

**PARKLAND IMPROVEMENT  
AND  
JOINT ACCESS AGREEMENT  
(YMCA Town Lake Branch)**

This Parkland Improvement and Joint Access Agreement (this “**Agreement**”) is effective the last date signed by the parties (the “**Effective Date**”) between the YMCA OF AUSTIN, a Texas nonprofit corporation (“**YMCA**”), and the CITY OF AUSTIN, TEXAS, a Texas home-rule city and municipal corporation (the “**City**”).

YMCA owns and operates an exercise and recreational facility located at 1100 W. Cesar Chavez St., Austin, Texas 78703 (the “**Facility**”).

The Facility is adjacent to a City-owned park complex (the “**Park**”) managed by the City of Austin Parks and Recreation Department (“**PARD**”).

On December 8, 2016, the Austin City Council approved a Master Plan for the Lamar Beach Park.

The YMCA is a nonprofit organization that provides management services for PARD facilities, such as aiding with the parking management at the Lamar Beach Park location, and it is providing significant financial and other benefits to the City.

The City and YMCA desire to construct approximately 210 parking spaces on the west side of B. R. Reynolds Drive, Austin, Texas, within park land, as contemplated by the Master Plan (the “**Parking Improvements**”), for the mutual benefit of the City and YMCA and in furtherance of the park activities and recreational activities supported by both the City and the YMCA on this property.

The City desires to lease approximately .75 acres of land owned by the YMCA, for the purpose of licensing this area to Austin Pets Alive (APA) for the development of an animal services center to replace the facilities currently located at the Lamar Beach Park. APA contracts with the City for the City purpose of providing animal adoption assistance services.

**NOW, THEREFORE**, for and in consideration of the premises and the mutual promises and covenants contained in this Agreement, YMCA and the City agree as follows:

## **I. TERM**

The term of this Agreement will commence on the Effective Date and will terminate twenty-five years after completion of the Parking Improvements, subject to renewal as set forth below (the “*Term*”).

## **II. DESIGNATION OF CITY REPRESENTATIVE**

The City designates the Director of PARD (the “*Director*”) as its authorized representative to act on the City’s behalf with respect to this Agreement. The City may change its authorized representative from time to time.

## **III. RESPONSIBILITIES OF YMCA**

YMCA shall be responsible for the construction and installation of the improvements identified and described on Exhibit A attached and incorporated by reference (collectively, the “*Parking Improvements*”) on that portion of the Park identified and described on Exhibit B attached and incorporated by reference (the “*Park Improvement Area*”). The Parking Improvements must be constructed and installed (a) in a good and workmanlike manner, (b) in compliance with all Applicable Laws (as defined below), and (c) in accordance with the plans, specifications, construction schedules and other construction-related documents, all of which must be approved by the Director before the commencement of work on the Project (collectively, the “*Project Documents*”).

Before commencing work on the Project, YMCA will deliver to the Director, for her review and approval, a proposed construction schedule for the construction and installation of the Parking Improvements. The Director will have 10 business days after her receipt of YMCA’s proposed construction schedule to review and provide any comments to the schedule to YMCA. Once the Director approves the construction schedule, YMCA will adhere to the schedule, subject only to delays caused by unusually inclement weather, acts of God, strikes, shortages in labor or materials, acts of terrorism, and other causes beyond the reasonable control of YMCA. The schedule will include time for the YMCA to obtain the proper permits for its construction. Approval of the schedule does not constitute approval of the permits.

YMCA shall not place liens on the Park and shall not permit any liens to be placed on the Park.

YMCA will coordinate all construction actively through PARD staff designated by the Director to minimize disruption of ongoing activities at the Park.

YMCA shall deliver to the City written notice that the Parking Improvements have been completed (the “**Completion Notice**”). Within 21 days after the City’s receipt of the Completion Notice, the City shall either submit to YMCA a list of items still requiring completion or accept the Parking Improvements. Acceptance of the Parking Improvements or any phase of the construction work must be evidenced by a letter of acceptance from the City (the “**Letter of Acceptance**”).

YMCA, its agents, contractors, consultants, subcontractors, employees, and assigns shall perform the obligations set forth in this Agreement as independent contractors.

