

## **INTERLOCAL AGREEMENT AND MEMORANDUM OF UNDERSTANDING**

This Interlocal Agreement and Memorandum of Understanding (“MOU”) is hereby executed this the 18 day of May, 2021 by and between the City of San Marcos, a Texas home rule municipality (“the City”), and Hays County, a political subdivision of the State of Texas (“the County”) (collectively, the “Parties”), related to the Cape’s Dam Complex.

### **RECITALS**

**WHEREAS**, both the City and the County have made significant investments within the corporate limits of the City of San Marcos in the areas of Parks, Open Space, and Conservation; and

**WHEREAS**, the City and the County have also both invested in open space that benefits the health of the San Marcos River while providing responsible public access to it and the surrounding areas; and

**WHEREAS**, the City and the County have both considered the current condition of the complex known as Cape’s Dam and the Mill Race, which provides water to the waterfall at Stokes’ Park, owned by Texas Parks and Wildlife and managed by the City of San Marcos (the “Cape’s Dam Complex”); and

**WHEREAS**, the Parties recognize that the current condition of Cape’s Dam and the Mill Race presents hazards which have been mitigated by the City but warrant additional work; and

**WHEREAS**, the Hays County Historical Commission has pointed out that the Cape’s Dam Complex has been designated as a “Trinomial” in recognition of its historic importance and relevance; and

**WHEREAS**, the scientific community has also pointed out that the flow rate in the main channel of the San Marcos River and the Mill Race are important factors to consider in the protection of river wildlife, including endangered species such as the Fountain Darter, populations of which have been found in both the main channel and the Mill Race; and

**WHEREAS**, the City and the County have had discussions to determine the best way to accommodate and balance the values of **public safety, environmental conservation, public safety, historic preservation, and public recreation (“the Values”), in that order of priority;** and

**WHEREAS**, the City and the County wish to collaborate in the formation of a plan for the Cape’s Dam Complex that accommodates all of the aforementioned Values;

**NOW, THEREFORE**, in consideration of the foregoing and the mutual terms and conditions of this MOU, the County and City agree as follows:

## **ARTICLE 1 PURPOSE**

The purpose of this MOU is to provide a framework for collaboration and cost-sharing in regard to the proposed rehabilitation of the Cape's Dam Complex. This framework would begin with (a) due diligence and analysis of the current condition of the Cape's Dam Complex and its impact(s) on the Values, as well as how the proposed rehabilitation would impact the Values, (b) due diligence and analysis of what permitting would be needed to perform work on the Cape's Dam Complex, (c) development of a plan, which would include permitting for work on the Cape's Dam Complex, and (d) implementation of that plan.

## **ARTICLE 2 PHASED APPROACH – TASK ORDERS**

**2.1** The Parties agree to utilize a phased approach to fulfill the Purpose cited above, beginning with exploration of alternatives, with full consideration given to each of the Values. This phased approach shall be utilized by way of Task Orders, which shall include each of the details referenced in the Task Order form, attached hereto and incorporated herein as **Exhibit A**.

**2.2** **PHASE 1:** The Parties agree that the Phase 1 Task Orders shall engage the services of subject matter experts equipped with training and experience to provide input into the methods for fulfilling the Purpose cited in Article 1, above, while also protecting the Values. It is anticipated that the Parties would engage professionals specializing in Biology, Endangered Species Protection, Historical Preservation, Parks and Open Space Planning and/or Structural Engineering.

**Task Order #1:** The Parties agree that the first Task Order executed under this Phase shall be tailored to engage the services of a Program Manager, which shall a) act as a liaison between the City and the County, b) work with the City and the County to identify a scope work to be performed and assess funding needed for on the Cape's Dam Complex, c) act as a representative of the Parties by providing oversight of work being performed at the Cape's Dam Complex, d) receive and organize input from the public regarding the Cape's Dam Complex, and e) perform other contractual duties agreed upon by the City and the County.

**2.3** **PHASE 2:** The Parties agree that the Phase 2 Task Orders shall engage the services of subject matter experts equipped with training and experience to create a conceptual plan for proposed work on the Cape's Dam Complex, as well as those professionals experienced in attaining the needed permits to perform the proposed work.

**2.4** **PHASE 3:** The Parties agree that the Phase 3 Task Orders shall engage the services of contractors qualified to perform the work conceptualized and permitted by Phase 2 operations. The Parties agree that the work performed in Phase 3 shall be planned and implemented to maximize protection of each of the Values.

**2.5 PHASE 4:** The Parties agree that the Phase 4 Task Orders shall implement an operational plan to ensure proper protection and maintenance of the Cape’s Dam Complex over the remaining term of this MOU, and which shall be utilized to arrange a long-term collaborative effort between the Parties.

