

PARKLAND IMPROVEMENT AGREEMENT

between
THE CITY OF AUSTIN
and
AUSTIN PARKS FOUNDATION

Effective Date: _____ 2009

This Parkland Improvement Agreement (the "**Agreement**") is entered on the Effective Date by and between the CITY OF AUSTIN, TEXAS, a Texas home-rule municipal corporation situated in Hays, Travis and Williamson counties (the "**City**") and AUSTIN PARKS FOUNDATION, a Texas non-profit corporation ("**Parks Foundation**").

WHEREAS, Parks Foundation wishes to garner funds and in-kind contributions to build and donate certain improvements to the parks in the City of Austin (individually, the "**Park**;" collectively, the "**Parks**") on an ongoing basis; and

WHEREAS, Parks Foundation and the City agree that the various improvements contemplated will allow the City to better serve its citizens and numerous visitors to the Parks; and

WHEREAS, the parties wish to enter into an Agreement to allow Parks Foundation and the City to share responsibilities for such improvements to the Parks;

NOW, THEREFORE, the parties, in consideration of the mutual covenants expressed herein, agree as follows:

I. TERM

This term of the Agreement begins on the Effective Date and, unless terminated in accordance with other provisions of this Agreement, continues for an initial period ending on _____ 2014 (the "**Initial Term**"). The City has the option within one-hundred eighty (180) days prior to the end of the Initial Term or the first Extension Term to extend the Agreement for up to two (2) additional five-year terms following the Initial Term (each, an "**Extension Term**") on the same terms and conditions by written notice to the Parks Foundation.

II. DESIGNATION OF CITY REPRESENTATIVE

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

III. RESPONSIBILITIES OF PARKS FOUNDATION

A. Parks Foundation shall be allowed to carry out project and construction improvement activities in the Parks following submission and written approval of a conceptual description of each proposed project to PARD which is set forth on a form approved by PARD (the "**Conceptual Plan**"). For a Conceptual Plan that includes a construction improvement to one or more Parks, Parks Foundation may include a request for funding assistance from the City, provided the cumulative amount of all requests under this Agreement does not exceed an amount in excess of the then current administrative contracting authority of the City Manager (currently, \$52,000.00). Within fourteen (14) calendar days of receipt of the Conceptual Plan, City shall respond to Parks Foundation by either submitting approval of the Conceptual Plan or by conditionally accepting the Conceptual Plan subject to additional requirements approved by Parks Foundation. Acceptance of the improvements shall be evidenced by a letter of acceptance from PARD. Except with respect to the portion of a Conceptual Plan that requests funding assistance from the City, which amounts must be approved in writing by the City, failure of the City to respond to a Conceptual Plan within the 14-day period shall be deemed acceptance by the City.

B. For a Conceptual Plan that includes a construction improvement to one or more Parks, the Parks Foundation shall submit to the City on a form approved by PARD the proposed construct improvements which are designed and constructed according to plans, specifications and construction documents, including a construction schedule, approved in writing by PARD prior to the beginning of any construction activity.

C. Parks Foundation agrees to follow all City ordinances and other rules and regulations regarding permits and approvals related to activities and construction of the improvements in the Parks, as well as those of any other governmental entity having jurisdiction. Work shall not commence until PARD has issued a written "**Notice to Proceed**" on each project for improvements. All construction work shall meet or exceed City standards.

D. Parks Foundation shall have no right to place liens on the Parks, and shall not allow any liens to be placed against any Park by any contractor, subcontractor, employee, agent or assign (the "**Contractors**") or their vendors.

E. Parks Foundation agrees to diligently prosecute completion of the improvements and to coordinate all construction activity with designated PARD staff following issuance of the Notice to Proceed to minimize disruptions to any Park's usage.

F. Upon completion of each project, Parks Foundation shall deliver to the City written notice that the improvements have been completed on a form approved by PARD ("**Completion Notice**"). Within fourteen (14) calendar days of receipt of the Completion Notice, the City shall respond to Parks Foundation by either submitting a list of items still requiring completion or by accepting the project improvements. Acceptance of the improvements shall be evidenced by a letter of acceptance from PARD. Failure to respond to a Completion Notice within the 14-day period shall be deemed acceptance by the City.

