

CHARITABLE GRANT AGREEMENT

THIS CHARITABLE GRANT AGREEMENT (this "Agreement") is made and entered into and to be made effective as of August 25, 2017 by and between the CITY OF WIMBERLEY, a municipal corporation organized under the laws of the State of Texas ("City"), whose mailing address is P.O. Box 2027, Wimberley Texas 78676, and PETER M. WAY, an individual, and the WAY FAMILY FOUNDATION (collectively "Grantor"), whose address is P.O. Box 36530 Houston, Texas 77236.

RECITALS:

A. City intends to construct, subject to final approval by the Texas Department of Transportation for certain use of public right-of-way, a waste water system for downtown (the "Project"), as more particularly described in TPDES Permit No. WQ0013321001, TX0135445 and designed by Alan Plummer Associates, Inc. dated June 14, 2016 (the "Project Plans"). The "Project Plans" shall be deemed to include certain change orders customarily made in the construction of similar project, but shall expressly exclude any future systems, or other expansion of the Project as currently designed.

B. As of the date of this Agreement, the cost of the Project is estimated to be approximately \$6,500,000 (the "Project Budget"), which the City intends to be funded from a loan from the Texas Water Development Board in the approximate amount of \$5,500,000.00 and a grant from the United States Economic Development Administration in the approximate amount of \$1,000,000.00, in addition to funds currently available and expressly allocated to the cost of the Project by the City in the approximate amount of \$40,000.00. The total funds available to City for the construction of the Project, in the cumulative amount of approximately \$6,540,000.00 shall be collectively referred to herein as the "City Funds".

C. In anticipation of minor modifications of the Project and potential cost overruns customary for the completion of waste water utility systems, the City requires, prior to the commencement of the construction of the Project, confirmation of the availability of contingency funds to ensure that the Project can be completed in accordance with the Project Plans.

D. For several years, the Grantor has advocated to the City that the Project be completed and desires to see the Project completed. In consideration for ensuring that the City timely commences the construction of the Project, Grantor has agreed to make the Grant (as defined below) available to the City as contingency funds which shall be disbursed in accordance with this Agreement to ensure that the Project be completed in accordance with the Project Plans.

NOW, THEREFORE, in consideration of Ten and 00/100 Dollars (\$10.00) paid in hand and the mutual covenants and agreements of the parties hereinafter set forth, the receipt and sufficiency of which are hereby acknowledged, it is mutually covenanted and agreed as follows:

ARTICLE I. THE GRANT

Section 1.1 The foregoing recitals to this Agreement are incorporated herein and made a part hereof by reference to the same extent as if herein set forth in full.

Section 1.2 In consideration for (a) ensuring that the City timely commence and complete the Project in accordance with the Project Plans, (b) promoting the environmental benefits which are intended to

result from the Project and (c) other intangible benefits, Grantor has agreed to make available to the City an amount up to (but not to exceed) the sum of ONE MILLION AND NO/DOLLARS (\$1,000,000.00) (the “Grant”). The Grant (or portions thereof) shall be disbursed to the City in accordance with Article III of this Agreement, in the event that (a) the actual cost of the construction of the Project exceeds the Project Budget and (b) the City has expended all City Funds allocated to the Project.

Section 1.3 By its signature below, Compass Bank hereby acknowledges that Grantor maintains one or more accounts with a sufficient balance to satisfy the Grant and Grantor’s obligations under this Agreement and Compass Bank is prepared to disburse the Grant (or portions thereof) at the direction of Grantor in accordance with this Agreement. As contemplated by Section 3.2, Grantor agrees to maintain at Compass Bank funds sufficient to satisfy Grantor’s obligation to make Advances pursuant to this Agreement. Compass Bank shall have no other obligations or responsibilities under this Agreement except as contained in this Section 1.3. Notwithstanding the foregoing, City hereby agrees and understands that Grantor retains the right to ultimately have the Grant paid from any other of its accounts at its sole discretion and in such manner as to obtain and/or preserve tax benefits, including a charitable deduction, for all funds applied to the Grant.

