

**PARKLAND IMPROVEMENT, MANAGEMENT, AND OPERATIONS AGREEMENT  
BETWEEN  
THE AUSTIN PARKS FOUNDATION  
AUSTIN DMO, INC. D/B/A DOWNTOWN AUSTIN ALLIANCE  
AND  
THE CITY OF AUSTIN FOR  
REPUBLIC SQUARE**

Date: February 10<sup>th</sup>, 2015

This Parkland Improvement, Management, and Operations Agreement (Republic Square) (this “**Agreement**”) is made and entered into by AUSTIN PARKS FOUNDATION, a Texas nonprofit corporation (“**APF**”), AUSTIN DMO, INC. D/B/A DOWNTOWN AUSTIN ALLIANCE, a Texas nonprofit corporation (“**DAA**”), 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**”), sometimes collectively referred to herein as the “**Parties**” or each as a “**Party**”. For and in consideration of the premises and the mutual promises and covenants set forth herein, the Parties agree as follows:

**I. RECITALS**

**A.** The City is the long term ground lessee from the State of Texas of that certain parkland property in Austin, Travis County, Texas, which is bounded by the rights-of-way of W. 4<sup>th</sup> Street on the south, Guadalupe Street on the east, W. 5<sup>th</sup> Street on the north, and San Antonio Street on the west, and which is known as Republic Square (the “**Park**”).

**B.** The City, APF and DAA have agreed that the public benefits of the Park will be substantially enhanced through the re-improvement of the Park in accordance with a previously developed Republic Square Master Plan for the Park (the “**Master Plan**”).

**C.** The City, APF and DAA have further agreed that this goal can best be achieved by utilizing the services of APF and DAA as nonprofits in connection with the re-improvement, management and operation of the Park in accordance with the terms and conditions of this Agreement, and as authorized by Texas Local Government Code Section 252.022(a)(7)(F).

**D.** The Board of Directors of APF has approved the execution of this Agreement on December 10, 2014,

**E.** The Board of Directors of DAA has approved the execution of this Agreement on December 10, 2014.

**F.** The City Council approved the Master Plan on June 12, 2014, and approved the final negotiation and execution of this Agreement by the City Manager or his designee on December 11, 2014.

**G.** In this Agreement, the term “**Contractors**” shall mean and refer to the contractor(s), subcontractor(s) and supplier(s) of APF and/or DAA, as the context shall indicate.

H. The Parties agree that the foregoing recitals are an integral part of this Agreement and not mere recitals.

## II. TERM

A. The term of this Agreement (“**Term**”) begins on the Effective Date (hereafter defined) of this Agreement and, unless further extended in accordance with Section II.B. below, terminates fifteen (15) years after the Effective Date.

B. The initial fifteen (15) year Term of this Agreement may be further extended for successive ten (10) year periods by amendments to this Agreement, each of which must be executed by the Parties not less than one hundred eighty (180) days prior to the expiration of the then current initial Term or extension thereof, on such terms and conditions to which the Parties may at such time agree. If extended, the extended periods shall be understood to be included within the meaning of the word Term as used herein.

C. Notwithstanding anything in Sections II.A. and II.B. above, however, if at any time during the Term or extended Term of this Agreement the continued existence of the DAA as a public improvement district (“PID”) under Chapter 372 of the Texas Local Government Code (or successor statute) is not reauthorized by the City, or the PID otherwise ceases to exist for any reason, the DAA may terminate this Agreement by written notice to the other Parties and the Parties shall cooperate in good faith to cause the transition of all the duties and functions of the DAA under this Agreement back to the City as soon as reasonably possible, but not later than ninety (90) days after the notice of termination.

## III. DESIGNATION OF CITY REPRESENTATIVE

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

## IV. DESIGN, PERMITTING AND CONSTRUCTION RESPONSIBILITIES

A. APF shall be responsible for the design, permitting, bidding (or other lawful method of procuring construction delivery), and construction of those improvements to the Park (the “**Parkland Improvements**”) which are necessary or desirable in its reasonable judgment, and feasible based on available funding, to substantially conform to the Master Plan. Provided, the final design shall be subject to review and approval by the City’s Parks and Recreation Board (PARB) through PARD, which approval shall not be unreasonably withheld, conditioned or delayed. In order to obtain PARD and PARB approval for the final design, APF shall submit design and construction documents to PARD in phases as follows:

1. the schematic phase;
2. the design development phase;
3. the 50% completion of construction documents phase; and

4. the 95% completion of construction documents phase.

In addition, APF shall provide estimated construction costs at the schematic phase, the design development phase, and the 50% completion of construction documents phase. PARD will review the design documents at each phase and either provide direction to continue or identify areas of concerns within ten (10) working days of receipt. If areas of concern are identified, APF and PARD shall exert prompt, good faith and commercially reasonable efforts to resolve the concerns. A proposed site plan, the abovementioned design documents, related specifications, the cost estimates and other associated construction documents are collectively referred to herein as the “**Final Design Development Plan**”.

**B.** Except for the funding which the City has agreed to provide pursuant to Section VI.B. below, or as otherwise expressly provided by this Agreement, APF shall be responsible for all actual costs of design, permitting and construction of the Parkland Improvements. The term "actual costs" as used herein includes, but is not limited to, design costs, engineering costs, other consultant fees, legal fees, insurance costs, labor costs, materials costs, equipment costs, other construction costs, site restoration, re-vegetation costs and landscaping costs, permit and inspection fees (unless waived pursuant to Section VI.B.4. below), and any other costs actually incurred by APF in the design, permitting and construction of the Parkland Improvements.

**C.** Notwithstanding the provisions of Section IV.B. above, or anything else in this Agreement to the contrary, if it is discovered that there is a legal requirement to remediate or mitigate environmental, cultural, geological or other conditions of the site, APF shall be responsible for the cost of doing so only to the extent that contingency funds are available in its Parkland Improvements construction budget for such purposes (contingency funds will be equivalent to no less than 10% of the construction budget). However, APF shall have no responsibility for costs attributable to remediation or mitigation of areas outside the boundaries of the Park, such as surrounding streets or other properties. To the extent that any such remediation or mitigation costs exceed the contingency funds which are available in the construction budget, the City shall work in good faith to identify funding to remediate or mitigate such conditions to ensure compliance with local, state and federal laws. If the City is unable to identify or obtain such additional funding, APF may terminate this Agreement and shall have no further obligation for such remediation or mitigation costs.

**D.** The Parkland Improvements shall be designed, permitted, bid (or facilitated by other lawful method of procuring construction delivery), and constructed within the following timeline (collectively the “**Timeline**”), subject to adjustment of the Timeline by agreement of APF and PARD for reasonable cause:

1. The Final Design Development Plan shall be submitted to PARD in phases as described by Section IV.A. above, with good faith and commercially reasonable efforts being made to obtain PARD approval within 365 days after the Effective Date of this Agreement;
2. The proposed site plan for the Parkland Improvements will be submitted to the City’s Planning and Development Review Department for approval

within 90 days after PARD approval of the Final Design Development Plan and the site plan shall thereafter be diligently pursued to approval;

3. Applications for any necessary building permits or other permits required for structures or other improvements shown on the approved site plan will be submitted to the appropriate City department(s) within 180 days after approval of the site plan and all such permits shall thereafter be diligently pursued to approval;
4. Bids for the construction of the Parkland Improvements shall be shall be solicited within 90 days after all necessary permits have been obtained and a bid shall be promptly selected after compliance with all applicable bidding requirements (or an agreement for another lawful method of procuring construction delivery shall be obtained within 120 days after all necessary permits have been obtained);
5. Construction of the Parkland Improvements shall be commenced within 60 days after a bid is selected (or an agreement for another lawful method of procuring construction delivery has been obtained) and commercially reasonable efforts shall be exercised to cause the completion of the construction within 545 days after its commencement, subject to Force Majeure (hereafter defined).

