection with such defense or contest, all at the sole cost and expense of the Indemnitor. Notwithstanding that the Indemnitor is actively conducting such defense or contest, any claim or demand may be settled, compromised or paid by the Indemnitee without the consent of the Indemnitor. Any such claim or demand may be settled, compromised, or paid by the Indemnitor without the Indemnitee's consent, so long as such settlement or compromise does not cause the Indemnitee to incur any present or future material cost, expense, obligation or liability of any kind or nature, or require any admission or action or forbearance from action by Indemnitee.

C. If a conflict of interest exists between the Indemnitee and the Indemnitor with respect to any claim or demand, the Indemnitee shall have the right to participate in the defense of such claim or demand with separate counsel chosen by the Indemnitee, subject to the approval of the Indemnitor, and paid by the Indemnitor.

**Section 14.03 No Affiliate Liability.** The obligations and liabilities of any Party to this Agreement are solely the obligations and liabilities of the Party and shall not be the obligations or liabilities of any of the officers, elected officials, directors, trustees, employees, volunteers, or donors of and to the Party. No Party may seek any remedy under or related to this Agreement against any of the officers, elected officials, directors, trustees, employees, volunteers, or donors of and to another Party, none of whom shall have any personal liability.

**Section 14.04 Survival.** The obligations contained in this Article 14 will survive the expiration or earlier termination of this Agreement, but only insofar as such indemnities relate to (i) any liabilities, damages, suits, claims or judgments that accrue or arise before the expiration or earlier termination of this Agreement, or (ii) any acts or omissions that occur before the expiration or earlier termination of this Agreement.

**Section 14.05 City Limitations.**

A. The LGC and the Conservancy may not seek any remedy for non-payment by the City if such non-payment is due to: (i) Article VIII, Section 1 of the Austin City Charter which prohibits the payment of any money to any person, firm or corporation who is in arrears to the City for taxes, and (ii) §2-8-3 of the Austin City Code concerning the right of the City to offset indebtedness owed the City.

B. The funding of this Agreement by the City is dependent upon the availability of appropriations. The City's payment obligations are payable only and solely from funds appropriated and available for this Agreement. The absence of appropriated or other lawfully available funds shall render this Agreement null and void to the extent funds are not appropriated or available. The City shall provide the Conservancy written notice of the failure of the City to make an adequate appropriation for any fiscal year to pay the amounts due under this Agreement, or the reduction of any appropriation to an amount insufficient to permit the City to pay its obligations under this Agreement. In the event of non or inadequate appropriation of funds, there will be no penalty nor removal fees charged to the City.

**Section 14.06 No Consequential Damages.** In no event shall any Party to this Agreement ever have any liability to any other Party for incidental, consequential, exemplary or punitive damages. Additionally, recourse upon the Conservancy for any breach of this Agreement is in all things limited to the Project Disbursement Fund Account. In no event shall the City or the LGC ever have recourse under this Agreement or otherwise upon any funds or other assets of the Conservancy, or its members, directors, officers, employees, representatives, affiliates, successors, and assigns, apart from the Project Disbursement Fund Account.

## **ARTICLE 15**

### **TERMINATION EVENTS, EVENTS OF DEFAULT, AND REMEDIES**

**Section 15.01 Automatic Termination Events.** The Parties acknowledge that certain obligations and requirements of this Agreement are of fundamental importance to the Parties, such that the breach of the obligations and requirements justifies the automatic termination of this Agreement and that no alternate remedy would appropriately protect the respective interests of the Parties. Each of the following is an Automatic Termination Event that, without notice or opportunity to cure by any Party when it occurs, will result in the automatic termination of this Agreement, other than with respect to those matters which survive termination as expressly stated in this Agreement:

- A. The Public District Sites are not used for Public Purposes.
- B. The entry of a non-appealable ruling by a court of competent jurisdiction that the that the LGC did not have power or authority to enter into this Agreement.
- C. The entry of a non-appealable ruling by a court of competent jurisdiction that the Conservancy did not have power or authority to enter into this Agreement.
- D. The entry of a non-appealable ruling by a court of competent jurisdiction that the City did not have authority to enter into this Agreement.
- E. The entry of a non-appealable ruling by a court of competent jurisdiction that this Agreement is not valid or enforceable.
- F. If fraudulent statements are made to induce the City or the LGC to give any approvals under this Agreement.