**2.6 FUNDING AND PROCUREMENT:** This Agreement does not, without subsequent agreement to the terms of a Task Order, bind either Party to expend funds. The Parties agree to discuss and mutually agree how each Task Order shall be funded, on a task-by-task basis; and to each make a diligent effort to secure third-party funding (e.g. grants, etc.) to assist in fulfillment of the Purpose stated in Article 1. Likewise, procurement of the work described in a particular Task Order shall be performed by either Party, on a task-by-task basis, and shall fully comply with federal and state law, as well as the policies of the entity performing the procurement.

**2.7 TASK ORDER EXECUTION:** Each Party shall be responsible for establishing its own protocols for the execution of Task Orders under this MOU. The Parties agree that any individual executing Task Orders under this MOU shall be duly authorized by Council or Court, as appropriate.

**2.8 PROGRESS UPDATES:** Each Party shall receive periodic project updates and presentations regarding major milestones.

### ARTICLE 3 PUBLIC ENGAGEMENT

**3.1 Phase 1 Engagement:** The agreement with the contractor for Program Management Services described in Section 2.2, above, shall include the responsibility of receiving and organizing Public Comments for consideration by the Parties, during Phase 1 activities. The contractor will place priority on communications with the nearby neighborhoods of Blanco Gardens and Wallace Addition.

**3.2 Phase 2 Engagement:** The Parties agree to prioritize public engagement as part of Conceptual Planning during Phase 2 activities. Such public engagement may include in-person or virtual community meetings designed to provide an opportunity for citizen feedback before finalization of a conceptual plan. The contractor will place priority on communications with the nearby neighborhoods of Blanco Gardens and Wallace Addition.

### ARTICLE 4 TERM AND TIME OF PERFORMANCE

**4.1** The effective date of this MOU shall be the date last executed by the Parties, below (the “Effective Date”). The term of the MOU shall continue from the Effective Date until September 30, 2025, or until the Parties have fulfilled all obligations under this MOU.

### ARTICLE 5 NOTICE

**5.1** Except as may be otherwise specifically provided in this MOU, all notices, demands, requests, or communications related to non-compliance issues required or permitted hereunder shall be in writing and shall either be (i) personally delivered against a written receipt, or (ii) sent by registered or certified mail, return receipt requested, postage prepaid and addressed to the parties at the addresses set forth below, or at such other addresses as may have been theretofore specified by written notice delivered in accordance herewith:

If to the County:

Hays County  
Attn: County Judge  
111 E. San Antonio, Suite 300  
San Marcos, Texas 78666

If to the City:

City of San Marcos  
Attn: Bert Lumbreras  
630 E. Hopkins Street  
San Marcos, Texas 78666

**ARTICLE 6  
DISPUTE RESOLUTION**

**6.1** Negotiation. The Parties will attempt in good faith to resolve promptly through negotiation any claim or controversy arising out of or relating to this MOU. If a controversy or claim should arise, the Parties agree to each select a Representative and to have those Representatives meet at least once to attempt in good faith to resolve the dispute. For such purpose, any Party may request the others to meet within ten (10) days, at a mutually-agreed-upon time and place. The Parties shall, within ten (10) days after the Effective Date of this MOU, each designate to the other their respective Representatives, who shall be an executive-level individual with authority to settle disputes. Each of the Parties may change the designation of its Representative, but shall maintain at all times during the term of this MOU a designated Representative and shall ensure that the other Parties are notified of any change in the designation of its Representative.

**6.2** Mediation. If the dispute has not been resolved within sixty (60) days after the first meeting of the designated Representatives (or such longer period of time as may be mutually agreed upon), any of the parties may refer the claim or controversy to non-binding mediation conducted by a mutually-agreed-upon party qualified to perform mediation of disputes related to the subject matter of this MOU (herein referred to as the "Mediator") by sending a written mediation request to the other party. In the event that such a request is made, the Parties agree to participate in the mediation process. The Parties and the Mediator may join in the mediation any other party necessary for a mutually acceptable resolution of the dispute. Should the Mediator ever be unable or unwilling to continue to serve, the parties shall select a successor Mediator. The mediation procedure shall be determined by the Mediator in consultation with the parties. The fees and expenses of the Mediator shall be borne equally by the parties.

**6.3** Litigation. If the dispute is not resolved within thirty (30) days after the commencement of mediation, or if no mediation has been commenced within ninety (90) days after the first meeting between Representatives (or such longer period of time as may be mutually agreed upon), any of the Parties may commence litigation to resolve the dispute in any Texas state court

of competent jurisdiction, or in the United States District Court for the Western District of Texas to the extent said Court shall have jurisdiction over the matter.

