

INTERLOCAL AGREEMENT FOR HIKE AND BIKE TRAIL CONSTRUCTION

Rosewood Drive Extension and Heritage Oaks Hike and Bike Trail Segment 3A Project

RECITALS

A. This agreement (“Agreement”) is by and between the City of Killeen, a home rule municipal corporation in Bell County, Texas (“Killeen”), and the City of Harker Heights, a home rule municipal corporation in Bell County, Texas (“HH”), acting through their authorized representatives. Killeen and HH are collectively referred to in this Agreement as the “Parties.”

B. This Agreement will be deemed to be effective (“Effective Date”) immediately following the full satisfaction of the last condition precedent to this Agreement, which shall consist of: 1) HH City Council approval of this Agreement following receipt and tabulation of bids; and 2) Killeen City Council approval of this Agreement, which shall be sought contemporaneously with approval of bid award.

C. Rosewood Drive runs south near the east/west city limit boundary shared by the Parties. Killeen plans to extend Rosewood Drive further south to intersect with Chaparral Road. Alongside of Rosewood Drive is proposed to be a hike and bike trail. Killeen proposes to extend the hike and bike trail into the City limits of HH and tie into the Purser Family Park located in HH.

D. Killeen is now in the process of designing an extension to Rosewood Drive within its own city limits (“Rosewood Drive Extension.”) Killeen is requesting that the work extend into the HH city limits in order to provide the connectivity described above and, subject to the terms of this Agreement; Killeen will be responsible for the costs to do so.

E. By completing the work in a single project, the Parties avoid duplication of effort and expense in designing, bidding, administering, and constructing the improvements, thereby preserving taxpayer resources, while providing a direct benefit to the citizens of both communities by providing more efficient connectivity. In addition, by using one contractor the Parties expect to receive a more unified and higher quality of work, with reduced risk of disputes involving coordination and warranty support.

F. This Agreement is authorized by the Parties’ broad and inherent authority, as home-rule municipalities under Article 11, Section 5, of the Texas Constitution, to promote the public health, safety, and general welfare of their respective residents. In addition, this Agreement is authorized by §§791.011 and 791.028 of the Texas Government Code.

G. The purpose of this Agreement is to state the terms and conditions under which Killeen will participate in the contract administration and construction to occur within HH’s boundaries.

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, the Parties agree as follows:

1. **Term and Termination.**

A. Unless otherwise provided for, this Agreement shall commence on the Effective Date, and continue until the services specified in the Agreement have been fully and completely performed.

B. Continuation of this Agreement is contingent upon appropriation or availability of funds for this Agreement. If the City Council for any reason does not allocate funds for this Agreement in the annual budget for any given fiscal year, Killeen may terminate this Agreement in whole or in part effective as of the last day in the fiscal year for which sufficient funds were budgeted and appropriated for this Agreement. Termination for non-appropriation is not a default hereunder, and the terminating Party shall not incur any liability or penalty as a result thereof, except as provided herein. Party shall endeavor to notify the other in writing of any such non-allocation of funds at least sixty (60) days in advance.

C. In the bidding process for Rosewood Drive Extension, Killeen shall identify the Project as an Add Alternate. Continuation of this Agreement is contingent upon Killeen City Council awarding the bid and allocating funds for the Project. If the City Council for any reason does not allocate funds for the Project as a part of the Rosewood Drive Extension bid, Killeen may terminate this Agreement in whole or in part with a 10 day notice. Termination hereunder is not a default hereunder, and the terminating Party shall not incur any liability or penalty as a result thereof.

2. **Project.** The Project (herein so-called) consists of the construction of a 10 feet wide hike and bike trail (approximately 197 feet in length constructed within the city limits of HH, with concrete 5 inches thick and 4 inches of sand as a base) which connects with Purser Park trail within the city limits of HH. No lighting or railing to be provided for trail within HH city limits.

3. **Killeen Rights and Obligations.**

A. Killeen agrees to:

- (1) Either personally or through its agents and contractors furnish all bidding, contracting, construction, superintendence, administration, licenses, permits, facilities, tools, machinery, equipment, personnel, labor, materials and supplies necessary to complete the Project in the manner set forth herein.
- (2) Comply with all reasonable instructions, requests and guidance of HH relating to the Project.
- (3) Ensure that the Project bidding and contract documents conform to HH's reasonable requirements, and that all bonds, insurance, and other security associated with the Project inure to the benefit of HH.
- (4) Exercise reasonable precautions on behalf of, and be responsible for, the safety of its own officers, employees, agents, contractors, subcontractors, licensees, and

other persons, as well as their personal property, while performing services hereunder.