**Section 15.02 Events of Default.** Each of the following will be an Event of Default:

A. A Party fails to perform or observe any of the obligations, covenants or agreements to be performed or observed by such Party under this Agreement, which failure continues for more than 30 days following written notice of such failure to such Party, or such longer period of time as may be reasonable under the circumstances, if such failure cannot be cured within 30 days because of the nature of the default and during such 30 day period curative action has commenced and is thereafter pursued diligently by such Party.

B. Any material representation or warranty of a Party is untrue when made or

becomes untrue thereafter and remains untrue after 30 days following written notice to such Party that the material representation or warranty is untrue.

C. A Party submits a report, application, certificate or other information required under the terms of this Agreement which intentionally or knowingly contains any false or misleading statements of material facts.

D. The LGC or the Conservancy transfers or encumbers any portion of the Public District Sites in violation of this Agreement.

E. The Managing Party fails to maintain the Project Disbursement Fund Account (or any subaccount), Capital Repair Funds or the Reserve Funds in accordance with this Agreement.

F. A Party makes a general assignment for the benefit of creditors.

G. A petition under any section or chapter of federal bankruptcy laws or under any similar law or statute of the United States or any state thereof is filed by or against a Party and is not dismissed, withdrawn or otherwise concluded without adjudication within 75 days after being filed.

H. A Party admits in writing its inability to pay its debts when due.

I. A bill in equity or other proceeding for the appointment of a receiver of a Party or other custodian for a Party's business or assets is filed and consented to by that Party.

J. A receiver or other custodian (permanent or temporary) of substantially all of the Party's assets or property, or any part thereof, is appointed by any court of competent jurisdiction.

K. Proceedings for a composition with creditors under any state or federal law have been instituted by or against a Party.

L. A final judgment representing a claim or charge against the assets of a Party in an amount in excess of \$1.0 million remains unsatisfied or of record for 180 days or longer (unless a supersedeas or other appeal bond is filed); provided, however, that this provision shall not apply to the City.

M. A Party is dissolved.

N. Execution is levied against a Party's business or substantially all of its property.

O. The Managing Party fails for a period of more than 30 days, after funding by any of the other Parties of a Payment/Reimbursement Request to pay or cause payment to the Project Architect, Project Landscape Architect, Contractors or others engaged by the Managing Party in the implementation of any Project amounts due and owing to be paid out of such funding and not disputed by the Managing Party in connection therewith.

P. Failure by the Conservancy or the City to fund all or part of its Contributions in

accordance with the terms of this Agreement and any applicable Phase Plans, and the failure to thereafter fund such amounts within 30 days following notice from another Party of such failure.

**Section 15.03 Remedies for Uncured Event of Default under Section 15.02.**

Subject to Section 3.10, after delivery of any required notice, any non-defaulting Party may pursue, at its option and without prejudice to any other rights and remedies provided for pursuant to this Agreement or by law, any right or remedy conferred upon or reserved to it under this Agreement or at law or in equity, including, without limitation, the right to pursue specific performance and termination of this Agreement. The rights and remedies provided in this Agreement shall be in addition to and cumulative of all other rights and remedies available to a Party, and the pursuit of one remedy will not be an election of a sole remedy and will not preclude the right to pursue any or all other available remedies, whether the same be remedies at law and/or equitable remedies, including injunction and relief in the form of mandamus. Any failure of a Party to exercise any right or remedy as provided in this Agreement shall not be deemed a waiver by such Party of any claim for actual damages it may have by reason of the other Party's default and specific performance.

