

**AGREEMENT TO OVERSIZE COOL SPRINGS WASTEWATER
INTERCEPTOR
BETWEEN
CITY OF KYLE
AND
TACK DEVELOPMENT, LP**

THIS AGREEMENT TO OVERSIZE COOL SPRINGS WASTEWATER INTERCEPTOR (the “Agreement”) is made and entered into by and between the City of Kyle (the “City”), a Home-rule municipality in Hays County, Texas and Tack Development, LP or its successors or assigns (the “Developer” or “Tack”). The City and Developer are occasionally referred to jointly as “the Parties”.

RECITALS

1. The Parties have previously entered into the Retail Water and Wastewater Services Agreement dated December 16, 2014 wherein the City agreed, upon other matters, to provide retail wastewater service to the LaSalle Project.
2. The City owns and maintains a wastewater plant and collection lines.
3. The Developer or Assigns intend to construct and install improvements necessary to connect to the City’s existing permitted and approved facilities. The City agrees to use the improvements to provide retail wastewater service to the customers within the LaSalle Project.
4. The City is negotiating an agreement with the Cool Springs Developer (defined herein)to install a wastewater interceptor to service its customers and connect to the City’s Wastewater System and to oversize the wastewater interceptor to serve the LaSalle Project at Tack’s expense (the “Oversizing Agreement”). The anticipated size of the Cool Springs Wastewater Interceptor is 10 inches in diameter. The Cool Springs Project is shown on Exhibit A.
5. The Parties agree that it would be mutually beneficial and efficient for Cool Springs Developer to oversize the Cool Springs Wastewater Interceptor to increase its capacity and for LaSalle to bear the cost of oversizing.
7. The Parties agree that the proper sizing of the Cool Springs Wastewater Interceptor should be a minimum of 21 inches in diameter.
8. The Parties recognize that in 2013 the Texas Legislature created LaSalle Municipal Utility Districts 1-5 over the LaSalle Project. These MUDs are intended, among other matters, to assist in financing wastewater improvements.

9. The Parties further agree that it is to their mutual benefit that a 12 inch reclaimed water main from the City's wastewater treatment facility back to the LaSalle project for beneficial reuse of treated effluent be constructed and installed at the sole cost of Tack or Assigns.
10. The City and the Developer now desire to execute this Agreement to evidence henceforth the agreement for Tack to pay the costs to oversize the Cool Springs Wastewater Interceptor and the cost to construct and install a 12 inch reclaimed water main.

AGREEMENT

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and the Developer or Assigns agree as follows:

ARTICLE I DEFINITIONS

Section 1.01. Definitions of Terms. As used in this Agreement, except as otherwise provided herein, the following terms have the meanings ascribed in this section.

"Agreement" means this "Agreement to Oversize Cool Springs Wastewater Interceptor Between City of Kyle and Tack Development, LP."

"City" means the City of Kyle, a Texas Home-rule municipality in Hays County, Texas.

"City of Kyle Service Area" means, only for purposes of this Agreement, the area denoted "City of Kyle Service Area on Exhibit A. the City's wastewater service area, whether or not it is a certificated service area, as such service areas now exist or as the City may change hereafter.

"City's Wastewater System" means all wastewater treatment, collection facilities and all appurtenances that comprise the wastewater system of the City, together with all extensions, expansions, improvements, enlargements, and replacements.

"Cool Springs Wastewater Interceptor" means the 10 inch wastewater interceptor that Cool Springs intends to construct and install in order to tie into City of Kyle's wastewater system, oversized to serve the LaSalle Project to a minimum 21 inch line. The current planned route of the Cool Springs wastewater interceptor is shown on Exhibit B and will be in Rights of Way and or Easements owned by The City.

"Tack" means Tack Development, LP, or successor or assigns, the developer of property within the Districts.

"Cool Springs Developer" means the developer of the Cool Springs Project.

“Districts” means the LaSalle MUDs Nos. 1-5, political subdivisions of the State of Texas or their successor District(s). Tack intends to Assign the Agreement to one or more of the Districts.

“Customers” mean the residential and commercial customers that will be located within the Districts’ boundaries and that will be retail customers of the City.