E. APF agrees to follow all applicable City ordinances, rules and regulations in connection with permits and approvals for construction of the Parkland Improvements and in connection with the actual construction of the Parkland Improvements, as well as those of any other governmental entity having jurisdiction, including without limitation applicable competitive bidding requirements and the minority-owned and female-owned business enterprise procurement program requirements of City Code, Chapters 2-9A, 2-9B, 2-9C and 2-9D as required by City Resolution No. 20120112-058 adopted by the City Council on January 12, 2012, all in the same manner that the City would be required to comply if the City was carrying out the construction of the Parkland Improvements. APF shall also comply with City's "Construction in Parks Specifications" (the "**Park Specs**"), which are attached as **Exhibit "A"** to this Agreement, as applicable, and as the Park Specs may be amended or waived by PARD from time to time for purposes of this Agreement and/or the construction of the Parkland Improvements. Provided, (1) PARD must notify APF of any amendments to the Park Specs before any such amendments are binding on APF, (2) no changes to the Park Specs after 75% completion of the Park Improvements shall be binding on APF, and (3) nothing in this **Section IV.E.** shall prevent or prohibit APF or PARD from seeking or securing exceptions from, variances to, or waivers of governmental ordinances, rules, and regulations or the Park Specs. Provided further, the requirements of this **Section IV.E.** are intended to apply to the construction of the Parkland Improvements and are not intended to apply and shall not apply to procurements associated with the DAA's operation of the Park as set forth below in this Agreement.

F. APF shall have no right, authority, or power to bind the City or any interest of the City in the Park or the Parkland Improvements for labor, materials, or any other charge or expense incurred in construction of any improvements or other work done on the Park, or to include

expenses resulting from damage to the Park as a result of an APF Contractor's actions. APF 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 Park or the Parkland Improvements, and APF shall in no way be considered as the agent of the City in the construction, erection, or operation of the Park or Parkland Improvements. If any liens or claims for labor or materials supplied or claim to have been supplied to the Park or Parkland Improvements are filed, APF shall promptly pay or bond around 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 Park or Parkland Improvements by any Contractors or other claimant.

**G.** APF 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. APF shall take affirmative action to ensure that Contractors are treated during the construction of the Parkland Improvements without regard to race, creed, color, national origin, sex, age, religion, veteran status or sexual orientation. APF shall, in all solicitations or advertisements for employment placed on or behalf of APF, state that all qualified applicants shall receive consideration for employment without regard to race, creed, color, national origin, sex, age, religion, veteran status or sexual orientation.

**H.** APF and its Contractors shall perform the obligations set forth in the Agreement as independent contractors.

**I.** APF agrees to coordinate all construction activity with designated PARD staff to ensure that construction reasonably meets applicable Parks Specs requirements.

**J.** Although APF shall be responsible for securing all permits and approvals necessary to construct the Parkland Improvements, PARD staff shall assist and cooperate with APF in the submission of permit applications, shall assist APF in responding to specific permitting concerns or issues during the permit review process, and shall assist APF in obtaining any easements, restrictive covenants or similar documents required in connection with permits and approvals. APF and/or their Contractors shall coordinate with PARD staff to secure any information in the possession or control of PARD which is necessary to facilitate the applications for permits and approvals.

**K.** APF shall secure advance approval for any cutting or pruning of trees in connection with the Parkland Improvements. To secure said approval, APF shall present a tree trimming plan prepared by a certified arborist (the "**Tree Trimming Plan**") to PARD no fewer than fourteen (14) calendar days prior to the day the cutting or pruning will occur. The Tree Trimming Plan shall identify the trees and/or limbs to be cut or pruned and shall identify the technique that shall be utilized to prune each tree. In addition, each tree and/or limb to be cut or pruned must be marked in the field.

**L.** Within thirty (30) days after substantial completion of the Parkland Improvements, APF shall deliver to the City written notice that the Parkland Improvements have been substantially completed.

M. Within thirty (30) days after substantial completion of construction of the Parkland Improvements, APF shall deliver to PARD certificates of occupancy for any structure(s) requiring certificates of occupancy.

N. Upon completion of the Parkland Improvements, APF must obtain from each of its Contractors which constructed Parkland Improvements a written warranty, reasonably acceptable to the City, that the Parkland Improvements will be free of defects for at least one (1) year.

## V. MANAGEMENT AND OPERATIONAL RESPONSIBILITIES

A. Except for a certain baseline of services to be provided by the City as more particularly described in Section VI.A. below, and except for those management decisions to be made by the “**Republic Square Management Committee**” as described by the attached Exhibit “C”, the DAA shall be responsible for the management and operation of the Park upon completion of the Parkland Improvements and during the Term of this Agreement.

B. Concurrently with APF’s creation of the Final Design Development Plan as provided by Section IV.A. above, and by not later than the date contemplated for approval of the Final Design Development Plan by PARD as provided by Section IV.D.1. above, the Parties shall in good faith negotiate and execute a mutually agreeable management plan (the “**Management Plan**”) for DAA’s management and operation of the Park after the completion of the Park Improvements and during the Term of this Agreement. The City shall not execute the Management Plan until the City Council has approved the maximum number of paid events requiring full closure of the Park which may be held in any one year. All other deadlines in the Timeline described in Section IV.D. above shall be tolled for the length of time which is equal to the length of time for which these requirements are not met. Upon its execution, the Management Plan shall be deemed an amendment to this Agreement which shall govern in the event of any conflict with this Agreement. City shall continue to be responsible for maintenance and operation of the Park until the effective date of the Management Plan and during any transition period as may be provided by the Management Plan.

C. Without limiting the scope of the negotiations, it is anticipated and understood that the essential concepts in the Management Plan will include the following:

1. Management Committee. The Management Plan will include the oversight of the Republic Square Management Committee (the “**Management Committee**”), substantially as described by the attached Exhibit “C”.
2. Guiding Principles. The Management Plan will include streamlined processes for reservations and permitting of events, which will be based on the Guiding Principles for Park Programs described by the attached Exhibit “D”.
3. Annual Programming. Not later than 30 days prior to the reopening of the Park following the completion of its construction, DAA shall provide to the Director in a form reasonably acceptable to the Director, for the Director’s review and approval, an annual programming plan (the “**Annual Programming Plan**”) for the operation of the Park for the fiscal year or

remainder thereof ending on the next September 30. Thereafter, an Annual Programming Plan must be submitted to the Director at least 30 days prior to the beginning of each fiscal year. Prior to submission to the Director, each Annual Programming Plan must be approved by the DAA Board of Directors and by the Management Committee. Each Annual Programming Plan shall establish the proposed budget, events, programs, activities, program rates, and all facility fees including rental fees, and shall include all proposed vendors and concessionaires, all full-time and part-time positions, all proposed subcontractors, and other operational requirements necessary to manage the Park. The Annual Program Plan shall contain a list of proposed events requiring full or partial closures of the Park that in any way limit access to the Park by the public. PARD approval of the Annual Programming Plan will be contingent upon City Council approval of the list of events requiring full closure of the Park as noted in the proposed Annual Programming Plan. Each Annual Programming plan shall include an **“Annual Programming Report”** providing information regarding DAA’s programming for the previous year, including but not limited to events, activities, issues, and vendors’ performance. Amendments to the Annual Programming Plan may be submitted during the year as may be necessary or desirable due to changed circumstances. The Director’s approval of an Annual Programming Plan or amendment thereto shall not be unreasonably withheld, conditioned or delayed. However, the Director may not approve a proposed amendment to an approved Annual Programming Plan which increases the number of events requiring full closure of the Park as previously approved by the City Council for that particular year without further City Council approval. The Director may not disapprove a fee increase request for the upcoming year if the requested increase does not exceed the prior year’s existing fee amount for the same activity by an amount equal to five percent (5%) of the prior year’s existing fee amount. The Director may not disapprove a proposed vendor or concessionaire without good cause.

4. Permitted Use of Park and Parkland Improvements. DAA may use the Park only for the purpose of operating the Parkland Improvements for use by the public or special events identified in the Annual Programming Plan and for no other purpose without the prior written consent of the Director. Except for paid special events, DAA will offer, conduct, and operate non faith-based recreational activities.
5. Illegal Use Not Permitted. DAA may not use any part of the Park 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.
6. Zoning, Restrictions and Other Laws. The management and operation of the Park is subject to any facts which an accurate survey or physical inspection would show, all zoning, restrictions, regulations, rulings and

ordinances, building restrictions, and other laws now in effect or later adopted by any governmental authority having jurisdiction.

