

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

DEPARTMENT: Financial Services

AGENDA DATE: Introduction March 23, 2010
Public Hearing March 30, 2010

CONTACT PERSON NAME AND PHONE NUMBER: Liza Ramirez-Tobias (915) 541-4074

DISTRICT(S) AFFECTED: Rep. Lilly, #1

SUBJECT:

An Ordinance authorizing the City Manager to sign a lease agreement between the City of El Paso and El Paso Tennis and Swim Club, for the lease of a portion of Arroyo Park Totaling 9.890 acres, El Paso, Texas, for a term of twenty (20) years and canceling the lease agreement approved by Ordinance Nos. 2872, 4559, 5826, 6868 and 14092.

BACKGROUND / DISCUSSION:

The El Paso Tennis and Swim Club desires to enter into a lease agreement with the City for the use of a portion of Arroyo Park totaling 9.890 acres, commonly know as 2510 N. St. Vrain Street to provide tennis and swimming activities to the residents of the City of El Paso, subject to release of all liens. The lease period shall be for a primary term of twenty (20) years, at a rate of \$1,000.00 per year and for certain additional in-kind public benefit consideration received, as outlined in greater detail in the attached Lease Agreement. The tennis courts will be open to general public from 1:00 pm - 5:00 pm, Monday through Thursday, for open play. This increases the availability of recreational facilities, which are of general benefit to the citizens of El Paso. The El Paso Tennis and Swim Club has occupied the site since 1963.

PRIOR COUNCIL ACTION:

Ordinance Nos. 2872, 4559, 5826, 6868, 14092

AMOUNT AND SOURCE OF FUNDING:

Revenue generating

BOARD / COMMISSION ACTION:

CARE recommends approval

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

AN ORDINANCE AUTHORIZING THE CITY MANAGER TO SIGN A LEASE AGREEMENT BETWEEN THE CITY OF EL PASO AND EL PASO TENNIS AND SWIM CLUB, FOR THE LEASE OF A PORTION OF ARROYO PARK TOTALLING 9.890 ACRES MORE OR LESS, EL PASO, TEXAS, FOR A TERM OF TWENTY (20) YEARS AND REPLACING THE LEASE AGREEMENT APPROVED BY ORDINANCE NOS. 2872, 4559, 5826, 6868 AND 14092 WHICH WILL EXPIRE IN APRIL OF 2010.

WHEREAS, EL PASO TENNIS AND SWIM CLUB (“EPTC”) has leased a portion of Arroyo Park totaling 9.890 acres more or less, more fully described in the attached Exhibit “A,” and commonly known as the El Paso Tennis Club, at 2510 N. St. Vrain Street, El Paso Texas 79902, (“Premises”) from the City of El Paso (“City”) continuously since 1963.

WHEREAS, EPTC has constructed and maintained the improvements located on the Premises at its sole expense and operated a tennis and swim facility thereon;

WHEREAS, by approving this Ordinance the City Council of the City of El Paso is making a finding that EPTC is serving a public purpose by increasing the availability of recreational facilities for the citizens in the area and reducing the need for additional public facilities;

WHEREAS, the City desires to lease the Premises to EPTC for an additional term of 20 years in accordance with the terms specified below;

WHEREAS, the City Council desires to replace the Lease Agreement and Amendments authorized through Ordinance Nos. 2872, 4559, 5826, 6868 and 14092 with the Lease attached to this Ordinance as **EXHIBIT “A”**.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager is hereby authorized to sign, on behalf of the City of El Paso, a new lease upon the following terms to EPTC of El Paso, Texas:

- (1) The Premises to be leased is located at a portion of Arroyo Park, El Paso, El Paso County, Texas, as further identified in Exhibit “A”, attached hereto and made a part hereof.
- (2) The lease period shall be for a primary term of twenty (20) years, at a rate of \$1,000.00 (ONE THOUSAND AND NO/100 DOLLARS) per year and for certain additional in-kind public benefit consideration received, as outlined in greater detail in the attached Lease Agreement. This Lease Agreement supersedes all prior agreements, whether written or oral, regarding the lease of the Premises by EPTC.

ORDINANCE NO. _____

Doc. No.: 55057
Doc. Name: Ord. El Paso Tennis Club
Doc. Author: SFIR

- (3) Said lease from the City of El Paso to EPTC shall be in the form that is attached as Exhibit "A" and incorporated herein by reference for all purposes as if set forth verbatim.
- (4) Further, the prior Lease Agreement and Amendments authorized by the City of El Paso by way of Ordinance Nos. 2872, 4559, 5826, 6868 and 14092 is hereby replaced by the attached Exhibit "A".

PASSED AND APPROVED on this the _____ day of _____, 2010.

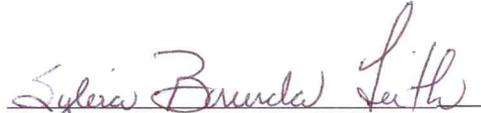
THE CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

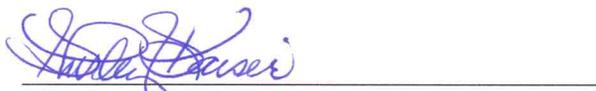


Sylvia Borunda Firth
Senior Assistant City Attorney

APPROVED AS TO CONTENT:



Nanette Smejkal
Director, Parks and Recreation



For Liza Ramirez-Tobias
Capital Assets Manager

ORDINANCE NO. _____

Doc. No.: 55057
Doc. Name: Ord. El Paso Tennis Club
Doc. Author: SFIR

THE STATE OF TEXAS
COUNTY OF EL PASO

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§
§

LEASE AGREEMENT

This Lease Agreement (“Agreement”), made this the ____ day of _____, 2010, between the CITY OF EL PASO, a home rule municipal corporation (“City”), and EL PASO TENNIS AND SWIM CLUB, a non-profit corporation (“EPTC”).

