

CITY OF ROCKPORT

MINUTES

CITY COUNCIL SPECIAL MEETING 1:00 p.m., Monday, May 9, 2016 Rockport City Hall, 622 East Market Street

On the 9th day of May 2016, the City Council of the City of Rockport, Aransas County, Texas, convened in Special Session at 1:00 p.m., at the regular meeting place in City Hall, and notice of meeting giving time, place, date and subject was posted as described in V.T.C.A., Government Code § 551.041.

CITY COUNCIL MEMBERS PRESENT

Mayor Charles J. Wax
Mayor Pro-Tem Pat Rios, Ward 3
Council Member Rusty Day, Ward 1
Council Member Barbara Gurtner, Ward 4

CITY COUNCIL MEMBER(S) ABSENT

Council Member J. D. Villa, Ward 2

STAFF MEMBERS PRESENT

City Manager Kevin Carruth
City Secretary Teresa Valdez

ELECTED OFFICIALS

Opening Agenda

1. Call to Order.

With a quorum of the Council Members present, the Special Meeting of the Rockport City Council was called to order by Mayor Wax at 1:23 p.m. on Monday, May 9, 2016, in the Council Chambers of the Rockport City Hall, 622 E. Market Street, Rockport, Texas.

Mayor Wax stated for the information of the audience, the City received input from the Rockport Art Association's legal counsel at 12:45 p.m. today. Mayor Wax said there were three issues that were being discussed: 1) exclusivity, 2) term, and 3) liquidated damages. Mayor Wax added that the conversation will lead to a speedy resolution of these issues.

Executive Session

City Council will hold an executive session pursuant to the provisions of Chapter 551 of the Texas Government Code, in accordance with the authority contained in:

2. Section 551.072 Deliberation about Real Property: Deliberate the purchase, exchange, lease, or value of real property: 1100 block of East North Street, between Austin Street and Water Street.

At 1:24 p.m., Mayor Wax convened the Rockport City Council into an executive session pursuant to provisions of Chapter 551 of the Texas Government Code, in accordance with the authority

contained in Section 551.072 Deliberation about Real Property-Deliberate the purchase, exchange, lease, or value of real property: 1100 block of East North Street, between Austin Street and Water Street.

Open Session

3. **City Council will reconvene into open session pursuant to the provisions of Chapter 551 of the Texas Government Code to take any actions necessary related to the executive sessions noted herein, or regular agenda items, noted above, and/or related items.**

At 2:10 p.m., Mayor Wax reconvened the Rockport City Council into open session pursuant to the provisions of Chapter 551 of the Texas Government Code to take any necessary actions related to the executive sessions noted herein, or regular agenda items, noted above, and/or related items.

MOTION: Mayor Wax moved that Council approve the draft lease he has marked as “final” (attached) and instruct the City Manager, with all deliberate speed, to prepare the lease for signatures by both parties. Mayor Pro-Tem Rios seconded the motion. Motion carried unanimously.

4. Adjournment

At 2:12 p.m., Council Member Day moved to adjourn. Motion was seconded by Mayor Pro-Tem Rios and carried unanimously.



ATTEST:


Teresa Valdez, City Secretary

APPROVED:


Charles J. Wax, Mayor

Final
[Signature]

LEASE AND IMPROVEMENT AGREEMENT

This LEASE and Improvement Agreement ("Lease Agreement") is entered into by and between the City of Rockport, Texas, a Home Rule Municipality located in Aransas County, ("City"), and the Rockport Art Association, Inc., a non-profit organization operating within the City, ("RAA").

I. Recitals

1. RAA is preparing to construct new facilities for its operations on three lots located within the City's downtown area and bisected by 1100 block of East North Street in the City block that is bordered on the west by Austin Street and on the east by Water Street ("the Property"), being more fully depicted on the attached Exhibit "A" map.
2. East North Street is a public street subject to the exclusive control of the City, as provided by Sections 311.001 and 311.007, Texas Transportation Code, which authority includes the right to control, regulate, improve, close, vacate, remove encroachments or obstructions from, or to otherwise regulate the street.
3. RAA has requested that the City close the Property to regular vehicular traffic in order to incorporate the public street and sidewalk area into a landscaped public area with outdoor art features and related improvements.
4. The City Council is of the opinion that RAA's relocation to the proposed facilities and utilization of the Property in the manner described will enhance the appearance of the downtown area and create a campus atmosphere that will attract tourists and additional development to the downtown area, will promote economic development, and will stimulate business and commercial activity in the City.
5. The City Council has considered the requirements of Chapter 316, Texas Transportation Code, and has made the findings required by Sections 316.303 and 317.007.

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II. Definition

For the purposes of this Lease Agreement, the term "exclusive possession" "exclusive use" or "exclusive right" with regard to RAA's interest in and use of the Property shall mean the following:

- a. The City shall not allow or permit any public event, festival, parade, or similar event to occur on the Property unless approved or requested by RAA;
- b. Use of the Property by RAA shall not prevent members of the public having access to the Property on foot or non-motorized personal vehicles (e.g. bicycles) so long as:

- 42 (i) such access is in accordance with RAA's policies and regulations for the
- 43 Property; and
- 44 (ii) such access does not damage, threaten, or pose a genuine threat to any
- 45 outdoor art feature, landscaping, or improvement placed on the property
- 46 by RAA;
- 47 c. The City shall not be prevented from entering the property with emergency or utility
- 48 vehicles or personnel when such entry is necessary to protect the health, safety, or
- 49 welfare of the public, particularly including fire or police protection, ambulance and
- 50 EMT services, or repair, removal, replacement, or installation of utility facilities; and
- 51 d. In the event that RAA notifies the City that any planned, threatened, or anticipated
- 52 event on or entry to the Property poses a threat, injury, or damage to RAA, its
- 53 personnel or property, the City will use every means at its disposal to prevent,
- 54 contain, cancel, or terminate such event or entry.

55 **III. Grant of Lease and Agreement**

56 For and in consideration of the foregoing recitals, the mutual covenants contained herein,
 57 and other good and valuable consideration, the receipt of which is hereby acknowledged, the
 58 City and RAA hereby agrees as follows:

- 59 1. **Closing of Property to Motorized Vehicles.** City will close the Property by Ordinance
 60 to regular, motorized vehicular traffic and enforce the closure by placement of
 61 appropriate signage and barriers at the east and west ends of the Property that will
 62 prohibit the passage of motorized vehicular traffic except as specifically authorized
 63 herein but which may be moved to allow the passage of authorized emergency vehicles as
 64 defined in Sec. 541.201(1), Tex. Trans. C. The closure shall take place no later than the
 65 tenth (10th) day following receipt by RAA of its building permit for the improvements to
 66 be constructed upon the property located at 106 and 204 S. Austin St. and 203 Water St.,
 67 Rockport, Texas.
- 68 2. **Lease.** City hereby leases to and allows RAA the exclusive right to utilize and possess
 69 the public street and sidewalk area within the Property as shown in Exhibit "A" attached
 70 hereto and incorporated herein by reference for all purposes, in conjunction with its other
 71 facilities, to create a landscaped area with outdoor art features and other improvements,
 72 including the placement therein of other works of art.
- 73 3. **Warranties.** The City makes this grant solely to the extent of its right, title and interest
 74 in the Leased Property and warrants that RAA shall have the exclusive right to use of the
 75 Property subject to the terms, definition, and conditions recited herein.

76 **Term.** This Lease Agreement shall commence on the effective date and shall continue in
 77 full force and effect for an initial term of twenty-five (25) years, provided that the
 78 Property is used solely and exclusively for the purposes set out herein and this Lease
 79 Agreement is not sooner terminated as provided for in Paragraph 15 hereafter. Following

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expiration of the initial term, the term of this Lease Agreement shall automatically renew for one term of twenty-five (25) years unless terminated in accordance with Paragraph 15 herein. The initial term and the extended term shall be referred to herein as the "Lease Term".

4.

5. **Liquidated damages:** The City acknowledges that this lease is an integral part of the RAA's decision to build a new RAA center in this location and that it provides value to the RAA's project as a whole; and that the RAA has detrimentally relied upon this right to exclusive possession and use of the public street to bridge its two properties and create a campus atmosphere, in purchasing the adjacent properties, for the purpose of building a new art center. In the event it is found, by a judge or jury, that the City or RAA intentionally breached or terminated this lease agreement without just cause, the party responsible for said breach or wrongful termination shall be responsible for any actual damages incurred by the other party as a result of said breach and wrongful termination.

6. **Compensation.** Consideration for this lease shall be the economic development and enhanced appearance of the City's downtown area provided by RAA's exclusive use of the Property for the purposes authorized. No annual fee is required. As further consideration, RAA agrees that if a third party causes damage to or destruction of a work of art or improvement placed on the Property by RAA, RAA covenants not to sue the City or pursue other methods against the City to recover costs of repairing or replacing the art or improvements, save and except in the event the damage is the result of the City's negligence, in whole or in part.

7. **Limits on Lease.** This Agreement is subordinate to any easements, utility easements, rights of way, use of the streets for utility and emergency vehicles and non-motorized vehicular traffic, or other property interests recorded and associated with the Property.

8. **Entry by City.** In case of emergency, the City may enter the Property without giving notice and without incurring any obligation to RAA, in order to remove landscaping, improvements, or outdoor art features if the City Manager deems it is necessary: (a) in order to exercise the City's rights or duties with respect to the Property; (b) to protect persons or property; or (c) for the public health or safety with respect to the Property or the outdoor art features or other improvements placed thereon by RAA. In no event may the City enter the Property to remove landscaping improvements or outdoor art features upon the request of a third party.

9. **Conditions and Responsibilities: Outdoor Art Features, Landscaping, and Other Improvements**

A. **Location of Outdoor Art Features.** RAA shall place the outdoor art features, landscaping, and other improvements on the Property in a manner that does not impede pedestrian or non-motorized vehicular traffic or access to the streets, sidewalks, or other public property.

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Deleted: Following expiration of the initial term or the first extended term, the term of this Lease Agreement shall automatically renew for one extended term of twenty-five (25) years unless notice to terminate is given by either party to the other party one hundred-twenty (120) days prior to the expiration of the initial term. The initial term and the extended terms shall be referred to herein as the "Lease Term" ¶

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Deleted: the City and the RAA shall engage a mutually agreeable appraiser to determine the reduction in value to the RAA campus resulting from the loss of the Property. The City will pay RAA the amount of the reduction in value together with the costs of the appraisal. Should it be determined by the appraisal that there is no reduction in value to RAA as a result of the loss of the Property, RAA will pay the costs of the appraisal. Should the parties be unable to agree on the person or firm to conduct the appraisal, a sitting District Judge for Aransas County shall select the appraiser upon motion and hearing before the Court. In the event it is found, by a judge or jury, that RAA intentionally breached or terminated this lease agreement without just cause, RAA shall be liable for any actual damages incurred by the City as a result of said wrongful termination

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- B. **Installation of Sculptures and Works of Art.** RAA shall install all outdoor art features in a manner that insures that the same can withstand winds up to 70 miles per hour without blowing over or blowing away. If installation requires any additional construction or excavation, RAA shall obtain approval from the City for the excavation or construction prior to installation. RAA shall return the Property to its pre-installation condition upon removal of the outdoor art features.
- C. **Landscaping and Other Improvements.** RAA may erect or construct improvements or landscaping on the Property that is consistent with the uses herein authorized. RAA may erect or construct improvements which may include a performance area, accommodations for public events, or similar facilities provided, however, that any such improvements must be approved by the City Manager prior to erection or construction, and that the same shall be capable of removal or transport by the end of the term of this Lease Agreement.
- D. **Utility and Emergency Vehicle Access.** RAA agrees that none of the outdoor art features, improvements, or landscaping will restrict public access to the Property by pedestrian or non-motorized vehicular means, and will not prevent or unreasonably hinder access by City authorized utility, police, fire, ambulance, or other emergency vehicles. In this regard, RAA agrees that its landscaping and placement of outdoor art features will always retain a minimum of fifteen (15) feet of open passage through the Block for City authorized utility and emergency vehicles.
- E. **Graphic/Artistic Content of Outdoor Art Features.** RAA may not install an outdoor art feature on the Property that, in the opinion of the City, is pornographic, violent or discriminatory. No later than five (5) calendar days following notice by the City that it has determined an outdoor art feature to be pornographic, violent or discriminatory, RAA may request a hearing by the City Council to contest the City's determination. In the event offensive graffiti is written on an outdoor art feature, or other improvement, RAA is required to eliminate the graffiti or to remove the outdoor art feature, or improvement promptly.
- F. **Removal or Modification of Outdoor Art Features, Landscaping and Improvements.** If RAA constructs or locates an outdoor art feature, landscaping, or other improvement on the Property, RAA may be required at its own cost to remove the same upon termination of this Lease Agreement, in whole or in part, or prior to termination upon a determination by the City, that an outdoor art feature, needs to be removed or modified because (a) it is or is becoming is a hazard to persons or property; (b) it prevents the City from using the Property for a purpose provided for herein; (c) the City requires access to its utilities for repair or replacement; (d) RAA is in violation of this Lease Agreement; or (e) because it does not comply with federal, state or local ordinances, or this Lease Agreement. All outdoor art features, landscaping, and other improvements must meet the City's ordinances and be accessible pursuant to the Americans with Disabilities Act and Texas Accessibility Standards.
- G. **Maintenance.** RAA is solely responsible for the timely and proper maintenance of the outdoor art features, landscaping, and improvements. Outdoor art features

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may be removed or replaced with new outdoor art features at the discretion of the RAA and in accordance with the provisions of this agreement.

H. **Intellectual Property and Other Rights to Display.** RAA shall be solely responsible for securing and maintaining all rights to hold, display, and present the outdoor art features from the artist or owner if different than RAA. RAA indemnifies and holds harmless the City for any display or use of any outdoor art features in any manner that is not approved by the artist or owner or which violates the owner's or artist's copyright, trademark, or any other intellectual property right in the outdoor art features.

I. **Owners.** RAA shall require the owners of the outdoor art features (if RAA is not the Owner) to execute an agreement with RAA, which includes the following language:

Owner understands and agrees that any outdoor art feature that is placed in the right-of-way are subject to the terms and conditions of a Lease Agreement between Rockport Art Association, Inc. ("RAA") and the City of Rockport, which is attached hereto as Exhibit A. Owner agrees and authorizes placement of the outdoor art feature in accordance with such terms and conditions.

Owner hereby agrees to indemnify, save, and hold harmless the City of Rockport, its officers, employees, agents, and representatives against any and all liability, damage, loss claims, causes of action, expenses or demands (collectively "costs") of any nature whatsoever, on account of personal injury (including without limitation, Workers' Compensation and death claims), or property loss of any kind whatsoever, including damage to the outdoor art feature of owner, which arises, or is claimed to arise, out of or in any manner connected with the placement, construction, installation, existence, operation, display, use, maintenance, repair, restoration, or removal of the work of art from the Leased Property within the City of Rockport.

10. **Installation and Construction Responsibility.** RAA shall bear all costs of installing, maintaining, displaying, removing, repairing, and handling all outdoor art features, landscaping, and other improvements placed on the Property, and shall be responsible for overseeing the construction process and obtaining and supervising all contractors used to install the same or to construct any related improvements. All contractors and consultants performing work on the Property shall be covered by a General Liability Policy secured by RAA specifying the City as an additional insured in an amount as determined by RAA.

11. **Compliance with Applicable Law.** RAA shall comply with all applicable federal, state, and local laws, including all City ordinances, codes, and regulations, in the design and construction of the outdoor art features, landscaping, and other improvements. Failure to obtain any necessary approval of the City prior to construction or failure to comply with all applicable federal, state and local law including all City ordinances, codes, and regulations, shall constitute a material breach of this Lease Agreement. In addition, RAA shall obtain all permits and inspections required by the City.

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12. **Contractors.** RAA will notify the City in writing of the nature of any work to be performed by a contractor or consultant of RAA and the intended date of commencement and completion of such work. Such work will not, under any circumstances, relieve RAA of its responsibilities and obligations under this Lease Agreement. All work performed by RAA or its agent shall be done in a good and workmanlike manner satisfactory to the City. Any contractor or consultant hired by RAA shall have sufficient skills and experience to properly perform the work described in this Lease Agreement.
13. **Insurance.** By placing outdoor art features, landscaping, and other improvements on the Property, RAA acknowledges that the City may seek to insure the same through Texas Municipal League Intergovernmental Risk Pool coverage ("TML insurance") and RAA will provide City with any information needed to insure the City against liability for placement of the outdoor art features, improvements, and landscaping on City Property. RAA acknowledges and agrees that the TML insurance of City may or may not protect RAA and may or may not cover damage to the sculptures and works of art and that the TML insurance is for the protection of the City against liability created by placement of the outdoor art features, landscaping, or improvements on City Property. RAA agrees that, if any claims are made and collected on City's TML insurance policy which claim arises out of the placement of the outdoor art features, landscaping, or other improvements on City Property, RAA shall be responsible for payment of any deductible provided under the TML insurance. In the event that TML coverage does not fully cover the City against general liability, RAA shall be required to obtain a liability policy in an amount determined by the City and naming the City as an additional insured throughout the term of the Lease and any subsequent extension of the Lease Term.
14. **Indemnification.** RAA hereby agrees to indemnify, save, and hold harmless the City of Rockport, its officers, employees, agents, and representatives (collectively called "Indemnitees") against any and all liability, damage, loss, claims, causes of action, expenses or demands (collectively "Costs") of any nature whatsoever, save and except in the event of gross negligence by Indemnitees, on account of personal injury (including without limitation, Workers' Compensation and death claims), or property loss or damage of any kind whatsoever, which arises, or is claimed to arise, out of or is, or is claimed to be, in any manner connected with, placement, display, construction, installation, existence, operation, use, maintenance, repair, restoration, or removal of the outdoor art features, landscaping, or other improvements on the Property pursuant to this Lease Agreement. RAA must, at its own expense, investigate all those claims and demands, attend to their settlement or other disposition, defend all actions based thereon using counsel satisfactory to the City's Attorney, and pay all other costs and expenses of any kind arising from any of the aforesaid claims, demands or causes of action. This indemnification provision does not apply to any costs for which the City has been compensated by insurance.
15. **Termination.** If RAA abandons or fails to maintain Property and the outdoor art features, landscaping, or other improvements and the City Manager receives no substantive response within ten (10) business days following written notification to RAA,

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328 then the City may remove the outdoor art features, landscaping, or other improvements
329 from the Property. RAA covenants to pay the City's actual expenses incurred in
330 connection therewith within thirty (30) days after being billed therefore. All of RAA's
331 outdoor art features, landscaping, or improvements not removed are deemed property of
332 the City when abandoned by RAA. Abandonment of the same shall be presumed if the
333 outdoor art feature is not removed from the Property (or storage if applicable) within
334 thirty (30) days of the date that the City requests removal or the date of termination of
335 this Lease Agreement.
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337 Upon termination of this Lease Agreement by either party by agreement or for just cause,
338 RAA shall remove all landscaping, improvements, outdoor art features, at its sole
339 expense, and shall restore the Property to the same condition that existed prior to the
340 effective date of this Lease Agreement, provided, however, that the City may in its
341 discretion waive, in writing, a requirement to remove particular landscaping,
342 improvement, outdoor art features or to otherwise restore the Property.
343

344 If the City fails to keep the street closed, as provided for herein, or otherwise violates any
345 of the terms of this lease and the RAA receives no substantive response within ten (10)
346 business days following written notification to RAA, RAA may bring any and all causes
347 of action to which it may be entitled.
348

349 16. Findings. Pursuant to Ch. 316, Texas Transportation Code, the City Council finds that
350 the rights granted to RAA under this lease agreement, including the placement of outdoor
351 art features, landscaping, and improvements, will not create a hazardous condition or
352 obstruction of public travel on the municipal street; and that the design and location of the
353 outdoor art features, landscaping, and improvements includes all reasonable planning to minimize
354 potential injury or interference to the public in the use of the municipal street. Any encroachment
355 on the street or sidewalk and effect on vehicular or pedestrian traffic, as contained in this Lease
356 Agreement, is found by the Council to be allowed pursuant to Sec. 316.007(b), Transportation
357 Code.
358

359 17. 17. Venue. Venue for any lawsuit concerning this Agreement shall be in the State
360 District courts of Aransas County, Texas.
361

362 18. Waiver of Default. Either party may waive any default of the other at any time, without
363 affecting or impairing any right arising from any subsequent or other default.
364

365 19. Assignment. RAA shall not assign, sublet or transfer its interest in this Lease Agreement
366 without the prior written consent of the City Council. RAA shall provide the City with a
367 copy of any such proposed assignment or transfer of any of RAA's rights in this
368 Agreement, which must include the name, address, and contact person of the assignee,
369 along with the proposed date of assignment or transfer.
370

371 20. Notice. Notice required or permitted to be given in connection with this Lease
372 Agreement must be in writing. Notice may be given by hand delivery or certified mail,
373 postage prepaid, to the recipient at the address for notice set forth below or at the last
374 address for notice that the sender has for the recipient at the time notice is given. If

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properly addressed and sent certified mail or hand-delivered as provided herein, such notice will be deemed received on the day hand delivered, as evidenced by a written acknowledgment of receipt by the recipient, or on the third day after deposit in the U.S. mail, if sent certified mail, postage prepaid. Notice given in any other manner will be deemed delivered if and when actually received by the party specified below.

City: City of Rockport
Attn.: City Manager
622 E. Market Street
Rockport, TX 78382

RAA: Rockport Art Association, Inc.
Attn: Executive Director
[902 Navigation Circle](#)
Rockport, TX [78382](#)

In the event the address or contact for a party changes, it shall be the responsibility of that party to notify the other party of the new address or contact within five (5) business days of that change.

21. **Default.** If RAA fails to comply with the terms of this Lease Agreement, then the City Manager shall give RAA written notice as set out in Section 20, Notice. RAA will have ten (10) days from the date of such notice to take action to remedy the failure complained of, or such lesser period if such is required under the terms of this Agreement, and, if RAA does not satisfactorily remedy the same within that thirty (30) day period, the City may remedy the default or contract to remedy the default.

Such remedy may include the City's right to take possession of an outdoor art feature and store it in a secure location at RAA's expense until the owner of outdoor art feature takes possession. Any outdoor art feature removed by the City under the terms of this Lease Agreement shall not be authorized for placement on any other City Property.

22. **Interpretation.** Although drafted by the City, this Lease Agreement must, in the event of any dispute over its meaning or application, be interpreted fairly and reasonably, and neither more strongly for or against either party.

23. **Application of Law.** This Lease Agreement must be governed by the laws of the State of Texas. If the final judgment of a court of competent jurisdiction invalidates any part of this Lease Agreement, then the remaining parts must be enforced, to the extent possible, consistent with the intent of the parties as evidenced by this Agreement.

Executed effective, the ___ day of May, 2016.

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Attest:

C. J. Wax, Mayor

Teresa Valdez, City Secretary

Rockport Art Association, Inc.

Terry Baiamonte, President

Luis Puron, Executive Director

THE STATE OF TEXAS §
COUNTY OF ARANSAS §

This instrument was acknowledged before me on this ____ day of May, 2016, by C. J. Wax, Mayor of the City of Rockport, on behalf of the City.

Deleted: April

Notary Public, State of Texas
My Commission expires: _____

THE STATE OF TEXAS §
COUNTY OF ARANSAS §

This instrument was acknowledged before me on this ____ day of May, 2016, by Terry Baiamonte, President, and Luis Puron, Executive Director of the Rockport Art Association, Inc., on behalf of that organization.

Deleted: April

Notary Public, State of Texas
My Commission expires: _____

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EXHIBIT A

DRAFT 05/06/16



Page 3: [1] Deleted **John Warren** **5/9/2016 10:01:00 AM**

the City agrees to pay the RAA as damages the sum equal to equal to any costs associated with RAA's relocating of improvements constructed by RAA and the depreciated cost of any non-relocatable outdoor art featureimprovements resulting from such termination or breach.

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