**ARTICLE 16  
ASSIGNMENT**

The Parties shall not assign (partially or in the entirety) any rights or duties under this Agreement without prior written consent of each other Party, and this consent may be withheld in the respective Party's sole and absolute discretion. If an assignment of this Agreement is approved by the Parties, the transfer of this Agreement or any of the documents referenced in this Agreement shall confer all rights and duties with respect to the Projects.

**ARTICLE 17  
FORCE MAJEURE EVENTS**

**Section 17.01 Mitigation.** Each Party shall use commercially reasonable efforts to mitigate any delay in performance by such Party under this Agreement caused by a Force Majeure Event.

**Section 17.02 Notice.** Each Party whose performance under this Agreement is prevented by a Force Majeure Event shall provide notice to the other Parties within three Business Days after the Party becomes aware of the occurrence of the Force Majeure Event. The notice shall describe the facts and circumstances of the Force Majeure Event and the anticipated effect thereof on the performance of such Party's obligations, duties, covenants and agreements under this Agreement, which notice shall be supplemented from time to time upon request. Such Party shall also give notice to the other Parties of its ability to resume performance under this Agreement within a reasonable time following termination of the Force Majeure Event.

**Section 17.03 Effect of Force Majeure Event.** The Parties agree they shall grant the other Parties a reasonable extension of time as appropriate if a Force Majeure Event renders timely performance of the Parties' obligations impossible or unexpectedly burdensome. Consent to an extension of time for performance under such circumstances will not be

unreasonably withheld, conditioned or delayed. Failure to fulfill obligations due to conditions beyond a Party's control shall not be considered a breach of this Agreement; provided, however, that the obligations shall be suspended only for the reasonable duration of such conditions. Suspension of one Party's obligations pursuant to this Section 17.03 shall likewise suspend performance of the other Party's obligations for the duration of the suspension.

## **ARTICLE 18**

### **CITY COUNCIL APPROVAL; CAPACITY OF THE CITY; GOVERNMENTAL FUNCTIONS**

**Section 18.01 City Council Approval.** The LGC and the Conservancy recognize and agree that any contracts or agreements contemplated to be entered into by the City under the terms of this Agreement, which are not attached as exhibits to this Agreement, may be subject to the prior approval of City Council, if the approval of City Council is required under the terms of the City's charter or other Applicable Law, such determination to be made by the City in its sole and absolute discretion. Further, any approvals required of the City for any assignment of this Agreement will be subject to the prior approval of City Council.

**Section 18.02 Capacity of the City.** Without in any way limiting or extending the obligations, duties, covenants and agreements of the City as a Party to this Agreement, the Parties agree that any action, omission or circumstance arising out of the exercise or performance of the City's required Governmental Functions shall not cause or constitute a default by the City under this Agreement or any other document delivered in connection with this Agreement or give rise to any rights or claims for damages or injury against the City in its capacity as a Party to this Agreement. The Conservancy's and the LGC's remedies for any injury, damage or claim resulting from any other action, omission or circumstance shall be governed by the laws and regulations concerning claims against the City as a home rule charter city. These provisions shall survive any termination of this Agreement.

**Section 18.03 Capacity of Parties Acting on Behalf of the City.** All references in this Agreement to employees, agents, representatives, contractors and the like of the City shall refer only to persons or entities acting on behalf of the City in its capacity as a Party to this Agreement, and all such references specifically exclude any employees, agents, representatives, contractors, elected officials and the like acting in connection with the performance of the City's required Governmental Functions.

**Section 18.04 No Limitation on the City's Governmental Functions.** The Parties acknowledge that no representation, warranty, consent, approval or agreement in this Agreement by the City (as a Party to this Agreement) shall be binding upon, constitute a waiver by or estop the City from exercising any of its rights, powers or duties in its required Governmental Functions. For example, approval by the City of this Agreement shall not constitute satisfaction of any requirements of, or the need to obtain any approval by, the City in the exercise of its Governmental Functions or as may be required under any Applicable Laws.