WHEREAS, EPTC has leased and operated the premises since March 7, 1963 and desires to enter into a new lease agreement for the same premises with the City for the use of a portion of Arroyo Park, totaling 9.890 acres more or less, such property further referenced in **EXHIBIT “A”**, attached hereto and made a part hereof, and commonly known as the El Paso Tennis Club, located at 2510 N. St. Vrain Street, El Paso TX 79902 (“Premises”); and

WHEREAS, EPTC intends to use the Premises to provide tennis and swimming activities for the citizens of El Paso; and

WHEREAS, City believes that the activities contemplated herein and the agenda set forth by EPTC would further the objectives of all parties by increasing the availability of recreation alternatives and tennis facilities to residents of El Paso, which are of benefit to the citizens of El Paso.

NOW, THEREFORE, for and in consideration of the following mutual covenants and agreements set forth herein, and other good and valuable consideration, the City hereby grants a non-assignable right to EPTC to lease the Premises.

1.0 TERM AND RENT

- 1.1 Term of Agreement. This Agreement is effective the ____ day of _____, 2010 and expiring on the ____ day of _____, 2030, unless terminated earlier as provided for herein.
- 1.2 Rent. As monetary consideration for this Agreement EPTC will deliver to the City the sum of ONE THOUSAND AND NO/100 DOLLARS (\$1,000.00) per year. Rent is due and payable upon the effective date of this lease and each year thereafter on the anniversary date. Additional consideration consists of non-monetary public benefits that will be provided by EPTC as well as capital improvement to the Premises valued at \$350,000.00 during the lease term, which may include but are not limited to lighting, three tennis courts, resurfacing 15 tennis courts, a new pool deck that EPTC will construct in accordance with the schedule attached hereto as **EXHIBIT “B”** and incorporated herein by reference, and other renovations at the option of EPTC as approved by City.

2.0 USE OF PREMISES

- 2.1 Premises. The Premises shall be under the control of EPTC during the lease term of this Agreement. EPTC understands and agrees that the Premises are to be open to the public on a non-discriminatory basis, yet that general admission and activities may be limited to members of EPTC, with the exception of time set aside for tennis court use from 1:00 pm - 5:00 pm, Monday through Thursday, for open play by non-members. However, EPTC may impose reasonable restrictions on admission consistent with the need to preserve and protect the Premises or the safety and welfare of any occupants therein. The parking lot will be available at all times to members of the public that wish to use Billy Rogers Arroyo Park.
- 2.1.1 It is understood that EPTC intends to use the premises for recreational purposes and to provide 15 tennis courts, swimming pool and a clubhouse that includes an exercise area, snack bar, pro-shop and restrooms. The use herein provided serves as the consideration provided to City for this Agreement.
- 2.1.2 Admission to Events at Facilities. EPTC may charge a fee for admission to its activities, other standard EPTC programs (“Standard Activities”) held at the Premises and for private rentals.
- 2.1.3 The proceeds from admissions, memberships, instructions, and private rentals allowed in Subsection 2.1.2 must be used by EPTC solely and exclusively to pay for operational costs and for facility improvements.
- 2.1.4 Financial Statement, Right to Audit, and Annual Activity Reports. EPTC shall submit a financial report, to the Director of Financial Services, detailing all financial activity related to the Premises for the prior year each year at the anniversary of the execution of this Agreement. The City Manager or designee shall have the right at all times to audit EPTC’s books and other records related to monies derived from all uses of the leased premises permitted pursuant to Subsection 2.1.2. Any proceeds from the use of the Premises shall be used solely for the maintenance and upkeep of the leased premises, improvements thereto, or for capital improvements to benefit EPTC at the Premises.

As consideration for this Agreement and as part of the terms and conditions of this Agreement, EPTC shall provide an annual report outlining the nature and scope of all public purpose activities completed, the numbers of participants, and the dates and times when such activities were provided. EPTC must also include in the annual report the number of each kind of activity that has taken place at the leased premises, the charge (if any) for and the revenue generated from each activity at the leased premises. It is understood that City would not have entered into

this Agreement without the Section 2.1 public purpose projects and activities promised. As such, this annual report should demonstrate compliance with both the letter and spirit of this lease. It shall be forwarded to the Capital Assets Manager at the address for notice specified in paragraph 8.15 below.

2.1.5 As an incidental use, alcoholic beverages may be sold or served to members of EPTC at the Premises in compliance with all applicable Federal, State and Local Laws, Ordinances and Regulations. EPTC is responsible for obtaining permits and licenses for alcoholic use in the Premises in compliance with all applicable Federal, State and Local Laws, Ordinances and Regulations.

2.1.6 EPTC, its officers, agents, servants, employees, volunteers and third parties shall not discriminate on account of race, color, religion, sex or national origin, nor permit or allow any discrimination. Admission to a public function held on the Premises and thus, covered by this Agreement, shall not be denied to any person described in Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973.

2.2 Landscaping. EPTC acknowledges that the exterior of the premises contains impervious ground cover and landscaping. EPTC may provide planters and may plant and maintain same on any part of the exterior portion of the Premises that EPTC determines to be in need of such improvement and that are appropriate for such improvement. EPTC shall obtain written permission from the City, by and through its Director of Parks and Recreation or designee, prior to installing such landscaping on the Premises.

2.2.1 EPTC understands and agrees that it shall water, trim and maintain any such improvements so that the same is kept in a neat, orderly and attractive condition at all times.