Section 1.4 AS A MATERIAL PART OF THE CONSIDERATION OF THIS AGREEMENT, CITY HEREBY AGREES AND ACKNOWLEDGES THAT THE GRANT SHALL BE USED SOLELY FOR THE COMPLETION OF THE PROJECT IN ACCORDANCE WITH THE PROJECT PLANS. NO GRANT FUNDS SHALL BE USED BY THE CITY FOR ANY OTHER PURPOSE.

ARTICLE II. CONSTRUCTION OF PROJECT

Section 2.1 City covenants and agrees to use all commercially reasonable efforts to perform or cause to be performed any and all of the construction obligations (including, without limitation, material compliance with all design, development, construction and delivery schedules and deadlines) and to cause: (a) the commencement of the Project on or before December 31, 2017; and (b) completion of the Project to occur on or before twenty-four (24) months after the date of the actual commencement of construction of the Project.

Section 2.2 The Project shall be constructed in substantial accordance with the Project Plans, subject to certain change orders customarily made in the construction of similar projects. The Project Plans are incorporated herein and made a part hereof by reference to the same extent as if herein set forth in full, and the same shall not be changed or modified in any material respect without the written notice to Grantor.

ARTICLE III. ADVANCES

Section 3.1 Following the commencement of the Project, City shall keep Grantor reasonably informed regarding the status of the Project, including providing periodic updates regarding the status of construction, estimated completion dates for the Project, any change orders to the Project Plans, any changes to the Project Budget and availability of remaining City Funds. The City shall provide prompt written notice to Grantor (but in all events, at least ninety (90) days prior written notice of any requested disbursement of the Grant) when it reasonably anticipates that (a) the actual cost of the construction of the Project will exceed the Project Budget (“Project Cost Overrun Amount”) and (b) all City Funds allocated to the Project will be exhausted (“Grant Notice”). The Grant Notice shall specify the (a) total amount of the anticipated Project Cost Overrun to complete the Project; (b) City’s next required Advance (as defined below) and (c) date the City is requesting that such Advance be made.

Section 3.2 Promptly upon receipt of any Grant Notice, Grantor shall make arrangements to ensure that funds sufficient to satisfy the Project Cost Overrun Amount, in an amount **not** to exceed the Grant, be made available to advance to the City in accordance with this Agreement. Any installment of the Grant (each an “Advance”) shall be disbursed by Grantor to City, from time to time but not more frequently than once in any 30-day period, and only after compliance by City with all of the terms and conditions specified in Section 3.4 of this Agreement as conditions or requirements for Advances. Advances shall only be made for the payment of actual costs of labor and materials, equipment and services performed or supplied for the construction of the Project. City shall submit requisitions for an Advance of the Grant at least ten (10) days prior to the date of the anticipated disbursement. All request for an Advance for payment shall be submitted on AIA Forms G-702 and G-703, Application and Certification for Payment, or such other form as Grantor may hereafter reasonably require. Provided City has complied with all of the applicable terms, conditions and provisions set forth in this Agreement as conditions for Advances, Grantor shall disburse such requested portion of the Grant to City within ten (10) days after receiving City’s request for an Advance. Grantor may, at its sole and absolute option, make any and all disbursements or portions thereof for construction expenses directly to City or directly to any contractor or subcontractor owed more than Twenty-Five Thousand and 00/100 Dollars (\$25,000.00), and/or in an appropriately designated special bank account and the execution of this Agreement by City shall, and hereby does, constitute an irrevocable direction and authorization to so advance the funds. In the event Grantor disburses funds to City, any contractor or subcontractor, Grantor shall provide City with timely notice of such disbursement. Grantor agrees that if the City’s request for an Advance is for an allowed expense (*i.e.*, payment or reimbursement of the bills for the labor, materials, fixtures, interest, fees and services used in the development of the Project and the construction of the Project) and otherwise satisfies the terms of this Agreement, Grantor shall be obligated to make such Advance and shall not have discretion to refuse a request that is consistent with the Project plans and satisfies the terms of this Agreement.

