

10-719c

## Operator Agreement between The City of Pleasanton and Lifetime Tennis, Inc.

This Agreement between the City of Pleasanton and Lifetime Tennis, Inc. ("Agreement") is entered into this 1<sup>st</sup> day of January 2011, by and between the City of Pleasanton ("CITY"), a municipal corporation, and Lifetime Tennis, Inc., a California S-Corp. ("LIFETIME TENNIS").

### RECITALS

- A. Within Pleasanton Tennis and Community Park ("Park"), the City owns tennis facilities, including ten (10) outdoor courts, clubroom and the administration building ("Facilities").
- B. CITY desires to utilize the services of LIFETIME TENNIS to schedule courts, teach group and private tennis lessons, conduct tournaments and socials, organize leagues, operate a retail/pro shop, wash the courts at least twice a month and undertake other related tennis services.
- C. LIFETIME TENNIS represents that it has the necessary experience and qualifications to provide these services and has submitted a proposal dated June 11, 2010, which is attached as Exhibit B and incorporated only to the extent consistent with this Agreement.
- D. CITY and LIFETIME TENNIS agree that the primary objectives for LIFETIME TENNIS's performance under this Agreement are to ensure high quality tennis programs and to generate revenues sufficient for operations.

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

### **1.0 DEFINITIONS.**

The following terms shall be defined as follows for the purposes of this Agreement:

- 1.01 **Annual Plan.** "Annual Plan" is defined in Section ~~3.06~~ <sup>3.07</sup> *JK*
- 1.02 **City.** "City" is the City of Pleasanton and owner of the Facilities.
- 1.03 **Director.** "Director" is CITY's Director of Community Services, or his or her designee.
- 1.04 **Effective Date.** "Effective Date" is defined in Section 2.01.
- 1.05 **Executive Director.** "Executive Director" is the owner of Lifetime Tennis, Inc., who is Dana Gill.

1.06 **Facilities.** “Facilities” are the ten (10) outdoor courts, bleachers, the administration building with restrooms, and a clubroom at the Pleasanton Tennis and Community Park (“Facilities”).

1.07 **Capital Expenditures.** “Capital Expenditures” are any equipment or alteration, addition, improvement, repair, replacement, rebuilding or renovation to the Pleasanton Tennis and Community Park, the cost of which exceeds Five Thousand Dollars (\$5,000.00), or whatever amount may be established for City departments in the future unless the adjustment is not approved by the Director, and which has a useful life of more than one (1) year.

1.08 **Furnishings and Equipment.** “Furnishings and Equipment” are all furniture, furnishings, trade fixtures, apparatus and equipment, including without limitation, cash registers, rental tennis rackets, ball equipment, benches, uniforms, kitchen equipment, appliances, office equipment, computers, copy machines, facsimile machines, telephone systems (not including pay telephones), and other personal property used in or held in storage for use in the operation of the Facilities, other than Resale Inventory.

1.09 **General Manager.** “General Manager” is LIFETIME TENNIS’s management representative at the Facilities as described in Section 5.01.4.

1.10 **Marketing and Promotional Plan.** “Marketing and Promotional Plan” is defined in Section 4.08.

1.11 **Operating Year.** “Operating Year” is the period from January 1 and each following twelve (12) calendar month period for the term of the Agreement.

1.12 **Park.** “Park” is the Pleasanton Tennis and Community Park located at 5801 Valley Avenue, Pleasanton.

1.13 **Pro Shop.** “Pro Shop” is the tennis professional shop located in the Facilities.

1.14 **Resale Inventory.** “Resale Inventory” is Pro Shop merchandise and food and beverage items.

1.15 **Supplies.** “Supplies” are consumable items used in or held in storage for use in the operation of the Facilities, including tennis balls, league or tournament awards, marketing trinkets, teaching aides, office supplies and other similar items, other than Resale Inventory.

1.16 **Tennis Professional.** “Tennis Professional” or “Tennis Pro” is LIFETIME TENNIS’s primary on-site tennis instructor as described in Section 5.01.4.

## 2.0 TERM.

2.01 **Term.** The term of this Agreement shall commence on January 1, 2011 (the "Effective Date") and continue until December 31, 2016.

