

## **AGREEMENT FOR THE DEVELOPMENT, OPERATION AND MAINTENANCE OF PUBLIC GOLF FACILITIES AT WALTER E. LONG PARK**

**THIS AGREEMENT** for the development, operation and maintenance of the public golf facilities is by and between the **CITY OF AUSTIN, TEXAS**, a Texas home-rule municipal corporation principally situated in Travis County (the “City”), and **DECKER LAKE GOLF, LLC.**, a Texas limited liability company (“Developer”) hereinafter collectively referred to as the “Parties” and each as a “Party”.

The City is the owner of the land located in Austin, Texas at 6614 Blue Bluff Road, and commonly known as Walter E. Long Park (the “Park”). The Park consists of approximately 3,779 acres, which includes approximately 2,400 acres of undeveloped land and 1,269 acres of lake and is described more particularly in the Attached Exhibit “A.” The City intends to use approximately 735 acres of the Park for public golf. (The land designated for golf purposes in this agreement, hereafter, “Premises,” is described in Exhibit “A”). As one of the initial steps in realizing this objective, the City, on May 19, 2014 issued a request for qualification statements (“RFQS,” a copy of which is attached as Exhibit “B”) to provide interested developers an opportunity to demonstrate capability and vision for the development and operation of a premier municipal golf destination at the Park.

The Developer, in its response to the RFQS, attached as Exhibit “C” (“RFQS Response”), demonstrated that it shares the City’s objectives in bringing world class public golf opportunities to Austin and that its combination of vision and professional capabilities present the City with the best-value for the City in terms of the criteria stated in the RFQS and the ranking system used by the City to rank responses to the RFQS.

The City desires to contract with the Developer to finance, design, develop, construct, operate and manage two public golf courses, and one short course, at the Park. (The courses, including the “Short Course,” which is defined at Section 1.5 of this agreement, and any appurtenant buildings or other structures, hereafter referred to collectively as the “Courses,” a “Course”, the “Premises,” or the “Project” as indicated by context.)

For and in consideration of the premises, benefits, covenants and agreements contained herein, the Parties hereby agree as follows:

### **ARTICLE 1. TERM AND AREA UNDER LICENSE**

1.1 Subject to Section 1.2 below, the Effective Date of this agreement is \_\_\_\_\_ and has a term of 50 years. This agreement includes four options for renewal, which may be exercised at the Developer’s discretion. Each renewal shall be for a term of 10 years. The total term of this agreement, including all options, shall not exceed 90 years. Renewal of this agreement by the exercise of the options is subject to the written approval of the Contractor and the City

Manager or his designee. The Developer must notify the City of its intent to exercise a renewal option at least six months prior to the expiration of the current term.

1.2 If within the three years immediately following the Effective Date the Developer determines, for any or for no reason, that it will not develop a Course at the Park, and notifies the City of its intention to not build a Course, or if the Developer has not requested a Notice to Proceed, as described in Section 5.2 of this agreement, this agreement shall expire on the earliest of either the Developer's written notice of its intention to not proceed with "Development," as that term is defined in Section 2.1 of this agreement, or on the first day of the 37<sup>th</sup> month immediately following the Effective Date. The Developer reserves the right to terminate the agreement without penalty if a tour event commitment from the PGA is not secured prior to the City's issuance of a Notice to Proceed.

1.3 The area of land subject to this agreement shall be determined by the boundaries of the Courses under Development, as that term is defined in Section 1.4 of this agreement, or that have been Developed, at any time during the term of this agreement. The current metes and bounds of the total area subject to this agreement shall be updated and maintained as specified in Section 5.3 of this agreement. Under no circumstances shall the total combined area of the Courses exceed 735 acres.

1.4 The Parties expect that the Developer will Develop two Courses under this agreement. For convenience in referencing the separate courses, the term "First Course," shall refer to the Course that will be developed at the Park first in time, and the term "Second Course," shall refer to the subsequently developed Course.

1.5 The Developer, in accordance with Section 3.1 of this agreement, shall develop a short course ("Short Course"), which shall be a smaller course appropriate for introducing new players, particularly youth, to the game of golf.

1.6 The Developer shall have the right to remove any personal property from the Courses upon the expiration of the agreement. Any and all real property, including fixtures, located on the Courses shall remain the property of the City. For this agreement, the term "fixture," means goods that have become so related to particular real property that an interest in them arises under Texas real property law; and the term "personal property," means any type of property that is not real property or a fixture. Holdover and surrender are addressed in Sections 18.5 and 18.6 of this agreement

## **ARTICLE 2. PROJECT DEVELOPMENT MANAGEMENT AND APPROVALS**

2.1 The Developer will provide the project management services for the design, community outreach, preliminary engineering, environmental assessments, permitting, bidding, and construction, required for the development

of the Courses (design, preliminary engineering, environmental assessments, permitting, and construction, are hereafter referred to collectively, as a noun, as the "Development," or, as a verb, "Develop," or "Developed"). The Developer shall be responsible for all costs associated with the Development. The Developer's costs are stated in specificity throughout this agreement and also include, without limitation, all costs for design, permitting, construction, repair of City property damaged during construction, including utility lines, inspections, testing, document recording, and surveying.

2.2 The City's Manager for Golf Operations, (the "City's Golf Manager") will act on behalf of the City with respect to the City's obligations for facilitating the Development. The Golf Manager's activities shall include receiving and transmitting information and instruction and the City's Golf Manager will have complete authority to interpret and define the City's policies and decisions with respect to the Development, and shall serve as advisor to the City with respect to any questions uniquely relating to the development of public golf facilities. The City's Director of Parks and Recreation will designate a "City Project Manager" and may designate other representatives to act on behalf of the City with respect to the Development. The City Project Manager shall make visits to the work site at intervals appropriate to the various stages of construction of the Courses as the Project Manager deems necessary to observe the progress that has been made and the quality of various aspects of the executed work. The Project Manager will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work. The Project Manager's efforts will be directed toward providing for the City a greater degree of confidence that the completed Development will conform generally to approved plans. On the basis of such visits and on-site observations, the Project Manager will keep the City informed of the progress of the Development and will endeavor to guard the City against defective work.

2.3 The Developer shall identify a project manager ("Developer Project Manager") who, during the Development of the Courses, will coordinate with the City on behalf of the Developer, receive and transmit information and instructions, and will have complete authority to interpret and define the Developer's decisions with respect to the Development.

2.4 If a disagreement between the Parties arises regarding any requirement or provision of this agreement, and the disagreement is not resolved by the Developer Project Manager and the City Golf Manager, it shall be referred as soon as possible to the Developer's Chief Operating Officer and the City's Director of Parks and Recreation, or the Director of the department managing the particular matter ("Director"), for resolution. If the Developer's Chief Operating Officer and the Director do not resolve the issue, it shall be referred as soon as possible to the Assistant City Manager responsible for the department managing the particular matter.

2.5 The Parties will participate in joint review meetings with representatives from the Developer and the City, and the City shall provide a designated review team to facilitate the review process for any approvals required of the City.

2.6 As stated throughout this agreement, the Developer will be required to obtain several approvals and permits from the City as the Development is being completed. The City recognizes and values the Developer's commitment to bringing a world class public golf facility to the City of Austin. In no instance in which the City's discretionary approval is required in relation to the administration of this agreement shall the City unreasonably withhold its approval or consent.

2.7 Save and except for water to be used for the irrigation of the Courses, which is addressed in the following Section 2.12, the cost to design, obtain and connect to any/all utilities, including, but not limited to, natural gas, electricity, light, heat, power, water, wastewater and drainage and communication services, necessary for the operation of the Courses will be at the sole cost of Developer. All costs, including, but not limited to, deposits, installation and extension costs, connection and inspection fees, and all costs of utilities consumed or utility services provided, shall be paid for by Developer to the appropriate utility provider.

2.8 All utilities must be separately metered and installed within the boundary line of the Courses so that Developer is paying for usage of any utilities by Developer. Meters must be installed at Developer's expense so that they are readily accessible in order to obtain routine readings.

2.9 Developer shall be responsible for the payment of all utilities consumed on the Courses, and all fees and charges for utilities and similar services rendered or supplied to the Courses, including, but not limited to, the Regional Storm Water Management Program, as addressed in Section 16.2 of this agreement, at any point during the Term of this agreement.

2.10 Developer shall be solely responsible for the payment of all water, wastewater and storm water impact fees, if any, in connection with the Development.

2.11 Save and except for water used for the irrigation of the Courses, which is addressed in the following Section 2.12, Developer, at its sole cost, shall construct and install the requisite utility infrastructure in order to adequately serve the Courses, which infrastructure shall be designed and constructed in a manner so as to minimize future inconvenience as the Courses are developed and constructed.

2.12 Water to be used for Course irrigation.

2.12.1 The Developer shall utilize sources of water that have been approved by the City Council for Course irrigation. As of the Effective Date, the only source of water that has been approved by City Council for irrigation of the Course is as described in the attached Exhibit "D". Upon the expiration or termination of this agreement, Developer shall continue to provide water for irrigating the Course through the end of the 89<sup>th</sup> year following the Effective Date in amounts, and of a quality and temperature

sufficient, to adequately irrigate the Course at a fair market rate as determined by an appraiser certified by the State of Texas mutually agreed upon by the parties. The provision of water following the termination or expiration of this agreement may be made under a separate agreement. Any agreements between the Developer and a third-party relating to the processing or delivery of water for irrigating the Course ("Third-Party Irrigation Agreement") shall be assumable by the City in the event of the expiration or termination of this agreement. The Developer shall not enter into any Third-Party Irrigation Agreement without the prior written approval by the City.

2.12.2 Should the Developer, after having used a source of water that has been approved by City Council for irrigation, determine that an alternate water source is necessary for course irrigation, City Council approval of such water source will be required.

2.12.3 The Developer will install rainwater catchments systems where feasible to augment the use of irrigation.

2.13 Developer must receive the express written consent of the City prior to the design or construction of any element of the Courses that would create a "wetland," as that term is defined at 40 CFR 230.3, on any part of the Premises.

2.14 Nothing in this agreement confers on the Developer entitlements, privileges, permits, rights, or expectations in water or the use of water in any form, including water in or from Lake Walter E. Long, or any groundwater beneath the Courses and the Park.

2.14.1 The City shall consult with the Developer and shall at all times provide reasonable notice, to the fullest extent possible, to the Developer of any anticipated changes in the City's use or operation of the Lake, including as to any reasonably foreseeable changes in the lake elevations.

2.14.2 Developer or its agents, subsidiaries, affiliates or any other related entities (collectively "Developer Party," or "Developer Parties," as indicated by context), in the construction and operation of the Golf Courses, shall not in any manner or at any time impair or interfere with the City's use and operation of Lake Walter E. Long.

2.14.3 The City may use and operate Lake Walter E. Long for any purpose that it deems necessary or advisable and that the City may seek to amend its water right permits in Lake Walter E. Long in any manner it deems necessary or desirable. The Developer will not formally protest any such permit application or amendment by the City.

2.14.4 The City has no obligation to the Developer or any Developer Party to maintain Walter E. Long Lake at any particular elevation and the City's use and operation of Lake Walter E. Long may include the significant and regular drawdown of the lake level for extended periods of time that may have negative aesthetic impacts on the lake appearance.

2.14.5 The City, as property owner, maintains fully all of its rights in any groundwater beneath the Golf Courses and Walter E. Long Park. The City maintains fully all of its rights to store and withdraw water in any form in any aquifer beneath the Golf Courses and Walter E. Long Park.

## **ARTICLE 3. ADDITIONAL COMMUNITY BENEFITS AND ENGAGEMENT IN THE DESIGN PROCESS**

### **3.1 The Short Course**

The Short Course shall be Developed simultaneously with the Second Course, if not earlier. In any event, the Short Course must be ready for use by the public within seven years from the date on which the City has issued the Notice to Proceed for the First Course

3.1.1 All proceeds from use of the Short Course shall be allocated to the promotion, operation, repair, and maintenance of the Short Course. The use of such proceeds is further addressed in Section 8.2 of this agreement.

3.1.2 The Short Course, may be operated by the Developer, or a Third-Party Operator, as that term is defined in Section 7.7.5.

3.2 The Developer acknowledges the importance of engaging the community and will carry out the community involvement process stated in Exhibit “E,” in designing and planning the Development of the Courses. Developer shall conduct community engagement meetings at least quarterly starting 90 days after the Effective Date of this agreement until the Certificate of Occupancy is issued by the City for the Development. Community engagement meetings will provide an open forum of communication between the Developer, City staff and the public to: a) inform citizens of project status/progress; b) address community issues and concerns specific to the Development; c) garner public input on design and construction of the Development; and d) any additional objectives identified in Exhibit E.

3.3 Developer shall design and construct the Courses in accordance with the Proposal’s “Park within a Park” concept to include recreational, cultural, and communal amenities. The “Park within a Park” amenities may include but are not limited to hiking trails and footpaths, water-based recreational amenities, for example, dock, pier, and concessions and a “food forest.” The “Park within a Park” elements will be identified and prioritized through the community involvement process stated in Exhibit E and implemented as part of the Development of the First Course.

## **ARTICLE 4. SUSTAINABILITY**

4.1 Sustainable Operations and Maintenance. The Audubon Cooperative Sanctuary Program for Golf Courses is an environmental education and certification program that helps golf courses protect the environment, preserve the natural heritage of the game of golf, and gain recognition for their efforts. Developer shall obtain Audubon Certification for both Courses no later than two years after the City provides Certificate of Occupancy (open for business). Developer shall obtain recertification every two years after the first certification using the Audubon Cooperative Sanctuary Program for Golf Courses.

4.2 Sustainable Design and Construction of Golf Course. Developer shall design and construct the Golf Course to meet GEO Certified® standards and will achieve GEO Certification no later than two years after the City provides Certificate of Occupancy (open for business.) This requirement utilizes the international nonprofit Golf Environment Organization's program guidance document, "Sustainable Golf Development: Creating a Positive Legacy". GEO Certified® is an Eco-Label program specifically for golf, and is intended to showcase the creative and responsible planning, design and construction of a unique, resource efficient and ecologically rich golf environment.

4.3 Sustainable Design and Construction of Clubhouse. Developer shall design and construct the Clubhouse and any future buildings of over 2000 Square Feet to achieve a minimum 2 Star Rating in Austin Energy's Green Building Program or achieve U.S. Green Building Council Silver LEED® Certification, with the goal of achieving higher levels of green building certification, and including leveraging all available incentives. Rating or Certification shall be achieved no longer than two years after the City provides Certificate of Occupancy.

4.4 The Developer shall make reasonable efforts to utilize the GEO Certification process to certify future tournaments.

## **ARTICLE 5. COURSE PRE-CONSTRUCTION**

5.1 The Developer will ensure that its architects, design engineer(s), and other consultants provide professional liability, workers compensation, automobile liability, and general liability insurance in accordance with the standard requirements of the City for similar projects, as established in Article 14 of this agreement, and the Developer will have the City named as additional insureds with respect to such coverage. The Developer and its architects, design engineer(s), and other consultants will provide the City a waiver of subrogation on the auto liability, general liability, and worker's compensation coverages, as stated in Exhibit H. To the extent allowed by Texas law, the City shall be deemed to be a third party beneficiary to each contract and subcontract between the Developer and its architects, design engineer(s), and other consultants.

