

Storm Water Drain Relocation Agreement

Table of Contents

1. Pertinent Information.....	1
2. The Project.....	Error! Bookmark not defined.
3. Compliance with Federal, State and Local Laws	4
4. Funding and Assistance by City and Requirements for Reimbursement.. ..	<u>5</u>
5. Indemnity.....	<u>7</u>
6. Insurance.....	<u>9</u>
7. Termination.....	Error! Bookmark not defined. <u>0</u>
8. Taxes.....	<u>100</u>
9. Dispute Resolution.....	<u>100</u>
10. Miscellaneous Provisions.	<u>111</u>
11. Public Information.....	<u>133</u>

1. Pertinent Information.

Effective Date:

Authorizing Ordinance:

S.P. No.: 2120

City: City of San Antonio (“City”)

City’s Address: City Hall, P.O. Box 839966, San Antonio, Texas 3966
(Attention: Director, Capital Improvements Management Services Department)

Joint Users: “Joint Users” mean, as applicable, one or both of the following:

1 Riverwalk, LLC (“ORP Owner”)
Convent Ventures, L.P. (“Convent LP”)

Joint Users’ Address: 1 Riverwalk, LLC
c/o USAA Real Estate Company
9830 Colonnade Blvd., Ste. 600
San Antonio, TX 78230-2239
Attention: _____

Convent Ventures, L.P.
Attn.: Joseph Newton
333 Convent Street
San Antonio, Texas 78205

Term: This Storm Water Drain Relocation Agreement (“**Agreement**”) shall become effective on the Effective Date and shall terminate upon completion of the Project, as defined below (the “**Term**”)

Premises: The “**Premises**” means: 1) the Convent LP property located at 333 Convent Street, as further described in **Exhibit A** (the “**Convent LP Property**”); and 2) the Utility Easement property that is in part located on property owned by Convent LP and in part property owned by ORP Owner (the “**Joint Property**”), as further depicted in **Exhibit B**.

The Project: The “**Project**” means:

1. ORP Owner shall cap and disconnect the existing storm drain currently located under the Convent LP Property from the City’s storm drainage system. The City shall abandon the existing storm water drain and discontinue use of the storm water drain, and vacate any easement attendant to the abandoned storm water drain that is located on the Convent LP Property.
2. ORP Owner shall install a new thirty inch (30”) in diameter, reinforced concrete storm drain (“**Drainage Infrastructure**”) in a location that is either: a) subsurface within the utility easement (“**Utility Easement**”) described in the attached **Exhibit B** and as far west in the Utility Easement as is feasible subject to existing and planned utility locations, site conditions, and City and utility provider requirements; or b) under another location that is wholly or partially outside the Utility Easement, provided that any such location is not within the Convent LP Property or the Joint Property unless otherwise agreed to in writing by the owner of the specifically affected property.

Payment/Consideration: The City shall reimburse ORP Owner one-third of the cost incurred by ORP Owner in the performance of its

obligations under this Agreement from available funds in the FY 2018 Storm Water Utility Fund (“**City Funding**”) following the completion of all work in a manner reasonably satisfactory to the City’s Department of Transportation & Capital Improvements (“**TCI**”) based on applicable federal, state, or local laws, rules, or regulations and Unified Development Code requirements and certification by ORP Owner’s engineer that the work has been completed in accordance with the Plans approved by the City (collectively, the “**Funding Requirements**”). The City Funding shall not exceed Ninety-Four Thousand Two Hundred 00/100 Dollars (\$94,200.00) (“**City Funding Cap**”). Following written notice from ORP Owner that ORP Owner has completed the performance of its obligations under this Agreement that are eligible for reimbursement from the City Funding (the “**Reimbursement Notice**”), City shall, within forty-five (45) days following delivery of the Reimbursement Notice, either reimburse ORP Owner with City Funding not to exceed the City Funding Cap, or provide written notification to ORP Owner what specific Funding Requirements have not been met, in which event ORP Owner may issue a subsequent Reimbursement Notice following investigation of the alleged failure to satisfy a Funding Requirement, and the above process shall be repeated.

