

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** by and between the **NEW BRAUNFELS ECONOMIC DEVELOPMENT CORPORATION**, a Texas non-profit corporation (hereinafter referred to as the “EDC”), and **CITY OF NEW BRAUNFELS, TEXAS**, a Texas home-rule municipality (hereinafter referred to as “City”), is made and executed on the following recitals, terms and conditions.

WHEREAS, the EDC is a Type B economic development corporation, created pursuant to Chapter 505 of the Texas Local Government Code, as amended; and

WHEREAS, Section 505.152 of the Texas Local Government Code, in pertinent part, defines the term “project” to mean “land, buildings, equipment, facilities, and improvements found by the board of directors to be required or suitable for use for professional and amateur sports, including children’s sports, athletic, entertainment, tourist, convention, and public park purposes and events, including stadiums, ball parks, auditoriums, amphitheaters, concert halls, parks and park facilities, open space improvements, museums, exhibition facilities, and related store, restaurant, concession, and automobile parking facilities, related area transportation facilities, and related roads, streets, and water and sewer facilities, and other related improvements that enhance any of the items described by this section”; and

WHEREAS, City has applied to EDC for financial assistance necessary to acquisition certain real property consisting of approximately 1.126-acre tract being commonly known as 263 Main Plaza, New Braunfels, Comal County, Texas, 78130, and being more particularly described in *Exhibit A* of this Agreement, which is attached hereto and incorporated herein for all purpose; and

WHEREAS, the EDC’s Board of Directors have determined the financial assistance provided to City pursuant to this Agreement is consistent and meets the definition of “project” as that term is defined in Section 505.152 of the Texas Local Government Code; and the definition of “cost” as that term is defined by Section 501.152 of the Texas Local Government Code; and

WHEREAS, City agrees and understands that Section 501.073(a) of the Texas Local Government Code requires the City Council of the City of New Braunfels, Texas, to approve all programs and expenditures of the EDC, and accordingly this Agreement is not effective until City Council has approved this project at a City Council meeting called and held for that purpose.

NOW, THEREFORE, for and in consideration of the agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the EDC and City agree as follows:

SECTION 1. FINDINGS INCORPORATED.

The foregoing recitals are hereby incorporated into the body of this Agreement and shall be considered part of the mutual covenants, consideration and promises that bind the parties.

SECTION 2. TERM.

This Agreement shall be effective as of the Effective Date, as defined herein, and shall continue thereafter until **September 30, 2030**, unless terminated sooner under the provisions hereof.

SECTION 3. DEFINITIONS.

The following words shall have the following meanings when used in this Agreement.

- (a) **Act.** The word “Act” means Chapters 501 to 505 of the Texas Local Government Code, as amended.
- (b) **Agreement.** The word “Agreement” means this Performance Agreement, together with all exhibits and schedules attached to this Agreement from time to time, if any.
- (c) **City.** The word “City” means the City of New Braunfels, Texas, a Texas home-rule municipality, its successors and assigns, whose address for the purposes of this Agreement is 550 Landa Street, New Braunfels, Texas 78130.
- (d) **EDC.** The term “EDC” means the New Braunfels Economic Development Corporation, a Texas non-profit corporation, its successors and assigns, whose corporate address for the purposes of this Agreement is 550 Landa Street, New Braunfels, Texas 78130.
- (e) **Effective Date.** The words “Effective Date” mean the date of the latter to execute this Agreement by and between the City and the EDC.
- (f) **Event of Default.** The words “Event of Default” mean and include any of the Events of Default set forth below in the section entitled “Events of Default.”
- (g) **Property.** The word “Property” means that certain tract, piece or parcel of land situated in Comal County, Texas, and being Lots 40, 42, and part of Lot 36, Block 1005, being a 1.126 acre tract in the City of New Braunfels, Comal County, Texas, and being those lots described by deed recorded in Volume 56, Pages 150-153, LESS that portion of Lot 36 conveyed by deed recorded in Volume 57, Pages 307-309, Deed Records of Comal County, Texas, said 1.126 acre tract being commonly known as 263 Main Plaza, New Braunfels, Comal County, Texas, 78130, and being more particularly described in **Exhibit A** of this Agreement, which is attached hereto and incorporated herein for all purposes.
- (h) **Qualified Expenditures.** The words “Qualified Expenditures” mean those expenditures consisting of the acquisition of the Property by the City for a purchase price of **Four Million Five Hundred Fifty Thousand and No/100 Dollars (\$4,550,000.00)** which is the appraised value for the Property, and those expenditures which otherwise meet the definition of “project” as that term is defined in Section 505.152 of the Act, and meet the definition of “cost” as that term is defined in Section 501.152 of the Act.

- (i) **Term.** The word “Term” means the term of this Agreement as specified in Section 2 of this Agreement.

SECTION 4. AFFIRMATIVE COVENANTS OF CITY.

