

**AGREEMENT FOR TEMPORARY CONSTRUCTION ACCESS  
AND RIGHT OF ENTRY LICENSE  
BY AND BETWEEN THE CITY OF AUSTIN, COVENANT PRESBYTERIAN CHURCH  
AND SPAWGLASS CONTRACTORS, INC.**

This AGREEMENT FOR TEMPORARY CONSTRUCTION ACCESS AND RIGHT OF ENTRY LICENSE (the "Agreement") is entered into this \_\_\_\_\_ day of August 2007 by and between the City of Austin, Texas ("City"), a municipal corporation organized and existing under the laws of the State of Texas, acting by and through its duly authorized representative, Toby Hammett Futrell, City Manager, and; Covenant Presbyterian Church ("Covenant") of Austin, Texas, a Texas non-profit corporation organized and existing under the laws of the State of Texas, acting by and through its duly authorized officer, Frederick L. Clement, Director of Administration, under the authority of the Session, the governing body of Covenant, and; SpawGlass Contractors, Inc. (SpawGlass), a Texas for-profit corporation acting by and through its duly authorized officer, Joel D. Stone, Vice President.

**RECITALS**

WHEREAS, SpawGlass, as agent and construction manager at-risk under contract with Covenant, is razing an obsolete building situated near the southwest corner on Covenant's property and, in lieu thereof, is constructing a new multi-story building on Covenant's property, in a corner location with limited accessibility for purposes of construction staging, delivery of materials, and vehicular turnaround, and;

WHEREAS, Austin Memorial Park, a City owned and maintained cemetery, and Covenant separately own and maintain land and improvements located adjacent to a common property boundary, near or upon which boundary Covenant owns and maintains an existing chain link fence, and;

WHEREAS, Covenant and SpawGlass require reasonable access to Covenant's construction site for the purpose of facilitating construction, by way of temporary construction access and a right of entry upon undeveloped land in the Austin Memorial Park situated adjacent to Covenant's construction site, and;

WHEREAS, Covenant desires to provide the City with certain consideration intended for use by the City to improve the Austin Memorial Park, which improvements in the Austin Memorial Park shall be specified and wholly performed by the City, in its sole discretion, in exchange for Covenant's temporary construction access and a right of entry upon a certain section of undeveloped land in Austin Memorial Park;

NOW, THEREFORE, the parties to this Agreement, in consideration of the sum of Ten and 00/100 Dollars (\$10.00), paid by Covenant to the City upon the mutual execution and delivery of this Agreement, plus other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the mutual covenants expressed herein, agree as follows:

#### **I. TERM**

- A. The term of this Agreement shall be for twelve (12) months, beginning October 1, 2007, and concluding when the Restorations, as defined hereinafter, have been accepted by the City, whichever occurs last. Preexisting and contemporaneous conditions and covenants which by their terms are performable before, during and after the termination of this Agreement shall remain fully performable.

#### **II. DESIGNATION OF CITY REPRESENTATIVE FOR COMMUNICATION PURPOSES**

- A. The City designates the Director of the City's Parks and Recreation Department ("PARD") as its authorized representative to receive communication on the City's behalf with respect to this Agreement.

#### **III. DESIGNATION OF COVENANT AND SPAWGLASS REPRESENTATIVES**

- A. Covenant designates its Director of Administration, Frederick L. Clement, as its duly authorized representative to act on Covenant's behalf with respect to this Agreement. SpawGlass designates its Project Executive, Don Bulloch, as its duly authorized representative to act on SpawGlass' behalf with respect to this Agreement.

#### **IV. RESONSIBILITIES OF COVENANT PRESBYTERIAN CHURCH AND SPAWGLASS**

- A. Covenant agrees to design and construct, at is sole expense, the "Staging Area" and "Restorations" in the Austin Memorial Park, as described in Exhibit "B", attached hereto and incorporated herein by reference for all purposes. The Staging Area and Restorations shown in Exhibit "B" shall be constructed according to plans and specifications approved by PARD prior to commencing construction activity, and such approval by PARD shall not be unreasonably withheld. Covenant shall commence construction of the Staging Area by December 1, 2007. The chainlink fence in the Staging Area, as shown on the attached Exhibit "B", shall contain a shield / barrier that will protect the non-Staging Arealand from debris. The chainlink construction fence shall be properly maintained throughout the term of this Agreement. Covenant shall timely commence construction of the Restorations upon

substantial completion of Covenant's construction project.. For the purposes of Article 12, Restorations, if commenced or completed after the term identified in Article I of this Agreement, shall in no event trigger or otherwise be subject to the provisions of Article 12 hereof.