YMCA will be responsible for securing all permits and approvals necessary to construct, maintain and operate the Parking Improvements. PARD will assist YMCA as reasonably necessary in securing such permits and approvals; provided, however, PARD will not be required to incur any costs in connection with its assistance.

YMCA shall secure advanced approval for all removal, cutting, and pruning of trees in the Park by presenting a tree trimming plan (the “**Tree Trimming Plan**”) to the Director for approval (which approval will not be unreasonably withheld) no fewer than seven days before the date the removal, cutting or pruning will occur. The Tree Trimming Plan will identify the trees and limbs to be removed, cut or pruned and the technique YMCA proposes to use in connection with the removal, cutting, or pruning. In addition, each tree and limb to be removed, cut or pruned must be marked in the field. Concurrently with the submission of the Tree Trimming Plan, YMCA will submit a tree replacement and mitigation schedule detailing the types, sizes and number of trees to be placed on the Park Improvement Area by YMCA in connection with the Project.

The City retains the right to inspect the construction of the Parking Improvements and to exercise its rights and duties as a municipal body to protect persons, property or the public interest in the Park. YMCA acknowledges and agrees that the inspection, approval or acceptance of the Parking Improvements or any portion of the Parking Improvements by the City does not relieve

YMCA from its obligation to construct or maintain the Parking Improvements in a good and workman-like manner and in compliance with the Project Documents and Applicable Law.

During the Term, YMCA will obtain and maintain insurance in the types and amounts described on Exhibit C attached and incorporated by reference.

YMCA shall require that the Contractor executes performance and payment bonds on forms approved by the City. A solvent corporate surety company authorized to do business in the State of Texas and acceptable to the City shall issue each bond in the amount of one hundred percent (100%) of the Contract Amount, and shall meet any other requirements established by law or by the City pursuant to applicable law.

The City grants YMCA, its consultants, contractors, subcontractors, employees, and agents a non-exclusive, temporary license (the “**Temporary Construction License**”) for access over, across, and upon the Park Improvement Area for constructing the Parking Improvements. The Temporary Construction License shall commence on the date that is seven days after PARD’s receipt of a written notice from YMCA stating that YMCA has all permits required for this project and that it is ready to begin construction of the Parking Improvements (the “**Temporary Construction License Commencement Date**”). The Temporary Construction License shall expire automatically at midnight on the earlier to occur of the date that is (a) 365 calendar days after the Temporary Construction License Commencement Date, or (b) 30 days after substantial completion of the Parking Improvements. The Temporary Construction License is granted to YMCA subject to the general public’s right to use the Park Improvement Area and the Park, and all other liens, restrictions, easements and other encumbrances now or hereafter affecting the Park Improvement Area.

#### **IV. PROJECT COSTS**

YMCA will be responsible for costs of construction, installation, maintenance and use of the Parking Improvements, including, without limitation, 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, equipment costs, construction costs, and any other costs incurred in the design, construction, use or maintenance of

the Parking Improvements. The City shall be responsible for one half of such costs for an amount not to exceed \$375,000.

YMCA 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.

YMCA acknowledges that the City has provided notice that the City's payment obligations to YMCA 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 YMCA 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.

## **V. WARRANTIES**

YMCA must obtain from each subcontractor, materialman and supplier a written warranty acceptable to the City and that is in the form required by the City for public improvements on public land for any work performed or materials supplied in connection with the Parking Improvements. Upon completion and acceptance of the Parking Improvements, YMCA shall assign to the City, without cost, all warranties that YMCA has obtained in connection with the Parking Improvements. The Parking Improvements will be warranted free of defects for no less than one year from the date the Parking Improvements are accepted by the City.