## **ARTICLE 7 MISCELLANEOUS**

**7.1** Budget Out. Notwithstanding any other provision of this MOU, if the San Marcos City Council or the Hays County Commissioners Court fails to appropriate or budget funds to meet the terms and conditions cited herein, including any Task Orders executed pursuant to this Agreement, then the non-appropriating entity shall not be obligated to fulfill the its obligations under this MOU.

**7.2** Entire Agreement. This MOU represents the entire and integrated agreement between the County and the City and supersedes all prior negotiations, representations or arguments either written or oral.

**7.3** Lawful Authority. The execution and performance of this MOU by the County and the City have been duly authorized by all necessary laws, resolutions or corporate action, and this MOU constitutes the valid and enforceable obligations of the County and the City in accordance with its terms.

**7.4** Amendments. No amendment, modification or alteration of the terms hereof shall be binding unless the same shall be in writing and dated subsequent to the date hereof and duly executed by the parties hereto.

**7.5** Independent Parties. It is understood and agreed between the Parties that the County and the City, in executing this MOU, and in performing their respective obligations, are acting independently, and not in any form of partnership or joint venture.

**7.6** Construction. The captions and headings contained in this MOU are solely for convenient reference and will not be deemed to affect the meaning or interpretation of any provision or paragraph hereof. All references in this MOU to any particular gender are for convenience only and will be construed and interpreted to be of the appropriate gender. For the purposes of this MOU, the term “will” is mandatory. Should any provision in this MOU be found or deemed to be invalid, this MOU will be construed as not containing such provision, and all other provisions which are otherwise lawful will remain in full force and effect, and to this end the provisions of this MOU are declared to be severable.

**7.7** Conflict with Applicable Law. Nothing in this MOU shall be construed so as to require the commission of any act contrary to law, ordinance or administrative executive or judicial regulation, order or decree, or amendment thereof, contrary to which the parties have no legal right to contract.

**7.8** No Waiver. No waiver by a Party of any breach of any provision of this MOU shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other provision hereof.

**7.9** Public Information Act. City and County are governed by the Texas Public Information Act, Chapter 552 of the Texas Government Code. This MOU and all written information generated under this MOU may be subject to release under this Act.

**7.10** Additional Documents. The City and the County recognize that it may become necessary to approve and execute other and further instruments and documents to effectuate and carry out the terms of this MOU.

**7.11** Compliance with Laws. In performing this MOU, the City and the County will comply with all local, state and federal laws.

**7.12** Counterparts. This MOU has been executed by the parties in multiple originals or counterparts each having full force and effect.

[SIGNATURES ON NEXT PAGE]

This Interlocal Funding Agreement and Memorandum of Understanding is hereby EXECUTED on this \_\_\_\_ day of \_\_\_\_\_, 2021.

**County of Hays:**

By: \_\_\_\_\_  
Ruben Becerra  
Hays County Judge

ATTEST:

\_\_\_\_\_  
Elaine Cardenas, MBA, PhD  
Hays County Clerk

**The City of San Marcos:**

By: \_\_\_\_\_  
Bert Lumbreras  
City Manager

ATTEST:

\_\_\_\_\_  
Tammy Cook, Interim City Clerk

**EXHIBIT "A"**  
**Form of Task Order**

**Task Order #** \_\_\_\_\_  
**Task Name:** \_\_\_\_\_

**Project Background:** \_\_\_\_\_.

**Project Description:** \_\_\_\_\_.

**Hays County Responsibility:** \_\_\_\_\_.

**City of San Marcos Responsibility:** \_\_\_\_\_.

**Deliverables:** A. \_\_\_\_\_.  
B. \_\_\_\_\_.  
C. \_\_\_\_\_.

**Project Schedule:**

Project will start on or after \_\_\_\_\_ and be complete no later than \_\_\_\_\_.

**Project Budget:**

**Hays County Contact:**

**Mark Kennedy**  
**General Counsel**  
[mark.kennedy@co.hays.tx.us](mailto:mark.kennedy@co.hays.tx.us) (with copy to [janice.jones@co.hays.tx.us](mailto:janice.jones@co.hays.tx.us))  
**(512) 393.2219**

**City of San Marcos Contact:**

**Bert Lumbreras**  
**City Manager**  
\_\_\_\_\_  
\_\_\_\_\_

**Task Order #1, Blanco "No Discharge" Study, is executed by:**

**Hays County      City of San Marcos**

**BY** \_\_\_\_\_

**BY** \_\_\_\_\_

**NAME** \_\_\_\_\_

**NAME** \_\_\_\_\_

**TITLE** \_\_\_\_\_

**TITLE** \_\_\_\_\_

**DATE** \_\_\_\_\_

**DATE** \_\_\_\_\_