

**CITY OF EL PASO, TEXAS**  
**AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM**

**DEPARTMENT:**           **Engineering & Construction Management**

**AGENDA DATE:**       **Regular Agenda March 6, 2012**

**CONTACT PERSON/PHONE:** **R. Alan Shubert, City Engineer**

**DISTRICT AFFECTED:** **8 Rep. Niland**

**SUBJECT:**

Discussion and action that the City Manager be authorized to sign an Amended (By Restatement) Economic Development Grant Agreement ("the Agreement") by and between the City of El Paso ("City") and the El Paso Community Foundation ("Community Foundation") for the development of a nonprofit project to be located in downtown El Paso in association with Artspace Projects, Inc; and that the City Manager do such other acts and things, as may be reasonably requested by the Community Foundation for the purpose of carrying out this Agreement, subject to approval by the City Attorney.

**BACKGROUND / DISCUSSION:**

This is an amendment (by restatement) to the Economic Development Grant Agreement between the City and the Community Foundation, for the concerning the proposed ArtspaceProject to create a major, new, affordable live/work project for artistically creative individuals and their families to live and work in downtown El Paso. The project is a four phase-process and will include 50 to 60, more or less affordable artist live/work housing units.

The restated Grant Agreement, updates the project scope, updates the project timelines, and addresses the conditions and terms of use of 601 N. Oregon (the "Saddleblanket" property) as the project site location for the Artspace Project.

**PRIOR COUNCIL ACTION:**

On December 17, 2011, the City Council approved the original Economic Development Grant Agreement.

**AMOUNT AND SOURCE OF FUNDING:**

N/A

**BOARD / COMMISSION ACTION:**

(N/A)

**\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\***

**DEPARTMENT HEAD:** \_\_\_\_\_



*Information copy to appropriate Deputy City Manager*

**RESOLUTION**

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

That the City Manager be authorized to sign an Amended (By Restatement) Economic Development Grant Agreement ("the Agreement") by and between the City of El Paso ("City") and the El Paso Community Foundation ("Community Foundation") for the development of a nonprofit project to be located in downtown El Paso in association with Artspace Projects, Inc; and

That the City Manager do such other acts and things, as may be reasonably requested by the Community Foundation for the purpose of carrying out this Agreement, subject to approval by the City Attorney.

**ADOPTED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2012.**

**THE CITY OF EL PASO**

\_\_\_\_\_  
John F. Cook  
Mayor

**ATTEST:**

\_\_\_\_\_  
Richarda Duffy Momsen  
City Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Marie Taylor  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

\_\_\_\_\_  
Deborah G. Hamlyn, Deputy City Manager  
Community Services

**AMENDED (BY RESTATEMENT)**  
**ECONOMIC DEVELOPMENT GRANT AGREEMENT**

**THIS AMENDED (BY RESTATEMENT) ECONOMIC DEVELOPMENT GRANT AGREEMENT** (the "*Agreement*"), dated as of \_\_\_\_\_, 2012, is made and entered into by and between the CITY OF EL PASO, TEXAS, a Texas municipal corporation (the "*City*"), and EL PASO COMMUNITY FOUNDATION, a Texas nonprofit corporation (the "*Community Foundation*") (the City and the Community Foundation, individually a "*Party*" and collectively the "*Parties*"), with the limited joinder of Project Location Interim Owner (as hereinafter defined).

**RECITALS**

**WHEREAS**, the Community Foundation is a 501(c)(3) corporation and as such is eligible to receive grants from the City for the public purpose of development and diversification of the economy of the State, elimination of unemployment or underemployment, or development or expansion of commerce in the State in accordance with §380.002 Texas Local Government Code; and

**WHEREAS**, the Parties recognize and acknowledge the importance of the arts with respect to the quality of life of the community and with respect to economic benefits derived from the arts; and

**WHEREAS**, the Parties have observed and studied the success and economic development benefits of other communities' projects devoted to providing affordable, live/work units for artists and the derivative developments of entire neighborhoods associated with such efforts; and