## **ARTICLE 19**

### **PARTY REPRESENTATIVES**

**Section 19.01      The Conservancy Representative.** Upon execution of this Agreement, the Conservancy shall designate in writing to the City and the LGC the name of the individual (the “**Conservancy Representative**”) who will have full authority to execute any and all instruments requiring the Conservancy’s signature and to act on behalf of the Conservancy with respect to all matters arising out of this Agreement. The Conservancy shall have the right, from time to time, to change the Person who is the Conservancy Representative by giving the City and the LGC prior written notice. The Conservancy Representative shall represent the interests of the Conservancy, be responsible for overseeing all aspects of the Projects on behalf of the Conservancy, and work closely with the City Representative and the LGC Representative, on behalf of the Conservancy. Actions by the Conservancy Representative on behalf of the Conservancy shall be done in his or her reasonable judgment unless express standards or parameters therefor are included in this Agreement, in which case, actions taken by the Conservancy Representative shall be in accordance with such express standards or parameters. Any consent, approval, decision or determination by the Conservancy Representative shall be binding on the Conservancy; provided, however, that the Conservancy Representative shall not have any right to modify, amend, unless authorized in a Phase Plan, or terminate this Agreement or agree to, execute and deliver Phase Plans unless authorized by official action of the governing authority of the Conservancy.

**Section 19.02      The LGC Representative.** Upon execution of this Agreement, the LGC shall designate in writing to the City and the Conservancy the name of the individual (the “**LGC Representative**”) who will have full authority to execute any and all instruments requiring the LGC’s signature and to act on behalf of the LGC with respect to all matters arising out of this Agreement. The LGC shall have the right, from time to time, to change the Person who is the LGC Representative by giving the City and the Conservancy prior written notice. The LGC Representative shall represent the interests of the LGC, be responsible for overseeing all aspects of the Projects on behalf of the LGC, and work closely with the City Representative and the Conservancy Representative, on behalf of the LGC. Actions by the LGC Representative on behalf of the LGC shall be done in his or her reasonable judgment unless express standards or parameters are included in this Agreement, in which case, actions taken by the LGC Representative shall be in accordance with such express standards or parameters. Any consent, approval, decision or determination hereunder by the LGC Representative shall be binding on the LGC; provided, however, that the LGC Representative shall not have any right to modify or amend this Agreement, unless authorized in a Phase Plan, or terminate this Agreement or agree to execute and deliver Phase Plans, unless authorized by official action of the governing authority of the LGC.

**Section 19.03      The City Representative.** Upon execution of this Agreement, the City shall designate an individual or a committee of up to five individuals to be the City Representative (the “**City Representative**”) and provide the Conservancy and the LGC with prior written notice of the identity of the individuals so designated. The City shall have the right, from time to time, to change any or all of the Persons who are the City Representatives of the other Parties by giving the Conservancy and the LGC written notice. With respect to any action which is to be made by the City under this Agreement, subject to Article 18, the City



Representative may make such action as set out in this Agreement, in the Phase Plan or as otherwise permitted or shall notify the Conservancy and the LGC in writing of the Person(s) responsible for such action and shall forward any communications to such Person(s) for action. Actions by any City Representative on behalf of the City shall be done in his or her reasonable judgment unless express standards or parameters therefor are included in this Agreement, in which case, actions taken by the City Representative shall be in accordance with such express standards or parameters. Any consent, approval, decision or determination hereunder by the City Representative shall be binding on the City; provided, however, that the City Representative shall not have any right to modify or amend this Agreement, unless authorized in a Phase Plan or as may be otherwise permitted, or terminate this Agreement or to agree to, execute and deliver Phase Plans, unless authorized by the City.

