

## **PARKLAND IMPROVEMENT AND OPERATIONS AGREEMENT**

**(Grove at Shoal Creek Parks)**  
**[Draft staff proposal]**

**Date:**      \_\_\_\_ **October 2016**

### **RECITALS**

This Parkland Improvement and Operations Agreement (The Grove at Shoal Creek Parks ) (the “**Agreement**”) is made and entered into by **ARG BULL CREEK, LTD.**, a Texas limited partnership ( “**ARG**”), and the **CITY OF AUSTIN, TEXAS**, a Texas home-rule municipal corporation organized and existing under the laws of the State of Texas (the “**City**”).

ARG is the owner of the certain approximately 75.74 acre parcel of real property located in Austin, Travis County, Texas and more particularly described in that certain Special Warranty Deed recorded under Document No. 2015\_\_\_\_ of the Official Public Records of Travis County, Texas (the “**Property**”); and ARG intends to develop the Property as a mixed-use development including residential and commercial uses commonly referred to as The Grove at Shoal Creek (the “**Project**”);

In connection with the development of the Project, the City will own certain parkland property in Austin, Travis County, Texas out of the Property as part of the Project, and such parkland property is generally identified as the parkland areas (the “**City Parkland Areas**”) designated in that certain The Grove at Shoal Creek Park Plan attached as Exhibit “\_\_\_\_” (the “**Parks Plan**”) to City Ordinance No. 2016\_\_\_\_-\_\_\_\_ related to The Grove at Shoal Creek Planned Unit Development District (the “**PUD Ordinance**”);

After the approval of the PUD Ordinance, as development of the Project occurs, ARG will file one or more site plans with the City (each, a “**Site Plan**”);

Traditionally the City obligates itself to improve and maintain publicly dedicated parkland, that has been provided by the developer in accordance with the City Code §§ 25-1-601-609; however, to effectuate the PUD Ordinance and Parks Plan, the City and ARG have agreed that ARG will improve and maintain the City Parkland Areas in connection with the Project and the parkland will be superior to the parkland that would have been dedicated by ARG if ARG was not developing a PUD;

ARG has agreed, subject to the terms of this Agreement, that before the City approves any Site Plan for any portion of the Property which has been designated as City Parkland Areas as shown on the Parks Plan, ARG will determine the final boundaries of such City Parkland Areas as shown on the Parks Plan, Exhibit XX of the PUD, and will convey to the City by Deed such City Parkland Areas in the manner and subject to any reservations and easements as provided in this Agreement;

ARG will provide at least 13.88 acres of credited parkland. ARG will provide at least two park areas; one is the pocket park, and the other is the signature park. The formula for determining the parkland amount is (5 acres X (number of units + number of congregant care units with kitchens – number of affordable units) X 1.7 persons per household/1000 people) X 10%. The Signature park will include at least 705 linear feet of frontage that faces a public street to encourage public access, and a flat multi-purpose field that can be used by the public;

After completion of the construction of any City Park Improvements identified in any Site Plan, ARG and its successors and assigns, including without limitation any property owner's association (the "**Association**") created by ARG or its successors and assigns, will maintain and operate the City Parkland Areas as a public park to the City's "Level One" standards, as well as the City Park Improvements, and the landscaping, lawn, tree trimming, and irrigation systems related to the City Parkland Areas and City Park Improvements for the term of this Agreement, and so long as this Agreement is renewed by the City and ARG or its successors.

The City agrees (i) to accept the dedication of the City Parkland Areas and the completed City Park Improvements pursuant to the terms of this Agreement and the PUD Ordinance, (ii) to allow ARG and its successors and assigns, including the Association, to maintain and operate the City Parks and the Park Improvements open to the public and in the same manner as other public parks, (iii) and that ARG and its successors and assigns, including the Association, shall have the right, subject to the terms and conditions of this Agreement in conjunction with the City, to participate in the programming within the City Parkland Areas as public parks, including without limitation recreational activities, events, entertainment, and vendors (the "**City Parks Programming**").

**NOW, THEREFORE**, for and in consideration of the premises and mutual promises, and covenants, the Parties agree as follows:

## **I. DEFINITIONS**

In addition to the definitions set forth in the recitals above and in other portions of this Agreement, as used in this Agreement and any attachment or exhibit incorporated in it the following definitions have the meanings assigned to each:

**Annual Programming Plan** means the programming activities that ARG or its successor identify as described in this agreement below.

**ARG** means ARG Bull Creek, Ltd., and shall include its successors and assigns, including without limitation the Association.

**City Park Improvements** has the definition set forth in Section IV.C of this Agreement.

**City Standards** mean the requirements ARG must adhere to which are described in **Article IV and V** of this Agreement.

**Contractors** mean ARG's and/ ARG's successors and assigns (including the Association) contractor(s) or subcontractor(s), their employees, agents, materialmen, suppliers, and assigns employed to construct and/ or maintain any City Park Improvements.

**Director** means the Director of the Parks and Recreation Department of the City of Austin.

**Insurance Requirement** means the insurance coverages required to be maintained by ARG as described in **Exhibit "A"** which is attached to the Agreement and incorporated into and made a part of this Agreement for all purposes.

**Level One** means state of the art maintenance applied to a high quality diverse landscape. Level One is associated with high-traffic urban areas, such as high visitation parks, public squares, community center grounds, golf courses, aquatic facilities, and other special areas.

**Management Plan** means the management activities ARG identifies in its annual management plan developed in cooperation with the Parks and Recreation Department.

**Master Park Plan** means a plan developed in accordance with the process and requirements set forth below.

**Notice** means any formal written notice or written communication required or permitted to be given by one Party to another by this Agreement.

**Operate** means to perform the maintenance on the equipment and the park facilities (mowing, repairs, painting, removing graffiti, cleaning bathrooms and trash, and other routine maintenance that results in the Parks being usable by the public and being Level One quality).

**Parks** means the proposed City Parkland Areas shown on the Park Plan in Exhibit \_\_ of the PUD Ordinance \_\_\_\_\_ and labeled as the Signature Park, North Greenbelt, and Pocket Park.

**Party** means either City or ARG, and its successors and assigns, including without limitation the Association, as the context requires; collectively, referred to as "**Parties**."

**Parks Operation Manager** means ARG and its successors and assigns, the Association, or such other entity appointed by ARG or the Association and approved by the Director (such approval not to be unreasonably withheld, conditioned or delayed) to perform the duties set forth in Articles V and XIII of this Agreement.

**Permitted Exceptions** mean (a) this Agreement, (b) all exceptions of record which do not materially and adversely affect the use of the City Parkland Areas as parkland, (c) all matters shown in any subdivision plat for any City Parkland Areas, and (d) any other encumbrances approved or caused by the City.

