

**Second Extension and Amendment  
Of  
Operator Agreement between  
The City of Pleasanton and Pleasanton Golf, LLC**

This Extension and Amendment of Operator Agreement between the City of Pleasanton and Pleasanton Golf, LLC ("Extension Agreement") is entered into this \_\_\_\_ day of \_\_\_\_, 2020, by and between the City of Pleasanton ("CITY"), a municipal corporation, and Pleasanton Golf, LLC, a California limited liability company ("OPERATOR").

**RECITALS**

1. On or about June 1, 2010, CITY and OPERATOR entered into Operator Agreement between The City of Pleasanton and Pleasanton Golf, LLC ("Operator Agreement").
2. On or about April 21, 2015, CITY and OPERATOR extended the Operator Agreement for an additional 5-year period.
3. The term of the Operator Agreement expires on December 31, 2020.
4. Section 2.02 of the Operator Agreement provides that the Operator Agreement may be extended by the mutual written agreement of CITY and OPERATOR.
5. CITY and OPERATOR now desire to amend certain provisions and to extend the term of the Operator Agreement in accordance with the terms and provisions set forth in this Extension Agreement.

NOW, THEREFORE, in consideration for the mutual promises hereinafter set forth, the parties hereto agree to amend the Operator Agreement as follows:

**1. DEFINITIONS.**

All capitalized terms used in this Extension Agreement shall have the meanings set forth in the Operator Agreement unless otherwise expressly set forth in this Extension Agreement. The following language is added to Section 1.0 Definitions:

- 1.85 **Claim.** "Claim" is any claim, demand, obligation, cause of action, lawsuit, damage, loss, liability, cost or expense (including without limitation attorneys' fees and other litigation, mediation, arbitration or judicial reference expenses), of every kind and character, whether based on tort, contract, or equitable principles, in connection with any of the activities and obligations of OPERATOR or any of its affiliates, employees, contractors, or related entities related to this Agreement.

Section 1.39, **Insurance Requirements**, is amended to add the following sentence after the existing sentence: Moreover, Insurance Requirements include all policies of insurance necessary to ensure that the CITY is fully covered for any Claims asserted by any party.

**2. TERM AND EFFECTIVE DATE.**

The term in Section 2.01 of the Operator Agreement as amended and extended by this Extension Agreement shall end on June 30, 2025 unless otherwise terminated or cancelled pursuant to Section 12.02.2 of the Operator Agreement. The Effective Date of this Extension Agreement shall be July 1, 2020.

The City and Operator shall have the right, but not the obligation to extend this agreement for one additional three (3) years and one two (2) additional year periods by either party giving written notice no sooner than 12 months and no later than 6 months prior to the expiration of the current term and the subsequent extension.

**3. MANAGEMENT AND INCENTIVE FEES TO OPERATOR.**

Commencing on and effective as of July 1, 2020, Sections 8.03 and 8.04 of the Operator Agreement shall be amended and restated in their entirety as follows:

**8.03 Fixed Management Fee.**

**8.03.01 Annual Fixed Management Fee.** The annual fixed management fee to be paid to OPERATOR ("Fixed Management Fee") shall represent 80% of the Total Management Fee Attainable as follows:

<u>Operating Year</u>	<u>Total Management Fee Attainable</u>	<u>80% Fixed Fee</u>
July 1, 2020 to June 30, 2021	\$150,000	\$120,00

On July 1, 2021 and on each July 1<sup>st</sup> thereafter the amounts indicated above, for the ensuing year, shall be increased in the same proportion as changes in the Consumer Price Index, All Urban Consumers, San Francisco-Oakland-San Jose area; base years 1982-1984 = 100 published by the U.S. Dept. of Labor, ("CPI") shall have occurred since July 1, 2020.

**8.03.02 Payment of Fee.** The Fixed Management Fee shall be paid in equal monthly installments on the last day of each month.