The City shall ensure that no storm drain easement exists or shall exist on or under the Convent LP Property, excepting the portion of the Convent LP Property included within the Joint Property.

ORP Owner shall be responsible for any costs associated with the Project in excess of the City Funding Cap. Upon completion of the Project and the City’s reimbursement to ORP Owner of the City Funding as described above, ORP Owner shall grant to the City an easement within that portion of the Utility Easement that is owned by ORP Owner to permit the City to repair, maintain, and operate the Drainage Improvements, and Convent LP shall grant to the City an easement for the portion of the Utility Easement that is that is owned by Convent LP to permit the City to repair, maintain, and operate the Drainage Improvements.

2. The Project.

2.01. **Project Plans.** As soon as reasonably practical following the Effective Date, ORP Owner shall submit to TCI plans and specifications for the Project (“**Plans**”) in accordance with the Project description. All Plans are subject to City review and approval, provided however, that the City shall not unreasonably withhold, condition, or delay its review and approval.

2.02. **Costs.** Subject to the City Funding obligations as defined in Section 1 above, ORP Owner is solely responsible for all costs of construction, installation, and completion of the Project. Following the City’s acceptance of the Drainage Improvements as evidenced by its award of the City Funding, the City shall bear the costs of subsequent repairs, maintenance, operation, and the like of all Drainage Infrastructure.

2.03. **No Liability.** City assumes no liability or further expense pursuant to the express terms of this Agreement, except to the extent expressly provided herein.

2.04. **Installation and Maintenance.** All Drainage Infrastructure must be buried to a depth reasonably satisfactory to City. In determining proper depth, City may consider expected probable future as well as present drainage demands, however the City shall not require that the Drainage Infrastructure exceed thirty inches (30”) in diameter. ORP Owner must adhere to all applicable safety standards and must adhere to all federal, state, or local laws, rules, or regulations with the installation of the Drainage Infrastructure. Without limiting the foregoing, ORP Owner shall use commercially reasonable efforts to ensure that ORP Owner’s construction efforts in furtherance of the Project do not result, upon completion of the Project, in the Premises failing to comply with any aspect of the Unified Development Code relating to drainage.

2.05. **No Power to Bind.** Neither Joint User may bind or permit another to bind City for payment of money or for any other obligation in relation to this Agreement that is in excess of the City Funding.

2.06. **Site Access.** Convent LP agrees to provide access to the surface and subsurface of the Convent LP Property for the completion of the Project. Each Joint User further agrees to allow the City access to its portion of the Premises for the purposes of inspecting the Project.

3. Compliance with Federal, State and Local Laws.

3.01 In performing its obligations under this Agreement, ORP Owner will comply with all federal, state and local laws and regulations and will use all reasonable efforts to ensure said compliance by any and all consultants and sub-consultants working on the Project.

3.02 ORP Owner agrees it procured and will procure all contracts under this Agreement through open competitive processes which are advertised to the public in an appropriate manner.

3.03 The work performed by ORP Owner under this Agreement shall conform to Americans with Disabilities Act requirements and must be approved by the Texas Department of Licensing and Regulation. Final approval of the Plans shall be the responsibility of City, such approval not to be withheld, conditioned, or delayed.

3.04 City shall have authority to: 1) inspect the Project throughout the performance of the work to ensure compliance with the Plans; and 2) to request copies of the Plans. When submitting a City Funds payment request to City in accordance with this Agreement, ORP Owner shall cause its engineer to certify as to the progress of the Project, certifying that the work has been conducted in accordance with the Plans approved by City.

3.05 **TEXAS GOVERNMENT CODE §2270.002:** Texas Government Code §2270.002 provides that a governmental entity may not enter into a contract with a company for goods or services, unless the contract contains a written verification from the company that it:

- (1) does not boycott Israel; and
- (2) will not boycott Israel during the term of the contract.

By submitting an offer to or executing contract documents with the City of San Antonio, Joint Users hereby verify that they do not boycott Israel, and will not boycott Israel during the term of the Agreement. City hereby relies on Joints Users' verification. If affirmation is found to be false, City may terminate the Agreement for material breach.