“The LaSalle Project” means the LaSalle Property shown on Exhibit A.

“Reclaimed Water” means effluent treated to the tertiary level or standard as required by City of Kyle wastewater permit No. WQ 0011041-002 and any amendments thereto.

“Reclaimed Water Main” means a water main intended to convey treated or reclaimed water from the City’s Wastewater System back to the LaSalle Project for beneficial reuse.

“Utility Agreement” means the “Retail Water and Wastewater Services Agreement Between City of Kyle and LaSalle Holdings, LTD” dated December 16, 2014 and any amendments thereto.

“Cost Participation Agreement” means that certain Cost Participation Agreement for Public Improvements dated effective June 5, 2018 between the City and the Cool Springs Developer regarding the construction of the oversized Cool Springs Wastewater Interceptor and the Reclaimed Water Main, which is attached hereto as **Exhibit C**.

Captions. The captions appearing at the first of each numbered section or paragraph in this Agreement are inserted and included solely for convenience and will not be considered or given any effect in construing this Agreement.

ARTICLE II

OVERSIZING COOL SPRINGS WASTEWATER INTERCEPTOR

Section 2.01. Oversizing. The Parties agree that oversizing the Cool Springs Wastewater Interceptor to a 21-inch diameter is mutually beneficial and is essential to comply with terms of the Utility Agreement and is consistent with the terms of the Utility Agreement.

Section 2.02. Tack or Assigns to Pay Cost of Oversizing. In compliance with the Utility Agreement, Tack or Assigns will pay the cost of oversizing the Cool Springs Wastewater Interceptor from the size required to serve the Cool Springs Project, as determined by the City, to a minimum 21-inch diameter, which is referred to as the Reimbursable Cost in the Cost Participation Agreement (the “Oversizing Costs”). The Parties currently estimate the Oversizing Costs to be approximately \$400,000.00. The City will cause the Cool Springs Developer to bid the Cool Springs Wastewater Interceptor in accordance with the Oversizing Agreement, with the bidders providing alternate bids for a wastewater interceptor sized to serve the Cool Springs Project and a

21-inch wastewater interceptor. Tack's Oversizing Costs will be the difference between the dollar amount of the approved alternate bids. Tack or Assigns will deliver funds in the amount of the Oversizing Costs to the City or to Cool Springs Developer, as directed by the City, within thirty (30) days of City's requesting the funding. Tack or Assigns agrees not to delay the project by not funding its portion in a proper and timely manner. Tack acknowledges and agrees that the City may provide in the Oversizing Agreement that the Cool Springs Wastewater Interceptor may be built to a size to serve the Cool Springs Project only and not be oversized to serve the LaSalle Project in the event that Tack fails to timely fund the Oversizing Costs as provided in this Agreement. The City will then promptly pay those funds to Cool Springs Developer after the Cool Springs Wastewater Interceptor is completed and accepted by the City.

Provided, however, the Parties acknowledge and agree that there will be a need for a cost true-up at completion to determine actual amounts due in correlation to final construction costs. Tack and/or Assigns shall pay a pro-rata share of any costs that exceed the approved bids based on the formula for determining the Oversizing Costs.

Section 2.03. Ownership of Capacity. Tack and/or Assigns retain the right to capacities of the anticipated 7,600 LUEs in the oversized portion of the Cool Springs Wastewater Interceptor paid by Tack or Assigns meant to provide service to the LaSalle Project. However, Tack or Assigns have no claim on additional capacities created by oversizing or to additional capacities that infrastructure constructed by Tack or Assigns may or may not be capable of conveying that exceed LaSalle's 7,600 LUEs.

Section 2.04. Impact Fee Credit. The Parties acknowledge and agree that a 21 inch diameter line is required to serve the LaSalle Development, and that the Developer and/or its Assigns are not entitled to impact fee credits for capacity in the 21 inch line.

Section 2.05. Bidding Process. The City agrees, to the extent possible and practical, to encourage the Cool Springs Developer to follow public bid procedures in contracting the construction and oversizing the Cool Springs Wastewater Interceptor, unless exceptions to public bidding procedures apply. This section shall not relieve the Developer from funding the Reimbursable Costs as provided in this Agreement.

