

# Late Backup

## CITY PARKLAND IMPROVEMENT AND OPERATIONS AGREEMENT (Camelback Parks)

### RECITALS

This City Parkland Improvement and Operations Agreement (Camelback Parks) (the "**Agreement**") is made and entered into by **LOOP 360 LAND, L.P.**, a Texas limited partnership ("**Loop 360**"), 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**").

Loop 360 is the owner of that certain approximately 144.817 acre tract of land in the A.C. Champion Survey No. 188, Abstract No. 2603, the J. Spillman Survey No. 2, Abstract No. 739, and the James Jett Survey No. 1, Abstract No. 437, Travis County, Texas, described in Document No. 2017038499 of the Deed Records of Travis County, Texas, said 144.817 acre tract of land being more particularly described by metes and bounds in Exhibit A incorporated into this agreement (the "**Property**").

Consistent with City Ordinance No. 20181101-055, including the exhibits thereto, related to the Camelback Planned Unit Development (the "**PUD Ordinance**"), Loop 360 intends to develop the Property as a mixed-use development including residential and commercial uses (the "**Project**").

In connection with the development of the Project, and subject to the terms of this Agreement, Loop 360 will dedicate to the City, and the City will own, a total of at least 26.53 acres of credited parkland out of the Property, in the locations shown on Exhibit C to the PUD Ordinance. The dedicated parkland shall include at least 16.58 acres of dedicated, credited parkland in the Cliff Park, as shown on Exhibit H to the PUD Ordinance ("**Cliff Park**"), and at least 9.95 acres of dedicated, credited parkland in the Preserve Park, as shown on Exhibit I to the PUD Ordinance ("**Preserve Park**") (together, prior to dedication, the "**City Parkland**").

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, the City and Loop 360 have agreed that Loop 360 will improve, maintain, and operate the City Parkland in connection with the Project and the parkland will be superior to the parkland that would have been dedicated by Loop 360 if Loop 360 were not developing a PUD.

**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 herein, ~~it~~ the following definitions have the meanings assigned to each:

**Association** means any property owners' association created by Loop 360 or its successors or assigns.

**Contractors** mean Loop 360's and/or Loop 360'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 Parkland or Park Improvements.

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

**Effective Date** means the date the last Party signs this Agreement.

**Cliff Park Maintenance Requirements** means the requirements set forth in Exhibit B to this Agreement that Loop 360 must adhere to in maintaining and operating Cliff Park.

**Insurance Requirement** means the insurance coverages required to be maintained by Loop 360 as described in Exhibit C which is attached to the Agreement and incorporated into and made a part of this Agreement for all purposes.

**Loop 360** means Loop 360 Land, LP, and shall include its successors and assigns, including without limitation, the Association.

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

**Park Improvements** are those described in Section IV of this Agreement and in Part 7 of the PUD Ordinance, including the exhibits thereto.

**Park Rules** means the applicable requirements and conditions of Chapter 8-1 of the Austin City Code, as it may be amended from time to time, relating to the administration of public parks, and the guidelines and rules established by PARD for the use and enjoyment of public parks, as they may be amended from time to time, and any successor to such Code, guidelines or rules.

**Parks** means the City Parkland after Loop 360 has dedicated it to the City and the City has accepted the dedication.

**Parks Operation Manager** means Loop 360 and its successors and assigns, the Association, or such other entity appointed by Loop 360 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 VII, and VIII ~~and X~~ of this Agreement.

**Party** means either City or Loop 360, and its successors and assigns, including without limitation the Association, as the context requires; collectively, referred to as "**Parties**."

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

**Preserve Park Maintenance Requirements** means the requirements set forth in Exhibit B to this Agreement that Loop 360 must adhere to in maintaining and operating Preserve Park.

**Public Access Improvements** means 25 full-size, off-site parking spaces, including at least one van-accessible ADA space, for free public use, to be located in the Commercial (C) district; two off-site public restrooms, including changing stations, for free public use, to be located together in the Commercial (C) district shown on Exhibit C to the PUD Ordinance, in close proximity to the 25 off-site parking spaces; access to the Cliff Park from the required off-site parking spaces and off-site public restrooms; and access to the Preserve Park from the existing parking along Bridge Point Parkway.

