

**GENERAL MEETING OF THE BOARD OF DIRECTORS
OF THE
CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY**

RESOLUTION NO. 12-057

**APPROVE AN INTERLOCAL AGREEMENT AUTHORIZED BY THE CITY OF
AUSTIN RELATING TO SOUND WALL CONSTRUCTION ON CITY RIGHT OF WAY
FOR THE MOPAC IMPROVEMENT PROJECT.**

WHEREAS, development of the MoPac Improvement Project will include certain sound walls to minimize traffic noise in abutting neighborhood; and

WHEREAS, Sound Wall 3, as shown on the current plans for the Mopac Improvement Project, will be located within City of Austin right-of-way for Great Northern Boulevard, on the east side of Loop 1 starting just north of Northland Drive (RM 2222) and continuing northward to Mohawk Road; and

WHEREAS, staff for the Mobility Authority and the City of Austin have negotiated an interlocal agreement that sets out the parties' respective obligations with respect to Sound Wall 3 and other matters related to the MoPac Improvement Project; and

WHEREAS, the Austin City Council has approved the agreement attached as Exhibit 1; and


WHEREAS, the Executive Director recommends that the agreement attached as Exhibit 1 be approved by the Board.

NOW THEREFORE, BE IT RESOLVED that interlocal agreement attached as Exhibit 1 is hereby approved; and

BE IT FURTHER RESOLVED that the Executive Director is authorized to execute the agreement in the form or substantially the form attached as Exhibit 1.

Adopted by the Board of Directors of the Central Texas Regional Mobility Authority on the 29th day of August, 2012.

Submitted and reviewed by:


Andrew Martin
General Counsel for the Central
Texas Regional Mobility Authority

Approved:



Ray A. Wilkerson
Chairman, Board of Directors
Resolution Number: 12-057
Date Passed: 08/29/2012

Exhibit 1

INTERLOCAL AGREEMENT FOR SOUND WALL 3

[on the following 6 pages]

Davis Notes for CTRMA Board Meeting 8/29/2012

1. Settlement Status

- 2243 defendants (TxDOT, Dan Williams Company, ABC Erosion Control and CP&Y) settled at the end of 2011. The total settlement was \$450,000. TxDOT contributed \$85,000 to the fund.
- The remaining parties (CTRMA, HNTB, HDR, Hill County Constructors, URS, AECOM, .W. Webber, Rodriguez Transportation Group, and K. Friese & Associates) participated in a half-day mediation on June 29.
- Prior to the mediation, all defendants other than CTRMA received a settlement offer from the plaintiffs. The total was \$5,099,000 (down from 6.8M), which was divided as follows:
 - HCC – 1.5 M
 - URS – 2.1 M
 - AECOM – 1 M
 - HNTB – 300K
 - HDR – 199K
- The parties did not settle at the mediation. We believe the defendants offer was up to \$200K collectively at the end, but CTRMA was not included in the discussions after we reiterated our position that CTRMA would not contribute any money to a settlement fund.

2. Litigation Status

- The plaintiffs have designated expert witnesses who support the plaintiffs' claims.
- The defendants deadline to designate experts is a floating deadline based on depositions of the plaintiffs experts. CTRMA will designate experts that are retained by the other defendants.
 - Property Valuation Expert – Paul Hornsby who will testify that the property has not reduced in value over the relevant time period.
 - Hydorologist who will testify about the magnitude of the storms and flow of water from and around Brushy Creek showing that the road construction was not a cause of the flooding.
 - Engineers who will testify that the engineering work met all applicable engineering standards.

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- To establish a takings claim Plaintiffs must show: (1) a governmental entity intentionally performed certain acts, (2) that resulted in a taking or damaging of property, (3) for public use.
- The Texas Supreme Court has held that a governmental entity acts intentionally for purposes of a takings claim if it knows that a specific act is causing identifiable harm, or knows that the harm is substantially certain. *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004). The entity must know that damage is “necessarily incident to, or necessarily a consequential result of the government’s actions.”
- In the context of flooding, “recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur.” *Tarrant Reg’l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004).
- Flooding must be “frequent and inevitably recurring to constitute a compensable taking, otherwise it is merely a consequential injury or a tort.” *Reunion Hotel v. Dallas Area Rapid Transit*, 250 S.W.3d 203, 208 (Tex. App.—Dallas 2008, no pet.). “While nonrecurrent flooding may cause damage, a single flood event does not generally rise to the level of a taking.” *Id.* “The recurrence requirement assures that the government is not held liable for taking property when a project’s adverse impacts, and by implication its benefit to the public, are too temporal or speculative to warrant compensation.” *Id.*

5. Prior Status of Lawsuit

- Documents have been exchanged, the plaintiffs have been deposed, but more will have to be done to develop the case.
- Experts are not yet designated, but will be required: hydrologist, engineer, property valuation
- The parties mediated the case on November 14, 2011, but did not reach an agreement at that time.

INTERLOCAL AGREEMENT

THIS INTERLOCAL AGREEMENT (the “Agreement”) is made and entered into effective as of the ___ day of _____, 2012, by and between the CITY OF AUSTIN (the “City”) and the CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY (the “Mobility Authority”), political subdivisions of the State of Texas (collectively, the “Parties”).