5.2 Before construction may begin on any Course, the City must issue a written “Notice to Proceed,” For a Notice to Proceed to be issued, the Developer must have obtained, at its own cost and expense:

5.2.1 City approval of the plans, which shall be obtained by the Developer prior to construction at these stages- schematic design; preliminary construction; 50% including finishes, details and landscaping; and 95%.

A. The design of the Courses shall be consistent with the sustainability standards stated in Article 4 of this agreement, design principles cited in the RFQS and the conceptual designs in Exhibit B, including all ancillary recreational amenities as noted in the Proposal’s “Park within a Park” concept, including hiking trails, footpaths, water-based recreational amenities (dock, pier, concessions), “food forest”, or any other recreational needs identified by the community.

B. The designs of the Courses shall conform with all applicable codes and regulations adopted by City and in effect as of the Effective Date, including without limitation those established in the City Code, the Building Criteria Manual, Drainage Criteria Manual, Environmental Criteria Manual, Fire Protection Criteria Manual, Standard Specification Standards, Transportation Criteria Manual, and the Utilities Criteria Manual.

C. The Developer shall comply with the stormwater management requirements stated in Article 17 of this agreement

D. Developer shall design the Courses with due consideration for traffic flow and parking capacity and shall be responsible for permitting and for the costs of Developing sufficient road and traffic management facilities to ensure that the construction and operation of the Courses will safely and seamlessly integrate into the existing road system. All curb cuts and access ways or points shall address impact on traffic safety and flow and turn out lanes as necessary.

E. At each stage of design described in this Section 5.2.1, the City shall provide reviews and approvals of the submitted plans and specifications for the Courses by providing any initial comments within 14 days of submittal, and follow-up reviews and approvals of the Developer’s responses to those initial comments within seven days, and work in good faith to resolve any outstanding issues. The City’s approval of the submitted plans and specifications addressed in this Section 5.2.1 does not entail the City’s approval of any permits.

5.2.2 All permits and approvals required by the City and other relevant permitting entities including all permits and approvals required to bring any



and all required water, wastewater, electricity, and telephone to the Courses

5.3 Before the City issues a Notice to Proceed, the Developer must obtain at its own expense and give to the City:

5.3.1 a survey, including metes and bounds and property description, prepared by a Texas registered professional land surveyor.

5.3.2 evidence, in a form reasonably acceptable to the City, of funding sufficient to cover the construction costs of Course One and two years of operations and maintenance.

5.3.3 estimated construction costs with sufficient justification for determining the amount of the statutorily required payment and performance bonds.

5.3.4 copies of the payment and performance bonds described in Section 6.6 of this agreement.

5.3.5 A letter from the Developer's contractor and subcontractors listing all salaried specialists. A salaried specialist is anyone except an hourly worker required to be paid a prevailing wage in accordance with City policies and regulations.

5.3.6 A letter designating the Developer's "Safety Representative," as that term is defined further in Section 6.4 of this agreement, along with certifications or other documentation of the Safety Representative's qualifications as specified in Section 6.4.4 of this agreement.

5.3.7 Copies of all applicable safety plans, including those pertaining to excavation safety.

5.3.8 Safety training certificates as are appropriate and required under City policies for workers that will initially be on site.

5.3.9 Initial construction schedules.

5.3.10 A plan illustrating proposed locations of temporary facilities.

5.4 Neither the acceptance nor the approval of any of the submittals required in the preceding Section 5.3 will constitute the adoption, affirmation, or direction of the Developer or its contractor's means and methods.

5.5 The Developer shall have the right to enter the Park to conduct any and all inspections and examinations as Developer, at its sole risk and expense, and in its commercially reasonable discretion, deems necessary or advisable in order to evaluate to Developer's own and complete satisfaction for Development in accordance with the terms and provisions of this agreement.

5.6 The right of entry described in the preceding Section 5.5 expressly excludes the right to begin any construction activities, including site preparation, or the right to interfere with any ongoing use of the Park by the public. Environmental assessments are addressed in further detail in Article 16 of this

agreement. To the extent that the Developer intends to conduct any ground clearance as part of its assessment of the Park, Developer must, at its own expense, obtain the City's prior consent to such clearance, and, if applicable, any approvals and permits required under City code or regulation, or other applicable law.

5.7 The Developer shall repair any material damage done to any part of the Park by the Developer that is not necessary for or otherwise included in the Development of the Course. This obligation shall survive the termination or expiration of this agreement.

5.8 The Developer's entry into the Park for inspection and examination, or any other purpose, shall be at its own risk. The indemnification provisions stated elsewhere in this agreement shall apply to the Developer's, including its agents or employee's, entry onto the Park before construction of the Courses.

5.9 As stated with further specificity in Article 21 of this agreement, in procuring and employing consultants, engineers, or other service providers, or providers of goods relating to the Development of the Courses, Developer must adhere to the City's requirements for the MBE/WBE contracting if applicable.

5.10 City will review and approve the naming of the Courses or any element thereof including buildings, holes, or any other asset or amenity in accordance with City policy.

5.11 The removal and replacement of any fencing around the Park will require the express written approval of the City.

## **ARTICLE 6. CONSTRUCTION**

6.1 Developer shall be responsible for procuring and employing contractors and ensuring the complete construction of the Courses. In this agreement, the term "Developer's contractor(s) and subcontractor(s)," means the contractors and subcontractors employed or hired by the Developer to carry out, perform, and complete the construction of the Courses in accordance with this agreement. The term "Work," means the entire completed construction, or the various separately identifiable parts thereof, required to be furnished for execution of the Development.

6.1.1 Developer must ensure that its contractor(s) will supervise, inspect and direct the construction of the Courses competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the construction in accordance with all applicable rules, regulations, and specifications. Developer and its contractors shall be responsible for the means, methods, techniques, sequences and procedures of construction. Developer shall be responsible to see that the completed construction complies accurately with the approved plans.

6.1.2 Developer must ensure that its contractor(s) has an English-speaking, competent Superintendent on the work-site at all times that the construction is in progress. The Superintendent will be the contractor(s)'s representative on the construction work and shall have the authority to act on the behalf of the contractor. All communications given to the Superintendent shall be as binding as if given to the contractor. Either the contractor or the Superintendent shall provide the City a cellular phone number and an emergency home telephone number at which one or the other may be reached if necessary when work is not in progress. The Superintendent must be an employee of the contractor unless such requirement is waived in writing by the City. If the Developer proposes a management structure with a project manager supervising, directing, and managing construction of the work in addition to or in substitution of a Superintendent, the requirements of this agreement with respect to the Superintendent shall likewise apply to the any such project manager.

6.1.3 Developer shall ensure that its contractor(s) will maintain a work force adequate to accomplish completion of the construction within the proposed times. Developer shall ensure that its contractor(s) and subcontractor(s) employ only orderly and competent workers, skillful in the type of work required to complete construction of the Courses as stated in this agreement. Developer shall ensure that its contractor(s) and subcontractor(s) will remove immediately any worker or representative from the work site that is incompetent, disorderly, abusive or disobedient, has knowingly or repeatedly violated safety regulations, has possessed any firearms in contravention of the applicable provisions of Texas law, or has possessed or was under the influence of alcohol or drugs on the job. Developer must ensure that its contractor(s) maintain good discipline and order on the work site in all matters pertaining to the Development.

6.1.4 Developer itself, or through its contractor(s) and subcontractor(s) shall provide and pay for all materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities and all other facilities and incidental necessary for the furnishing, performance, testing, start-up and completion of the Development.

6.1.5 All material, equipment, machinery, tools, and appliances provided in accordance with the preceding Section 6.1.4 shall be of good quality.

6.1.6 To the extent allowed by Texas law, the City shall be deemed to be a third party beneficiary to each contract and subcontract by the Developer for the construction of the Courses.

## 6.2 Patent Fees and Royalties

6.2.1 Developer shall be responsible at all times for its compliance, and the compliance of its contractors and subcontractors, with all applicable patents or copyrights encompassing, in whole or in part, any design,

device, material, or process utilized, directly or indirectly, in the Development.

6.2.2 Developer itself, or through its contractor(s), shall pay all royalties and license fees and shall provide, prior to the commencement of any construction under this agreement and at all times during the performance of work related to the Development, for lawful use of any design, device, material or process covered by letters, patent or copyright by suitable legal agreement with the patentee, copyright holder, or their duly authorized representative whether or not a particular design, device, material or process is specified by the City.

6.2.3 Developer shall defend all suits or claims for infringement of any patent or copyright and shall save the City harmless from any loss or liability, direct or indirect, arising with respect to Developer's performance of work under this agreement performed by itself or through its contractor(s). The City reserves the right to provide its own defense to any suit or claim of infringement of any patent or copyright in which event the Developer shall indemnify and save harmless the City from all costs and expenses of such defense as well as satisfaction of all judgments against the City.

6.3 The Developer itself, or through its contractor(s), shall maintain in a safe place at the work site, or other location acceptable to the City, one record copy of all drawings, specifications, and addenda, field orders and written interpretations and clarifications in good order and annotated to show all changes made during construction. These record documents together with all final samples and all final shop drawings will be available to the City for reference during performance of the construction of the Courses. Upon Substantial Completion of the construction, these record documents, samples, and shop drawings shall be delivered promptly to the City's Golf Manager.

6.4 The Developer is responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the construction of the Courses.

6.4.1 It is the duty of the Developer to ensure that its contractor(s) and subcontractor(s) are familiar with and comply with 29 USC Section 651, et seq., the Occupational Safety and Health Act of 1970, as amended ("OSHA") and to enforce and comply with all provisions of this Act.

6.4.2 It is the duty of the Developer to ensure that its contractor(s) and subcontractor(s) comply with all applicable requirements of Subpart P of Part 1926 of 29 C.F.R., OSHA Safety and Health Standards, Texas Health and Safety Code Section 756.023, as amended, and shall submit a unit price for the particular excavation safety systems to be used by the Developer's contractor(s) and subcontractor(s) for all excavations which exceed a depth of five feet (5').

6.4.3 Before commencing any excavation which will exceed a depth of five feet, the Developer's contractor shall provide the City with detailed plans and specifications regarding the safety systems to be utilized. Said plans and specifications shall include a certification from a licensed professional engineer indicating full compliance with the OSHA provisions cited above.

6.4.4 The Developer must ensure that its contractor(s) identifies a "Safety Representative." The Safety Representative shall be responsible for conducting safety training; identifying and mitigating hazardous conditions, and unsafe work practices; and developing, maintaining and supervising the implementation of safe work practices and safety programs as deemed necessary and appropriate for the construction of the Courses. The Safety Representative shall exercise due diligence in the execution of all safety duties related to the construction of the Courses. The Safety Representative shall report directly to the Developer, not an on-site project manager.

A. The Safety Representative shall present certification of completion of the OSHA 30-hour Construction Industry Outreach Program described at the following website, or other locations as updated by OSHA: <http://www.osha.gov/dte/outreach/constructiongeneralindustry/construction.html>

B. The Safety Representative shall verify that all construction workers (defined as persons covered by a prevailing wage determination in accordance with applicable city policies and requirements) on the job site, whether employed by a Developer contractor or subcontractor, have completed the OSHA 10-hour Construction Industry Training Outreach Program described at the following website, or other locations as updated by OSHA: <http://www.osha.gov/dte/outreach/constructiongeneralindustry/construction.html>. The Safety Representative must receive a certificate of training completion before allowing a worker on site and shall have all such certificates available for inspection by the City.

C. The Safety Representative shall ensure that workers, including designated competent persons, have completed all applicable OSHA specific or other training needed to perform their job assignments. Training topics applicable to the scope of the current project may include, but are not limited to, scaffolds, fall protection, cranes, excavations, electrical safety, tools, concrete and masonry construction, steel erection, operation of motor vehicles and mechanized equipment.

D. The Safety Representative shall post notice on the job site stating that all workers shall have completed OSHA Construction Industry Training. The City may require, and the Safety

Representative should consider providing a means of readily identifying workers who have completed the required training to monitor compliance with these requirements.

E. The Safety Representative shall ensure that all OSHA and Workers Compensation notices to workers are posted in English and Spanish at one or more conspicuous locations on the work site.

6.4.5 The Developer shall ensure that its contractor(s) coordinates any exchange of material safety data sheets or other hazard communication information required to be made available to or exchanged between or among employers at the site in accordance with laws and regulations.

6.4.6 Developer must ensure that if there is an accident involving injury to any individual or damage to any property on or near the job site, Developer's contractor will provide to the City's Golf Manager or Project Manager verbal notification within one hour and written notification within 24 hours of the event and the circumstances surrounding the event through photographs, interviewing witnesses, obtaining medical reports, police accident reports and other documentation that describes the event. Copies of such documentation shall be provided to the City's Golf Manager or Project Manager for the City's records within 48 hours of the event. Developer shall cause its contractor(s) and subcontractor(s) to cooperate with the City on any City investigation of any such incident.

6.4.7 Developer must ensure that its contractor(s) post notice in English and Spanish in one or more conspicuous locations, in signage that is compliant with the City's then current rules for size, content, and location of such signage, of the content of City Ordinance No. 20100729-047, relating to rest breaks. A violation of this ordinance may be enforced with criminal penalties and civil remedies, as set forth in the ordinance.

6.5 The City may order the Developer's contractor(s) or subcontractor(s) to stop construction activities at any point if a safety violation has occurred until the cause for such order is eliminated. The right of the City to stop work under this Section shall not give rise to a duty on the part of the City to supervise the Developer's contractor(s)' or subcontractor(s) work or to control the means and methods of work. The City shall not be liable to any party for any expenses incurred in relation to any shut down of work under this Section.

6.6 In emergencies affecting the safety or protection of persons or the Work at the site or adjacent thereto, Developer, without special instruction or authorization from the City is obligated to act reasonably to prevent threatened damage, injury or loss and to mitigate damage or loss to the Work. The Developers shall give the City Project Manager telephone notification as soon as reasonably practical.

6.7 Authorized agents of the Developer shall respond immediately to call-out at any time of any day or night when circumstances warrant the presence on Project site of Developer or his agent to protect the Work or adjacent property

from damage, restriction or limitation or to take such action or measures pertaining to the Work as may be necessary to provide for the safety of the public. Should Developer and/or their agent fail to respond and take action to alleviate such an emergency situation, the City may direct other forces to take action as necessary to remedy the emergency condition, and the City will charge the Developer any cost of such remedial action. Such charges shall be due and payable within 30 days of demand.

## **6.8 Tests and Inspections**

**6.8.1 Notice of Defects:** Prompt notice of all defective Work of which the City, through its Project Manager has actual knowledge will be given to the Developer. All defective Work may be rejected, corrected or accepted as provided in this Article 6. The Developer must give the City prompt notice of any defective Work of which the Developer has actual knowledge

**6.8.2 Access to Work:** the City and its representatives, independent testing laboratories and governmental agencies having jurisdiction, will have access to the Work at reasonable times for observing, inspecting and testing. Developer shall provide them proper and safe conditions for such access, and advise them of Developer's site safety procedures and programs so that they may comply therewith as applicable

### **6.8.3 Tests and Inspections:**

A. The Developer shall give the City timely notice of readiness of the Work for all required inspections, tests or approvals, and shall cooperate with inspection and testing personnel to facilitate required inspections or tests.