## 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 consider updating the requirements of this Agreement at least once every five years. This Agreement may be renewed by the mutual written agreement of Loop 360 and the City as desired to continue the maintenance and operation of the Parks. The City Manager has the authority to agree to renewals that do not materially change this Agreement without further council action.

## III. DESIGNATION OF REPRESENTATIVES

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. Loop 360 designates Jonathan Coon as its authorized representative to act on Loop 360's behalf with respect to this Agreement.

## IV. DESIGN, PERMITTING, AND CONSTRUCTION RESPONSIBILITIES

A. Park Development Plans. Within ~~365~~80 days of the Effective Date of this Agreement, Loop 360 shall submit development plans for Preserve Park and Cliff Park to the City for approval (~~collectively together, the~~ "**Park Development Plans**"). The Park Development Plans shall include, but not be limited to, the locations of the Park Improvements described below.

B. Park Improvements. The Park Improvements shall comply with the PUD

Ordinance, including the exhibits thereto, and the Park Rules, shall meet the minimum City standards for materials and specifications, shall be included in the Park Development Plans, and shall include, but not be limited to, the following elements:

1. Cliff Park

- a. 1,400 linear feet of nature trail;
- b. 100 linear feet of ADA accessible multi-modal trail, with a minimum width of ten (10) feet, to the westernmost cliff overlook;
- c. Three (3) shade structures or pergolas measuring approximately 15 by 15 feet;
- d. One (1) drinking fountain with a dog bowl and ability to fill large drinking containers;
- e. Four (4) trash receptacles (recycling and waste);
- f. Four (4) park benches or seat walls;
- ~~f.g.~~ Four on-site public scenic vista points; and
- ~~g.h.~~ Appropriate signage, including interpretive, park rules, directions, information regarding how to reserve Cliff Park and/or the Park Improvements therein, and other relevant information. Such signage shall conform to the applicable Park Rules for signage in public parks.

2. Preserve Park

- a. 2,000 linear feet of low impact, single track nature trail to be constructed of gravel, mulch, or cut into existing rock;
- b. One (1) designated trailhead with a shade structure measuring approximately 15 by 15 feet;
- c. One (1) drinking fountain with a dog bowl and ability to fill large drinking containers;
- d. Two (2) trash receptacles (recycling and waste);
- e. Two (2) park benches; and
- f. Appropriate signage, including interpretive, park rules, directions,

information regarding how to reserve Preserve Park and/or the Park Improvements therein, and other relevant information. Such signage shall conform to the applicable Park Rules for signage in public parks.

C. Boundaries. The boundaries of Cliff Park and Preserve Park shown on Exhibit C to the PUD Ordinance shall not be changed administratively unless the change results in an increase in the size of one or both of the Parks and an increase does not decrease in the amount of shoreline or cliff frontage in Cliff Park.

D. Minimum Construction Costs. The minimum construction cost for the Park Improvements and Public Access Improvements, as provided below, shall be One Million Five Hundred Thousand Dollars (\$1,500,000). An engineer's estimates of construction costs for Park Improvements in each of the Parks shall be provided to the City for approval as part of the Park Development Plans. Construction costs may include the cost of the Public Access Improvements, provided that the credited cost of the 25 off-site parking spaces may not exceed Four Hundred Fifty Thousand Dollars (\$450,000), even if the parking spaces are located in a parking garage. Construction costs may not include design and project management costs.

E. Tree Removal. Except as otherwise provided in the PUD Ordinance or the approved Park Development Plans, Loop 360, its successors and assigns, including the Association, and the Parks Operation Manager shall comply with the applicable City Code regulations for all removal, cutting, and/or pruning of trees on the City Parkland or the Parks.

