

STATE OF TEXAS §

**FUNDING AGREEMENT FOR THE
FLOYD CURL DRIVE "GREEN
STREET" PROJECT**

§
COUNTY OF BEXAR §

This Funding Agreement, referred to as "Agreement") is hereby made and entered into and effective this _____, date of _____ (hereafter referred to as the "Effective Date"), said effective date reflecting the date of the second and final signature to this Agreement, by and between the City of San Antonio (hereinafter referred to as "City"), a Texas municipal corporation in the State of Texas, whose mailing address is P.O. Box 839966, San Antonio, Texas 78283-3966, acting by and through its City Manager pursuant to Ordinance No. _____ dated _____ and the Medical Center Alliance (hereinafter referred to as "MCA", whose mailing address is P.O. Box 8278, San Antonio, TX 78208 (hereinafter referred to as "Owner"), acting by and through its representative, hereto duly authorized to enter into said Agreement (City and Owner hereafter individually referred to as "a Party" and collectively referred to as "the Parties").

WHEREAS, City has identified the need for infrastructure improvements along Floyd Curl Drive (hereafter referred to as "the Project"); and

WHEREAS, Owner owns property located in the Medical Center and acknowledges and accepts City's Project directly will benefit Owner's property; and

WHEREAS, Owner wishes to contribute a maximum of **SIX HUNDRED TWENTY-EIGHT THOUSAND DOLLARS AND NO/100 (\$628,000.00)** (hereafter referred to as "Owner's Project Contribution") to the cost of City's Project in exchange for City including infrastructure improvements which also promote non-motorized transportation as an integral part of the overall transportation system; and

WHEREAS, the City has identified Owner as the appropriate party to contract with for the fulfillment of the Project; and

NOW THEREFORE, the Parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations contained herein and to the performance and accomplishment of the tasks hereinafter described.

I. TERM

This Agreement shall remain in force for a period which may reasonably be required for the award of the construction contract, and construction and completion of the Project including any extra work and any required extensions thereto unless discontinued as provided for elsewhere in this Agreement.

II. GENERAL RESPONSIBILITIES OF OWNER

2.1 Owner, under the terms of this Agreement, hereby agrees to contribute Owner's Project Contribution of a maximum of **SIX HUNDRED TWENTY-EIGHT THOUSAND DOLLARS AND NO/100 (\$628,000.00)** towards City's Project costs as a reimbursement of construction costs incurred by City in including the construction of infrastructure improvements within City's Project scope of work, which includes the following:

- A two-way cycle track along the west side of Floyd Curl Drive from Louis Pasteur to Hamilton Wolfe;
- A two-way cycle track along the east side of Floyd Curl Drive from Hamilton Wolfe to Fawn Meadow;
- Sidewalks on both sides along Floyd Curl Drive from Louis Pasteur to Fawn Meadow;
- Landscaped medians from Fawn Meadow to Louis Pasteur;
- A mill & overlay from Louis Pasteur Drive to just short of Hamilton Wolfe; and

2.2 Owner's representative, Dick McNary, shall be the designated representative for the management of this Agreement. Owner's designated representative shall remain in place until written notification from Owner to City noting a change is received, acknowledged and approved by City.

2.3 City's Director of Transportation & Capital Improvements Department or his/her designee shall be responsible for the administration of this Agreement on behalf of City until the completion of the Project.

2.4 Communications between City and Owner shall be directed to the designated representatives of each Party, as set forth in **Section 2.02 and Section 2.03** herein above.

III. OWNER'S REPRESENTATIONS, WARRANTIES AND COVENANTS

3.1 Owner further represents and warrants:

3.1.1 All information, data or reports heretofore or hereafter provided by Owner to City is, shall be, and shall remain complete and accurate as of the date shown on the information, data or report, and since said date shown, shall not have undergone any significant change without written notice to City.

3.1.2 It is financially stable and capable of fulfilling its obligations under this Agreement and Owner shall provide City immediate written notice of any adverse material change in the financial condition of Owner that may materially and adversely effect its obligations hereunder.

3.1.3 No litigation or proceedings are presently pending or to Owner's knowledge, threatened against Owner.

- 3.1.4 None of the provisions contained herein contravene or in any way conflict with the authority under which Owner is doing business or with the provisions of any existing indenture or agreement of Owner.

IV. GENERAL RESPONSIBILITIES OF CITY

4.1 By entering into this Agreement, City agrees to accept SIX HUNDRED TWENTY-EIGHT THOUSAND DOLLARS AND NO/1000 (\$628,000.00) from Owner for construction of infrastructure improvements along Floyd Curl Drive.

4.2 City agrees to construct the Project within Owner's tract within eighteen (18) months of the execution of this Agreement, unless an extension is approved by the Director of TCI.

V. INDEMNITY

By entering into this Agreement, Owner covenants and agrees to FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, the City and the elected officials, employees, officers, directors, volunteers and representatives of the City, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the City directly or indirectly arising out of resulting from or related to Owner's activities under this Agreement, including any acts or omissions of Owner, any agent, officer, director, representative, employee, consultant, contractor or subcontractor of Owner, and their respective officers, agents, employees, directors and representatives while in the exercise of performance of the rights or duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of City, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT OWNER AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

5.1 The provisions of this Indemnity solely are for the benefit of the Parties hereto and not indented to create or grant any rights, contractual or otherwise, to any other person or entity. Owner shall advise the City in writing within 24 hours of any claim or demand against the City or Owner known to Owner related to or arising out of Owner's activities under this Agreement and shall see to the investigation and defense of such claim or demand at Owner's cost. The City shall have the right, at its option and at its own expense, to participate in such defense without relieving Owner of any of its obligations under this paragraph.