2.02 **Extension.** CITY and LIFETIME TENNIS shall have the right, but not the obligation, upon their mutual agreement to extend the term of this Agreement, subject to such additional or other terms and provisions as the parties may agree in writing. The preceding sentence shall not obligate either party to extend the term of this Agreement. The failure of either party to agree to an extension of the term of this Agreement shall not be deemed a breach by such party of the covenant of good faith and fair dealing. If a party is interested in pursuing negotiations to extend the term of the Agreement, the party shall provide notice to the other party not later than twelve (12) months prior to the expiration of the term of the Agreement. No less than six (6) months prior to the expiration of the term of the Agreement, the parties shall enter into an extension of the Agreement or provide notice that the Agreement will not be extended and that Section 12.0, "Transition Procedures," of the Agreement is effective.

## 3.0 OWNERSHIP AND MANAGEMENT OF FACILITIES.

3.01 **Ownership.** Ownership of the Park and Facilities, and Furnishings and Equipment acquired by CITY, and all alterations, additions or betterments, shall remain with CITY. Ownership of Furnishings and Equipment acquired by LIFETIME TENNIS shall remain with LIFETIME TENNIS, unless acquired with City funds on behalf of City or if otherwise set forth in this Agreement or determined by the parties. CITY reserves the right from time to time during the term of this Agreement, to promulgate such reasonable rules and regulations concerning the use of the Park or Facilities and any part or parts thereof, as CITY, in its sole discretion, shall deem appropriate.

3.02 **Role of LIFETIME TENNIS.** Subject to the terms of this Agreement, CITY hereby retains LIFETIME TENNIS as an independent contractor, and LIFETIME TENNIS agrees, to: (i) implement the policies, standards, and schedules for the operation of the Facilities in accordance with this Agreement; (ii) hire, train, and supervise the Tennis Professional and all other employees and subcontractors if approved; (iii) supervise and direct all phases of advertising and business promotion for the Facilities, in addition to the City's Activity Guide; and (iv) procure and maintain Supplies, Furnishings and Equipment necessary and appropriate for the efficient operation of the Facilities.

3.03 **LIFETIME TENNIS Warranties.** LIFETIME TENNIS warrants and represents that it has full power and authority to enter into this Agreement and perform the obligations in this Agreement; that consummation of this Agreement will not create a default under any other agreement and will not violate any law, regulations, order, judgment, decree or rule; that LIFETIME TENNIS has conducted its own review of the Facilities prior to execution of this Agreement; and that LIFETIME TENNIS is not relying on any representation of the CITY in connection with the execution of this Agreement. LIFETIME TENNIS warrants and represents that it is authorized to transact business in the State of California and that all of LIFETIME

TENNIS's employees, and subcontractors if approved, are properly licensed and trained for their respective positions and responsibilities.

### 3.04 **Premises.**

3.04.1 **CITY's Right of Possession.** This Agreement does not constitute a lease and the right of possession of the Park and Facilities shall at all times remain with CITY. CITY and its authorized representatives shall have the right to enter the Facilities at any time without notice and for any purpose, including, without limitation, during the term of the Agreement. CITY reserves the right to establish, grant or utilize easements or rights-of-way over, under, along and across the Facilities.

3.04.2 **Condition of Premises.** LIFETIME TENNIS acknowledges that, except as expressly set forth in this Agreement, CITY has made no representations or warranties concerning the condition of the Facilities.

3.04.3 **Reservation of Facilities.** Lifetime shall have the ability to use the clubroom for activities, without the requirement to schedule through the City. However, Lifetime shall provide to the City a monthly schedule of clubroom usage.

The City's use of the clubroom for City activities or other public functions shall be coordinated through Lifetime, with the parties acknowledging that the City has the right to preempt / bump a scheduled use of the clubroom by Lifetime with at least two business days notice, and the City will use its best efforts to provide at least five business days notice.

Lifetime is responsible for daily maintenance of the clubroom unless the City is the scheduled user.

3.04.4 **Public Use.** LIFETIME TENNIS acknowledges that the Facilities are located in Park. LIFETIME TENNIS shall treat all who enter Facilities with consideration and courtesy.

3.04.5 **Notification to CITY of Defect or Illegal Activity.** LIFETIME TENNIS shall immediately notify CITY upon discovering a possible workmanship or material defect in any structure or improvement on the Facilities or upon discovery of any unauthorized or illegal dumping, disposal, use or activity at the Facilities or Park.