3.06 **TEXAS GOVERNMENT CODE § 2252.152.** Texas Government Code §2252.152 provides that a governmental entity may not enter into a governmental contract with a company that is identified on a list prepared and maintained under Texas Government Code §2270.0201 or §2252.153 "Listed Companies". Each Joint User hereby certifies that it is not identified on such a list and that it will notify City should it be placed on such a list while under contract with City. City hereby relies on each Joint User's certification. If found to be false, or if a Joint User is identified on such list during the course of its contract with City, City may terminate this Agreement for material breach.

4. Funding and Assistance by City and Requirements for Reimbursement.

4.01 City shall reimburse ORP Owner for all eligible Project expenses incurred hereunder up to the City Funding Cap. The total of all payments and other

obligations made or incurred by City hereunder shall not exceed the City Funding Cap. Eligible Project expenses shall include, but are not limited to, site work, capping the existing storm drain, construction and installation of the Drainage Improvements, materials and equipment costs, engineering fees, contractor fees, etc.

4.02 ORP Owner agrees to maintain readily identifiable records providing, to ORP Owner's actual knowledge, accurate, current, separate, and complete disclosure of the status of any City Funding received pursuant to this Agreement. ORP Owner further agrees:

(A) Maintenance of said records shall be in compliance with all terms, provisions, and requirements of this Agreement and with all generally accepted accounting practices; and

(B) ORP Owner's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure.

4.03 ORP Owner shall retain all books, records, documents, reports, written accounting policies and procedures and all other relevant materials (hereinafter "*Records*") pertaining to activities pertinent to this Agreement for a minimum of four (4) years from the completion of the Project.

4.04 On or before submitting a Reimbursement Notice, ORP Owner shall submit an invoice through City's Project Reporting Information Management Exchange Link (hereafter referred to as "*PRIMElink*").

4.05 All requests for reimbursement shall be submitted through *PRIMELink*. ORP Owner shall sign a Business Level Agreement reasonably acceptable to ORP Owner and ensure all of its employees or representatives utilizing *PRIMELink* sign and comply with an Individual User Agreement. Such requests for reimbursement shall be completed utilizing *PRIMELink* or utilizing forms and instructions reasonably approved by TCI. Prior to the initial request for reimbursement, ORP Owner must submit a schedule of values for payment to be approved by TCI, which approval shall not be unreasonably withheld, conditioned or delayed. Any changes to the schedule of values once approved shall be processed and approved as task orders through the *PRIMELink* portal.

4.06 Prior to reimbursement, City shall have the right to inspect the Project work completed to ensure conformance with the approved Plans. Invoices should include all supporting documentation that costs have been incurred, as required by City.

5. Indemnity.

5.01. These definitions apply to the indemnity provisions of this Agreement:

5.01.01. “Indemnified Claims” mean all loss, cost, liability, or expense, including reasonable attorneys’ fees and court costs, directly or indirectly arising in whole or in part out claims asserted by a third party regarding of the acts or omissions of any person other than Indemnitees who is acting under the direction of an Indemnitor in furtherance of the Project. Indemnified Claims include, but are not limited to, those arising from property damage and from personal or bodily injury, including death and those relating to flooding. Though the City has reviewed the Plans and Drainage Infrastructure and retains the right to assure its proper installation, Indemnitor retains all liability for inadequacy of design or improper construction relating to the Drainage Infrastructure for a period not to exceed one (1) year following the City’s acceptance of the Drainage Improvements as evidenced by its award of the City Funding. If Indemnitor acquires actual knowledge of any problem with the proposals, Indemnitor will notify City of that problem in writing before work begins or, if work has already begun, as soon as practicable after the problem is uncovered.

5.01.02. “Indemnitees” means the City of San Antonio and its elected officials, officers, employees, agents, and other representatives against whom an Indemnified Claim has been asserted.

5.01.03. “Indemnitor” means any Joint User.

5.02. Indemnitor must indemnify Indemnitees, individually and collectively, from all Indemnified Claims, except to the extent caused by an Indemnitee’s gross negligence or willful misconduct.