## **II. TERM**

The term of this Agreement ("**Term**") begins on the Effective Date of this Agreement and, unless terminated or amended by either party, runs for 20 years. Since standards of care and requirements relating to such matters as accessibility of facilities change, the parties agree to review and update the requirements of this agreement at least once every five years. The Agreement may be renewed by the ARG and the City as needed to continue the maintenance and operation of the Parkland. The City Manager has the authority to agree to renewals that do not materially change this Agreement without further council action.

## **III. DESIGNATION OF CITY REPRESENTATIVE**

The City designates the Director (the "**Director**") of the Parks and Recreation Department ("**PARD**") or the Director's designee as its authorized representative to act on the City's behalf with respect to this Agreement.

## **IV. DESIGN, PERMITTING AND CONSTRUCTION RESPONSIBILITIES**

A. No later than 15 calendar days after the City permits the first development application with residential units, ARG shall submit a Park Master Plan for the Signature Park to the Director for approval. The Plan will be developed with input from neighborhood groups and PARD. ARG shall also submit a site plan for the pocket park, but that park will not require a Master Plan. PARD may present briefings to the Parks and Recreation Board regarding any of the parks within the development. The Director has the final authority regarding any approval of the Park Master Plan. The Park Master Plan shall include the following:

1. Inventory of existing conditions and environmental conditions, including topography, soils, vegetation, heritage trees, creeks, critical environmental features, bank stabilizations, sediment collections, flooding potential, flora and fauna information.
2. Built conditions/land uses: including existing and proposed utilities and easements and other structures.
3. Demographics: (Current and projected) within a 1 mile radius.
4. Site Analysis: The collected data should be represented using maps, diagrams, narratives, to develop opportunity and constraint conclusions that may influence the future development of the park.
5. Community Input. No less than three community input meetings should be held during the development of the master plan. Stakeholders should include all neighborhood associations within 1 mile of the Signature Park. PARD staff shall act as facilitators at the community input meetings.
6. Vision Plan. At least one vision plan should be developed after the site analysis and at least one community input meeting. The vision plan should include goals, and planning principles that will guide the master planning for the facility. The vision plan will also include a spatial

representation of key images and sketches identifying the intended character of the uses and proposed park elements. The Vision Plan should be presented for input at one of the community input meetings.

7. Park Master Plan. This stage refines program elements and must include the City Park Improvements found IV D. Exhibits and narrative should outline the square footage required for major program elements; and projected maintenance and long-term capital replacement costs. The Park Plan should be presented for input at one of the community input meetings.
8. Plan Implementation. A phasing plan, if applicable, should identify priorities for park construction by priority order.

B. No later than permitting of the development application for the 500<sup>th</sup> residential unit, ARG shall be responsible for the design, permitting, bidding (or other lawful method of procuring construction delivery), and construction of those improvements within the dedicated City Parkland Areas (the “**City Park Improvements**”) which are necessary or desirable in its reasonable judgment, to substantially conform to the Parks Plan Exhibit attached to the PUD Ordinance \_\_\_\_\_. The City acknowledges and agrees that because the City Parks Improvements will be constructed before the Parks and City Park Improvements will be dedicated, ARG is not obligated to publicly bid any work related to the City Park Improvements prior to dedication. However, ARG shall insure that City standard construction documents are used for the contracts for the improvements, that any improvements that are made have warranties that are equal to, or that exceed, the warranties the City receives for such construction and improvements, that the City is a named insured on any such warranties, and that all warranties and insurance documents will be provided in full to the Director before the City accepts the dedication of the Parkland and City Park Improvements. Moreover, any improvements or construction done by ARG after dedication of the parks will comply with all City requirements, ordinances, state statutes, and laws applicable to construction of public works on public property.

C. The City Park Improvements shall meet the minimum City standards for materials and specifications, shall be included in a Site Plan, and shall include but not be limited to the following elements:

1. A concrete Urban Trail that connects the City’s Shoal Creek Greenbelt Park to Gregg Hill Park adjacent to Jefferson Street, through the Signature Park to the intersection of Bull Creek and 45<sup>th</sup> Street. This trail shall be named Tea Garden Trail per specification in the gift deed by Margaret Louise Hill to the City of Austin dated November 28, 1977, recorded in Vol. 5154 at Page 2230 in the Travis County Deed Records;
2. Recreational amenities surrounding the Project’s pond to be located in the Signature Park;
3. Active recreational equipment for children, seniors, and the public in general;
4. Street access for the signature park of at least 705 linear feet; and
5. A flat multi-purpose field suitable for recreation.

D. Minimum construction costs for City Park Improvements within the dedicated Parks, not including the costs to construct the concrete Urban Trail and any water quality and detention pond as well as the amenities that ARG may build around the pond, shall be calculated as follows: the total number of market rate dwelling units approved in the PUD Ordinance including congregant care units with kitchens multiplied by \$750. An engineer's estimate of construction costs for City Park Improvements shall be provided to PARD for approval of each site plan submitted for any portion the Parks. Construction costs may not include design and project management costs.

E. Before the City issues a Certificate of Occupancy for either the Signature Park or the Pocket Park, ARG shall prepare a land title survey showing the final boundaries of the real property to be donated to the City as City Parkland Area (a "Survey") and deliver such Survey to the City. After delivery of the Survey and before the City issues a Certificate of Occupancy for either the Signature Park or the Pocket Park, ARG shall execute and deliver to the City a special warranty deed ("Deed") conveying the City Parkland Areas, subject only to the Permitted Exceptions. The land title survey and Phase one ESA with no further recommendations must be certified to the City. These documents must be paid for by ARG. The City will not accept title to the property without these documents.

F. ARG shall have no right, authority, or power to bind the City or any interest of the City in the Parks or the Parkland Improvements for labor, materials, or any other charge or expense incurred in construction of any improvements or other work done on the Park. ARG shall take no action to render the City liable for any lien or right of lien for any labor, materials, or other charge or expense incurred in connection with any work performed on the Parks or the Parkland Improvements, and ARG shall in no way be considered as the agent of the City in the construction, erection, or operation of any improvements made on the Park or Parkland Improvements. If any liens or claims for labor or materials supplied or claim to have been supplied to the Parks or Parkland Improvements are filed, ARG shall promptly pay or bond such liens or claims to the City's reasonable satisfaction or otherwise obtain the release or discharge of the lien or claim placed against the Parks or Parkland Improvements by any Contractors or other claimant.

G. ARG shall not discriminate against any Contractors or applicants for employment because of race, creed, color, national origin, sex, age, religion, veteran status or sexual orientation. ARG shall take affirmative action to ensure that Contractors are treated during the construction of the Construction Project without regard to race, creed, color, national origin, sex, age, religion, veteran status or sexual orientation. ARG shall, in all solicitations or advertisements for employment placed on or behalf of ARG, state that all qualified applicants shall receive consideration for employment without regard to race, creed, color, national origin, sex, age, religion, veteran status, or sexual orientation.

