

AGREEMENT FOR CITY FUNDS TO BE PAID TO THE WATERLOO GREENWAY CONSERVANCY TO OBTAIN FUND-RAISING SERVICES

This agreement (**Agreement**) is effective as of the last date signed by the Parties. This Agreement is between the City of Austin (**City**), a Texas home rule city and municipal corporation, and the Waterloo Greenway Conservancy, a Texas non-profit corporation d/b/a The Waterloo Greenway Conservancy (**Conservancy**).

The term of this Agreement is from the effective date through December 31, 2021. The parties may agree to one extension to a date that is no later than December 31, 2021.

1. RECITALS

- A. The Waller Creek District (District, as shown on Exhibit A) is located in the City and is a prominent geographic feature that has helped to shape the historical evolution of the City.
- B. The City has constructed the Tunnel within the District along Waller Creek, which removes approximately 28 acres of property from the 100-year floodplain and facilitates the enhancement and revitalization of the District and the surrounding area to allow the reclaimed area to be developed. Although construction is complete, the City maintains, operates, repairs, and improves the Tunnel and related facilities, as needed.
- C. Certain portions of the District have been blighted through years of being in the 100-year floodplain and not having sustained use or development.
- D. The City is interested in seeking support to assist the City with the necessary work to design, develop, construct, operate and maintain the Public Improvement Sites in the District as a premier public amenity with a high level of design excellence.
- E. The Conservancy was formed on July 30, 2010 and raised a significant portion of the necessary funds to develop a comprehensive design of the District, which has resulted in the approved Design Plan for the District, as shown on Exhibit B. The Conservancy has volunteered to support the City's efforts and is using the time and talent of its board and staff to increase the community's awareness and backing for this vital amenity for the City. Specifically, among other things, the Conservancy is endeavoring to (i)

facilitate and aid the City with respect to its enhancement and development of the District, (ii) raise funds from the community and through other sources to help implement the Design Plan, (iii) and defray costs of the landscaping and other amenities within the District.

- F. City Council approved and extended the time of operation for the Tax Increment Reinvestment Zone No. 17, as set forth in Resolution Nos. 20141211-095, 20160818-071, 20160818-071, 20170518-038, 20170831-051, and 20180524-016.
- I. The City and the Conservancy (sometimes referred to collectively as the Parties and singularly as Party) are entering into this agreement to assist the Conservancy in exploring federal grant funds for the work in the District. Toward this end, the City is contributing \$45,000 toward the cost of hiring a professional with expertise in obtaining federal grant funds.
- E. The **Parties** wish to execute this Agreement to govern the provision of funds by the City to the Conservancy to assist the Conservancy in funding a professional with expertise in obtaining federal grant funding to ensure effective use of possible funding that would be in addition to the City funding and private funding being provided for improvements in the District.

NOW THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

2. DEFINED TERMS

City Funds means an amount not to exceed the \$45,000 contributed toward the Conservancy's hiring of a professional with expertise in federal grants to assist in finding grants for the improvements consistent with the Design Plan within the District.

Contributed Funds means the matching funds to be raised and used to pay for these professional services by the Conservancy pursuant to this Agreement.

Design Plan means the concept design plan for the Public Improvement Projects prepared by the Project Landscape Architect dated September 12, 2012, as amended and modified June 20, 2013 and which has been approved by the Council, the City, the Waller Creek Local Government Corporation, and the Conservancy consistent with Amendment No. 2 to the Waller Creek Tax Increment Reinvestment Zone No. 17 ([Ordinance No. 20180524-013](#)).

District means the area of the City referred to as the Waller Creek District, which is shown on Exhibit A attached to this Agreement.

Effective Date means the last date this Agreement is signed by the Conservancy and the City.

Project means construction of the completed capital improvements consistent with the Council-approved Design Plan within the District.

Owner means the City of Austin, Texas, a municipal corporation, home rule city and political subdivision organized and existing under the laws of the State of Texas, acting through the City Manager or the City Manager's designee, officers, agents or employees to administer design and construction of the Project.

