

AGREEMENT

AGREEMENT BETWEEN THE CITY OF INDIAN WELLS AND THE DESERT RECREATION DISTRICT FOR COOPERATIVE PARK AND RECREATION DEVELOPMENT, MAINTENANCE AND PROGRAMMING SERVICES

This Agreement is made and entered into by and between the City of Indian Wells, a municipal corporation, hereinafter referred to as "City," and the Desert Recreation District, a public recreation and park district, hereinafter referred to as "DRD" or "District."

RECITALS

WHEREAS, for the past several years, the City and District have worked collaboratively to deliver park and recreation services to the joint residents of the City and District; and

WHEREAS, that relationship has included joint planning, sharing facilities, presentation of joint events and special interest activities within the City; and

WHEREAS, the parties also have discussed jointly developing park spaces within the City; and

WHEREAS, the City purchased an area within the City for a small park (the "Park") and DRD and the City currently have an opportunity to coordinate its development, maintenance, operation and use; and

WHEREAS, in addition to continuing to other joint projects, the parties also now have determined to work together on such neighborhood park on the terms and conditions set out herein.

NOW, THEREFORE, in consideration of their mutual promises and obligations, the parties agree as follows:

1. Recitals. The Recitals set out above are true and correct.

2. City Obligations.

A. Purchase of Property. The City has purchased and has title to the property described in Exhibit "A", attached hereto and incorporated by reference (the "Property").

B. Design of Improvements. The City will work with DRD on the process and schedule to identify a mutually acceptable design of the Park.

C. Construction. The City will work with DRD during the construction of the Park and provide input as needed and required by this Agreement.

3. DRD Obligations.

A. Develop the Park. DRD shall work with the City to develop schedules for determination of use, design and construction of the Park.

B. Design. DRD shall be responsible for the process of selecting and contracting for all design services necessary to design the Park, in compliance with all applicable local, state and federal laws. This includes, but is not limited to, scheduling and implementing design workshops, preparing final design, plans, and specifications that will be the basis for the bid and construction of the Park, and obtaining all applicable environmental clearances and permits necessary to construct the Park. DRD shall provide City a reasonable opportunity to review and approve all design documents generated for the Park, which will be relied upon by the selected contractor to construct the Park. Upon completion of the Park design, DRD will provide to City an accounting and invoice of the actual design costs for the Park. This shall include any documents, requirements, evidence or information in DRD's possession that City may reasonably request with regard to the design costs, including, but not limited to, final invoices, records, change order documents, payment invoices, cancelled checks and other necessary documents.

C. Construction. DRD shall be responsible for procuring all construction services necessary to complete the Park. DRD will take any and all actions necessary to manage and complete construction of the Park as provided in this Agreement, including, without limitation, preparing contract documents, soliciting and obtaining bids for the construction of the Park, hiring contractors, securing necessary permits and other approvals, construction inspection, construction, and construction management. DRD shall include, in its contract with the contractor, a requirement that the contractor include the City, its officials, officers, employees and agents as additional insureds and indemnify the same parties. Selection of the contractor to construct the Park will be in compliance with all applicable local, state and federal laws including, without limitation, the California Public Contract Code and the California Labor Code. DRD shall obtain the City's input on contract documents and selecting the contractor and the City and DRD shall work together to address issues which arise during the construction process. Change orders shall be approved by both the City and DRD. In the event that before completion of construction of Park, DRD's total Costs as defined below equal or exceed \$900,000, DRD may notify the City to provide funding to complete construction once DRD reaches its Maximum Expenditure. Such funding will be provided by City either as direct payment to contractors or by providing funds to DRD. After DRD reaches its Maximum Expenditure, DRD is under no obligation to advance its own funds to pay for the costs of construction.

4. Mutual Obligations.

A. Costs. As used herein, "Costs" includes all costs to acquire the Property (due diligence, purchase, realtor, escrow, title insurance and related fees), all costs to design the Park, including, but not limited to, preparation of plans and specifications and all applicable environmental clearances and permits, all costs to construct the Park, including but not limited to, grading, bidding, construction, construction management, construction inspection, security, purchase of improvements, installation of improvements, any cost of utility services, and plans, fees and costs for permits from the City and other public agencies with jurisdiction of the improvements, unless otherwise waived. "Costs" do not include the cost of any maintenance or operations of the Park upon completion of the Park or any capital costs to repair, replace or add improvements to the Park or the value of any fees that have been waived.

B. Maximum expenditure. The City and DRD will each provide 50% of the Costs in an amount not to exceed \$1 million per party (the "Maximum Expenditure"). In the event

the Costs exceed \$2 million, the City solely shall be responsible for the Costs that exceed \$2 million.

C. Determination of Costs. Within thirty (30) days of acceptance of the Park by the City from DRD, City shall provide DRD with an accounting of all of the City's Costs. DRD shall provide the City with an accounting of all of the design and construction costs and any funds advanced to pay such Costs. The parties will work cooperatively to agree to a final accounting of the Costs, including determining whether or not one party owes the other party payment of funds in accordance with the cost sharing obligations in this Agreement. Any outstanding balance shall be paid by the responsible party within thirty (30) days of the parties agreeing to the final accounting.

D. Resolution of Disputes Regarding Costs. In the event there is a dispute regarding the nature or amount of any Costs, the parties shall work together through the City Manager or designee ("City Manager") and General Manager or designee ("General Manager") to resolve the issues. If the City Manager and General Manager cannot resolve the dispute, either party may request in writing that the dispute be submitted to further dispute resolution procedures, e.g. nonbinding mediation, as may be agreed upon by the parties.

5. Recreational Programs and Facilities Use; Fees and Charges.

A. The City retains the right to set Park hours and permitted uses of the Park in coordination with DRD. The City retains the right to request, add, review or approve programming at the Park in coordination with DRD.

B. Except as determined by City, DRD shall provide for recreational programs and services as set out on Exhibit B, to be attached and incorporated upon determination of the type, use and design of the Park as set out above. If applicable, DRD shall handle any facilities rentals using its District facilities rental procedures and forms. All facilities use and program participation forms and waivers shall indemnify and hold harmless the City, its officers, agents and employees from any and all liability. No later than March 15 of each fiscal year, the City shall provide DRD with a list of programs or services for the coming year that it wishes to continue, add, modify, or delete. DRD thereafter shall coordinate with the City regarding such requests before finalizing programs for the coming fiscal/program year. If during the fiscal or program year the City wishes to add programs, the City Manager shall contact the DRD General Manager and make such request. DRD shall use its best efforts to accommodate such request.

C. In the event any fees are charged at the Park, DRD shall set and retain any and all fees and charges to the public for recreational programs or Park use pursuant to the current DRD Fees and Charges Manual and shall provide coordinate such fees with City as set out below. Such amounts shall increase annually by the Consumer Price Index as provided by the DRD Fees and Charges Manual. In the event of an unexpected increase in the cost of supplies or materials, such fees may be revised during the fiscal year as allowed by law. Alternatively, DRD may provide City the opportunity to assist with the payment of such costs on a one-time or on-going basis. DRD shall retain all funds collected to be used to support maintenance and operations activities at the Park.

D. Annually, during its preliminary budget process, DRD may review and revise its fees and charges using the process set out in its Fees and Charges Manual. DRD will notify the City Manager or designee of any proposed change in fees under this Agreement and shall use its best efforts to obtain City review and ratification prior to adoption of DRD's final budget.

6. Maintenance, Repairs and Capital Improvements

A. DRD shall be responsible at its sole expense for ongoing maintenance and operations of the Park after completion and acceptance of the Park by the City. The parties shall agree upon the scope of such maintenance and operations as soon as the type, use and design of the Park has been agreed upon between them and shall incorporate that scope in a written document attached to this Agreement as Exhibit C and incorporated herein by this reference. Such services shall be reviewed annually at the same time as programs are review and may be modified from time to time by mutual agreement of the parties in writing. The Park shall be operated in accordance with all City and DRD regulations, including, but not limited, to hours of operations and permitted uses. Where those regulations conflict, City regulations shall prevail.

B. DRD will be responsible for capital improvements and replacements at the Park up to a cost of \$5,000.

C. City shall be responsible to pay for trash services at the Park under its solid waste franchise agreement. DRD shall be responsible for utilities at the Park, including, but not limited to, water, power and internet (to the extent internet is provided).

D. City shall be responsible for the cost of capital improvements and replacements at the Park in excess of \$5,000. DRD will plan, coordinate and execute agreed upon capital improvements and replacements to the Park in excess of \$5,000 at the City's expense. If performed by DRD, DRD shall follow the design and construction obligations of DRD in this Agreement. Notwithstanding the foregoing, the City reserves the right to make such capital improvements itself.

E. Annually in advance of the City's budget process, the parties shall meet and agree upon replacements or capital improvements to the Park for that upcoming fiscal year. If agreed upon, the City thereafter shall budget for such costs.

F. In the event of an emergency, DRD shall take the necessary actions to contain the emergency and the parties then shall meet and confer regarding the responsibility for remediation and extent of insurance coverage.

7. Marketing and Promotional Materials. Both City and/or DRD may include the Park in its marketing or promotional materials without additional consent from the other party.

8. Compliance with Laws/Non Discrimination. The services under this Agreement shall be provided in accordance with applicable local, state, and federal laws and regulations and specifically without discrimination as to protected categories of users.

9. Insurance.

A. City and DRD mutually represent and acknowledge that both are members of the California Joint Powers Insurance Authority (“JPIA”), a municipal self-insurance pool. The California JPIA provides liability coverage, including general liability and automobile liability, to the City and DRD.

B. If at any point during the term of this Agreement, City or DRD no longer receive liability coverage through the California JPIA, the parties mutually agree to renegotiate the insurance requirements contained herein.

C. City and DRD shall procure and maintain at all times during the term of this Agreement, Workers’ Compensation (statutory limits) and Employer’s Liability insurance in the minimum amount of \$1,000,000 per accident or disease. City and DRD agree to waive subrogation against the other party, and shall compel their workers’ compensation insurers to do the same.

10. Indemnification.

A. City shall be responsible for all damages to persons or property that occur as a result of City’s or its officers, agents, employees, and/or servants fault or negligence in connection with this Agreement. Further, City shall indemnify, defend, and save harmless DRD, its officers, agents, employees, and servants from all claims, suits, or actions of every name, kind, description, brought for, or on account of, injuries to or death of any person or damage to property resulting from the fault or negligence of City, its officers, agents, employees, and/or servants in connection with this Agreement.

B. DRD shall be responsible for all damages to persons or property that occur as a result of DRD’s or its officers, agents, employees, and/or servants fault or negligence in connection with this Agreement. Further, DRD shall indemnify, defend, and save harmless City, its officers, agents, employees, and servants from all claims, suits, or actions of every name, kind, description, brought for, or on account of, injuries to or death of any person or damage to property resulting from the fault or negligence of DRD, its officers, agents, employees, and/or servants in connection with this Agreement.

11. Relationship of the Parties. In order to carry out the provisions of to this Agreement, each party shall hire and supervise personnel in accordance with its own personnel rules and regulations and the specific provisions of this Agreement. This Agreement does not and shall not be deemed to create an employment relationship between the City and DRD employees, DRD and City employees, or a joint venture between the City and DRD.

12. Emergency Contacts. Each party shall provide the other with twenty-four (24) hour emergency contacts and revise such contacts to keep them current.

13. Ownership, Term and Termination.

A. Ownership. Notwithstanding anything in this Agreement, the City shall be the sole owner of the Property and the Park, including any and all improvements to the Park.

B. Term. The term of this Agreement shall be for twenty (20) years commencing as of the last date of execution of this Agreement by both parties (the “Initial Term”).

Thereafter, the Agreement shall automatically renew for an additional one (1) year period, in perpetuity, unless either party gives the other party at least one year's prior written notice of termination.

C. Termination for Convenience. City may, by written notice to DRD, terminate the whole or any part of this Agreement at any time and without cause by giving written notice to DRD of such termination, and specifying the effective date thereof, at least sixty (60) consecutive calendar before the effective date of such termination. Upon termination, the City may sell the Property, repurpose the Property, or do as it may with the Property. If the City terminates this Agreement for convenience prior to the expiration of the Initial Term, the City shall reimburse DRD for any and all Costs expended by DRD prior to termination on a pro rata basis and DRD shall be entitled to no further compensation. For example purposes only, if DRD expends \$1,000,000 in Costs and the City terminates this Agreement after ten (10) years, the City will reimburse DRD \$500,000.

D. Termination for Default: In the event that either party consistently repeatedly defaults in the performance of a material term or condition of this Agreement, prior to any notice of termination, the non-defaulting party shall give notice to the defaulting party as follows.

(a) The representative for the non-defaulting party first orally shall discuss the default with the representative of the other party.

(b) The non-defaulting party shall give notice of the specific default(s) and the proposed cure and shall allow at least 30 calendar days in which to cure or commence a cure. In the event that public health and safety is at risk the period for cure shall be 5 or fewer calendar days.

(c) In the event that the default is not cured or a cure commenced within the time frames in subsection (b), the non-defaulting party may give 45 days' prior written notice of termination of the Agreement. In the event that public health and safety is at risk, the notice period shall be 10 calendar days.