WITNESSETH:

WHEREAS, the City of Austin is a Texas home-rule municipal corporation, operating pursuant to the Austin City Charter adopted by its citizens; and

WHEREAS, the Mobility Authority is a regional mobility authority created pursuant to the request of Travis and Williamson Counties and operating pursuant to Chapter 370, Texas Transportation Code; and

WHEREAS, the Mobility Authority’s goals include improving mobility within Travis and Williamson counties, and to further that goal, the Mobility Authority has exercised its option pursuant to Section 228.0111 of the Texas Transportation Code to develop, construct, and operate a transportation project in the City of Austin, Travis County, along an 11-mile portion of Loop 1 (“MoPac”) between Parmer Lane and Cesar Chavez Street (the “MoPac Improvement Project,” or “Project”); and

WHEREAS, the City and the Mobility Authority have the authority under Chapter 791, Government Code, and Chapter 370, Transportation Code, to enter into this Agreement for the performance of governmental functions and services in connection with the construction by the Mobility Authority of a transportation project;

WHEREAS, the Texas Department of Transportation (“TxDOT”), in coordination with the Mobility Authority, is conducting an environmental study on the MoPac Improvement Project, and construction of sound walls along the project corridor has been considered as part of that study; and

WHEREAS, the Mobility Authority proposes to construct sound walls along the project corridor within TxDOT right-of-way, with those sound walls to be maintained by TxDOT in accordance with provisions of a project development agreement to be executed by the Mobility Authority and TxDOT before beginning construction of the Project; and

WHEREAS, the Mobility Authority has proposed construction of a sound wall (“Sound Wall 3”) immediately east of Loop 1 and the Union Pacific Railroad right-of-way in City right-of-way for Great Northern Boulevard, starting just north of Northland Drive (RM 2222) and continuing northward to Mohawk Road (the “ROW”); and

WHEREAS, construction of Sound Wall 3 in the ROW is supported by the City and by affected property owners, and will benefit citizens and residents of the City, particularly the residents east of Loop 1 where Sound Wall 3 will be constructed; and

WHEREAS, by Resolution No. 20111103-032, approved November 3, 2011, the Austin City Council approved construction of Sound Wall 3 in the ROW and authorized the City Manager to negotiate an appropriate agreement to construct Sound Wall 3 in the ROW; and

WHEREAS, the Parties agree it is mutually beneficial to set forth in this Agreement their respective obligations concerning the use of the ROW for Sound Wall 3.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained the undersigned Parties agree as follows:

A. FINDINGS

Recitals. The recitals set forth above are incorporated herein for all purposes and are found by the Parties to be true and correct. It is further found and determined that the Parties have authorized and approved the Agreement by resolution adopted by their respective governing bodies, and that this Agreement will be in full force and effect when executed by both Parties.

B. ACTION

1. **Obligations of the Mobility Authority.** (a) The Mobility Authority, acting through its contractor(s) and at its sole cost, shall construct Sound Wall 3 in the ROW generally as depicted in Exhibit A. The exact limits, location, and design of Sound Wall 3 within the ROW shall be determined in the discretion of the Mobility Authority and shall comply with applicable City of Austin regulatory and permitting requirements for construction located in the ROW, but shall in all events be generally consistent with the plans shown as Exhibit A. To the extent the Mobility Authority determines it is necessary or convenient in connection with the construction of Sound Wall 3, the Mobility Authority may remove or alter landscaping, paving, shrubbery and other vegetation, irrigation systems, and other improvements and natural features in the ROW near the proposed location of Sound Wall 3. Notwithstanding the foregoing, the Mobility Authority shall make reasonable efforts to protect and not remove or otherwise disturb any utility lines and related utility improvements in the ROW. With respect to any public property in the ROW that is damaged as a result of the construction of Sound Wall 3, including utility lines and related structures, the Mobility Authority shall restore or repair and place that property as nearly as practicable in the condition existing immediately prior to the damage caused by the construction.

(b) After the completion of the construction of Sound Wall 3 and any necessary restoration of utility lines and related structures or damaged public property, the Mobility Authority shall provide notice of such completion to the City. When all work has been completed in accordance with the plans and specifications approved by the City in accordance with applicable regulatory and permitting requirements, the City shall accept Sound Wall 3 for ownership and maintenance, and the Mobility Authority shall assign to the City its rights under any contractor's warranty provided to the Mobility Authority. After the notice required by this subparagraph is provided to the City, the Mobility Authority shall have no continuing duty or obligation to maintain, repair, or replace either Sound Wall 3 or any other improvement or natural feature in the ROW.

(c) The Mobility Authority, as a part of the Project and at its sole cost, agrees to plant trees in TxDOT right-of-way east of Loop 1 between Hancock Drive and Northland Drive to provide a buffer and screening that benefits the Austin Memorial Park Cemetery. The trees shall be planted in available and suitable space in TxDOT right-of-way, in accordance with a final landscaping design approved by the Mobility Authority after coordinating with the City, TxDOT, and the Texas Historic Commission regarding the type of trees, spacing, and planting requirements necessary to prevent an adverse impact on character-defining landscape features that contribute to the significance of the Austin Memorial Park Cemetery.