## **VI. MAINTENANCE**

During the Term, YMCA shall perform all routine, preventive and capital maintenance of the Parking Improvements at YMCA's initial cost and expense, including, without limitation, mowing, watering, pruning, replacement of dead plants and trees, litter removal, and any and all other maintenance required to keep the Parking Improvements safe, orderly, clean and operational (collectively, the ***"YMCA Maintenance Responsibilities"***). The City grants to YMCA a non-exclusive license to access the Park Improvement Area for the purpose of performing the YMCA Maintenance Responsibilities (the ***"Maintenance License"***), which Maintenance License shall last

until the earlier to occur of the date (a) the Term expires, (b) this Agreement terminates for any reason other than the expiration of the Term, or (c) the City notifies YMCA in writing that YMCA is no longer responsible for the YMCA Maintenance Responsibilities. The Maintenance License is granted to YMCA subject to the general public's right to use the Park Improvement Area and the Park, and all other liens, restrictions, easements and other encumbrances affecting the Park Improvement Area. During the third quarter of each year, PARD and YMCA shall agree upon a maintenance budget for the following year. The City shall reimburse YMCA 50% of such maintenance costs, subject to the funds availability provisions set forth in the final paragraph of Section IV above.

## **VII. LIABILITY AND INDEMNIFICATION**

During construction, YMCA shall indemnify, defend and hold harmless the City, its employees, officers, representatives and agents from and against all claims, causes of action, losses, costs, and damages, including, without limitation, reasonable attorneys' fees and court costs, arising from or in connection with any breach of this Agreement by YMCA or the negligent or willful acts or omissions of YMCA, its agents, employees, contractors, subcontractors, licensees or invitees in the design, construction, operation, maintenance or use of the Improvements or the Facilities. After completion of construction, to the extent allowed by Texas law, the City agrees that it is responsible for its 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. YMCA's obligations under this Article VII will survive the expiration of the Term or the earlier termination of this Agreement. .

## **VIII. USE OF PARKING IMPROVEMENTS**

Upon issuance of the Letter of Acceptance, and in consideration of YMCA's payment of 50% of the construction, installation, and maintenance of the Parking Improvements, the City grants to YMCA a non-exclusive license to access and use the Park Improvement Area and the Parking Improvements for the purposes described in this Agreement (the "*Use License*"), and the Parking Improvements shall not be removed without consent of the YMCA or reimbursement of

the YMCA's expenses incurred. The term of the Use License shall commence on the date YMCA receives the Letter of Acceptance and shall terminate upon the expiration of the Term or the earlier termination of this Agreement. The Use License is granted to YMCA subject to the general public's right to use the Park Improvement Area and the Park, and all other liens, restrictions, easements and other encumbrances now or hereafter affecting the Park Improvement Area.

The Park Improvement Area shall be used by YMCA, its agents, employees, contractors, subcontractors, licensees and invitees, only for park and general recreational purposes consistent with the character of the Park and the Parking Improvements and subject to the rules and regulations promulgated, revised and amended by the City from time to time governing the use of the Park.

The Park Improvement Area shall be used on an unreserved, first-come, first-served basis. ~~, and neither the City nor YMCA shall (a) install any parking control devices that would limit or restrict access to the Park Improvement Area, or (b) charge a fee for parking.~~ The YMCA and City may install signs, and parking meters, -stating that the maximum time period for parking is two hours.

The City reserves the right to exercise and enjoy all of City's rights, benefits and powers as the City of the fee simple title in and to the Park Improvement Area, subject to the terms of this Agreement.

YMCA accepts the Park Improvement Area in its "AS IS, WHERE IS" condition, "WITH ALL FAULTS," and without any warranties of any type or nature, either express or implied.

## **IX. RENEWAL TERM**

Before conclusion of the initial 25-year term, the YMCA may renew this Agreement for a single additional 25-year term by giving written notice to the City. If at the time of such notice the City has previously issued to the YMCA a written notice of default, renewal shall not become effective until YMCA has cured such default.

## **X. CITY AGREEMENT REGARDING YMCA TRACT**

Upon the effective date of this Agreement, YMCA and the City shall enter into that certain Ground Agreement attached as Exhibit D.

## **XI. COMPLIANCE WITH LAWS**

YMCA shall comply, at its sole cost and expense, with (a) all laws, statutes, orders, ordinances, rules, regulations, and procedures of federal, state, county and municipal authorities (collectively, “***Applicable Laws***”) relating to the design, construction, maintenance or use of the Parking Improvements and the Park Improvement Area; (b) all directions, orders or citations made pursuant to law by any public officer requiring abatement of any nuisance or which imposes upon YMCA any duty or obligation arising from YMCA’s particular manner of occupancy or use of the Park Improvement Area or required by reason of a breach of any of YMCA’s obligations under this Agreement or by or through any other fault of YMCA; (c) all insurance requirements set forth in this Agreement; (d) all Applicable Laws governing 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 (collectively, “***Hazardous Substances***”), and any required or permitted alteration, repair, maintenance, restoration, removal or other work in or about the Park Improvement Area that involves, disturbs or affects any Hazardous Substances.