**WHEREAS**, other communities have utilized projects associated with the renovation and expansion of existing buildings for purposes of (i) providing affordable, live/work units for artists and their families, (ii) furthering local businesses which cater to such artists and families, (iii) developing and preserving a diverse population of people who want to live in such a thriving community; and (iv) providing jobs associated with the construction and related activities of renovation and expansion of such existing buildings; and

**WHEREAS**, the development of such projects can create collaboration among such artist residents, as well as collaboration between such artist residents and other local, national and international artists; and

**WHEREAS**, such projects can serve to create and enhance the cultural and historical heritage of the communities in which they are located; and

**WHEREAS**, such projects have in other communities served as significant catalysts for other private sector investments and efforts which serve to improve areas surrounding or proximate to such projects; and

**WHEREAS**, in other communities such improvement of surrounding or proximate areas has been so significant as to dramatically raise the values of such surrounding or proximate areas as to, absent a nonprofit involvement in the project buildings, make it too costly for the artist residents to continue their residencies and work in the project buildings, so that the very economic success associated with the artist residents project can sometimes (without involvement of a nonprofit entity) effectively doom the future of artist residents being able to continue living and working in the project area; and

**WHEREAS**, the Parties have, for some time now, been mutually pursuing the possibility of the development of a nonprofit mixed-use economic development project (the "Project") to be located in downtown El Paso, which Project would make available to qualifying artists (i) residences and studio/work spaces and (ii) possible gallery spaces and common area spaces, all in furtherance of such residents' pursuit of their respective artistic endeavors; and

**WHEREAS**, in furtherance of such mutual pursuit of the possibility of the Project, the Parties previously entered into one certain Economic Development Grant Agreement, dated effective December 7, 2010 (the "**Prior Agreement**"); and

**WHEREAS**, as an inherent part of such Project, it is believed that such artists who would become residents in such a Project must, at a minimum (i) meet the income qualifications associated with a low-income housing project pursuant to Section 42 of the Internal Revenue Code of 1986, as amended (the "**Internal Revenue Code**"); and (ii) have a demonstrated passion for, and commitment to, their respective arts; and

**WHEREAS**, prior to the effective date of this Agreement, the Parties have already initiated and completed, in association with consultation services provided by Artspace Projects, Inc. (a Minnesota nonprofit corporation and publicly-supported charity under Section 501(c)(3) of the Internal Revenue Code and one of the nation's leading nonprofit real estate developer for the arts, "**Artspace**"), some initial steps in studying the Project, evaluating certain aspects associated with the Project's feasibility, evaluating possible alternative sites for the Project, and receiving the recommendations of the Oversight Committee formed in accordance with the Prior Agreement and of Artspace as to the proposed site for the Project; and

**WHEREAS**, such initial studies associated with respect to the proposed Project have been completed and preliminarily indicate that the Project is feasible and that a proposed site for the Project has been identified and recommended by both the Oversight Committee and Artspace; and

**WHEREAS**, the cost of these initial studies undertaken by the Parties with advisory services provided by Artspace have been shared equally between the Parties; and

**WHEREAS**, the City Council of the City of El Paso has determined that a public purpose will be served by the Project to create more affordable housing options in downtown El Paso and will meet downtown revitalization goals thereby providing for development and

diversification of the economy, elimination of unemployment or underemployment, and development and expansion of commerce; and

**WHEREAS**, the Parties now desire and intend to further agree among themselves as to how further steps can be taken, in association with the advisory and other services of Artspace, for further evaluating and possibly pursuing furtherance of the Project.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed, the Parties hereto do hereby amend by restatement the Prior Agreement and agree as follows (this Agreement to be, as of the effective date of this Agreement) in amendment of and in full substitution for the Prior Agreement:

## **ARTICLE I** **AGREEMENTS BY THE PARTIES**

**Section 1.1 Generally.** It is acknowledged and agreed between the Parties that success or failure of the Project will necessarily require: (i) the continuing cooperation of, and the general continuing consensus among, both the Parties; and (ii) the retention of qualified, experienced advisors (including, without limitation, Artspace) for purposes of further studying, planning, evaluating and implementing the Project. In furtherance of such, with respect to the Project:

- a. The Parties will: (i) fully share information among themselves with respect to the Project; and (ii) reasonably cooperate with one another with respect to studying, planning, evaluating, and implementing the Project.
- b. The Parties will, among themselves: (i) share equally the costs described in Section 1.2 of this Agreement; (ii) bear those costs as otherwise provided in this Agreement; and (iii) share costs as otherwise agreed in writing between the Parties from time-to-time, additional costs of studying, planning, and possibly implementing the Project. No Party can, however, obligate the other Party for costs without the mutual written consent of both Parties. Payments by the City to the Community Foundation with respect to the City's portion of the costs described in Section 1.2 of this Agreement (the City's portion of such costs aggregating \$350,000.00) shall be made by the City to the Community Foundation, as follows:
  - (1) Payments totaling \$150,000 were made during 2011 in two (2) payments as follows: (i) \$75,000.00 upon delivery of preliminary analysis of candidate building/sites with respect to cost, availability and other factors; and (ii) \$75,000.00 upon delivery of final report determining building location and size; and
  - (2) A payment equal to \$200,000.00 is due and payable upon delivery of preliminary Project Design and Financing Modeling, which is expected to be delivered during the first quarter of 2012.

- c. With respect to studying, planning, and implementing the Project: (i) the City will continue to fund its share of costs associated with the Project as specified herein; (ii) the Community Foundation will continue to contract with Artspace and other advisors; and (iii) Artspace will, in turn, continue to retain and contract with other advisors (including, by way of example only and without limitation, architects) needed or desired with respect to the Project.
- d. Although the City itself has not, is not, retaining Artspace: (i) the City continues to interpose no objection to the retention of Artspace by the Community Foundation; (ii) the City shall have, without becoming a party thereto, approved the form of any such written agreement between Artspace and the Community Foundation; and (iii) the City understands and agrees that the Community Foundation's continued retention of Artspace has been, and is, in furtherance of this Agreement and partially in reliance upon the City's obligations pursuant to this Agreement.

**Section 1.2 Next Steps in the Process with Respect to the Project.** The Parties agree that the agreed steps in the process (with related costs therefor where now known, the City's portion of which now known costs being described in Section 1.1b above) with respect to the Project are as follows.

- a. The Parties continue to agree that in order to work collaboratively they need to establish a core oversight committee (the "Oversight Committee") to guide the process and provide input to Artspace in order to create a Project to meet the goals and serve the public purpose identified by the City. The Oversight Committee shall be revised from that created pursuant to the Prior Agreement to be an Oversight Committee of four (4) individuals, two (2) of whom to be designated from time to time by each of the City and the Community Foundation. Such individuals will, from time to time, agree upon meeting dates and other actions to be studied and effected by the Oversight Committee.
- b. Pursuant to the Prior Agreement, the Parties have concluded steps associated with determining a recommended Project location and preliminary scope for the Project. The Project location recommended by both the Oversight Committee and Artspace is a site commonly known as the "Saddleblanket location" at the corner of Oregon Street and Missouri Street, in El Paso, El Paso County, Texas as more fully described upon Exhibit "A", attached hereto and incorporated herein for all purposes (the "**Project Location**"). The Project Location is being transferred by the City to La Frontera Conservation Fund, a supporting organization affiliate of the Community Foundation (the "**Project Location Interim Owner**"), upon or about April, 2012, as a charitable donation made to the Community Foundation by direction of CIC Limited, Inc. in partial consideration for its sale to the City of certain other property in El Paso County, Texas. With respect to the Project Location:

- (1) The Project Location was recommended as the site for the Project for many reasons, including (by way of example and without limitation) the following: (i) the Project Location offers the physical capacity to accommodate the proposed development program that will include approximately fifty (50) to sixty (60), more or less, affordable artist live/work housing units, parking, and arts related non-residential uses; (ii) the Project Location offers a location that leverages significant neighboring community assets including the public library, Museum of History, and Insights Science Museum, and the Project Location is within easy walking distance of the Museum of Art, the Plaza Theatre, and other nearby artist venues; (iii) the Project Location is ideally located to take advantage of existing and planned transit service; (iv) the Project Location is located within a State of Texas designated "Cultural District", the proposed Project Location having been instrumental in obtaining such designation; and (v) the Project Location can serve as a "gateway" opportunity to El Paso's central business and arts districts.
  
- (2) Artspace will negotiate with the Community Foundation (which will be negotiating upon behalf of Project Location Interim Owner) as to a site control agreement with respect to the Project Location in contemplation of planning, financing, constructing, completing and leasing of the Project. Subject to this Agreement and any other written agreements between the Parties, the Project Location shall be held for use with respect to the Project, and shall be transferred by Project Location Interim Owner to an entity agreed by the City, the Community Foundation, and Artspace immediately prior to the mutually agreed commitments associated with financing and construction of the Project, such transfer to occur no later than March 31, 2015. In the event that either (i) any of the City, the Community Foundation, or Artspace shall determine, in their respective judgments, and given the others written notice that the Project is no longer deemed feasible for proceeding to the financing and construction phase or (ii) such transfer of the Project Location shall not, for any reason, have occurred upon or prior to March 31, 2015, then:
  - (a) In the event of such written notice pursuant to Section 1.2b(2)(i) above, either: (i) the City shall have a right to repurchase from Project Location Interim Owner the Project Location for cash in the amount determined in accordance with Section 1.2(c) below. (said right to repurchase to be exercised, if at all, by closing upon such repurchase no later than five (5) months from and after the last date of receipt of such written notice by the two (2) recipients); or (ii) absent any such repurchase of the Project Location by the City no later than the end of a five (5) month period following the written notice, the Project Location shall, upon such end date, be released and be free and clear of any and all agreements (including, but not limited to, those imposed pursuant

to this Agreement) by the City, Artspace, the Community Foundation, and/or Project Location Interim Owner with respect to the Project and matters related thereto, with Project Location Interim Owner having title to the Project Location, free and clear of all such matters.

- (b) In the event that such transfer of the Project Location shall not, as provided in Section 1.2b(2)(ii) above have occurred upon or prior to March 31, 2015: (i) the City shall have a right to repurchase from Project Location Interim Owner the Project Location for cash in the amount determined in accordance with Section 1.2(c) below (said right to repurchase to be exercised, if at all, by closing upon such repurchase no later than August 31, 2015); or (ii) absent any such repurchase of the Project Location by the City, the Project Location shall be released and be free and clear of any and all agreements (including, but not limited to, those imposed pursuant to this Agreement) by the City, Artspace, and/or the Community Foundation with respect to the Project and matters related thereto, with Project Location Interim Owner having title to the Project Location, free and clear of all such matters.
- (c) The purchase price to be paid by the City upon any such repurchase of the Project Location shall be determined as follows:
- [1] There shall be determined the fair market value ("FMV") of the Project Location as of the date of closing upon such repurchase by the City, in accordance with the following: [a] such appraisal shall be conducted by an appraiser who is qualified to appraise commercial real property in El Paso, Texas, is a Member of the Appraisal Institute (i.e., an MAI appraiser) or a member of any other appraisal organization of comparable standing if the Appraisal Institute should not then exist, and shall have been engaged in the business of appraisal of real estate in El Paso County, Texas for not less than five (5) years prior to such appraiser's appointment hereunder; [b] such appraiser shall be as mutually agreed in writing by the Parties, in their reasonable discretions, or absent such agreement, as appointed by a court of competent jurisdiction in El Paso County, Texas; and [c] any and all costs associated with such appraisal and appraisal process shall be borne equally by the Parties.
- [2] If the then FMV of the Project Location is equal to or less than the Project Location credit amount previously given the City as a part of the City's acquisition of the Keystone

Property (i.e., \$1,262,114.98), the analysis "stops there" and the repurchase price would be the then FMV.

If, on the other hand, the then FMV of the Project Location is in excess of such credit amount previously given to the City:

The amount of net appreciation with respect to the Project Location would be equal to the then FMV minus the credit amount (i.e., \$1,262,114.98).

Such net appreciation amount would be shared between the City and Project Location Interim Owner, as follows (never to exceed, in the aggregate, the aggregate net appreciation amount):

[a] First, Project Location Interim Owner would receive, as a part of the purchase price, the aggregate amount of expenditures incurred by the Community Foundation and/or Project Location Interim Owner with respect to ownership of the Project Location (e.g., insurance, security, dust control, weed control, etc.), such expenditures for purposes hereof not to exceed in the aggregate the sum of \$30,000.00.

[b] Next, Project Location Interim Owner would receive, as a part of the purchase price a portion of any (if any) remaining net appreciation amount, computed as follows (which computation can never be less than zero dollars): (i) 50%; multiplied by (ii) the remaining net appreciation amount, minus the aggregate sum of moneys expended by the City for demolition, environmental, and remediation associated with the Project Location (such expenditures for purposes hereof not to exceed, in the aggregate, the sum of \$500,000.00).

[3] If, on the other hand, the then FMV of the Project Location is in excess of such credit amount previously given to the City, the amount of net appreciation with respect to the Project Location would be equal to the then FMV minus the credit amount (i.e., \$1,262,114.98) (the "**Net Appreciation Amount**"). The Net Appreciation Amount would be shared between the City and Project Location Interim Owner, as follows (never to exceed, in the aggregate, the aggregate Net Appreciation Amount):

[a] First, Project Location Interim Owner would receive, as a part of the purchase price, the aggregate amount of expenditures incurred by the Community Foundation and/or Project Location Interim Owner with respect to ownership of the Project Location (e.g., insurance, security, dust control, weed control, etc.), such expenditures for purposes hereof not to exceed in the aggregate the sum of \$30,000.00 (the "*Ownership Costs*").

[b] Next, Project Location Interim Owner would receive, as a part of the purchase price a portion of any (if any) remaining Net Appreciation Amount, computed as follows (which computation can never be less than zero dollars): (i) 50%; multiplied by (ii) the remaining Net Appreciation Amount, minus the aggregate sum of moneys expended by the City for demolition, environmental, and remediation associated with the Project Location (such expenditures for purposes hereof not to exceed, in the aggregate, the sum of \$500,000.00) (the "*City Costs*").

[4] The total purchase price payable by the City and receivable by Project Location Interim Owner would be equal to the credit amount (\$1,262,114.98), plus if there is any Net Appreciation Amount, the Ownership Costs plus 50% of any remaining Net Appreciation Amount after subtracting the City Costs.

For purposes of providing examples of how the above might work, the following are offered:

**Example #1:**

Assumed facts: (i) FMV -- \$2,000,000; (ii) the City's actual aggregate costs for demolition, environmental, and remediation -- \$200,000; and (iii) Project Location Interim Owner and/or the Community Foundation's costs for insurance, security, dust control, weed control, etc. -- \$30,000.

1. FMV -- \$2,000,000.
2. FMV in excess of credit amount:
  - a. FMV in excess of credit =  $\$2,000,000 - \$1,262,114.98 = \$737,885.02$ .
  - b. FMV in excess of credit shared as follows:
    - (1) Project Location Interim Owner would receive, as a part of the purchase price aggregate owner's costs: \$30,000.
    - (2) Project Location Owner would additionally receive: (i) 50%; multiplied by (ii)  $\$707,885.02$ , minus  $\$200,000 = 50\%$  multiplied by  $\$507,885.02 = \$253,942.51$ ,

The total purchase price receivable by Project Location Interim Owner = \$1,262,114.98 + \$30,000 + \$253,942.51 = \$1,546,057.49.

Of the total \$737,885.02 net appreciation value to be shared, Project Location Interim Owner will have shared = \$1,546,057.49 - \$1,262,114.98 = \$283,942.51.

The total credits to the City with respect to such purchase price = \$2,000,000 - \$1,546,057.49 = \$453,942.51.

Of such total credits sum, \$200,000 is attributable to the demolition, remediation, etc. and \$253,942.51 represents the additional 50%/50% sharing of the remaining net appreciation amount.

**Example #2:**

Assumed facts: Same as Example #1, except FMV -- \$1,282,114.98.

1. FMV -- \$1,282,114.98.
2. FMV in excess of credit amount:
  - a. FMV in excess of credit = \$1,282,114.98 - \$1,262,114.98 = \$20,000.
  - b. FMV in excess of credit shared as follows:
    - (1) Project Location Interim Owner would receive, as a part of the purchase price aggregate owner's costs: \$20,000.
    - (2) No remaining net appreciation amount to be shared.

The total purchase price receivable by Project Location Interim Owner = \$1,262,114.98 + \$20,000 = \$1,282,114.98.

The total credits to the City with respect to such purchase price = \$1,282,114.98 - \$1,282,114.98 = \$0.

- (d) With respect to any repurchase by the City of the Project Location:
        - (i) all recording fees arising from the recordation of documents necessary to vest good title to the Project Location in the City shall be paid by the City; and (ii) premiums and other charges for the issuance of the Owner's Policy of Title Insurance for the Project Location shall be paid by the City.
      - (e) Notwithstanding the foregoing, the City and the Community Foundation may mutually agree to an alternative use for the Property, which both serves a public purpose and is consistent with the mission and objectives of the Community Foundation, in such event the City, the Community Foundation, and Project Location Interim Owner will execute an amendment to this Agreement to reflect the same.
  - c. Project Design and Financing Modeling (anticipated to take an additional 12 - 18 months and to cost \$350,000.00, all of such \$350,000.00 having already been paid to Artspace, and/or having been caused to be paid to Artspace, by the Community Foundation).

- (1) Artspace will, with participation by the Parties, establish a process for selecting the architectural team.
  - (2) Artspace, with input from the Parties, will confirm development goals and space program with the selected architectural team.
  - (3) Artspace will, at its sole expense, engage: (i) the architectural team to create conceptual plans and schematic designs; and (ii) a cost consultant or contractor to provide pre-construction services with respect to the Project.
  - (4) Artspace will resolve any contingent conditions relating to site control through continued due diligence.
  - (5) Artspace will create capital (sources and uses of funds) and operating (annual income and expense) budgets to be associated with the Project.
  - (6) Artspace will obtain proposals and/or other letters of interest from possible lenders and equity investor financing partners.
  - (7) Artspace will submit low income housing tax credit and/or other federal tax credit applications with respect to the Project.
  - (8) Artspace will submit other financing applications, as applicable with respect to the Project.
- d. From Tax Credits to Financial Closing (anticipated to be an additional 4 – 9 months and to cost an additional \$200,000.00).
- (1) Artspace will secure final gap funding commitments with respect to the Project.
  - (2) Artspace will raise funds for equity, including (without limitation) private sector philanthropic dollars.
  - (3) Artspace will complete construction documents and submit permit applications.
  - (4) Artspace will negotiate construction and permanent loan commitments.
  - (5) Artspace will negotiate limited partner equity investment commitments.
  - (6) Artspace will advance Project to construction closing.
- e. Construction and Lease-up (anticipated to take an additional 12 – 18 months and at a cost which will depend upon the final details of the Project, as approved).

- (1) Artspace, upon behalf of the then owner of the Project, is to oversee Project construction and related matters.
- (2) Artspace is to engage, from time to time, a local management company with respect to the Project.
- (3) Artspace is to identify any (if any) commercial tenants and sign lease agreements.
- (4) Artspace is to conduct the residential tenant selection process, identify such residential tenants, and sign lease agreements.

**Section 1.3 Ownership and Operations of the Project, Post-Construction.**

- a. The Parties anticipate that the Project, once constructed, will be owned and operated by Artspace or a related entity or affiliate (collectively, "Artspace"), such ownership and operation to be within the context of guidelines to be developed and agreed by the Parties and Artspace for purposes of maintaining the purposes of the Project, as agreed between the Parties and Artspace.
- b. Although in order to complete the Project there undoubtedly will be a requirement for funding by other nonprofit sources (including, by way of example only and without limitation, other nonprofit foundations) and by other private sector and governmental sources, all of which to be a part of any details for the Project as agreed in writing between Artspace and the Parties in the future, beyond that provided pursuant to this Agreement: (i) there is no commitment or obligation (funding or otherwise) by the City with respect to acquiring, constructing, or operating the Project; and (ii) there is no commitment or obligation (funding or otherwise) by the Community Foundation with respect to acquiring, constructing, or operating the Project.
- c. Although there is no current commitment or obligation with respect thereto, it is understood by the Parties that, in order to complete the Project, there necessarily must be a future, related allocation of low income housing tax credits (pursuant to Section 42 of the Internal Revenue Code).

**Section 1.4 Termination of this Agreement.** This Agreement may be terminated as follows:

- a. By the then mutual written agreement of both Parties, in their respective sole discretions.
- b. By either Party by reason of the other Party's breach of this Agreement, provided such breach continues for not less than ten (10) days after receipt of written notice to the violating Party, specifying such breach with particularity; provided, however, that any termination of this Agreement pursuant to this Section 1.4b

shall be without limitation upon any remedies at law or in equity available to the terminating Party from the breaching Party by reason thereof.

- c. In the event Artspace fails to deliver the services required pursuant to the contract (the "Contract") by and between Artspace and the Community Foundation, there shall be no liability of the Community Foundation to reimburse the City the funds which it has advanced pursuant to this Agreement, it being understood and agreed between the Parties that: (i) the selection of Artspace and the Contract between Artspace and the Community Foundation are matters about which the Parties have mutually agreed; (ii) in the event that Artspace should fail to deliver such services, the City and the Community Foundation shall have each suffered damages respectively by reason of any such failure by Artspace; and (iii) except as regards any payments due under this Agreement which shall have accrued prior to any such failure, neither the City nor the Community Foundation shall owe the other Party reimbursement or damages by reason of any such failure by Artspace to deliver such services.
- d. In the event the Project is not constructed, assuming that both the City and the Community Foundation have performed, and are not in uncured default with respect to, their respective obligations under this Agreement, the City and Community Foundation will jointly own the work product created by Artspace as contemplated by this Agreement. If either Party shall have performed its obligations under this Agreement and the other Party shall not have performed its obligations under this Agreement or shall have an uncured default under this Agreement, the non-defaulting Party will solely own the work product created by Artspace as contemplated by this Agreement.

## ARTICLE II MISCELLANEOUS

**Section 2.1 Amendments or Modifications.** No alteration, amendment or modification hereof shall be valid unless executed by an instrument in writing by the Parties hereto.

**Section 2.2 Further Assurances.** Each of the Parties hereby agrees to cooperate reasonably with each other Party in connection with any steps required to be taken as part of their respective obligations under this Agreement, and shall: (i) furnish upon request to each other such further information; (ii) execute and deliver to each other such other documents (including, without limitation, any written releases of use restrictions and/or other agreements with respect to the Project Location, in accordance with Section 1.2.b(2)(a) and Section 1.2.b(2)(b) of this Agreement); and (iii) do such other acts and things, all as the other Party may reasonably request for the purpose of carrying out the this Agreement.

**Section 2.3 Partial Invalidity.** If any Article, Section, subsection, term or provision of this Agreement or the application thereof to any Party or circumstance shall, to any extent, be invalid or unenforceable, the remainder of the article, section, subsection, term or provision of this Agreement or the application of same to Parties or circumstances other than those to which it is

held invalid or unenforceable shall not be affected thereby and each remaining article, section, subsection, term or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law, provided that no such severance shall serve to deprive either Party of the enjoyment of its substantial benefits under this Agreement.

**Section 2.4 Current Revenue.** The obligations of the City contained in this Agreement will be satisfied solely out of current revenues. In the event the City Council should fail to provide for funding of this Agreement in subsequent budget years, the City's obligation to fund shall cease and any obligations of the Community Foundation pursuant to this Agreement shall likewise cease.

**Section 2.5 Gender and Number.** Whenever the context requires, the gender of all words used herein shall include the masculine, feminine and neuter, and the number of all words shall include the singular and the plural.

**Section 2.6 Attorneys' Fees and Costs.** If any action at law or in equity is brought to enforce or interpret the provisions of this Agreement, the prevailing Party(ies) shall be entitled to reasonable attorneys' fees and costs in addition to any other relief to which he/she/it may otherwise be entitled.

**Section 2.7 Applicable Law.** This Agreement has been prepared in the State of Texas and shall be governed in all respects by the laws of the State of Texas.

**Section 2.8 Multiple Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

**Section 2.9 Prior Agreements.** This Agreement supersedes any prior understanding or written or oral agreements between the Parties respecting the within subject matter. There are no oral agreements among the Parties hereto.

**Section 2.10 Notices.** All communications or notices required or permitted by this Agreement shall be in writing and shall be deemed to have been given at the earlier of the date when actually delivered, or when sent by telecopy or facsimile machine to the number shown below, or when properly deposited for delivery by a nationally-recognized commercial overnight delivery service, prepaid, or by deposit in the United States mail, certified or registered mail, postage prepaid, return receipt requested, and addressed as follows, unless and until any of such Parties notifies the other in accordance with this Section 2.10 of a change of address or change of telecopy number:

a. If to the City:

City Manager  
City of El Paso  
2 Civic Center Plaza  
10th Floor  
El Paso, TX 79901  
Fax: (915) 541-4501

With a copy to:

City Attorney  
City of El Paso  
2 Civic Center Plaza  
9th Floor  
El Paso, TX 79901  
Fax: (915) 541-4501

- b. If to the Community Foundation  
or to Project Location Interim  
Owner:

El Paso Community Foundation  
P. O. Box 272  
El Paso, Texas 79943-0272  
Attention: President  
Fax No: (915) 532-0716

With a copy to:

ScottHulse, PC  
201 E. Main Drive  
11th Floor  
El Paso, Texas 79901  
Attention: G. Russell Hill, Esq.  
Fax No.: (915) 546-8333.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date first written above.

**THE CITY:**

**CITY OF EL PASO,**  
a Texas municipal corporation

By: \_\_\_\_\_  
Name: Joyce A. Wilson  
Title: City Manager

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Marie A. Taylor  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

  
\_\_\_\_\_  
Deborah G. Hamlyn  
Deputy City Manager, Community Services

**THE COMMUNITY FOUNDATION:**

**EL PASO COMMUNITY  
FOUNDATION,**  
a Texas non-profit corporation

By: \_\_\_\_\_  
Name: Eric Pearson  
Title: President

**JOINDER WITH RESPECT TO OBLIGATIONS OF PROJECT LOCATION INTERIM  
OWNER:**

**LA FRONTERA CONSERVATION FUND**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**EXHIBIT "A"**  
**Legal Description of Project Location**

Lots 1 through 10, both inclusive, Block 1, Satterthwaite Addition, an Additional to the City of El Paso, El Paso County, Texas, according to the City Block Map in the Office of the County Clerk of El Paso County, Texas.



EL PASO

WYOMING

I-10

I-10

601 N. Oregon

OREGON

MISSOURI

### 601 N. Oregon



GIS  
GEOGRAPHIC INFORMATION SYSTEMS



The features represented on this map are in the Texas State Plane Coordinate system, Central Zone, NAD 83, units feet, using the Lambert Conformal Conic projection.

This map was generated using ArcGIS by the GIS Division for the City of El Paso, Texas.  
Two Civic Center Plaza, 79901 (915) 541-4719

This map is designed for illustrative purposes only. The features depicted here are approximate and more site-specific studies may be required to draw accurate conclusions. Enlargements of this map to scales greater than its original can induce errors and may lead to misinterpretations of the data.

The GIS Division makes no claim to its accuracy or completeness.

March 1, 2012