H. ARG and its Contractors shall comply with the applicable accessibility provisions of (i) the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., (ii) the Texas Architectural Barriers Act, Ch. 469, Texas Govt. Code, (iii) Americans with Disabilities Act Accessibility Guidelines, and (iv) the Texas Accessibility Standards.

I. ARG and its Contractors shall perform the obligations set forth in the Agreement as independent contractors.

J. Except as may be permitted in any Site Plan approved with respect to City Parkland Areas, ARG shall secure advance approval for all removal, cutting, and pruning of trees on the Parks that will be dedicated to the City or on any other PARD property where the Parkland Improvements will be constructed. To secure this approval, ARG shall present a tree trimming plan (the "**Tree Trimming Plan**") to the Director no fewer than 14 calendar days before the day the pruning will occur. The Tree Trimming Plan shall identify the trees and limbs to be removed, cut, and pruned and shall identify the technique that shall be utilized to prune each tree in an effort, without negatively impacting any existing trees. In addition, each tree or limb to be removed, cut, and pruned must be marked in the field.

K. Upon completion of construction of City Park Improvements permitted in a Site Plan (a "**Construction Project**"), ARG shall deliver to the City written notice that the Construction Project has been completed (the "**Completion Notice**"). Within 21 business days following City's receipt of the Completion Notice of the Construction Project, the City shall respond to ARG by either submitting a list of items still requiring completion, or by accepting the Construction Project with respect to the particular phase of the Construction Project. Acceptance of the Construction Project or any phase shall be evidenced by a letter of acceptance from PARD (the "**Acceptance Letter**"). The City must issue an Acceptance Letter to accept the City Park Improvements and the City Parkland (the "**City Acceptance**"). No certificate of occupancy for the City Park Improvements will be issued until PARD has issued the Acceptance Letter.

L. When all of the Park Improvements are complete, and ARG has delivered all warranties, documented that there are no liens for the work performed, and provided a current Phase 1 ESA with no further recommendations certified to the City for the parkland, provided a final and complete survey, and provided any additional documentation reasonably required by the City, the City shall accept the Parkland and shall record the Deed. ARG's failure to provide the documents requested by the City relieves the City of the requirement to accept the Parkland and Park Improvements and will be an event of default under this Agreement.

#### **IV. MAINTENANCE, REPAIR, AND CAPITAL IMPROVEMENT RESPONSIBILITIES**

A. The Parks Operation Manager will at all times during the Term, keep and maintain, or cause to be kept and maintained, the Parks, including the City Park Improvements and all other buildings and improvements erected in the Parks, in a good state of appearance and repair (except for reasonable wear and tear) and to at least a "Level One" standard based on current City park maintenance standards at the sole expense of ARG its successor and assigns, including the Association. The Parks Operation Manager shall be responsible for the performance of all of the duties and obligations provided in this Agreement with respect to the operations and maintenance of the City Parkland Areas. The maintenance and operation of the City Parkland Areas and City Park Improvements shall be funded by Association dues or other funding mechanism identified by the Parks Operation Manager and approved by the City (such approval not to be unreasonably withheld, conditioned or delayed).

B. Level One includes the following requirements:

## **Level One**

State-of-the-art maintenance applied to a high-quality diverse landscape. Level One is associated with high-traffic urban areas, such as high visitation parks, public squares, community center grounds, golf courses, aquatic facilities, and other special areas.

- **Turf Care:** Grass height is maintained according to species and variety of grass. Mow at least once every five to seven working days but may be as often as once every three working days. Aerate turf at least two times per year: April through October. Reseed or sod as needed. Weed control practice is that no more than five percent of the surface has weeds present. Complete site edging of trees, curbs, sidewalks, light poles, electrical boxes, and buildings.
- **Fertilizer:** Adequate fertilization to plant species according to their optimal requirements. Staff base requirements on soil and tissue analysis as needed. Fertilize turf as needed or as scheduled for over-seeded facilities. Fertilize trees, shrubs, and flowers according to their individual requirements for nutrients for optimum growth.
- **Irrigation:** Sprinkler irrigated, automated systems used. The use of central irrigation control is standard. Irrigation system components are inspected on watering days on turf areas and other plant material to identify signs of stress or weakness. Total system preventative maintenance checks are completed weekly using Irrigation Inspection/Repair Checklist to ensure that the system components are operating properly. Identified problems are corrected or repaired immediately.
- **Litter Control / Graffiti:** Minimum of once per day, seven days a week. Staff will check all trash receptacles daily. Staff will pull trashcan liners if they are over half full and install new liners. Extremely high visitation may increase the frequency of park patrolling and trash removal. Receptacles should be plentiful enough to hold all trash usually generated between servicing without overflowing. Graffiti on any surface will be removed within 24 hours of the incident.
- **Pruning:** Frequency dictated by species, length of growing season, design concept also a controlling factor i.e., using clipped method vs. natural-style hedges.
- **Disease and Pest Management:** Controlling objective to anticipate and avoid public awareness of any problem. Using an integrated pest control management program, it is anticipated that pest problems will either be prevented or observed at a very early stage and corrected immediately. Weed control will be accomplished by chemical and mechanical methods on a daily or as needed basis. Depending on weed species and variety, appropriate herbicides will be applied when the weed first becomes visible and has enough leaf surface to accept the herbicide. Pre-emergent herbicides will be applied as needed to minimize weed growth in all high priority turf or decomposed granite areas. All areas will be inspected for daily insect and rodent infestations. Any pesticide application will be completed in strict accordance with Texas Department of Agriculture requirements.
- **Surfaces:** Staff will clean sidewalks and pavilions so that at no time is there an accumulation of sand, dirt, or leaves. This may be required daily. Staff will



inspect trail surfaces daily for debris, erosion, and hazards. Sweeping and cleaning frequency as such that at no time does accumulation of debris distract from look or safety of the area.