B. The Developer shall employ and pay for services of an independent testing laboratory to perform all inspections, tests or approvals required by all applicable laws, rules, regulations, ordinances, or specifications.

C. If laws or regulations of any public body having jurisdiction require any Work (or part thereof) specifically to be inspected, tested or approved by an employee or other representative of such public body, Developer shall assume full responsibility for arranging and obtaining such inspections, tests or approvals, pay all costs in connection therewith and furnish City's Project Manager the required certificates of inspection or approval.

D. Developer shall also be responsible for arranging and obtaining and shall pay all costs in connection with any inspections, tests or approvals required for the City's review of materials or equipment to be incorporated in the Work, or of materials, mix designs or equipment submitted for review prior to Developer's purchase thereof for incorporation in the Work.

### **6.8.4 Uncovering Work:**

A. Uncovering Work as provided in this paragraph shall be at Developer's expense.

B. If the City's Project Manager considers it necessary or advisable that covered Work be observed, inspected or tested, Developer shall, at Developer's cost, uncover, expose or otherwise make available for observation, inspection or testing that portion of the Work in question, furnishing all necessary labor, material and equipment. If it is found that such Work is defective, Developers shall pay all claims, costs, losses and damages caused by, arising out of or resulting from such uncovering, exposure, observation, inspection and testing and of satisfactory replacement or reconstruction (including but not limited to all costs of repair or replacement of work of others).

**6.8.5 The City May Stop the Work:**

A. If the Work is defective, or Developer fails to supply sufficient skilled workers, suitable materials, and/or equipment; or fails to furnish or perform the Work in such a way that the Work in progress or the completed Work will conform to the approved plans and specifications, the City may order Developer to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the City to stop the Work shall not give rise to any duty on the part of the City to exercise this right for the benefit of Developer or any surety or other party.

B. If Developer fails to correct defective Work or submit a satisfactory plan to take corrective action, with procedure and time schedule, the City may order Developer to stop the Work, or any portion thereof, until cause for such order has been eliminated, or take any other action permitted by this agreement.

6.9 In procuring and employing contractors for the construction of the Courses, Developer and Developer's contractor(s) and subcontractor(s) must adhere to the City's requirements for the paying of prevailing wages to construction workers, MBE/WBE contracting if applicable, and workplace safety.

6.10 In addition to the requirements stated in the preceding Section 6.2, the Developer will ensure that each contract for each contractor and subcontractor who performs work on the Courses includes the following assurance: The contractor, sub-recipient, or sub-contractor shall not discriminate on the basis of race, color, religion, sex, sexual orientation national origin or ancestry, or age in the performance of this contract.

6.11 The Developer will ensure that its contractors and subcontractors who perform work on the Courses provide commercial liability, workers compensation, automobile liability, all risks builders' risk, and excess umbrella coverage in accordance with the standard requirements of the City for similar projects, as established in Article 14 of this agreement, and the Developer will have the City



named as additional insureds with respect to such coverage. The Developer will provide a waiver of subrogation on the auto liability, general liability, and worker's compensation coverages.

6.12 The Developer agrees to maintain all of its, and those of its contractors and subcontractors, books, documents, papers, accounting records, and other documentation relating to wages paid to persons who work or worked on the Courses, and to make such materials available to the City for review and inspection at its respective office during the period that this agreement is in effect and for four years after the Development is completed or until any impending litigation or claims are resolved.

6.13 The Developer must prevent any aspect of the construction of the Courses from interfering with the public, or the City's, established use of the Park unless agreed to by the City. Developer shall cause any construction staging area to be located only in an area mutually and reasonably approved by Developer and the City. Developer, at its sole cost and expense, shall be responsible for implementing (or causing to be implemented): (1) commercially reasonable construction techniques and procedures suitable for a densely populated area in order to minimize the impact on the operations at the City from the deleterious effects of construction during Development; (2) lawful and appropriate safety procedures intended, designed and implemented to protect the tenants and customers of the City while any such construction work is in progress; and (3) commercially reasonable efforts to keep the areas close to the portions of the Courses then under construction clean and free from any types of obstructions, dust or debris to the extent reasonably practicable.

6.14 The Developer may implement any construction changes that it deems reasonably required to enhance the playability of the Courses after receiving written approval of the City. Such approval shall not be unreasonably withheld.

6.15 The general contractor(s) working on the construction of the Courses shall provide payment and performance bonds in the forms of those attached as Exhibits "F" and "G" naming Developer and the City as dual obligees. The bonds shall be maintained and kept in full force and effect for one year after Substantial Completion, as that term is defined at Section 6.15.1 below, of the Course, or that portion of the Course that is constructed by the respective general contractor. The bonds shall be issued by a surety licensed to transact business in the State of Texas acceptable to the City. The bonds shall be in a penal amount equal to the full amount of all contract(s) required for the construction of the Facilities.

The performance bond shall be for the protection of the City, and must ensure the full faithful and timely performance by the General Contractor of its obligations to construct the Facilities in accordance with the plans and specifications therefor, and all applicable contract documents. The payment bond shall guarantee the prompt payment by Developer and General Contractor to all persons and firms supplying labor, materials (including specially-fabricated materials), provisions, supplies and equipment used directly or indirectly by any

Subcontractor, material man and/or supplier in the construction of the Facilities, and shall protect the City from any and all liability, losses, costs, expenses or damages arising therefrom.

6.15.1 For this agreement, "Substantial Completion," (or any of its variations, such as "Substantially Complete" or "Substantially Completed") shall be deemed to have occurred in respect of the Courses constructed upon the earlier to occur of (a) the date on which the Course has been substantially completed in accordance with the applicable plans with the exception of only minor "punch list" items or (b) the date on which the City issues a Certificate of Occupancy for the Course.

6.16 Before the City issues Certificate of Occupancy for any Course, and within 180 days after Substantial Completion of any Course, Developer shall submit to the City written documentation that the construction has been completed as required by this agreement including as-built drawings of the Course.

## **ARTICLE 7. SERVICES AND OPERATIONS**

7.1 The Courses shall be operated and maintained at all times as a public City park and in accordance with the non-discrimination requirements stated in Article 20 of this agreement. Nothing in this agreement shall be construed as preventing or otherwise discouraging the Developer from facilitating use of the Course for activities in addition to golf.

7.2 Prohibited Uses and Services. The Park is zoned as Parkland and any uses inconsistent with that designation are prohibited.

7.3 Marketing.

7.4 Signage. Developer shall be responsible for all required directional signage.

7.5 Sponsorship banners, advertising signs, and temporary signs may be installed at Developer's cost with the prior approval of the City.

7.5.1 The City shall approve, deny, or offer modifications on any signage approval request no later than 30 days after receipt of a complete proposed design.

7.6 Licenses and Permits. Developer shall obtain all permits and licenses necessary to operate, manage, and maintain the Park and to sell in the Park (1) food and beverages, (2) merchandise related to or consistent with the permitted uses, (3) goods and services in furtherance of the permitted uses, and (4) upon approval of the Director, alcoholic beverages. All permits shall be displayed in a conspicuous location.

7.7 Personnel and Customer Service.

7.7.1 In the operation of the Courses, Developer and Third-Party Operators, as that term is defined in the following Section 7.7.5, shall employ such personnel as will assure a high standard of customer service

to the public. All personnel shall be clean, neat in appearance, uniformly attired, and courteous at all times.

No person employed by Developer or Third-Party Operators shall use foul or vulgar language; act in a loud, boisterous, or otherwise improper manner; be permitted to solicit business in a manner that is offensive or otherwise unprofessional; or possess or use alcoholic beverages or any controlled substance. Developer and/or Third-Party Operators shall provide its/their employees customer service training on an annual basis.

Developer and Third-Party Operators shall ensure that all personnel who have direct contact with vulnerable populations (i.e. seniors and minors) pass a criminal background check approved by the City.

7.7.2 Developer and Third-Party Operators shall maintain close supervision over its/their agents, contractors and employees to ensure the maintenance of a high standard of service to the public and compliance with this agreement. The satisfactory performance of the obligation hereunder shall be determined at the reasonable discretion of the Director. Developer and Third-Party Operator shall take proper steps to discipline employees who participate in acts of misconduct on or about the Premises, subject to labor contracts, if any, and applicable law.

7.7.3 Developer or Third-Party Operator shall post, in a conspicuous location, a City-approved public notification sign on how customers may file a complaint and/or submit comments about the Premises. City may conduct customer satisfaction surveys to determine if Developer and/or Third-Party Operator is/are meeting the needs and expectations of the customers or public and to identify operational improvements to maximize profitability and customer service. Developer shall participate in and cooperate with the City in conducting the customer satisfaction surveys. City shall notify Developer of the results of such survey. Developer and Third-Party Operator shall implement any operational changes indicated in the surveys as directed by the City.

7.7.4 Developer shall provide the City with copies of any manuals or written guidelines governing the conduct of employees, or employees of a Third-Party Operator, as that term is defined in the following Section 7.7.5, involved in Course operations.

7.7.5 Management by Third-Party Operator. Developer shall have the right to directly operate the Courses. Developer, subject to the City's prior written approval, has the right to subcontract operation of the Courses to firms affiliated, owned or under common control with Developer and/or any of its joint venture partners or to unrelated third parties ("Third-Party Operators"). Any such subcontracting shall not relieve Developer of its primary responsibility for performance of its duties and obligations under this agreement. To the extent allowed by Texas law, the City shall be

deemed to be a third party beneficiary to each contract and subcontract by the Developer for operation or maintenance of the Courses.

A. All contracts and subcontracts for the maintenance and operation of the Courses must require at a minimum strict compliance with the provisions of this agreement and a provision providing for the assignment of the contract or subcontract to the City in the event of Developer's default hereunder and the termination of this agreement prior to its Expiration Date, without consent of the contractor, upon request of the City. Developer assumes ultimate responsibility for all work, acts or omissions of any contractor made in connection with this agreement. The above provision shall apply with equal force to any assignment proposed by Developer.

B. Developer agrees that it is responsible for the performance of its contractors, and joint venture partners, if any, under this agreement. Developer agrees to initiate and take all corrective action should a Contractor or joint venture partner fail to comply with its contract with Developer or any provision of this agreement. The failure of a contractor or joint venture partner to comply with the provisions of this agreement shall constitute a default by Developer under this agreement entitling the City to exercise its remedies pursuant to Article 18 of this agreement.

7.8 Maintenance Reserve. Developer shall maintain in its operating budget a reserve fund for maintenance. This reserve shall be in an amount equal to no less than 10% of the Developer's annual operating budget. Developer shall include documentation of this within the first month of receiving its Certificate of Occupancy and thereafter with the Activity Reports described in Section 9.3.4 D of this agreement. The reserve fund shall become payable to the City immediately upon the termination of this agreement for reason of default.

7.9 Use Exhibit. Developer shall provide for City approval an Annual Use Exhibit providing hours of operation, annual schedule/closures, fee schedule, rental space rates, instructor and class rates, in-kind service, and the rates for any other revenue generating activity on the Premises. The annual Use Exhibit is due to the City no later the January 1<sup>st</sup> of each year. All fees and costs charged for use of the Courses are subject to Council approval.

7.10 Special Events. Developer shall coordinate special events in compliance with federal, state, and local requirements.

7.11 As stated with further specificity in Article 21 of this agreement, in procuring and employing consultants, engineers, or other service providers, or providers of goods relating to the Development of the Courses, Developer must adhere to the City's requirements for MBE/WBE contracting if applicable

7.12 Developer shall be responsible for providing security to protect the Courses and users of the Courses. The Developer shall receive the express written approval of the City prior to implementing its plans for maintaining security.

7.13 Incident Report. Within 10 days of receipt of notice of the occurrence of any complaints or reports of violations of the law that have occurred on the Premises and that are significant in nature and that have a material effect on the operations of the Premises, Developer or Third-Party Operator shall notify the City's Golf Manager of such occurrence or report. Developer or Third-Party Operator shall maintain for review by the City upon reasonable notice, information as reasonably required by the City to satisfy the City's responsibilities, including information regarding injuries and unusual incidents on the Premises and regarding security measures and safety programs (including recommendations for changes for such measures) on the Premises.

## **ARTICLE 8. COMMUNITY BENEFITS**

8.1 Austin Resident Green Fee Discount. Residents of the City may reserve tee times seven or less days in advance at a discounted rate. The discount will be in an amount of no less than 40% of the rate approved by the City in the Annual Use Exhibit described in Section 7.9.

8.2 Non-Resident Surcharge and Short Course Proceeds. Developer shall charge a surcharge of no less than \$10 to users of the Courses who do not reside within the City ("Non-Resident Surcharge"). The Non-Resident Surcharge shall be deposited in a separate account, along with all fees and any other revenue or subsidies collected for the use of the Short Course and related educational or recreational programming. The account shall be under the control of the Developer or a Third-Party Operator approved by the City that is a tax exempt non-profit corporation having as its sole purpose the construction, maintenance, and operations of the Short Course and the carrying out of related educational or recreational programming. The Developer, or non-profit corporation, shall demonstrate to the City's satisfaction on an annual basis that monies expended for the Short Course and related programming are generally recognized as ordinary, necessary, and reasonable to carry out this purpose.

8.2.1 Developer shall deposit 25% of the Non-Resident Surcharge in a separate account for the purpose of park improvements to the parks within District 1 ("District 1 Park Improvement Fund"). District 1 Park Improvement Fund will be administered by the tax exempt non-profit corporation referenced in Section 8.2 of the agreement. The remainder of the Non-Resident Surcharge, 75%, shall be used to benefit the Short Course.

8.3 Open House. Developer shall hold an annual open house or town hall meeting to provide City residents an opportunity to discuss Golf and Event operations impact on the Community.

8.4 Camps and Instruction. Developer shall partner with City, schools, or non-profit organizations to provide golf instruction via camps or individual instruction to youth. Developer shall secure in-kind service in accordance with the dollar equivalent established in the approved Annual Use Exhibit described in Section 7.8.

8.5 Financial Aid. Developer and any Third-Party Operators shall participate in the Austin Parks and Recreation Department Financial Aid for Youth Programs with respect to use of the Short Course and Courses.

8.6 Employment Recruitment. The Developer agrees to hold job recruitment fairs as needed within City Council District 1 ("District 1") for the purposes of hiring local community members for job openings during the construction of the project as well as with operations and maintenance of the Development. All job applicants from District 1 who both meet the minimum qualifications and preferred qualifications (if any) will be granted an initial interview for any open position.

8.7 Community Benefits Report. Developer shall provide a report to the City annually as mutually agreed upon in writing between Developer and City's Golf Manager detailing its activities identified in Sections 8.1 – 8.7.