7. Routine and Preventative Maintenance. The DAA will at all times during the Term provide the routine and preventative maintenance necessary to keep the Park clean, functional, and accessible. Examples of this level of maintenance include, but are not limited to minor nonstructural building repairs, painting, tile replacement, window glass replacement, maintenance of the irrigation system, replacement of filters and screens, and replacement of light bulbs and light fixtures.
8. Capital Repairs. Except to the extent covered by the warranties of Contractors or by insurance, capital repairs such as those necessitated by structural damage or structural failure, shall be made at the cost of the City or shall be paid for from the Capital Repair Fund contemplated by **Section VI.C.4.** below. Capital repairs refers to improvements made to fixed assets such as walks, walls, retaining walls, light standards, built structures and other asset built into or tied to the infrastructure of the Park to appreciably prolong the useful life of the asset.
9. Waste or Nuisance. DAA shall neither commit nor allow to be committed any waste of the Park Improvements, nor shall DAA maintain, commit or permit the maintenance or commission of any nuisance in the Park.
10. Inspections. The City may conduct inspections of the Park and Parkland Improvements to insure that fire, safety and sanitation regulations and other provisions contained in this Agreement or in the City Code are being adhered to by the DAA. The City shall notify the DAA of its findings, specifying any items needing attention.
11. Maximizing Public Use of Park. DAA shall exercise due diligence and good faith in managing and operating the Park in a manner that maximizes public access and utilization of the Park and Parkland Improvements and that is responsive to community feedback. DAA shall also periodically review and adapt programming to meet current community priorities and needs during a plan year.
12. Maximizing Public Benefit From Park. DAA shall exercise due diligence and good faith efforts in managing and operating the Park so as to minimize operating expenses and maximize Gross Revenue consistent with the uses permitted in the Park. DAA in establishing and implementing its operating policies may schedule not only those events that generate substantial Gross Revenue to the Park but also those events that produce less Gross Revenue but in DAA's good faith judgment generate either a significant cultural or other public benefit or otherwise serve the public interest; provided that DAA shall ensure the Parkland Improvements are used for a public purpose that furthers the Park's mission and is in compliance with this Agreement.



13. Licenses and Permits. DAA shall have the authority to and shall obtain all permits and licenses necessary to operate, manage, and maintain the Park and to sell in the Park (1) food and beverages, (2) merchandise related to or consistent with the permitted uses, (3) goods and services in furtherance of the permitted uses, and (4) upon approval of the Director, alcoholic beverages. All permits shall be displayed in a conspicuous location.
14. Subcontracting. DAA shall have the authority to and shall negotiate, execute, perform, and manage all subcontracts, use agreements, licenses and other agreements: (i) with persons who desire to schedule events at the Park or who desire otherwise to use the Parkland Improvements or any part thereof, or (ii) that otherwise pertain to the use, operation, and occupancy of the Park or any part thereof.
15. Special Events. DAA shall coordinate special events in compliance with federal, state and local requirements.
16. Incident Report. Within ten (10) calendar days of receipt of notice of the occurrence of any complaints or reports of violations of the law that have occurred at the Park and that are significant in nature and that have a material effect on the operations of the Park, DAA shall notify the Director of such occurrence or report. DAA shall maintain for review by the City upon reasonable notice, information as reasonably required by the City to satisfy the City's responsibilities, including information regarding injuries and unusual incidents at the Park and regarding security measures and safety programs (including recommendations for changes for such measures/programs) at the Park.
17. Taxes. DAA will pay and discharge all taxes, general and special assessments, and other charges of any kind levied on or assessed against or in connection with the Parkland Improvements, if any. DAA will pay all the taxes, charges, and assessments directly to the public officer charged with their collection before they become delinquent, and, to the extent permitted by law, DAA will indemnify City and hold it harmless from all such taxes, charges, and assessments. DAA may, in good faith at its own expense (and in its own name) contest any such taxes, charges, and assessments and must pay the contested amount, plus any penalties and interest imposed, if and when finally determined to be due.
18. Use of Gross Revenue for Operations. The DAA shall retain and use the Gross Revenue derived from its operation of the Park for the sole purposes of funding the maintenance and operation of the Park and the Capital Repair Fund contemplated by Section VI.C.4. below. As used herein, the term "**Gross Revenue**" means all revenues excluding sales tax received by the DAA from or in respect to the operation of the Park or Parkland Improvements and from any income generating activity directly associated

with the operation of the Park or Parkland Improvements, including but not limited to the following:

- (a) All revenues received from admission fees, concessions, rental events, and fees and charges for all other goods and services provided to the public at the Park.
  - (b) All revenue from vending machines and the selling price of all merchandise sold in, on, about or from the Park in the ordinary course of business; provided however, that with respect to revenue and sales of merchandise by vending machines not owned by or leased to DAA, only the amount paid to DAA on account of such sales shall be included.
  - (c) All other charges of any character made and received by the DAA or other revenue for the rendering of any service or goods or work of any kind conducted in, on, about or from the Park.
19. Quarterly Financial Reports. Within thirty (30) calendar days following each of DAA's fiscal quarterly periods during the Term, DAA shall furnish to PARD a report regarding the Park's financial performance during the prior quarterly period.
20. Auditing.
- (a) City Audits. DAA agrees 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 DAA related to the performance under this Agreement. DAA shall retain all such records for a period of three (3) years after final payment on this Agreement or until all audit and litigation matters that the City has brought to the attention of DAA are resolved, whichever is longer.
  - (b) DAA Independent Audit. Independent certified audits of DAA's financial statements and operations must be submitted to the Director each year at the same time that the DAA submits its annual audit to the City for the PID.

**D.** DAA shall have no right, authority, or power to bind the City or any interest of the City in the Park or the Parkland Improvements for labor, materials, or any other charge or expense incurred in construction of any improvements, other work done on the Park, operation, or maintenance of the Park, or to include expenses resulting from damage to the Park as a result of an DAA Contractor's actions. DAA 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 Park or the Parkland Improvements. If any liens or claims for labor or materials supplied or claim to have been supplied to the Park or Parkland Improvements are filed, DAA shall promptly pay or bond around 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 Park or Parkland Improvements by any Contractors or other claimant.

**E.** DAA 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. DAA shall take affirmative action to ensure that Contractors are treated during the course of this Agreement without regard to race, creed, color, national origin, sex, age, religion, veteran status or sexual orientation. DAA shall, in all solicitations or advertisements for employment placed on or behalf of DAA, 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.

**F.** DAA and its Contractors shall perform the obligations set forth in the Agreement as independent contractors.

## **VI. RESPONSIBILITIES AND AGREEMENTS OF THE CITY**

**A.** The City will provide the following baseline services to the maintenance and operation of the Park:

1. Mowing of the grass, weeding, and power blowing on a regular schedule as established in each Annual Programming Plan.
2. Trash removal and disposal on a regular schedule as established in each Annual Programming Plan.

**B.** The City shall provide to APF the following funding sources in connection with the design, permitting, bidding (or other lawful procurement of construction delivery), and construction of the Parkland Improvements as provided by this Agreement:

1. The City shall take all actions necessary to transfer or assign to APF, or otherwise make available for APF's use as necessary, its Republic Square account(s) or funds dedicated to Republic Square, including without limitation the currently remaining balance (approximately \$983,294.95) of the funds paid to the City by the United States General Services Administration in connection with the vacation of the west half of the right-of-way of San Antonio Street between W. 4<sup>th</sup> and W. 5<sup>th</sup> Streets and dedicated to the improvement of Republic Square by City Ordinance No. 20091217-041.
2. The City shall provide Seven Hundred Thousand Dollars (\$700,000.00) from the proceeds of its 2012 bond issue for improvement of downtown squares.
3. The City shall provide a limited amount of Parkland Dedication Funds (approximately \$447,850.00) collected from development projects in general proximity to Republic Square.

4. The City shall pay for all utilities used in connection with the construction of the Parkland Improvements. This paragraph excludes City obligation to pay for tap, connection, or capital recovery fees.