- B. Covenant and SpawGlass agree to comply with all City ordinances and other rules and regulations regarding permits and approvals related to construction of the Staging Area and Restorations, as well as those of any other governmental entity having jurisdiction. Covenant and SpawGlass shall have no right to place any liens on the NRC and Austin Memorial Park properties and shall not allow any liens to be placed against same.
- C. Covenant agrees to coordinate all construction activity with designated PARD staff, so as to ensure that normal NRC and Austin Memorial Park operations continue uninterrupted.
- D. Upon substantial completion of the Restorations, Covenant shall deliver to the City written notice that the Restorations have been substantially completed ("Notice of Substantial Completion"). Within fourteen (14) calendar days of the City's receipt of the Notice of Substantial Completion, the City shall respond to Covenant by either submitting a written list of items the City deems requiring completion or by accepting the Restorations, as the case may be. Acceptance of Restorations, or any phase thereof, shall be evidenced by a letter of acceptance from the City. Failure by the City to respond in writing to Covenant's Notice of Substantial Completion within fourteen (14) calendar days shall be deemed acceptance by the City of the Restorations as then built, subject to the warranty provisions of Article VIII hereof.
- E. Covenant shall perform this Agreement as an independent contractor, and may engage SpawGlass, its general contractor, or sub-contractors, to construct the Staging Area and Restorations, as the case may be.
- F. Covenant intends that its construction project shall commence on or about October 1, 2007, and shall conclude within approximately twelve months of commencement, barring exigent contingencies. Covenant further intends to vacate the Staging Area and perfect the Restorations as soon as its general contractor has installed and substantially completed Covenant's construction project such that the Staging Area is no longer needed, in which case the Staging Area will be timely vacated and Restoration timely perfected so as to vacate the License in the Austin Memorial Park as soon as practicable. All expenses related to surveying and preservation and relocation of existing monuments, if any, shall be borne by Covenant. Furthermore, Covenant agrees, at Covenant's expense, to conduct soil tests (method of soil test shall be approved by all parties) on the staging area before staging their equipment. Covenant agrees after completion of the construction, Covenant will, at its

expense, conduct a second soil test, and will restore the ground to the condition it was in prior to staging within a reasonable time.

- G. For the purposes of this Agreement, SpawGlass is responsible to the City only for performing the Indemnification and Release provisions of Article X and the Insurance provisions of Article XI hereof. Otherwise, SpawGlass is performing as an agent of Covenant.

#### **V. RESPONSIBILITIES OF THE CITY**

- A. The City grants Covenant, its contractors, subcontractors, employees, agents or assigns (collectively, "Covenant and Agents") responsible for any construction of the Staging Area and Restorations, or any related activity, during construction of the Staging Area and Restorations, and during construction of Covenant's construction project, the following:
1. An exclusive temporary construction access and right of entry (the "License") in, upon, over, under, and across that certain undeveloped section of real property situated in the Austin Memorial Park (the "Staging Area"), as more particularly illustrated in the attached Exhibits "B" and "D" diagrams labeled "B" and "D", and incorporated herein by reference for all purposes.
- B. The City grants to Covenant and Agents the right during construction of the Staging Area, Restorations and Covenant's construction project, to use the above described License, and for purposes incidental to such construction activities. This temporary construction access and right of entry and related uses at the Austin Memorial Park shall cease and be terminated at such time as the Restorations have been accepted by the City in writing, or as otherwise provided in Article IV, Section E, hereof.
- C. The City retains the right to inspect construction of the Staging Area and Restorations, and to exercise its rights or duties in order to protect persons, property or the public interest in the Austin Memorial Park.
- D. Covenant and Agents shall have the right during the term of this Agreement, and at Covenant's sole expense, to erect, maintain, and use gates and fences, as described in Exhibits "B" and "D" diagrams "B" and "D", which now cross or which may hereafter cross the boundary line separating Covenant's and the Austin Memorial Park's properties.
- E. Covenant and Agents shall have the right during the term of this Agreement to use a practical route or routes of ingress and egress upon the Austin Memorial Park provided, however, that Covenant and Agents responsible for any construction of the Staging Area,

Restorations and Covenant's construction project shall have neither any right nor take any manner of ingress or egress upon the Austin Memorial Park's driveways, streets, burial grounds, and land, except for the otherwise licensed uses of the Austin Memorial Park's undeveloped land defined herein as the Staging Area.