City covenants and agrees with EDC that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Qualified Expenditures.** City covenants and agrees to submit to the EDC paid invoices, paid receipts, or other paid documentation of the Qualified Expenditures in a form acceptable to the EDC within 120 days of the Effective Date of this Agreement.
- (b) **Operate Park Facility.** City covenants and agrees to maintain and operate the Property or portions of the Property as a public park consistent with Section 505.152 of the Act during Term of this Agreement.
- (c) **Performance.** City agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements by and between the City and EDC.

SECTION 5. AFFIRMATIVE COVENANTS OF EDC.

EDC covenants and agrees with City that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Financial Assistance for Qualified Expenditures.** EDC covenants and agrees to provide financial assistance in the aggregate amount of **Four Million Five Hundred Fifty Thousand and No/100 Dollars (\$4,550,000.00)** to the City to be used by City for the Qualified Expenditures, with \$500,000 due by August 1, 2024, and the balance to be paid as follows:
- (1) **Five Hundred Thousand and No/100 Dollars (\$500,000.00) by October 1, 2024;**
- (2) **Five Hundred Thousand and No/100 Dollars (\$500,000.00) by October 1, 2025;**
- (3) **Five Hundred Thousand and No/100 Dollars (\$500,000.00) by October 1, 2026;**
and
- (4) **Two Million Five Hundred Fifty Thousand and No/100 Dollars (\$2,550,000.00)**
on the sooner of the following:
- (A) on the date that New Braunfels Utility (“NBU”) turns over possession of the Property to the City under a lease agreement between the City and NBU;

or

(B) on the termination date of the lease by and between NBU and the City.

- (b) **Performance.** EDC agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements by and between the City and EDC.

SECTION 6. CESSATION OF ADVANCES.

If the EDC has made any commitment to provide any financial assistance to City, whether under this Agreement or under any other agreement, the EDC shall have no obligation to advance or disburse the financial assistance if: (i) City becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged bankrupt; or (ii) an Event of Default occurs.

SECTION 7. EVENTS OF DEFAULT.

Each of the following shall constitute an Event of Default under this Agreement:

- (a) **General Event of Default.** Failure of City or EDC to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement, or failure of City or EDC to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement by and between City and EDC is an Event of Default.
- (b) **False Statements.** Any warranty, representation, or statement made or furnished to EDC by or on behalf of City under this Agreement that is false or misleading in any material respect, either now or at the time made or furnished is an Event of Default.
- (c) **Insolvency.** City's insolvency, appointment of receiver for any part of City's property, any assignment for the benefit of creditors of City, any type of creditor workout for City, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against City is an Event of Default.

SECTION 8. EFFECT OF AN EVENT OF DEFAULT.

In the event of default under Section 7 of this Agreement, the non-defaulting party shall give written notice to the other party of any default, and the defaulting party shall have thirty (30) days to cure said default. Should said default remain uncured as of the last day of the applicable cure period, and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement, enforce specific performance as appropriate or maintain a cause of action for damages caused by the event(s) of default. In the event, City defaults and is unable or unwilling to cure said default within the prescribed time period, the amounts provided by the EDC to City pursuant to Section 5(a) of this Agreement shall become immediately due and payable by City to the EDC.

SECTION 9.

MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- (a) **Amendments.** This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.
- (b) **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Comal County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Comal, Texas.
- (c) **Assignment.** This Agreement may not be assigned without the express written consent of the other party.
- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. City warrants and represents that the individual or individuals executing this Agreement on behalf of City has full authority to execute this Agreement and bind City to the same. EDC warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind it to the same.
- (e) **Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of the Agreement.
- (f) **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- (g) **Notices.** Any notice or other communication required or permitted by this Agreement (hereinafter referred to as the "Notice") is effective when in writing and (i) personally delivered either by facsimile (with electronic information and a mailed copy to follow) or by hand or (ii) three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified with return receipt requested, and addressed as follows:

if to EDC:

New Braunfels Economic
Development Corporation
550 Landa Street
New Braunfels, Texas 78130
Attn: Jeff Jewell, Director of Economic &
Community Development

Telephone: (830) 221-4621

if to City:

City of New Braunfels, Texas
550 Landa Street
New Braunfels, Texas 78130
Attn: Robert Camareno, City Manager
Telephone: (830) 221-4280

- (h) **Severability.** If a court of competent jurisdiction finds any provision of this Agreement to be invalid or unenforceable as to any person or circumstance, such finding shall not render that provision invalid or unenforceable as to any other persons or circumstances. If feasible, any such offending provision shall be deemed to be modified to be within the limits of enforceability or validity; however, if the offending provision cannot be so modified, it shall be stricken and all other provisions of this Agreement in all other respects shall remain valid and enforceable.
- (i) **Time is of the Essence.** Time is of the essence in the performance of this Agreement.

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THE PARTIES ACKNOWLEDGE HAVING READ ALL THE PROVISIONS OF THIS PERFORMANCE AGREEMENT, AND THE PARTIES AGREE TO ITS TERMS. THIS AGREEMENT IS EFFECTIVE AS OF THE EFFECTIVE DATE AS IS PROVIDED HEREIN.