**8.04 Incentive Management Fee.**

**8.04.1. Incentive Management Fee.** In addition to the Fixed Management Fee, CITY shall pay OPERATOR an incentive fee of up to 20% of the Total Management Fee Attainable (as set forth in Section 8.03.1) (the "Incentive Management Fee"). The intent of the Incentive Management Fee is to provide an incentive to OPERATOR to improve the marketing and quality of the Golf Course, thereby increasing the number of rounds of golf and Gross Revenues. CITY shall pay OPERATOR an Incentive Management Fee equal to: (a) fifteen percent (15%) of the difference between the Gross Revenues (excluding food and beverage sales, Pro Shop merchandise sales and lesson fees) and the Base Performance Standard for Golf set forth in Section 8.04.2 if the Base Performance Standard for Golf is met; and (b) fifteen percent (15%) of the difference between the Gross Revenues from both food and beverage sales and Pro Shop merchandise

sales and the Base Performance Standard for Merchandise and Food/Beverage set forth in Section 8.04.3 if the Base Performance Standard for Merchandise and Food/Beverage is met.

**8.04.2 Base Performance Standards for Golf.** CITY shall pay OPERATOR that portion of the Incentive Management Fee described in subsection 8.04.1(a) above if the following base performance standard for Gross Revenues excluding food and beverage sales, Pro Shop merchandise sales and lesson fees (the "Base Performance Standard for Golf") is met or exceeded:

Contract Year beginning July 1, 2020	\$3,000,000
--------------------------------------	-------------

To increase Annually by CPI

**8.04.3 Base Performance Standard for Merchandise and Food/Beverage.** City shall pay OPERATOR portion of the Incentive Management Fee described in Section 8.04.1(b) if the following base performance standard and revenue generated from food and beverage and Pro Shop merchandise sales ("the Base Performance Standard for Merchandise and Food and Beverage") is met or exceeded:

Contract Year beginning July 1, 2020	\$1,100,000
--------------------------------------	-------------

To Increase Annually by CPI

**8.04.4 Payment.** The amount of Incentive Management Fee earned in a month will be determined by comparing actual monthly revenues to the Base Performance Standard for Golf and the Base Performance Standard for Merchandise and Food/Beverage, with each month's Base Performance Standard factored by a mutually agreed upon percentage of the year. The Incentive Management Fee is to be calculated on a monthly basis and paid on a quarterly basis. Any adjustment to the annual Incentive Management Fee will be accounted for in the last month of the operating year.

**8.04.5 Correction to Gross Revenues and Incentive Management Fee.** If an inspection or audit pursuant to Article 10.0 results in a correction of the amount of Gross Revenues: a) CITY shall pay OPERATOR any additional Incentive Management Fee amount pursuant to Section 8.04 within thirty (30) days of receipt of notice of the correction, if the amount of Gross Revenues, or if the revenue from food/beverage sales and Pro Shop merchandise sales has been adjusted upward; or b) OPERATOR shall refund to CITY the amount of any overpayment of the Incentive Management Fee pursuant to Section 8.04 within thirty (30) days of receipt of notice of the correction, if the amount of Gross Revenues, or if the revenue from food/beverage sales and Pro Shop merchandise sales has been adjusted downward.

#### **4. OPERATOR'S SERVICE OBLIGATIONS.**

Commencing on and effective as of July 1, 2020, Section 4.01 of the Operator Agreement shall be amended and restated in its entirety as follows:

4.01 **Golf Professional Services.** OPERATOR shall sell, rent, and repair golf equipment; sell golf-related clothing and supplies; provide instructional services in the playing of golf; rent golf carts; and operate a driving range. Such services shall be provided by or under the on-Premises direct supervision of the Golf Professional.

4.01.1 **Pro Shop and Merchandise.** The Pro Shop shall be open on the dates and at the time provided in the Golf Course Manual.

a) Inventory. OPERATOR shall procure and maintain in the Pro Shop such inventory of golf merchandise as deemed necessary or appropriate to adequately meet public demand and consistent with the goal in Section 3.02.2.

b) Mark Down of Merchandise. Merchandise that can reasonably be classified as “stale” or “unsellable” may be marked down. After six (6) months, if OPERATOR determines that any aged merchandise in the Pro Shop cannot be sold or should not be sold because of the reputation or image of the Pro Shop, then OPERATOR may sell the merchandise at less than cost and include the payment for the merchandise in the Gross Revenues.