G. Parks Foundation and its agents shall perform this Agreement as independent contractors.

H. Other than Section III.A., notwithstanding any provision of this Agreement to the contrary, this Agreement shall not apply to any maintenance or repairs, plantings, and associated operations of Parks Foundation in any Park that would be deemed to be non-capital in nature under generally accepted accounting principles (collectively, the “**Excluded Operations**”). Excluded Operations shall continue to be governed by normal operating policies and procedures of the City and Parks Foundation.

I. All provisions of this Agreement are contemplated to fall within the general exemptions set forth in Texas Local Government Code, Section 252.022(7)(F). In addition, where the City does not fund an improvement in whole or in part, the provisions of Chapter 7-2, *Art in Public Places*, of the City Code of Austin do not apply to this Agreement.

J. Parks Foundation 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. Parks Foundation shall take affirmative action to ensure that Contractors are treated during the improvement project without regard to race, creed, color, national origin, sex, age, religion, veteran status or sexual orientation. Parks Foundation shall, in all solicitations or advertisements for employment placed on or behalf of Parks Foundation, 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.

IV. RESPONSIBILITIES OF THE CITY

A. The City grants Parks Foundation and its Contractors responsible for any construction of the improvements or any related activity the right to enter that part of any Park designated on the plans as the “**Park Construction Site**” to construct the improvements. This right of entry with respect to each Project shall expire automatically upon acceptance of the completed improvements by the City for the particular Project.

B. PARD staff may assist in securing all permits and approvals necessary to construct the improvements. Parks Foundation and the Contractors shall coordinate with PARD staff to provide any information in the possession or control of Parks Foundation or the Contractors that is necessary or will facilitate applications for permits and approvals.

C. The City retains the right to inspect construction and to exercise its rights or duties in order to protect persons, property or the public interest in the Parks.

V. MUTUAL RESPONSIBILITIES

The Parties agree to cooperate in efforts which may benefit or otherwise impact any improvements falling within the terms of this Agreement.

VI. PROJECT COSTS AND RESPONSIBILITIES

A. Except for costs that the City agrees in writing to provide funding assistance, Parks Foundation shall be responsible for all costs of the improvements. Any increases in the actual costs of the improvements, including cost increases, change orders and overruns shall be borne by Parks Foundation, unless otherwise approved by the City. Costs include, but are not limited to, consultant fees, design costs, landscaping costs, labor costs, site restoration and re-vegetation costs, materials costs, engineering costs, legal fees, utility connection fees, permits, inspection fees, insurance costs and any other costs incurred in the design and construction of the Improvements.

B. At the City's request and prior to beginning the improvements, Parks Foundation shall provide proof that it has the ability to pay for all costs to be incurred under this Agreement. Such proof may include an independently certified financial statement, or in the case of in-kind contributions, letters of commitment from the contributors.

VII. WARRANTIES

Except as may be specifically set forth in this Agreement, Parks Foundation makes no representation or warranty, express or implied, regarding any improvements constructed or work performed pursuant to this Agreement, but shall, upon completion and acceptance of the improvements, assign to the City, without further recourse against Parks Foundation, all warranties that Parks Foundation may have received with respect to the Improvements.

VIII. MAINTENANCE

Upon acceptance by the City of the improvements, the City shall have complete ownership of the improvements and shall assume responsibility for maintenance.

IX. LIABILITY AND INDEMNIFICATION

A. Parks Foundation shall indemnify and hold harmless the City, its employees and agents against any claims, causes of action, personal injuries, or damages, including but not limited to, reasonable attorneys' fees from or in connection with the negligent acts or omissions of Parks Foundation, its agents, employees, and Contractors in the execution of its duties under this Agreement, but not from any negligent acts or omissions of or caused by the City, its employees or agents.