C. The City shall provide to DAA the following funding sources in connection with the maintenance and operation of the Park as provided by this Agreement:

1. The City agrees that fees and other Gross Revenue derived from the DAA's operation of the Park shall be retained and used by the DAA for its routine maintenance and operation of the Park and to fund the Capital Repair Fund contemplated by Section VI.C.4. below.
2. PARD will request and support, and the City Council will favorably consider, waivers of any and all fees for City permits, approvals, licenses and inspections needed by DAA in connection with the maintenance and operation of the Park by DAA.
3. The City will remit to DAA an annual payment for the utility costs to be incurred in connection with the maintenance and operation of the Park. The estimated amount thereof shall be included in each Annual Programming Plan.
  - (a) The initial year payment shall be based on the average utility costs incurred during the final three years prior to the construction of the Park Improvements.
  - (b) The annual utility payment requested may be adjusted to account for known rate increases or other factors specific to utility costs incurred by DAA.
  - (c) PARD shall include any adjustment to the utility payment authorized by the Director through the approval of the Annual Programming Plan in its annual budget request. Funding will be contingent upon Council approval.
  - (d) The annual utility payment shall be paid on or before the 31<sup>st</sup> of January following the adoption of each annual City budget.
4. In order to fund the cost of capital repairs needed to the Park or Parkland Improvements over time, the City Council and the Board of Directors of the DAA may consider creating and funding at an appropriate level a "**Capital Repair Fund**", from funding sources which may be available to either body, if any.
5. The City solely or in partnership with the DAA and APF may fund future capital improvements (meaning improvements to the Park which are in addition to the Park Improvements contemplated by this Agreement and the Master Plan) with capital improvement project funds, fees in lieu of

parkland dedication required by the City's Land Development Code, or other available funding sources.

**D.** It is recognized that the City has committed to a funding source under **Section VI.B.2.** of this Agreement above for the improvement and/or maintenance and operation of the Park and Parkland Improvements (collectively the "**Tax-Exempt Facility**") from the proceeds of certain obligations the interest on which is tax-exempt under the Federal income tax laws (the "**Tax-Exempt Bonds**"). In connection with the issuance of the Tax-Exempt Bonds, the City has covenanted (the "**Bond Covenants**") with the holders of the Tax-Exempt Bonds that the proceeds of such bonds and the Tax-Exempt Facility will be used in a manner which assures that the Tax-Exempt Bonds will qualify as obligations within the meaning of Section 103 of the Internal Revenue Code (the "**Code**"). APF and DAA agree not to use nor permit the use of the proceeds of the grant or the Tax-Exempt Facility in a manner which it knows or should know would result in their use either in an unrelated trade or business or in a manner which would otherwise violate the Bond Covenants. Moreover, in furtherance thereof, if the APF or DAA is notified by City that the Tax-Exempt Bonds have been selected for audit by the Internal Revenue Service, then they agree to provide to the City any information which is in its possession regarding the use of the proceeds or the Tax-Exempt Facility as may be needed by the City to timely respond to questions posed by the Internal Revenue Service. In the event of a failure to comply with this covenant the City will have the right to specific performance, injunctive relief, or the recovery of economic damages suffered by the City as a result thereof.

**E.** City agrees to assist APF and DAA in their respective efforts to secure grants of funds by providing advice, consultation, and review of documents and application material, and may independently, or with the advice, consultation, and review by APF and DAA, apply for and manage grants as funding sources for the Park.

**F.** City agrees to in good faith consider reasonable deviations from the Master Plan if the costs of the Parkland Improvements turns out to be materially higher than reasonably anticipated by the Parties and beyond the scope of the available funding sources. Revised proposals may be prepared by APF and approved by the Director

**G.** The City grants APF and its Contractors (including all proposed contractors bidding on the Parkland Improvements) the right to enter the Park for the purpose of preparing for bidding, for pre-construction activities, and for other purposes contemplated by this Agreement, even if prior to the time when the Management Plan is executed.

**H.** APF shall have the right to temporarily close access to the Park or portions thereof for construction authorized by this Agreement and construction staging.

**I.** The City shall establish a Republic Square Technical Advisory Group ("**TAG**") composed of appropriate City staff members. The purposes of the TAG shall be to do the following:

1. Coordinate related City planning, design and construction projects in the Republic Square area and ensure consistency with the Republic Square

Master Plan (examples include Great Street improvements on 4<sup>th</sup> and 5<sup>th</sup> Street, wayfinding, public art, urban rail, other public improvements).

2. Identify timelines and funding sources to implement Great Streets on 4<sup>th</sup> and 5<sup>th</sup> Streets, and any other infrastructure improvements that support and enhance the Park experience.
3. Develop a coordinated approach to the planning and implementation of the Travis County courthouse and other nearby development sites that may have an impact on the Park.
4. Develop an integrated approach to the design and management of the right of way adjacent to the Park.

## VII. TERMINATION, DEFAULT AND REMEDIES

**A.** If any Party fails to properly fulfill its obligations under this Agreement in a timely manner, or if any Party violates any of the provisions of the Agreement, the non-breaching Party shall notify the other Parties 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 said thirty (30) calendar day period and the breaching Party has diligently pursued such remedy as shall be reasonably necessary to cure violation, then the Parties may agree in writing to an extension of the period during which the violation must be cured. In addition, the following shall be deemed events of default by APF or DAA (as indicated by the context) under this Agreement:

1. APF fails to make the Parkland Improvements as required by this Agreement;
2. DAA vacates any substantial portion of the Park operations as contemplated by the Management Plan or Annual Programming Plan for a period of longer than thirty (30) calendar days, unless DAA can demonstrate to the reasonable satisfaction of the Director that all reasonable efforts are being made by DAA to resume the required Park operations;
3. APF or DAA makes a transfer in fraud of creditors, makes an assignment for the benefit of creditors, or is in bankruptcy; or
4. APF or DAA fails to comply with any other term, provision or covenant of this Agreement that is material.

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

C. If APF defaults under this Agreement prior to completion of the Parkland Improvements, 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 of any contract documents or contract rights related to construction of the Parkland Improvements.

D. The City at its sole discretion may at any time terminate this Agreement, by giving the Parties 30 days' notice of termination, provided that the notice of termination must be authorized by a unanimous vote of the City Council after not less than 30 days' written notice to the Parties of when such item will appear on the City Council agenda.

### VIII. INSURANCE

A. During the Term, APF and DAA and their Contractors, at their sole cost and expense, will obtain, provide and keep in force the Insurance Requirements attached to this Agreement as Exhibit "B", as applicable under the circumstances.

B. Each of the Parties hereby 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 this Section VIII.B. 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 APF or DAA) containing or including a clause or endorsement to the effect that such release shall not adversely affect or impair the subject policy or prejudice the right of the releaser to recover under the policy. The APF and DAA agree that they will request their insurance carriers to include in their policies such a clause or endorsement. If any such clause or endorsement will require payment of an additional premium or charge, the Party whose policy is affected will not be obligated to obtain such clause or endorsement but shall notify the other Party who may elect to pay the additional premium or charge to obtain such clause or endorsement but shall not be obligated to do so.

### IX. FORCE MAJEURE

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

B. The Party invoking Force Majeure shall give timely and adequate notice to the other Parties 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.

#### **X. INDEMNITY; WAIVER OF ATTORNEYS FEES**

**A.** APF SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS CITY, ITS OFFICERS, APPOINTED OR ELECTED OFFICIALS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS (INDEMNIFIED PARTIES), AGAINST ALL COSTS, EXPENSES, LIABILITIES, DAMAGES, CLAIMS, SUITS, ACTIONS, AND CAUSES OF ACTIONS (CLAIMS), TO THE EXTENT ARISING, DIRECTLY OR INDIRECTLY, OUT OF (A) A BREACH OF THIS AGREEMENT OR VIOLATION OF LAW BY APF, ITS OFFICERS, AGENTS, EMPLOYEES, SUCCESSORS OR ASSIGNS, (B) A FALSE REPRESENTATION OR WARRANTY MADE BY APF IN THIS AGREEMENT OR IN ITS PROPOSAL, (C) THE NEGLIGENCE OR WILLFUL MISCONDUCT OF APF IN CONNECTION WITH ITS WORK PERFORMED PURSUANT TO THIS AGREEMENT, OR (D) THE ACTS OR OMISSIONS OF APF IN THE COURSE OF ITS PERFORMANCE OF APF'S WORK PURSUANT TO THIS AGREEMENT INCLUDING WORK THAT MAY CREATE LIABILITY FOR ENVIRONMENTAL REMEDIATION (BUT SPECIFICALLY EXCLUDING ANY ENVIRONMENTAL CONDITION ALREADY EXISTING ON THE EFFECTIVE DATE OF THIS AGREEMENT, EXCEPT TO THE EXTENT THAT APF HAS AGREED TO CONTRIBUTE TO ANY SUCH REMEDIATION COSTS AS EXPRESSLY PROVIDED BY SECTION IV.C ABOVE).