ARTICLE III **RECLAIMED WATER MAIN**

Section 3.01. City to Require Cool Springs Developer To Construct 12 Inch Reclaimed Water Main. As part of this Agreement, the City agrees to require the Cool Springs Developer to construct and install or cause to be constructed and installed, a 12 Inch Reclaimed Water Main from the City's wastewater system to the LaSalle Project, subject to the Developer delivering the Reimbursable Costs to the City as required by this Agreement. The 12 Inch Reclaimed Water Main will be the property of Tack. The approximate location of the 12 Inch Reclaimed Water Line is shown on Exhibit B and will be included in the same Right of Way as the Cool Springs Wastewater Interceptor Line.

Section 3.02. Tack or Assigns to Pay the Cost of the 12 Inch Reclaimed Water Main. Tack or Assigns shall be solely responsible to pay for the 12 Inch Reclaimed Water Main. The Parties currently estimate the cost to be approximately \$200,000.00. The City will cause the Cool Springs Developer to bid the 12 Inch Reclaimed Water Main in accordance with the Oversizing Agreement, as a separate line item or an alternate bid, as determined appropriate. Tack or Assigns will deliver an amount equal to the amount set forth in the approved bid for the 12 Inch Reclaimed Water Main to the City or to Cool Springs Developer, as directed by the City, within thirty (30) days of City's requesting the funding. Tack or Assigns agrees not to delay the project by not funding its portion in a proper and timely manner. Tack acknowledges and agrees that the City may provide in the Oversizing Agreement that the Cool Springs Developer is not obligated to construct the 12 Inch Reclaimed Water Main in the event that the Tack fails to timely fund the costs for the 12 Inch Reclaimed Water Main as provided in this Agreement. The City will then promptly pay those funds to Cool Springs Developer after completion of the 12 Inch Reclaimed Water Main and its acceptance by the Developer and/or Assigns.

Provided, however, the Parties acknowledge and agree that there will be a need for a cost true-up at completion to determine actual amounts due in correlation to final construction costs. The Developer and/or Assigns shall pay, within thirty days of written demand by the City, any costs for construction of the 12 Inch Reclaimed Water Main that exceed the approved bid.

Section 3.03. Ownership of Capacity. In compliance with the Utility Agreement, Tack and/or Assigns will convey the 12 Inch Reclaimed Water Main to the City within thirty (30) days of request for conveyance by the City. Provided, however, Tack or Assigns retain the right to capacities in the 12 Inch Reclaimed Water Main.

Section 3.04. Bidding Process. The City agrees, to the extent possible and practical, to encourage the Cool Springs Developer to follow public bid procedures in contracting the construction and installation of the 12 Inch Treated Water Main, unless exceptions to public bidding procedures apply. This section shall not relieve the Developer from funding the Reimbursable Costs as provided in this Agreement..

ARTICLE IV

General Provisions

Section 4.01. Contingent Agreement. The Parties agree and acknowledge that Tack's or Assigns' responsibility in this Agreement is contingent on Cool Springs Developer performing in compliance with its separate agreement with the City and on Cool Springs Developer's agreement to allow Tack and Assigns to perform hereunder, and the Developer's timely deposit of the Reimbursable Amounts with the City. This Agreement and the obligations herein are further contingent upon the City entering into the Oversizing Agreement with Tack. The City will provide the Developer written notice and a copy of the approved, executed Oversizing Agreement.

Section 4.02. Term; Extensions. This Agreement will be effective from the date of adoption by the City Council and Tack or Assigns and will continue in effect for a period of one year unless terminated earlier by mutual consent or completion of the activities in the Agreement. The Agreement may be extended from time to time by mutual consent.

Section 4.03. Default.

a. In the event Tack or Assigns default in the payment of any amounts due under this Agreement or in the performance of any material obligation to be performed by Tack or Assigns under this Agreement, the City will have the right to terminate this Agreement or to pursue any remedy available at law or in equity, including but not limited to the right to sue for specific performance. The remedies set forth in this section are cumulative.

b. In the event the City will default in the performance of any material obligation to be performed by the City under this Agreement, then Tack and the Assigns, after having given the City sixty (60) days written notice of such default and the opportunity to cure same, will have the right to pursue any remedy available at law or in equity, pending cure of such default by the City.