3. PROJECT COSTS AND RESPONSIBILITIES

a. Conservancy will employ the person with expertise in obtaining federal grants to identify and recommend possible grants that would be appropriate for the Project. The services will begin no later than July 1, 2021, and continue for 6 months, with the option to extend the contract for these services for up to twelve additional months. This schedule may be changed based on the recommendations of the professional, but any change must be approved in writing by both parties to be effective. The milestones for this Agreement are set forth in **Attachment B** and are incorporated in this Agreement.

b. Payment Obligations of the City: The City will provide payments to the Conservancy monthly within 30 days after the Conservancy submits a complete invoice for grant review services.

i. The City has the right to review the invoices and deny payment if the invoices are not sufficiently documented to ensure that the professional has taken active steps to identify and recommend potential federal grant opportunities. A minimum of three potential federal grant opportunities should be identified.

ii. Any contract entered into between the Conservancy and the grant services provider shall contain terms allowing the City to obtain monthly reports on the status of the work, and to review to ensure that the possible grants do not contain conditions or requirements that would add to the costs of the Project, require matching funds from the City (unless agreed to by the Parties), or create requirements that the City cannot meet.

c. Acceptance of Grant Funds

i. **Conservancy** will develop criteria required for grant acceptance. The criteria will be approved by the City prior to the person with the federal grant funding expertise commencing pursuit of grant funding. The criteria may change from time to time, but any change must be approved in writing by both parties to be effective. If the Parties are selected for grant funding, the Conservancy will develop a memorandum of understanding outlining the roles and responsibilities related to grant administration. The memorandum of understanding will be agreed to and signed by the Parties prior to accepting the grant.

ii. **City** will support the grant process in good faith. The City shall have the right, to move forward without grant funding if the grant funding will result in delay or additional cost to the Project.

4. EVENTS OF DEFAULT AND REMEDIES

a. **Conservancy's Default and the City's Remedies:** The Conservancy shall be in default under this Agreement if the Conservancy fails or refuses to perform the Conservancy's obligations under this Agreement, or if any representation or warranty made by the Conservancy pursuant to this Agreement becomes untrue, and the non-performance or breach remains un-remedied after 30 days' notice of an event of default from the City. The Conservancy shall not be default if the cause of the default was a default by the City. If the Conservancy is in material breach of or default under this Agreement after the expiration of the cure period, the City shall be entitled to require specific performance, to a refund of the funds paid by the City, and to terminate this Agreement. In the event a default by the Conservancy is not reasonably curable within the 30 day period, then the Conservancy shall, only with specific written approval by the City, have additional time to complete the cure of its default so long as it prosecutes its cure diligently and in good faith. Fraudulent statements made in the inducement of the City by board members or officers of the Conservancy who are materially involved with the Project shall be grounds for termination for cause.

b. **The City's Defaults and Conservancy's Remedies:** The City shall be in default under this Agreement if the City fails to meet, comply with, or perform any covenant, agreement, or obligation within the time limits and in the manner required in this Agreement. If the City is deemed to be in default under this Agreement, the City shall also have a 30 day time period, after being notified by the Conservancy of the default, in which to cure the default. After the expiration of the cure period, the Conservancy may terminate this Agreement by written notice delivered to the City, including, without limitation, any obligation to make further contributions

under this Agreement. The Conservancy may not seek any remedy for non-payment by the City if such non-payment is due to:

(1) Article VIII, Section 1 of the Austin City Charter which prohibits the payment of any money to any person, firm or corporation who is in arrears to the City for taxes, and of §2-8-3 of the Austin City Code concerning the right of the City to offset indebtedness owed the City; and

(2) Non-Appropriation. The funding of this Agreement is dependent upon the availability of appropriations. The City's payment obligations are payable only and solely from funds appropriated and available for this Agreement. The absence of appropriated or other lawfully available funds shall render the Agreement null and void to the extent funds are not appropriated or available. The City shall provide the Conservancy written notice of the failure of the 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 the City to pay its obligations under the Agreement. In the event of non or inadequate appropriation of funds, there will be no penalty nor removal fees charged to the City.

c. Limitation of Claims: In no event shall any Party to this Agreement ever have any liability to any other Party for incidental, consequential, exemplary or punitive damages. Additionally, recourse upon the Conservancy for any breach of this Agreement is in all things limited to the funding received from the grants for the Project. In no event shall City of Austin ever have recourse under this Agreement or otherwise upon any funds or other assets of the Conservancy, or its members, directors, officers, employees, representatives, affiliates, successors, and assigns, apart from the grant funds.

d. Termination for Convenience (or without cause)

1 The City may terminate this Agreement for convenience at any time with 30 calendar days' written notice to Conservancy. On receipt of the Notice, Conservancy shall immediately stop performance of services (unless the Notice directs otherwise) and deliver all documents, programs, reports, and materials accumulated in performing this Agreement (whether finished or in process) to City within 10 business days, or as otherwise stated in the Notice. City shall pay the Conservancy for all reimbursable costs and obligations incurred up to the date of termination. In no event shall the Conservancy or its fundraiser be entitled to recover any profit for unperformed Services.

