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

DEPARTMENT: Parks and Recreation

AGENDA DATE: August 8, 2006

CONTACT PERSON/PHONE: Norman C. Merrifield (915) 541-4910

DISTRICT(S) AFFECTED: District 3

SUBJECT:

APPROVE a resolution / ordinance / lease to do what? OR AUTHORIZE the City Manager to do what? Be descriptive of what we want Council to approve. Include $ amount if applicable.

A ordinance authorizing the City Manager to sign a Lease Agreement between the City and County for the use of the Happiness Senior Citizens Center located at 563 North Carolina Drive as a Nutrition Center.

BACKGROUND / DISCUSSION:

Discussion of the what, why, where, when, and how to enable Council to have reasonably complete description of the contemplated action. This should include attachment of bid tabulation, or ordinance or resolution if appropriate. What are the benefits to the City of this action? What are the citizen concerns?

The County intends to use the facility to serve meals onsite related to the El Paso City – County Nutrition Project, as well as an opportunity to offer social and recreational activities to county residents. This is a year-to-year lease with automatic renewals not to exceed 30 years.

PRIOR COUNCIL ACTION:

Has the Council previously considered this item or a closely related one?

Yes. City Council approved the Friendly Senior Citizens Center Lease Agreement at their July 25, 2006 Council meeting. This lease agreement is for a different facility, however, is a part of the same County Nutrition Program.

AMOUNT AND SOURCE OF FUNDING:

How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?

The County assumes 20% of the utility costs for the building. They also cover all the costs required for them to coordinate this operation at this location, including sole responsibility for the repair of fixtures, equipment, property and solid waste removal.

BOARD / COMMISSION ACTION:

Enter appropriate comments or N/A

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

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

DEPARTMENT HEAD: _____

(Example: if RCA is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

ORDINANCE NO._____

AN ORDINANCE AUTHORIZING THE CITY MANAGER TO SIGN A LEASE AGREEMENT BETWEEN THE CITY OF EL PASO AND THE COUNTY OF EL PASO, TEXAS, FOR THE LEASE OF THE HAPPINESS SENIOR CITIZENS CENTER, LOCATED AT 563 NORTH CAROLINA, EL PASO, TEXAS 79915, FOR A TERM OF ONE (1) YEAR, WITH AUTOMATIC RENEWAL NOT TO EXTEND BEYOND THIRTY YEARS.

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 ("CITY"), a lease upon the following terms to the COUNTY OF EL PASO, TEXAS ("COUNTY"):

(1) The area to be leased is the Happiness Senior Citizens Center, located 563 NORTH CAROLINA, EL PASO, TEXAS 79915, El Paso County, Texas, as further described in the Lease Agreement ("Agreement") attached hereto as Exhibit "A" and known as "Premises".

(2) The lease period shall be for a primary term of one (1) year, with non-monetary consideration of certain additional in-kind public benefit consideration received, as outlined in greater detail in the attached Agreement, and may be extended on the same terms through automatic renewal of additional one (1) year periods not to exceed thirty (30) years for the original term plus all extensions under the same price, terms and conditions, upon mutual agreement of COUNTY and CITY, by and through its City Manager. This lease agreement supersedes all prior agreements, whether written or oral, regarding the lease of the Premises by the COUNTY.

(3) Said lease from the City of El Paso to the COUNTY shall be in the form that is attached as Exhibit "A" and incorporated herein by reference for all purposes as if set forth verbatim.

PASSED AND APPROVED on this the _____ day of _____, 2006.

CITY OF EL PASO

_____
John F. Cook
Mayor

ATTEST:

_____
Richarda Duffy Momsen,
City Clerk

APPROVED AS TO FORM:

_____
Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:

_____
Norman C. Merrifield, Ed.D., Director
Parks and Recreation Department

Document Name:PARKS/1/LEASE AGMT HAPPINESS COUNTY NUTRITION PROGRAM
Document #: 20555v6
Author_Id: JFLO

THE STATE OF TEXAS §
§ **LEASE AGREEMENT**
COUNTY OF EL PASO §

This Lease Agreement ("Agreement"), made this the 10th day of July, 2006, between the CITY OF EL PASO, TEXAS, a home rule municipal corporation ("CITY"), and the COUNTY OF EL PASO, TEXAS ("COUNTY").