To ensure compliance with these laws, the YMCA shall use the City’s construction documents for any and all work the YMCA does, or contracts to do, on the Park Improvement Area. Additionally, the YMCA must comply with the City’s construction requirements including but not limited to the following:

**Minority and Women Business Enterprises.** YMCA shall substantially comply with the requirements of the City Code Chapters 2-9(A), 2-9(B), 2-9(C), and 2-9(D) (Minority-Owned and Female-Owned Business Enterprise Procurement Program). It is City’s policy to ensure that Minority-owned and Women-owned Business Enterprises (“MWBE”) have the full opportunity to compete for and participate in City contracts. The policies and objectives of City Code Chapters 2-9(A), 2-9(B), 2-9(C), and 2-9(D) are incorporated into this Agreement. YMCA shall develop and implement a MWBE Procurement Program (“MWBE Program”), which shall substantially comply with City Code Chapters 2-9(A) and 2-9(B) in the design and construction of the Parking Improvements. The current annual gender, ethnic-specific design and construction goals contained in City Code Chapters 2-9(A) and 2-9(B) are set forth on Exhibit \_\_\_\_ attached to this Agreement.



The MWBE Program shall be incorporated into and made a part of this Agreement for all purposes. If YMCA receives a notice of any violation of the MWBE Program, YMCA shall diligently work to cure such violation as is required and cooperate with City to correct such violations.

a) **MWBE Reporting.** Within 45 days from the Effective Date of this Agreement, YMCA shall provide City with a copy of YMCA's MWBE Program, and thereafter, YMCA shall provide monthly reports on progress toward meeting the MWBE participation goals on forms to be provided by City. YMCA may also be required to provide periodic reports to SMBR Citizen Advisory Committee regarding MWBE participation. YMCA shall maintain records showing (a) construction contracts and agreements with MWBEs, and (b) specific efforts to identify and award construction contracts and agreements to MWBEs.

b) **Outreach.** In an effort to meet the gender and ethnic-specific MWBE utilization goals, YMCA shall implement an outreach program designed to solicit participation of MWBEs. These outreach efforts should also target small businesses generally. YMCA may seek the assistance of SMBR in these outreach efforts.

c) **Supplier Diversity Policy.** Within 90 days after the Effective Date, YMCA shall submit to City a reasonable supplier diversity policy which will not conflict with the MWBE Program regarding YMCA's procurement of materials and services to be used exclusively at the Premises which may be reasonably modified from time to time by the YMCA, provided the policy and all modifications are approved by SMBR.

**Worker Safety.** YMCA shall also comply with, and require its contractors and subcontractors to comply with, "Third Party Resolution" Worker Safety requirements pursuant to City Ordinance No. 20110728-106 throughout the construction, improvement, renovation, restoration, replacement and/or alteration of the Parking Improvements.

**Wage Rates/Prevailing Wage.** YMCA shall comply with, and require its contractors supplying construction labor or materials to the Parking Improvements to comply with, the City's prevailing wage requirements throughout solicitation of any construction contract or procurement of services for the construction of the Parking Improvements as described in this Agreement. City has adopted the general prevailing rate of per diem wages established by the U.S. Department of Labor for work of similar character in the locality in which the work is performed as the minimum

per diem wages to be paid in connection with a city public improvement project for the construction of public buildings. The rates City pays are the rates in effect for Travis County at the time City advertises these projects for bid. Resolution No. 20080605-047 adopts these same wage rates for public-private projects, such as the project contemplated by this Agreement in which City is a participant.

**Living Wage.** YMCA shall ensure all personnel are paid the City's Living Wage in accordance with the policy set forth in City Council Resolution No. 20141016-035, or as may subsequently be amended. YMCA shall pay the City's current living wage rate for all of its workers at the Parking Improvements and such living wage rate shall be adjusted annually to reflect the City's new living wage rate that results from applying the cost of living index in accordance with City Council Resolution No. 20141016-035 or as may subsequently be amended.