2. **Obligations of the City.** (a) The City acknowledges that it has reviewed and approved the general location of Sound Wall 3 as depicted in Exhibit A. The City consents to the removal or alteration of landscaping, paving, shrubbery and other vegetation, irrigation systems, and other improvements and natural features in the ROW pursuant to section B(1)(a) of this Agreement.

(b) After the notice of completion required by section B(1)(b) is provided to the City by the Mobility Authority, the City shall have the responsibility to maintain, repair, or replace Sound Wall 3 and any improvements or natural features in the ROW in accordance with its standard practices for maintenance, repair, and replacement of improvements within its ROW.

3. **Responsibility for Liability.** To the extent allowed by Texas law, the City agrees that it is responsible to the exclusion of any such responsibility of the Mobility Authority for its own proportionate share of liability for its negligent acts and omissions for claims, suits, and causes of action, including claims for property damage, personal injury and death, arising out of or connected to this Agreement and as determined by a court of competent jurisdiction, provided that the execution of this Agreement will not be deemed a negligent act. To the extent allowed by Texas law, the Mobility Authority agrees that it is responsible to the exclusion of any such responsibility of the City for its own proportionate share of liability for its negligent acts and omissions for claims, suits, and causes of action, including claims for property damage, personal injury and death, arising out of or connected to this Agreement and as determined by a court of competent jurisdiction, provided that the execution of this Agreement will not be deemed a negligent act. In the event of the joint and concurrent negligence of both Parties, responsibility for liability, if any, shall be apportioned comparatively in accordance with the laws of the State of Texas, without, however, waiving any governmental immunity available to the City or the Mobility Authority under Texas law and without waiving any defenses of the Parties under Texas law.

C. GENERAL PROVISIONS

4. **Notice.** All notices and other communications required or permitted hereunder or which any Party may desire to give, shall be in writing and shall be deemed to have been given on the sooner to occur of (i) receipt by the Party to whom the notice is hand-delivered, with a written receipt of notice provided by the receiving Party, or (ii) two (2) business days after deposit in a regularly maintained express mail receptacle of the United States Postal Service, postage prepaid, or registered or certified mail, return receipt requested, addressed to such

Party at the respective addresses set forth below, or to such other address as each Party may from time to time designate by written notice to the other to the following:

City: City of Austin
Attn: City Manager
P.O. 1088
Austin, TX 78646-0319

Mobility Authority: Central Texas Regional Mobility Authority
Attn: Executive Director
301 Congress Avenue, Suite 650
Austin, Texas 78701

5. **Prior Written Agreements.** This Agreement is the complete agreement by and between the parties on the subject matter of the Agreement. This Agreement is without regard to any and all prior written contracts or agreements between the Parties regarding any other subject matter and does not modify, amend, ratify, confirm, or renew any such other prior contract or agreement between the Parties.
6. **Other Services.** Nothing in this Agreement shall be deemed to create, by implication or otherwise, any duty or responsibility of either of the Parties to undertake or not to undertake any other service, or to provide or not to provide any service, except as specifically set forth in this Agreement or in a separate written instrument executed by both Parties.
7. **Limitations of Liability.** Nothing in this agreement shall be construed to place any liability on the City, the Mobility Authority, or the Mobility Authority's contractor(s) for personal injury or property damages to a third party alleged or proven to result from the construction of Sound Wall 3.
8. **Governmental Immunity.** Nothing in this Agreement shall be deemed to waive, modify, or amend any legal defense available at law or in equity to either of the Parties nor to create any legal rights or claims on behalf of any third party. Neither of the Parties waives, modifies, or alters to any extent whatsoever the availability of the defense of governmental immunity under the laws of the State of Texas and of the United States.
9. **Amendments and Modifications.** This Agreement may not be amended or modified except in writing and executed by both Parties to this Agreement and authorized by their respective governing bodies.
10. **Severability.** If any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof, but rather this entire Agreement will be construed as if not containing the particular invalid or unenforceable provision(s), and the rights and obligations of the Parties shall be construed and enforced in accordance therewith. The Parties acknowledge that if any provision of this Agreement is determined to be invalid or unenforceable, it is their desire and intention that such provision be reformed and construed

in such a manner that it will, to the maximum extent practicable, give effect to the intent of this Agreement and be deemed to be validated and enforceable.

11. Execution in Counterparts. This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall be considered fully executed as of the date first written above, when both Parties have executed an identical counterpart, notwithstanding that all signatures may not appear on the same counterpart.

IN WITNESS WHEREOF, the Parties have executed and attested this Agreement by their officers thereunto duly authorized.

City of Austin

Central Texas Regional Mobility Authority

By: _____
[Name and Title]

Mike Heiligenstein, Executive Director
Central Texas Regional Mobility Authority

EXHIBIT A
SCHEMATIC DESIGN FOR CONSTRUCTION OF SOUND WALL 3
AND
BOUNDARIES OF CITY RIGHT-OF-WAY

[TO BE ATTACHED]