- **Playgrounds, Water Features, Exercise Courses and Fountains:** Staff inspects all playground equipment and areas on a daily basis (High Frequency) to ensure the equipment is in safe, clean, operating condition and the surfacing is free and clear of hazards. Staff trained by or passed the National Playground Safety Inspector (NPSI) Program will inspect the playground equipment and area at least two times per year (Low Frequency). The water play feature will be inspected and test operated on a daily basis to ensure that it is in safe, clean condition and is operating properly. Drinking fountains will be inspected daily for operation and cleanliness. Staff will remove debris as needed. Staff will clean and sanitize all drinking fountains on a daily basis.
- **Restrooms and Pavilions:** Staff will clean, sanitize, and stock all restrooms at a minimum of once per day or more frequently as needs arise. This includes floors, walls, ceilings, toilets, and urinals. Staff will inspect all plumbing fixtures, lighting, and hand dryers at a minimum of once per day. Staff will clean and inspect pavilions at a minimum of once per day. Staff will clean barbeque grills, empty trashcans, sweep the area, and clean tables on a daily basis.
- **Tree and Plant Care:** Staff will evaluate all trees and shrubs weekly for pruning as needed. Staff will prune trees according to International Society of Arboriculture (1995) and ANSI A300 Standards. All trees to be pruned of sucker growth on an as needed basis. Shrubs, groundcovers, and floral plantings will be selectively pruned to promote health, visibility, safety, and to promote the natural colors and variety of each species. Certain facilities will require seasonal color replacement. Maintenance activities are to coincide with low demand periods or to take advantage of special growing characteristics. All newly planted trees will be staked and tied to department specifications. All damaged or diseased trees will be removed and new trees installed as resources are available. Landscaped bed areas should be kept in a weed, leaf and debris-free condition.
- **Sport Courts:** All sports courts will be inspected on a daily basis to ensure safe and clean conditions. Any damaged or missing nets will be replaced immediately. Hard surface courts will be swept and washed with a power washer on an as needed basis. Sand volleyball courts will be checked weekly have the base material leveled and fluffed on an as needed basis. Lighting systems and timers will be checked weekly for problems and work requests generated to repair the deficiencies immediately.
- **Skate Park – BMX:** Due to the high visibility and visitation of these amenities, skate parks are to be inspected daily for safety, cleanliness, graffiti, and general liability. Surfaces will be swept daily or as needed. Deficiencies are documented on the facility checklists and repairs are prioritized.
- **Area / Security Lights, Flag Poles, and Park Signage:** All area and security lighting will be checked daily. Light pole bases and poles will be inspected weekly for indications of damage and rust. The lighting system, timer, and light fixtures will be checked weekly for operation. Flag poles will be checked weekly

of ropes, cables, and flags will be replaced as needed due to wear and damage. Signs and support frames will be inspected weekly for loose rivets, missing text, graffiti, and wear. Signs and support frames will be replaced as needed.

- **Inspections / Repairs:** A staff member to conduct inspections daily at restrooms, playgrounds, ball fields, sports courts, parking lots, sidewalks, and landscaped areas. Repairs to all elements of the design should be done immediately when problems are discovered, replacement parts and technicians are available to accomplish the job. When disruption to the public might be major and the repair is not critical, repairs should be postponed to a time period that is the least disruptive.
- **Trails:** Trail surfaces vary within the park system to include granite gravel, concrete, mulch and natural. Trail surfaces should be clear of trip hazards/holes, repaired, or replace when appearance has noticeably deteriorated.
  - **Inspection:** Conduct daily inspection.
  - **Granite Gravel Surfaces:** Resurface complete trail surface annually. Eliminate all trip hazards caused by erosion, exposed tree roots and/or rocks immediately. Maintain 15' width on all granite gravel trails annually. Import dirt or decomposed granite, compact it, and recreate a well-drained outsloped trail annually.
  - **Short Cuts:** Eliminate user created "trails" immediately as discovered.
  - **Outslope:** Maintain outslope annually to eliminate buildup of soil that prevents water flow.
  - **Gradient:** Maintain linear gradient annually of trail to be less than 10%.
  - **Pruning Vegetation:** Maintain an 8' vertical clearance throughout trail system.
  - **Signing/Mapping:** Provide adequate information to educate trail users on rules, wayfinding and mile markers.
  - **Invasive Species:** Monitor invasive species and develop a plan to eliminate all invasive species on banks of the trail.
- **Sustainability:**
  - **Recycling:** Provide receptacles to collect all types of recyclables - aluminum, plastic and paper.
  - **Irrigation:** Audit control system annually for water conservation efforts.
  - **Lighting:** Audit control system annually for electricity conservation efforts.
  - **Invasive Species:** Develop a program to monitor and remove.
  - **Chemicals:** Use only "green" chemicals for cleaning and disinfecting restrooms and surfaces.
  - **Fuels:** Use only "clean" fuels to maintain turf and structures.

C. The City has the right to approve any management company hired, or otherwise placed under contract, by ARG for the operations and maintenance of the City Parkland and City Park Improvements. ARG shall provide to the City not only the name of the management company, but also the work plan, and evidence that the company is bonded and insured. The City's approval of the company will not be unreasonably withheld.

D. After City Acceptance, any alterations, improvements, or new construction work in the Parks by ARG or its successors and assigns following completion of the initial City Park Improvements requires prior written approval from the Director. If new permits or site plan corrections are required for any alterations, improvements or new construction, PARD staff also will timely and reasonably review and approve such plans or corrections.

E. After ARG dedicates the Parks, or any portion of the Parks, to the City, the City may repair, modify or construct City Park Improvements after ARG constructs the initial City Park Improvements; if the City gives at least 60 days written notice to the Parks Operation Manager before commencement of any non-emergency repair, modification, or construction.

F. Inspections. The City retains the right to inspect construction and to exercise its rights or duties in order to ensure compliance with applicable laws in the Parks. The City shall conduct periodic and regular inspections as may be required of the City Park Improvements to insure that applicable fire, safety and sanitation regulations and other applicable provisions contained in this Agreement or in the City Code are being adhered to by the Parks Operation Manager. The City shall notify the Parks Operation Manager of its findings, specifying any items needing attention in order to comply with applicable legal requirements. Failure to allow the conduct of any inspections as may be required shall not operate as a waiver of the City's right to conduct these inspections and shall not be considered a default of the terms of this Agreement.

G. Illegal Use Not Permitted. ARG may not use any part of the Parks, the City Park Improvements, or any other building situated in the Parks for any use or purpose that violates any applicable law, regulation, or ordinance of the United States, the State of Texas, the County of Travis, or the City of Austin, or other lawful authority with jurisdiction over the City Park Improvements.

H. Licenses and Permits. The Parks Operation Manager shall comply with the provisions of Article XIII below with respect to sale in the Parks of (1) food and beverages, (2) merchandise related to or consistent with the permitted uses, (3) goods and services in furtherance of the permitted uses, and (4) upon approval of the Director, alcoholic beverages. All permits shall be displayed in a conspicuous location.

I. Rules and Regulations. Except as otherwise may be provided this Agreement or in PUD Ordinance No. \_\_\_\_\_, the Parks Operation Manager shall (i) comply and conform with the applicable requirements and conditions of Chapter 8-1 of the Austin City Code relating to the administration of public parks, and the guidelines and rules established by PARD for the use and enjoyment of public parks (collectively, the "**City Park Rules**"), (ii) comply with all applicable laws and all applicable governmental regulations, rules and orders that may from time to time be put into effect relating to the use and operation of the City Park Improvements, and (iii) shall secure, or cooperate with the City in its securing, all applicable permits and licenses specifically required for the operation of the City Park Improvements.

J. Utilities. ARG, its successors and assigns, including the Association, at its sole cost and expense, will incur the cost to provide all gas, water, sewer, electric utilities, network, and communication services for use of the City Park Improvements to the extent necessary for their safe and efficient operation as determined by the Parks Operation Manager in its reasonable discretion.