## **ARTICLE 9. DISTRIBUTION OF REVENUE**

9.1 Gross Collected Revenues. "Gross Collected Revenues" means any and all revenues paid to and/or payable to the Developer in connection with this agreement and shall include, without limitation, amounts from the following sources:

9.1.1 All fees for usage of the Courses by the public or by private persons or groups;

9.1.2 All concessions sold at the Courses;

9.1.3 All other amounts paid directly to the Developer by any Third-Party Operator

9.2 Distribution of Revenue: Sharing is based on gross revenues of operations including golf, concessions, space rental, tournaments and events. The Developer's obligation to make such payments shall commence at the first "Revenue Year," and continue until the expiration of this agreement. For this agreement, "Revenue Year," means each 12-month period following the City's issuance of a certificate of occupancy for the First Course, which shall begin on the first day of the month that immediately follows the month in which the Certificate of Occupancy is issued. To clarify, the first "Revenue Year," begins on the date that the City issues the Certificate of Occupancy for the First Course. As stated in Article 8 of this agreement, proceeds collected from use of the Short Course will not be subject to revenue sharing:

9.2.1 **Revenue Years 1 through 15.**

A. **Monthly Fees.**

The Monthly Fee owed by the Developer to the City beginning with the first Revenue Year shall be made on or before the tenth day of the month following the month in which sales are made. For Revenue Years 1 through 15, the Monthly Fee shall be \$7,500 per month.

B. **Annual Lump Sum Payment:**

Beginning with the 15<sup>th</sup> day of the first month immediately following the end of a Revenue Year for Revenue Years 1 through 15, Developer shall pay the City a recurring annual lump sum payment (“Annual Lump Sum Payment”). As illustrated below, the Annual Lump Sum Payment shall be determined based on the annual Gross Collected Revenue for the preceding Revenue Year. To calculate the Annual Lump Sum Payment, Gross Collected Revenue shall be totaled and a multiplier shall be applied to each tier of Gross Collected Revenue as follows:

- a) **Tier 1** – Annual Lump Sum Payment shall equal 3% of the first \$4 Million in Gross Collected Revenues;
- b) **Tier 2** – Annual Lump Sum Payment shall equal 5% of the second \$4 Million in Gross Collected Revenues (or Gross Collected Revenues of more than \$4 Million and less than \$8 Million);
- c) **Tier 3** – Annual Lump Sum Payment shall equal 7% of the third \$4 Million in Gross Collected Revenues (or Gross Collected Revenues of more than \$8 Million and less than \$12 Million);
- d) **Tier 4** – Annual Lump Sum Payment shall equal 9% of the fourth \$4 Million in Gross Collected Revenues (or Gross Collected Revenues of more than \$12 Million and less than \$16 Million);
- e) **Tier 5** – Annual Lump Sum Payment shall equal 11% of Gross Collected Revenues of more than \$16 Million.

The Annual Lump Sum payment for any Revenue Year shall be equal to the amounts determined by applying the multiplier for each applicable tier for Gross Collected Revenue, added together, minus \$90,000 (the annual aggregate of Monthly Fees, which is equal to \$7,500 multiplied by 12 months).

**Calculation of Annual Lump Sum - Illustration:** For purposes of illustration and clarification only, if for a hypothetical Revenue Year, the Gross Collected Revenue is \$15 Million, the Annual Lump Sum Payment owed to the City would be \$780,000, calculated as follows:

<b>Tier</b>	<b>Gross Collected Revenue</b>	<b>Multiplier</b>	<b>Annual Lump Sum</b>
1	\$4,000,000	3%	\$120,000
2	\$4,000,000	5%	\$200,000
3	\$4,000,000	7%	\$280,000

4	\$3,000,000	9%	\$270,000
<b>Subtotal</b>			<b>\$870,000</b>
<b>Less annual aggregate of Monthly Fees</b> <b>\$12,500 * 12 = \$90,000</b>			<b>(\$90,000)</b>
<b>TOTAL ANNUAL LUMP SUM</b>			<b>\$780,000</b>

**9.2.2 Revenue Years 16 through 25.**

The Monthly Fee owed by the Developer to the City shall be made on or before the tenth day of the month following the month in which sales are made. For Revenue Years 16 through 25, the Monthly Fee shall be equivalent to 11% of Gross Collected Revenue realized in the previous month for each month of the agreement. Developer shall not be obligated to pay an Annual Lump Sum Payment during Revenue Years 16 through 25.

**9.2.3 Revenue Years 26 to Expiration of the agreement.**

The Monthly Fee owed by the Developer to the City shall be made on or before the tenth day of the month following the month in which sales are made. For Revenue Years 26 to the Expiration Date, the Monthly Fee shall be equivalent to 12% of Gross Collected Revenue realized in the previous month for each month of the agreement. Developer shall not be obligated to pay an Annual Lump Sum Payment during Revenue Years 26 through the end of this agreement.

**9.2.4 Late Fees.** Any monies not paid on or before the fifth day following the due date shall bear interest at the default rate specified in the Texas Finance Code (“Default Rate”) until paid, and the City will be entitled to charge Developer an administrative processing charge in an amount equal to five percent (5%) of the amount then due. The administrative processing charge is agreed by the parties to be liquidated damages and to constitute a reasonable estimate of the extra administrative costs and expenses expected to be incurred by the City in handling such delinquency. The terms of this Section 9.2.4 shall survive the expiration or termination of this agreement.

**9.3 Books and Records.** Developer shall keep and maintain complete and accurate books and records necessary for the fulfillment of Developer’s obligations under this agreement in accordance with generally accepted accounting principles consistently applied and in a form satisfactory to the City throughout the Term of this agreement and for four years after expiration or earlier termination of the Agreement. Developer shall keep and maintain books and records in sufficient detail to fully and properly document and account for all transactions which relate to the amounts reported to the City. Developer shall require Third-Party Operators to keep and maintain books and records consistent with this agreement.

**9.3.1** Subject to any Third-Party Operators’ proprietary system, Developer shall be required, and shall require all Third-Party Operators, to



install a cash control system or point of sale equipment which shall record all sales or service transactions by category with all data necessary to provide the City with information required in this agreement. All cash registers must be equipped with tapes, or similar records, upon which transaction details are imprinted. Beginning and ending sales totalizer counter readings shall be recorded at least once every 24 hours or as frequently as the proprietary system will allow. Additionally, the sales or cash receipt system must be capable of proving, in a satisfactory manner to the City, that all transactions are recorded.

9.3.2 In addition to the required financial statements, Developer shall provide the City, within 180 days following Substantial Completion of each Course, a calculation of Developer's Original Capital Improvements Cost, defined below, together with reasonable and substantiating evidentiary documentation. "Developer's Original Capital Improvements Cost" shall mean, and refer to, the actual and verifiable costs and expenses incurred by Developer and/or any Third-Party Operators, as the case may be, in connection with the construction of any improvements to the Development Area of each Course, which shall include both "hard" construction costs and so-called "soft" costs associated with the design and permitting of such improvements; provided, however, that any such "soft" costs associated with the design and/or permitting of the improvements shall be included in the calculation of Developer's Original Capital Improvements Cost only to the extent such "soft" costs do not exceed 17% of the total "hard" costs of construction.

9.3.3 Throughout the Term, beginning with the 12-month period starting on the date on which the City issues Developer a Certificate of Occupancy for the First Course

9.3.4 Developer shall submit to the Director the following:

- A. Sales tax reports. Developer shall submit to the City's Golf Manager a copy of the monthly or quarterly sales tax report by the 10<sup>th</sup> of each month;
- B. Tax Forms. Developer shall provide to the City's Golf Manager a copy of Internal Revenue Service Form 1040, Schedule C (Statement of Operations) and all other applicable federal tax forms, including Extension forms pertaining specifically to concession business. This form shall be submitted to contract Manager annually within seven business days of filing with IRS;
- C. Revenue Reports. Developer shall submit to the City's Golf Manager no later than the 10<sup>th</sup> of each month the Monthly Concession Revenue Report provided by the City and the cash register tapes (Z tapes) or equivalent technology per Section 9.3.1; and

D. Activity Reports. Developer shall submit to the City's Golf Manager no later than the 10<sup>th</sup> day of each month a monthly activity attendance report to be completed on a form provided by the City.

9.4 A summarization of all the above described certified statements, certified as accurate and complete by the Chief Financial Officer or other executive officer of Developer.

9.5 If through the foregoing it is established that additional charges are due to the City, Developer shall pay such additional charges to the City not later than 15 days after completion of such statement and receipt of written notice from the Director. If it is established that Developer has overpaid the City, then Developer and the City agree to apply such overpayments as a credit.

## **ARTICLE 10 RIGHTS AND DUTIES OF CITY**

10.1 Right to Inspect and Maintain. The City shall have the right at all reasonable times to enter upon and inspect the Courses to observe the performance by Developer of its obligations hereunder and to do any act which City may be obligated or have the right to do under this agreement, the City Code. Except in an emergency, the City shall use reasonable efforts to minimize disruption to Developer arising out of such inspections. If upon entry it is determined that Developer's obligations pursuant to the terms this agreement are not being performed adequately, the City shall so notify Developer in writing. If Developer does not commence maintenance or repair as specified in such notice within 30 days after receipt of such notice, the City, or its agents, contractors or employees, shall have the right to enter upon the particular area and perform the maintenance or repair.

Notwithstanding the foregoing, in the event of the occurrence of an emergency condition (meaning that personal injury, property damage, or both, or the violation of a City regulation is imminent), the City may immediately, and without advance notice to Developer, enter upon the particular area and perform immediate maintenance or repair. The City's cost for the performance of such maintenance or repair plus an amount equal to 15% of cost to cover administrative costs, shall be charged to and paid by Developer as additional fees.

### 10.2 Audits and Enforcement

10.2.1 Upon not less than 15 days' prior written notice, the City's auditors or other authorized representatives shall, at any time or times during the Term of this Agreement and within four years after expiration or earlier termination of the Agreement, have access to, and the right to audit, examine or reproduce, any and all books and records of the Developer and Third-Party Operators related to performance under this agreement, including, without limitation, those pertaining to the calculation and payment of all Course revenue distribution, Gross Collected Revenue and any other fees and amounts payable to the City or related to the performance under this agreement.

Developer and Third-Party Operators shall retain such books and records for the longer of four years after the expiration or termination of this agreement or until completion of all pending audits or litigation between the parties. Developer shall either keep and maintain all such records at a mutually acceptable location in Austin, Texas, or make such books and records available to the City of Austin within 15 days of receipt of written demand.

If a City audit reveals a discrepancy of more than three percent between the amount of Gross Collected Revenue distribution, Developer shall reimburse City for the cost of such audit. If as a result of such inspection and audit it is established that Developer has overpaid fees due to City, such overpayment shall be refunded to Developer. Except at the end of the Term, such refund shall be in the form of a credit against future Gross Collected Revenue distribution payments.

10.2.2 The City's right to audit shall include the right to inspect all books and records and account system reports of all subcontractors pertaining to the Premises entered into by Developer. The City Attorney or his or her designee shall have the right, after consultation with the Director, to enforce all legal rights and obligations under this agreement without further authorization. Developer covenants to provide the City Attorney all documents and records that the City Attorney deems necessary to assist in determining Developer's compliance with this agreement, with the exception of those documents made confidential by federal or State law or regulation.

10.2.3 Developer shall, on an annual basis, engage a Certified Public Accounting firm to perform an annual, independent, certified financial audit; and agreed-upon procedures related to the revenue collection process. Developer shall provide to the City's Golf Manager a copy of audited financial statements and a report of findings based on agreed-upon procedures related to the revenue collection process within 10 days of completion.

## **ARTICLE 11. MAINTENANCE AND REPAIR**

11.1 Developer's Maintenance and Repair Obligations. Developer, at its sole cost and expense, shall keep, maintain and repair the Courses and every part thereof, in good order and repair and in a safe condition consistent with the standards established in this agreement at all times during the Term of this agreement. This obligation shall include and encompass replacements as needed, from time to time, which such replacements shall be of a quality substantially equal to, or exceeding, the original in materials and workmanship.

Developer, at its sole cost and expense, shall be responsible for modernization, including all future mandatory code compliance updates and upgrades to all improvements and grounds.

11.2 Solid Waste and Recycling: Developer, at its sole cost and expense, shall keep the Courses reasonably free from rubbish, filth and refuse. Developer, at its sole cost and expense, shall install a necessary number of covered trash and recycling receptacles. Developer, at its sole cost and expense, shall collect and properly dispose or recycle all rubbish, filth, refuse, and recyclables located throughout the Premises. Developer, at its sole cost and expense, shall also maintain a pest control program in accordance with City policies.

11.3 Developer shall allow no defacing of facilities.

11.4 Upon completion of the Courses, Developer shall not make any structural alterations, repairs, or improvements of the Premises without written permission from the City. Any such alteration made without permission shall become the property of the City at the termination of the agreement. City reserves the right to require Developer to restore the property to the original condition at the Contractor's expense.

## **ARTICLE 12. INDEMNIFICATION**

12.1 The indemnities established in this Article 12 are additional to, and shall not be construed as limiting, those established in Article 17 below.

**12.2 DEVELOPER AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY PARTIES HARMLESS FROM AND AGAINST ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH, OR INCIDENTAL TO PERFORMANCE BY THE DEVELOPER OR BY ANY THIRD PARTY OPERATOR, AS THE CASE MAY BE, AND THEIR RESPECTIVE AGENTS, EMPLOYEES, OR CONTRACTORS (COLLECTIVELY, THE "DEVELOPER PARTIES") UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY ANY FALSE REPRESENTATION OR WARRANTY MADE BY THE DEVELOPER PARTIES HEREUNDER.**

**12.3 IN DEFENDING ANY CLAIM AGAINST THE INDEMNIFIED PARTIES, THE DEVELOPER MAY NOT UNDER ANY CIRCUMSTANCES ADMIT LIABILITY ON THE PART OF CITY OR ANY CITY PARTY WITHOUT THE EXPRESS PRIOR WRITTEN CONSENT OF THE AUSTIN CITY ATTORNEY.**

**12.4 DEVELOPER SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY PARTIES HARMLESS DURING THE TERM OF THIS AGREEMENT AND FOR FOUR (4) YEARS AFTER THE AGREEMENT TERMINATES.**

**12.5 THE FOREGOING INDEMNIFICATION SHALL NOT BE INTERPRETED AS REQUIRING DEVELOPER TO INDEMNIFY THE CITY PARTIES FROM ANY LIABILITY ARISING SOLELY OUT OF THE CITY'S WILLFUL MISCONDUCT OR GROSS NEGLIGENCE UNDER THIS AGREEMENT.**

**12.6 CONTRACTOR AND SUBCONTRACTOR. DEVELOPER SHALL REQUIRE ALL OF ITS CONTRACTORS, SUBCONTRACTORS AND THIRD PARTY OPERATORS (AND THEIR RESPECTIVE CONTRACTORS AND EMPLOYEES) TO INDEMNIFY THE CITY PARTIES TO THE SAME EXTENT AND IN SUBSTANTIALLY THE SAME FORM AS THE DEVELOPER'S INDEMNITY TO THE CITY PARTIES.**

**12.7 WAIVER OF CONSEQUENTIAL DAMAGES. EACH DEVELOPER PARTY HEREBY WAIVES ANY AND ALL RIGHTS TO RECOVER ANY CONSEQUENTIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR OTHER SPECIAL DAMAGES FROM THE OTHER PARTY, INCLUDING, WITHOUT LIMITATION, THOSE PREDICATED IN WHOLE OR IN PART UPON CLAIMS ASSERTED BY ANY OF DEVELOPER'S THIRD PARTY OPERATORS OR THEIR RESPECTIVE AGENTS, EMPLOYEES, LICENSEES, CONCESSIONAIRES, CONTRACTORS AND INVITEES.**

12.8 Notice of Claims. If the Developer receives notice of any claim or circumstances which could give rise to an indemnified loss, the Developer shall give written notice to the City of such claim or circumstances within five business days. Notice shall be delivered either personally or by certified mail, return receipt requested, and shall be directly sent to the Austin City Attorney, 301 West 2<sup>nd</sup> Street, Austin, Texas 78701 and to the City at the address specified in Section 22.5.

12.9 Defense of Claims

12.9.1 Developer may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to the City. Developer shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, Developer must advise the City as to whether or not it will defend the claim. If Developer does not assume the defense, the City shall assume and control the defense, and all reasonable defense expenses constitute an indemnification loss.

12.9.2 If Developer elects to defend the claim, the City may, at its own expense, retain separate counsel to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations. Developer may settle the claim without the consent or agreement of the City, unless it (i) would result in injunctive relief or other equitable remedies or otherwise require the City to comply with restrictions or limitations that adversely affect the City, (ii) would require the City to pay amounts that Developer does not fund in full, or (iii) would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement. Participation by the City's counsel in the defense or any settlement negotiations shall not interfere with, prohibit, or in any material manner impede the strategy or progress of Developer's counsel's representation.

## **ARTICLE 13. TAXES**

13.1 Taxes and Assessments. Developer shall pay or cause to be paid prior to delinquency all taxes of whatever character that may be levied or charged upon the Premises and/or the operations of Developer and/or its Third-Party Operators hereunder, including, without limitation, ad valorem taxes and assessments on the Premises (including all Facilities comprising the Premises), all sales and/or use taxes, any tax or assessment that may be levied by the TABC, and any and all other taxes and/or assessments relating to the use of the Premises (or any application portion thereof) by Developer or any of its Third-Party Operators. Developer shall obtain and pay for all licenses or permits necessary or required by law for the construction of improvements, the installation of equipment and furnishings, and any other licenses necessary for the conduct of its operations hereunder. Developer and its respective Third-Party Operators shall be responsible for the payment of all personal property taxes on their respective personal property from time to time placed in or upon the Premises, whether constituting a part of the Removable Fixtures or otherwise.

13.2 Right to Contest Taxes. Developer shall have the right to contest in good faith and by all appropriate proceedings the amount, applicability or validity of any tax or assessment pertaining to the Premises set forth at its own cost or expense. If, at any time, payment of any tax or assessment becomes necessary to prevent any forfeiture or loss, Developer shall pay the tax or assessment in time to prevent the forfeiture or loss.

13.3 Tax Reports. Upon request by the City, Developer shall furnish to the Director copies of its quarterly Texas sales and use tax returns as well as certain portions of Texas and federal income tax returns and possessory interest tax returns and any amendments thereto. All copies of such returns must be certified copies of the original documents as prepared by a CPA. Developer and all Third-Party Operators shall immediately notify and provide the City with copies of any audit reports pertaining to the Premises conducted by the Texas Franchise Tax Board or the Board of Equalization.

## **ARTICLE 14. INSURANCE AND PERFORMANCE SECURITY**

14.1 Insurance Coverages and Coverage Limits. With no intent to limit Developer's liability or the indemnification provisions set forth in Article 12 of this agreement, or other insurance requirements as provided for in this agreement, Developer shall obtain, at a minimum, on or before the Effective Date of this agreement and thereafter maintain in full force and effect, at all times during the Term of this agreement, the insurance set forth on Exhibit "H", attached hereto; provided, however, that the Director may by written notice to Developer reestablish the minimum limits of liability and types of coverages set forth on Exhibit H as necessary from time to time.

14.2 Form of Policies. The insurance coverages required hereunder may be in one or more policies of insurance, the form(s) of which shall be approved by the Director. It is agreed, however, that nothing the Director does or fails to do shall

relieve Developer from its duties to provide the required coverages hereunder, and Director's actions or inactions will never be construed as waiving City's rights hereunder.

14.3 Issuers of Policies. The issuer of any policy shall have a Certificate of Authority to transact insurance business in the State of Texas and have a Best's rating of at least A- and a Best's Financial Size Category of Class VII or better, according to the most revenue distribution edition Best's Key Rating Guide, Property-Casualty United States.

14.4 Insured Parties. Each policy, except those for Workers Compensation and Employer's Liability, must name the City (and its officers, agents and employees) as additional insured parties on the original policy and all renewals or replacements.

14.5 Premiums and Deductibles. Developer shall be solely responsible for payment of all insurance premium requirements hereunder, and the City shall not be obligated to pay any premiums. Developer shall be responsible for and pay any claims or losses to the extent of any deductible amounts and waives any claim it may ever have for the same against the City.

14.6 Cancellation. Developer and its Third-Party Operators shall give 30 days' advance written notice to the Director if any insurance policies are to be cancelled, materially changed or non-renewed. Within such 30 day period, Developer and its Third-Party Operators shall attain other suitable policies in lieu of those about to be cancelled, materially changed or non-renewed so as to maintain in effect the required coverage. If Developer does not comply with this requirement, the Director, at his or her sole discretion, may immediately suspend Developer from any further performance under this agreement and begin procedures to terminate for default City, its officers, agents or employees.

14.7 Notice of Impaired Coverage. Developer shall give written notice to the Director within five days of the date upon which total claims by any party against Developer reduce the aggregate amount of coverage below the amounts required by this agreement.

14.8 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 officers, agents or employees.

14.9 Endorsement of Primary Insurance. Each policy hereunder, except Worker's Compensation, shall be primary insurance to any other insurance available to the additional insured with respect to claims arising hereunder.

14.10 Contractors and Third-Party Operators. Developer shall require all Contractors and Third-Party Operators to carry insurance naming the City as an additional insured and meeting all of the above requirements except amount. The amount shall be commensurate with the amount of the applicable contract or subcontract, but in no case shall it be less than \$2,000,000 per occurrence. All Contractors or Third-Party Operators selling alcoholic beverages shall carry liquor liability insurance coverage of at least \$1,000,000 per occurrence and a

\$3,000,000 aggregate. Developer shall provide copies of such insurance certificates to the Director.

14.11 City Right to Review and Adjust Coverage Limits. The Director reserves the right at reasonable intervals during the Term of this agreement to cause the insurance requirements of this Article 14 to be reviewed by the City's Risk Manager or an independent insurance consultant experienced in insurance for public cities in Texas, taking into consideration changes in statutory law, court decisions, or the claims history of Developer, and, based on the written recommendations of such consultant or Risk Manager, to reasonably adjust the insurance coverage and limits required herein.

14.12 Proof of Insurance. Prior to commencing any performance hereunder and at any time during the Term, Developer shall furnish Director with Certificates of Insurance, along with an affidavit from the Contractors or Third-Party Operators, as applicable, confirming that the Certificate accurately reflects the insurance coverage required herein. If requested in writing by the Director, Developer shall furnish the City with certified copies of Developer's actual insurance policies.

Failure of Developer to provide certified copies, as requested, within 10 days after receipt of written notice from Director, may be deemed, in the Director's and/or City Attorney's discretion, to constitute a breach of this agreement. Notwithstanding the proof of insurance requirements set forth above, it is the intention of the parties hereto that Developer, continuously and without interruption, maintain in force the required insurance coverages set forth above.

Failure of Developer to comply with this requirement shall constitute a default of Developer allowing the City, at its option, to immediately terminate this agreement. Developer agrees that the City shall never be argued to have waived or be estopped to assert its right to terminate this agreement hereunder because of any acts or omissions by the City regarding its review of insurance documents provided by Developer, its assigns, or their respective agents or employees.

## **ARTICLE 15. CASUALTY LOSS AND CONDEMNATION**

15.1 Casualty Loss. Should the Courses during the term of this agreement be wholly or partially destroyed or damaged by fire, or any other casualty whatsoever, Developer shall promptly repair, replace, restore or reconstruct the same in substantially the form in which the same existed prior to any such casualty and with at least as good workmanship and quality as the improvements being repaired or replaced but with such alterations or modification shall be consistent with the further terms and provisions hereof. Developer shall commence such work on or before 180 days from the event giving rise to such construction obligation and such work shall be completed thereafter with reasonable diligence. In the event of any casualty damage to all or any part of the Premises occurring after the 25<sup>th</sup> anniversary of the Effective Date of this agreement which would require more than 90 days to repair and restore after commencement of restoration, Developer shall have the option to terminate this



agreement at any time prior to commencement of rebuilding by giving notice of termination to the City.

15.2 In the event of termination of this agreement (i) by Developer under the circumstances set forth in the preceding Section 15.1, or (ii) by the Director as a result of Developer's failure to commence (or complete) restoration for any of the reasons or under any of the circumstances set forth above, this agreement shall terminate and come to an end upon Developer's termination or the Director's termination, as applicable, as though the date of such termination by Developer were the date of expiration of the term of this agreement, and all insurance proceeds shall be payable as follows: first, to discharge any previously made and existing mortgages made by Developer and/or its Third-Party Operators; second, to the City in an amount sufficient to pay the cost to clear the Premises of the partially damaged or destroyed improvements; and third, with the balance to be divided equally between Developer and the City. In the event of any such casualty, the Gross Collected Revenue distribution and other payments herein provided for shall not be abated, and the occurrence of any such casualty shall not cause a termination of this agreement except as herein provided.

## **ARTICLE 16. ENVIRONMENTAL CONDITION**

16.1 Presence of Hazardous Materials. If Developer, in carrying out any environmental assessments as provided in the preceding Section 5.6 of this agreement, learns of the presence of Hazardous Materials, as that term is defined in the following Section 16.1.6 of this agreement, Developer, at its sole option, may either accept the Land AS IS, and assume the responsibility to remediate the Hazardous Materials to the extent necessary at Developer's expense, or Developer may by written notice to the City given on or prior to the [REDACTED] terminate this agreement, or, with the written consent of the City, amend this agreement to delete the contaminated areas.

In the event any inspection or assessment indicates the presence of Hazardous Materials. Developer shall give the City prior written notice of any planned environmental assessments, including the scope of the assessment and the specific sites or locations to be investigated. Developer shall provide City with a copy of all environmental assessments of the Park performed by Developer, or on its behalf. Unless a pre-existing Environmental Condition, as defined below, affecting the Land has been identified and documented, it shall be presumed that the Environmental Condition arose during the term of this agreement.

16.2 NEPA Environmental Assessment. Development within the City (of which the Land is a part) is subject to applicable federal, state, and local environmental regulations, including, without limitation, those implementing the National Environmental Policy Act ("NEPA"). Developer may be required to perform a NEPA environmental analysis (including a Categorical Exclusion, Environmental Assessment or Environmental Impact Statement). The City shall fully cooperate with Developer in seeking a categorical exclusion from having to perform a NEPA Environmental Assessment, including providing all reasonably necessary or appropriate documentation and supporting information. All costs to

perform a NEPA Environmental Assessment, or to seek a categorical exclusion from such requirement, shall be the sole responsibility of and paid by Developer.

## **ARTICLE 17. ENVIRONMENTAL COMPLIANCE**

### **17.1 Definitions**

17.1.1 “City Environmental Party” shall mean the City and its elected and non-elected officials, officers, agents, employees, contractors, subcontractors, successors and assigns.

17.1.2 “Developer Environmental Party” shall mean Developer and its members, directors, officers, agents, employees, joint venture partners, Contractors, Third-Party Operators, customers, invitees, successors and assigns.

17.1.3 “Environmental Claims” shall refer to, and include, all claims, demands, suits, actions, judgments and liabilities for: (i) removal, remediation, assessment, transportation, testing and disposal of Hazardous Materials as directed by any governmental authority, court order or Environmental Law; (ii) bodily injury or death; (iii) damage to or loss of use of property of any person; (iv) injury to natural resources; (v) fines, costs, fees, assessments, taxes, demand orders, directives or any other requirements imposed in any manner by any governmental authority under applicable Environmental Laws; and/or (vi) costs and expenses of cleanup, remediation, assessment, testing, investigation, transportation and disposal of a Hazardous Materials spill, redevelop or discharge.

17.1.4 “Environmental Condition” shall mean any condition with respect to the soil, subsurface waters, ground waters, surface or subsurface strata, ambient air or other environmental medium on or off the Land, whether or not yet discovered, which could or does result in any Environmental Claim to or against the City or Developer by any third party, including, without limitation, any governmental authority.

17.1.5 “Environmental Laws” shall refer to and include all applicable laws related to pollution or protection of the environment, including, without limitation, those regulating emissions, discharges, redevelops or threatened redevelops of, or the use, handling, treatment, storage, discharge, disposal or transportation of, Hazardous Materials. Environmental Laws, specifically include, but are not limited to, NEPA, the Superfund Amendments and Reauthorization Act of 1986, the Federal Insecticide, Fungicide, and Rodenticide Act, the Safe Drinking Water Act, the Oil Pollution Control Act of 1990, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Toxic Substances Control Act, the Clean Air Act, the Clean Water Act, the Hazardous Materials Transportation Act, the Resource Conservation and Recovery Act, the Occupational Safety and Health Administration Hazard Communication Standards, the Environmental Protection Agency Oil

Pollution Prevention Act, the Texas Hazardous Substances Act, and the Texas Water Quality Control Act, as all such acts may be amended.

17.1.6 “Hazardous Materials” shall mean and refer to and include all substances whose use, handling, treatment, storage, disposal, discharge or transportation is governed, controlled, restricted or regulated by Environmental Laws, that have been defined, designated or listed by any responsible governmental authority as being hazardous, toxic, radioactive, or that present an actual or potential hazard to human health or the environment if improperly used, handled, treated, stored, disposed, discharged, generated or redeveloped. Hazardous Materials specifically include, but are not limited to, asbestos and asbestos containing materials, petroleum products, including, without limitation, crude oil or any fraction thereof, gasoline, aviation fuel, jet fuel, diesel fuel, lubricating oils and solvents, urea formaldehyde, flammable explosives, PCBs, radioactive materials or waste and pesticides.

17.2 Compliance. In its operations on the Land, a Developer Environmental Party shall strictly comply with all generally accepted industry environmental practices and standards, applicable Environmental Laws, and the applicable City Environmental Policies/Procedures which are included in the Storm Water Pollution Prevention Plan and Spill Response Plan (“SWPPP”), which is incorporated herein by reference. Without limiting the generality of the foregoing provision, a Developer Environmental Party shall not use or store Hazardous Materials on or at the City except as reasonably necessary in the ordinary course of its permitted activities on the Premises, and then only if such Hazardous Materials are properly labeled and contained, and notice of and a copy of the revenue distribution material safety data sheet is provided to the City for each such Hazardous Material. Prior to commencing operations on the Premises, Developer will complete a City baseline environmental questionnaire.