Section 3.3 City covenants and agrees that it will hold all Advances of the Grant it receives from Grantor as a trust fund to be withdrawn and used solely for the payment or reimbursement of the bills for the labor, materials, fixtures, interest, fees and services used in the development of the Project and the construction of the Project for which such Grant funds were requested by City, and for no other purpose whatsoever. Each and every request for an advance presented by City to Grantor shall constitute a representation and warranty by City to Grantor, that (a) all City Funds have been exhausted (or will have been exhausted but for the requested Advance) towards the construction of the Project, and with respect to the work, materials, and services for which payment is requested by City: (b) that such work, materials and services have been incorporated into the Project or have been or will be purchased for use in the Project; (c) that the value thereof is as estimated therein to the best of its knowledge; (c) that to the best of its knowledge such work and materials conform in all material respects to the Project Plans and Specifications, and this Agreement; and (d) that the sums requisitioned for such work, materials and services for which payment is requested by City have either (i) theretofore been in fact paid for in cash by City, or (ii) are then due and owing by City and will in fact be paid in cash by City within ten (10) days after City’s receipt of the requested advance, only to unrelated third parties for work performed and materials supplied for construction of the Project.

Section 3.4 Not less than five (5) business days prior to any Advance, to the reasonable satisfaction of Grantor, the following conditions shall have been satisfied by City, at no cost to Grantor:

(a) City shall have submitted to Grantor an updated project budget, identifying (i) all variances from the initial Project Budget, (ii) the total Project costs previously paid for, (iii) the status of construction of the Project, including the specification of all incomplete portions of the Project Plan; (iv) the anticipated outstanding Project Overrun Amount, (v) the anticipated completion date of the Project; and (vi) a cash disbursement projection setting forth any anticipated future Advance requests and

verifying that that the outstanding Project Overrun Amount does **not** exceed the undisbursed portion of the Grant.

(b) City shall have submitted any new change orders to the Project Plan.

(c) City otherwise shall have complied with all other terms and conditions of this Agreement applicable to any previous Advance, and Grantor determines, in its reasonable judgment that all material portions of the work completed at the time of the application for an Advance shall have been performed in accordance with the Project Plans.

(d) Grantor may, in its sole and absolute discretion, require that it be provided with an updated Certification by City and such additional evidence as Grantor may reasonably require that the matters set forth in the Grant Notice and previous Advances Notices, as applicable, are true and accurate in all material respects or if not, the reasons why.

Section 3.5 Whenever so requested by Grantor, City will promptly furnish Grantor written evidence satisfactory to Grantor that all monies theretofore advanced by Grantor have actually been applied in payment of the cost of construction of the Project and in payment of the other items of costs for which such funds were advanced by Grantor, and until such evidence is produced, at the option of Grantor, no future or additional payments or Advances of the Grant need be made hereunder. City shall segregate all of its records relating to the Grant and construction of the Project and shall make those records available to Grantor for inspection upon Grantor's request during usual business hours.

**ARTICLE IV.
RIGHT OF ENTRY AND ACCESS TO BOOKS, RECORDS AND PLANS**

Section 4.1 City shall maintain at the Project a copy of all sealed drawings, specifications, approved shop drawings, change orders and other modifications, together with all written or graphic interpretations and clarifications thereto in good order and marked to include all changes made during construction of the Project. These documents shall be available to the Grantor at all reasonable times.

**ARTICLE V.
ASSIGNMENT**

Section 5.1 No party may, without the prior written consent of the other party, assign or otherwise transfer this Agreement, except that City may pay or otherwise transfer any portion of the Grant to its contractor or any other third party in connection with the construction of the Project.