4.01.2 Golf Instruction. OPERATOR shall provide for golf instruction by qualified instructors supervised by the Golf Professional. All instructors shall be PGA or LPGA Class A golf professionals or apprentices, unless otherwise approved by Director. All golf instructors shall be employees, unless OPERATOR proposes an alternative plan that is approved by the Director. OPERATOR shall cause all golf instructors to comply with the rules and regulations set forth in the Golf Course Manual. It is expected that the Golf Professional and instructors will provide tips and mini-lessons at no cost to golfers. All golf instructors shall carry insurance covering their work and the CITY shall be named as an additional insured under such policies. In all events, golf instructors shall indemnify and defend the CITY for any and all claims of any nature arising out of or related to any actions taken by, or not taken by, any such golf professionals, apprentices, or instructors.

a) Availability. There shall be a PGA or LPGA Class A golf professional or apprentice available to answer questions and address customer concerns in the Pro Shop.

b) City-Sponsored Recreation Classes. The OPERATOR shall work in conjunction with the Director to provide group lessons at the driving range, putting greens and Course as a part of the CITY-sponsored Library and Recreation Department classes.

c) Junior Golf Programs. As provided in the Manual, OPERATOR shall organize and implement junior golf programs through CITY’s Library and Recreation Department, Recreation Division.

4.01.3 Golf Carts. OPERATOR shall procure by lease on behalf of the CITY and maintain in good condition power-driven golf carts in sufficient numbers to meet the public demand as set for in the Golf Course Manual. If the term of such leases extend beyond the term of this Agreement, OPERATOR shall assign, and CITY shall assume, such leases. The Director shall have the right, in Director’s sole and absolute discretion, to require a change in the number or types of golf carts in use at the Golf Course; provided, however, that the CITY shall increase or decrease the applicable Direct Cost Budget(s) reasonably to account for resulting increased or decreased Direct Costs. Prior to procuring golf carts, OPERATOR shall give Director written documentation concerning the type of golf cart to be leased. OPERATOR shall lease golf carts in accordance with Director’s written approval. All carts shall be 4-wheel, electric vehicles, aside from those carts necessary to accommodate ADA golfers, and shall be equipped with canopies, windshields, and sand and seed containers and holders. OPERATOR may prohibit the use of golf carts on the Golf Course whenever weather conditions expose the user to danger of the Golf Course to damage. OPERATOR shall employ an on-site mechanic who is able to repair and maintain the golf carts.

4.01.4 Driving Range. OPERATOR shall operate and manage all driving range operations, and procure and maintain all equipment necessary and appropriate to meet the goal set forth in Section 3.02.2. Driving range balls shall be of high quality, and all cracked and worn range balls shall be removed in a

timely manner. OPERATOR shall be solely responsible for the safe operation of the driving range and shall fully indemnify and defend the CITY against any Claims related thereto or arising from its use.

4.01.5 Golf Course Starter Services. OPERATOR shall render and provide Golf Course starter services including, but not limited to, opening and closing the Golf Course at the times set forth in the Golf Course Manual, collecting green fees, collecting tournament fees, taking reservations from the telephone and at the Golf Course and recording the reservations on starter sheets, placing golfers' names on a call sheet as necessary and appropriate, sending golfers to the tee and starting them off at proper intervals, receiving request from groups for tournaments, booking tournaments and collecting appropriate fees prior to each tournament's starting date, coordinating tournament food and beverage needs, ensuring tournament directors have obtained proper insurance coverage, taking all actions as necessary and appropriate to speed play on the Golf Course, entering each golfer's name on the automated tee sheet and issuing a receipt to each golfer upon payment of the applicable green fee. OPERATOR shall maintain a Point of Sale system that tracks number of rounds played and fees collected by fee category, including resident and non-resident rounds, on a daily basis. Such information shall be made available for review by the Director, as requested.

OPERATOR shall schedule reserved starting times for tournaments in accordance with procedures established in the Golf Course Manual and by the Director.

Totals on the number of rounds of play by fee categories and by resident/non-resident categories shall be submitted to CITY's Finance Department on a monthly basis using forms approved in writing by the Director in the Director's sole and absolute discretion.

4.01.6 Marshaling Time. OPERATOR shall procure the services of marshals at such times and in such numbers as necessary and appropriate to expedite play and ensure compliance with all rules and regulations.,

Commencing on and effective as of July 1, 2020, Section 4.04 of the Operator Agreement shall have the following language added to the end of the current section: If such parking program is required, OPERATOR shall purchase insurance in an amount not less than five million dollars (\$5,000,000) and shall name the CITY as an additional insured. OPERATOR shall be solely responsible for all claims and losses of whatever nature arising from or related to any such parking program.

Commencing on and effective as of July 1, 2020, Section 4.05 of the Operator Agreement shall have the following language added to the end of the current section: OPERATOR shall defend and indemnify the CITY for any claims related to or arising out of any food and beverage services.

Commencing on and effective as of July 1, 2020, Section 4.02.6 of the Operator Agreement shall have the following language added to the end of the current section: OPERATOR shall defend and indemnify the CITY for any claims related to or arising out of any service of alcohol at the Premises.

Commencing on and effective as of July 1, 2020, Section 4.07 of the Operator Agreement shall have the following language added to the end of the current section: OPERATOR shall defend and indemnify the CITY for any claims related to or arising out of any grounds maintenance services.

Commencing on and effective as of July 1, 2020, Section 4.08 of the Operator Agreement shall be amended and restated in its entirety as follows:

4.08 **Parking Lot Maintenance Services.** OPERATOR shall keep all parking lots on the Premises in a clean, good, and safe condition. Any failure to maintain the parking lot in safe conditions shall be the sole responsibility of OPERATOR and OPERATOR shall defend and indemnify the CITY for any

and all Claims related thereto. OPERATOR shall provide normal (non-capital) parking lot maintenance services, including, but not limited to, daily trash removal and landscaping maintenance. All costs of such parking lot maintenance will be Direct Costs. CITY shall be responsible for arranging sweepings of the parking lot twice per month.

## 5. OTHER CHANGES TO THE OPERATOR AGREEMENT

Section 3.03 is amended to add the following at the end of the section: Finally, OPERATOR warrants and represents that any tender of defense or indemnity obligations presented by the CITY shall be accepted within 7 business days absent clear and convincing evidence such obligations are inapplicable.

Section 3.04.3 is amended to add the following at the end of the section: OPERATOR has the sole obligation to maintain the Premises in safe condition.

Section 5.01(k) is amended to substitute the word “Claims” where the word “claims” is currently used.

Section 5.03 is amended and restated as follows:

- 5.03 **Contracts and Agreements.** All third party contracts related to the operation and maintenance of the Golf Course (including without limitation golf professional contracts, contracts for maintenance and repair services, pest control, supplies, landscaping services, and contracts for tournaments, banquets, and other group functions) shall abide by the requirements of this section, which shall be included in the contract. All such third party contracts shall have provisions requirement the CITY to be named as an additional named insured on all applicable insurance policies and shall require the third parties to defend and indemnify the CITY against any and all Claims arising from any services, products, or actions related to such contracts. Except as provided in this Agreement, all leases and financing agreements for Furnishings and Equipment, and all contracts and agreements relating to the operation and maintenance of the Golf Course entered into during the term of this Agreement which are not already in the CITY’s name, shall be entered into by OPERATOR as the contracting party. If the term of the lease, financing agreement, or other contract or agreement is for more than one year, extends beyond the term of this Agreement or the date for performance under such lease, agreement or contract is after this Agreement terminates, then prior approval of the Director is required. If the Director has approved the lease, agreement or contract, CITY shall assume any assignments of such lease, agreement or contract.

Section 5.09 is amended to add the following at the end of the section: OPERATOR shall be solely liable for any defense costs or settlements related to any such incidents.

Section 8.01.1(v) is stricken.