**B.** DAA SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS CITY, ITS OFFICERS, APPOINTED OR ELECTED OFFICIALS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS (INDEMNIFIED PARTIES), AGAINST ALL COSTS, EXPENSES, LIABILITIES, DAMAGES, CLAIMS, SUITS, ACTIONS, AND CAUSES OF ACTIONS (CLAIMS), TO THE EXTENT ARISING, DIRECTLY OR INDIRECTLY, OUT OF (A) A BREACH OF THIS AGREEMENT OR VIOLATION OF LAW BY DAA, ITS OFFICERS, AGENTS, EMPLOYEES, SUCCESSORS OR ASSIGNS, (B) A FALSE REPRESENTATION OR WARRANTY MADE BY DAA IN THIS AGREEMENT OR IN ITS PROPOSAL, (C) THE NEGLIGENCE OR WILLFUL MISCONDUCT OF DAA IN CONNECTION WITH ITS WORK PERFORMED PURSUANT TO THIS AGREEMENT, OR (D) THE ACTS OR OMISSIONS OF DAA IN THE COURSE OF ITS PERFORMANCE OF DAA'S WORK PURSUANT TO THIS AGREEMENT INCLUDING WORK THAT MAY CREATE LIABILITY FOR ENVIRONMENTAL REMEDIATION (BUT SPECIFICALLY EXCLUDING ANY ENVIRONMENTAL CONDITION ALREADY EXISTING ON THE EFFECTIVE DATE OF THIS AGREEMENT).

**C.** CITY SHALL GIVE APF OR DAA, AS THE CASE MAY BE, WRITTEN NOTICE OF A CLAIM ASSERTED AGAINST AN INDEMNIFIED PARTY. APF OR DAA, AS THE CASE MAY BE, 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 APF OR DAA, AS THE CASE MAY BE, OF ANY OBLIGATIONS IN THIS AGREEMENT. IN NO EVENT MAY APF OR DAA ADMIT LIABILITY ON THE PART OF AN INDEMNIFIED PARTY WITHOUT THE WRITTEN CONSENT OF CITY ATTORNEY.

**D.** MAINTENANCE OF THE INSURANCE REQUIRED UNDER THIS AGREEMENT SHALL NOT LIMIT APF OR DAA'S RESPECTIVE OBLIGATIONS UNDER THIS ARTICLE.

**E.** APF AND DAA SHALL REQUIRE ALL OF THEIR RESPECTIVE CONTRACTORS TO INDEMNIFY THE CITY AS PROVIDED IN THIS ARTICLE OR AS MAY BE REQUIRED BY THE CITY'S RISK MANAGEMENT DIVISION.

**F.** NOTWITHSTANDING ANYTHING ELSE IN THIS ARTICLE X OR ELSEWHERE IN THIS AGREEMENT TO THE CONTRARY, FOR VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE ACKNOWLEDGED BY ALL PARTIES, EACH PARTY KNOWINGLY AND INTENTIONALLY WAIVES THE RIGHT TO RECOVER ATTORNEYS FEES IN CONNECTION WITH ANY BREACH OF THIS AGREEMENT BY ANY OTHER PARTY, REGARDLESS OF THE FORUM, AND WHETHER UNDER SECTION 271.153 OF THE TEXAS LOCAL GOVERNMENT CODE OR OTHERWISE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, THE CITY AND ITS INDEMNIFIED PARTIES KNOWINGLY AND INTENTIONALLY WAIVE THE RECOVERY OF ATTORNEYS FEES IN CONNECTION WITH ANY OF THE INDEMNITIES SET FORTH ABOVE.

## **XI. MISCELLANEOUS PROVISIONS**

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

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

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

**D.** All official communications and notices required to be made under this Agreement shall be deemed made if sent by Certified Mail, Return Receipt Requested, or by hand delivery, to the parties at the addresses listed below, unless otherwise specified elsewhere in this Agreement:

If to the City, to:

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

If to APF, to:

Austin Parks Foundation  
Attn: Executive Director  
507 Calles St #116  
Austin, Texas 78702

If to DAA, to:

Austin DMO, Inc. d/b/a Downtown Austin Alliance  
Attn: Executive Director  
211 East 7<sup>th</sup> Street, Suite 818  
Austin, Texas 78701

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

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

## **XII. ASSIGNMENT**

No Party to this Agreement may assign or transfer any interest in this Agreement without the consent of the other Parties.

## **XIII. SEVERABILITY**

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

## **XIV. WAIVER**

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

## **XV. NO RECOURSE**

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

#### **XVI. 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.

#### **XVII. AMENDMENT IN WRITING**


A. This Agreement may be modified only by a writing properly executed by each of the Parties. Neither any representation or promise made after the execution of this Agreement, nor any modification or amendment of this Agreement, shall be binding on the Parties unless made in writing and properly executed by each of the Parties. Provided any amendment, change or extension does not increase the Agreement amount in excess of the then current administrative authority of the City Manager and the form of amendment is approved by the City Law Department, the City Manager or the City Manager's designee is authorized to execute any amendment to the Agreement on behalf of the City without further authorization by the City Council.

B. Notwithstanding any other provision of this Agreement to the contrary, no amendment may be deemed to be a termination of this Agreement. Further, if any portion of the Final Design Development Plan necessitates any discretionary approval, waiver, variance, modification, or adjustment from any City or other governmental board, agency, officer, director or employee or from any non-governmental board, agency, person, association, officer, director, or employee or necessitates termination or amendment of any restrictive covenant, condition, restriction, or agreement not within the unilateral control of APF or DAA or their respective successors and assigns, failure by APF, DAA 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.


**[SIGNATURE PAGE(S) FOLLOW]**

EXECUTED as of the "Effective Date", which shall be the date first stated above, being the date on which all Parties have signed.

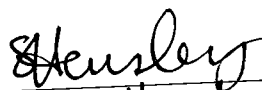
APF: AUSTIN PARKS FOUNDATION

By:   
Name: COLIN WALLIS  
Title: EXECUTIVE DIRECTOR  
Date 2/9/15

DAA: AUSTIN DMO, INC. D/B/A DOWNTOWN AUSTIN ALLIANCE

By:   
Name: Charles A. Betts  
Title: Exec. Dir.  
Date February 3, 2015

City: CITY OF AUSTIN, TEXAS

By:   
Name: Sara Hensley  
Title: Director  
Date 2-10-15

REVIEWED AS TO CONTENT:  
Parks and Recreation Department

By: *Kirk Seaman*  
Name: *Kirk Seaman*  
Title: *Contract Administrator*

APPROVED AS TO FORM:  
Law Department

By: *Angela C. Rodriguez*  
Name: *Angela C. Rodriguez*  
Title: *Asst. City Attorney*

## **EXHIBIT "A": PARK SPECS**

### **Exhibit A: Environmental Criteria Manual**

The Environmental Criteria Manual, Section 5 Construction in Parks can be accessed online:

[www.municode.com/library/tx/austin/codes/environmental\\_criteria\\_manual](http://www.municode.com/library/tx/austin/codes/environmental_criteria_manual)

## **SECTION 5 · CONSTRUCTION IN PARKS**

### **XVIII. 5.1.0 GENERAL**

The information in this section is intended to define the technical design criteria needed for construction on parkland owned by the City of Austin.