## **ARTICLE 20 BUDGETING, SCHEDULE AND REPORTS**

### **Section 20.01      Annual Project Funding and Planning Process for Phase Improvements.**

A. Annual Project Plans. Not later than 120 days before the beginning of each Fiscal Year, the LGC shall submit an annual plan of projects that are anticipated to be submitted as Phase Plans to be funded for such Fiscal Year.

B. Approval. The Parties shall have the right to review and approve (which approval shall not be unreasonably withheld) the Annual Project Plans for each Fiscal Year.

**Section 20.02      Schedule.** The City, the LGC, and the Conservancy shall work together to develop a long range schedule to identify, plan and implement to completion the Projects contemplated by the Design Plan, and they shall develop a priority list of Projects. Such priority list shall not dictate the order of work or prevent the LGC, the City and the Conservancy from approving a Phase Plan for other Projects before completing the Projects on the priority list. The LGC shall provide to the Representatives of the other Parties as and when available, for their information, the current Schedule for all Projects. The Schedule shall include time for adverse weather conditions to the extent normally encountered in the Austin, Texas area establish milestone dates for completion for the applicable Project, delineate all phases of the Project and described a projected date for completion of each phase in sufficient detail to allow the City and the Conservancy to monitor progress of the Project and to determine if milestone dates are being met. The Schedule shall indicate the projected milestone dates for the starting and completion of the various stages of the Project and shall be revised as required by the conditions of the Project. The phases of any Public Improvement Project to be addressed in a Schedule shall include, without limitation, (a) the design phases, (b) acquisition and approval of Permits, and (c) all construction phases.

**Section 20.03      Progress Reports.** The LGC shall provide to the Representatives of the other Parties and City Council written progress reports on a regular basis, but no less often than quarterly, unless otherwise agreed by the Parties. Such reports shall describe the status of all ongoing Projects and include, but not be limited to, actual versus estimated completion dates for each component of the Projects, any change in costs incurred in connection with the

completion of the Projects, performance against schedule, any change in the critical path and revisions to the Schedule as of the end of each reporting period.

**Section 20.04 Significant Event Reports.** Should any Force Majeure Event or other situation, occurrence or event having a material impact on a Project occur, the Managing Party within a reasonable time following the Managing Party's acquiring actual knowledge of such occurrence prepare a written "**Significant Event Report**" detailing all available information and the steps being taken to correct the problem and forward the same to the Representatives.

**Section 20.05 Inspection Reports.** The LGC shall cause its designee to implement and require all reasonably necessary inspections, testing, and safety programs for the Projects or otherwise mandated by Applicable Law or specified in the applicable Contracts, and shall prepare and submit its inspection reports, procedures, schedules and requirements with respect to such programs in writing to the City Representative as prepared.

**Section 20.06 Final Report.** Within 90 days after final completion of a Project, the Managing Party shall deliver or cause to be delivered to the City Representative a final project report, which report shall describe the total Project Costs incurred in connection with the completion of the Project through final completion of the Project.

**Section 20.07 Returns Required by Law.** The LGC shall execute and file punctually when due all forms, reports and returns relating to a Project required by Applicable Law, including, without limitation, reports relating to the employment of personnel.