2.3 Repairs. EPTC shall keep the facilities, improvements and property on the Premises in good condition and repair during the lease term of this Agreement. EPTC shall be solely responsible for any repairs needed during the lease term. EPTC shall at all times during the term of this Agreement keep the Premises clean, orderly and in an attractive condition. In the event of damage or destruction by fire or other casualty to the Premises, EPTC shall promptly restore or replace the same in a reasonable time. Further, EPTC shall submit a detailed listing of any and all defects to the interior or exterior of the Premises within ten (10) days of the start of the lease term. Should Premises not be in substantially the same condition as same were at the beginning of the term of this Agreement, EPTC shall make any necessary repairs to restore Premises to its pre-lease condition, except that the interior of the Premises shall be cleaned prior to vacating the Premises. At the conclusion of the lease, and at the discretion of the Director of

Parks and Recreation (“Director”), a payment in the amount of such repairs, in an amount determined appropriate by the sole discretion of the Director may be accepted in lieu of completion of said repairs, cleaning, or painting.

2.3.1 EPTC acknowledges that the Premises are leased “AS-IS.” EPTC shall not request and City shall not be responsible for completion of any improvements, modifications, corrections, repairs or the like believed helpful or necessary to EPTC’s stated purpose, agenda or mission or believed necessary for the continuance of the facility. This AS-IS condition shall specifically include, but shall not be limited to plumbing, electrical, carpentry, Americans with Disabilities Act, and heating, ventilation, and air conditioning problems that may or may not exist. EPTC is herein placed on notice that City neither has knowledge of, nor can it warrant against ADA noncompliance issues or the existence of asbestos either of which may or may not exist on the leased premises. Should EPTC determine that asbestos exists or that ADA compliance issues are present, it may rescind lease without further obligation.

2.4 Maintenance of Grounds. All other maintenance and upkeep of the Premises shall be the responsibility of EPTC.

2.4.1 Garbage and Trash. EPTC shall provide a complete and proper arrangement for the adequate and proper handling and disposal, away from the Premises, of all trash, garbage and other refuse caused by the operations of the Premises.

2.4.1.1 EPTC shall provide and use suitable covered metal receptacles for all such garbage, trash and other refuse throughout the Premises. Piling of boxes, cartons, trash or similar items on the Premises, including the building, facilities, improvements and park, shall not be permitted at any time. Additionally, the placement of trash receptacles shall be at locations approved by the Director or that person’s designee.

2.5 Earth Work. No moving of earth abutting the tennis center shall be performed unless such work is as authorized by the City. EPTC shall be responsible for securing all required permits and to perform the work in accordance with all applicable City Ordinances, laws and regulations.

2.6 Utilities. EPTC shall be responsible for the payment of all utilities at the Premises. EPTC further agrees that the use of outdoor recreational lighting will be done in accordance with all applicable City Ordinances, laws and regulations.

2.7 Improper Use. EPTC shall not permit on the Premises any entertainment, amusement or other activity that violates any federal, state and local laws and

regulations. Nor shall the Premises be used in any manner that creates a nuisance or is not compatible with the neighborhood surrounding the Premises.

- 2.8 Non-Profit Use/Zoning. EPTC expressly agrees that the premises will only be used for tennis and swimming activities that are in compliance with all applicable municipal regulations.
- 2.9 Safety and Security. EPTC is responsible for ensuring that its employees, agents, contractors, invitees, guests and licensees comply with all applicable laws, ordinances and regulations. EPTC shall exercise every precaution for the safety of public and private property and persons.
 - 2.9.1 EPTC understands and agrees that the City is not and will not be responsible for the safety or security of any items associated with the use of the Premises by EPTC or by the latter's licensee nor will the City be responsible for and damage(s) to any items or materials used in connection with EPTC or the latter's licensees.

3.0 CONTRACTUAL RELATIONSHIP

- 3.1 EPTC is an independent contractor and is otherwise a tenant in a landlord-tenant relationship with City. Except as may be expressly and unambiguously provided in this Agreement, no partnership or joint venture is intended to be created by this Agreement, nor any principal-agent or employer-employee relationship between the parties or any of their officers, employees, agents or sub-contractors.
 - 3.1.1 As an independent contractor, EPTC understands and agrees that it will be responsible for its respective acts or omissions, and the City shall in no way be responsible as an employer to EPTC's officers, employees, agents, representatives or sub-contractors who perform any service in connection with this Agreement.
 - 3.1.2 EPTC shall select its own employees and such employees shall be and shall act under the exclusive and complete supervision and control of EPTC.
- 3.2 EPTC shall not receive any compensation or benefits from the City.
- 3.3 EPTC understands and expressly agrees that, in all things relating to this Agreement, the City is performing a governmental function, as defined by the Texas Tort Claims Act. The parties hereby agree that the City enters into this Agreement as a governmental entity for the purpose of performing a governmental function.

4.0 INSURANCE AND INDEMNIFICATION PROVISIONS. EPTC agrees to provide the following as a condition of the Agreement:

4.1 **LIABILITY INSURANCE.** EPTC shall provide public liability insurance for personal injuries and death growing out of any one accident or other cause in a minimum amount of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) per person, and Five Hundred Thousand and No/100 Dollars (\$500,000.00) for two (2) or more persons in any one accident, and, in addition, shall provide property damage liability insurance in a minimum sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) for property damage growing out of any one accident or other cause.

4.1.1 EPTC is required to purchase liability insurance on behalf of the City or, alternatively, may name the City as an additional insured on the policy of general liability insurance referenced above. Such insurance shall provide coverage for any alleged acts or omissions of the City, its agents, employees or independent contractors, alleged or asserted by any individual, in connection with the performance of this Agreement. Certificate of Insurance should be on behalf of the City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901.