CITY:

CITY OF NEW BRAUNFELS, TEXAS,
a Texas home-rule municipality,

By: _____
Robert Camareno, City Manager
Date Signed: _____

ATTEST:

Gayle Wilkinson, City Secretary

EDC:

**NEW BRAUNFELS ECONOMIC
DEVELOPMENT CORPORATION,**
a Texas non-profit corporation

By: _____
Kathy Meurin, President
Date Signed: _____

ATTEST:

Jim Poage, Secretary

Exhibit A

[Legal Description and/or Depiction of the Property]

APPENDIX A
Description of the Property

All that certain tract, piece or parcel of land situated in Comal County, Texas, and being Lots 40, 42, and part of Lot 36, Block 1005, being a 1.126 acre tract in the City of New Braunfels, Comal County, Texas, and being those lots described by deed recorded in Volume 58, Pages 150-153, LESS that portion of Lot 36 conveyed by deed recorded in Volume 57, Pages 307-309, Deed Records of Comal County, Texas, said 1.126 acre tract being described by metes and bounds as follows:

BEGINNING at a point, the intersection of the Northeast line of Seguin Avenue and the Southeast line of East San Antonio Street, the same point being the West corner of Lot 40, Block 1005 of the City of New Braunfels, an "X" cut in a concrete walk;

THENCE with the Southeast line of East San Antonio Street and the Northwest line of Lot 40, North 38° 42' 08" East 191.59 feet to an iron pin set for the North corner of Lot 40, and in the Southwest line of Lot 36;

THENCE with the Southwest line of Lot 36, North 52° 00' West 31.05 feet to a fence corner, said corner being the West corner of a part of Lot 36 included in this tract and the South corner of a part of Lot 36 conveyed by instrument recorded in Volume 57, Pages 307-309 of the Deed Records of Comal County, Texas;

THENCE with the Northwest line of this tract, the Southeast line of the tract described in said conveyance, North 38° 38' 24" East 95.70 feet to a fence corner, said point lying in the Southwest line of Lot 37, the Northeast line of Lot 36;

THENCE with the Southwest line of Lot 37, and the Northeast line of Lot 36, South 52° 04' 19" East 127.07 feet to an iron pin set for the East corner of Lot 36, the South corner of Lot 37, and lying in the West line of Lot 42;

THENCE with the Northwest line of Lot 42 and the Southeast line of Lot 37, North 38° 41' 47" East 96.05 feet to an iron pin set in the Southwest line of Comal Avenue and being the North corner of Lot 42 and the East corner of Lot 37;

THENCE with the Southwest line of Comal Avenue, the Northeast line of Lot 42, South 52° 00' 02" East 96.04 feet to an iron pin set for the East corner of Lot 42, and the North corner of Lot 43;

THENCE with the Southeast line of Lot 42, the Northwest line of Lot 43, South 38° 32' 10" West 191.38 feet to an iron pin, said pin being the South corner of Lot 42, West corner of Lot 43, North corner of Lot 44 and the East corner of Lot 41;

THENCE with the Southwest line of Lot 42, the Northeast line of Lot 41, North 52° 18' 01" West 96.27 feet to an iron pin set for the West corner of Lot 42, the North corner of Lot 41, the East corner of Lot 40, and the South corner of Lot 36;

THENCE with the Southeast line of Lot 40 and the Northwest line of Lot 41, South 38° 41' 58" West 191.60 feet to a screw set in a concrete walk, said screw lying in the North line of Seguin Avenue and being the South corner of Lot 40 and the West corner of Lot 41;

THENCE with the Northeast line of Seguin Avenue and the Southwest line of Lot 40, North 52° 05' West 96.25 feet to the POINT OF BEGINNING, and containing 1.126 acres, more or less, according to a survey prepared under the supervision of D. R. Frazor, Registered Professional Engineer of San Antonio, Texas, reference to which is here made for all purposes, together with the improvements, including all buildings thereon, and being the same property described in the following deeds:

- (a) One dated March 9, 1892, recorded in Volume V Pages 309-310 of the Deed Records of Comal County, Texas;
- (b) One dated August 27, 1906, recorded in Volume 28, Pages 249-250 of the Deed Records of Comal County, Texas;
- (c) One dated January 25, 1909, recorded in Volume 30, Pages 329-330 of the Deed Records of Comal County, Texas;
- (d) One dated February 4, 1929, recorded in Volume 56, Pages 150-153 of the Deed Records of Comal County, Texas; and,
- (e) One dated May 15, 1969, recorded in Volume 169, Pages 719-723 of the Deed Records of Comal County, Texas, reference to all of said deeds and their recordings being here made for all purposes.

LESS, SAVE and EXCEPT from the tracts described in the above described deeds (a) through (d), that certain parcel of land conveyed by deed dated November 12, 1929, recorded in Volume 57, Pages 307-309 of the Deed Records of Comal County, Texas, which tract was conveyed to San Antonio Public Service Company.