**Section 20.08 Inspection Rights of the City.** The LGC and the Conservancy agree that the City Representative shall have the right at all times during normal business hours of the LGC or the Conservancy, or the Contractors to inspect the progress of any Project so long as such inspections do not unreasonably interfere with ongoing work. The City Representative shall, at the option of the LGC or the Conservancy, be accompanied by the LGC or the Conservancy or their respective representative during such inspection. In addition, the Conservancy shall keep the books and records to be maintained by the Conservancy pursuant to this Agreement at its regular business office. The City Representative may examine and audit such books and records (at its respective expense) during the normal business hours of the Conservancy, upon not less than three Business Days' notice to the Conservancy. The Conservancy further agrees to ensure that the contract with all Contractors or other Persons retained by or on behalf of the Conservancy will permit such inspections, examinations and audits. The provisions of this **Section 20.08** shall in no way limit or otherwise relieve the Conservancy from the Conservancy's obligation to implement the Projects in conformance with this Agreement. The City, through appropriate designees, which may change from time to time, further reserves the right to enter the District during regular business hours to conduct fire, safety and health inspections or any other inspections by Governmental Authorities or to exercise the City's normal police powers, provided that in exercising such powers (a) the City shall use its reasonable efforts not to unreasonably interfere with the operations of the Conservancy and (b) the City's inspection rights shall not be deemed to limit in any way the Conservancy's rights to contest the City's findings with respect to such inspections or the exercise of such police powers.

## **ARTICLE 21 MISCELLANEOUS PROVISIONS**

**Section 21.01 Notices.** The Parties contemplate that they will engage in informal communications with respect to the subject matter of this Agreement. However, any formal notices or other communications required or permitted to be given by one Party to another by this Agreement shall be given in writing addressed to the Party to be notified at the address described below for such Party, (a) by delivering the same in person, (b) by depositing the same in the United States mail, certified, return receipt requested, postage prepaid, addressed to the Party to be notified, (c) by depositing the same with a nationally recognized courier service guaranteeing “next day delivery,” addressed to the Party to be notified, (d) by electronic mail with confirming copy sent by one of the methods described in subsections (a), (b) or (c) of this sentence, or (e) by sending the same by telefax with confirming copy sent by one of the methods described in subsections (a), (b) or (c) of this sentence. A notice delivered in accordance with the immediately preceding sentence will be deemed to have been given upon the date of delivery (or refusal to accept delivery) as indicated on the return receipt; provided, however, if such notice is not delivered or refused on a Business Day, then notice shall be deemed to have been given on the first Business Day following the actual date of delivery or refusal. For the purposes of notice, the addresses of the Parties, until changed as provided below, shall be as follows:

**City:**

Sue Edwards  
Assistant City Manager  
City of Austin  
301 W. 2nd Street, 3rd Floor  
Austin, Texas 78701  
512-974-2200  
sue.edwards@austintexas.gov

**With copies to:**

Marc A. Ott  
City Manager  
City of Austin  
301 W. 2nd Street, 3rd Floor  
Austin, Texas 78701  
512-974-2200  
marc.ott@austintexas.gov

Karen Kennard  
City Attorney  
City of Austin  
301 W. 2<sup>nd</sup> Street, 3<sup>rd</sup> Floor  
Austin, Texas 78701  
512-974-2268  
karen.kennard@ austintexas.gov

Elaine Hart  
Chief Financial Officer

City of Austin  
301 W. 2<sup>nd</sup> Street, 3<sup>rd</sup> Floor  
Austin, Texas 78704  
512-974-2283  
elaine.hart@ austintexas.gov

Robert Goode  
Assistant City Manager  
City of Austin  
301 W. 2<sup>nd</sup> Street, 3<sup>rd</sup> Floor  
Austin, Texas 78701  
robert.goode@ austintexas.gov

Sara Hensley, CPRP  
Director of Parks and Recreation  
City of Austin  
200 S. Lamar  
Austin, Texas 78704  
512-974-6700  
sara.hensley@ austintexas.gov

George Adams  
Assistant Director  
Planning and Development Review Department  
City of Austin  
505 Barton Springs Road  
Austin, Texas 78704  
512-974-2146  
george.adams@austintexas.gov

Howard S. Lazarus, PE, PWLF  
Director  
Public Works Department  
City of Austin  
505 Barton Springs Road, Suite 1300  
Austin, Texas 78704  
512-974-7190  
howard.lazarus@austintexas.gov