4.1.2 EPTC shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and contractors, its officers, agents, servants or employees.

4.1.3 Immediately upon execution of this Agreement EPTC shall file a copy of the policy or certificate of liability insurance as herein set forth with the City Clerk and the Department of Parks and Recreation of the City. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without ten (10) days prior written notice to the City Clerk. Failure to keep the policy in full force and effect throughout the Term of this Agreement shall be grounds for cancellation of this Agreement.

4.2 **FIRE AND CASUALTY INSURANCE.** EPTC shall keep the Premises insured with a solvent insurance company that is authorized to do business in Texas, to the full amount of insurance procurable, for the benefit of EPTC and the City, as their interests may appear. A Certificate of Insurance indicating such coverage will be provided to the City within ten (10) days of the execution of this Agreement. Failure to provide the required proof of insurance, naming the City as an additional insured, shall result in the EPTC default in the terms of this Agreement.

- 4.3 **LIQUOR LIABILITY INSURANCE.** EPTC shall purchase liquor liability insurance to cover any incident related to the sale or serving of alcohol permitted pursuant to this Agreement. The parties agree that EPTC shall be responsible for liability resulting from all accidents, damage to personal or real property and personal injury caused by an intoxicated person through the serving of alcoholic beverages. The liquor liability policy must name the City as an additional insured. Certificate of Insurance should be on behalf of the City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901.
- 4.4 **INDEMNITY. AS A CONDITION OF THIS AGREEMENT, EPTC OR ITS INSURER SHALL INDEMNIFY, DEFEND AND HOLD THE CITY, ITS OFFICERS, AGENTS AND EMPLOYEES, HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE,) INCLUDING BUT NOT LIMITED TO ALL JUDGMENTS, SETTLEMENT AMOUNTS, ATTORNEYS' FEES, COURT COSTS AND EXPENSES INCURRED IN THE INVESTIGATION, HANDLING, DEFENSE AND LITIGATION OF ANY CLAIM OR SUIT, INCLUDING BUT NOT LIMITED TO ANY CLAIM OR SUIT FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON REGARDLESS OF THE MERITS OF OR OUTCOME OF SUCH CLAIM OR SUIT ARISING OUT OF OR RELATED TO THIS AGREEMENT. THIS INDEMNIFICATION PARAGRAPH SHALL APPLY EVEN WHERE SUCH BODILY OR PERSONAL INJURY, ILLNESS, LOSS OF SERVICES, PHYSICAL OR MENTAL IMPAIRMENT TO OR DEATH OF ANY PERSON, OR FOR DAMAGE OR DESTRUCTION TO ANY PROPERTY RESULTS FROM OR INVOLVES NEGLIGENCE OR ALLEGATIONS OF NEGLIGENCE ON THE PART OF THE CITY, ITS OFFICERS, AGENTS OR EMPLOYEES.** Without modifying the conditions precedent for preserving defenses, asserting claims or enforcing any legal liability, against the City as required by the City Charter or any law, the City shall promptly forward to EPTC every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein. EPTC shall 1) investigate or cause the investigation of accidents or occurrences involving such injuries or damages; 2) negotiate or cause to be negotiated the claim as EPTC may deem expedient; and 3) defend or cause to be defended on behalf of the City all suits for damages even if groundless, false or fraudulent, brought because of such injuries or damages. EPTC shall pay all judgments in actions defended by EPTC pursuant to this section along with all attorneys' fees and costs incurred by the City including interest accruing to the date of payment by EPTC, and premiums on any appeal bonds. The City, at its election shall have the right to participate in any such negotiations

or legal proceedings to the extent of its interest. The City shall not be responsible for any loss of or damage to EPTC's property from any cause.

5.0 RISK ALLOCATION – LIMITATION OF LIABILITY

5.1 Liability. This Agreement is not intended to alter or reallocate any defense or immunity authorized or available to either party by law.

5.1.1 Exclusion of Incidental and Consequential Damages. Independent of, severable from, and to be enforced independently of any other enforceable or unenforceable provision of this Agreement, the City shall not be liable to EPTC nor to any person claiming rights derived from such party's rights) for incidental, consequential, special, punitive, or exemplary damages of any kind - including lost profits, loss of business, and further including, mental anguish and emotional distress - as a result of breach of any term of this Agreement, regardless of whether the party was advised, had other reason to know, or in fact knew of the possibility thereof, except as expressly provided herein. The City shall not be liable to EPTC or any third party by reason of any inaccuracy, incompleteness, or obsolescence of any information provided or maintained by EPTC regardless of whether the party receiving said information from EPTC was advised, had other reason to know, or in fact knew thereof.

5.1.2 Maximum Aggregate Liability. Independent of, severable from, and to be enforced independently of any other enforceable or unenforceable provision of this Agreement, **IN NO EVENT SHALL THE City'S AGGREGATE LIABILITY TO EPTC (INCLUDING LIABILITY TO ANY PERSON OR PERSONS WHOSE CLAIM OR CLAIMS ARE BASED ON OR DERIVED FROM A RIGHT OR RIGHTS CLAIMED BY EPTC), WITH RESPECT TO ANY AND ALL CLAIMS AT ANY AND ALL TIMES ARISING FROM OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT, IN CONTRACT, TORT, OR OTHERWISE, EXCEED THE AMOUNT OF CONSIDERATION ACTUALLY PAID OR PAYABLE UNDER THE TERMS OF THIS AGREEMENT.**

5.1.3 Intentional Risk Allocation. The City and EPTC each acknowledge that the provisions of this Agreement were negotiated to reflect an informed, voluntary allocation between them of all risks (both known and unknown) associated with the transactions associated with this Agreement. The disclaimers and limitations in this Agreement are intended to limit the circumstances of liability. The remedy limitations, and the limitations of liability, are separately intended to limit the forms of relief available to the parties.