K. Funding Source: Funding for maintaining the Parks in compliance with this Agreement shall be contained in a segregated account to be used only for the operations and maintenance of the parks and the park facilities. This account shall be maintained in a federally insured institution. The account shall name the City as the beneficiary. ARG agrees to establish this account so that the City can assume the funds contained in the account if ARG breaches this Agreement and the breach cannot be cured to the City's satisfaction within 30 calendar days. The City's Controller shall have the authority to sign on behalf of the City on this account. ARG shall provide information regarding the funding and use of the account each year to the PARD representative.

## V. MANAGEMENT PLAN AND COMMITTEE

A. Formation and Operation of a Management Committee. The Management Plan will include the oversight of a Park Management Committee consisting of one member of the PARD staff with responsibilities for contracts and concessions; one member of PARD staff with responsibilities for Programs; one member of the association board formed for property management; one employee of the association formed for property management whose duties include park management; and one representative from the Ridgelea neighborhood association appointed by the association.

B. Management Plan and Annual Programming. At least three months before the anticipated opening date of the Parkland Improvements, and every year after that, ARG, with the participation of the Management Committee, shall provide to the Director for the Director's review and approval, a management plan (the "Management Plan") and an annual programming plan (the "Annual Programming Plan") for the operation of the Parkland Improvements in a form and substance acceptable to the Director for a period ending on the last day of the City fiscal year that is for a 12-month term (the initial period shall end on September 30).

1. **Annual Management Plan** shall delineate:

- a) Schedules of all mowing and edging of turf, trimming of trees and shrubs, replacement of dead or dying landscaping plantings, regular irrigation and irrigation system repair; litter control including trash removal and graffiti removal, and insect control using an integrated pest management program approved by the City,
- b) Assumption of payment of all irrigation and other utility charges,
- c) An accounting of the funds collected and expended for park maintenance for the prior calendar year and the proposal for collections and maintenance for the upcoming calendar year.

2. **Annual Programming Plan** shall be submitted to the Director 90 calendar days before the beginning of the City's Fiscal Year and delineate:

- a) The programs, activities and any access restrictions that might impact the public's use of the Parkland Improvements.

- b) Special Event Coordination Plan and Procedures ensuring compliance with park, facility, federal, state and local requirements, and the listing of the annual events for which ARG will be requesting permits.
- c) Diligence in using, managing and operating the Parkland Improvements in a manner that maximizes public access, utilization of the Parkland Improvements and is responsive to community feedback. Annually or such other period acceptable to the Director, ARG and the City will have a public and stakeholder input process, that results in community input regarding service delivery in the Annual Programming Plan. The Annual Programming Plan shall ensure that programming meets current community priorities and needs during each plan year.

C. After ARG has dedicated the Parkland and the Parkland Improvements, ARG may use the Parkland Improvements and maintain the Parkland Improvements for use by the public or paid special events identified in the Annual Programming Plan and for no other purpose without the prior written consent of the Director. Although Special Events will be approved for one year, PARD will approve temporary concessions for a period not to exceed six months. The vendors who are approved may come and go within that six month period.

D. For Special Events approved in the annual programming plan, the Parks Manager shall obtain all necessary permits and inspections from the City such as, but not limited to, sound permits, food permits, health and safety review for structures, and fire inspections. For events that will not be offered with such frequency that ARG needs an annual permit, PARD will process the single permit requests within 14 days of submittal of a complete application for the event.

E. ARG shall secure advance approval for all removal, cutting, and pruning of trees on the Parks that will be dedicated to the City or on any other PARD property where the Parkland Improvements are constructed. To secure this approval, ARG shall present a tree trimming plan (the "Tree Trimming Plan") to the Director no fewer than 14 calendar days before the day the pruning will occur. The Tree Trimming Plan shall identify the trees and limbs to be removed, cut, and pruned and shall identify the technique that shall be utilized to prune each tree in an effort, without negatively impacting any existing trees. In addition, each tree or limb to be removed, cut, and pruned must be marked in the field.

## **VII. REVENUE; CAPITAL INVESTMENT; RESERVE FUNDS; REPORTS**

### **A. Parkland Improvements.**

1. Annual Programming Report during the Term. Within 30 calendar days following the end of each of ARG's annual period during the Term, ARG shall furnish to PARD a report regarding the Parkland Improvements' annual programming performance. Within 15 calendar days following the filing of any sales tax reports or federal tax return relating to the operations of the parkland during the Term, ARG shall furnish to PARD a copy of the report or return.

2. Semi-Annual Reports and Right to Audit. The Parks Operation Manager shall semi-annually provide the Director with written reports detailing all funding collected by the Parks Operation Manager and all costs and expenses to which funds were applied during the applicable reporting period. ARG, the Association and the Parks Operation Manager further agree that the representatives of the Office of the City Auditor, or other authorized representatives of the City, shall have access to, and the right to audit, examine, or reproduce, any and all records of Parks Operation Manager related to the funding and the costs and expenses to which such funding was applied. The Parks Operation manager shall retain all such records for a period of three years after collection of such fees or until all audit and litigation matters that the City has brought to the attention of the Parks Operation Manager are resolved, whichever is longer.
3. The funds described above shall be kept in the segregated account described above.

## **VIII. WARRANTIES**

Upon completion and City Acceptance of each phase of any Construction Project, ARG must obtain from each of its Contractors a written warranty or bond, acceptable to the City, that the City Park Improvements will be free of defects for at least one-year from the date of City Acceptance for any work performed or materials supplied with respect to the Construction Project. Each warranty or bond shall be assigned to the City, without further recourse against ARG. ARG must provide the complete warranty or bond documents to the City.

## **IX. PERMITTED ACTIVITIES OF DEVELOPER WITHIN CITY PARKLAND AREAS**

If ARG complies with the PUD Ordinance and applicable legal requirements, the following activities by ARG, Association and the Parks Operation Manager are permitted within the City Parkland Areas, and ARG, its successors and assigns, have the right to construct in accordance with an approved Site Plan or other applicable permit, and to maintain as necessary within any City Parkland Areas the following (only if these improvements are under the control of ARG):

- (i) water quality and detention controls and facilities to serve the Project, provided that such improvements are also designed and maintained as aesthetic amenities in accordance in the PUD Ordinance,
- (ii) drainage facilities,
- (iii) utility improvements and facilities,
- (iv) floodplain modification, restoration or enhancement work and improvements approved by the City,
- (v) landscaping,

- (vi) Project identity and directional signage,
- (vii) City Park Improvements as allowed by this Agreement,
- (viii) any Urban Trails and bridges over Shoal Creek approved by the City, and
- (ix) any City Park Programming approved by the City pursuant to the terms of this Agreement and applicable City requirements.