Although parkland construction is generally achieved through contractual agreement, this section provides guidelines that coordinate the special requirements for park construction with the general development requirements of the Land Development Code and the Technical Manual Series.

Appeals concerning the enforcement of these rules shall be brought to the Director of the Parks and Recreation Department.

Construction activities that disrupt the environment are an inevitable part of the growth and maintenance of a city and as a city develops, the open areas of parks, creeks and greenbelts become more attractive as routes for underground utilities. This is the case in Austin where the many creeks and greenbelts, under the control of the Parks and Recreation Department, have and will continue to provide a convenient route. In many cases, such installation of underground utility lines, causes only temporary disruption and the environment eventually returns by natural means to its original state. The length of time required for recovery of the original vegetation may be great, however, depending on the proximity of seed sources and the suitability of soil conditions for plant establishment and growth. The purpose of these guidelines is to reduce and control the construction impact upon the City's park areas and to speed the recovery of natural vegetation. This can be done by minimizing the initial environmental impact of construction, restoring suitable soil conditions and introducing appropriate plant species.

Construction impact can be minimized by selecting the least destructive route that is feasible within the constraints of the budget. It also involves the avoidance of unnecessary impacts during the course of construction, such as the excessive destruction of vegetation and the loss of soil through uncontrolled erosion.

Restoration of soils involves restoring the original contours of the land and ensuring that soil physical conditions are suitable for plant growth. Soils of construction sites have generally been compacted by heavy machinery and topsoil has been lost or at least diluted by subsoils. These and other conditions must usually be improved before vegetation can be established.

### **XIX. 5.2.0 ADVANTAGES OF RESTORATION AND REVEGETATION**

Restoring natural vegetation in disturbed areas has practical advantages as well as ecological and aesthetic ones. On the practical side, natural vegetation provides low maintenance landscaping while also helping to minimize precipitation runoff and the consequent problems of soil erosion, siltation and flooding. Ecological and aesthetic advantages stem from the fact that natural vegetation is diverse in terms of species composition and growth forms. This diversity results not only in a more interesting landscape, but also one that provides suitable living space for native wildlife in an increasingly urbanized area.

A particular advantage of restoring natural vegetation in Austin is that of helping to conserve the city's unique flora. These guidelines should be used in conjunction with the Revegetation Criteria found in Section 1.4.0 of this manual.

The objective of the revegetation criteria is to provide information on the processes involved in planning the restoration of natural vegetation in disturbed areas.

The procedures for route selection, reconnaissance survey and preconstruction inventory should be followed. The information compiled should be presented as an environmental report and used in conjunction with the Parks and Recreation Department in selecting a route and for restoration and revegetation.

The initial environmental impact of construction can be minimized by proper planning. Effective and efficient restoration of the site upon completion of construction also calls for planning.

Ecologically or aesthetically valuable areas can often be avoided with little or no increase in construction costs. The resulting environmental savings is doubled by the fact that restoration of topography and vegetation is consequently less complex and less expensive. Once a final project alignment is selected, further savings are possible by planning resource salvaging efforts, erosion control and restoration of topography and vegetation.

### **5.3.0 ROUTE SELECTION**

A reconnaissance survey is necessary in order to select the least expensive alignment of the construction right-of-way corridor. Included in the expense estimate is the cost of restoring the pre-existing vegetation following construction, as well as the cost of the construction itself. In most cases, the cost of restoration will be insignificant compared to the expense of moving the alignment to avoid vegetation, but not always. If planning is done well in advance, it is probable that an alignment can be achieved which will not be significantly

more expensive, but will be considerably less destructive than some other alignment that is made without reference to the vegetation.

Using information obtained during the reconnaissance surveys, select the least destructive route through the area. In comparing the costs of various alternatives, the costs of restoration should be considered. For example, it may be less expensive to realign a potential construction corridor to avoid important vegetational or topographic features than to restore the features later. Rare plant populations must be avoided at all costs. Transplanting the rare species elsewhere is no solution, since habitats suitable for rare species are frequently protected.

After the final alignment is selected, an inventory of the resources in and near the construction easement should be conducted. This is necessary in order to plan restoration efforts and to minimize the immediate environmental impact of the project.

The simplest, most effective model for restoring vegetation is the original vegetation. If this is described prior to construction there will be fewer decisions to make concerning what species and densities to restore. If the original vegetation is weedy, however, it would be advisable to restore a more desirable community.

### **5.3.1 TREESURVEY**

When suitable alignment has been decided, a detailed tree survey of the construction and access easements is required. The survey is to include those trees adjacent to the easement whose driplines come within the easement.

The survey is to show all Class 2 or Class 3 trees whose diameter is larger than four (4) inches and all Class 1 trees, regardless of size. Particular attention should be paid to identifying Class 1 trees with a view to transplanting. (See Appendix F)

The survey is to show:

- The location of the tree.
- The diameter of the trunk at 4% feet above natural grade.
- The approximate crown size of the large trees.
- The species and/or common name of the tree.

Trees to be removed should be indicated and the locations approved by the Parks and Recreation Department. All trees that are to be retained are to be protected with tree protection fences (see Appendix K). These tree protection fences are to be shown on the construction drawings.

### **5.3.2 TREE EVALUATION**

A tree evaluation is required to establish a relative value of the trees that will be removed or impacted by the construction works (see Section 3.5.1).



These evaluations will provide the basis for replacement of those trees removed or to assign a monetary value to them.

The tree evaluation system is shown in detail in Section 3. Trees to be removed will be carried out in accordance with the methods shown in Section 5.4.6, Site Clearing.

### **5.3.3 DISTURBED NATURAL AREAS**

Natural areas within the Parks and Recreation Department's jurisdiction are greenbelts, wilderness parks and nature preserves. Any areas that are disturbed within these natural parkland areas will require restoration as detailed in Appendix L, to ensure that their character as natural areas are maintained.

## **5.4.0 CONSTRUCTION**

### **5.4.1 General**

The Texas Parks and Wildlife Code, Chapter 26, prohibits any construction activity on public land designated for park and recreation use unless an easement has first been granted by the City Council. This easement process is described below in Section 5.4.4.

All construction activity on lands under the jurisdiction of the Parks and Recreation Department shall conform to the requirements of these guidelines.

If not covered by these guidelines all construction activity shall, with the approval of the Parks and Recreation Department, be in accordance with the City of Austin Standard Specifications.

Particular attention is drawn to the following paragraphs of the "General Conditions of Agreement - Bidding and Contract Requirements," in Section 00140 of City of Austin Standard Specifications particularly 3.14 "Laws and Ordinances", and 10.10 "Safety of Persons and Property".

### **5.4.2 LAWS AND ORDINANCES**

The contractor shall at all times observe and comply with all federal, state and local laws, ordinances, codes and regulations which in any manner affect the contract or the work and shall indemnify and save harmless the owner and engineer/architect against any claim arising from the violation of any such laws, ordinances and regulations whether by the contractor or his employees. If the contractor observes that the project is at variance therewith, he shall promptly notify the engineer/architect in writing, and any necessary changes shall be prepared as provided in writing, and any necessary changes shall be prepared as provided in the contract for changes in the work. If the contractor performs any work knowing it to be contrary to such laws, ordinances, rules and regulations and without such notice to the engineer/architect, he shall bear all costs arising therefrom. The ordinances and regulations of the City shall be controlling and shall be considered as part of this contract to the same effect as though embodied herein.

Maintaining clean water, air and earth or improving thereon shall be regarded as of prime importance. The contractor shall plan and execute his operations in compliance with applicable federal, state and local laws and regulations concerning the control and abatement of water pollution and the prevention and control of air pollution.

Care shall be exercised to preserve the natural landscape within the project site and shall conduct his construction operations so as to prevent any unnecessary destruction, scarring or defacing of the natural surroundings in the vicinity of the work. Except where clearing is required for permanent construction, trees and vegetation shall be preserved and protected from damage which may be caused by equipment and construction operations. Where unnecessary destruction or damage occurs as a result of the contractor's operations to trees, replacement or correction shall be made at the contractor's expense as directed by the engineer/architect. Prevention of noise pollution shall be a responsibility of the contractor. Garbage, trash and material debris shall be picked up daily and deposited in a suitable receptacle provided and maintained by the contractor. Measures shall also be implemented to prevent the escape of mud and excess concrete.