Joe Pantalione, P.E.  
Deputy Director  
Watershed Protection Department  
City of Austin  
505 Barton Springs Road  
Austin, Texas 78704  
512-974-3438

joe.pantalion@austintexas.gov

**Conservancy:**

Melba Whatley  
President  
Waller Creek Conservancy  
2909 West 35th Street  
Austin, Texas 78703  
512-478-4675  
melba@mdwinterests.com

**With copies to:**

Tom Meredith  
Chairman  
Waller Creek Conservancy  
248 Addie Roy Road, Suite C200  
Austin, Texas 78746  
512-732-2544  
tom@mfiastin.com

Melanie Barnes  
Secretary/Treasurer  
Waller Creek Conservancy  
1706 Windsor Road  
Austin, Texas 78703  
512-422-1023  
mbmbarnes@aol.com

Stephanie Lee McDonald  
Executive Director  
Waller Creek Conservancy  
P.O. Box 12363  
Austin, Texas 78711  
512-541-3520  
slmcdonald@wallercreek.org

David Armbrust  
Armbrust & Brown PLLC  
100 Congress, Suite 1300  
Austin, Texas 78701-2744  
512-435-2301  
darmbrust@abaustin.com

Kimberly S. Beckham  
Armbrust & Brown PLLC  
100 Congress, Suite 1300  
Austin, Texas 78701-2744

512-435-2382  
[kbeckham@abaustin.com](mailto:kbeckham@abaustin.com)

**LGC:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**With a copy to:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The Parties may, from time to time, change their respective addresses, and each has the right to specify as its address any other address within the United States of America by giving at least five days written notice to the other Parties.

**Section 21.02 Business Days.** If any date or any period provided in this Agreement ends on a day that is not a Business Day, the applicable period shall be extended to the first Business Day following such non-Business Day.

**Section 21.03 Time.** Time is of the essence in performing under this Agreement.

**Section 21.04 Severability.** If any provision of this Agreement is illegal, invalid, or unenforceable under present or future laws such that the legitimate expectations of any Party hereunder is incapable of being realized and cannot be reformed to validly and legally meet such thwarted expectations, then, and only in that event, it is the intention of the Parties that this Agreement shall terminate in all respects. In any other event, it is the intention of the Parties that the remainder of this Agreement will not be affected.

**Section 21.05 Waiver.** Any failure by a Party to insist upon strict performance by the other Party of any material provision of this Agreement shall not be deemed a waiver, and such Party will have the right at any time to insist upon strict performance of any and all of the provisions of this Agreement.

**Section 21.06 Reservation of Rights.** To the extent not inconsistent with this Agreement, each Party reserves all rights, privileges, and immunities under Applicable Laws.

**Section 21.07 Further Documents.** The Parties agree that at any time after execution of this Agreement, they will, upon request of another Party, execute and deliver such further documents and do such further acts and things as any other Party may reasonably request in order to effectuate the terms of this Agreement.

**Section 21.08 Incorporation of Exhibits, Phase Plans and Other Documents by Reference.** All Exhibits, Phase Plans and other documents attached to or referred to in this Agreement are incorporated into this Agreement by reference for the purposes described in this Agreement.

**Section 21.09 Governing Law; Venue.** THIS AGREEMENT, AND THE ACTIONS OF THE PARTIES HEREUNDER SHALL IN ALL RESPECTS BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS (EXCLUDING PRINCIPLES OF CONFLICTS OF LAW). VENUE SHALL BE IN TRAVIS COUNTY, TEXAS.

**Section 21.10 Waiver of Attorneys' Fees.** In consideration of this Agreement and the mutual waiver of this right, the Parties, knowingly and intentionally waive their rights to attorneys' fees and costs of court in any administrative proceeding, alternative dispute resolution proceeding, or other litigation arising out of or connected to this Agreement, including, without limitation, any rights under Section 271.153 of the Texas Local Government Code or otherwise.