- 5.1.4 No Indemnification. The Parties expressly agree that EPTC shall not have the right to seek indemnification or contribution from the City for any losses, costs, expenses, or damages directly or indirectly arising, in whole or part, from this Agreement.

6.0 Compliance With Laws. EPTC, at EPTC's expense, agrees that it will construct, operate and maintain improvements on the Premises in accordance with the Declarations, and in accordance with all laws, rules, orders, ordinances, directions, regulations and requirements of federal, state, county and municipal authorities, now in force or which may hereafter be in force, including, but not limited to, those which shall impose any duty upon the City or EPTC, with respect to the use, occupation or alteration of the Premises and any improvements thereon. By way of example and not in limitation of the foregoing, the execution of this Lease and approval of EPTC's plans by the Director of Development Services or his designee shall not preclude the requirement that EPTC obtain all other approvals necessary for development of EPTC's project such as, but not limited to, building permits and certificates of occupancy.

EPTC, at EPTC's expense, specifically agrees to make or cause to be made all such alterations to the Premises, and any improvements thereon, including, without limiting the generality of the requirements of this sentence, removing such barriers and providing such alternative services, as shall be required by the Americans with Disabilities Act of 1990, as amended, and any other laws, rules, orders, ordinances, directions, regulations and requirements of federal, state, county and municipal authorities, now in force or which may hereafter be in force, which relate to the use or occupation of the Premises and any improvements thereon by disabled persons ("Disabilities Laws").

EPTC shall, at EPTC's expense, comply with all present and hereinafter enacted Environmental Laws, and any amendments thereto, affecting EPTC's use, operation, occupation or alteration of the Premises including any improvements thereon.

A. Definitions.

- (1) "Environmental Laws" means any one or all of the following as the same are amended from time to time: the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6941 et seq.; the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq.; the Safe Drinking Water Act, 42 U.S.C. Section 300h et seq.; the Clean Water Act, 33 U.S.C. Section 1251 et seq.; the Clean Air Act, 42 U.S.C. Section 7401 et seq.; and the regulations promulgated thereunder and any other laws, regulations and ordinances (whether enacted by the local, state or federal government) now in effect or hereinafter enacted that deal with the regulation or protection of the environment, including the ambient air, ground water, surface water, and land use, including sub-strata land.

- (2) "Hazardous material" shall mean all substances, materials and wastes that are, or that become, regulated under or classified as hazardous or toxic under any Environmental Law and all petroleum products, such as gasoline, kerosene, diesel fuel and the like.
- (3) "Release" shall mean any releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing, or dumping into the environment.

B. Compliance.

- (1) EPTC shall not cause or permit any Hazardous Material to be used, generated, manufactured, produced, stored, brought upon, or released, on, under or about the Premises, or transported to and from the Premises, by EPTC, its sublessees, agents, employees, contractors, invitees, or a third party in violation of any Environmental Law. **EPTC shall indemnify, defend and hold harmless City, its successors and assigns, its employees, agents and attorneys from and against any and all liability, loss, damage, expense, penalties and legal and investigation fees or costs, arising from or related to any claim or action for injury, liability, breach of warranty or representation, or damage to persons or property and any and all claims or actions brought by any person, entity or governmental body, alleging or arising in connection with contamination of, or adverse effects on, the environment or violation of any Environmental Law or other statute, ordinance, rule, regulation, judgment or order of any government or judicial entity which are incurred or assessed as a result (whether in part or in whole) of any activity or operation on or discharge from the Premises or any improvements thereon. This obligation includes, but is not limited to, all costs and expenses related to cleaning up the Premises, improvements, land, soil, underground or surface water as required under the law. EPTC's obligations and liabilities under this paragraph shall continue so long as City bears any liability or responsibility under the Environmental Laws for any action that occurred on the Premises or any improvements thereon. This indemnification of City by EPTC includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision because of hazardous material located on the Premises or any improvements thereon, or present in the soil or ground water on, under or about the Premises. The parties agree that City's right to enforce EPTC's promise to indemnify is not an adequate remedy at law for EPTC's violation of any provision of this Section. City shall**

also have all other rights and remedies provided by law or otherwise provided in this Lease.

- (2) Without limiting the foregoing, if the presence of any Hazardous Material on, under or about the Premises or in any improvements thereon or permitted by EPTC results in any contamination of the Premises or any improvements thereon, EPTC shall promptly take all actions at its sole cost and expense as are necessary to return the Premises or any improvements thereon to the condition existing prior to the introduction of any such Hazardous Material to the Premises or in any improvements thereon; provided that City's approval of such actions shall first be obtained, which approval shall not be unreasonably withheld so long as such actions would not potentially have any material adverse long-term effect on the Premises or on any improvements thereon.
- (3) EPTC shall, at EPTC's own cost and expense, make all submissions to, provide all information to, and comply with all requirements of the appropriate governmental authority (the "Government") under the Environmental Laws. Should the Government determine that site characterization, site assessment and/or a cleanup plan be prepared or that a cleanup should be undertaken on the Premises or in any improvements thereon, then EPTC shall, at EPTC's own cost and expense, prepare and submit the required plans and financial assurances, and carry out the approved plans. At no cost or expense to City, EPTC shall promptly provide all information requested by City to determine the applicability of the Environmental Laws to the Premises or to respond to any governmental investigation or to respond to any claim of liability by third parties which is related to environmental contamination.
- (4) EPTC shall immediately notify City of any of the following: (a) any correspondence or communication from any governmental entity regarding the application of Environmental Laws to the Premises or EPTC's operation on the Premises, and (b) any change in EPTC's operation on the Premises that will change or has the potential to change EPTC's or City's obligations or liabilities under the Environmental Laws.