- F. Covenant and Agents shall employ appropriate means and methods to protect existing trees in the Staging Area from damage. Covenant shall have the right to deposit tools, implements, and other materials in the Staging Area and utilize construction, automotive and other equipment thereon when necessary for the purpose of exercising Covenant's rights hereunder.

#### **VI. TEMPORARY CONSTRUCTION ACCESS AND RIGHT OF ENTRY LICENSING FEES**

- A. In consideration of the rights to exercise and duties to perform its License in the Austin Memorial Park, and all other relevant rights and duties under this Agreement, Covenant shall pay to the City a temporary construction access and right of entry licensing fee in the amount of \$100 upon the mutual execution and delivery of this Agreement, and;
- B. As additional consideration, Covenant shall pay to the City the sum of Fifty-five Thousand and 00/100 Dollars (\$55,000) to be used by the City solely for any improvements to the Austin Memorial Park, as shall be determined and performed by the City in its sole discretion.

Covenant's payment of the consideration expressed in Article VI, Section C, hereof shall be made to the City in one lump sum payment due and payable to the City on or before October 1, 2007.

#### **VII. PROJECT COSTS AND RESPONSIBILITIES**

- A. All costs of the Staging Area and Restorations shall be the sole responsibility of Covenant.
- B. Any increase in the actual costs of the Staging Area and Restorations, including cost increases, change orders and overruns, shall be borne by Covenant. Costs include, but are not limited to, architectural, engineering, consulting, design, labor, site preparation, site restoration, materials, supplies, legal fees, utilities, permits, inspections, insurance, and any other costs incurred in the design and construction of the Staging Area and Restorations. Covenant's costs shall not include the City's expenses in administering this Agreement.

- C. At the City's option, and upon request, prior to commencing construction of the Staging Area and Restorations, Covenant shall provide proof that it has the financial resources to pay all costs to be incurred in the construction of the Staging Area and Restorations. Such proof shall be evidenced by an Affidavit executed by Covenant setting forth the sufficiency of financial resources on hand, or otherwise financed, for the Staging Area and Restorations.

#### **VIII. WARRANTIES**

- A. Upon substantial completion and acceptance of the Restorations, Covenant shall assign to the City, without further recourse against Covenant, all warranties that Covenant may have with respect to the Restorations, all of which shall be warranted free of defects from one year from the date of substantial completion.

#### **IX. USE AND MAINTENANCE**

- A. Upon acceptance of the Restorations by the City, the City shall assume all maintenance responsibilities.
- B. Nothing in this Agreement shall be construed or interpreted in such a way as to vacate or amend any certain preexisting underlying agreements by and between the City and Covenant, all of which certain preexisting underlying agreements are and shall remain fully performable by the parties, subject to their terms and conditions.

#### **X. INDEMNIFICATION AND RELEASE**

- A. Covenant and SpawGlass shall indemnify, hold harmless and release the City, its employees, and agents from and against any claims, causes of action, personal injuries, or damages including, but not limited to, reasonable attorney's fees from or in connection with the negligent acts or omissions of Covenant and Agents in the execution of their rights and duties set forth herein.
- B. **Covenant and SpawGlass are fully aware, understand and accept the risks involved, which have had explained to SpawGlass and Covenant, in undergoing construction at the locations referenced in the contract. SpawGlass and Covenant understand there is an inherent risk of injury and do hereby RELEASE for themselves, their heirs, their executors and administrators, and WAIVE any and all rights to claims for damages against the City of Austin or its employees arising from any illness, death, injury or occurrence or aggravation thereof as a result of participation or connection with said construction.**

**This Release also applies to ordinary negligence of either party, including negligence related to the condition or maintenance of the property over which the program will occur and any other negligence expressed or implied in law, statute, regulation or public policy.**

**Covenant and SpawGlass understand that by signing this document Covenant and SpawGlass will lose any right Covenant and SpawGlass may have had to sue the City of Austin, its officers, employees, and agents because of any injuries, illness, or death SpawGlass and Covenant sustain resulting from the City of Austin's negligence or any other conduct actionable under the common law of the State of Texas, the statutes of the State of Texas, or under any otherwise available equitable relief. Covenant and SpawGlass understand that signing this document involves the waiver and release of valuable legal rights.**

#### **XI. INSURANCE**

- A. Covenant and SpawGlass shall procure and maintain in full force and effect for the duration of this Agreement, liability and property damage insurance with a minimum of \$[Insert City's Minimum Dollar Value] bodily injury, and \$1,000,000 (one million dollars) property damage for each occurrence, and \$ \$2,000,000 (two million dollars) comprehensive general liability insurance. Covenant and SpawGlass shall provide a current copy of its policy or policies of insurance, or a Certificate of Insurance evidencing same, to the City prior to exercising their rights and duties under this Agreement.
- B. Covenant shall require its contractor(s) who are responsible for constructing the Staging Area and Restorations to procure and maintain statutory limits of workers' compensation insurance coverage and a minimum of \$1,000,000 (one million dollars) employer's liability insurance for the duration of this Agreement.