- (5) Maintain all records relating to the Project, and allow HH to inspect such records at reasonable times, upon advance request.
- (6) Enforce all applicable rights and remedies of the “owner” under the contract documents on behalf of HH as against any person or entity providing services in connection with the Project. HH will promptly upon demand reimburse Killeen for all reasonable expenses incurred in doing so.
- (7) Include HH on the distribution list for all notices and correspondence related to the Project, invite HH to all meetings with engineers or contractors concerning the Project, and give HH reasonable advance notice of all such meetings.
- (8) Promptly notify HH of any actual or potential accident or claim arising in connection with the Project, including any contractor disputes and any incident involving injury, death, or damage to property.
- (9) Promptly notify HH if at any time Killeen is unable to comply with its obligations hereunder, and state the reasons for noncompliance.

B. Killeen may subcontract all or any part of the work to be performed hereunder, provided that HH may object in writing to a subcontractor or supplier and shall have the opportunity to discuss its objections with Killeen. If Killeen agrees, no subcontractor or supplier to whom HH has a reasonable objection shall be used on the Project.

4. **HH Obligations.** HH agrees to:

A. Furnish all easements and rights of way that may be reasonably necessary for the completion of the Project. Subject to applicable laws and regulations, and payment of any applicable fees, promptly issue any HH permits or approvals required by Killeen’s contractors and subcontractors to complete the Project.

B. Upon reasonable advance notice, make any HH facilities or property available to Killeen to facilitate the performance of Killeen’s obligations hereunder. HH hereby grants a Temporary Construction Easement to the property identified as Parcel 4 as shown on Exhibit D. The purpose for the easement is for the construction of the Project and for providing pedestrian and vehicular ingress and egress thereto by Killeen, its employees and contractors, as necessary for said construction. The Temporary Construction Easement shall terminate one year after the completion of construction.

C. May conduct regular review, oversight and inspection of the Project to ensure that all services are properly performed, and promptly notify Killeen of any claimed deficiency in the work, with specific reasons and reasonable requirements stated for causing the work to be accepted.

D. During the course of the Project, not attempt to communicate or contract with any of Killeen's contractors or subcontractors concerning labor or materials to be incorporated into the Project, except with the express written consent of Killeen.

E. Coordinate and provide for the timely relocation of any utilities within the HH city limits that will be affected by the Project.

F. Coordinate and timely resolve any Federal or State mandated environmental issues specific to the Project, to include, without limitation, issues arising under the Federal or State CWA, CAA, CERCLA, or the Texas Antiquities Code.

G. Issue any and all public notices relating to the commencement or progress of construction deemed necessary for the benefit of HH's citizens and address any questions relating to the Project received from HH's citizens.

5. **Joint Obligations.** The Parties agree:

A. To meet regularly throughout the course of the Project to review the status, discuss any concerns that might arise, and coordinate any decisions materially affecting Project design, milestones, construction standards, or cost.

B. Not to unreasonably interfere with or delay the Project.

C. Not to unreasonably withhold, condition or delay any requested approval or consent made by a Party hereto.

D. To cooperate in defending any legal action instituted by a third party challenging (i) the validity of one or more provisions of this Agreement; (ii) the state and local legislation authorizing the Parties to enter into this Agreement; or (iii) any discretionary action and approvals of either Party regarding permits or other entitlements issued pursuant to this Agreement.

E. To execute and deliver any additional documents and instruments and to perform any additional acts necessary or appropriate to perform the terms, provisions, and conditions of this Agreement and all transactions contemplated by this Agreement, or to correct any defect, error or omission that may be discovered in this Agreement or any documents executed incidental to it.

F. That upon completion of the Project, HH shall accept the improvements and maintain the property and improvements within HH. Killeen makes no warranty regarding the quality of labor or materials incorporated into the Project, and expressly disclaims all liability for defects in workmanship and materials in the completed Project. Upon final completion, Killeen will assign to HH all warranties and bond rights with respect to the Project, and thereafter HH's sole recourse for any such defects will be directly against the contractors, underwriters, or other providers of such warranties and bond rights. However, in the event that any such warranties or rights are not assignable, Killeen agrees after the Term of this Agreement to enforce such warranties and rights in

its own name as nominee for the use and benefit of HH, and HH will promptly upon demand reimburse Killeen for all reasonable expenses incurred in doing so.