F. Bidding Process. The City acknowledges and agrees that because the Park Improvements will be constructed before the City Parkland and Park Improvements are dedicated, Loop 360 is not obligated to publicly bid any work related to the Park Improvements prior to dedication. However, Loop 360 shall ensure 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 City Parkland and the Park Improvements. Moreover, any improvements or construction done by Loop 360 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.

G. Construction Liens. Loop 360 shall have no right, authority, or power to bind the City or any interest of the City in the City Parkland or the Park Improvements for labor, materials, or any other charge or expense incurred in construction of any improvements or other work done on the City Parkland. Loop 360 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 City Parkland or the Park Improvements, and Loop 360 shall in no way be considered as the agent of the City in the construction, erection, or operation of any improvements made on the City Parkland or Park Improvements. If any liens or claims for labor or materials supplied, or claimed to have been supplied, to the City Parkland or the Park Improvements are filed, Loop 360 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 City Parkland or Park Improvements by any Contractor or other claimant.

**H. Nondiscrimination Policy.** Loop 360 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. Loop 360 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. Loop 360 shall, in all solicitations or advertisements for employment placed by or behalf of Loop 360, 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.

**I. Accessibility Standards.** Loop 360 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, Texas Govt. Code chap. 469, (iii) the Americans with Disabilities Act Accessibility Guidelines, and (iv) the Texas Accessibility Standards.

**J. Independent Contractors.** Loop 360 and its Contractors shall perform the obligations set forth in this Agreement as independent contractors.

## **V. DEDICATION OF CITY PARKLAND**

**A. Completion of Construction.** Promptly upon completion of all construction of both Parks as shown in the Park Development Plans and of the Public Access Improvements (the "**Construction Project**"), Loop 360 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 Loop 360 by either submitting a list of items still requiring completion, or by accepting the Construction Project. Acceptance of the Construction Project shall be evidenced by a letter of acceptance from the City (the "**Acceptance Letter**"). The City must issue an Acceptance Letter to accept the Park Improvements and the City Parkland.

**B. Survey and Other Required Documentation.** Within 30 days of receipt of the Acceptance Letter, Loop 360 shall prepare and deliver to the City a certified land title survey showing the final boundaries of the real property to be dedicated to the City as parkland (the "**Survey**"). Within the same time period, Loop 360 shall also deliver to the City all required warranties, document that there are no liens for the work performed on the Construction Project, provide a current Phase 1 ESA with no further recommendations certified to the City for the City Parkland, and provide any additional documentation reasonably required by the City (all such documentation, together with the Survey, the "**Dedication Documents**"). Loop 360's failure to provide the Dedication Documents within the time required relieves the City of the requirement to accept the City Parkland and Park Improvements and shall be an event of default under this Agreement.

**C. Dedication.** Promptly following the City's acceptance of the Dedication Documents, Loop 360 shall execute and deliver to the City a special warranty deed conveying the

City Parkland and the Park Improvements to the City, subject only to the Permitted Exceptions (the "Deed"). The City shall accept the City Parkland and shall record the Deed (the "City Acceptance").

**D. Satisfaction of Parkland Requirements.** City Acceptance of the City Parkland and Park Improvements shall satisfy all City parkland requirements, including parkland development fees, for the Camelback PUD.

## **VI. CERTIFICATE OF OCCUPANCY**

All requirements of the PUD Ordinance relating to the Park Improvements and the Public Access Improvements must be satisfied and City Acceptance must occur prior to the issuance of a Certificate of Occupancy for any building not required for Park Improvements or the Public Access Improvements.

## **VII. MAINTENANCE, REPAIR, OPERATION, AND CAPITAL IMPROVEMENT RESPONSIBILITIES FOR PARKS AND PARK IMPROVEMENTS**

**A. Maintenance and Operation.** The Parks Operation Manager shall be responsible for the performance of all the duties and obligations provided in this Agreement with respect to the operations and maintenance of the Parks. The Parks Operation Manager shall at all times during the Term be responsible for security in the Parks; shall keep and maintain, or cause to be kept and maintained, and operate the Parks, including the Park Improvements and all other buildings and improvements erected in the Parks in accordance with the Park Development Plans approved by the City, in a good state of appearance and repair (except for reasonable wear and tear); and shall comply with the Cliff Park Maintenance Requirements and the Preserve Park Maintenance Requirements set forth in Exhibits B and D, respectively, all at the sole expense of Loop 360 or its successor and assigns, including the Association.