5.03. There are no third-party beneficiaries of this indemnity other than the category of people and entities included within the definition of Indemnitees.

5.04. Indemnitor must promptly advise the City of San Antonio in writing of any Indemnified Claim and must, at its own cost, investigate and defend the Indemnified Claim. Whether or not the City of San Antonio is an Indemnitee as to a particular Indemnified Claim, the City of San Antonio may require Indemnitor to replace the counsel Indemnitor has hired to defend Indemnitees. The City may also require Indemnitor to hire specific-named counsel for so long as the named counsel’s hourly rates do not exceed the usual and customary charges for counsel handling sophisticated and complex litigation in the locale where the suit is pending. No such actions release or impair Indemnitor’s obligations under this indemnity paragraph, including its obligation to pay for the counsel selected by City. Regardless of who selects the counsel, the counsel’s clients are Indemnitees, not Indemnitor.

5.05. In addition to the indemnity required under this Agreement, each Indemnatee may, at its own expense, participate in its defense by counsel of its choosing without relieving or impairing Indemnitor's obligations under this indemnity paragraph.

5.06. Indemnitor may not settle any Indemnified Claim without the consent of the City of San Antonio, whether or not the City is an Indemnatee as to the particular Indemnified Claim, unless (A) the settlement will be fully funded by Indemnitor and (B) the proposed settlement does not contain an admission of liability or wrongdoing by any Indemnatee. The City's withholding its consent as allowed in the preceding sentence does not release or impair Indemnitor's obligations of this indemnity paragraph. Even if the City of San Antonio is not an Indemnatee as to a particular Indemnified Claim, Indemnitor must give City at least 20 days advance written notice of the details of a proposed settlement before it becomes binding. Any settlement purporting to bind an Indemnatee must first be approved by City Council, which approval shall not be unreasonably withheld, conditioned, or delayed.

5.07. Nothing in this Agreement waives governmental immunity or other defenses of Indemnitees under applicable law.

5.08. If, for whatever reason, a court refuses to enforce this indemnity as written, and only in that case, the parties must contribute to any Indemnified Claim 5% by the Indemnitees and 95% by the Indemnitor. Indemnitor need look only to the City of San Antonio for Indemnitees' 5% if the City of San Antonio is an Indemnified Party as to a particular Indemnified Claim.

6. Insurance.

6.01. Without limiting City's rights to indemnity, ORP Owner must provide and maintain insurance, at its own expense, with companies admitted to do business in the State of Texas and with a rating of A- or better by A. M. Best and Company in the following types and amounts:

Type	Amount
a. Worker's Compensation during the performance of improvements to the Premises or an approved alternate plan at other periods during the Term.	Statutory, with a waiver of subrogation in favor of City
b. Employers' Liability during improvements to the Premises or an approved alternate plan at other periods during the Term.	\$500,000 per category, with a waiver of subrogation in favor of City
c. Commercial General (Public) Liability – to include coverage for the following where the exposure exists:	For Bodily Injury and Property Damage: \$1,000,000 per

- | | |
|--|--|
| <ul style="list-style-type: none"> (a) Premises/Operations (b) Independent Contractors (c) Products/Completed (d) Personal Injury Liability (e) Contractual Liability (f) Explosion, Collapse and Underground Property (g) Broad Form Property Damage | <p>Occurrence, \$2,000,000 general aggregate or its equivalent in Umbrella or Excess Liability coverage.</p> |
|--|--|

- | | |
|--|--|
| <p>d. Property Insurance -- for physical damage to the property of Joint User including improvements and betterments to the Premises.</p> | <p>Coverage for a minimum of 80% of the actual cash value of the improvements.</p> |
|--|--|

Any substitute for Workers' Compensation and Employer's Liability must be approved in advance by City's Risk Manager.

6.02. With respect to the above required insurance, each insurance policy required by this Agreement must contain the following clauses:

“No insurance provided by ORP Owner can be canceled, limited in scope or coverage, or non-renewed until after 30 days' prior written notice has been given to:

- (a) City Clerk, City of San Antonio
City Hall/Military Plaza
P.O. Box 839966/2nd Floor, City Hall
San Antonio, Texas 78283-3966
Attention: Risk Manager

And

- (b) City of San Antonio
Transportation & Capital Improvements
P. O. Box 839966
San Antonio, Texas 78283-3966
Attention: Mike Frisbie, P.E., Director

“Any insurance provided by ORP Owner is primary to any insurance maintained by the City of San Antonio.”