VI. CONFLICT OF INTEREST

6.1 Owner covenants to the best of its knowledge that neither it nor any member of its governing body or of its staff presently has any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Agreement. Owner further covenants, in the performance of this Agreement, no persons having such interest shall be employed or appointed as a member of its governing body or of its staff.

6.2 Owner further covenants that to the best of its knowledge no member of its governing body or its staff shall possess any interest in, or use their position for, a purpose that is or gives the appearance of being motivated by desire for private gain for themselves or others, particularly those with which they have family, business, or other ties.

6.3 No member of City's governing body or of its staff who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this Agreement shall:

6.3.1 Participate in any decision relating to this Agreement which may affect his or her personal interest or the interest of any corporation, partnership, or association in which he or she has a direct or indirect interest;

6.3.2 Have any direct or indirect interest in this Agreement or the proceeds thereof.

VII. POLITICAL ACTIVITY

None of the activities performed hereunder shall involve and no portion of the funds received hereunder shall be used, either directly or indirectly, to Owner's knowledge for any political activity including, but not limited to, an activity to further the election or defeat of any candidate for public office or for any activity undertaken to influence the passage, defeat or final content of local, state or federal legislation.

VIII. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL

All finished or unfinished reports, documents, data, studies, surveys, charts, drawings, maps, models, photographs, designs, plans, schedules, or other appended documentation to any proposal or contract, and any responses, inquiries, correspondence and related material submitted by Owner, shall, upon receipt, become the property of City.

IX. CHANGES AND AMENDMENTS

9.1 Except when the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof shall only be by amendment in writing executed by both City and Owner under authority granted by formal action of the Parties' respective governing bodies.

9.2 It is understood and agreed by the Parties hereto any changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this Agreement and any such changes automatically shall be incorporated into this Agreement without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

X. ASSIGNMENTS

Owner shall not transfer, pledge or otherwise assign this Agreement, any interest in this Agreement or any claim arising thereunder, without first procuring the written approval of City. Any attempt at transfer, pledge or other assignment shall be void *ab initio* and shall confer no rights upon any third person.

XI. SEVERABILITY OF PROVISIONS

If any clause or provision of this Agreement is held invalid, illegal or unenforceable under present or future federal, state or local laws, including, but not limited to, the City Charter, City Code or ordinances of the City of San Antonio, Texas, then and in that event it is the intention of the Parties hereto such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable

clause or provision was never contained herein. It also is the intention of the Parties hereto, in lieu of each clause or provision of this Agreement deemed invalid, illegal or unenforceable, there be added as a part of the Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

XII. NON-WAIVER OF PERFORMANCE

12.1 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either Party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

12.2 No act or omission of either Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to either Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

12.3 No representative or agent of City may waive the effect of the provisions of this Article without formal action from the City Council.

XIII. ENTIRE AGREEMENT

This Agreement constitutes the final and entire agreement between the Parties hereto and contains all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the Parties hereto unless same be in writing, dated subsequent to the date hereof and duly executed by the Parties.

XIV. NOTICES

14.1 For purposes of this Agreement, all official communications and notices among the Parties shall be deemed sufficient if in writing and mailed, registered or certified mail, postage prepaid, to the addresses set forth below:

CITY: Director Transportation & Capital Improvements
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OWNER: Dick McNary,
Owner's Representative
Medical Center Alliance
P.O. Box 8278, San Antonio, TX 78208

14.2 Notice of change of address by either Party must be made in writing and mailed to the other Party's last known address within five (5) business days of such change.

XV. PARTIES BOUND

This Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns, except as otherwise expressly provided herein.

XVI. RELATIONSHIP OF PARTIES

Nothing contained herein shall be deemed or construed by the Parties hereto, or by any third party, as creating the relationship of principal and agent, partners, joint venturers or any other similar such relationship between the Parties hereto.

XVII. TEXAS LAW TO APPLY

This Agreement shall be construed under and in accordance with the laws of the State of Texas and all obligations of the Parties created hereunder are performable in Bexar County, Texas.

XVIII. GENDER

Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.

XIX. CAPTIONS

The captions contained in this Agreement are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this Agreement.

XX. LEGAL AUTHORITY

20.1 Owner represents, warrants, assures, and guarantees it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement and to perform the responsibilities herein required.

20.2 The signer of this Agreement for Owner represents, warrants, assures and guarantees he or she has full legal authority to execute this Agreement on behalf of Owner and to bind Owner to all terms, performances and provisions herein contained.

EXECUTED IN DUPLICATE ORIGINALS, each of which shall have the full force and effect of an original this the ____ day of _____, 20____.

CITY OF SAN ANTONIO

MEDICAL CENTER ALLIANCE, a Texas
non-profit corporation

By: _____

By: _____

Mike Frisbie, P.E.
Director, Transportation & Capital
Improvements Department

Name: _____

Title: _____

APPROVED AS TO FORM:

CITY ATTORNEY

DRAFT