**ADA** YMCA shall comply with the 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 in constructing, operating, and maintaining the Parking Improvements. YMCA shall provide a certificate establishing compliance from a Registered Accessibility Specialist (RAS) licensed by the Texas Department of Licensing and Regulation before execution or renewal of any contract, or shall provide a waiver from the regulatory agency responsible for enforcement of disabilities law.

## **XII. DEFAULT AND TERMINATION**

If YMCA fails to fulfill its obligations under this Agreement, the City shall notify YMCA in writing of its specific violations, and YMCA shall have 30 days from its receipt of the notice in which to cure the violations described in the notice. If YMCA does not timely cure the violations

specified in the notice, the City shall have the right to terminate this Agreement by sending written notice to YMCA.

The YMCA's right to the Park Improvement Area shall terminate automatically upon the expiration of the Term or the earlier termination of this Agreement.

Upon the expiration of the Term or earlier valid termination of this Agreement, YMCA will relinquish to the City, at no cost to the City, all rights in and to the Parking Improvements located on City property, the Park Improvement Area, the Project Documents and any contract rights related to the design, construction, use or maintenance of the Parking Improvements located on City property, and thereafter neither YMCA nor the City will have any further rights or obligations under this Agreement except for those rights and obligations that expressly survive the termination of this Agreement. YMCA will cooperate with the City and will execute and deliver to the City all documents and instruments necessary to effect the relinquishment described in this Article. This Article will survive the expiration of the Term or the earlier termination of this Agreement.

### **XIII. MISCELLANEOUS PROVISIONS**

This Agreement constitutes the entire agreement between YMCA and the City with respect to the subject matter of this Agreement. Any written or oral agreement, assertion, statement, understanding, or other commitment made before or contemporaneously with this Agreement that is not expressly addressed in this Agreement shall have no force or effect. This Agreement may not be amended except in a writing duly executed by both YMCA and the City.

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 lie in the City of Austin, Travis County, Texas. The City represents that this Agreement complies with Texas Local Government Code Chapter 271, Subchapter I in that: (1) the City is a local government entity pursuant to Section 271.151(3) of such statute; (2) this Agreement is statutorily authorized; and (3) this Agreement is subject to Subchapter I.

This Agreement will not be construed more or less favorably between the parties by reason of authorship or origin of language.

Any notice required or permitted under this Agreement must be in writing and will be deemed to be delivered (whether or not actually received) three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown below. Any address for notice may be changed by written notice delivered in the manner described in this Article. Notice addresses for the City and YMCA as of the Effective Date are as follows:

If to the City:

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

If to YMCA:

James P. Finck  
President/CEO  
YMCA of Austin  
1402 East Cesar Chavez  
Austin, Texas 78702

This Agreement binds and inures to the benefit of the City and YMCA and their respective successors, assigns and legal representatives.

YMCA may not assign, transfer or encumber any interest in this Agreement without the prior written consent of the City, which consent the City may withhold in its sole and absolute discretion. Any assignment, transfer or encumbrance made without the City's prior written consent shall be void *ab initio*.

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

If at any time the City fails to enforce this Agreement, that failure shall not constitute a waiver or estoppel of the right to enforce it.

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

This 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 this Agreement shall be as valid and binding as original signatures.

In consideration of the award and execution of this Contract and in consideration of the City's waiver of its right to attorney's fees, the YMCA knowingly and intentionally waives its right to attorney's fees under Section 271.153 of the Texas Local Government Code in any administrative proceeding, alternative dispute resolution proceeding, or litigation arising out of or connected to this Contract.

YMCA 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.

YMCA acknowledges that the City has provided notice that the City's payment obligations to YMCA 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 YMCA 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.

[The signature page(s) follow.]

The City and YMCA have executed this Agreement to be effective as of the Effective Date.

YMCA OF AUSTIN, INC.

By: \_\_\_\_\_  
James P. Finck  
President and CEO

CITY:

CITY OF AUSTIN, TEXAS

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

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

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Leela Fireside  
Assistant City Attorney

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

Attachments: