RR
12/05/13
Item No. 4B

AN ORDINANCE 2013-12-05-0832

APPROVING A DEVELOPMENT AGREEMENT FOR DOWNTOWN EXPANSION AND PROJECT IMPROVEMENTS WITH HEB GROCERY COMPANY, L.P. ("HEB") FOR A DEVELOPMENT PROJECT TO BE LOCATED IN CITY COUNCIL DISTRICT 1.

* * * * *

WHEREAS, HEB has developed a Master Plan for future expansion of its downtown headquarters located at 626 S. Main Ave., which contemplates the closure of a portion of S. Main Ave. between E. Cesar E. Chavez and E. Arsenal; and

WHEREAS, HEB's downtown headquarters currently houses 1,600 employees and, as a result of the street closure, HEB will have the ability to expand by as much as 800 additional employees by 2020; and

WHEREAS, in conjunction with this corporate expansion, HEB will develop and operate a 10,000 sq. ft. grocery store for a period of five (5) consecutive years, which is anticipated to assist in the redevelopment and revitalization of the Downtown area; and

WHEREAS, the canvassing effort and Traffic Improvement Analysis for the street closure has identified several items such as the need to provide access to the Commanders House from South Flores; the desire to create more synergy with the park, neighborhood, and grocery store; the need to replace and/or preserve a bicycle route and pedestrian path through S. Main Ave; and traffic improvements that would mitigate the impact of the street closure; and

WHEREAS, HEB has committed to undertake and complete such improvements; **NOW, THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Council approves the negotiation and execution of a Development Agreement for Downtown Expansion and Project Improvements, including all Exhibits between the City of San Antonio and HEB Grocery Company, L.P.

SECTION 2. The City Manager or her designee is authorized to execute the Agreement in accordance with this Ordinance. A copy of the Agreement, in substantially final form, is attached to this Ordinance as "**Exhibit A**." The final agreement shall be filed with this Ordinance upon execution.

SECTION 3. This Ordinance shall be effective immediately upon its passage by eight (8) votes or after the 10th day after its passage by less than eight (8) affirmative votes.

RR
12/05/13
Item No. 4B

PASSED AND APPROVED this 5th day of December, 2013.

M A Y O R
Julián Castro

ATTEST:

Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

Michael D. Bernard, City Attorney

Agenda Item:	**4B (in consent vote: 4A, 4B)**
Date:	12/05/2013
Time:	01:24:05 PM
Vote Type:	Motion to Approve
Description:	An Ordinance approving a development agreement that would facilitate the expansion of HEB's headquarters to include a 10,000 square foot grocery store and construction of public improvements.
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x			x	
Ivy R. Taylor	District 2		x				x
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4				x		
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7		x				
Ron Nirenberg	District 8				x		
Joe Krier	District 9		x				
Carlton Soules	District 10		x				

EXHIBIT A

STATE OF TEXAS	§	**DEVELOPMENT AGREEMENT**
	§	**FOR DOWNTOWN EXPANSION**
COUNTY OF BEXAR	§	**AND PROJECT IMPROVEMENTS**

This DEVELOPMENT AGREEMENT FOR DOWNTOWN EXPANSION & PROJECT IMPROVEMENTS (this "***Agreement***") is entered into as of the Effective Date provided on the signature page by and between the CITY OF SAN ANTONIO, TEXAS, a Texas municipal corporation (the "***City***"), and HEB GROCERY COMPANY LP, a Texas limited partnership ("***HEB***"). City and HEB may be referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, City has a goal of redeveloping and revitalizing downtown San Antonio by increasing employment in the downtown district and increasing the number of residents living in the downtown district;

WHEREAS, HEB currently employs approximately 1,600 persons at its corporate headquarters located in downtown San Antonio at 646 South Main Avenue; and

WHEREAS, HEB seeks to maintain and expand its presence in downtown San Antonio and HEB has developed a Master Plan that is attached hereto as **Exhibit "A"** ("***Master Plan***") to allow for such expansion;

WHEREAS, the Master Plan will allow HEB to increase the number of employees at its downtown headquarters by as many as 800 by 2020 (over fifty-percent (50%) of which are anticipated to be newly-created positions); and

WHEREAS, the Master Plan also provides HEB with the opportunity to grow by an additional 800 employees by 2030, for a cumulative total of 3,200 employees at the downtown campus by such date; and

WHEREAS, the Master Plan contemplates a $75 million investment by HEB; and

WHEREAS, the Master Plan provides for (a) the expansion of the downtown HEB headquarters and (b) the development of an HEB grocery store with a floor area of at least 10,000 square feet (as further described below);

WHEREAS, the City desires to facilitate the implementation of the Master Plan for purposes of (a) increasing downtown employment, and (b) making downtown a more attractive residential district through the introduction of a neighborhood grocery store; and

WHEREAS, the Master Plan requires the unification of the historic Arsenal property, which is located on opposite sides of South Main Avenue, through the closure of the portion of South Main Avenue between East Cesar E. Chavez Boulevard and East Arsenal Street (the "***Street Closure***"); and

WHEREAS, the City has commissioned and reviewed the Traffic Impact Analysis attached hereto as **Exhibit "B"** (the "***TIA***") to determine the impact of the Street Closure on vehicular, pedestrian, and bicycle traffic; and

WHEREAS, the TIA recommends certain traffic improvements for purposes of mitigating the impact of the Street Closure on vehicular, pedestrian, and bicycle traffic, a general description of such improvements being described on the attached **Exhibit "C"**; and

WHEREAS, the canvassing of City departments, utilities, and other major stakeholders regarding the Street Closure identified needs for purposes of mitigating the impact of the Street Closure, including the Traffic Improvements, certain Commander's House Work (as defined herein) to improve public access to the Commanders House, and the construction of certain Pedestrian and Bicycle Paths to improve pedestrian and bicycle access between the surrounding neighborhoods, the Commander's House Park, the Grocery Store and the HEB headquarters (collectively, the "***Project Improvements***"); and

WHEREAS, the City's street closure procedure requires approval of the City Council and the payment of a fee equivalent to the appraised value of the land being vacated by the Street Closure, which has been determined by appraisal to be Three Million Five Hundred Forty Thousand and No/100 Dollars ($3,540,000.00) (the "***Street Closure Fee***") as more particularly described in Section 6.2 below; and

WHEREAS, Section 37-11(d)(2) of the City's Code of Ordinances (the "***Code***") provides that the Director (as defined below) may recommend to City Council that it reduce the fee paid for a street closure if the petitioner for such street closure proposes to make improvements qualifying for reduction or waiver of fees under the City's incentive policies; and

WHEREAS, the Director has found that the Project Improvements qualify under Section 37-11(d)(2) of the Code for purposes of allowing the City Council to reduce the fee for the Street Closure and has recommended to the City Council that it agree to reduce the fee for the Street Closure by allowing HEB to offset the costs incurred to construct the Project Improvements against the Street Closure Fee; and

WHEREAS, the City's willingness to permit HEB to offset the costs of the Project Improvements against the Street Closure Fee is premised partially upon HEB's commitment to develop the Grocery Store and operate such Grocery Store for at least five years; and

WHEREAS, Section 37-11(e) of the Code provides that the Director may require a petitioner for a street closure to execute an agreement setting out the applicable closure fee and the conditions imposed by City departments in connection with the street closure; and

WHEREAS, this Agreement is entered into in contemplation of the approval by the City Council of the Street Closure by separate ordinance; and

NOW, THEREFORE: for and in consideration of the mutual covenants, agreements,

and benefits to the parties herein named, it is agreed as follows:

I. DEFINITIONS

1.1 Specific Terms. As used in this Agreement, the following terms shall have meanings as set out below:

a. "***City***" is defined in the preamble to this Agreement and includes its successors and assigns.

b. "***City Codes and Regulations***" shall mean those standards, rules, permitting requirements and regulations applicable to the construction and maintenance of buildings and structures within the City, and subject to City enforcement and inspection, such as San Antonio's Unified Development Codes, and other building regulations.

c. "***Commander's House Improvements***" shall mean the improvements described in Section 5.3 below.

d. "***Construction Documents***" shall mean the plans, specifications and estimates for the Project Improvements which shall be prepared pursuant to the terms of this Agreement. The Construction Documents shall illustrate the dimensions, materials, methods of construction, and other details of the Project Improvements.

e. "***Contractor***" shall mean one or more Texas licensed general contractors under contract with HEB to undertake construction of the Project Improvements.

f. "***Director***" is the Director of the City's Capital Improvements Management Department or such other person as the Director may designate.

g. "***Effective Date***" is defined above the signature lines in this Agreement.

h. "***Engineer***" shall mean a Texas licensed professional engineer under contract with HEB to design and perform engineering services for the Project Improvements.

i. "***Grocery Store***" shall mean an approximately 10,000 square foot HEB grocery store located along Flores Street south of its intersection with East Cesar Chavez Boulevard.

j. "***HEB***" is defined in the preamble to this Agreement and includes its successors and assigns.

k. "***Newly Dedicated Right-of-Way***" shall mean the right-of-way located on HEB's property within the Pedestrian and Bicycle Paths.

l. "***Pedestrian and Bicycle Paths***" shall mean (a) a new protected pedestrian path and a new protected bicycle path on the east side of Flores Street between E. Arsenal and E. Cesar E. Chavez, resulting in a 30 foot amenity path, as further described in **Exhibit "D"**, (b) bicycle and pedestrian paths and landscaping, as further described in **Exhibit "D"**, along

Arsenal Street between Flores Street and the San Antonio River, and (c) bicycle and pedestrian paths within the City-owned Commander's House property.

m. "***Project Costs***" shall mean all hard and soft construction costs and expenses incurred by HEB with respect to the Project Improvements, including, without limitation, (a) the appraised value of the Newly Dedicated Right-of-Way, (b) all costs to prepare the Construction Documents, including, but not limited to, all engineering fees and expenses for all studies, estimates of probable costs and other work performed by the Engineer; (c) all costs of preparing any necessary environmental reports, traffic impact analysis, appraisals and similar reports in connection with the Project Improvements and this Agreement; (d) all costs and expenses to construct the Project Improvements; and (e) other reasonable and necessary fees and expenses relating to the Project Improvements.

n. "***Project Improvements***" shall mean the Traffic Improvements, the Commander's House Improvements and the Pedestrian and Bicycle Paths.

o. "***Street Closure***" shall mean the closure of the portion of South Main Avenue extending between East Cesar E. Chavez Boulevard and East Arsenal Street depicted on the attached **Exhibit "E"**.

p. "***Street Closure Fee***" shall mean Three Million Five Hundred Forty Thousand and No/100 Dollars ($3,540,000.00).

q. "***TIA***" shall mean the Traffic Impact Analysis described in **Exhibit "B"** attached hereto that was commissioned by the City to determine the impact of the Street Closure on vehicular, pedestrian, and bicycle traffic

r. "***Traffic Improvements***" shall mean the traffic improvements generally described on the attached **Exhibit "C"**, with the exact details of such improvements to be agreed to by the Parties within thirty (30) days following the Effective Date.

s. "***Work***" or "***work***" shall mean the design and construction of the Project Improvements as provided herein.

1.2 General. Any other term to which meaning is expressly given in this Agreement shall have such meaning.

1.3 Gender and Number, Other Terms. When the context permits, the singular shall include the plural, the plural the singular, and the masculine shall include the neuter and feminine.

II. PURPOSE

2.1 Purpose. The purpose of this Agreement is to establish the terms and conditions for the Street Closure, the construction of the Project Improvements, the construction and operation of the Grocery Store, and the terms under which the Project Costs may be offset against the Street Closure Fee.

2.2 No Partnership. HEB and City agree that the Project Improvements constitute an HEB project and not a joint enterprise, joint venture or any other type of joint undertaking between HEB and City.

2.3 Mutual Cooperation. Notwithstanding Section 2.2 above, HEB and City will collaborate to ensure the Project Improvements and other aspects of this Agreement are implemented in accordance with the terms and conditions of this Agreement, and City agrees to cooperate with HEB in obtaining any and all governmental permits or consents as may be required in connection with the construction of the Project Improvements and the Grocery Store.

III. TERM

3.1 Term. The term of this Agreement (the "***Term***") shall commence upon execution by the Parties and, unless sooner terminated in accordance with the provisions of this Agreement, terminate upon the expiration of five (5) years following the completion of the Project Improvements and opening of the Grocery Store.

IV. CONDITIONS

HEB's obligations set forth in this Agreement are subject to satisfaction of the following conditions:

4.1 Street Closure. City shall have approved the Street Closure by ordinance on or before December 5, 2013, subject only to the conditions set forth in this Agreement, the reservation of utility easements approved by HEB, and such other conditions as HEB may approve in its sole discretion. If any lawsuit is filed against City and/or HEB challenging the Street Closure, the City and HEB, as applicable, shall actively pursue the resolution of such action as expeditiously as possible and, in such event, HEB shall also have the option of electing to defer any of the obligations set forth herein until such time as any such lawsuit is finally dismissed with prejudice and not subject to any further appeals.

4.2 Zoning and Permits. HEB shall have obtained a special use authorization permit to locate a gas station adjacent to the Grocery Store, and any other governmental permits or consents as may be required to construct the Project Improvements and/or the Grocery Store.

4.3 Plan Approval. City shall have approved the plans and specifications and other Contract Documents for the construction of the Project Improvements in accordance with Article VIII and IX below.

V. HEB'S OBLIGATIONS

5.1 Temporary Access Easement. Upon approval of the Street Closure, HEB shall grant to City a non-exclusive access easement across the area subject to the Street Closure in the form attached hereto as **Exhibit "E"** (the "***Temporary Access Easement***"). As described in Exhibit "E", the Temporary Access Easement provides that the area subject to the Street Closure shall remain open for purposes of passage by the general public for no less than three hundred sixty three (363) days per year until such time as construction of the Project Improvements has been

completed and accepted by the City in accordance with Section 5.6 below (the "***Project Improvements Completion Date***").

5.2 Grocery Store. HEB shall coordinate the design of the Grocery Store with City's Historic Design & Review Commission. HEB shall commence construction of the Grocery Store promptly following the Project Improvements Completion Date and exercise diligent efforts to complete construction of the Grocery Store and open for business within one year thereafter. HEB shall operate the Grocery Store for a period of no less than five (5) consecutive years following completion of the Grocery Store.

5.3 City-Owned Commander's House. The City-owned Commander's House is adjacent to HEB's corporate headquarters. This public facility shall remain in the City's ownership and operated in accordance with the City's policies. For purposes of enhancing public access and use of the Commander's House, HEB shall perform the following work as part of the Project Improvements (collectively, the "***Commander's House Work***"):

a. New Entrance. HEB shall construct a new vehicular entrance and driveway off of Flores Street at Whitley Street to the Commander's House, which shall be accessible to the general public seeking access to the Commander's House, and provide an access easement to City as may be reasonably required to provide access from the public street to the Commander's House entrance drive.

b. Road Restoration. HEB shall repair the circular drive on the Commander's House grounds and provide a paved access to the parking lot from the circular drive.

c. Plans and Access. The Commander's House Work shall be performed in accordance with plans and specifications approved by HEB and City and City shall grant HEB such access and construction easements as may be reasonably are necessary for purposes of performing this work.

5.4 Pedestrian and Bicycle Paths. As part of the Project Improvements, HEB shall construct the Pedestrian and Bicycle Paths. Upon completion of construction of the Pedestrian and Bicycle Paths, HEB shall dedicate the Newly Dedicated Right-of-Way (which is the right-of-way located on HEB's property contained within such Pedestrian and Bicycle Paths) and all the improvements located thereon to the City. The Pedestrian and Bicycle Paths shall be constructed in accordance with plans and specifications approved by HEB and City and the City shall grant HEB such access and construction easements as may be reasonably necessary for purposes of performing this work.

5.5 Traffic Mitigation Improvements. As part of the Project Improvements, HEB shall construct the Traffic Improvements.

5.6 Completion of Project Improvements. HEB agrees to commence construction of the Project Improvements promptly following satisfaction of the Conditions set forth in Article IV, and following such commencement exercise diligent efforts to complete the Project Improvements within twelve (12) months thereafter. The Project Improvements shall be deemed to be completed for purposes of this Agreement upon written acceptance thereof by the Director on behalf of City.

5.7 Performance Bond/Letter of Credit. To secure HEB's obligations to construct the Project Improvements, HEB shall provide, for the City's benefit, a performance bond or letter of credit, in a form reasonably acceptable to City's Risk Manager, in an amount of up to THREE MILLION FIVE HUNDRED FORTY THOUSAND DOLLARS AND NO CENTS ($3,540,000.00), which performance bond or letter of credit shall remain in place until the Project Improvements have been completed.

5.8 Landscaping and Grounds Maintenance. Upon HEB's completion of the Commander's House Work, HEB shall assume responsibility for maintaining the landscaping and grounds of the Commander's House in substantially their existing condition for a period of twenty (20) years from the Effective Date of this Agreement. Notwithstanding the foregoing, the cost of any capital repairs and replacements to the Commander's House landscaping or grounds shall be borne by City except to the extent such costs arise out of HEB's failure to perform its maintenance obligations hereunder. Notwithstanding anything contained herein to the contrary, HEB's obligations under this Section 5.8 shall survive the termination of this Agreement until the expiration of the 20-year period described above.

5.9 Waivers. HEB agrees to forego any incentive funds other than City and SAWS Fee waivers from the City for the construction and operation of the Grocery Store and Project Improvements. HEB shall be entitled to the benefit of City and SAWS Fee waivers in accordance with the City's and SAWS' fee waiver policies applicable to the Grocery Store and Project Improvements.

5.10 Cost of TIA. Following the Street Closure, HEB agrees to reimburse City the sum of $36,878.00 for the costs undertaken in commissioning the TIA. City shall provide HEB with an invoice for the cost of the TIA and HEB shall pay City the amount no later than sixty (60) days following the submission of the invoice.

VI. APPLICATION OF PROJECT COSTS TO STREET CLOSURE FEE

6.1 Closure Fees. Under Section 37-11 of City's Municipal Code, fees for the closures, vacations, and abandonments of street by City are: a) a non-refundable processing fee of $815.00 and b) the fair market value of the right-of-way segment being closed, vacated, or abandoned. HEB previously petitioned City for the Street Closure and paid to City an amount of $815.00 to commence the closure process.

6.2 Appraisal. The Street Closure shall be performed in accordance with Section 37-11 of the City's Municipal Code, which requires the petitioner to pay a fee equivalent to the fair market value of the right-of-way segment being closed, vacated, or abandoned. The City has undertaken and completed an independent appraisal of the street right-of-way in accordance with the City's street closure procedure, which appraisal is attached hereto as **Exhibit "F"**. The Parties agree that the stated value in the appraisal, being the Street Closure Fee, represents the fair market value of the Street Closure.

6.3 Deduction of Costs. The Parties anticipate that the Project Costs may equal or exceed the Street Closure Fee and, thus, there will be no additional monetary consideration owed by HEB upon completion of the Project Improvements. Pursuant to Section 37-11(d)(2) of the Code, the

Street Closure Fee shall reduce by (a) the Project Costs incurred in accordance with this Agreement, and (b) so long as HEB commences construction of the Project Improvements within ninety (90) days following satisfaction of the Conditions set forth in Article IV above, City agrees to defer HEB's obligation to pay any portion of the Street Closure Fee until the completion of the Project Improvements.

6.4 Remaining Balance. Notwithstanding anything contained herein to the contrary, if the Project Costs do not equal or exceed the Street Closure Fee, then within thirty (30) days following completion of the Project Improvements, HEB shall pay to the City the amount by which the Street Closure Fee exceeds the Project Costs (the "***Remainder Fee***").

VII. PROJECT MANAGEMENT

7.1 Project Management. HEB will manage, oversee, administer and carry out all of the activities and services required for construction of the Project Improvements. HEB will use its best efforts to ensure that the Project Improvements are constructed and completed with quality materials in a good and workmanlike manner, in accordance with the terms of this Agreement and the design and Construction Documents. HEB will be responsible for meeting all applicable legal, regulatory, and code requirements for the Project Improvements.

7.2 Timely Performance. HEB and City herein acknowledge that this Agreement has time performance requirements. HEB and City will work together in good faith and cooperation to carry out the work expeditiously and to timely perform their respective duties.

7.3 Improvements Committee. At the request of either HEB or City, a committee with membership representing HEB and City may be established to review aspects of the Project Improvements and Grocery Store. The purpose of the committee is to continue the collaborative effort between the entities in the construction of the Project Improvements and the Grocery Store.

7.4 Accessibility. During construction, HEB shall permit access to the Project Improvements by City's employees, agents, contractors, and their employees and subcontractors for the purpose of inspection by City. City representatives will comply with all safety requirements of HEB or its Contractors at the site.

VIII. DESIGN AND ENGINEERING

8.1 Selection. HEB shall enter into contract(s) with such professional consultants, engineers, firms and other persons as are necessary for design and engineering services (collectively "***Engineers***"), for development of designs, plans and specifications, and such studies, reports and analyses that are preliminary to construction of the Project Improvements (collectively "***Engineering Services***"). HEB shall select the providers of Engineering Services in accordance with its usual and customary procurement procedures. HEB shall inform City of its selection(s) within ten (10) business days following the selection date. HEB will forward a copy of the fully-executed contract(s) to the City within ten (10) days of contract execution.

8.2 Review of Construction Documents. HEB shall provide City access to HEB's complete Construction Documents. HEB shall notify the City of such design posting if it is intended for

review and approval by the City. City will review the Construction Documents for compliance with City Codes and Regulations within twenty (20) business days of submission by HEB. HEB shall not proceed to construct any part of the Project Improvements until City has determined that HEB's designs for such part are compliant with the City's Codes and Regulations. If there are any deviations from the City Codes and Regulations that require corrective action, the City shall promptly notify HEB.

IX. CONSTRUCTION

9.1 Selection. HEB shall enter into contract(s) (the "***Construction Contract***") for construction of the Project Improvements. HEB shall be solely responsible for the selection of Contractor(s) for construction of the Project Improvements in accordance with its usual and customary procurement procedures. HEB shall inform City of the Contractor's selection within ten (10) business days following the selection date and forward to City a copy of the fully executed construction contract(s) within ten (10) days of contract execution. If HEB does not receive qualified bids within the cost estimates, HEB may redesign and rebid the Project Improvements until it is within an acceptable budget. City shall be consulted if the need to eliminate or redesign material portions of the Project Improvements becomes necessary due to the actual costs exceeding the cost estimates.

9.2 Construction Documents/Corrective Actions. HEB shall provide the City with a complete set of the Construction Documents. HEB shall notify the City of such construction posting if it is intended for review and approval by the City. Upon submission by HEB of the complete set of Project Construction Documents, the City will promptly review within twenty (20) business days for compliance with City Codes and Regulations. If there are any deviations from the City Codes and Regulations that require corrective action, the City shall promptly notify HEB.

9.3 Permits and Approvals. HEB's obligations to commence construction of the Grocery Store and Project Improvements are conditioned upon the timely receipt by HEB of applicable City permits and approvals. Without limiting the foregoing, HEB agrees to use its commercially reasonable efforts (without cost or expense to the City) to apply for and obtain all requisite approvals from any regulatory authority in connection with the construction of the Grocery Store and the Project Improvements.

9.4 Construction Execution. HEB shall use its commercially reasonable efforts to cause the Contractor to construct the Project Improvements in a diligent and continuous fashion until completion. Construction of the Project Improvements shall at all times be performed in a good and workmanlike manner using only quality materials as shall be specified in the Construction Documents. The Project Improvements may be designed and built in stages as HEB may determine. During construction of the Project Improvements, HEB shall provide the Director, upon request, status reports showing the percentage of completion of the Work and expenditures incurred in connection with the construction of the Project Improvements. The Director shall have the authority to approve completion of the Project Improvements on behalf of the City. "As-Built" Plans shall be provided to the City no later than sixty (60) days after completion of the Project Improvements.

9.5 Change Orders and Modifications. HEB shall notify the CITY of any variations from the Construction Documents with cost impacts of $500,000.00 or more.

9.6 Inspections. The Project Improvements shall be accessible at all reasonable times to the Director or his/her designee for inspection. HEB acknowledges that any inspections performed by City during the course of construction for purposes of this Agreement (as opposed to routine building and construction inspections performed by City for permitting and acceptance purposes common to all similar construction projects) are for the benefit of the City only and may not be relied upon by others, be claimed by HEB as an approval by the City, a permit granted by the City, a waiver by the City, or used for any purpose by HEB, the Contractor or any third party. HEB further acknowledges that HEB and Contractor are required to perform their own inspections, and inspections by the City do not address any obligations of HEB or others. Subject to the foregoing, the City shall promptly notify HEB of any defects or non-conformances discovered during any City inspections.

X. ACCOUNTING

10.1 Accounting. HEB shall account for all funds expended associated with the Project Improvements. Within twenty (20) business days of the end of each quarter during the period of construction of the Project Improvements, HEB shall prepare a report setting forth all expenditures of funds on the Project Improvements and, upon completion of the Project Improvements, HEB will perform a final report of expenditure and submit to City.

XI. AUDIT RIGHTS

11.1 Audit Conditions and Requirements:

a. The cost of the Project Improvements is subject to periodic audits by City's auditors or other City staff as designated by the Director. This may include the records of HEB and HEB's Contractor's that are related to the Project Improvements.

b. Following 30 days after a written request by City, HEB shall submit a written report stating what has been accomplished to date and the most current percentage of completion of the total work for the Project Improvements that has been performed.

11.2 Access to Records. HEB will provide City's staff, including internal and external auditors and other persons as designated by City, such as independent public accountants, access during regular business hours, as deemed necessary by City for the purposes of auditing, monitoring, evaluating, coordinating, investigating and making excerpts and/or copies of any and all of HEB's books, records and files related to the Project Improvements. The submission of falsified information or the failure to timely submit to City such records, reports and financial statements as requested by City pursuant to this Article XIV may constitute a breach of this Agreement and grounds for termination under Article XIII above.