In performing or conducting these activities, ARG, the Association or the Parks Operation Manager as applicable shall minimize the impact of such activities on the usage of the Parks to the extent feasible. In addition, except for routine day-to-day operation and maintenance of the Parks, ARG, the Association or the Parks Operation Manager as applicable shall reasonably notify and coordinate with the Director regarding these activities.

To the extent that any of this work is a use inconsistent with park use, ARG shall not perform such work until the City has completed a hearing pursuant to Chapter 26 of the Texas Parks and Wildlife Code documenting that there is no feasible alternative for the work to be completed except for conducting the work in the park. ARG is responsible for providing evidence sufficient to allow the City Council the ability to make legally required findings for any Chapter 26 hearing. ARG shall also comply with PARD rules and requirements regarding Construction in Parks, including restoration and revegetation, route selection, general construction requirements, and laws and ordinances applicable to this construction,

#### **X. CONDITION OF PARK IMPROVEMENT AND MAINTENANCE AREA; DISCLAIMER OF WARRANTY; DAMAGES**

A. Except as expressly set forth or called for in this Agreement, neither the City nor any agent, employee, or representative of the City, makes or has made any warranties or representations of any kind or character, expressed or implied, with respect to the physical condition of the City Parkland Areas or its fitness or suitability for any particular use.

B. Except as provided in this Agreement, City is not be responsible, under any circumstances, for any damage to property belonging to ARG, its members, employees, agents, contractors, subcontractors, invitees, licensees, or trespassers, which may be damaged, stolen, or destroyed, and ARG releases City from any responsibility therefore, SAVE AND EXCEPT to the extent allowed by Texas law, the City agrees that it is responsible to the exclusion of any such responsibility of ARG for its own proportionate share of liability for its negligent acts and omissions for claims, suits, and causes of action, including claims for property damage, personal injury and death, arising out of or connected to this Agreement and as determined by a court of competent jurisdiction, provided that the execution of this Agreement will not be deemed a negligent act. If the City Park Improvements are damaged or destroyed by fire or any other casualty, ARG, Association or Park Operations Manager shall within 90 calendar days from the date of the damage or destruction, begin to repair, reconstruct, or replace the damaged or destroyed City Park Improvements and pursue the repair, reconstruction, or replacement with reasonable diligence so as to restore the City Park Improvements to substantially the condition the City Park Improvements were in before the casualty. But if beginning or completing this work is prevented or delayed by war, civil commotion, acts of God, strikes, governmental

restrictions or regulations, or interferences, fire or other casualty, or any other reason beyond ARG's control, whether similar to any of those enumerated or not, the time for beginning or completing the restoration (or both) will automatically be extended for the period of each such delay. In lieu of reconstructing the City Park Improvements, the parties can mutually agree to declare this Agreement terminated.

## **XI. LIABILITY AND INDEMNIFICATION**

**A. ARG SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS CITY, ITS OFFICERS, APPOINTED OR ELECTED OFFICIALS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS (INDEMNIFIED PARTIES), AGAINST ALL COSTS, LIABILITIES, DAMAGES, CLAIMS, SUITS, ACTIONS, AND CAUSES OF ACTIONS (CLAIMS), TO THE EXTENT ARISING, DIRECTLY OR INDIRECTLY, OUT OF (A) A BREACH OF THIS AGREEMENT OR VIOLATION OF LAW BY ARG, ITS OFFICERS, AGENTS, EMPLOYEES, SUCCESSORS OR ASSIGNS, (ARG PARTIES), (B) A FALSE REPRESENTATION OR WARRANTY MADE BY THE ARG PARTIES IN THIS AGREEMENT OR IN ARG'S PROPOSAL, (C) THE NEGLIGENCE, WILLFUL MISCONDUCT, OR BREACH OF A STANDARD OF STRICT LIABILITY BY THE ARG PARTIES IN CONNECTION WITH THIS AGREEMENT. CLAIMS TO BE INDEMNIFIED UNDER THIS ARTICLE INCLUDE CLAIMS FOR BODILY INJURY OR DEATH, OCCUPATIONAL ILLNESS OR DISEASE, LOSS OF SERVICES WAGES OR INCOME, DAMAGE DESTRUCTION OR LOSS OF USE OF PROPERTY, AND WORKERS' COMPENSATION CLAIMS. ARG'S OBLIGATIONS UNDER THIS ARTICLE ARE NOT EXCUSED IN THE EVENT A CLAIM IS CAUSED IN PART BY THE ALLEGED NEGLIGENCE OR WILLFUL MISCONDUCT OF THE INDEMNIFIED PARTIES.**

B. City shall give ARG written notice of a Claim asserted against an Indemnified Party. ARG shall assume on behalf of the Indemnified Parties and conduct with due diligence and in good faith the defense of all Claims against the Indemnified Parties. The Indemnified Parties shall have the right (but not the obligation) to participate in the defense of any claim or litigation with attorneys of their own selection without relieving ARG of any obligations in this agreement. In no event may ARG admit liability on the part of an Indemnified Party without the written consent of City Attorney.

C. Maintenance of the insurance required under this Agreement shall not limit ARG's obligations under this Article. ARG shall require all successors and assigns to indemnify City as provided in this Article. ARG agrees that for any work performed by a volunteer with respect to the Construction Project within the City Parkland Areas under this Agreement, ARG will secure a Volunteer Release Form.

D. Each party is responsible for its own attorneys' fees.

## **XII. TERMINATION, DEFAULT AND REMEDIES**

A. If any party fails to properly fulfill its obligations under this Agreement in a



timely manner, or if any party violates any of the provisions of the Agreement, the non-breaching party shall notify the other party in writing of the specific violation of the Agreement. The breaching party shall have 30 calendar days from receipt of this notice in which to cure any such violations. If the violation cannot be reasonably cured within said 30 calendar day period and the breaching party has diligently pursued such remedy as shall be reasonably necessary to cure violation, then the parties may agree in writing to an extension of the period during which the violation must be cured. In addition, the following shall be deemed events of default by ARG under this Agreement:

1. ARG makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors;
2. ARG, the Association and/ the Park Operation Manager fails to operate and maintain the Parks for a period of 60 calendar day after notice from the City and an opportunity to cure such failure; or
3. ARG fails to comply with any other term, provision or covenant of this Agreement that is material.

B. If the breaching party has not cured any such violation as specified in the written notice within the required time, then the non-breaching party, at its sole option, shall have the right to terminate this Agreement. This termination shall be made by sending written notice (the "**Notice of Termination**") to the breaching party. The Notice of Termination shall be effective for all purposes when deposited in the U.S. Mail, postage prepaid and mailed Certified Mail, Return Receipt Requested.

C. If ARG defaults under this Agreement, and the default is not cured within the cure period allowed under this Agreement, or this Agreement otherwise terminates under the terms of the Agreement, upon depositing the Notice of Termination in the U.S. Mail as specified above, the City may, but is not obligated to, assume control and possession of the City Park Improvements, Construction Project, or any contract documents or contract rights related to construction or maintenance of the Construction Project.

