

**CITY OF EL PASO, TEXAS
REQUEST FOR COUNCIL ACTION (RCA)**

CITY CLERK DEPT.

08 MAR 28 PM 12:38

DEPARTMENT: Community Development

AGENDA DATE: 4-8-08

CONTACT PERSON/PHONE: Andrea Tirres/541-4845

DISTRICT(S) AFFECTED: All Districts

SUBJECT: Discussion and Action on a resolution authorizing the City Manager to sign a Facilities Use Agreement with the El Paso Housing Finance Corporation (HFC), whereby the City agrees to provide the use of certain City facilities and services to HFC, subject to reimbursement for costs in accordance with the terms of the Agreement. The Agreement shall be for a term of one year and shall automatically renew for one-year terms, as more specified in the Agreement.

BACKGROUND / DISCUSSION: The El Paso Housing Finance Corporation previously had an agreement with the City of El Paso to utilize office space at City Hall for its Executive Director. The El Paso Housing Finance Corporation is in the process of hiring a new Executive Director and would like to enter into a Facilities Use Agreement with the City of El Paso to house this individual.

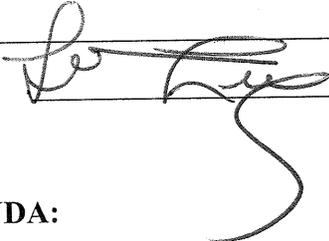
PRIOR COUNCIL ACTION: In approximately March 2003, the City of El Paso entered into an agreement with the El Paso Housing Finance Corporation to utilize office space at City Hall.

AMOUNT AND SOURCE OF FUNDING: n/a

BOARD / COMMISSION ACTION: n/a

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

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD:  _____

APPROVED FOR AGENDA: _____

CITY MANAGER: _____

DATE: _____

RESOLUTION

WHEREAS, in 1979, the City of El Paso approved the incorporation of the El Paso Housing Finance Corporation ("HFC") pursuant to the Texas Housing Finance Corporations Act, Chapter 394, Texas Local Government Code; and

WHEREAS, the HFC provides a means to finance the cost of residential ownership and development that will provide decent, safe, and sanitary housing at affordable prices for low and moderate income residents of the El Paso community; and

WHEREAS, HFC, as a public instrumentality and nonprofit corporation, performs an essential governmental function on behalf of and for the benefit of the general public and citizens of El Paso; and

WHEREAS, the City desires to provide the use of certain facilities and services to HFC that will enable HFC to accomplish the public purposes to which it is dedicated; and

WHEREAS, the City and HFC desire to enter into a Facilities Use Agreement that will provide for the use of certain facilities and services by HFC and the reimbursement to the City of costs associated with such use.

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

THAT the City Manager be authorized to sign a Facilities Use Agreement by and between the City and HFC, whereby the City agrees to provide the use of certain City facilities and services to HFC, subject to reimbursement for costs in accordance with the terms of the Agreement. The Agreement shall be for a term of one year and shall automatically renew for one-year terms, as more specified in the Agreement.

ADOPTED this ____ day of _____, 2008.

CITY OF EL PASO

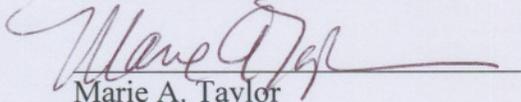
ATTEST:

John F. Cook
Mayor

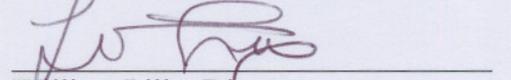
Richarda Duffy Momsen
City Clerk

(Signatures Continue on Following Page)

APPROVED AS TO FORM:


Marie A. Taylor
Assistant City Attorney

APPROVED AS TO CONTENT:


William Lilly, Director
Community and Human Development
Department

STATE OF TEXAS)
)
COUNTY OF EL PASO)

FACILITIES USE AGREEMENT

THIS FACILITIES USE AGREEMENT ("Agreement"), is entered into this _____ day of _____, 2008, by and between the City of El Paso, a Texas municipal corporation ("CITY") and the El Paso Housing Finance Corporation, a nonprofit corporation organized pursuant to the terms of the Texas Housing Finance Corporations Act, Texas Local Government code, Chapter 394 ("HFC").