XII. TERMINATION

12.1 Termination Defined. For purposes of this Agreement, "termination" of this Agreement shall mean termination by expiration of the Agreement term as stated in Article III or earlier termination pursuant to any of the following provisions.

12.2 Unauthorized Assignment. If HEB attempts to sell, transfer, pledge or transfer this Agreement without the prior approval of the City, then the City shall have the option of terminating this Agreement effective as of the date provided in the notice given to HEB in accordance with Article XVIII.

12.3 Events of Default. The following shall be deemed to be Events of Default by HEB hereunder:

a. Failure to abide by the terms of the Temporary Access Easement.

b. Failure to complete and convey the Project Improvements to City within twelve (12) months following satisfaction of the Conditions set forth in Article IV, subject to extensions for Force Majeure and pursuant to Section 4.1 above.

c. Failure to open the Grocery Store on or before the expiration of eighteen (18) months following the date upon which the Project Improvements are completed, subject to extensions for Force Majeure.

d. Failure to operate the Grocery Store for a period of five (5) consecutive years.

e. Failure to perform or failure to comply with any other material covenant herein required

12.4 Default Termination. Upon the occurrence of an Event of Default, the City may deliver written notice to HEB specifying the nature of such Event of Default (a "***Notice of Default***"). Upon receipt of a Notice of Default, HEB shall then have ninety (90) calendar days (the "***Cure Period***") to cure the Event of Default. If HEB does not cure the Event of Default within the Cure Period, then the City shall have the right, without further notice, to terminate this Agreement (such event referred to herein sometimes as a "***Default Termination***"), and HEB shall be liable to City for payment of the sums set forth in Sections 12.5 and 12.6, as applicable.

12.5 Failure to Complete Project Improvements. Upon an Event of Default by HEB under Section 12.3.b and failure by HEB to cure the Event of Default within the Cure Period, if the proceeds of any Performance Bond or Letter of Credit posted by HEB are not sufficient or available to satisfy HEB's obligation to complete the Project Improvements, then HEB shall pay to the City within thirty (30) days, as Liquidated Damages, a sum equal to the funds required to complete the Project Improvements, as reasonably determined by City. The Parties acknowledge that HEB's failure to complete the Project Improvements will cause the City to incur substantial economic damages and losses of types and in amounts which are impossible to compute and ascertain with certainty as a basis for recovery by the City of actual damages, and that the Liquidated Damages represent a fair, reasonable and appropriate estimate thereof. Such Liquidated Damages are intended to represent estimated actual damages and are not intended as a penalty. HEB shall pay such Liquidated Damages to the City within sixty (60) days of a Default Termination.

12.6 Failure to Open or Operate the Grocery Store. Upon an Event of Default by HEB under Section 12.3.c or d and failure by HEB to cure the Event of Default within the Cure Period, HEB shall pay to City Liquidated Damages in the amount of Three Million Five Hundred Thousand and No/100 Dollars ($3,500,000.00). The Parties acknowledge that an Event of Default by HEB under Section 12.3.c or d will cause the City to incur substantial economic damages and losses of types and in amounts which are impossible to compute and ascertain with certainty as a basis for recovery by the City of actual damages, and that the Liquidated Damages represent a fair, reasonable and appropriate estimate thereof. Such Liquidated Damages are intended to represent estimated actual damages and are not intended as a penalty. HEB shall pay such Liquidated Damages to the City within sixty (60) days of a Default Termination.

12.7 Termination By Law. If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall be interpreted as if such provision was never included in this Agreement, unless such interpretation would be repugnant to the overall intent of the Parties' to this Agreement in which case this Agreement shall automatically terminate as of the effective date of such prohibition.

12.8 Termination Not Sole Remedy. In no event shall City's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of City's remedies, nor shall such termination limit, in any way, at law or at equity, City's right to seek damages from any Event of Default under Section 12.3.a or e, it being understood that City's sole recourse for an Event of Default under Sections 12.3.b, c or d shall be termination and receipt of Liquidated Damages as provided therein.

12.9 Nonwaiver. Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver of relinquishment for the future of such covenant or option. No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges or remedies to be always specifically preserved hereby; provided that it is expressly agreed that neither Party shall have the right to seek consequential, special or punitive damages against the other for any default under this Agreement.

12.10 Waiver of Consequential Damages. Notwithstanding anything contained herein to the contrary, neither party hereto shall be liable for any consequential, punitive or special damages arising out of an Event of Default or breach of this Agreement.

XIII. DOCUMENTS

13.1 Access. All Contract Documents and any other Project Improvement documents, including the original drawings, estimates, specifications, and all other documents and data owned by HEB, Engineer and/or Contractor will remain the property of HEB, Engineer and/or

Contractor as instruments of service. However, it is understood that the City shall have access to all such information relating to the Project Improvements with the right, at the City's sole expense, to make and retain copies of drawings, estimates, specifications and all other documents and data. Any reuse without specific written verification or adaptation by HEB, Engineer and/or Contractor will be at the City's sole risk and without liability or legal exposure to HEB, Engineer and/or Contractor.