D. ARG shall be relieved of liability for any claims, injuries or losses resulting from negligent acts or omissions of the City, its employees or agents, and for the negligent acts or omissions arising out of the construction of the Construction Project as of the date of either the expiration of this Agreement or the Notice of Termination, whichever date is earlier.

E. Any termination of this Agreement as provided in this article will not relieve ARG from paying any sum or sums due and payable to City under this Agreement at the time of termination, or any claim for damages then or previously accruing against ARG under this Agreement. Any such termination will not prevent City from enforcing the payment of any such sum or sums or claim for damages by any remedy provided for by law, or from recovering damages from ARG for any default under the Agreement. All City's rights, options, and remedies under this Agreement will be construed to be cumulative, and not one of them is exclusive of the other. City may pursue any or all such remedies or any other remedy or relief provided by law, whether or not stated in this Agreement.

F. ARG acknowledges that the City has provided notice of Article VIII, Section 1 of the Austin City Charter which prohibits the payment of any money to any person who is in

arrears to City of Austin for taxes, and of § 2-8-3 of the Austin City Code concerning the right of City of Austin to offset indebtedness owed City of Austin.

G. ARG acknowledges that the City has provided notice that the City's payment obligations to ARG, if any, are payable only from funds appropriated or available for the purpose of this Agreement. If the City does not appropriate funds for this Agreement, or if there are no other lawfully available funds for this Agreement, the Agreement is void. City shall provide ARG notice of the failure of City to make an adequate appropriation for any fiscal year to pay the amounts due under the Agreement or the reduction of any appropriation to an amount insufficient to permit City to pay its obligations under the Agreement.

### **XIII. INSURANCE**

A. During the Term, ARG and its Contractors, at their sole cost and expense, will obtain, provide and keep in force the Insurance Requirements attached to this Agreement.

B. Each of the Parties releases the other from any and all liability or responsibility to the other or anyone claiming through or under them by way of subrogation or otherwise for any loss or damage to property caused by fire or any of the extended coverage casualties covered by the Insurance Requirements, even if such fire or other casualty shall have been caused by the fault or negligence of the other party, or anyone for whom such party may be responsible. The release made by each of the Parties pursuant to Section XXX, is conditioned upon, and will be effective only in the event of, the inclusion in each of the policies of insurance to be obtained pursuant to the Insurance Requirements (whether by the City or by ARG) containing or including a clause or endorsement to the effect that such release shall not adversely affect or impair the subject policy or prejudice the right of the releaser to recover under the policy. ARG agrees that it will request its insurance carrier to include in its policies such a clause or endorsement. If any such clause or endorsement will require payment of an additional premium or charge, the party whose policy is affected will not be obligated to obtain such clause or endorsement but shall notify the other party who may elect to pay the additional premium or charge to obtain such clause or endorsement but shall not be obligated to do so. ARG shall provide complete and correct copies of all insurance documents to the City.

### **XIV. COMPLIANCE WITH LAWS**

Except as otherwise provided in this Agreement, ARG, at its sole expense, shall (i) comply with all laws, statutes, orders, ordinances, rules and regulations of federal, state, county and municipal authorities (the "**Laws**") having jurisdiction over the City Park Improvements relating to ARG's particular manner of use of the City Park Improvements or which are the direct result of ARG's use of the Parkland Improvements; (ii) comply with any direction, order or citation made pursuant to law by any public officer requiring abatement of any public nuisance or which imposes upon either of the Parties any duty or obligation arising from ARG's particular manner of use of the City Park Improvements or required by reason of a breach of any of ARG's obligations under this Article XII or by or through other fault of ARG; (iii) comply with the Insurance Requirements; (iv) without limiting the obligations of ARG under clause (i) above,

and relating to ARG's particular manner of use of the City Park Improvements or which are the direct result of ARG's use of the City Park Improvements comply with all Laws governing, and all procedures established by the City for, the use, abatement, removal, storage, disposal or transport of any substances, chemicals or materials declared to be, or regulated as, hazardous or toxic under any applicable Laws ("**Hazardous Substances**") and any required or permitted alteration, repair, maintenance, restoration, removal or other work in or about the City Park Improvements that involves or affects any Hazardous Substances, and (v) except in compliance with all applicable Laws relating to the storing, handling, use, removal, disposal and/or transport of Hazardous Substances, not store, use, release, produce, process or dispose in, on or about, or transport to or from the City Park Improvements, any Hazardous Substances. ARG agrees to indemnify and hold the City harmless from any loss, cost, claim or expense which the City incurs or suffers by reason of ARG's failure to comply with its obligations under this Agreement.

## **XV. CONCESSIONS AND SPECIAL EVENTS**

In connection with any special events or activities within the Parks, and except as may be expressly provided in this Agreement, the Park Operations Manager will comply with the City Park Rules and the Austin City Charter and acknowledges that events and the reservation of the Parks will be limited to those activities consistent with the operation of the Project and such activities will be open to the public. In addition, except as provided in this Agreement, the Park Operations Manager will comply with the permitting provisions of Chapter 8-1 of the Code and the City Park Rules to the extent such special events and activities are related to public health and safety and no person will be discriminated against or excluded from the use of the Parks for permissible park purposes.

1. Public Access. Except for those portions of the Parks that may be temporarily reserved for private events, all special events and activities within the Parks shall be open to the public.
2. PARD Notice. Subject to the applicable provisions of the City Park Rules, if the Park Operations Manager wishes to schedule any special events or activities on the premises, the Park Operations Manager shall reasonably coordinate with the Director and follow the City's requirements with respect to such special events.

B. Duties and Responsibilities of PARD and the City. Except for the duties, responsibilities and obligations to be performed by the Park Operations Manager by this Agreement, PARD shall continue to have the duty and responsibility for enforcing the City Park Rules within Parks, and for exercising its duties and powers with regard to the public health and safety. The City shall have the duty and responsibility of enforcing penal ordinances and state laws and taking the appropriate action with regard to any violation thereof or other illegal conduct. The Park Operations Manager acknowledges that the City will not be obligated to provide any special police protective services for any special events or activities scheduled by

the Park Operations Manager, beyond those that would otherwise be provided by the City in accordance with the provisions of the City Code or the City Park Rules.

## **XVI. FORCE MAJEURE**

A. Each party to this Agreement agrees to excuse the failure of another party to perform its obligations under this Agreement to the extent that failure is caused by an event of Force Majeure. *Force Majeure means acts and events not within the control of the party, and which the party could not use due diligence to avoid or prevent.* Events of Force Majeure include acts of God, strikes, riots, sabotage, civil disturbances, epidemics, acts of domestic or foreign terrorism, lightning, earthquakes, fires, storms, floods, and landslides. Force Majeure does not include economic or market conditions, which affect a party's cost, but not its ability to perform.