WHEREAS, the City is the owner of the premises and improvements, including the parking lot adjacent to the building, located at 563 North Carolina, El Paso, Texas 79915, such property further referenced in Attachment "A," commonly known as the Happiness Senior Citizens Center (hereinafter the "Premises"); and

WHEREAS, the COUNTY desires to enter into a lease agreement ("Agreement") with the CITY for the use of the Premises; and

WHEREAS, the COUNTY intends to use the Premises to serve meals both on-site as part of the El Paso City-County Nutrition Project, and to offer social and recreational activities to senior citizens who reside in the COUNTY (hereinafter the "Program"); and

WHEREAS, the CITY believes that the activities contemplated herein and the agenda set forth by the COUNTY would further the objectives of all parties by increasing the availability of nutrition and alternatives for area seniors and provide recreational and social activities, which would general benefit the citizens of El Paso; and

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 the COUNTY to lease the Premises.

1.0 TERM AND RENT

1.1 Term of Agreement. This Agreement shall become effective immediately upon execution by the El Paso City Manager and shall be for a primary term of one (1) year from that date. Said Agreement will be subject to automatic renewal periods of one (1) year, each under the same price, terms and conditions as approved jointly by COUNTY and CITY by and through its County Judge and City Manager, respectively, unless terminated as hereinafter provided in Section 6.0, *et seq.*, of this Agreement. The original term plus all extensions shall not exceed thirty (30) years.

1.2 Consideration. The consideration contributed by the COUNTY is non-monetary, and consists of the public benefit of meals and related nutrition services and social and recreational activities that will be provided by the COUNTY to senior citizens at the Premises, as well as the COUNTY'S performance of all of the services and duties listed hereinafter during the lease term.

2.0 USE OF PREMISES

2.1 Premises. The Premises shall be under the control of the COUNTY during the lease term of this Agreement primarily for the operation of the El Paso City-County Nutrition Project. The COUNTY understands and agrees that the Premises are to be free and open to the public on a non-discriminatory basis, yet that general services offered through the Program may be limited to senior citizens of the CITY and the COUNTY and those citizens' spouses (hereinafter "Participants") as determined appropriate by the COUNTY. However, the COUNTY 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.

It is understood that the COUNTY intends to use the Premises primarily to prepare and provide meals and related nutrition services, and secondarily to provide social and recreational activities to Program Participants. The use herein provided serves as the consideration provided to the CITY for this Agreement. The COUNTY expressly agrees to use the facility only for such public purposes of benefit to area seniors and their spouses, as a use that provides such Participants with a safe and healthy nutrition and social alternative, and agrees to not use the Premises for any other purpose without first obtaining the CITY'S consent in writing. The CITY reserves the right to use the Premises for such recreational programs and activities that would not be incompatible with the COUNTY'S lease and use of the Premises hereunder.

2.1.1 Admission to Events at Facilities. The COUNTY shall not charge a fee for admission to functions held at the Premises. As such, Premises are to be open to the general public as provided herein. However, the Nutrition Center Site Council may charge admission to dances and other activities and retain the proceeds in accordance with its bylaws.

2.1.1.1 The COUNTY, 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 Repairs. The COUNTY shall keep the facilities, improvements, without limitation including the fixtures, equipment and property on the Premises in good condition and repair during the lease term of this Agreement, as stated in Section 1.1 above. The COUNTY shall be solely responsible for any repairs needed during the lease term. The COUNTY shall at all times during the term of this Agreement keep the Premises clean, orderly and in an attractive condition. The COUNTY shall not be responsible for maintenance or repair of the parking lot or the grounds and landscaping.

2.3 Delivery, Acceptance and Surrender of Premises. The COUNTY 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, and any extensions. Should Premises not be in substantially the same condition as same were at the beginning of the term of this Agreement, the COUNTY shall make any necessary repairs to restore Premises to its pre-lease condition, and 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, a payment in the amount of such

repairs, in an amount determined appropriate by the sole discretion of the Director of Parks and Recreation may be accepted in lieu of completion of said repairs, cleaning, or painting.

2.3.1 The COUNTY acknowledges that the Premises, including the parking lot adjacent to the building at the Premises, are leased "AS-IS." The COUNTY shall not request and the CITY shall not be responsible for completion of any improvements, modifications, corrections, repairs or the like believed helpful or necessary to the COUNTY'S stated purpose, agenda or mission or believed necessary for the continuance of the Premises. This AS-IS condition shall specifically include, but shall not be limited to structural walls, foundation, roof, plumbing, electrical, carpentry, compliance with the Americans with Disabilities Act, and heating, ventilation, and air conditioning problems that may or may not exist, as well as any problems with the parking lot adjacent to the building located on the Premises. **The COUNTY has been and is herein placed on notice that the CITY neither has knowledge of, nor can it warrant against the existence of asbestos, either of which may or may not exist on the leased Premises. Should the COUNTY determine that asbestos exists, it may rescind Lease without further obligation.**

2.3.2 Improvements. The COUNTY shall not, without first obtaining the written consent of the Director of Parks and Recreation of the CITY, make any alterations, additions or improvements in, to or about the Premises. All such alterations shall be made at the COUNTY'S expense and may, at the CITY'S option, become the property of the CITY at the end of the lease term without indemnification by the CITY.

2.3.2.1 Fixtures. The CITY at its option, at the termination of this Agreement, may retain any fixtures placed by the COUNTY upon the Premises; or may require that such fixtures be removed by the COUNTY or its agents as soon as possible upon termination of this Agreement. The COUNTY shall bear all reasonable costs for repair to the Premises that may be required due to removal of such fixtures.

2.3.3 Signs. The COUNTY agrees to remove all identifying signs or symbols placed on the Premises by it before redelivery of the Premises to the CITY and to restore the portion of the Premises on which they were placed to the same condition as before their placement.

2.4 Clean-Up, Utilities, and Zoning.

2.4.1 Garbage and Trash. The COUNTY shall provide a complete and proper arrangement for the adequate and proper handling and disposal, away from the Premises, including the parking lot adjacent to the building at the Premises, of all trash, garbage and other refuse caused by the COUNTY'S operations of the Premises.

2.4.2 The COUNTY 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 parking lot adjacent to the building, shall not be permitted at any time. Additionally, the placement of trash receptacles shall be at locations approved by the Director of Parks and Recreation or that person's designee.

2.5 Earth Work. No moving of earth at the Premises shall be performed unless such work is as authorized by the Director of Parks and Recreation and necessary permits have been requested and authorized by the CITY.

2.6 Utilities. Whereas, the Premises and the City's Carolina Parks and Recreation Facility are adjacent to one another and are on the same electric, gas, and water meters, the parties hereby agree that the County will be responsible for 20% of the utility bills and the City shall pay the remainder. The City shall invoice the County for its portion of the bills and the County shall remit its payment to the City within 15 days of receipt.

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

2.8 Non Profit Use/Zoning. The COUNTY expressly agrees that the Premises will only be used for government or non-profit community outreach activities, which are in compliance with municipal regulations to include zoning regulations, and are limited to those included in this Agreement.

3.0 CONTRACTUAL RELATIONSHIP

3.1 The COUNTY is an independent contractor and is otherwise a tenant in a landlord-tenant relationship with the 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, the COUNTY 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 the COUNTY'S officers, employees, agents, representatives or sub-contractors who perform any service in connection with this Agreement.

3.1.2 The COUNTY shall select its own employees and such employees shall be and shall act under the exclusive and complete supervision and control of the COUNTY.

3.2 The COUNTY shall not receive any compensation or benefits from the CITY other than those described herein.

3.3 The CITY and the COUNTY understand and expressly agree that, in all things relating to this Agreement, the CITY and the COUNTY are performing a governmental function, as defined by the Texas Tort Claims Act. The parties hereby agree that the CITY and the COUNTY enter into this Agreement each as a governmental entity for the purpose of performing a governmental function.

4.0 INSURANCE

4.1 Liability Insurance. The COUNTY understands and warrants that it shall provide liability insurance coverage in no less than the following amounts: $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 facilities and the Premises) for the term of this Agreement. The CITY, as owner of the Premises, shall be named as an additional named insured under the coverage. 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 cancellation of this Agreement.

4.2 Cancellation. Each policy must expressly state that it may not be canceled or non-renewed unless thirty (30) days advance notice of cancellation or intent not to renew is given in writing to the Director of Parks and Recreation by the insurance company. The COUNTY shall give written notice to the Director of Parks and Recreation within five (5) days of the date upon which total claims by any party against the COUNTY reduce the aggregate amount of coverage below the amounts required by this Agreement.

4.3 Subrogation. Each policy must contain an endorsement to the effect that the issuer waives any claim or right in the nature of subrogation to recover against the CITY, its elected and appointed officials, officers, agents or employees.

4.4 Endorsement of Primary Insurance. Each policy must contain an endorsement that such policy is primary insurance, so long as it is customary in the industry and under Texas law for such insurance to be primary, to any other insurance available to the CITY, the Additional Insured, with respect to claims arising hereunder and that the insurance applies separately to each insured.

4.5 Liability for Premium. If any of the policies referred to above do not have a flat premium rate and such premium has not been paid in full, such policy must have a rider or other appropriate certificate of waiver sufficient to establish that the issuer is entitled to look only to the COUNTY for any further premium payment and has no right to recover any premiums from the CITY.

5.0 CLAIMS

5.1 Without modifying the conditions of preserving, asserting or enforcing any legal liability against the CITY as required by the City Charter or any law, the CITY will promptly forward to the COUNTY every demand, notice, summons or other process received by the CITY in any claim or legal proceeding contemplated herein.

5.2 In addition, the COUNTY shall promptly advise the CITY in writing of any claim or demand against the CITY or the COUNTY known to the COUNTY related to or arising out of the COUNTY'S activities under this Agreement.

5.3 The COUNTY understands and agrees that it will 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 the COUNTY may deem expedient.

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

6.1 Termination by Mutual Consent. The parties may terminate this Agreement by mutual consent upon such terms as they may agree in writing.

6.2 Termination by Either Party. It is further understood and agreed by the COUNTY and the CITY that either party may terminate this Agreement by providing the other party with ninety (90) days written notice.

6.3 Termination by CITY. If the COUNTY ceases to use or occupy the Premises for the purposes herein contemplated for a time period of more than twelve (12) continuous months, or if the COUNTY defaults in any of its obligations under this Agreement and fails to correct such default within thirty (30) days written notice, the CITY may terminate said Agreement by written notice and take possession of the Premises. In such an event, all rights of the COUNTY in the Premises, including buildings, facilities and improvements, including the parking lot adjacent to the building on the Premises, shall then terminate.

6.4 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.

6.5 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.

6.5.1 Upon termination of this Agreement for any reason, ownership of all improvements done by the COUNTY on the Premises shall revert to the CITY.

6.6 Effective Federal or State Eminent Domain Proceedings. State or federal eminent domain proceedings resulting in condemnation of the Premises or any part thereof shall result in termination of this Agreement. All compensation awarded shall be the CITY'S and the COUNTY hereby assigns and transfers to the CITY any claim it may have to compensation for damages as a result of such condemnation except reasonable moving expenses.

7.0 GENERAL PROVISIONS

7.1 Taxes and Assessments. The COUNTY will promptly pay all taxes and assessments lawfully levied on the COUNTY'S leasehold interest, on the buildings and structures on the property as well as on the COUNTY'S personal property.

7.2 Assignments and Subletting. The COUNTY shall not assign this Agreement nor sublet the Premises or any part thereof without the prior written consent of the CITY, except that the COUNTY 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 Premises 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.

7.3 Liens and Encumbrances. COUNTY shall not give nor permit any liens or encumbrances on the Premises, including but not limited to the facilities, buildings and improvements. Upon termination of this Agreement, COUNTY shall peacefully surrender such Premises to the CITY free of all such liens or encumbrances.

7.4 Inspections. The CITY shall have the right to enter the Premises at all reasonable times, on reasonable notice to the COUNTY (except that no notice need be given in case of an emergency) for the purpose of inspecting the same and determining compliance with the terms of this Agreement. The COUNTY shall have no claim or cause of action against the CITY by reason thereof.

7.5 Outside Lighting. Outside lighting, except security lighting, on the property shall be operated during the established hours set forth in Section 13.24.040, El Paso City Code. 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 City Code. If this provision is violated, the CITY may require any such lighting to be extinguished, changed or removed at COUNTY'S expense.

7.6 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 of Parks and Recreation or designee prior to installation.

7.7 Compliance with Laws. The COUNTY shall observe and comply with all federal, state and local codes and ordinances including, but not limited to those related to the preparation, handling and distribution of food, and with such further reasonable rules and regulations as the CITY may prescribe, on written notice to the COUNTY, for the safety, care and cleanliness of the Premises.

7.8 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 ten (10) calendar days, the demanding party may treat this failure as an anticipatory repudiation of the Agreement.

7.9 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 herein.

7.10 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 COUNTY. 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. Any waiver by the CITY of any breach of any of the COUNTY'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 the COUNTY.

7.11 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.

7.12 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.

7.13 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.

7.14 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.

7.15 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.

7.16 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 El Paso, Texas 79901-1196
COPY TO:	Parks and Recreation Department Attention: Parks Director Two Civic Center Plaza, 6th Floor El Paso, Texas 79901-1196
COUNTY:	COUNTY OF EL PASO Attention: County Judge 500 East San Antonio El Paso, Texas 79901

7.17 Warranty of Capacity to Execute Agreement. 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.

Executed, this the _____ day of _____, 2006.

(Signature page to follow)

CITY OF EL PASO

Joyce A. Wilson
City Manager

EL PASO COUNTY

ATTEST:

Dolores Briones
County Judge

County Clerk

COUNTY CLERK OF EL PASO COUNTY TEXAS

APPROVED AS TO FORM:

Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:

Norman Merrifield, Ed.D., Director
Parks and Recreation Department

ATTACHMENT "A"

HAPPINESS CENTER
CAROLINA RECREATION CENTER
563 NORTH CAROLINA DRIVE

Tract 4-F (5.078 ACRES) and Tract 4-G (11.008 ACRES) and Tract 4-H (6.42 ACRES), Block 18, Ysleta Grant Survey, City of El Paso, El Paso County, Texas