**Section 21.11 No Party Deemed Drafter.** Each Party has thoroughly reviewed and revised this Agreement (including each exhibit attached to this Agreement) and has had the advice of counsel before execution of this Agreement, and the Parties agree that none of them shall be deemed to be the sole drafter.

**Section 21.12 Use of Defined Terms.** Any defined term used in the plural shall refer to all members of the relevant class, and any defined term used in the singular shall refer to any number of members of the relevant class. Any reference to this Agreement shall include this Agreement, the Phase Plans, exhibits and other instruments, documents and agreements as originally executed and as the same may from time to time be supplemented, modified or amended to conform with the requirements of Section 21.14.

**Section 21.13 Multiple Counterparts.** This Agreement may be executed in multiple counterparts, including by electronic means, each of which shall be deemed to be an original, but taken together shall constitute only one document. The Parties agree to circulate for execution all executed counterparts in order that each Party may obtain one counterpart executed by all Parties.

**Section 21.14 Entire Agreement, Amendment and Waiver, Survival.** This Agreement, together with the attached exhibits and the documents referenced in this Agreement, constitute the entire agreement of the Parties with respect to the subject matter of this Agreement and supersedes all prior written and oral agreements and understandings with respect to such subject matter, including, without limitation, the MOU. Neither this Agreement nor any of the terms of this Agreement may be terminated, amended, supplemented, waived or modified orally, but only by an instrument in writing signed by the Party against which the enforcement of the termination, amendment, supplement, waiver or modification shall be sought, and in the case of the City, approved by action of City Council. No failure or delay of any Party in exercising any power or right under this Agreement will operate as a waiver of such power or right, nor will any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right of power, preclude any other or future exercise thereof or the exercise of any other right or power. All of the representations and warranties of each Party contained in this Agreement shall survive the execution, delivery and acceptance of this Agreement and any termination of this Agreement. Unless otherwise described in this Agreement, all agreements of the Parties contained in this Agreement which must survive to

afford each respective Party the anticipated benefits of such agreements shall likewise survive, whether or not identified in this Agreement to so survive.

**Section 21.15 Table of Contents; Headings.** The table of contents and headings of the various articles, sections and other subdivisions of this Agreement are for convenience of reference only and shall not modify, define or limit any of the terms or provisions of this Agreement.

**Section 21.16 Parties in Interest.** The terms of this Agreement shall be binding upon, and inure to the benefit of, the Parties and their successors and permitted assigns. Nothing in this Agreement, whether express or implied, shall be construed to give any person (other than the Parties and their successors and permitted assigns and as expressly provided in this Agreement) any legal or equitable right, remedy or claim under or in respect of this Agreement or any covenants, conditions or provisions contained in this Agreement or any standing or authority to enforce the terms and provisions of this Agreement.

**Section 21.17 Notices of Changes in Fact.** Promptly after either Party becomes aware of same, such Party will notify the other Party of:

A. Any change in any material fact or circumstance represented or warranted by such Party in this Agreement; and

B. Any default, event or condition which, with notice or lapse of time or both, could become a breach by such Party under this Agreement, specifying in each case, the nature of the condition and what action the Party has taken and proposes to take with respect to that condition.

*[Signature Pages Follow]*



**IN WITNESS WHEREOF**, the City, the LGC and the Conservancy have executed this Agreement as of dates below, to be effective as of the Effective Date.

**CONSERVANCY:**

**WALLER CREEK CONSERVANCY**

By \_\_\_\_\_

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

Title: \_\_\_\_\_

Date: \_\_\_\_\_

DRAFT

**LGC:**

**WALLER CREEK LOCAL GOVERNMENT  
CORPORATION**

By\_\_\_\_\_

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

Title:\_\_\_\_\_

Date:\_\_\_\_\_

DRAFT

**CITY:**

**CITY OF AUSTIN, TEXAS**

By \_\_\_\_\_

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

Title: \_\_\_\_\_

Date: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
City Clerk