### **5.4.3 SAFETY OF PERSONS AND PROPERTY**

All reasonable precautions for the safety of and shall provide all reasonable protection to prevent damage, injury or loss to:

1. All employees on the work and all other persons who may be affected thereby;
2. All the work and all materials and equipment to be incorporated therein, whether in storage or off the site, under the care, custody or control of the contractor or any of his subcontractors or sub-subcontractors; and
3. Other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, fences, roadways, structures and utilities not designed for removal, relocation or replacement in the course of construction.

The contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. He shall erect and maintain, as required by existing conditions and progress of the work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent utilities.

When the use or storage of explosives or other hazardous materials or equipment is necessary for the execution of the work, the contractor shall exercise the utmost care and shall carry on such activities under the supervision of properly qualified personnel.

All blasting, including methods of storing and handling explosives and highly flammable materials, shall conform to federal, state and local laws and Ordinances.

### **5.4.4 EASEMENTS**

For information and procedures for obtaining easements through City of Austin Parkland see the Administrative Criteria v1 annual.

#### **5.4.5 ACCESS AND SECURITY**

All permanent easements, temporary construction easements, access roads, work areas and materials storage sites should be shown on the construction drawings in locations agreed and approved by the Parks and Recreation Department. All construction shall be confined to the marked easements. No material, equipment, plant, vehicle parking or storage shall occur outside this easement or within the dripline of trees retained in or adjacent to the easement. The contractor will be responsible for all damages to work areas, storage sites and access roads which are a result of his use or negligence in protection and for all damage that is caused by the contractor working outside of these areas. Spillage or discharge of oil or other toxic fluids shall be contained and removed from the site.

Prior to bringing major construction equipment into unpaved areas, the contractor shall outline the limits of the construction and access easements which will be disturbed, with a barrier in accordance with City standards.

If the construction works are carried out in a park location where the public has access, an eight (8) foot high chain link security fence is to be provided around the immediate area of construction operations, all work areas and storage sites. This fence is to be secured to prevent unauthorized entry at all times when contractors personnel are not at the site.

The contractor shall exercise utmost care in preventing damage to trees and other items in the Parks and Recreation Department area. Any damaged item shall be repaired or replaced, at no expense to the City, to a condition equal to or better than their condition before construction.

All workers should be informed of the special efforts to salvage and restore the vegetation and they should be encouraged to prevent unnecessary damage.

#### **5.4.6 SITE CLEARING/EROSION CONTROL**

To prevent erosion, clearing of easements and access routes will only be carried out for a distance of 1,000 feet in advance of construction or seven (7) days prior to construction being at that location.

Trees that are to be removed shall be taken down in a manner which will not impact any of the adjacent trees to be retained.

All trees will have crown and limbs removed before being felled and depending upon the density of vegetation the trunk shall be felled before the stump is removed.

The City may require that limbs and underbrush be chipped/shredded and retained on site to be spread as a mulch after construction has finished.

The boundary of the access route and working easement clearing shall be marked with a barrier described above. The boundary shall be reviewed with the Parks and Recreation Department prior to marking. No clearing operations will be allowed in an unmarked area.

Salvaging and placing existing topsoil shall be in accordance with City of Austin Standard Specifications, Item No. 601.

Spoil shall not be placed within the drip line of trees. In locations where the line runs along the creek bank, care is taken to prevent excavated material from spilling into or blocking the creek. At the end of the work day, all spoil shall be cleaned up, ditches backfilled and excess spoil removed from the job site.

#### **5.4.7 TEMPORARY EROSION CONTROL**

Temporary erosion controls during the construction period shall be carried out in accordance with the measures contained in Section 1.4.0 of this manual.

#### **5.4.8 CONSTRUCTION IN CREEKS**

Every effort shall be made to keep the zone of immediate construction free of surface water. For construction in the creek channel, a pipe of adequate size to divert normal stream flow shall be provided around the construction area. Diversion may be by pumping or gravity flow using temporary dams.

##### **A Discharge of Pumped water.**

Where water must be pumped from the construction zone, discharges shall be in a manner that will not cause scouring or erosion. All discharges shall be on the upstream or upslope side of emplaced erosion control structures. If discharges are necessary in easily erodible areas, a stabilized, energy-dissipating discharge apron shall be constructed of riprap with minimum stone diameter of six (6) inches and minimum depth of 12 inches. Size of the apron in linear dimensions shall be approximately ten (10) times the diameter of the discharge pipe. Discharges into creeks or major drainages should be as identified by the site development permit.

##### **B. In-Channel Erosion and Siltation Controls.**

The contractor will be responsible for controlling erosion and sedimentation in the construction zone. When leaving the job site for more than 12 hours, the contractor shall remove loose excavated materials from the creek channel, except all excavated trench sections shall be backfilled when the contractor leaves for the weekend.

##### **C. Creek Banks.**

Creek banks shall be restored wherever they have been disturbed during the construction process. The contractor shall be responsible for the costs of repair and restoration for all damage to the creek banks, whether caused by personnel or equipment. Stone riprap or gabions shall be used to

stabilize cut banks where line enters and exits channel or as otherwise approved by Parks and Recreation Department.

#### **D. Excavation in Creek Channel.**

Material excavated from the trench in the creek channel shall not be deposited on the channel banks. Excavation shall be hauled out of the channel or used in backfill of open trench. No loose excavated material shall be left in the channel at the end of a work day.

#### **E. Trench Cap in Creek Channel.**

The contractor shall cap the trench in the creek channel with two (2) square feet or larger job excavated rock material or similar. This cap shall extend a minimum of 30 inches from the top of the trench.

### **5.4.9 SITE CLEANUP**

Upon completion of the work and before restoration and revegetation, the contractor shall clean and remove from the site of the work, all surplus and discarded materials, temporary structures and debris of every kind. He shall leave the site of the work in a neat and orderly condition at least equal to that which originally existed. Surplus and waste materials removed from the site of the work shall be disposed of in a permitted disposal area.

In the event the contractor fails or refuses to clean up and remove surplus materials and debris as above provided, the City may do so or cause same to be done, at the contractor's expense and the reasonable cost thereof shall be deducted from the final payment.

### **5.4.10 RESTORATION/REVEGETATION**

The Parks and Recreation Department will provide detailed planting requirements for revegetation of all disturbed areas. These requirements will consider and be based upon the submitted Environmental Report, the Tree Evaluation Survey and Restoration of Disturbed Natural Areas, Appendix L. The revegetation shall be carried out in accordance with the City of Austin Standard Specifications.

### **5.5.1 PARK RULES**

#### **5.5.2 Smoking Policy**

Per Austin City Code, Chapter 10-6, smoking is prohibited in all City parks and any other city-owned land used for a park or recreational purpose that is under the administrative control of the Parks and Recreation Department. However, an exemption can be made for temporary designated smoking areas in a park for special events.

1. In order to have temporary designated smoking areas, an application must be submitted through the Parks and Recreation Department's Office of Special Events. The department director will then make a recommendation to City Council as to whether the exemption should be granted, and City Council will have the final approval of granting an exemption for temporary designated smoking areas.

2. The application for temporary designated smoking areas must be submitted to the Office of Special Events at the close out of the current calendar year for the upcoming year's events, or at the time the Applicant submit their application for the special event (whichever timeline is greater), but in no event no later than 8 weeks prior to the event. If the deadline is missed, an appeal may be made to the Director. On appeal, the director may waive the deadline provided that the applicant shows good cause that the waiver should be granted. In order to show good cause, the applicant must show at a minimum that failure to comply with the deadline was unintentional, that granting the waiver will not unduly prejudice the City in anyway, and that the applicant can still comply with all other laws and legal requirements regulating the special event. The Director may consider any other factor that the Director deems relevant to determining the existence of good cause.

3. Temporary designated smoking areas are permitted only during special events. Special events are those events which are having or anticipating 1,000 or more persons and must occur in approved special event venues. Special event sites include Auditorium Shores, Brush Square Park, Fiesta Gardens West End, Republic Square Park, Walter E. Long Park, Waterloo Park, Woolridge Square and other specially approved sites.