Section 4.04. Insurance. The City provide in the Oversizing Agreement that the contractor for the Cool Springs Wastewater Interceptor and the 12 Inch Reclaimed Water Main shall carry insurance at levels typically required by the City in its construction agreements and name the City and the Developer as additional insured.

Section 4.05. Records. The City and Tack and Assigns each agree to preserve, for a period of at least five years from the date of their preparation or production, all books, records, test data, charts and other records pertaining to this Agreement. The City and Tack and Assigns will each, respectively, have the right at all reasonable business hours to inspect such records to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to any provisions of this Agreement.

Section 4.06. Force Majeure. If any party is rendered unable, wholly or in part, by Force Majeure to carry out any of its obligations under this Agreement other than an obligation to pay or provide money, then such obligations of that party to the extent affected by such Force Majeure and to the extent that due diligence is being used to resume performance at the earliest practicable time, will be suspended during the continuance of any inability so caused to the extent provided but for no longer period. Such cause, as far as possible, will be remedied with all reasonable diligence. It is understood and agreed that the settlement of strikes and lockouts will be entirely within the discretion of either party hereto, and that the above requirements that any Force Majeure will be remedied with all reasonable dispatch will not require the settlement of strikes and lockouts by acceding to the demand of the opposing party or parties when such settlement is unfavorable to it in the judgment of either party hereto.

Section 4.07. Severability. The provisions of this Agreement are severable, and if any provision or part of this Agreement or the application thereof to any person or

circumstance will ever be held by any agency or court of competent jurisdiction to be unenforceable, invalid or unlawful for any reason, the remainder of this Agreement and the application of such provision or part of this Agreement to other persons or circumstances will not be affected thereby, provided, however, in such event the parties mutually covenant and agree to attempt to implement the unenforceable, invalid or unlawful provision in a manner which is enforceable, valid or lawful.

Section 4.08. Entire Agreement; Modifications. This Agreement constitutes the sole agreement between the parties hereto relating to the rights herein granted and the obligations herein assumed and supersedes any and all prior understandings, negotiations, representations or agreements, whether oral or written. This Agreement will be subject to change or modification only with the mutual written consent of the City and Tack and Assigns.

Section 4.09. Addresses and Notices. Unless otherwise notified in writing by the other, the attention addressees, addresses, telephone numbers, facsimile numbers and e-mail addresses of the City and the District are as follows:

The City:

City of Kyle
100 W. Center Street
Kyle, TX
Attention: City Manager

Tack:

Tack Development, LP.
2490 FM 685 78764-5096
Hutto, Texas 78634-5096
Attention: Tim Timmerman

Section 4.10. Assignability; Successors Rights.

a. Except as shown in subparagraph (b), this Agreement may not be assigned by either party to any other entity without the express written consent of the other party, which consent will not be unreasonably withheld or delayed. This Agreement and the terms and provisions hereof will be binding upon and inure to the benefit of the respective successors, assigns and legal representatives of the parties hereto.

b. The Parties acknowledge that Developer may assign this Agreement to a successor in interest or to any or all LaSalle MUDs 1-5 without City consent provided that the successor or assign comply with all obligations of this Agreement and provided that the Developer gives the City notice that the assignment has occurred within thirty (30) days of the assignment.

Section 4.11. Dispute Resolution.