2 In the event of a termination for convenience, City shall have the right (but not the obligation) to take over the Services and complete them by contract or

otherwise, including the option to require Conservancy to assign its subcontracts to City.

5. MISCELLANEOUS PROVISIONS

a. Severability: If any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or invalid, such illegal or invalid term or provision shall not affect the balance of the terms and provisions of this Agreement.

b. Attorneys' Fees; Applicable Law; Venue: In consideration of the award and execution of this Agreement and in consideration of the City's waiver of its right to attorney's fees, the Conservancy 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 Agreement. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Texas. Venue for any action regarding this Agreement shall be in the District Courts of Travis County Texas.

c. No Interpretational Presumptions: This Agreement is to be deemed to have been prepared jointly by the Parties. If any inconsistencies or ambiguities exist, they shall not be interpreted or construed against either Party as the drafter.

d. Further Assurances: The Parties shall take such actions and execute such documents as each may reasonably request, to carry out the purposes of this Agreement.

e. Headings: All paragraph headings are inserted for convenience only and shall not be used in any way to modify, limit, construe or otherwise effect this Agreement.

f. Counterparts: This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.

g. Authority/Execution/Enforceability: Each Party represents and warrants to the other Party that it is duly authorized to execute this Agreement, that it has duly executed and delivered this Agreement, and that, upon execution and delivery of this Agreement by the other Party, this Agreement will be valid and enforceable against such representing and warranting Party in accordance with its terms.

h. Independent Contractor Status: In performing its obligations, Waterloo Greenway Conservancy shall be an independent contractor, and nothing in this Agreement shall be deemed to constitute the City and the Conservancy as partners or joint venturers. Nothing in this Agreement shall alter in any manner the status of personnel employed by Waterloo Greenway Conservancy or by the City, who shall in no event be deemed to be employees of the other.

i. Books and Records: The Conservancy shall keep proper books of record and account in which full and correct entries shall be made of all of its assets and operations so as to permit the presentation of financial statements prepared in accordance with sound accounting principles consistently applied on a cash basis.

j. Notices: If notice, payment, report or other matter is required or permitted to be given under this Agreement, it may be effected by personal delivery to the address set forth below, or by certified mail, postage prepaid, return receipt requested, properly addressed to the appropriate address set forth below:

If to the City:

The City of Austin
City Attorney
City of Austin Law Department
P.O. Box 1088
Austin, Texas 78767-1088

If to the City PM:

The City of Austin
Program Manager
Watershed Protection Department
P.O. Box 1088
Austin, Texas 78767
Attn: City PM for the Waller Creek District – Waterloo Greenway Project

If to Waterloo Greenway Conservancy:

Waterloo Greenway Conservancy
ATTN: Chief Financial Officer
PO Box 12363
Austin, TX 78711

With a copy to:

These addresses may be changed by notice to the other parties given in the same manner as above provided.

k. Force Majeure: Both Conservancy and the City agree they shall grant the other Party a reasonable extension of time as appropriate, if Acts of God, flood, riot, civil insurrection, labor strikes, orders of local or federal government or similar circumstances or conditions beyond the Parties' control render timely performance of the Parties' obligations impossible or unexpectedly burdensome. The Party suffering the impossibility or burdensome conditions must provide written notice to the other Party within 10 days of the onset of such performance delay, specifying the reasons for the delay. Consent to an extension of time for performance under such circumstances will not be unreasonably withheld, conditioned or delayed. Failure to fulfill obligations due to conditions beyond either Party's control shall not be considered a breach of this Agreement; provided, however, that the obligations shall be suspended only for the reasonable duration of such conditions. Suspension of one Party's obligations under this paragraph shall likewise suspend performance of the other Party's obligations for the duration of the suspension.