6. **Payment.**

A. Each party paying for the performance of governmental functions or services must make those payments from current revenues available to the paying party.

7. **Force Majeure.** Neither party shall be required to perform any term, condition or covenant hereunder for so long as performance is delayed or prevented by: acts of God; strikes; lockouts; orders or actions of any governmental or military authority; expropriation or confiscation of facilities; civil riots or disturbances; acts of war, terrorism, the public enemy, rebellion or sabotage; fires, floods, storms, epidemics, earthquakes, drought, explosions or other calamity; unavoidable accents or breakdowns, or any other cause not reasonably within the control of the party despite the exercise of due diligence by that party. If a party shall be delayed, hindered, or prevented from performance of any of its obligations by reason of force majeure, and such party is not otherwise in default, the time for performance of such obligation shall be extended for the period of such delay, provided that the affected party shall: (a) give prompt written notice to the other party; (b) diligently attempt to remove, resolve, or otherwise eliminate such event, keep the other party advised with respect thereto; and (c) commence performance of its obligations hereunder immediately upon such removal, resolution, or elimination.

8. **Dispute Resolution.** Any dispute between the Parties related to this Agreement that is not resolved through informal discussion may be submitted to a mutually acceptable mediation service or provider. The Parties to the mediation shall bear the mediation costs equally. Said mediation shall be non-binding. This paragraph does not preclude a Party from seeking equitable or other relief from a court of competent jurisdiction.

9. **Default and Remedies.**

A. Each of the following constitutes a material breach of this Agreement and an Event of Default by HH: (i) failing to fully and timely perform any covenant of HH under this Agreement; and (ii) making any representation to Killeen found to be materially false, misleading, or erroneous in connection with the Project.

B. Each of the following constitutes a material breach of this Agreement and an Event of Default by Killeen: (i) failing to fully and timely perform any covenant of Killeen under this Agreement; and (ii) making any representation to HH found to be materially false, misleading, or erroneous in connection with the Project.

C. If either party should commit an Event of Default, the party alleging such default shall give the other party not less than ten (10) days' notice specifying the nature of the alleged breach and, when appropriate, the manner in which the alleged breach may be satisfactorily cured. Notwithstanding the preceding sentence, if the nature of the alleged failure is such that the giving of ten (10) days' written notice is impractical due to a threat of harm to life or property, then the party alleging the failure shall give the other party such notice as may be reasonable under the circumstances.

D. In the event of an Event of Default that is not timely cured, the non-defaulting Party may (but shall not be obligated to), without prejudice to any other available right or remedy: (i) terminate this Agreement; (ii) seek recovery of any damage suffered; (iii) cure the default and receive reimbursement from the defaulting Party for all reasonable expenses incurred in doing so; (iv) discontinue payment or performance under this Agreement until the default is cured; (v) exercise any other remedy granted by this Agreement or by applicable law; or (vi) any combination of the foregoing.

E. Each party waives all special, incidental, consequential or punitive damages.

F. EACH PARTY WAIVES A TRIAL BY JURY OF ANY OR ALL ISSUES ARISING IN ANY ACTION OR PROCEEDING BETWEEN THE PARTIES HERETO OR THEIR SUCCESSORS, UNDER OR CONNECTED WITH THIS AGREEMENT, OR ANY OF ITS PROVISIONS.

G. It is not a waiver of default if the non-defaulting party fails to declare immediately a default or delays taking any action with respect to the default.

H. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees in addition to any other relief to which that party may be entitled.

10. **Notice.** All notices under this Agreement shall be in writing, and (a) delivered personally to the person to whom the notice is to be given, (b) given by certified or registered mail, return receipt requested, or (c) given by e-mail or facsimile transmission. Notice given by mail shall be effective three (3) days (exclusive of Saturdays, Sundays and postal holidays) after the same is deposited in the United States Postal Service, properly post-paid and certified and addressed to the party to be notified. Notice given by e-mail or facsimile transmission shall only be deemed received if the transmission thereof is confirmed and such notice is followed by written notice as provided in subparts (a) or (b) within three (3) business days following the e-mail or facsimile notice. Notice given in any other manner shall be effective only if and when actually delivered to the party to be notified or at such party's address for purposes of notice as set forth herein. A change in the notice address of any party may be effected by serving written notice of such change and of such new address upon the other party in the manner provided herein. Initially, notices shall be addressed as follows:

A. To HH:
 Mr. Mark Hyde
 Public Works Director
 305 Miller's Crossing
 Harker Heights TX 76548
 mhyde@ci.harker-heights.tx.us

With a copy to:

Mr. Burk Roberts
 Roberts & Roberts, LLP
 2501 East Elms Rd., Ste. A

Killeen TX 76542-3023
broberts@robertslegalfirm.com

- B. To Killeen:
Mr. David A. Olson
Executive Director of Public Works
3201-A South WS Young Dr.
Killeen, TX 76542
dolson@killeentexas.gov

With a copy to:

Mrs. Holli Clements
Killeen Deputy City Attorney – Public Works
P.O. Box 1329
Killeen TX 76540-1329
hclements@killeentexas.gov

11. **Miscellaneous.**

- A. **Assignment of Contract.** Neither of the Parties may assign this Agreement or any rights under the Agreement without the prior written consent of the other party, and any attempted or purported assignment in the absence of such consent shall be void. However, nothing herein shall be construed to prevent Killeen from subcontracting as provided herein.
- B. **Binding Effect.** Subject to the provisions regarding assignment, this Agreement shall be binding on the Parties and their respective representatives, successors and permitted assigns.
- C. **No Third-Party Beneficiaries.** There are no third-party beneficiaries of this Agreement. Nothing herein shall be construed to waive or limit any defense or immunity available to either Party in response to any third party claim.
- D. **Governing Law; Venue.** The Parties agree that this Agreement has been made in Texas and that it shall be governed by and construed pursuant to the laws of the State of Texas, without regard to choice of law rules of any other jurisdiction. Venue for any action to construe or enforce this Agreement shall be in Bell County, Texas.
- E. **Severability.** The provisions of this Agreement are severable. If a court or government agency of competent jurisdiction finds that any provision of this Agreement is unenforceable, the unenforceable provision shall be replaced, to the extent possible, with a legal, enforceable, and valid provision that is as similar in tenor to the unenforceable provision as is legally possible, and the Agreement as so-modified shall be enforced to the greatest extent permitted by law, except when such construction would operate as an undue hardship on a Party, or constitute a substantial deviation from the general intent and purpose of such parties as reflected in this Agreement.

F. Interpretation. Each Party has carefully read this entire Agreement, understands the meaning and effect of each and every provision contained herein, and acknowledges that it has relied on its own judgment in entering into this Agreement. Each Party executes this Agreement only after first having obtained, or having had the opportunity to obtain, competent legal advice. The use of the masculine or neuter genders herein shall include the masculine, feminine and neuter genders. The singular form shall include the plural when the context requires. Headings used throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held to explain, restrict, modify, amplify or aid in the interpretation or construction of the meaning of the provisions of this Agreement. The terms “hereof,” “hereunder” and “herein” shall refer to this Agreement as a whole, inclusive of all exhibits, except as otherwise expressly provided. This Agreement represents the result of extensive discussion between the parties, and thus should not be construed strictly for or against either party.

G. Amendment. The Parties agree that they may amend this Agreement only by a written agreement duly executed by persons authorized to execute agreements on behalf of the Parties.

H. Multiple Counterparts. To facilitate execution, this Agreement may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature or acknowledgment of, or on behalf of, each Party, or that the signature of all persons required to bind any Party, or the acknowledgment of such Party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. It shall not be necessary in making proof of this Agreement to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, and the respective acknowledgments of, each of the Parties hereto. Any signature or acknowledgment page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures or acknowledgments thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature or acknowledgment pages.

I. Entire Agreement. This Agreement is the complete and exclusive statement of the mutual understanding of the Parties. This Agreement supersedes and cancels all previous written and oral agreements and communications between the Parties relating to the subject matter of this Agreement. The exhibits, attachments and addenda which are a part of this Agreement are:

Exhibit D: Temporary Construction Easement Survey

CITY OF HARKER HEIGHTS

CITY OF KILLEEN

By: _____
David Mitchell, City Manager

By: _____
Ronald L. Olson, City Manager

Date: _____

Date: _____

ATTEST:

ATTEST:

Patricia Brunson, City Secretary

Dianna Barker, City Secretary

Date: _____

Date: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Burk Roberts, City Attorney

Kathy Davis, City Attorney