**ARTICLE VI.
NOTICES**

All notices and communications which are required or are permitted hereunder shall be in writing and shall be either hand delivered, or by national, overnight receipted courier service (such as Federal Express or UPS) with delivery charges prepaid by sender, or mailed by certified U.S. mail, return receipt requested, postage prepaid, or in any other manner as herein provided, and addressed to the parties as follows:

City:	Attention: City Administrator City of Wimberley P.O. Box 2027 Wimberley Texas 78676
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With a copy to: Attention: City Attorney
City of Wimberley
c/o Bickerstaff Heath Delgado Acosta LLP
3711 South Mopac Expressway
Building One, Suite 300
Austin, Texas 78746

Grantor: Attn: Peter Way
P.O. Box 36530
Houston, Texas 77236

With a copy to: Sneed, Vine & Perry, P.C.
Attn: Adam S. Wilk
900 Congress Avenue, Suite 300
Austin, Texas 78701

or to such other address as either party shall designate by written notice to the other in the manner provided herein. All such notices shall be effective and be deemed given and received on the earlier of actual receipt, the third business day after being deposited in the U.S. Mail as aforesaid or the next business day after deposit in such overnight receipted courier service as aforesaid or via facsimile transmission as described above.

ARTICLE VII. MISCELLANEOUS

Section 7.1 Grantor shall not be responsible, liable or obligated to any contractors, subcontractors, suppliers, materialmen, laborers, architects, engineers, or to any other parties, for services or work performed, or for goods delivered by them or any of them, for the Project or employed directly or indirectly in the construction of the Project, or for any debts or claims whatsoever accruing in favor of any such parties and against City or others. It is distinctly understood and expressly agreed that City is not and shall not be an agent of Grantor for any purpose whatsoever. Without limiting the generality of the foregoing, advances made, at Grantor's option, directly to any contractor, or any subcontractor or supplier of labor and/or materials, or to any other party, shall not be deemed a recognition by Grantor of any third party beneficiary status of any such person or entity.

Section 7.2 Neither the failure nor the delay of either party to exercise any right, option, power or privilege under this Agreement nor any advance hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any such right, option, power or privilege by either party operate as a waiver of any such right, option, power or privilege.

Section 7.3 All personal pronouns used herein, whether used in the masculine, feminine or neuter gender, shall include all other genders. The singular shall include the plural unless the context of the Loan Agreement shall specifically provide to the contrary.

Section 7.4 Time shall be of the essence of this Agreement. This Agreement shall terminate on the later of: (1) October 31, 2017, concurrently with the expiration of current funding commitments by the Texas Water Development Board (TWDB); or (2) in the event of an extension by the TWDB of the October 31, 2017 expiration date or any future expiration date(s), on such date that all TWDB commitments expire and are not extended.

Section 7.5 The parties understand and agree that this Agreement is subject to public disclosure under the Texas Public Information Act.

Section 7.6 The headings used herein are inserted only for convenience of reference and in no way define, limit or describe the scope or intent of this Agreement or of any particular paragraph or section hereto.

Section 7.7 This Agreement shall be construed and enforced according to, and governed by, the laws of the State of Texas except to the extent preempted by Federal law, without regard to any conflicts of law provisions.

Section 7.8 If any clause or provision herein contained operates or would prospectively operate to invalidate this Agreement in whole or in part, then such clause or provision only shall be held for naught, as though not herein contained, and the remainder of this Agreement shall remain operative and in full force and effect.

Section 7.9 This Agreement may be executed in multiple counterparts, each of which shall be an original instrument and which, taken together, constitutes one and the same agreement.

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IN WITNESS WHEREOF, City and Grantor, intending to be legally bound, have executed and delivered this Agreement under seal as of the day and year first above written.

CITY:

CITY OF WIMBERLEY

By: _____
Name: _____
Title: _____

GRANTOR:

Pt. M W
PETER WAY

WAY FAMILY FOUNDATION

By: Pt M W
Name: PETER M. WAY
Title: DONOR

AGREED AND ACKNOWLEDGED, SOLELY FOR THE PURPOSES OF ACKNOWLEDGING SECTION 1.3 OF THIS AGREEMENT:

COMPASS BANK

By: Mark W. Matson
Name: Mark W. Matson
Title: Houston - CEO