A Developer Environmental Party shall not discharge, redevelop or dispose of any Hazardous Materials on the Land or surrounding air, lands or waters, except as allowed under applicable Environmental Laws, and then strictly in accordance with those Environmental Laws. Developer shall promptly notify the City of any Hazardous Materials spills, redevelops or other discharges by a Developer Environmental Party on the Land and promptly abate, remediate and remove any of the same in accordance with applicable Environmental Laws.

Developer shall provide the City with copies of all reports, complaints, claims, citations, demands, inquiries or other notices relating to the environmental condition of the Land and City, or any alleged material noncompliance with Environmental laws by a Developer Environmental Party on the Premises, within 10 days after such documents are generated by or received by Developer.

If a Developer Environmental Party uses, handles, treats or stores Hazardous Materials on the Premises, it shall have a contract in place with an EPA or TCEQ approved waste transport or disposal company, and shall identify and retain spill

response contractors to assist with spill response and facilitate waste characterization, transport and disposal.

Complete records of all disposal manifests, receipts and other documentation shall be retained by the Developer as required under applicable Environmental Laws and made available to the City for review upon request. The City shall have the right at any time, upon reasonable written notice to Developer, to enter the Premises and inspect, take samples for testing, and otherwise investigate the Premises for the presence of Hazardous Materials. In the exercise of its rights under this paragraph, the City shall employ its commercially reasonable efforts not to unreasonably interfere with Developer's use and occupancy of the Premises (or the use and occupancy of the Premises by Developer's Third-Party Operators) pursuant to the provisions of this agreement.

**17.3 Responsibility.** Hazardous Materials that are generated, used, handled, treated, stored, disposed, redeveloped, discharged or transported by a Developer Environmental Party are the responsibility of the Developer Environmental Party and the Developer, and in no event shall they be (or be deemed to be) the responsibility of the City. Developer shall be liable for and responsible to pay all Environmental Claims that arise out of or are caused in whole or in part from a Developer Environmental Party's use, handling, treatment, storage, disposal, discharge or transportation of Hazardous Materials on, to or from the Premises, the violation of any Environmental Law by a Developer Environmental Party, or the failure of a Developer Environmental Party to comply with the terms, provisions, covenants and conditions of this agreement. To the extent the City incurs any costs or expenses, including attorney, consultant and expert witness fees, arising from a Developer Environmental Party's use, handling, treatment, storage, disposal, discharge or transportation of Hazardous Materials on, to or from the Premises, Developer shall promptly reimburse the City for such reasonable costs upon demand.

Developer shall comply with all applicable reporting requirements under Environmental Laws with respect to spills, redevelops or discharges of Hazardous Materials by a Developer Environmental Party on, to or from the Premises. Except as expressly assumed by Developer under this agreement, Developer shall not be responsible for Hazardous Materials that (i) exist on the City prior to the Effective Date, except to the extent that a Developer Environmental Party either disturbed or caused such pre-existing Hazardous Material to migrate, so as to give rise to an Environmental Claim, or (ii) to the extent Hazardous Materials are generated, used, handled, treated, stored, disposed, redeveloped, discharged or transported on the City by a City Environmental Party.

**17.4 INDEMNITY. WITH NO INTENT TO LIMIT DEVELOPER'S INDEMNIFICATION TO THE CITY SET FORTH IN ARTICLE XI, DEVELOPER SHALL PROTECT, DEFEND AND INDEMNIFY THE INDEMNIFIED PARTIES**

**FROM AND AGAINST ANY LOSS, COST, CLAIM, DEMAND, PENALTY, FINE, SETTLEMENT, LIABILITY OR EXPENSE, INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' AND CONSULTANTS' FEES, COURT COSTS, AND LITIGATION EXPENSES, RELATED TO:**

**17.4.1 ANY INVESTIGATION, MONITORING, CLEANUP, CONTAINMENT, REMOVAL, STORAGE OR RESTORATION WORK PERFORMED BY THE CITY OR A THIRD PARTY DUE TO A DEVELOPER ENVIRONMENTAL PARTY'S USE, HANDLING, TREATMENT, STORAGE, TRANSPORTATION OR PLACEMENT OF HAZARDOUS MATERIALS OF WHATEVER KIND OR NATURE, KNOWN OR UNKNOWN, ON THE CITY PREMISES, OR ANY OTHER AREAS IMPACTED BY THIS AGREEMENT**

**17.4.2 ANY ACTUAL, THREATENED OR ALLEGED HAZARDOUS MATERIALS CONTAMINATION OF THE CITY PREMISES BY A DEVELOPER ENVIRONMENTAL PARTY;**

**17.4.3 THE DISPOSAL, DISCHARGE, OR THREATENED DISCHARGE OF HAZARDOUS MATERIALS BY A DEVELOPER ENVIRONMENTAL PARTY AT THE CITY THAT AFFECTS THE SOIL, AIR, WATER, VEGETATION, BUILDINGS, PERSONAL PROPERTY OR PERSONS;**

**17.4.4 ANY PERSONAL INJURY, DEATH OR PROPERTY DAMAGE (REAL OR PERSONAL) ARISING OUT OF OR RELATED TO HAZARDOUS MATERIALS USE BY A DEVELOPER ENVIRONMENTAL PARTY AT THE CITY;**

**17.4.5 ANY VIOLATION BY A DEVELOPER ENVIRONMENTAL PARTY OF ANY ENVIRONMENTAL LAWS.**

**17.5 THE INDEMNITIES ESTABLISHED IN THIS ARTICLE 16 OF THE AGREEMENT ARE NOT APPLICABLE TO LOSSES, CLAIMS, PENALTIES, FINES, SETTLEMENTS, LIABILITIES AND EXPENSES THAT RESULT FROM CONDITIONS EXISTING ON THE EFFECTIVE DATE OF THIS AGREEMENT, EXCEPT TO THE EXTENT THAT RESPONSIBILITY FOR REMEDIATION OF HAZARDOUS MATERIALS IS ASSUMED BY DEVELOPER PURSUANT TO THIS AGREEMENT OR A DEVELOPER ENVIRONMENTAL PARTY EITHER DISTURBED OR CAUSED PRE-EXISTING HAZARDOUS MATERIALS TO MIGRATE, SO AS TO GIVE RISE TO AN ENVIRONMENTAL CLAIM**

**17.6 Removal.** Prior to the end of the Term or earlier termination of this agreement, Developer shall remove or remediate in accordance with applicable Environmental Laws and the City's Environmental Policies/Procedures, all of Developer's Hazardous Materials from the Premises, and surrounding lands and waters. Unless instructed otherwise by the City, Developer shall also, prior to vacating the Land, remove all tanks, piping and other equipment which stored Hazardous Materials, or which are contaminated by Hazardous Materials.

Developer's responsibilities under this paragraph shall not extend to any Environmental Conditions existing on, in or arising from the Premises, or property

adjacent or contiguous to the Premises, prior to Developer's occupancy of the Premises except to the extent that responsibility for remediation of Hazardous Materials is assumed by Developer pursuant to this agreement or a Developer Environmental Party either disturbed or caused such pre-existing Hazardous Materials to migrate, so as to give rise to an Environmental Claim.

17.7 Compliance with Federal and State Storm Water Requirements.

Developer acknowledges that the City is subject to the National Pollution Discharge Elimination System Program ("NPDES"), Federal Storm Water Regulations (40 CFR Part 122) and the Texas Pollution Discharge Elimination Program ("TPDES"). In its operations on the Premises, Developer shall comply with all applicable provisions of NPDES, TPDES, all applicable federal and state storm water Regulations, and the SWPPP, as they may be amended from time to time, in accordance with all applicable Environmental Laws. Developer, at its sole cost and expense, shall obtain, and maintain in effect, a TPDES storm water discharge permit in its own name for activities performed by a Developer Environmental Party regulated under TPDES, including fueling.

17.8 Developer shall cooperate with the City to ensure compliance with any NPDES, TPDES and Federal and State Storm Water Regulations storm water discharge permit terms and conditions, as well as to ensure safety and to minimize costs.

Developer shall implement "Best Management Practices," as defined in 40 CFR, Part 122.2, as amended from time to time, if necessary to minimize the exposure of storm water to significant materials generated, stored, handled or otherwise used by Developer as defined in the federal storm water regulations.

17.9 The City's NPDES storm water discharge permit and any subsequent amendments, extensions or renewals are incorporated into this agreement. Developer shall be bound by all applicable portions of such permit.

17.10 Developer shall implement the NPDES, TPDES and Federal and State Storm Water Regulations requirements as they pertain to the Land, at its sole cost and expense, unless otherwise agreed to in writing between the City and Developer. Developer shall meet all deadlines that may be imposed or agreed to by the City and Developer. Time in this regard is of the absolute essence.

17.11 If either party asks, the other party shall provide any non-privileged information submitted to a government entity(ies) under applicable NPDES, TPDES and Federal and State Storm Water Regulations.

17.12 Developer shall negotiate with the appropriate governmental entity(ies) for any modifications to the City's NPDES and TPDES storm water discharge permit.

17.13 Developer shall participate in any City organized task force or other work group established to coordinate stormwater activities at the City.

17.14 Natural Resources and Energy Conservation and Management.

Developer shall comply with all applicable City Regulations pertaining to recycling and energy or natural resource conservation and management. The

City has, or will, in the future, establish and implement an Environmental Management System for the City facilities. The City reserves the right to implement an alternative fuel vehicle program. Developer, in consultation with the City's Watershed Department, shall use Best Management Practices for managing water run-off and managing and conserving water supplied to the Courses for irrigation purposes, and shall fully cooperate with the City in the implementation and enforcement of all such conservation and management policies and programs.

17.15 Watershed Protection. In addition to the natural resource management requirements described in Section 17.14, the Developer shall also:

17.15.1 Establish a 150 foot development buffer ("Buffer) from the shoreline of the Lake, measured horizontally inland. Within this Buffer, development shall be prohibited. Development encroachment within this Buffer, if deemed necessary by the Developer, must be approved by the City's Watershed Protection and Planning Development and Review Departments as if it was an administrative variance meeting the required findings as described in City Code 25-8-42 and following existing administrative variance procedures.

17.15.2 Develop an Integrated Pest Management (IPM) plan based on current scientific principles that minimize potential environmental impacts of pesticide use on the Premises. The Developer shall obtain approval of the Integrated Pest Management plan from the City's Watershed Protection Department; and

17.15.3 Seek early consultation during the design process from the City's Watershed Protection Department in the completion of the Environmental Resource Inventory required by City Code. The City's Watershed Protection Department will provide suggestions for critical environmental feature buffers and wetland mitigation where needed, which may help reduce the number of site plan revisions required for permitting.

17.16 Regional Storm Water Management Program. Developer shall participate and comply with all applicable Regulations and City Rules and Regulations pertaining to the Regional Storm Water Management Program ("RSWMP") and pay all fees and charges for Developer's participation in the RSWMP. The City has established a RSWMP for the City and Developer shall fully cooperate with the City in the implementation and enforcement of the policies and programs related to the RSWMP.

17.17 Incorporation into Third-Party Operator Agreements. Developer shall incorporate the provisions of this Article 17 into any agreement it enters into with a Developer Environmental Party, including, without limitation, the obligation to indemnify the City against any Environmental Claims caused in whole or in part by a Developer Environmental Party. The City shall be a third party beneficiary of such agreements, with the express right to enforce the environmental covenants of all Third-Party Operators.

17.18 Right of Entry. The City may enter upon the Premises at any time for purposes of inspection to ensure that Developer is complying with this Article and any other provisions in this agreement without committing a trespass.

17.19 Survival. The covenants, conditions and indemnities of this Article 17, and the City's remedies with regard to this Article 17, shall survive termination of this agreement

## **ARTICLE 18. DEFAULT, TERMINATION, HOLDING OVER, SURRENDER**

18.1 Developer Default. The following events shall be deemed to be events of default by Developer under this agreement:

18.1.1 Developer fails to pay when due any installment of Gross Collected Revenue distribution or any other obligation under this agreement involving the payment of money and such failure continues for a period of 10 days following written notice thereof to Developer; provided, however, that if, during any calendar year during the Term of this agreement, the City has already given Developer two separate notices of any payment default on the part of Developer hereunder, no subsequent notice during the remainder of such calendar year shall be required in order for a payment delinquency to constitute an event of default hereunder – that is, the event of default will automatically occur on the third (or any subsequent failure) on the part of Developer to pay timely any installment of revenue distribution or other monetary obligation during the remainder of such calendar year.

18.1.2 Developer fails to comply with any provision of this agreement, other than as described in Section 18.1.1 above, and either does not cure such failure within 30 days after written notice thereof to Developer, or cures that particular failure but again fails to comply with the same provision of this agreement within three months following the City's written notice to Developer of the prior violation.

18.1.3 Developer or any guarantor of Developer's obligations under this agreement becomes insolvent, or makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors.

18.1.4 Developer or any guarantor of Developer's obligations under this agreement files a petition under any section or chapter of the federal Bankruptcy Code, as amended, or under any similar law or statute of the United States or any state thereof; or, Developer or any guarantor of Developer's obligations under this agreement is adjudged bankrupt or insolvent in proceedings filed against Developer or any guarantor of Developer's obligations under this agreement.

18.1.5 A receiver or trustee is appointed for the Premises or for all or substantially all of the assets of Developer or any guarantor of Developer's obligations under this agreement.

18.1.6 Developer attempts to assign or in any manner transfer this



agreement or any of its rights hereunder.

18.1.7 The failure of Developer to provide the City with a copy of Developer's MBE/WBE Program within the time period prescribed for Developer.

18.2 Termination by City. The City has the right to terminate this agreement for reason of default, or for any other reason, or for no reason at all, with no obligation to the Developer or any other person or entity. Such termination shall require the prior approval of the City Council of the City of Austin. The City's termination of this agreement shall not preclude the City from exercising its other rights under this agreement or at law with respect to any default by the Developer.

18.3 No Waiver of Default. A party's election to waive a default shall not constitute a waiver of a subsequent default of the same or similar nature. A party's failure to insist on strict performance or failure to exercise a right upon default (i) shall not constitute a waiver of the right to insist on and to enforce strict compliance of other obligations or of future performance, and (ii) shall not constitute a waiver of the right to exercise any right or remedy arising out of any future default or failure to perform.

18.4 Remedies Cumulative. The rights and remedies contained in this agreement shall not be exclusive, but shall be cumulative of all rights and remedies now or hereafter existing, whether by statute, at law, or in equity; provided, however, that neither party may terminate its duties under this agreement except in accordance with the express provisions of this agreement.

18.5 Holding Over. In the event Developer continues to occupy the Land after the expiration of this agreement, or any earlier termination date of this agreement, and the City elects to accept Gross Collected Revenue distribution thereafter, a tenancy from month-to-month shall be created, and not for any longer period, at a monthly Gross Collected Revenue distribution and Additional Facility revenue distribution rate equal to 150% of the highest Gross Collected Revenue distribution rate paid in the 60 months prior to last day of the Term or earlier termination date of this agreement. The City's acceptance of revenue distribution during any such period of holdover shall not constitute a waiver of the City's rights under applicable law or this agreement.