“Any insurance maintained by the City of San Antonio applies in excess of, not in contribution with, insurance provided by this policy.”

6.03. Each insurance policy required by this Agreement, excepting policies for Workers' Compensation, Employer's Liability and Professional Liability, must contain the following clause:

"The City Of San Antonio, its elected officials, employees, agents, and representatives are added as additional insureds."

6.04. ORP Owner must deliver to City, within 30 days after the Effective Date, endorsements to the above-required policies adding the applicable clauses referenced above. Such endorsements must be signed by an authorized representative of the insurance company and show the signatory's company affiliation and title. ORP Owner must deliver to City documentation acceptable to City confirming the authority of those signing the endorsements.

6.05. The Notices and Certificates of Insurance must be provided to the same addresses as for notice of cancelation or nonrenewal.

7. Termination.

7.01 If the director of the City's TCI Storm Water Division determines prior to the completion of the Project that ORP Owner's use of the Premises will adversely and materially affect drainage on the Premises after completion of the Project, the City may terminate this Agreement with ten (10) days written notice to the Joint Users.

7.02. Upon termination for an act of default by ORP Owner and failure to cure within thirty (30) days of City written notification, all rights and privileges immediately cease, and ORP Owner must immediately cease use of the Convent LP Property. City, at its option, may direct ORP Owner to either (a) abandon the encroaching improvements and appurtenances, including Drainage Infrastructure and equipment; or (b) remove all or any part of the improvements and appurtenances, including Drainage Infrastructure, and restore the Premises, at ORP Owner's sole cost, to original condition. If ORP Owner fails to do so timely, City may do it at ORP Owner expense and, if ORP Owner fails to pay promptly upon demand, file a lien for the cost of work against ORP Owner's property at [LEGAL DESCRIPTION], San Antonio, Bexar County, Texas.

8. Taxes.

City is a governmental entity and does not expect to pay taxes. In no case will City ever be responsible for any taxes, local, state, or federal assessed against Joint User.

9. Dispute Resolution.

9.01. As a condition precedent to bringing any action arising out of or relating to this agreement or any aspect thereof, including an action for declaratory relief but not an action specifically excepted below, the disputants must first submit in good faith to mediation. The parties may not assert limitations, laches, waiver, and estoppel based upon attempts to mediate.

9.02. Filing suit on a claim that should be mediated hereunder waives the filer's right to demand mediation. But one party's waiver does not affect another party's right. A defendant does not waive mediation for so long as, within a reasonable time after appearing, the defendant gives written notice to the plaintiff or its counsel of intent to require compliance with this paragraph.

9.03. Mediation must be conducted in San Antonio, Bexar County, Texas.

9.04. The party desiring relief has the burden to initiate mediation. Waiting for another party to initiate mediation does not waive the right to it.

9.05. If the parties can otherwise agree on a mediator, they may do so. Alternatively, either party may petition any court of competent jurisdiction to appoint a mediator. The only predicate issues the court need consider before appointing a mediator are whether (i) the copy of the Agreement before the court is authentic and (ii) the Agreement was duly signed and delivered by all parties to be bound to mediate. If neither of those issues is denied under oath, the court may appoint a mediator upon motion, without trial.

9.06. Mediator fees must be borne equally.

9.07. The parties need not mediate before going to court for either party to seek emergency injunctive relief.

10. Miscellaneous Provisions.

10.01. **Relationship Limited.** This instrument creates only the relationship of City and the Joint Users. The parties are not principal and agent, partners, joint venturers, or participants in any common enterprise.

10.02. **Nondiscrimination.** ORP Owner must not discriminate against any individual or group on account of race, color, gender, age, religion, national origin, or handicap, in employment practices or in the use of the Premises as related to its obligations with respect to the Project.