**B. Hours of Operation.** The City acknowledges and agrees that pursuant to Section 8-1-14 of the Austin City Code, the Director has approved and hereby approves of alternate operating hours during which the Parks shall remain open. The operating hours for the Parks shall be limited to thirty (30) minutes before sunrise to thirty (30) minutes after sunset ("Hours of Operation") unless an alternative schedule is otherwise agreed to by both Parties.

**C. Funding.** The maintenance and operation of the Parks and the Park Improvements in compliance with this Agreement shall be funded by Association dues or other funding mechanism identified by the Parks Operation Manager and approved by the City Manager or the Manager's designee (such approval not to be unreasonably withheld, conditioned or delayed). Such funding shall be contained in a segregated account to be used only for the operations and maintenance of the Parks and the City Parkland Improvements. This account shall be maintained in a federally insured institution and shall name the City as the beneficiary. Loop 360 agrees to establish this account so that the City can assume the funds contained in the account if Loop 360 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. Loop 360 shall provide information regarding the funding and use of the account each year to the

Director.

**D. Fees.** Except as may be allowed pursuant to Section VII.E below, Loop 360, its successors and assigns, including the Association, and the Park Manager shall not charge admission fees, concession fees, rent, or other charges for use of any of the following: the Parks, the Park Improvements, the 25 off-site parking spaces for access to Cliff Park, the on-street parking spaces on West Bridge Point Parkway for access to Preserve Park, or the public access between the parking spaces and the Parks.

**E. Fees and Reservations to Prevent Overuse.** If either Party believes one or both of the Parks is being overused, it shall promptly notify the other Party. If the other Party agrees that the Park or Parks is being overused, the Parties shall work in good faith to develop a mutually agreeable plan to alleviate the overuse. Such a plan may, but is not required to, include a reservation system and fees; it also may, but is not required to, establish administrative guideline regarding overuse.

**F. Indebtedness.** Loop 360 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 the City for taxes, and of § 2-8-3 of the Austin City Code concerning the right of the City to offset indebtedness owed to the City.

**G. Third Party Management.** The City has the right to approve any management company hired or otherwise placed under contract by Loop 360 for the operation and maintenance of the Parks and the Park Improvements. Loop 360 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.

**H. Permitted Activity After Dedication.** After City Acceptance, if any alterations, improvements, or new construction work, including but not limited to, utilities, signage, or other recreational improvement, in the Parks by Loop 360 or its successors and assigns, including the Association, requires prior written approval from the Director, such approval shall not be unreasonably withheld, conditioned, and/or delayed. If new permits or site plan corrections are required for any alterations, improvements or new construction, PARD staff will timely and reasonably review such plans or corrections.

**I. Impact on Public Access.** In performing or conducting the activities described in Section VII.H above, Loop 360, its successor and assigns, including the Association, or the Parks Operation Manager, as applicable, shall minimize the impact of such activities on the use of the Parks to the greatest extent feasible. In addition, except for routine day-to-day operation and maintenance of the Parks, Loop 360, its successors and assigns, including the Association, or the Parks Operation Manager, as applicable, shall reasonably notify and coordinate with the Director regarding these activities.

**J. Non-Permitted Activities.** Unless the work is authorized and completed before Loop 360 dedicates the City Parkland, if Loop 360 is conducting work that will result in a use inconsistent with the terms of this Agreement, Loop 360 shall only perform such work after the



City has completed a public hearing pursuant to Texas Parks and Wildlife Code, Chapter 26, documenting that there is no feasible alternative for the work to be completed except for conducting the work in the Park or Parks. Loop 360 is responsible for providing evidence sufficient to allow the City Council the ability to make legally required findings for any Chapter 26 hearing. Loop 360 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 the construction.