13.2 Records Retention. HEB, Engineer and/or Contractor shall retain any and all documents produced as a result of the work performed under this Agreement for a period of three (3) years from the date of Project Improvement completion or termination (the Retention Period). If, at the end of the Retention Period, there is litigation or other questions arising from, involving or concerning this documentation or the work performed hereunder, HEB shall retain the records until the resolution of such litigation or other such questions. HEB acknowledges and agrees that City shall have access to any and all such documents at any and all times, as deemed necessary by City, during the Retention Period.

XIV. INSURANCE

14.1 Certificates. Prior to the commencement of any work under this Agreement, HEB shall deliver to City copies of Certificates of Insurance ("***Certificates***") and all required endorsements.

14.2 Coverage. HEB will cause the Engineer and Contractor to name the City of San Antonio as an Additional Insured on its' Insurance Policies for the Project Improvements, excluding Workers Compensation, Employer's Liability, Professional Liability and any other coverage which, because of the type of coverage would preclude doing so.

14.3 Modifications. The City reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and, if deemed necessary by City, to recommend modifications to the insurance coverage's and their limits when deemed necessary and prudent by the City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement, but in no instance will the City allow modification whereupon City may incur increased risk.

14.4 Other Changes. When there is a cancellation, non-renewal or material change in coverage which is not made pursuant to a request by the City, HEB shall require Engineer and/or Contractor to notify the City of such and shall give such notices not less than thirty (30) days prior to the change, if Engineer and/or Contractor knows of said change, cancellation or non-renewal in advance, or ten (10) days' notice after the change, if Engineer and/or Contractor did not know of the change in advance. Such notice must be accompanied by a replacement Certificate.

14.5 Self-Insurance. Notwithstanding any other provision contained herein, HEB shall have the right to satisfy any insurance requirements hereunder through a commercially reasonable program of self-insurance.

XV. QUALITY OF WORK

15.1 Engineering Services. HEB will use its commercially reasonable efforts to cause the Engineering Services required under this Agreement to be performed with the same degree of professional skill and care that are typically exercised by similar professionals performing similar services in Bexar County, Texas.

15.2 Construction Work. If the Work is found to be defective, either wholly or in part, and/or found to be non-conforming with the Construction Documents during the 12-month period following completion of the Project Improvements as defined in the Construction Contract, the City shall immediately give HEB written notice thereof specifying the defect and/or non-conforming Work with particularity. HEB shall then promptly pursue all reasonable steps to cause the Contractor to correct such defective or non-conforming work at no additional costs to City, within thirty (30) days of notice thereof given by the City, or within such longer time as may be reasonably necessary, provided HEB is working diligently and continuously toward a cure. This provision shall survive termination of this Agreement.

XVI. CONFLICT OF INTEREST

16.1 Policy. HEB acknowledges that it is informed that the Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as those terms are defined in Part B, Section 10 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as City-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a City officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten percent (10%) or more of the voting stock or shares of the business entity or ten percent (10%) or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a City contract, a partner or a parent or subsidiary business entity.

16.2 Warranty. Pursuant to the subsection above, Contractor warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of the City. Contractor further warrants and certifies that it has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with the City's Ethics Code.

XVII. AS BUILT DRAWINGS

17.1 Delivery to City. HEB shall maintain a set of "as built" drawings of the Project Improvements constructed by HEB during the progress of the work. Within sixty (60) days of completion of the Project Improvements, HEB shall furnish the City with copies of "as built" drawings showing all elements of the completed work.

XVIII. NOTICES

18.1 Formal Notice. Any notice, demand, or other communication required to be given or to be served upon any Party under this Agreement shall be in writing and delivered to the person to whom the notice is directed, either: (i) in person with confirmation; (ii) by United States Mail, as a registered or certified item with return receipt required; (iii) delivered by delivery service

(including any express mail or overnight delivery service); or (iv) by confirmed facsimile, notices, demands, or other communications delivered by mail shall be deemed given and received when deposited in a post office or other depository under the care or custody of the United States Postal Service, enclosed in a wrapper, addressed properly, with proper postage affixed. Any notice, demand, or other communication given other than by certified or registered mail, return receipt requested, shall be deemed to have been given and received when delivered to the address of the Party to whom it is addressed as stated below:

To City at:	City of San Antonio CIMS Department P.O. Box 839966 San Antonio, Texas 78283-3966 Attn: Mike Frisbie
with copy to:	City of San Antonio City Attorney P.O. Box 839966 San Antonio, Texas 78225 Attn: Lori Houston
To HEB at:	HEB Grocery Company, LP 646 South Main Avenue San Antonio, Texas 78204 Attn: Todd A. Piland
with copy to:	Golden Steves Cohen & Gordon LLP 300 Convent Street, Suite 2600 San Antonio, Texas 78205 Attn: Stephen L. Golden

18.2 Changes. A change of address or other contact information for any Party may be given by written notice as provided above.

XIX. MISCELLANEOUS

19.1 Assignment. Except as herein provided, HEB may not assign its rights or obligations under this Agreement without the prior written consent of the City. Any such assignment, whether voluntary or involuntary, by operation of law, under legal process or proceedings, by receivership, in bankruptcy or otherwise, without the prior written consent of the City shall, at the City's option, be of no force and effect whatsoever. Any consent to any such assignment or transfer shall not constitute a waiver of any of the restrictions of this section, and the provisions of this section shall apply to each successive assignment or other transfer hereunder, if any. Notwithstanding the above, HEB may assign this Agreement without obtaining the City's consent to (i) one or more of its affiliates, or (ii) an entity which acquires fee title to a portion of the Development from HEB or one of its affiliates.