B. The party invoking Force Majeure shall give timely and adequate notice to the other party of the event by facsimile transmission, telephone, or e-mail and then the party must promptly provide written notice of the Force Majeure in the manner required by this Agreement. The party shall use due diligence to remedy the effects of Force Majeure as soon as reasonably possible. If a party's performance is delayed by the event of Force Majeure, the parties will mutually agree to extend the time for the completion of obligations by a period of time reasonably necessary to overcome the effect of the Force Majeure event.

## **XVII. MISCELLANEOUS PROVISIONS**

A. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement. Any previous agreement, assertion, statement, understanding, or other commitment before the date of this Agreement, whether written or oral, shall have no force or effect. No agreement, assertion, statement, understanding, or other commitment during the Term of this Agreement, or after the Term of this Agreement, shall have any legal force or effect unless properly executed in writing by the parties.

B. This Agreement is made, and shall be construed and interpreted under by the laws of the State of Texas and venue for any lawsuit concerning this Agreement shall lie in the City of Austin, Travis County, Texas.

C. Regardless of the actual drafter of this Agreement, this Agreement shall, in the event of any dispute over its meaning or application, be interpreted fairly and reasonably, and neither more strongly for or against any party.

D. All official communications and notices required to be made under this Agreement shall be deemed made if sent, postage prepaid to the parties at the addresses listed below, unless otherwise specified elsewhere in this Agreement:

If to the City, to:

Parks and Recreation Department  
City of Austin  
Attn: Central Park Division Manager  
P.O. Box 1088  
Austin, Texas 78767

If to ARG, to:

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

E. The Parties bind themselves and their successors in interest, assigns and legal representatives to this Agreement.

F. The Agreement may be executed in multiple counterparts, each of which shall be fully effective as an original and all of which together shall constitute one and the same instrument. Facsimile signatures appearing on the Agreement shall be as valid and binding as original signatures.

G. In the event of a dispute, the Parties agree to attempt a negotiated resolution prior to filing suit over the dispute. On request of either Party, an informal attempt to negotiate a resolution of the dispute shall be made. Such request shall be in writing, and shall seek a meeting between representatives of each Party within 14 calendar days after receipt of the request or such later period as agreed by the Parties. Each Party shall provide for the meeting, at a minimum, one senior level individual with decision-making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt in good faith to negotiate a resolution of the dispute. If, within 30 calendar days after such meeting, the Parties have not succeeded in negotiating a resolution of the dispute, they shall proceed directly to mediation as described below. Informal negotiation may be waived by a written agreement signed by both Parties, in which event the Parties shall proceed directly to mediation as described below.

H. The mediation shall take place in Austin, Texas. The Parties shall select a mediator within 30 calendar days of the written waiver, or within 60 calendar days of the informal negotiation meeting. 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 dispute. If the time period for selecting the mediator has expired with no agreement on the mediator, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC). The Parties agree to participate in mediation in good faith for up to 30 calendar days from the date of the first mediation session. The Parties will share the costs of mediation equally.

## **XVIII. ASSIGNMENT**

ARG may assign this Agreement with respect to all or part of any City Parkland Areas from time to time to an Association, to an affiliate of ARG or a third party, so long as such third party has demonstrated to the City that the third party has the financial and managerial capacity, the experience, and expertise to perform the duties or obligations so assigned. ARG may not assign this Agreement without City approval. Such approval shall not be unreasonably withheld. Upon such assignment or partial assignment, ARG, but not its successors and assigns, shall be fully released from any and all obligations under this Agreement and shall have no further liability with respect to this Agreement related to the portion of the City Parkland Areas so assigned.

## **XIX. SEVERABILITY**

If the final judgment of a court of competent jurisdiction invalidates any part of this Agreement, then the remaining parts of the Agreement shall remain in full effect.

## **XX. WAIVER**

If at any time either Party or their successors or assigns, fail to enforce the Agreement, whether or not any violations of it are known, such failure shall not constitute a waiver or estoppel of the right to enforce it.

## **XXI. NO RECOURSE**

No recourse shall be had against any elected official, director, officer, attorney, agent, or employee of either of the Parties whether in office on the effective date of this Agreement or after such date, for any claim based upon the Agreement.

## **XXII. AUTHORITY TO EXECUTE**

Each Party warrants and represents to the other that the person signing this Agreement on its behalf is authorized to do so, that it has taken all action necessary to approve this Agreement, and that this Agreement is a lawful and binding obligation of the Party, except as may be limited by applicable bankruptcy, insolvency, or similar laws affecting creditor's rights, or with respect to City, governmental immunity under the Constitution and laws of the State of Texas.

## **XXIII. AMENDMENT IN WRITING**

A. This Agreement may be modified only by a writing properly executed by each of the Parties. Neither any representation or promise made after the execution of this Agreement, nor any modification or amendment of this Agreement, shall be binding on the Parties unless made in writing and properly executed by each of the Parties. Provided any

amendment, change or extension does not increase the Agreement amount in excess of the then current administrative authority of the City Manager and the form of amendment is approved by the City Law Department, the City Manager or the City Manager's designee is authorized to execute any amendment to the Agreement on behalf of the City without further authorization by the City Council.

B. Notwithstanding any other provision of this Agreement to the contrary, no amendment may be deemed to be a termination of this Agreement. Further, if any portion of a Site Plan necessitates any discretionary approval, waiver, variance, modification, or adjustment from any City or other governmental board, agency, officer, director or employee or from any non-governmental board, agency, person, association, officer, director, or employee or necessitates termination or amendment of any restrictive covenant, condition, restriction, or agreement not within the unilateral control of ARG or ARG's successors and assigns, failure by ARG or PARD to secure such approval, waiver, variance, modification, adjustment, termination, or amendment, shall not be deemed to be a default of this agreement or failure to perform hereunder.

#### **XXIV. NAMING OF PARKS AND CITY PARK IMPROVEMENTS**

The parks and park improvements shall be named as set forth in City Code Sections 14-1-37(A) and 14-1-39(I).

**[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]**

THE EFFECTIVE DATE of this Agreement is the Date first above stated.

**ARG:**

\_\_\_\_\_

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

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

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

Date: \_\_\_\_/\_\_\_\_/2016

**City:**

**CITY OF AUSTIN, TEXAS**

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

Name: Elaine Hart

Title: Interim City Manager

Date: \_\_\_\_/\_\_\_\_/2016

REVIEWED AS TO CONTENT:  
PARKS AND RECREATION DEPARTMENT

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

Name: Sara Hensley

Title: Director

APPROVED AS TO FORM:  
LAW DEPARTMENT

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

Name: Leela R. Fireside

Title: Assistant City Attorney



Attachments:

Exhibit A - Insurance Requirements

Exhibit B – Park

DRAFT