B. Parks Foundation agrees that for any work performed by a volunteer with respect to a Project under this Agreement, Parks Foundation will secure a release of liability substantially in the form as set forth in Exhibit "A" to this Agreement.

X. INSURANCE

A. Parks Foundation shall require its Contractors to procure and maintain in full force and effect for the duration of this Agreement insurance coverages in accordance with the requirements as set forth in Exhibit "B" to this Agreement.

B. Parks Foundation shall also require performance and payments bonds from its Contractors in the full amounts of its contract sums.

XI. TERMINATION

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 this Agreement, the non-breaching party shall notify the other party in writing of the specific violations of the Agreement. The breaching party shall have fifteen (15) days from receipt of this notice in which to cure any such violations. If the violation cannot be reasonably cured within said 15-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 in which the violation must be cured.

B. If, however, the breaching party has not cured any such violation as specified in the written notice or any extension within the time provided, then the non-breaching party, at its sole option, shall have the right to terminate this Agreement. This termination shall be made by sending a written Notice of Termination to the breaching party. This 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 Parks Foundation defaults under this Agreement, upon depositing the Notice of Termination with the U.S. Mail as specified above, the City may assume control and possession of Parks Foundation's contract documents, rights and improvements relating to the performance of this Agreement. Parks Foundation 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 Improvements as of the date of the Notice of Termination.

D. Termination for Convenience; Termination Without Cause. Either party may terminate this Agreement for convenience at any time with thirty (30) calendar days' written notice to the other party. On receipt of the Notice, the party receiving the notice shall immediately stop performance of services (unless the Notice directs otherwise) and deliver all documents, programs, reports, and materials accumulated in performing this Agreement (whether finished or in process) to the party giving the notice within ten (10) business days, or as otherwise stated in the Notice. If Parks Foundation terminates this Agreement, then Parks Foundation shall pay all outstanding costs and obligations incurred in connection with each project for improvement up to the date of termination.

E. Suspension. At any time and without cause, City may suspend the work or any portion of the work for not more than ninety (90) calendar days by written notice

to Parks Foundation stating the date on which Parks Foundation shall resume the work. Parks Foundation shall resume the work on the date stated in the City's notice.

XII. CONDITION OF PREMISES; DISCLAIMER OF WARRANTIES

Except as otherwise expressly provided in this Agreement, Parks Foundation agrees to accept each Park Construction Site in "as is" condition and agrees that the City shall have no obligation to alter a site in any way. 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 a Park Construction Site or its fitness or suitability for any particular use.

XIII. MISCELLANEOUS PROVISIONS

A. This Agreement constitutes the entire agreement between the parties. Any previous agreement, assertion, statement, understanding, or other commitment before the date of this contract, 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 the laws of the State of Texas, and venue for any lawsuit concerning this Agreement shall be brought 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:

If to the City:
Director
Parks and Recreation Department
City of Austin
P. O. Box 1088
Austin, Texas 78767

If to Parks Foundation:
Austin Parks Foundation
Attn: Treasurer
701 Brazos Street – Suite 170
Austin, Texas 78701-2577

E. The City and Parks Foundation, respectively, bind themselves, assigns and legal representatives to this Agreement.

XIV. SEVERABILITY

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

XV. WAIVER

If at any time the City, its successors or assigns, fails to enforce this Agreement, whether or not any violations of it are known, such failure shall not constitute a continuing waiver or estoppel of the right to enforce it.

XVI. NO RECOURSE

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

XVII. NO ASSIGNMENT

A Party to this Agreement may not assign or transfer its interests under this Agreement.

XVIII. 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.

XIX. AMENDMENT IN WRITING

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 contracting 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.

EXECUTED AND EFFECTIVE the date first above stated.

CITY OF AUSTIN, a home-rule municipal corporation

By: _____
Mark A. Ott
City Manager

APPROVED AS TO FORM:

James M. Williams, Sr.
Assistant City Attorney

AUSTIN PARKS FOUNDATION

By: _____
Don Degrasse, President

Attachments:

- Exhibit A - Volunteer Release Form
- Exhibit B - Insurance Requirements