19.2 Force Majeure. In the event HEB is unable in whole or in part by force majeure to carry out any covenant, agreement, obligation or undertaking to be kept or performed under this Agreement, the time for the performance of such covenant, agreement, obligation or undertaking so delayed shall be extended for the period of such delay. HEB will make reasonable attempts to remedy the effects of the force majeure and continue performance under this Agreement with all reasonable dispatch. The term "force majeure" as employed in this section shall include acts of God, acts of terrorism, strikes, lockouts, or other industrial disturbances, acts of a public enemy, war, blockades, riots, epidemics, earthquakes, explosions, accidents, or repairs to machinery or pipes, the delays of carriers, inability by reason of governmental regulation to obtain materials, acts of public authorities, governmental permitting, litigation, or other causes, whether or not of the same kind as specifically enumerated, not within the control of the Party claiming suspension and which by the exercise of due diligence such Party is unable to overcome. If Contractor suffers any event of force majeure, such event shall likewise constitute force majeure with respect to HEB.

19.3 Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any prior oral or written agreement. Any alterations, additions or deletions to the provisions herein shall only be by amendment in writing executed by both Parties.

19.4 Binding Agreement. This Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, legal representatives, and successors and assigns.

19.5 No Joint Venture; No Partnership. Nothing contained in this Agreement is intended by the Parties to create any form of joint venture or partnership, and any implication to the contrary is hereby expressly disavowed by both Parties. It is understood and agreed that this Agreement does not create a joint enterprise of any kind.

19.6 Independent Contractors. It is expressly understood and agreed that both Engineer and Contractor are and shall be deemed to be independent contractors of HEB. The City is not responsible for any acts or omissions by the Engineer or Contractor.

19.7 Third Party Beneficiaries. There shall be no third-party beneficiaries to this Agreement.

19.8 Governing Law; Venue. This Agreement will be governed by and construed in accordance with the laws of the State of Texas. Proper venue for any dispute or litigation shall be only in Bexar County, Texas.

19.9 Captions. The captions contained in this Agreement are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this Agreement.

19.10 Invalid Provisions. If any clause or provision of this Agreement is held invalid, illegal or unenforceable, then it is the intention of the Parties that such invalidity, illegality or unenforceability shall not affect any other clause or provision herein and that the remainder of this Agreement shall be construed as valid.

19.11 Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, all of which taken together shall constitute one single Agreement among the Parties.

Signatures to appear on next page.

This Agreement is executed to be effective as of the _____ day of _____, 2013 (the "Effective Date").

CITY:

CITY OF SAN ANTONIO
a municipal corporation

_____
Sheryl L. Sculley
City Manager

HEB:

HEB GROCERY COMPANY LP,
a Texas limited partnership

_____
Todd A. Piland
Executive Vice President

ATTEST:

_____
Leticia Vacek
City Clerk

Approved as to Form:

_____
City Attorney

Exhibits

Exhibit "A" - HEB Master Plan
Exhibit "B" - Traffic Impact Analysis
Exhibit "C" - Traffic Improvements
Exhibit "D" - Depiction and description of Pedestrian and Bicycle Paths
Exhibit "E" - Temporary Access Easement
Exhibit "F" - Appraisal

Exhibit "A"

HEB Master Plan

[to be attached]

Exhibit "B"

Traffic Impact Analysis

That certain Traffic Impact Analysis prepared by Kimberley-Horne dated December, 2013.

Exhibit "C"

Traffic Improvements

1. HEB shall add a bike lane on the north side of Arsenal to connect to the shared use path on Flores and to connect to San Pedro Creek.

2. HEB shall provide a painted bike path connection from Flores to the existing bike path network on S Main and Dwyer via Old Guilbeau Road;

3. HEB shall add a stop sign on S. Main Ave. at Arsenal on the northbound approach.

4. HEB shall remove the traffic signal at Cesar Chavez and S. Main.

5. HEB shall add a traffic signal at E. Cesar E. Chavez and Dwyer Street.

6. HEB shall rebuild the Cesar E. Chavez and St. Mary's St. traffic signal, adding flashing yellow arrow displays on each approach to provide protected permitted left turn movements.

7. HEB shall rebuild the traffic signal at Cesar E. Chavez and Flores St. to provide for protected left turns.

8. At City's election at any time within six (6) months following the Effective Date, HEB shall close the median at E. Cesar E. Chavez and Pancoast, converting to right-in, right-out (alternate add short northbound right-turn lane).

9. HEB shall make traffic signal timing plan adjustments in the E. Cesar E. Chavez and Flores St. corridors.

10. HEB shall rebuild Flores and Arsenal traffic signals, adding pedestrian accommodations.

11. HEB shall add a traffic signal at Flores St. and Whitley St.

12. HEB shall install striping at the Turner/Washington/Pancoast intersection and add stop signs at such intersection.

13. HEB shall install an all-way stop at Washington St. and Arsenal St. intersection.

14. HEB shall install a painted crosswalk across Washington St. at Beauregard.