l. Right to Audit: The Conservancy agrees that the representatives of the Office of the City Auditor, or other authorized representatives of the City, shall, upon reasonable notice to the Conservancy, have access to, and the right to audit, examine, or reproduce at the expense of the City, any and all records of the Conservancy related to the performance under this Agreement. Any audit or examination shall take place at the offices of the Conservancy during reasonable business hours. Conservancy shall retain all such records for a period of three years after final payment under this Agreement, or until any audit and litigation matters relating to the Project, or this Agreement, that the City has brought to the attention of the Conservancy are resolved, whichever is longer. At the request of the Conservancy, the City shall provide the Conservancy a copy of the audit.

m. Right to Inspect Records: City agrees that representatives of the Conservancy shall have, upon reasonable notice to the City, access to, and the right to examine, or reproduce at the expense of the Conservancy, payment records relating to the Project. Should this review result in an audit of these payment

records, at the request of the City, the Conservancy shall provide the City a copy of the audit.

g. Indemnity: THE CONSERVANCY SHALL DEFEND (AT THE OPTION OF THE CITY), INDEMNIFY, AND HOLD THE CITY, ITS SUCCESSORS, ASSIGNS, OFFICERS, EMPLOYEES AND ELECTED OFFICIALS HARMLESS FROM AND AGAINST ALL INDEMNIFIED CLAIMS (HEREINAFTER DEFINED) UNDER THIS AGREEMENT. NOTHING IN THIS AGREEMENT SHALL BE DEEMED TO LIMIT THE RIGHTS OF THE CITY OR THE CONSERVANCY (INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO SEEK CONTRIBUTION) AGAINST ANY THIRD PARTY WHO MAY BE LIABLE FOR AN INDEMNIFIED CLAIM. THIS INDEMNIFICATION DOES NOT INCLUDE INDEMNIFIED CLAIMS ARISING OUT OF, INCIDENT TO, CONCERNING OR RESULTING FROM THE FAULT OF THE CITY OR THE CITY'S AGENTS, EMPLOYEES, REPRESENTATIVES OR SUBCONTRACTORS.

As used in this Agreement, "**Indemnified Claims**" means any and all claims, demands, suits, causes of action, judgments, liabilities, and costs solely arising from or relating to the Conservancy's grant related activities. Both parties to this agreement knowingly waive the right to seek attorney's fees from each other.

h. Dispute Resolution: In the event of a dispute, either Party may make a written request for a meeting between representatives of each Party within 14 calendar days after receipt of the request or such later period as agreed by the Parties. Each Party shall include, at a minimum, one senior level individual with decision-making authority regarding the dispute. The purpose of this is to attempt in good faith to negotiate a resolution of the dispute. If, within 30 calendar days after such meeting, the Parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by both Parties, then the Parties may proceed directly to mediation as described below.

If the efforts to resolve the dispute through negotiation fail, or the Parties waive the negotiation process, the Parties may select, within 30 calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option, the City and the Conservancy agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in this Agreement prevents the Parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the Parties fail to agree on a mediator within 30 calendar days of initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC). The Parties agree to participate in mediation in good faith for up to 30 calendar days from the date of

the first mediation session. The City and the Conservancy will share the costs of mediation equally.

i. **CONFIRMATION AND WAIVER:** EACH OF THE PARTIES TO THIS AGREEMENT CONFIRMS TO THE OTHER THAT IT IS NOT RELYING ON, AND WAIVES ANY CLAIM REGARDING, ANY EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY CONCERNING OR RELATING TO THE PROJECT (OTHER THAN THE EXPRESS REPRESENTATIONS AND WARRANTIES OF THE OTHER PARTY IN THIS AGREEMENT). EACH PARTY FURTHER ACKNOWLEDGES AND AGREES WITH THE OTHER PARTY THAT IT IS ENTERING INTO THIS AGREEMENT AND THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT BASED SOLELY UPON ITS OWN CONSULTANTS, LEGAL COUNSEL, EVALUATIONS AND EXAMINATIONS AND THE OTHER PARTY'S PERFORMANCE OF ITS OBLIGATIONS HEREUNDER.

[END OF TEXT]

IN WITNESS WHEREOF, the Parties have duly executed this Agreement as of the last date stated below.