**K. Voluntary Maintenance by City.** After City Acceptance, the City may, in its sole discretion, undertake maintenance in the Parks, repair or modify the Park Improvements, or construct additional improvements, provided the City gives at least 60 days' written notice to the Parks Operation Manager before commencement of any non-emergency repair, modification, or construction.

**L. 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 Parks and the Park Improvements to ensure 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.

**M. Illegal Use Not Permitted.** Loop 360 may not use any part of the City Parkland, the Parks, the Park Improvements, or any other building or structure 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 Parks and the Park Improvements.

**N. Concessions and Special Events.** Concessions and special events shall not be permitted in the Parks unless in a manner mutually agreed to by the Parties. In the event the Parties agree to allow concessions or special events, the Parks Operation Manager shall comply with the Park Rules.

**O. Rules and Regulations.** Except for the duties and responsibilities to be performed by the Park Operations Manager, PARD shall continue to have the duty and responsibility of enforcing the City Park Rules within the City Parkland and for exercising its duties and responsibilities with respect to public health and safety. Except as otherwise may be provided this Agreement or in the PUD Ordinance, the Parks Operation Manager shall (i) comply and conform with the 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 Parks and/or the Park Improvements, and (iii) secure, or cooperate with the City in its securing, all applicable permits and licenses specifically required for the operation of the Parks and the Park Improvements.

**P. Utilities.** Loop 360 or 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 Parks and the Park Improvements to the extent necessary for their safe and efficient operation as determined by the Parks Operation Manager in its reasonable discretion.

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

A. 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. Loop 360 and its successors and assigns, including 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.

B. Segregated Account. The funds described above shall be kept in the segregated account described in Section VII.C.

## **IX. WARRANTIES**

Upon City Acceptance of the Parks and the Park Improvements, Loop 360 shall obtain from each of its Contractors a written warranty or bond, acceptable to the City, that the 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 Park Improvements. Each warranty or bond shall be assigned to the City, without further recourse against Loop 360. Loop 360 must provide the complete warranty or bond documents to the City.

## **X. DISCLAIMER OF WARRANTY; DAMAGES**

A. Disclaimer. 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 or its fitness or suitability for any particular use.

B. Liability for Damages. Except as provided in this Agreement, the City is not responsible, under any circumstances, for any damage to property belonging to Loop 360, its members, employees, agents, contractors, subcontractors, invitees, licensees, or trespassers, which may be damaged, stolen, or destroyed, and Loop 360 releases City from any responsibility therefore. The City agrees that it is responsible to the exclusion of any such responsibility of Loop 360 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.

C. Repair, Reconstruction, Replacement. If the Park Improvements are damaged or destroyed by fire or any other casualty, Loop 360, its successors or assigns, including the Association, or the Parks Operation Manager shall, within ninety (90) calendar days from the date of the damage or destruction, begin to repair, reconstruct, or replace the damaged or destroyed Park Improvements and pursue the repair, reconstruction, or replacement with reasonable diligence so as to restore the Park Improvements to substantially the condition they 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 Loop 360'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 Park Improvements, the parties may agree in writing to declare this Agreement terminated.

## **XI. LIABILITY AND INDEMNIFICATION**

A. Indemnification. **LOOP 360 SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS OFFICERS, APPOINTED OR ELECTED OFFICIALS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS (THE "INDEMNIFIED PARTIES") AGAINST ALL COSTS, LIABILITIES, DAMAGES, CLAIMS, SUITS, ACTIONS, AND CAUSES OF ACTIONS (THE "CLAIMS"), TO THE EXTENT ARISING, DIRECTLY OR INDIRECTLY, OUT OF (A) A BREACH OF THIS AGREEMENT OR VIOLATION OF LAW BY LOOP 360, ITS OFFICERS, AGENTS, EMPLOYEES, SUCCESSORS OR ASSIGNS, INCLUDING THE ASSOCIATION (THE "LOOP 360 PARTIES"); (B) A FALSE REPRESENTATION OR WARRANTY MADE BY THE LOOP 360 PARTIES IN THIS AGREEMENT OR IN ANY LOOP 360 PROPOSAL RELATED TO THIS AGREEMENT, THE CITY PARKLAND, THE PARK IMPROVEMENTS, OR THE PARKS; AND/OR (C) THE NEGLIGENCE, WILLFUL MISCONDUCT, OR BREACH OF A STANDARD OF STRICT LIABILITY BY THE LOOP 360 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. LOOP 360'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.**