14. Amendments. Except as otherwise provided in this Agreement, any amendment, modification, or variation from the terms of this Agreement shall be in writing and shall be effective only upon approval by the DRD General Manager or Board of Directors (as applicable) and the City Manager. No waiver of any term or condition of this Agreement shall be a continuing waiver thereof. This Agreement constitutes the entire agreement of the parties as to the subject matter hereof, and supersedes any other agreements, whether written or oral.

15. Contact Persons and Notice. All notices or demands of any kind served by either party to this Agreement by the other will be in writing and will be personally delivered or mailed by registered or certified mail, return receipt requested addressed to the representative of each party as set out here:

City Manager
City of Indian Wells
44950 El Dorado Drive

General Manager
Desert Recreation District
45-305 Oasis St.

16. Force Majeure. Performance by either party hereunder shall not be deemed to be in default, or considered to be a default, where delays or defaults are due to the force majeure including, without limitation, events of war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, casualties, acts of God, acts of the public enemy, pandemics, epidemics, quarantine restrictions, freight embargoes or lack of transportation, unusually severe weather-caused delays, inability to secure necessary labor, materials or tools, delays of any contractors, subcontractor or supplier (which are not attributable to the fault of the party claiming an extension of time to prepare or acts or failure to act of any public or governmental agency or entity) or any delay caused by a third party, including, without limitation, independent vendors and suppliers, whose performance is not within the control of the party. Extension of time for any such force majeure cause shall be for the period of the enforced delay and shall commence on the first date of occurrence of the delay. The party seeking to invoke such force majeure provision shall give written notice to the other party within five (5) business days of the date that the force majeure event has occurred, specifying (i) the first date from which the enforced delay commenced and the actual or the expected final date, as applicable, for which an enforced delay extension of time of performance is then being sought, and (ii) a description of the particular circumstances, events, facts or occurrences which have given rise to the force majeure.

17. Litigation Costs. In the event an action is filed by either party to enforce any rights or obligations under this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees and court costs in addition to any other relief granted by the court.

18. Interpretation of Agreement. The use of the words "shall" or "must" or similar words within this Agreement is not intended to and does not create a mandatory duty of any kind.

19. Authority to Execute Agreement. Both the City and the DRD covenant that each individual executing this Agreement on behalf of each party is a person authorized to do so.

20. Assignment of Agreement. Neither party may assign or transfer its respective rights or obligations under this Agreement without the express written consent of the other party. Any purported assignment or transfer by one party without the express written consent of the other party shall be null and void and of no force or effect.

[SIGNATURES ON NEXT PAGE]

SIGNATURE PAGE FOR AGREEMENT BETWEEN THE CITY OF INDIAN WELLS AND THE DESERT RECREATION DISTRICT FOR COOPERATIVE PARK AND RECREATION DEVELOPMENT, MAINTENANCE AND PROGRAMMING SERVICES

IN WITNESS WHEREOF, the parties have signed this Agreement on the dates set forth below:

Dated: January 18, 2022

CITY OF INDIAN WELLS ^{K.M.}
E-SIGNED by Christopher Freeland
on 2022-01-18 14:13:22 PST
By: _____
Christopher J. Freeland
City Manager

Dated: January 18, 2022

ATTEST
E-SIGNED by Angelica Avila
on 2022-01-18 14:14:30 PST
By: _____
Angelica Avila
City Clerk

Dated: January 19, 2022

DESERT RECREATION DISTRICT
E-SIGNED by Kevin Kalman
on 2022-01-19 11:23:45 PST
By: _____
Kevin Kalman, General Manager

APPROVED AS TO FORM:

Dated: January 18, 2022

E-SIGNED by Todd Leishman
on 2022-01-18 09:28:24 PST

Best, Best & Krieger
Attorney for City of Indian Wells

Dated: January 19, 2022

E-SIGNED by Elizabeth Martyn
on 2022-01-19 11:13:54 PST

Elizabeth Martyn, Cole Huber
Attorney for Desert Recreation District

EXHIBIT A

Legal Description

Lots 5 and 6 of Tract No. 2056, in the City of Indian Wells, County of Riverside, State of California, As per map recorded in Book 38 ages 95 and 96 of Maps, in the office of the County Recorder of said County.

EXHIBIT B

RECREATIONAL PROGRAMS AT THE PARK

To be provided

EXHIBIT C

OPERATION AND MAINTENANCE SERVICES

To be provided