#### **XII. LIQUIDATED DAMAGES**

- A. It is the express intent of the parties to this Agreement that each shall receive value for performance of the terms and conditions of this Agreement. It is further agreed and understood that Covenant shall timely perform its duties in connection with the Staging Area and Restorations.
- B. If the Staging Area has not been vacated by Covenant before the expiration of the term of this Agreement, Covenant agrees to pay liquidated damages to the City, any and all of which liquidated damages shall be used by the City solely for improvements to the Austin Memorial Park, subject to the following graduated scale:

- a. The first two weeks beyond expiration of the term of this Agreement: \$1,500 per week;
- b. The third through fifth weeks beyond expiration of the term of this Agreement: \$2,500 per week;
- c. The sixth week and all weeks thereafter beyond the expiration of the term this Agreement: \$5,000 per week;
- d. Except liquidated damages shall not apply to performance of the Restorations or for any delay attributable to acts of nature or events beyond the control of Covenant and Agents which may otherwise preclude timely and substantial completion of the Improvements and Restorations.

### **XIII. TERMINATION**

- A. If any party fails to properly fulfill its obligations under this Agreement in a timely manner, or if any party violates any of the provisions of this Agreement, the non-breaching party shall notify the other party in writing of the specific violations of the Agreement. The breaching party shall have thirty (30) days from receipt of this notice in which to cure any such violation. If the violation cannot be reasonably cured within said 30-day period, and the breaching party has diligently pursued such remedy as shall be reasonably necessary to cure violation, then the parties may agree in writing to an extension of the period in which the violation must be cured.
- B. If, however, the breaching party has not cured any such violation as specified in the written notice or any extension with the time provided, then the non-breaching party, at its sole option, shall have the right to terminate this Agreement. This termination shall be made by sending written "Notice of Termination" to the breaching party. This notice of Termination shall be effective for all purposes when deposited in the US Mail, postage prepaid and mailed Certified US Mail, Return Receipt Requested.
- C. If Covenant defaults under this Agreement, upon depositing the Notice of Termination with the US Mail as specified above, the City may assume control and possession of all Covenant's contract documents, rights and improvements relating to the performance of this Agreement. Covenant shall be relieved of liability for any claims, injuries or losses resulting from negligent acts or omissions of the City, its employees or agents, and for the negligent acts or omissions arising out of the construction of the Staging Area and Restorations as of the date of the Notice of Termination.



#### XIV. MISCELLANEOUS PROVISIONS

- A. This Agreement constitutes the entire agreement between the parties. Any previous agreement, assertion, statement, understanding, or other commitment before the date of this Agreement, whether written or oral, shall have no force or effect upon the terms and conditions of this Agreement, except as otherwise provided for and acknowledged in Article IX, Section B, hereof. No agreement, assertion, statement, understanding, or other commitment during the term of this Agreement, or after the term of this Agreement, shall have any legal force or effect upon the terms and conditions of this Agreement unless properly executed in writing by the parties.
- B. This Agreement is made, and shall be construed and interpreted under by the laws of the State of Texas, and venue for any suit concerning this Agreement shall rest in the City of Austin, Travis County, Texas.
- C. Regardless of the actual drafter of this Agreement, this Agreement shall, in the event of any dispute over its meaning or application, be interpreted fairly and reasonably, and neither more strongly for nor against the parties to this Agreement.
- D. All official communications and notices required to be made under this Agreement shall be deemed made if sent postage prepaid to the parties at the addresses listed below, unless otherwise specified in this Agreement:

If to the City:                      Director of Parks & Recreation Department  
   City of Austin  
   PO Box 1088  
   Austin, Texas 78767-1088

If to Covenant:                      Director of Administration  
   Covenant Presbyterian Church  
   3003 Northland Drive  
   Austin, Texas 78757-5099

If to SpawGlass:                      Vice President  
   SpawGlass Contractors, Inc.  
   1111 Smith Road  
   Austin, Texas 78721

- E. The City ,Covenant and SpawGlass, respectively, bind themselves, their successors in interest, assigns and legal representatives to this Agreement. Covenant and SpawGlass

shall not assign or transfer any interest in this Agreement without the prior written consent of the City.