18.6 Surrender. Developer shall, upon the Expiration Date or earlier termination of this agreement, surrender and yield (and correspondingly cause its Third-Party Operators to surrender and yield) to the City the Premises.

## **ARTICLE 19. LIENS AND ENCUMBRANCES**

### **19.1 Liens and Encumbrances**

19.1.1 If any mechanics' or materialmen's liens or claims thereof, or other liens or orders for the payment of money, shall be filed against the Premises, or any portion thereof, by reason of or arising out of any labor or material furnished or alleged to have been furnished or to be furnished

to or for Developer, or for or by reason of any change, alteration or addition to any part of the Land, or the cost or expense thereof, or any contract relating thereto, or against the City as owner thereof, Developer shall within 30 days cause the same to be canceled and discharged of record, by bond or otherwise at the election and expense of Developer, and shall also defend on behalf of the City, at Developer's sole cost and expense, any action, suit or proceeding which may be brought thereon or for the enforcement of such lien, liens, claims or orders.

Developer further covenants and agrees that it will not make any contract or agreement, either oral or written, for the construction, alteration or repair of the Premises without providing in such contract or agreement that no lien or claim shall thereby be created or arise or be filed or maintained by anyone thereunder upon or against the Premises or any of the appurtenances, equipment, machinery or fixtures thereon or therein, and without procuring from the architect, engineer, contractor or contractors, materialmen, mechanics, persons, firms or corporations named in any such contract or agreement, a written waiver of all right of lien which said architect, engineer, contractors, materialmen, mechanics, persons, firms or corporations might otherwise have or claim upon the estate or interest of the City in the Premises or the items furnished by Developer, and Developer hereby agrees that before any work shall begin or material be furnished it will exhibit and cause to be delivered to the Director said original waiver or waivers of lien, and Developer shall, upon written demand from the Director, stop any and all work and delivery of materials therefor if such waivers of lien are not delivered as herein provided, and it is expressly understood and agreed, and notice is hereby given, that no persons, firms or corporations furnishing labor, material or service for the construction, repairing, reconstruction or the making of the alterations or additions to the Premises shall have any lien upon the Premises or any part or portion thereof.

19.1.2 City shall have a lien upon all Removable Fixtures and other trade fixtures of Developer and its Contractors and Third-Party Operators placed in the Premises, to the extent permitted by law, for the purpose of securing the payment of all sums of money which may be due to City from Developer under this agreement.

19.1.3 Developer shall have no right to subordinate City's liens without express written consent by Director.

19.1.4 The City's right to receive revenue distribution shall not be subordinated to secure Developer's financing without the City's express written consent

19.2 No Authority to Bind City. It is further agreed that no authority is given by this agreement to Developer, expressly or impliedly, to bind the City for the payment of any money in connection with the planning, development, design, construction, repairs, alterations, additions or operations relating to the Premises,

nor is there any authority given Developer hereby directly or indirectly to permit any mechanics', materialmen's or contractors' liens to arise against the Premises, and Developer expressly agrees that it will keep and save the Premises and the City harmless from all costs and damages resulting from any such liens or lien of any character created through any act or thing done by Developer.

## **ARTICLE 20. NON-DISCRIMINATION, NUISANCE AND ADDITIONAL REGULATIONS**

20.1 Non-discrimination. Developer, for itself, and its successors and assigns, including, without limitation, all of its Contractors and Third-Party Operators, as a part of the consideration for this agreement, does hereby covenant and agree that: (1) no person on the grounds of race, color, religion, sex, sexual orientation, national origin or ancestry, or age, shall be excluded from participation in, denied benefits of, or otherwise subjected to discrimination in the use of the Premises; (2) that in construction of any improvements on, over or under the Premises and the furnishing of services thereon, no person on the grounds of race, color, religion, sex, sexual orientation national origin or ancestry, or age, shall be excluded from participation in, denied benefits of, or otherwise subjected to unlawful discrimination; (3) Developer covenants that (i) no person shall be excluded on these grounds from participating in or receiving the services of benefits of any program or activity covered by this paragraph, and (ii) it will require that any covered Contractor or Third-Party Operator require assurances to the same effect as required by the City's applicable non-discrimination policies. Developer shall post, or shall cause its Contractors and Third-Party Operators to post, in conspicuous places available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

20.2 Non-discrimination in Employment. Developer, its Contractors, or Third-Party Operators shall not engage in any discriminatory employment practice as defined in Chapter 5-4 of the City Code. Developer shall execute and file with the City Purchasing Office a current Non-Discrimination Certification. Developer shall sign and return the Non-Discrimination Certification attached hereto as Exhibit "I". Non-compliance with Chapter 5-4 of the City Code may result in sanctions, including termination of the agreement.

20.3 Economic Non-discrimination. Developer shall make the Premises available to all users thereof on a reasonable, and not unjustly discriminatory, basis and shall charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that Developer may make reasonable and nondiscriminatory discounts, rebates or similar types of price reductions to volume purchases.

20.4 Public Accommodation Laws. Developer covenants that it shall comply fully with all Regulations governing nondiscrimination in public accommodations and commercial facilities, including, without limitation, the requirements of the Americans With Disabilities Act and all regulations hereunder, and that the

Premises shall remain in compliance with those Regulations throughout the term of this agreement.

20.5 Compliance with Laws. In its use and occupancy of the Premises, Developer shall strictly comply with applicable law. Developer shall not do, or permit anything to be done, in or on the Premises that would constitute a public or private nuisance.

20.6 The City may adopt and enforce reasonable rules and regulations, which Developer agrees to observe and obey, with respect to the use of the Land and its appurtenances, together with all facilities, improvements, equipment and services, for the purpose of providing for safety, good order, good conduct, sanitation and preservation of the parkland and its facilities.

## **ARTICLE 21. BUSINESS RECRUITMENT, MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM, AND WAGES**

### 21.1 Recruitment

21.1.1 In addition to employment recruitment efforts described in Section 8.6, the Developer shall make commercially reasonable efforts to work with local non-profit organizations such as the Austin Gay and Lesbian Chamber of Commerce, the Austin/Travis County Reentry Roundtable, the Greater Austin Black Chamber of Commerce, the Greater Austin Asian Chamber of Commerce, the Greater Austin Hispanic Chamber of Commerce, Minorities for Equality in Employment Education Liberty & Justice (MEEELJ), the Texas Department of Assistive and Rehabilitative Services (DARS), and/or other appropriate organizations to expand its pool of diverse candidates in hiring recruitment efforts for jobs at the Course. The Developer shall provide documentation of its efforts to the City upon request.

21.1.2 The Developer shall make commercially reasonable efforts to recruit residents of the Austin area for its full-time jobs. The Developer shall provide documentation of its efforts to the City upon request.

### 21.2 City Certified Minority- and Women-Owned and Local Small Business Participation.

21.2.1 General. The Developer shall comply with the applicable standards and principles of Chapters 2-9A (Construction), 2-9B (Professional Services), 2-9C (Nonprofessional Services) and 2-9D (Commodities) of the City's ordinance and Program Rules for M/WBEs ("M/WBE Program") in the purchase of commodities at its Course by its employees at the Course, and design and construction of its Course, in effect at the time of the solicitation for the particular scope of work or commodity purchase is to be completed. It is the Developer's responsibility to contact the City's Small and Minority Business Resources

Department (“SMBR”) to ensure the Developer is complying with the current and applicable ordinances and rules.

21.2.2 Informational Meeting. Prior to the Developer expending money subject to the requirements of this Section 21.2.2 or no less than ninety 90 days from the Effective Date, the Parties will meet to discuss the requirements for compliance with the M/WBE Program and the City will advise the Developer of all available resources to assist with compliance.

21.2.3 Supplies/Commodities. In an effort to further stimulate and positively impact the local economy, the Developer shall use commercially reasonable efforts to provide minority-owned, women-owned and local small businesses certified by the City an equal opportunity to participate as suppliers for materials and services purchased by the Developer exclusively for use at its Courses. To assist in recruiting efforts, the Developer is required to contact SMBR for a list of available City certified minority-owned, women-owned and local small businesses prior to procuring supplies.

A Supplier Diversity Policy. Within 90 days after the Effective Date, the Developer shall submit to the City a reasonable supplier diversity policy which will not conflict with the M/WBE Program regarding the Developer’s procurement of materials and services to be used exclusively at the Course, which may be reasonably modified from time to time by the Developer, provided the policy and all modifications are approved by SMBR.

B Threshold Amount. The Developer agrees to adhere to the supplier diversity policy for the procurement of materials and services for which the cost is more than the purchasing authority established for the City Manager on an annual basis pursuant to Article VII (Finance) § 15 (Purchase Procedure) of the City Charter, and for which there are qualified local certified M/WBE suppliers, providing competitive prices and with sufficient financial resources in light of the particular materials and services to be supplied. The City shall advise the Developer annually of any changes to this threshold amount, or the Developer may contact the City at any time for such information.

With respect to any individual procurement of materials or services for which the cost is less than the established threshold amount, the Developer is encouraged, but not required, to adhere to the requirements of this Section 21.2. The Developer shall maintain and provide documentation of its efforts to comply with this paragraph to Section 21.3.6.

C Existing Contracts. This Section shall not apply to valid contracts the Developer has in existence on the Effective Date of this agreement for the procurement of supplies.

D Non-Compliance. Failure to comply with this Section 21.2 shall be considered a breach of this agreement.

21.3 Design and Construction. The Developer shall comply with the applicable standards and principles of the M/WBE Program in the design and construction of its Courses in effect at the time of solicitation for the particular scope of work to be completed. It is the Developer's responsibility to contact SMBR to ensure the Developer is complying with the current and applicable ordinances and rules.

21.3.1 With respect to any design or construction projects for the Courses, including, but not limited to, improvements, the Developer, the architect and the general contractor shall meet the gender and ethnic-specific participation goals or subgoals for each year in which design or construction occurs as determined by the Director of SMBR in accordance with the M/WBE Program.

21.3.2 Prior to advertising a bid for any portion of the design or construction work, the Developer shall submit to SMBR a copy of a proposed solicitation in order for the City to determine the gender and ethnic-specific participation goals or subgoals for the project. The determination by SMBR shall be based on the proposed size, type and scope of work to be undertaken by the Developer and described in the bid documents, and the availability of each group of M/WBEs to perform elements of the work. The City may utilize either the cumulative M/WBE goal or the subgoals for each group of minority persons in the proposed solicitation, or set project M/WBE participation goals as provided in Section 2-9A-19 (*Establishment of MBE/WBE Participation Levels for Individual Contracts in Construction*), or as may subsequently be amended. SMBR shall have ten business days from receipt of a bid package from the Developer in order to evaluate and determine the required level for utilization of M/WBE project or phase-specific goals or subgoals, if any, and shall notify the Developer in writing of the Director's determination.

21.3.3 Outreach. In an effort to meet the gender and ethnic-specific M/WBE utilization goals, the Developer shall implement an outreach program designed to solicit participation of M/WBEs. These outreach efforts should also target small businesses generally. The Developer may seek the assistance of SMBR in these outreach efforts as described in Section 21.3.5 below.

21.3.4 For any year in which the Developer, the architect and the

general contractor fail to meet each of the goals or subgoals established by SMBR, the Developer, the architect and the general contractor must demonstrate good faith efforts to meet the goals as described in the City's M/WBE Program Ordinance. The Developer shall submit documentation demonstrating its own and the architect's and general contractor's good faith efforts to meet the goals as is required under the following Section 21.3.6. If the Developer provides documentation to SMBR evidencing its own and its architect's and general contractor's good faith efforts, the Developer shall be deemed in compliance with this Section. Failure to perform this obligation shall be considered a material breach of this agreement. The City acknowledges that this obligation does not require the Developer to modify, nullify or abrogate any contracts that the Developer has entered into prior to the Effective Date of this agreement.

21.3.5 The Developer shall apprise SMBR when the Developer desires assistance from SMBR in its efforts to meet the gender and ethnic specific M/WBE utilization goals established for the purchase of commodities and supplies procured by and for the Course, and design and construction of improvements. This assistance may include providing a list of certified M/WBE firms from which the Developer may solicit or cause the architect or its general contractor to solicit participation in the design and construction of any improvements, identifying potential scopes of work, establishing the bid packages, scheduling and hosting outreach meetings, and assisting the Developer, its architect, or general contractor in soliciting M/WBE firms to provide bids. The Developer is not required to solicit participation during a period in which the Developer is not engaged in designing and/or constructing its Course, but rather, the Developer is required to incorporate the standards and principles of the City's M/WBE Program including the M/WBE utilization goals established by the Director into its development process as and when such process exists in connection with the Course.

21.3.6 The Developer shall provide monthly reports to SMBR no later than the 10th day of each month to track (i) the utilization on a percentage basis of M/WBE firms in the design and construction of the improvements; (ii) the utilization on a percentage basis of M/WBE firms in the purchase of commodities and/or supplies by and for the Course; and (iii) a summary of the Developer's efforts to implement the standards and principles of the City's M/WBE Program. SMBR shall provide the forms to be used by the Developer in submitting such reports.

#### 21.4 Construction Worker Requirements

21.4.1 The Developer agrees to pay and shall require its contractors to pay workers retained for any construction on the Course, including

remodeling, Prevailing Wage Rates, as adopted by the City, or as may otherwise be amended and increased by the City; or if a worker involved in any aspect of construction or remodeling is not covered by published wage determinations adopted by the City's Prevailing Wage Ordinance, the Developer agrees to pay and shall require its contractor to pay workers the Living Wage Rate, as adopted by the City.

21.4.2 Developer's Responsibilities. Prior to commencement of and during construction of the Course, in order to comply with this Section 21.4 (Construction Worker Requirements), it is Developer's responsibility to:

A Contact the City's Contact Management Department (CMD) and obtain the current prevailing wage rates in effect for Building Construction Type (BC) and Heavy Highway Construction (HH) for the construction workers performing work on the particular scope of work to be completed for all or part of the Course;

B Maintain certified weekly payrolls on-site for every contractor and subcontractor performing work on the project. Certified weekly payrolls must contain the name, address and occupation of each worker employed by the Developer, its contractor or subcontractor, and the actual per diem wages paid to each worker;

C Employee Certification. Developer and its contractor or subcontractor shall identify in writing the classification agreed to by each worker, and pay no less than the specified wage rate or Living Wage. A form designating the worker's classification and wage rate shall be signed by each worker, and if work performed by the worker is different than the rate or trade classification agreed upon, the worker shall be paid for the work completed no less than the minimum prevailing wage rate for that specified trade or \$11.39 per hour, whichever is higher.

D Payroll Deduction Authorization Form. Developer or its contractor or subcontractor shall prepare for each worker's signature a payroll deduction authorization form identifying all payroll deductions **excluding** those required by law, such as federal income taxes, Medicare and Social Security.

E A statement of Compliance shall be signed and dated by the party responsible for supervising the payment of persons employed or contracted by Developer, contractor or subcontractor, and identify the name of the signatory party and title, name of project, payroll period and name of contractor or subcontractor. The statement shall attest that the payroll complies with the terms of this agreement and 29 CFR issued



by the Secretary of Labor.

F Provide a single point of contact responsible for monitoring and enforcing the Developer's construction process.

G Erect and maintain a wage rate postings board in English and Spanish (form posting available from the City) displaying the wage rate per worker classification that may be working on the site, placed in a conspicuous place at the Course site accessible for all workers to view.

H Coordinate with city staff or its authorized representatives.

21.4.3 Developer shall allow CMD staff or other staff designated by the City Manager, or third party representatives retained by the City to:

A Access the Course site,

B Audit documents related to construction worker wages paid to determine wage compliance,

C Interview workers,

D Conduct on-site observations related to wage compliance, and

E Review all construction-related certified payroll reports on-site once a month or as requested by the City.

21.4.4 Wage Rate Infraction. The City shall notify Developer of any wage rate issues identified by the City. The ninety day opportunity to cure of Article 18 (Default, Termination, Holding Over, Surrender) shall not apply to individual wage rate infractions in this Section 21. Depending on the severity of the infraction, Developer shall or require its contractors to correct and remediate any wage rate issues identified within the timeframe specified in the notice provided by the City, not to exceed thirty days. The parties may agree to shorten or extend the time period for the Developer or its contractor to comply depending on the type and severity of the wage rate infraction.

21.4.5 The Developer shall make commercially reasonable efforts to ensure that all contractors and subcontractors constructing the Course cover all their construction workers with workers' compensation insurance and provide OSHA 10-hour safety training.

21.5 Certificate of Compliance and Inspection.

21.5.1 Beginning xxxxxxxx and continuing each year thereafter during the term of this agreement, the Developer shall deliver to the City before March 31 of each year a Certificate of Compliance utilizing the form attached as Exhibit “J”.

21.5.2 In the Certificate of Compliance, the Developer shall warrant to the City that it is in full compliance with each of its obligations under this agreement.

21.5.3 The City, and/or its representative(s), including third-parties contracted by the City, has the right to inspect all relevant records of the Developer as are reasonably necessary to verify compliance with all requirements of this agreement. Inspections shall be preceded by at least two weeks’ notice in writing to the Developer.

21.6 Throughout the term of this agreement, the Developer shall provide health insurance coverage for all full time employees working at the Courses and their families/dependents, including same sex partners of full time employees working at the Courses.

21.7 Throughout the term of this agreement, the Developer shall ensure that all full-time employees working at the Courses are paid at least the City of Austin’s living wage requirement as may be subsequently amended.

## **ARTICLE 22. MISCELLANEOUS**

22.1 Reuse of Documents Prohibited. Developer or other person or organization performing or furnishing any of the Work under a direct or indirect contract with the Developer shall not reuse any drawing, specifications, plans or other documents or copies on any other project without the written consent of the City.

22.2 Applicable Laws and Venue. This Agreement is subject to all laws of the State of Texas, the City Code, the laws of the federal government of the United States of America, and all rules and regulations of any regulatory body or officer having jurisdiction, including, without limitation, the City’s Charter and Code. Venue for any litigation relating to this agreement shall be Travis County, Texas

22.3 Attorneys’ Fees. In the event that the City brings any action, suit or proceeding to collect all or a portion of the revenue distribution due under this agreement, to take possession of all or a portion of the Premises, or to ensure compliance with this agreement, Developer shall pay the City reasonable attorneys’ fees and associated legal expenses, in an amount allowed by the court in said action, suit or proceedings.

22.4 Payments, Notices and Consents. Except as may be specifically provided elsewhere in this agreement, all payments, notices and consents shall be sent to the following addresses:

If to City:

City of Austin Purchasing Office  
Attn: Contract Administrator  
P.O. Box 1088  
Austin, TX 78767  
(512) 974-2500

If to Developer:

Decker Lake Golf, LLC  
Attn: Warren Hayes, Chief Operating Officer  
8108 FM 973  
Austin, TX 78724  
(512) 845-6319  
Whayes@hayesmodular.com

22.5 All notices required or permitted hereunder shall be in writing and shall be deemed delivered when actually received or, if earlier, on the third day following deposit in a United States Postal Service post office or receptacle with proper postage affixed (certified mail, return receipt requested) addressed to the respective other party at the address prescribed above or at such other address as the receiving party may have theretofore prescribed by notice to the sending party delivered in accordance with this paragraph.

22.6 No Third Party Beneficiary. This Agreement is made for the benefit of the parties hereto, and nothing herein shall be construed to create any right or benefit enforceable by any third party.

22.7 Entire Agreement. This Agreement contains the entire, integrated, full and final agreement between the parties relating to the subject matter hereof, and there are no other enforceable agreements between the parties, whether written or oral, relating to the subject matter. This Agreement supersedes all prior agreements and understandings of the parties, whether written or oral.

22.8 Survival of Certain Provisions. Developer shall remain obligated to the City under all clauses of this agreement that expressly or by their nature extend beyond and service the expiration or termination of this agreement, including, but not limited to, the indemnity provisions hereof.

22.9 Captions and Headings. Captions contained in this agreement are for reference purposes only, and therefore will be given no effect in construing this agreement and or not restrictive of the subject matter of any article or paragraph of this agreement. Any reference to gender shall include the masculine, feminine and neutral.

22.10 Relationship of the Parties. The City and Developer agree that no partnership relationship between the parties hereto or joint venture between City

and Developer is created by this agreement, and Developer is not made the agent or representative of the City for any purpose or in any manner whatsoever.

22.11 No Waiver of Governmental Authority. Nothing in this agreement shall be construed to abrogate or impair any governmental power and authority to regulate the prices, terms of service and other operations of Developer to the full extent allowed by law, regardless of whether such regulation is imposed by the City or by other governmental authority.

Developer understands that such governmental power and authority may not lawfully be bartered for or contracted away, anything in this agreement to the contrary or which seemingly could be construed to the contrary notwithstanding.

22.12 No Damages for Delay. The City shall not pay the Developer or the Developer's contractor(s) and subcontractor(s) any compensation for delays or hindrance to the Development.

22.13 No Waiver Implied. The failure of either party to insist, in any one or more instances, upon performance of any of the terms, provisions, covenants or conditions of this agreement shall not be construed as a waiver or relinquishment of the future performance of any such term, provision, covenant or condition by the other party, but the obligation of such party with respect to the future performance of such term, provision, covenant or condition shall continue in full force and effect.

22.14 Severability. In the event any term, provision, covenant or condition herein contained shall be held to be invalid by any court of competent jurisdiction, such invalidity shall not affect any other term, provision, covenant or condition herein contained, provided that such invalidity does not materially prejudice either Developer or the City and their respective rights and obligations contained in the valid terms, provisions, covenants or conditions hereof.

22.15 Written Amendment. Unless otherwise provided herein, this agreement may be amended only by written instrument duly executed on behalf of the City (upon approval by the City Council, if and as necessary) and Developer unless it is necessary to modify this agreement to comply with the requirements of applicable law, in which case the City may unilaterally modify this agreement, as may be reasonably required to comply with its legal obligations. Nothing herein shall preclude Developer from contesting such orders or decisions, but Developer shall abide by the unilateral modification by the City, until or unless rescinded, overturned, or, if stayed, for the duration of the stay.

In no event will Developer be required to pay any charge or fee greater than specified in this agreement on account of a unilateral amendment. Nothing in this agreement shall be construed as preventing the City to make administrative amendments to this agreement without prior City Council approval to the extent that such amendments do not materially modify the agreement or otherwise prevent the agreement from being completed in accordance with the authority previously granted by City Council.

22.16 Acceptance and Approval. An approval by the Director of the Parks and

Recreation Department, or by any other instrumentality of the City, of any part of Developer's performance shall not be construed to waive compliance with this agreement or applicable law or to establish a standard of performance other than required by this agreement or by applicable law

22.17 Ambiguities. In the event of any ambiguity in any of the terms of this agreement, it shall not be construed for or against any party hereto on the basis that such party did or did not author the same.

22.18 No City Expenditure. Nothing in this agreement shall be construed to require that the City make any expenditure of its funds by, through or under this agreement. All statements or representations found anywhere in this agreement that imply or expressly state the City has an obligation(s) to expend City funds shall be interpreted by City and Developer to mean that such obligation(s): (i) is subject to an appropriation being made by City Council; (ii) shall be met under a separate contract(s) between City and a third party(s); (iii) shall not be construed in any manner to be a third party beneficiary contract(s) benefiting Developer; and (iv) shall not give any enforcement rights, in law or equity, vested in Developer or any other person or entity, either under separate contract(s) or this agreement.

22.19 Successors. This agreement shall bind and benefit the parties and their legal successors and permitted assigns. This agreement does not create any personal liability on the part of any officer, agent or employee of the City.

22.20 Force Majeure. Timely performance by both parties is essential to this agreement. However, neither party is liable to the other for damages resulting from delays or other failures to perform its obligations under this agreement to the extent the delay or failure is directly caused by Force Majeure at the City and affecting the Land. "Force Majeure" means fires, floods, explosions, war, terrorist acts, riots, court orders, and the acts of superior governmental or military authority occurring on the City. If the Force Majeure is of such a nature that it requires closure of the City for an extended period of time, **DEVELOPER WAIVES ANY CLAIM IT MAY HAVE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM THE CLOSURE**. However, Developer is not relieved from performing its obligations under this agreement due to a strike or work slowdown of its employees or employees of its joint venture partners or Contractors or Third-Party Operators. Developer shall employ only fully trained and qualified personnel during a strike.

22.21 Time Periods. Unless otherwise expressly provided herein, all time periods provided for in this agreement shall be determined on the basis of and utilizing "calendar" days. If any date for performance or the conclusion of any time period provided for herein falls on a day which is not a business day, the date for performance or the conclusion of such time period, as the case may be, shall be deemed to be extended until the next business day. A "business day" is any day which is not a Saturday, a Sunday, or any holiday observed by the City, federally-chartered national banks, or Texas state-chartered banks.

22.22 Construction. As used in this agreement, the words "hereof," "herein,"

“hereunder” and words of similar import shall mean and refer to this entire agreement, and not to any particular article, section or paragraph hereof, unless the context clearly indicates otherwise.

22.23 Independent Covenants. The covenants of Developer to pay any charge or fee and to perform all of its other obligations hereunder are entirely independent of any covenants made by the City hereunder; no default, alleged default or failure in whole or in part of the City to perform any of its covenants hereunder shall relieve Developer from its covenants to pay and perform hereunder.

22.24 Notwithstanding any other provisions herein, the City of Austin does not represent or warrant that Lake Walter E. Long will be retained at any specific level at any particular time. It is fully understood by the parties hereto that the level of Lake Walter E. Long will vary as a result of the City of Austin’s operation of Lake Walter E. Long for any and all purposes, including operation as an off-channel reservoir with fluctuating lake levels.

22.25 This agreement may not be assigned without the prior written consent of the City, which may be granted or withheld at its sole discretion, for any, or for no reason.

**AS-IS, WHERE-IS. DEVELOPER AGREES TO ACCEPT THE LAND ON AN “AS-IS, WHERE-IS AND WITH ALL FAULTS” BASIS. THE CITY HEREBY SPECIFICALLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY, GUARANTY OR REPRESENTATION, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, OR, CONCERNING (i) THE NATURE AND CONDITION OF THE LAND AND THE SUITABILITY THEREOF FOR ANY AND ALL ACTIVITIES AND USES WHICH DEVELOPER MAY ELECT TO CONDUCT THEREON, (ii) THE AVAILABILITY OF WATER AND WASTERWATER FROM ANY SOURCE; (iii) THE NATURE AND EXTENT OF ANY RIGHT-OF-WAY, DEVELOP, POSSESSION, UTILITIES, LIEN, ENCUMBRANCE, LICENSE, RESERVATION, CONDITION OR ANY OTHER MATTER RELATING IN ANY WAY TO THE LAND, (iv) THE COMPLIANCE OF THE LAND OR ITS OPERATION WITH ANY LAWS, ORDINANCES OR REGULATIONS OF ANY GOVERNMENT OR OTHER AUTHORITY OR BODY, OR (v) THE EXISTENCE OF ANY TOXIC OR HAZARDOUS SUBSTANCE OR WASTE IN, ON, UNDER THE SURFACE OF OR ABOUT THE LAND. DEVELOPER ACKNOWLEDGES THAT HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE LAND AND THE LAND INFORMATION, DEVELOPER WILL RELY SOLELY ON ITS OWN INVESTIGATION OF THE LAND AND THE LAND INFORMATION AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY THE CITY. DEVELOPER FURTHER ACKNOWLEDGES THAT ANY INFORMATION PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE LAND WAS OBTAINED FROM A VARIETY OF SOURCES AND THE CITY (A) HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND (B) HAS NOT MADE ANY EXPRESS OR IMPLIED, ORAL OR WRITTEN, REPRESENTATIONS AS TO THE ACCURACY OR**

**COMPLETENESS OF SUCH INFORMATION, EXCEPT AS SPECIFICALLY SET FORTH HEREIN. DEVELOPER EXPRESSLY ACKNOWLEDGES THAT, IN CONSIDERATION OF THE AGREEMENTS OF THE CITY HEREIN, EXCEPT AS OTHERWISE SPECIFIED HEREIN, THE CITY HAS NOT MADE AND DOES NOT HEREBY MAKE ANY REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, ARISING BY OPERATION OF LAW OR OTHERWISE, WHATSOEVER WITH RESPECT TO THE CONDITION OF THE LAND, INCLUDING, WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY REGARDING CONDITION, HABITABILITY, SUITABILITY, QUALITY OF CONSTRUCTION, WORKMANSHIP, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, AND DEVELOPER ACKNOWLEDGES THAT IT IS ENTERING INTO THIS AGREEMENT WITHOUT RELYING UPON ANY ORAL STATEMENT OR REPRESENTATION MADE BY THE CITY. AND PERFORMANCE OBLIGATIONS TO BE UNDERTAKEN BY DEVELOPER HEREUNDER ARE TO BE MADE ENTIRELY AT DEVELOPER'S SOLE COST AND EXPENSE AND WITHOUT ANY CONTRIBUTION FROM THE CITY.**

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**IN WITNESS HEREOF**, the City and Developer have made and executed this agreement in multiple copies, each of which shall be deemed an equal, effective as of the Effective Date.

Decker Lake Golf, LLC

City of Austin

By: \_\_\_\_\_  
Signature

By: \_\_\_\_\_  
Signature

Name: \_\_\_\_\_  
Printed Name

Name: \_\_\_\_\_  
Printed Name

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**List of Exhibits**

- Exhibit A Project location
- Exhibit B RFQS
- Exhibit C RFQS response
- Exhibit D Water Source Approved by City Council
- Exhibit E Community Engagement Plan
- Exhibit F Payment bond
- Exhibit G Performance bond
- Exhibit H Insurance requirements
- Exhibit I Non-Discrimination Certificaton
- Exhibit J Certificate of Compliance