A. Notice of Claim. The City shall give Loop 360 written notice of a Claim asserted against an Indemnified Party. Loop 360 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 Loop 360 of any obligations in this agreement. In no event may Loop 360 admit liability on the part of an

Indemnified Party without the written consent of City Attorney.

**B. Indemnification by Successors and Assigns.** Maintenance of the insurance required under this Agreement shall not limit Loop 360's obligations under this Article. Loop 360 shall require all successors and assigns, including the Association, to indemnify the City as provided in this Article. Loop 360 agrees that for any work performed by a volunteer with respect to the Park Improvements within the City Parkland under this Agreement, Loop 360 will secure a Volunteer Release Form.

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

**A. Default and Cure In Event of Non-Material Breach.** If any party fails to properly fulfill its obligations under this Agreement in a timely manner, and if such failure or violation does not constitute an imminent threat to public health and safety material breach of the Agreement, 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 thirty (30) calendar days from receipt of this notice in which to cure any such violations. If the violation cannot be reasonably cured within the 30 calendar days and the breaching party has diligently pursued such remedy as shall be reasonably necessary to cure the violation, then the parties may agree in writing to an extension of the period during which the violation must be cured.

**B. Right to Terminate.** 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. Default In Event of Material Breach.** A material breach of this Agreement shall constitute an event of default.

**D.C. Assumption.** If Loop 360 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 Parkland, Park Improvements and/or the Parks, or any contract documents or contract rights related to construction or maintenance of the City Parkland, the Park Improvements and/or the Parks.

**E.D. Release.** Loop 360 shall be relieved of liability for any claims, injuries or losses resulting solely from negligent acts or omissions of the City, its employees or agents and for the solely negligent acts or omissions of the City arising out of the construction of the Construction Project as of the date of the expiration of this Agreement or a Notice of Termination, whichever is earlier.

**F.E. Outstanding Financial Obligations.** Any termination of this Agreement as provided in this Article shall not relieve Loop 360 from the obligation to pay any sum or sums due

and payable to the City under this Agreement at the time of termination, or any claim for damages then or previously accruing against Loop 360 under this Agreement. Any such termination will not prevent the 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 Loop 360 for any default under the Agreement. All the 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. The City may pursue any or all such remedies or any other remedy or relief provided by law, whether or not stated in this Agreement.

### **XIII. INSURANCE**

A. Insurance Requirements. During the Term, Loop 360, its successors and assigns, including the Association, and its Contractors, at their sole cost and expense, shall obtain, provide and keep in force the Insurance Requirements attached as Exhibit C to this Agreement.

B. Subrogation. 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 this section 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 Loop 360) 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. Loop 360 agrees that it will request its insurance carrier or carriers to include in its policies such a clause or endorsement. If any such clause or endorsement requires 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. During the Term, Loop 360 shall provide complete and current copies of all insurance documents to the City.

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

Except as otherwise provided in this Agreement, Loop 360, 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 Parkland, the Park Improvements and/or the Parks; (ii) comply with any direction, order or citation made pursuant to law by any public officer requiring abatement of any public nuisance, which imposes any duty or obligation, or which is required by reason of a breach of any of Loop 360's obligations under this Agreement or by or through other fault of Loop 360; (iii) comply with the Insurance Requirements; (iv) without limiting the obligations of Loop 360 under clause (i) above, 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

Parkland, the Park Improvements and/or the Parks 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 Parkland, the Park Improvements and/or the Parks, any Hazardous Substances. Loop 360 agrees to defend, indemnify and hold the City harmless from any loss, cost, claim or expense which the City incurs or suffers by reason of Loop 360's failure to comply with its obligations under this Article.