F. Time is of the essence in this Agreement.

#### **XV. SEVERABILITY**

A. If the final judgment of a court of competent jurisdiction invalidates any part of this Agreement, then the remaining parts of this Agreement shall remain in full effect.

#### **XVI. WAIVER**

A. If at any time the City, its successors or assigns, fails to enforce this Agreement, whether or not any violations of it are known, such failure shall not constitute a waiver or estoppel of the right to enforce it.

#### **XVII. NO RECOURSE**

A. No recourse shall be had against any elected official, director, officer, attorney, agent, or employee of either the City or of Covenant or of SpawGlass, whether in office on the effective date of this Agreement or after such date, for any claim based upon this Agreement.

**THIS AGREEMENT** is made to be effective on the date first written above.

**WITNESS** our hands at the City of Austin, Travis County, Texas.

**CITY OF AUSTIN**  
*(A Municipal Corporation)*

**COVENANT PRESBYTERIAN CHURCH**  
*(A Texas Non-Profit Corporation)*

By \_\_\_\_\_  
TOBY HAMETT FUTRELL,  
City Manager

By \_\_\_\_\_  
FREDERICK L. CLEMENT,  
Director of Administration

Date \_\_\_\_\_

Date \_\_\_\_\_

**SPAWGLASS CONTRACTORS, INC.**  
*(A Texas For-Profit Corporation)*

By \_\_\_\_\_  
JOEL D. STONE,  
Vice President

APPROVED AS TO FORM:

By \_\_\_\_\_  
Name  
Position Title

Date \_\_\_\_\_

## **EXHIBIT "B"**

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### **To Agreement for Temporary Construction Access and Right of Entry License by and between the City of Austin, SpawGlass and Covenant Presbyterian Church**

In Re: Construction of Staging Area and Restorations in the Austin Memorial Park, 2800 Hancock Drive, Austin, Texas 78731.

Description of Staging Area and Restorations in the Austin Memorial Park to be performed by Covenant Presbyterian Church, as an independent contractor, at its sole expense, in conformity with the above and foregoing Agreement:

#### **Staging Area**

For the purposes of this Agreement, the "Staging Area" is defined as that certain section of undeveloped Austin Memorial Park land measuring 50' deep north-to-south, extending south from the existing chain-link fence on the Austin Memorial Park's north property boundary line, by 400' wide west-to-east, extending from the existing chain-link fence on the Austin Memorial Park's west property boundary line adjacent to the MoPac off-ramp, (comprising 20,000 s.f., more or less) and otherwise proximately situated in and near the northwest corner of the Austin Memorial Park as red-lined and labeled "Staging Area" in Exhibits "B" and "D" diagrams "B" and "D", a site plan attached hereto and incorporated herein by reference.

The Staging Area shall be privacy-fenced on its east, south and west sides where exposed to public view if standing within the Austin Memorial Park property looking northerly. The privacy fence shall be a minimum of 7' tall, supported by vertical metal poles set in-ground, and chain-link, privacy-screened fence material attached to both vertical and horizontal metal poles. The existing chain-link fence owned and maintained by Covenant along the Covenant-Austin Memorial Park property boundary line may be opened or otherwise removed on the north side of the Staging Area for temporary construction access and right of entry purposes associated with the construction of Covenant's project.

There shall be no gate or any opening in the Staging Area's privacy fence along its east, south and west sides for any pedestrian or vehicular ingress or egress upon the Austin Memorial Park land not otherwise defined as the Staging Area.

The Staging Area shall have a crushed stone or other suitable surface temporarily installed in the hatch area to support loads from construction equipment and materials.

**EXHIBIT "B"**

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To Agreement for Temporary Construction Access,  
and Right of Entry License  
by and between the City of Austin, SpawGlass  
and Covenant Presbyterian Church

**Restorations**

Upon completion of Covenant's construction project, or Covenant's withdrawal and use of the Staging Area in the Austin Memorial Park, whichever occurs first, Covenant shall remove the Staging Area's chain-link privacy fencing and crushed stone surface (or alternative surface), re-grade the affected Austin Memorial Park site to match conditions existing before construction, sod the affected area with a species of grass to match conditions existing before construction, and reinstall the portion of existing chain-link fence owned and maintained by Covenant that may have been removed prior to construction, so as to timely return the Austin Memorial Park land to the condition it was in prior to construction.