4. The minimum physical requirements for a temporary designated smoking area include:

a. The area must be at least 15-feet away from any heavily trafficked areas and areas where people can congregate. Heavily trafficked areas include those areas where pedestrian traffic is constantly flowing within the special event venue. Areas where people can congregate include those areas where patrons (more than 3 people) gather within a special event venue, such as food courts, audience-viewing stage area, vendor booths, portable toilets' queue space, water stations, and other areas which attract gatherers.

b. The area must be surrounded by a chain-link type fencing of preformed 6-feet-high freestanding panels;

c. The area must have at a minimum two entries/exits, and at least one uniformed security officer shall be positioned at each entry/exit to check an age-bearing photo identification of patrons entering the temporary designated smoking area;

d. Fireproof receptacles for cigarette/cigar litter must be placed throughout the area; throughout the duration of the event there should be no cigarette/cigar litter on the park grounds, and the applicant is responsible for this ongoing cleanup;

e. There should be no structures such as roofs or walls that would diminish the dispersion and dilution of smoke; and

f. Signs that read "DESIGNATED SIVOKING AREA" must be placed in prominent locations throughout the area. These signs must be at a minimum 10" Wide x 15" High in size.

5. The temporary designated smoking areas shall be used by patrons for smoking purposes only.

6. Applicant's event staff should be aware of any temporary designated smoking areas and how to direct smokers to them.

7. At the conclusion of the special event, the temporary designated smoking areas will be thoroughly cleaned and returned to its original state by the applicant.

8. During periods when a Burn Ban is in effect exemptions for temporary designated smoking areas are not granted. Refer to Austin City Code Chapter 8, Article 7, Restrictions on Outdoor Burning. However, during a Burn Ban an Applicant may submit an application for a temporary designated smoking area in the event that the Burn Ban ends prior to the date of the event in which case a temporary designated smoking area would be considered.

9. The Applicant must fill out the Temporary Designated Smoking Area Application.

### **5.5.3 SMOKING APPLICATION**

#### **TEMPORARY DESIGNATED SMOKING AREA APPLICATION**

The application for an exemption to be granted to allow smoking in parks can be found online at:  
[https://www.municode.com/library/tx/austin/codes/environmental\\_criteria\\_manual](https://www.municode.com/library/tx/austin/codes/environmental_criteria_manual)

## EXHIBIT "B": INSURANCE REQUIREMENTS

APF and DAA shall carry insurance in the types and amounts indicated below for the duration of the Agreement, as applicable under the circumstances and to the extent commercially available:

- (1) **Commercial General Liability Insurance** with a minimum bodily injury and property damage per occurrence limit of \$500,000 for coverage's A & B. The policy shall contain the following provisions:
  - (a) Blanket contractual liability coverage for liability assumed under this contract and all contracts relative to this project.
  - (b) Completed Operations/Products Liability for the duration of the Warranty period.
  - (c) Independent Contractors coverage.
  - (d) City of Austin listed as an additional insured, endorsement CG 2010.
  - (e) 30 day notice of cancellation in favor of the City of Austin, endorsement CG 0205.
  - (f) Waiver of Transfer Right of Recovery Against Others in favor of the City of Austin, endorsement CG 2404.
  
- (2) **Business Automobile Liability Insurance** for all owned, non-owned and hired vehicles with a minimum combined single limit of \$500,000 per occurrence for bodily injury and property damage. Alternate acceptable limits are \$250,000 bodily injury per person, \$500,000 bodily injury per occurrence and at least \$100,000 property damage liability per accident. The policy shall contain the following endorsements in favor of the City of Austin:
  - (a) Waiver of Subrogation endorsement TE 2046A
  - (b) 30 day Notice of Cancellation endorsement TE 0202A
  - (c) Additional Insured endorsement TE 9901B

All Contractors providing services at the Park shall carry insurance in the types and amounts indicated below for the duration of their contract, which shall include items owned by the City in the care, custody and control of the Contractor prior to and during the construction and warranty period:

### Specific Requirements for Contractors

- (1) **Workers' Compensation and Employers' Liability Insurance** coverage with limits consistent with statutory benefits outlined in the Texas Workers' Compensation Act (Section 401) and minimum policy limits for employers liability of \$100,000 bodily injury each accident, \$500,000 bodily injury by disease policy limit and \$1.00,000 bodily injury by disease each employee.



The Contractor's policy shall apply to the State of Texas and include these endorsements in favor of the City of Austin:

- (a) Waiver of Subrogation, form WC 420304
  - (b) 30 day Notice of Cancellation, form WC 420601.
- (2) **Commercial General Liability Insurance** with a minimum bodily injury and property damage per occurrence limit of \$500,000 for coverage's A & B. The policy shall contain the following provisions:
- (a) Blanket contractual liability coverage for liability assumed under this contract and all contracts relative to this project.
  - (b) Completed Operations/Products Liability for the duration of the Warranty period.

**All endorsements naming the City of Austin such as additional insured, waivers, and notices of cancellation endorsements as well as the attached certificate shall indicate: City of Austin, Parks and Recreation Department, P.O. Box 1088, Austin, Texas 78767-8828.**

The "other" insurance clause shall not apply to the City where the City of Austin is an additional insured shown on any policy. It is intended that policies required in the Contract, covering both the City and the Contractor, shall be considered primary coverage as applicable.

If insurance policies are not written for amounts specified above, Contractor shall carry Umbrella or Excess Liability Insurance for any differences in amounts specified. If Excess Liability Insurance is provided, it shall follow the form of the primary coverage.

The City shall be entitled, upon request and without expense, to receive certified copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision or modification of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of the parties hereto or the underwriter on any such policies.

The City reserves the right to review the insurance requirements set forth during the effective period of this Parkland Improvement Agreement and to make reasonable adjustments to insurance coverage, limits, and exclusions when deemed necessary and prudent by the City based upon changes in statutory law, court decisions, the claims history of the industry or financial condition of the insurance company as well as the Contractor.

The Contractor shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of its contract or as required in its contract.

The Contractor shall be responsible for premiums, deductibles and self-insured retention's, if any, stated in policies. All deductibles or self-insured retention's shall be disclosed on the certificate of insurance attached.

The Contractor shall provide the City thirty (30) days written notice of erosion of the aggregate limits below occurrence limits for all applicable coverage's indicated within the contract.

If City owned property is being transported or stored off-site by the Contractor, the appropriate property policy will be endorsed for transit and storage in an amount sufficient to protect the City's property.

The insurance coverage's required under this contract are required minimums and are not intended to limit the responsibility or liability of the Contractor.

**EXHIBIT "C": REPUBLIC SQUARE MANAGEMENT COMMITTEE**

1. The Republic Square Management Committee (the "**Management Committee**") shall consist of two (2) members selected by the Board of Directors of DAA, one (1) member selected by the Board of Directors of APF, and one (1) member of the PARD staff selected by the Director.
2. A majority of the Management Committee must approve the Annual Programming Plans to be submitted by DAA to the Director pursuant to **Section V.C.3.** of the foregoing Agreement.
3. The Management Committee may by majority vote adopt guidelines for Park use, security, maintenance and other operations. These guidelines shall be incorporated into the Management Plan.
4. The Management Committee shall have the right by majority vote to develop a donor recognition program for the Park, with the concurrence of PARD.

## **EXHIBIT "D": GUIDING PRINCIPLES FOR PARK PROGRAMS**

1. Republic Square is first and foremost a neighborhood park. The Park Improvements and operations are intended to support and encourage regular, daily use of the Park for those who need green space.
2. The Park and its programs will support a diversity of users, including nearby residents and employees, families with children, seniors, transit users, tourists and many others.
3. There will be a limited number of events that require a full closure of the Park and these events will be carefully planned to ensure limited impacts to the Park and to its users.
4. The Republic Square area will continue to provide a crucial role as a staging area for transport to and from the Austin City Limits music festival.
5. The Sustainable Food Center's Farmers' Market Downtown is an important program that is intended to be maintained and supported as part of the Park's community offerings.