Section 8.01.3 is amended to add the following subsection d) at the end of the section:

- d) Legal fees related to defense obligations or indemnity costs due to any Claims related to OPERATOR’S alleged negligence (whether in whole or in part).

Section 11.01.1(c)(i) is amended and restated as follows:

The City, its officers, officials, employees, affiliates, representatives, and volunteers are to be covered as additional insureds relating to any and all matters covered by this Agreement, including but not limited to” liability arising out of activities performed by or on behalf of the

OPERATOR; products and completed operations of the OPERATOR; premises owned, occupied, or used by the OPERATOR; or automobiles owned, leased, hired or borrowed by the OPERATOR. The coverage shall contain no special limitations on the scope of protection afforded to the CITY, its officers, officials, employees or volunteers.

The introductory paragraph of Section 11.04 is amended and restated as follows:

11.04 **Indemnification and Hold Harmless.** To the fullest extent permitted by law, OPERATOR shall indemnify, defend (with counsel reasonably satisfactory to CITY), and hold harmless CITY and its affiliates and any of their respective elective and appointive boards, commissions, officers, agent, members, managers, representatives, shareholders, directors, partners, employees, successors and assigns, if any (collectively “Indemnitees”) from and against any and all Claims. OPERATOR’s obligation to defend and indemnify the Indemnitees shall apply even if the Claim was caused by the active and/or passive negligence or other misconduct of the Indemnitees. This Agreement shall not, however, obligate OPERATOR to indemnify any Indemnitee for any Claims arising from the sole negligence or willful misconduct of that Indemnitee. Nothing in OPERATOR’s indemnity obligations shall be construed to negate, abridge or otherwise reduce any of CITY’s other rights of indemnity which would otherwise exist. OPERATOR’s obligation shall include Claims based on duties, obligations or liabilities imposed on the Indemnitees by Law and Claims based on theories of peculiar risks or non-delegable duty arising from conditions of the Facilities or Premises. OPERATOR’s indemnification obligation hereunder shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the OPERATOR under any worker’s compensation acts, disability benefits acts or other employee benefits acts. Payments by OPERATOR on behalf of the Indemnitees shall be in addition to any and all other legal remedies available to the Indemnitees and shall not be considered the Indemnitee’s exclusive remedy. OPERATOR’s obligations under this paragraph shall survive the expiration or any termination of this Agreement.

Section 11.06 is amended and restated as follows:

11.06 **Handling of Claims.** OPERATOR shall be responsible for handling all Claims, demands, and lawsuits for any losses, damages, liability, and expenses (including, without limitation, personal injury and property damage Claims), whether or not such Claims are covered by the insurance required under this Article 11.0. Handling such Claims shall include, without limitation, responding to such Claims within 3 business days, investigating such Claims, retaining legal counsel to defend such Claims, settling such Claims, and paying any losses, damages, and expenses related to such Claims or overseeing the insurance carrier’s activities in this regard. CITY shall have the right to approve any legal counsel retained by OPERATOR to defend the CITY. In the event of disagreement on legal counsel to be retained, CITY may designate legal counsel to be retained. OPERATOR shall use its best efforts to notify the CITY of any Claims or lawsuits relating to the Golf Course within three (3) days after OPERATOR receives notice of such Claims or lawsuits.

**6. OPERATOR AGREEMENT INCORPORATED AND TO REMAIN IN EFFECT.**

Except as expressly amended herein, the Operator Agreement shall remain in full force and effect throughout the term as extended by this Extension Agreement hereby and the parties agree to abide by such terms which are incorporated herein by this reference. In the event of any inconsistency between the provisions of this Extension Agreement and the provisions of the Operator Agreement, the provisions of this Operator Agreement shall control.

IN WITNESS WHEREOF, the undersigned have executed this Extension Agreement effective as of the date first above written.

CITY OF PLEASANTON:

OPERATOR – Pleasanton Golf, LLC

\_\_\_\_\_  
Nelson Fialho  
City Manager

By: \_\_\_\_\_  
Michael Sharp, President

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

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

ATTEST:

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

\_\_\_\_\_  
Karen Diaz, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Daniel Sodergren, City Attorney