D. Reporting.

- (1) At any time that EPTC submits any filing pertaining to its property, operations, or presence on the Airport with any governmental entity (other than the Internal Revenue Service) by way of example but not in limitation, the Environmental Protection Agency or the Texas Commission on Environmental Quality, EPTC shall provide duplicate copies of the filing(s) made along with any related documents to City.

- (2) Upon expiration, termination or cessation of this Lease for any reason, EPTC shall provide current environmental inspection and inventory reports on the Premises acceptable to City; and if, in the opinion of City, the Premises shall require environmental remediation, EPTC shall perform same to return the Premises into a (like new) condition equal or better to that as of the effective date of the Lease.

7.0 TERMINATION. This Agreement may be terminated as provided herein.

- 7.1 Termination by Mutual Consent. The parties may terminate this Agreement by mutual consent upon such terms as they may agree in writing.
- 7.2 Termination by Either Party. It is further understood and agreed by EPTC and the City that either party may terminate this Agreement, in whole or in part, upon thirty (30) days written notice if the other party fails to perform any of its material obligations hereunder and fails to completely cure the breach.
- 7.3 Termination by City. If EPTC ceases to use or occupy the Premises for the purposes herein contemplated for a time period of more than two (2) continuous months, or if EPTC defaults in any of its obligations under this Agreement and fails to correct such default within thirty (30) days written notice, City may cancel said Agreement and take possession of the property. In such an event, all rights of EPTC in the Premises, including buildings, facilities and improvements, shall then terminate. Any waiver by the City of any breach of any of EPTC's obligations shall not be deemed a continuing waiver and shall not prevent the City from exercising any remedy it may have for any succeeding breach of the same or another obligation of EPTC.
- 7.4 Time of Performance Termination – Force Majeure. Neither party to this Agreement will be liable for failure to comply with any term of this Agreement when such failure is caused by an event of war, fire, earthquake, flood, strike, any law, rule, regulation or act of governmental authority, or any other act, event, cause or occurrence rendering a party to this Agreement unable to perform its obligations, which is not within its reasonable control. The party affected by such event will immediately notify the other party in writing.
- 7.5 Termination Shall Not Be Construed as Release. Termination by either party shall not be construed as a release of any claims that may be lawfully asserted against the terminating party. Further, the terminated party shall not be relieved of any liability for damages sustained by the terminating party by virtue of any breach of this Agreement.
 - 7.5.1 Rights Upon Expiration. At the expiration of this Agreement, City shall be entitled to have the Premises returned to City clear of all improvements above ground level. EPTC shall have one hundred and eighty (180) days

after expiration in which to remove such improvements. If EPTC fails to remove said improvements, City may remove same at EPTC's expense. In the event EPTC should fail to reimburse City for the expense of removing improvements within 30 days of receipt of City's written demand for reimbursement, City may file suit to collect the amount owed and the costs of court and attorney's fees incurred by the City to collect reimbursement.

City may, at its option, take title to the improvements in lieu of removal by or for EPTC. City shall notify EPTC of its election to require removal of the improvements or take possession of the improvements at least ninety (90) days prior to the beginning of the last year of this Lease; provided EPTC may request City to make such election at least one hundred and eighty (180), but not more than three hundred and sixty (360), days before the beginning of the last year of this Lease or any extension or renewal thereof.

8.0 GENERAL PROVISIONS

- 8.1 Taxes and Assessments. EPTC will promptly pay all taxes and assessments lawfully levied on EPTC's leasehold interest, on the buildings and structures on the property as well as on EPTC's personal property.
- 8.2 Assignments and Subletting. EPTC shall not assign this Agreement nor sublet the Premises or any part thereof without the prior written consent of the City, except that EPTC may grant permission, in the nature of licenses (as the term is used in real property law), but not in the nature of leases or subleases, for the use of the property for the purposes contemplated by this Agreement, but such permission shall not impair or diminish the rights of the City hereunder. The City shall have the right to refuse any license when such license authorizes a use not contemplated within this Agreement.
- 8.3 Liens and Encumbrances. EPTC shall not give nor permit any liens or encumbrances on the Premises. Upon termination of this Agreement, EPTC shall peacefully surrender such Premises to the City free of all such liens or encumbrances. **EPTC shall defend and indemnify the City against any liability and loss of any type arising from any such lien or encumbrance on the Premises, including facilities, buildings, improvements and park, together with reasonable attorney's fees, costs and expenses incurred by the City in negotiating, settling, defending or otherwise protecting against such liens or encumbrances.**

As used herein, the term "Mortgage" includes a deed of trust and the term "Mortgagee" includes the beneficiary under a deed of trust. EPTC may encumber its leasehold estate and its interest in the improvements constructed and to be

constructed on the Premises by the execution and delivery of a Mortgage for the purpose of obtaining a loan, or loans, to make capital improvements to the Premises, provided that the aggregate balance of all amounts due under such loans shall not exceed \$200,000.00 and the term of such loans shall not extend beyond the term of the Lease. The Mortgagee of any such Mortgage and EPTC shall deliver to City a written notice specifying:

- A. The amount of the obligation secured by the Mortgage;
- B. The date of the maturity or maturities thereof; and
- C. The name and mailing address of the Mortgagee.

It shall be an event of default under the Lease and the City may, at its discretion, terminate the Lease if:

- 1. EPTC fails to provide written notice of the fact a Mortgage has been created; or
- 2. EPTC attempts to create a Mortgage(s) in excess of \$200,000.00; or
- 3. Maturity of the Mortgage(s) extends beyond the term of the Lease; or
- 4. EPTC defaults in the payment of the Mortgage(s) created.

8.4 Inspections. The City shall have the right to enter the Premises at all reasonable times for the purpose of inspecting the same and determining compliance with the terms of this Agreement.

8.5 Outside Lighting. Outside lighting, except security lighting, on the property shall be operated during the established park hours, as set forth in El Paso City Code Section 13.24.040. Outside lighting will not be operated at such hours or with such intensity as to constitute a nuisance to the occupants of other property in the neighborhood or otherwise violate Chapter 18.18 (Outdoor Lighting) of the El Paso Municipal Code. If this provision is violated, the City may require any such lighting to be extinguished, changed or removed at EPTC's expense.

8.6 Signs. All signs on the Premises, including building, facilities and improvements, shall comply with the El Paso Building Code, El Paso Zoning Code, and other relevant ordinances of the City. The size, design and location of all signs shall additionally be subject to the approval of the Director or designee prior to installation.

8.7 Right to Assurance. Whenever one party to this Agreement in good faith has reason to question the other party's intent to perform, said party may demand that the other party give written assurance of its intent to perform. In the event that a demand is made and no assurance is given within five (5) calendar days, the

demanding party may treat this failure as an anticipatory repudiation of the Agreement.

- 8.8 Survival. Each party shall remain obligated to the other under all clauses of this Agreement that expressly or by their nature extend beyond the expiration or termination of this Agreement, including but not limited to the Indemnification provisions hereof.
- 8.9 Amendments and Waiver. The parties may amend this Agreement at any time by mutual consent. Unless otherwise provided herein, this Agreement may be amended only by written instrument duly executed on behalf of the City and EPTC. No claim or right arising out of a breach of this Agreement can be discharged in whole or in part by a waiver or renunciation of the claim or right unless the waiver or renunciation is supported by consideration and is in writing signed by the aggrieved party.
- 8.10 Attorney's Fees. In any action brought by either party for the enforcement of any provision of this Agreement, the successful party shall be entitled to recover reasonable attorney's fees.
- 8.11 Complete Agreement. This Agreement constitutes the entire agreement between the parties relating to the terms and conditions of the Agreement. The parties expressly acknowledge and warrant that there exists no other written or oral understanding, agreements or assurances with respect to such matters except as are set forth herein. Unless expressly stated, this Agreement confers no rights on any person(s) or business entity(s) that is not a party hereto. This Agreement shall not be construed against or unfavorably to any party because of such party's involvement in the preparation or drafting of this Agreement.
- 8.12 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of Texas, along with any applicable provisions of the federal law, the City Charter and/or any ordinance of the City of El Paso.
- 8.13 Severability. All agreements and covenants contained in this Agreement are severable. Should any term or provision of this agreement be declared invalid by a court of competent jurisdiction, the parties intend that all other terms and provisions of this Agreement should be valid and binding and have full force and effect as if the invalid portion had not been included.
- 8.14 Venue. For the purpose of determining place of this Agreement and the law governing the same, this Agreement is entered into in the City and County of El Paso, the State of Texas, and shall be governed by the laws of the State of Texas. Venue shall be in the County of El Paso, State of Texas.

- 8.15 Notices. All notices required or permitted hereunder shall be in writing and shall be deemed delivered when actually received via United States Postal Service post office or certified mail, return receipt requested addressed to the respective other party at the address below or at such other address as the receiving party may have theretofore prescribed by written notice to the sending party.

The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

CITY: City of El Paso
Attention: City Manager
Two Civic Center Plaza, 10th Floor
El Paso, Texas 79901-1196

COPY TO: Financial Services Department
Attention: Capital Assets Manager
Two Civic Center Plaza, 7th Floor
El Paso, Texas 79901-1196

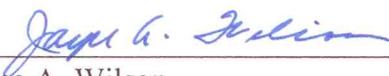
LESSEE: EL PASO TENNIS AND SWIM CLUB
Attention: President
2510 N. St. Vrain Street
El Paso, Texas 79902
(915)

- 8.16 Warranty of Capacity to Execute Agreement. The person signing this Agreement on behalf of EPTC warrants that he/she has the authority to do so and to bind EPTC to this Agreement and all the terms and conditions contained herein.

9. **AUTHORIZED REPRESENTATIVE.** Each person signing below represents that he or she has read this Agreement, and all attachments, in its entirety; understands its terms; and agrees on behalf of such party that such party will be bound by those terms.

[SIGNATURES BEGIN ON THE FOLLOWING PAGE]

THE CITY OF EL PASO



Joyce A. Wilson
City Manager

APPROVED AS TO FORM:

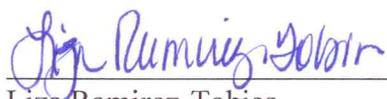


Sylvia Borunda Firth
Senior Assistant City Attorney

APPROVED AS TO CONTENT:



Nanette Smejkal
Director, Parks and Recreation



Liza Ramirez-Tobias
Capital Assets Manager

ATTEST:

By: _____
Title: _____

EL PASO TENNIS AND SWIM CLUB

By: _____
Title: _____

EXHIBIT "A"

Aerial Map



YORK

ROBINSON VIRGINIA

CINCINNATI

YORK

CINCINNATI

YORK

YORK

YORK

YORK

BLANCHARD

YORK

EXHIBIT "A"

DORADO ENGINEERING, INC.

2717 E. Yandell El Paso, Texas 79903 (915) 562-0002 Fax (915) 562-7743

El Paso Tennis Club

Metes and Bound description of a parcel of land being a portion of Blocks 199, 200, 201, F33 and F34, Portion of St. Vrain, Ange, Octavia, Boston and Robinson Streets out of Alexander Subdivision, portion of Blocks 4, 19, 20, and 20A and portion of Dortero Place (vacated), Bishop Place (vacated), Arroyo Drive (vacated), out of Kern Place Subdivision, City of El Paso, County of El Paso, Texas and more particularly described as follows;

From an existing bolt at the centerline intersection of New York Street and St. Vrain St, said bolt bears South $52^{\circ} 55' 12''$ West a distance of three hundred thirty and fifty six hundredths (330.56) feet to a found nail at the centerline intersection of New York Street and Virginia Street; Thence North $37^{\circ} 30' 00''$ West along the centerline of St. Vrain Street a distance of two hundred and no hundredths (200.00) feet to a set rebar on the Southerly property line of the parcel being described said rebar also being the Point of Beginning for this description;

Thence South $52^{\circ} 30' 00''$ West along the Southerly line of the parcel being described a distance of thirty five and no hundredths (35.00) feet to a set rebar for a corner on the Westerly Right-of-Way line of St. Vrain Street;

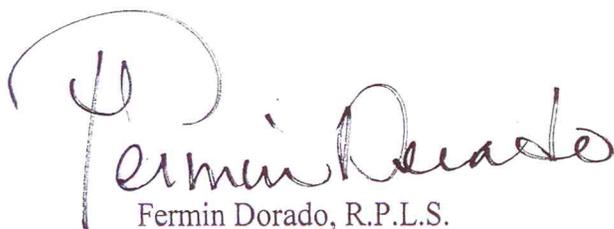
Thence North $37^{\circ} 30' 00''$ West along the Westerly Right-of-Way line of St. Vrain Street, a distance of five hundred and no hundredths (500.00) feet to a set rebar on the Northwestern corner of the parcel being described;

Thence North $43^{\circ} 43' 12''$ East along the Northerly property line of the parcel being described a distance of seven hundred seventy nine and thirteen hundredths (779.13) feet (field) (778.10 deed), to a set rebar on the Northeasterly corner of the property being described;

Thence South $37^{\circ} 30' 00''$ East along the Easterly line of the parcel being described a distance of six hundred eighteen and ninety three hundredths (618.93) feet (field) (612.00 deed), to a set rebar on the Southeasterly corner of the parcel being described;

Thence South $52^{\circ} 30' 00''$ West along the Southerly line of the parcel being described a distance of seven hundred thirty five and no hundredths (735.00) feet to a set rebar on the intersection of the centerline of St. Vrain Street and Southerly property line of the parcel being described, said rebar also being the Point of Beginning for this description.

Said parcel of land contains 430,789.00 square feet or 9.890 acres of land more or less.


Fermin Dorado, R.P.L.S.



August 25, 2009

EL PASO TENNIS & SWIM CLUB			
St Vrain, El Paso, Texas			
Opinion of Probable Capital Improvement Construction Cost			
20-year Plan (2009-2029)			
Site & Outdoor Facilities			\$194,500
Tennis Courts			\$152,500
Re-surfacing	15 courts @ \$7500 per court		\$112,500
Site Repairs	Fencing repairs and replacement		\$10,000
	Replace stairs at courts 14, 15 and access to court 9 seating steps		\$5,000
	Replace / Patch / Repair walk ways and terraces surface finish including handicap accessibility		\$25,000
Parking & Driveways	Miscellaneous asphalt repairs - Handicap signage		\$10,000
Pool Area			\$32,000
Re-grout pool deck			\$5,000
Exterior porch	Enclose and Air Condition Existing Covered Patio for pool kids play and family eating space.		\$15,000
Lights	Replace and Repair Pool and Seating Area Lighting		\$12,000
Club House			\$155,500
Roof	Replace club house BU roof		\$64,000
Deck	Resurface deck above lounge		\$5,000
Restrooms & Lockers	Renovate existing restrooms and locker rooms to include handicap accessibility compliance		\$20,000
Lounge	Replace flooring, replace ceiling, up-grade lighting and finish walls and base.		\$11,500
Windows	Replace or up-grade windows at club house for double pane low E for energy efficiency and operability.		\$10,000
HVAC System	Replace one Evaporative Unit and Furnace every two years		\$45,000
Total Estimated Capital Improvement Construction Cost:			\$350,000

EL PASO TENNIS & SWIM CLUB			
St Vrain, El Paso, Texas			
Opinion of Probable Capital Improvement Construction Cost			
20-year Plan (2009-2029)			
PHASE 1 (2009-2013)			
Site & Outdoor Facilities			\$64,500
Tennis Courts			\$58,500
Re-surfacing	3 courts @ \$7500 per court		\$22,500
Site Repairs	Fencing repairs and replacement		\$1,000
	Replace stairs at courts 14, 15 and access to court 9 seating steps		\$5,000
	Replace / Patch / Repair walk ways and terraces surface finish including handicap accessibility		\$30,000
Parking & Driveways	Handicap parking striping/ signage		\$1,000
Pool Area			\$5,000
	Re-grout pool deck		\$5,000
Club House			\$49,500
Roofing	Patch roofing		\$4,000
	Resurface deck above lounge		\$5,000
Restrooms & Lockers	Renovate existing restrooms and locker rooms to include handicap accessibility compliance		\$20,000
Lounge	Replace flooring, replace ceiling, up-grade lighting and finish walls and base.		\$11,500
HVAC System	Replace two evaporative unit and furnace		\$9,000
Phase 1 Total Estimated Capital Improvement Construction Cost:			\$114,000