## **XV. FORCE MAJEURE**

A. Event of Force Majeure. 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. Notice of Force Majeure. 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.

## **XVI. ASSIGNMENT**

Loop 360 may assign this Agreement with respect to all or part of the Parks and/or the Park Improvements to the Association, to an affiliate of Loop 360, or to a third party, so long as such affiliate or third party has demonstrated to the City's satisfaction that the third party has the financial and managerial capacity, experience, and expertise to perform the duties or obligations so assigned. Loop 360 may not fully or partially assign this Agreement to an affiliate or third party without City approval, such approval not to be unreasonably withheld. Upon an assignment or partial assignment, Loop 360, but not its successors and assigns, shall be fully released from any and all assigned obligations under this Agreement. Loop 360 shall have no liability with respect to the portion of the Agreement so assigned, but such release of liability applies only to damages, losses or claims arising from an act or omission that occurs after the assignment becomes effective. Loop 360 shall provide written and complete copies of both this Agreement and the PUD Ordinance, including all exhibits and attachments, to any such assignee prior to such assignment.

## **XVII. 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 force and effect.

#### **XVIII. NO WAIVER**

If at any time either Party or their successors or assign, 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.

#### **XIX. 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.

#### **XX. 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, by governmental immunity under the Constitution and laws of the State of Texas.

#### **XXI. AMENDMENT OF AGREEMENT**

A. Amendment. 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, does not materially alter the obligations related to the Park Improvements, the Public Access Improvements, or the Parks, 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. ~~This Agreement may be modified only as to a non-material provision, 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.~~

B. Not Deemed Default. If any portion of the Park Development Plans 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 Loop 360 or Loop 360's successors and assigns (the "**Required Approvals**"), failure by Loop 360 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; provided, however, that in such event, Loop 360 and the City shall cooperate to revise the Park Development Plans and Loop 360 shall, as soon as reasonably practicable, submit revised Park Development Plans that are sufficient to obtain the Required Approvals.

## **XXII. NAMING OF CITY PARKLANDS AND PARK IMPROVEMENTS**

The Parks and Park Improvements shall be named as set forth in City Code Chapter 14-1.

## **XXIII. MISCELLANEOUS PROVISIONS**

A. Entire Agreement. 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. Applicable Law and Venue. This Agreement is made, and shall be construed and interpreted, under the laws of the State of Texas and mandatory venue for any lawsuit concerning this Agreement shall lie in the City of Austin, Travis County, Texas.

C. No Party Deemed Drafter. 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. Notice. 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  
Email: \_\_\_\_\_

If to Loop 360, to:

Loop 360 Land, L.P. Attn: Jonathan Coon  
3939 Bee Caves Road, C100  
Austin, TX 78746  
Email: jonathan@impossibleventures.com



with a copy to:

Jeffrey S. Howard  
McLean & Howard, LLP  
901 S. Mopac Expressway, Suite 2-225  
Austin, Texas 78746  
Email: jhoward@mcleanhowardlaw.com

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

**F. Multiple Counterparts.** 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. Procedure in Event of Dispute.** 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. Mediation.** 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.

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

**LOOP 360 LAND, LP**

By: Loop 360 Land GP, LLC,  
its General Partner

By: \_\_\_\_\_  
Jonathan Coon, Manager

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

**CITY OF AUSTIN, TEXAS**

By: \_\_\_\_\_  
Spencer Cronk, City Manager

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

REVIEWED AS TO CONTENT:  
PARKS AND RECREATION DEPARTMENT

By: \_\_\_\_\_  
Kimberly McNeely, Director

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

APPROVED AS TO FORM:  
CITY LAW DEPARTMENT

By: \_\_\_\_\_  
Mary Searcy Marrero  
Assistant City Attorney

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

**Attachments:**

- Exhibit A - Legal Description
- Exhibit B - Parkland Maintenance Requirements
- Exhibit C - Insurance and Bond Requirements