c. Settlement by Mutual Agreement. In the event any dispute, controversy or claim between the parties arises under this Agreement or is connected with or related in any way to this Agreement or any right, duty or obligation arising hereunder or the relationship of the parties hereunder (a “Dispute or Controversy”), including, but not limited to, a Dispute or Controversy relating to the effectiveness, validity, interpretation, implementation, termination, cancellation or enforcement of this Agreement, the parties will first attempt in good faith to settle and resolve such Dispute or Controversy by mutual agreement in accordance with the following procedures set forth in this Section. Step 1: If a Dispute or Controversy arises, either party will have the right to give notice to the other party that it has elected to implement the procedures set forth in this Section. Within fifteen (15) days after delivery of any such notice by one party to the other regarding a Dispute or Controversy, the designated representatives of the parties will meet at a mutually agreed time and place to attempt, with diligence and good faith, to resolve and settle such Dispute or Controversy. Step 2: Should a mutual resolution and settlement not be obtained as a result of a meeting or meetings during, or should no such meeting take place within, such fifteen (15) day notice period specified in Step 1, then any party may, by notice to the other party, within fifteen (15) days after the Step 1 period ends, regardless of the reason, refer the Dispute or Controversy to the governing bodies of the Parties for resolution. Within fifteen (15) days after delivery of any such notice by one party to the other party or parties referring such Dispute or Controversy to governing bodies of the Parties for resolution, representatives of each of the Parties will meet at a mutually agreed upon time and place to attempt, with diligence and good faith, to resolve and settle such Dispute or Controversy. Step 3: Should a mutual resolution and settlement not be obtained as a result of a meeting or meetings during, or should no such meeting take place within, such fifteen (15) day notice period specified in Step 2, then any party may, by notice to the other party within fifteen (15) days after the Step 2 period ends, regardless of the reason, refer the Dispute or Controversy to mediation in accordance with the provisions of this Section. Upon the receipt of notice of referral to mediation hereunder, the parties will be compelled to mediate the Dispute or Controversy in accordance with the terms of this Section without regard to the justiciable character or executory nature of such Dispute or Controversy. The fifteen (15) day notice periods specified in this Section 8.07a may be extended by mutual agreement of the parties. This section shall not apply to delivery in an amount equal to the Reimbursable Costs with the City as required by this Agreement.

d. Mediation. Each party hereby agrees that any Dispute or Controversy which is not resolved pursuant to the procedures of this Section may be submitted to mediation on hereunder.

Section 4.12. Good Faith. Each party agrees that, notwithstanding any provision herein to the contrary, neither party will unreasonably withhold or unduly delay any consent, approval, decision, determination or other action which is required or permitted under the terms of this Agreement, it being agreed and understood that each party will act in good faith and will at all times deal fairly with the other party.

Section 4.13. Interpretation.

(a) This Agreement and all the terms and provisions hereof will be liberally construed to effectuate the purposes set forth herein to sustain the validity of this Agreement.

(b) This Agreement will not be construed as an agreement of fiduciary relationship, of partnership, of joint venture, of an equity position, or of any other form of business arrangement other than as an agreement for provision of water services. Services provided are not exclusive to the District and may be provided to others at the sole discretion of City consistent with the terms of this Agreement.

(c) This Agreement has been authored jointly by the parties hereto, and neither this Agreement as a whole nor any term or provision hereof will be construed as having been authored by or at the sole direction of either party.

(d) Time is of the essence in the performance of this Agreement.

Section 4.14. Titles and Headings. The title of this Agreement, titles and headings of articles and sections hereof have been inserted for convenience of reference only and are not to be considered a part hereof and will not in any way modify or restrict any of the terms or provisions hereof and will never be considered or given any effect in construing this Agreement or any provision hereof or in ascertaining intent, if any question of intent should arise.

Section 4.15. Counterparts. This Agreement may be executed in as many counterparts as may be convenient or required. All counterparts will collectively constitute a single instrument, and it will not be necessary in making proof of this Agreement to produce or account for more than a single counterpart.

Section 4.16. Governing Law; Venue. The terms and provisions hereof will be governed by and construed in accordance with the laws of the State of Texas and the United States of America from time to time in effect. Hays County, Texas will be the place of venue for suit hereon.

Section 4.17. Authority of Parties Executing Agreement. By their execution hereof each of the undersigned parties represents and warrants to the other party to this document that he or she has the authority to execute the document in the capacity shown on this document.

Section 4.18. Boycott Israel. Tack hereby verifies that the La Salle Developer does not boycott Israel and will not boycott Israel during the term of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in multiple copies, each of which will be deemed to be an original and of equal force and effect this _____ day of _____, 2018.

CITY OF KYLE

BY: _____
Travis Mitchell, Mayor

ATTEST:

Jennifer Crabtree, City Secretary

APPROVED AS TO FORM:

, City Attorney

Tack Development, LP.

BY: _____
Managing Partner

EXHIBIT A

EXHIBIT B