RECITALS

WHEREAS, in 1979, the City approved the incorporation of HFC pursuant to the Texas Housing Finance Corporations Act, Chapter 394, Texas Local Government Code; and

WHEREAS, HFC, provides a means to finance the cost of residential ownership and development that provides affordable, decent, safe, and sanitary housing for low and moderate income residents of the El Paso community; and

WHEREAS, HFC, as a public instrumentality and nonprofit corporation, performs an essential governmental function on behalf of and for the benefit of the general public and citizens of El Paso; and

WHEREAS, the CITY desires to provide the use of facilities and services to HFC that will enable HFC to accomplish the public purposes to which it is dedicated; and

WHEREAS, HFC shall reimburse the CITY for the use of facilities and services in accordance with the provisions of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants, representations, and warranties set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agrees as follows:

ARTICLE ONE

Services

- 1.1 **Services.** HFC shall provide assistance to low and moderate income residents of the City of El Paso to acquire and own decent, safe, sanitary, and affordable housing, the Services described in more detail on Schedule A.
- 1.2 **Facilities.** The Services shall be performed at the Facilities of the CITY described on Schedule B.

- 1.3 **Equipment and Personnel.** In connection with the use of the Facilities, HFC shall also have the use of the Equipment and Personnel of the CITY described on Schedule C.
- 1.4 **Compliance With Laws.** HFC expressly represents and warrants that its performance of the Services shall, in all respects, comply with federal, State, and local laws and regulations.

ARTICLE TWO
Use of Facilities and Equipment

- 2.1 The CITY grants to HFC a nonassignable, nonexclusive right to use and occupy those portions of the Facilities described on Schedule B and to use the Equipment and Personnel described on Schedule C.
- 2.2 HFC represents that the Premises and the Equipment and Personnel shall be used for the purpose of providing the Services and for no other purpose whatsoever, without the prior written consent of the CITY.
- 2.3 HFC will not, without the prior written consent of the Director, cause or permit any nails or other things to be driven into any portion of the Facilities, nor any signs to be affixed either to the exterior or interior of the Facilities, nor cause or permit any changes, alterations, repairs, painting, or staining of any part of the Facilities or the furnishings or equipment thereof. All remodeling approved by the Director shall be done at HFC's sole expense.
- 2.4 HFC accepts the Premises and Equipment "as is" in the condition and state of repair existing at the time HFC first occupies the Premises, and agrees that, upon completion of its use of the Premises and Equipment, it will vacate and surrender the Premises and the Equipment to the City in the same condition, normal wear and tear excepted.
- 2.5 HFC agrees that, except as expressly set forth in this Agreement and the attached Schedules, all materials, supplies, equipment, services, and personnel ancillary or necessary to HFC's provision of the Services shall be furnished by HFC.
- 2.6 The City will bill HFC monthly for the HFC's expenses under this Agreement per term. HFC shall submit payment to the City within ten (10) business days after the date of each bill.

ARTICLE THREE
Obligation to Provide Services

- 3.1 HFC shall provide the Services as requested by the CITY in consideration for the limited right to use the Facilities and Equipment described in this Agreement.

- 3.2 HFC expressly agrees that its use and occupancy of the Facilities and Equipment is subject to its obligation to provide the Services.

ARTICLE FOUR
Recordkeeping and Billing

- 4.1 HFC shall create and maintain all records required by law or otherwise related to provision of the Services. All documents and records created by HFC shall be the exclusive property of HFC.
- 4.2 Except as otherwise required by law, all documents and records created by the CITY in connection with this Agreement shall be the exclusive property of the CITY.
- 4.3 The Parties expressly agree that the CITY shall have no responsibility for billing or collecting fees for Services.

ARTICLE FIVE
Term and Termination

- 5.1 **Term.** This Agreement will be in effect for a "Term" period from the date first entered above ("Commencement Date"), and ending one year thereafter ("Expiration Date"), unless sooner terminated in accordance with this Article Five.
- 5.2 **Term Extension.** The Term of the Agreement shall automatically renew for one-year terms, unless either Party sends a written notice of their non-renewal to the other party, thirty (30) days prior to the renewal date.
- 5.3 **Unilateral Termination.** Either Party may unilaterally terminate the Agreement at any time and for any reason, upon thirty (30) days' written Notice to the other Party in accordance herewith.
- 5.4 **Termination by Mutual Consent.** The Parties may terminate the Agreement by mutual consent upon such terms as they may agree in writing.
- 5.5 **Termination for Breach.** In the event of a Breach by either Party, the Nonbreaching Party may terminate the Agreement effective ten (10) business days from the date of written notice thereof.
- 5.6 **Other Terminations.**
- a. Either Party may terminate the Agreement immediately upon the discovery by that Party of any Material false statement or other Material misrepresentation made or submitted to that Party by the other Party.

- b. Either Party may terminate the Agreement immediately upon any failure by the other Party to provide, within ten (10) business days after Notice, satisfactory and adequate assurances to the terminating Party that the other Party is able and willing to fully and effectively perform its obligations under this Agreement.

ARTICLE SIX

Contractual Relationship

- 6.1 Nothing contained in this Agreement shall be construed as creating any partnership or joint venture, nor any principal-agent or employer-employee relationship between or among the Parties or any of their employees, agents or contractors.
- 6.2 HFC and its employees, agents and contractors, shall be, at all times, independent contractors to the CITY.
- 6.3 The Parties expressly agree that the Services are provided in the ordinary course of HFC's business.
- 6.4 HFC, its employees, agents and contractors shall not receive any compensation or benefits from the CITY, other than as expressly set forth in this Agreement.
- 6.5 HFC does not have, and will not attempt to assert, the authority to make commitments for or to bind the CITY to any obligation.

ARTICLE SEVEN

Insurance

- 7.1 HFC shall provide the CITY with written evidence of the following general liability coverage in the name of HFC with the City named as an additional insured. Such coverage shall be in the minimum amounts of \$250,000 per individual per occurrence for personal injury; \$500,000 per occurrence for personal injury for more than one person; \$100,000 for property damage (including damage to the Premises) for the Term of the Agreement. Nothing in this Agreement shall prevent HFC from obtaining a higher level of coverage for any category named herein.
- 7.2 HFC understands that the City of El Paso is self-insured.

ARTICLE EIGHT

Allocation of Risk

- 8.1 **Governmental Function.** The Parties expressly agree that, in all things relating to this Agreement, the CITY is performing governmental functions, as defined by the Texas Tort Claims Act. The Parties further expressly agree that every act or omission of any Party which, in any way, pertains to or arises out of this Agreement falls within the definition of governmental function. Accordingly, the Parties further agree that their liability, if any, for

damages for injury to or death of any person or for damage to any property, arising, if at all, out of or in connection with activities under this Agreement, shall be determined under the limited waiver of sovereign immunity contained in the Texas Tort Claims Act.

- 8.2 **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 WILL NOT BE LIABLE TO HFC (NOR TO ANY PERSON CLAIMING RIGHTS DERIVED FROM HFC'S RIGHTS) FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES OF ANY KIND -- including lost profits, loss of business, or other economic damage, and further including injury to property, mental anguish and emotional distress -- AS A RESULT OF BREACH OF ANY TERM OF THIS AGREEMENT, REGARDLESS OF WHETHER THE CITY WAS ADVISED, HAD OTHER REASON TO KNOW, OR IN FACT KNEW OF THE POSSIBILITY THEREOF.
- 8.3 **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 HFC (INCLUDING LIABILITY TO ANY PERSON OR PERSONS WHOSE CLAIM OR CLAIMS ARE BASED ON OR DERIVED FROM A RIGHT OR RIGHTS CLAIMED BY HFC), 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 SUM OF ALL AMOUNTS ACTUALLY PAID BY HFC TO THE CITY UNDER THE TERMS OF THIS AGREEMENT.
- 8.4 **Intentional Risk Allocation.** Each of the Parties expressly and independently acknowledges 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.

ARTICLE NINE General Administrative Provisions

9.1 **General Definitions.**

Agreement means this Facilities Use Agreement between the CITY and HFC.

Breach means (a) a breach by a Party of a covenant or warranty herein, or (b) a misrepresentation made hereunder (see also "Material").

City means the City of El Paso, Texas.

Clients means persons to whom HFC provides Services.

Commencement Date (see Section 5.1).

Director means the Director of the Community and Human Development Department of the City of El Paso.

CITY means the City of El Paso, Texas.

Expiration Date (see Section 5.1).

HFC means the El Paso Housing Finance Corporation.

Facilities means the facilities described on Schedule B.

Material, with respect to a particular matter (e.g., a Breach), means that the Matter is shown to affect adversely (a) the rights and benefits of the other Party under this Agreement; or (b) the ability of the other Party to perform its obligations hereunder; in either case to such a degree that a reasonable person in the management of his or her own HFC would be more likely than not to decline to enter into this Agreement in view of the matter in question.

Nonbreaching Party (see Article Five).

Notice means any notice required or permitted to be given under the terms of this Agreement.

Notice Address means the address for a Party to which Notices must be sent (see Section 9.2).

Operations means all of HFC's use of the Facilities, whether or not related to the provision of Services.

The Parties to this Agreement are the CITY and HFC.

Person means a natural person, a corporation (for profit or not-for-profit), an association, a partnership (general or limited), a joint venture, a trust, a government or political department, subdivision, or agency, or any other entity.

Premises means the portions of the Facilities occupied by HFC under the terms of this Agreement.

Schedules means the schedules attached to this Agreement.

Services means the assistance by HFC to residents of El Paso in obtaining financing for residential ownership and other services described on Schedule A.

Term (see Section 5.1).

Term Extension (see Section 5.2).

Termination means termination of this Agreement, pursuant to Article Five.

Texas Tort Claims Act means Sections 101.001 *et seq.* of the Texas Civil Practice & Remedies Code.

- 9.2 **Notices.** Any and all Notices required to be given by one Party to another under the terms of this Agreement shall be in writing and shall be effective only if sent by certified mail, return receipt requested, to the following Notice Addresses:

CITY: City of El Paso
Attn: City Manager
2 Civic Center Plaza
El Paso, Texas 79901

Copy to: Director of Community and Human
Development Department
2 Civic Center Plaza
El Paso, Texas 79901

HFC: El Paso Housing Finance Corporation
Attn: President

100 N. Stanton St., Ste. 1700
El Paso, Texas 79901

Copy to: Norman J. Gordon, Esq.
Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C.
100 N. Stanton St., Ste. 1700
El Paso, Texas 79901

- 9.3 **Choice of Law.** This Agreement will be interpreted and enforced in accordance with the law of the State of Texas applicable to agreements made and performed entirely in the City and County of El Paso, Texas, by Persons domiciled in Texas.

- 9.4 **Jurisdiction and Venue.** Suit to enforce this Agreement or any provision thereof will be brought exclusively in the state or federal courts located in El Paso, Texas.

- 9.5 **Assignment.** No Party may assign any right or interest under this Agreement, and any purported assignment will be null and void and a breach of this Agreement, except for the

following or as otherwise provided herein. HFC may enter into agreements with third parties to provide Services under this Agreement.

9.6 **Entire Agreement.**

- a. This Agreement constitutes the entire agreement between the Parties concerning the subject matter thereof. No prior or contemporaneous representations, inducements, promises, or agreements, oral or otherwise, between the Parties with reference thereto will be of any force or effect.
- b. Each Party represents and warrants that, in entering into and performing its obligations under this Agreement, it does not and will not rely on any promise, inducement, or representation allegedly made by or on behalf of the other Party with respect to the subject matter hereof, nor on any course of dealings or custom and usage in the trade, except as such promise, inducement, or representation may be expressly set forth herein.
- c. No modification or amendment to this Agreement will be valid or binding unless reduced to writing of equal dignity hereto and duly executed by the Party or Parties to be bound thereby.

9.7 **Severability.** If any term or provision of this Agreement, or any application of any term or provision of this Agreement, is held to be unenforceable, the unenforceability of that term, provision or application shall not affect the enforceability of any other term, provision, or application; and the remainder of the Agreement shall continue in full force and effect to the extent that it substantially reflects the agreement contemplated by the Parties.

9.8 **Force Majeure.** No Party shall be responsible for any delay, damage, failure, or inability to perform resulting from causes not within the control of the Party and which the Party is unable to prevent through reasonable diligence.

9.9 **No Waiver.** The failure of either Party at any time to require performance by the other Party of any provision of this Agreement shall in no way affect the right of a Party to require performance of that provision. Any waiver by a Party of any breach of any provision of this Agreement shall not be construed as a waiver of any continuing or succeeding breach of such provision, a waiver of the provision itself or a waiver of any right under this Agreement.

9.10 **Binding on Successors.** This Agreement will be binding upon and inure to the benefit of the Parties and their successors and assigns permitted by this Agreement.

9.11 **Section Headings.** The article headings contained in this Agreement are for reference purposes only and shall not in any way control the meaning or interpretation of this Agreement.

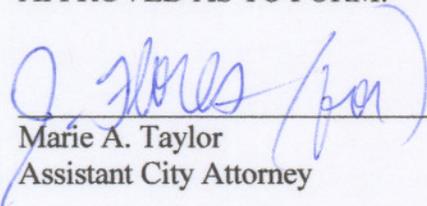
- 9.12 **Representation of Counsel; Mutual Negotiation.** Each Party has had the opportunity to be represented by counsel of its choice in negotiating this Agreement. This Agreement shall therefore be deemed to have been negotiated and prepared at the joint request, direction, and construction of the Parties, at arms length, with the advice and participation of counsel, and will be interpreted in accordance with its terms without favor to any Party.
- 9.13 **Counterparts.** This Agreement may be executed in separate counterparts, each of which so executed and delivered shall constitute an original, but all such counterparts shall together constitute one and the same instrument.
- 9.14 **Photostatic Copy.** The Parties stipulate that a photostatic copy of an executed original will be admissible in evidence for all purposes in any proceeding as between or among the Parties.
- 9.15 **Authorized Signatory.** Each person signing below represents that he or she has read this Agreement in its entirety (including any and all Schedules and Exhibits), understands its terms, is duly authorized to execute this Agreement on behalf of the Party indicated below by his or her name, and agrees on behalf of such Party that such Party will be bound by those terms.

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

THE CITY OF EL PASO

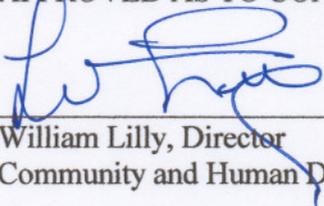
Joyce A. Wilson
City Manager

APPROVED AS TO FORM:



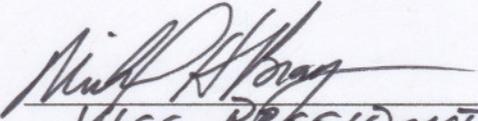
Marie A. Taylor
Assistant City Attorney

APPROVED AS TO CONTENT:



William Lilly, Director
Community and Human Development Department

EL PASO HOUSING FINANCE CORPORATION

By: 
Title: VICE PRESIDENT

APPROVED AS TO FORM:


Name (printed) NORMAN J. GALLOWAY
Title GENERAL COUNSEL

**Schedule A
Services**

- Issuance of single family mortgage revenue bonds to provide affordable mortgages and down payment assistance for low and moderate income first time homebuyers.
- Issuance of multifamily revenue bonds to provide financing for the construction or rehabilitation of multifamily units for low and moderate income renters.
- The El Paso Housing Finance Corporation will hire an Executive Director who will play a significant role in increasing the supply of affordable housing and the revitalization of neighborhoods in El Paso. As the El Paso HFC adds services and programs, they will alert the City to these services.

**Schedule B
Facilities**

- Office space within the Community and Human Development Department, located at 2 Civic Center Plaza, El Paso, Texas 79901-1196, to include limited use of an on-site storage area, as determined by the City Manager of the City of El Paso.
- Reasonable access to conference areas provided by the Community and Human Development Department. The Director will let the HFC Executive Director know the process for scheduling conference rooms.
- Access to parking spaces in the City employee parking areas, as determined by the City Manager or her designee. The HFC will pay the City for the use of the parking space.

Schedule C
Equipment and Personnel

- Office furniture to include a desk, an office chair, and filing cabinets that have a locking mechanism.
- A telephone with speakerphone with two phone lines provided by the City. All long distance phone calls will be reimbursed to the City by the HFC.
- Fax access and receipt. All long distance phone faxes will be reimbursed to the City by HFC.
- Email and internet access.
- Web hosting.
- Access to copier and to services provided by the printing shop. All such expenses will be reimbursed to the City by HFC.