10.03. **Consent/Approval of City.** As to any matter hereunder in which City's consent is required, the consent may be granted by the Director, Capital Improvements Management Services Department, City of San Antonio, as designee of the City Manager, without council action, unless the City Charter requires that the City Council consent by the passage of a City ordinance.

10.04. **Severability.** If any portion hereof is determined to be invalid or unenforceable, the determination does not affect the remainder hereof.

10.05. **Successors.** This Agreement inures to the benefit of and binds the heirs, representatives, successors, and permitted assigns of each party. This clause does not authorize any assignment not otherwise authorized.

10.06. **Integration. This Agreement Represents The Final Agreement Between The Parties And May Not Be Contradicted By Evidence Of Prior, Contemporaneous, Or Subsequent Oral Agreements Of The Parties. There Are No Oral Agreements Between The Parties.**

10.07. **Modification.** This Agreement may not be changed orally but only by a written agreement, signed by the party against whom enforcement of any modification is sought. No such modification, express or implied, affects the right of the modifying party to require observance of either (i) any other term or (ii) the same term or condition as it applies on a subsequent or previous occasion.

10.08. **Third Party Beneficiaries.** This Agreement is intended for the benefit of the parties hereto and their successors and permitted assigns only. There are no third party beneficiaries hereof.

10.09. **Notices.** Any notice provided for or permitted hereunder must be in writing and by certified mail, return receipt requested, addressed to the parties at their respective addresses set forth at the beginning. The giving of notice is complete three days after its deposit, properly addressed and postage prepaid, with the United States Postal Service. Failure to use certified mail does not defeat the effectiveness of notice actually received, but such notice is effective only on actual receipt. Address for notice may be changed by giving notice hereunder.

10.10. **Pronouns.** In construing this Agreement, plural constructions include the singular, and singular constructions include the plural. No significance attaches to whether a pronoun is masculine, feminine, or neuter. The words "herein," "hereof," and other, similar compounds of the word "here" refer to this entire Permission, not to any particular provision of it.

10.11. **Captions.** Paragraph captions in this Agreement are for ease of reference only and do not affect the interpretation hereof.

10.12. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which is an original, whether or not all parties sign the same document. Regardless of the number of counterparts, they constitute only one agreement. In making proof of this Agreement, one need not produce or account for more counterparts than necessary to show execution by or on behalf of all parties.

10.13. **Further Assurances.** The parties must execute and deliver such additional documents and instruments as may be reasonably required to effect fully the provisions hereof. But no such additional document(s) may alter the rights or obligations of the parties as contained in this Permission

10.14. **Ambiguities Not to Be Construed Against Drafter.** Ambiguities in this Permission must be resolved without construing against the drafter.

10.15. **Administrative Actions and Agreements.** The Director of Transportation & Capital Improvements, without further council action, agrees to, sign, and deliver on behalf of the City all consents, certificates, memoranda, estoppels, and modifications of nonmaterial rights and obligations arising under this Agreement and may declare Joint User defaults and pursue remedies for such defaults, including terminating this Agreement. This paragraph does not authorize amendments without council consent.

11. Public Information.

The Joint Users acknowledge that this Agreement is public information within the meaning of Chapter 552 of the Texas Government Code and accordingly may be disclosed to the public.

[Signature Page to Follow]

In Witness Whereof, the parties have caused their representatives to set their hands.

City:

City of San Antonio, a Texas municipal corporation

By: _____

Printed Name: _____

Title: _____

Date: _____

Joint User:

1 Riverwalk, LLC, a Texas limited liability company

By: _____

Printed Name: _____

Title: _____

Date: _____

Joint User:
Convent Ventures, L.P., a Texas limited partnership

By: _____

Printed Name: _____

Title: _____

Date: _____

Attest:

City Clerk

Approved As To Form:

City Attorney

Exhibit A
Convent LP Property

DRAFT

EXHIBIT B
Joint Property

[The below graphic should be replaced with metes and bounds if available prior to execution.]

The Joint Property is the area shaded in blue and red below, with the blue portion being owned by ORP Owner, and the red portion being owned by Convent LP. Boundary lines shown are approximate.