CITY OF AUSTIN, a Texas home rule city

DocuSigned by:
By: Rey Arellano
51CB512E5361489...
Rey Arellano, Assistant City Manager
Date: 10/27/2021

Waterloo Greenway Conservancy, a Texas non-profit corporation
DocuSigned by:
By: Kathy Miller
2E1A96F19CF046A...
Katherine Miller Interim CEO
Date: 10/26/2021

EXHIBIT A. Waller Creek District and Design Plan Boundary

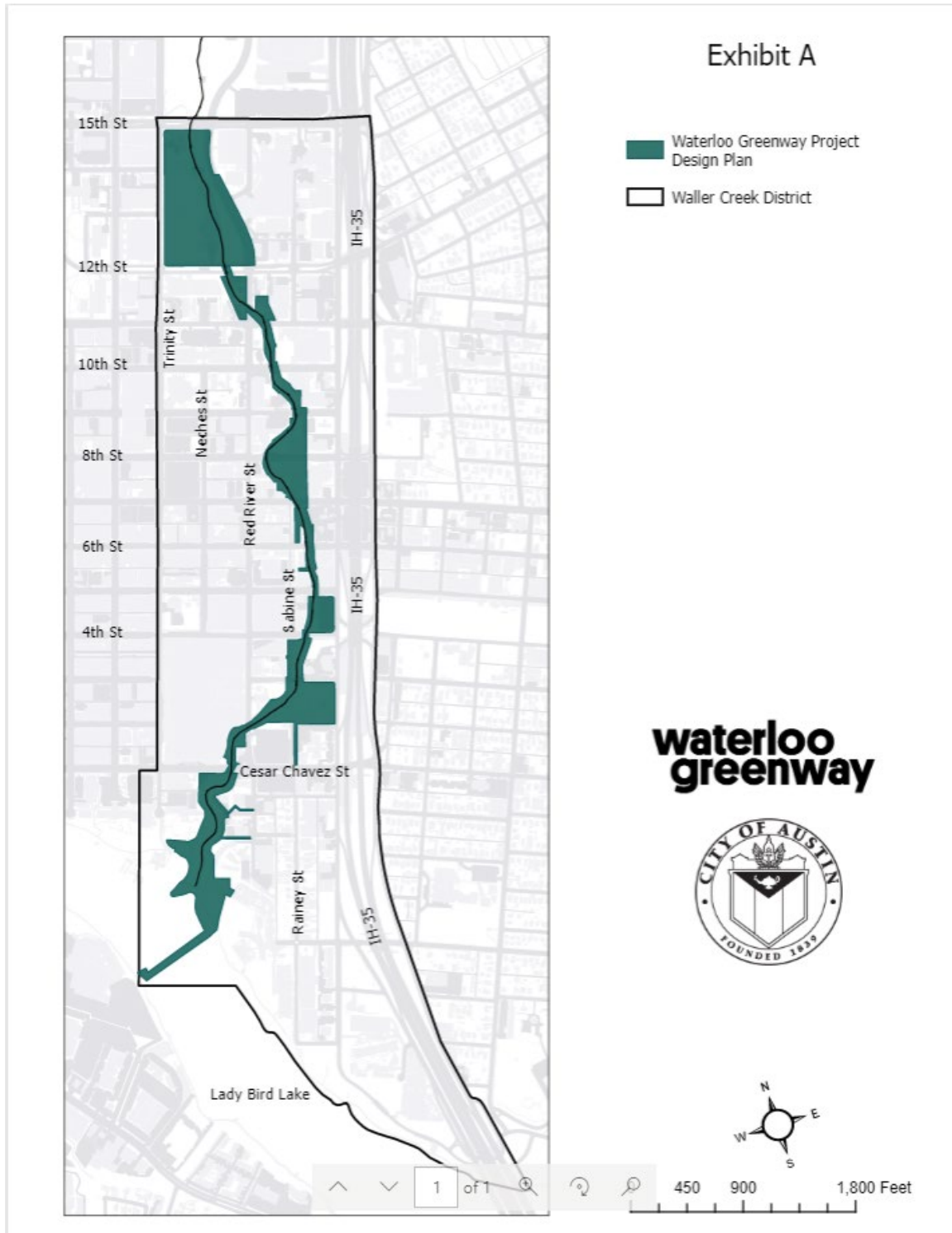


EXHIBIT 2. Design Plan