3.05 **Improvements.** Except in the event of an emergency threatening imminent injury to persons or damage to property, LIFETIME TENNIS shall make no improvements, additions, alterations or changes to the Pleasanton Tennis and Community Park ("Improvements") in excess of which would meet the definition of Capital Expenditure in Section 1.07, unless LIFETIME TENNIS: (i) obtains the prior written approval of the Director, which approval may be granted or withheld in the sole and absolute discretion of the Director; (ii) complies with such terms and conditions as may be imposed by the Director; (iii) secures all applicable licenses, permits and other governmental approvals for the Improvements; and (iv) causes the Improvements to be designed and constructed so as to be consistent with the architecture and design of the currently-existing , unless otherwise specifically approved by the Director in

writing. Any such Improvements shall be shown on as-built drawings that shall be delivered to the Director within thirty (30) days of completion of the work.

3.06 **Parking Lot Joint Use.** LIFETIME TENNIS acknowledges that the parking lot at the Park is a joint use facility used both by patrons of the Facilities and by persons accessing the Park. LIFETIME TENNIS shall reasonably observe the parking lot and promptly report to CITY any improper or illegal conduct.

3.07 **Annual Plan.**

3.07.1 **Preparation of the Annual Plan.** LIFETIME TENNIS shall submit to Director the Annual Plan for TENNIS for the next Operating Year ("Annual Plan") by February 1<sup>st</sup> prior to the start of that Operating Year.

3.07.2 **Contents of the Annual Plan.** The Annual Plan shall include:

a) Operating budget showing Tennis Expenses for previous year and estimates of all Tennis Expenses for the next Operating Year and for CITY's two-year budget, including expenditures for: (i) property operation and maintenance, (ii) repairs, replacements, and alterations which do not constitute Capital Expenditures, (iii) Furnishings and Equipment and Cost of Goods Sold, and (iv) advertising, sales, and business promotion;

b) Actual numbers for previous years and estimates for the following Operating Year for the following items: (i) Gross Revenues separated into court fees, lesson fees, camp fees, merchandise revenue, food and beverage revenue, and tournament revenue, (ii) number of employees, (iii) court usage categorized by weekday/weekend/holiday, time of day, rate and residents/nonresidents;

c) Capital Expenditures in previous years and budget for proposed Capital Expenditures ("Capital Budget");

d) Maintenance Plan including a report of maintenance activities undertaken during the current year as well as projections for the next Operating Year;

e) Marketing and Promotion Plan for TENNIS including a report of activities undertaken during the current year as well as projections for the next Operating Year; and

f) Results of the Service Audit Program conducted in previous years and plans for the next Operating Year.

3.07.3 **Approval of the Annual Plan.** The Director shall review the Annual Plan and make a recommendation to the Parks & Recreation Commission, which will act on any requested change to the fees. The City Council shall act on approval of the Annual Plan, with the City-wide budget process.

3.07.4 Quarterly Review of Annual Plan. The Director and the Executive Director of LIFETIME TENNIS shall meet quarterly and discuss the operating results of LIFETIME TENNIS. The parties shall agree upon any amendments or revisions to the Annual Plan to take into consideration variables or events that did not exist, or could not be anticipated by LIFETIME TENNIS or CITY, at the time the Annual Plan was prepared. Any revisions to the Annual Plan shall require approval of the Director, who in their sole and absolute discretion, may require further approval by the Parks & Recreation Commission and/or City Council.

3.08 **No Assignment.** LIFETIME TENNIS acknowledges that CITY is entering into this Agreement in reliance on the unique skill and experience of LIFETIME TENNIS and its employees. LIFETIME TENNIS shall not subcontract or assign all or any part of its right or obligations under this Agreement, unless approved in writing in advance by Director. Any change in the control of LIFETIME TENNIS, including, without limitation, any transfer or acquisition of a controlling percentage of LIFETIME TENNIS's equity or stock shall constitute an assignment for purposes of this Agreement.

#### **4.0 LIFETIME TENNIS'S SERVICE OBLIGATIONS.**

4.01 **Tennis Professional Services.** Lifetime staff shall register tennis classes, leagues, tournaments and instructional services and handle all financial transactions for such registration, as well as all financial transactions for merchandise, through Lifetime's own register.

4.02 **Pro Shop and Merchandise.** The Pro Shop shall be open when the Facilities are open. There shall be a representative of LIFETIME TENNIS to answer questions and address customer concerns in the Pro Shop during all hours of operation. LIFETIME TENNIS shall procure and maintain in the Pro Shop such inventory of tennis merchandise as deemed appropriate to adequately meet public demand.

4.03 **Tennis Instruction.** LIFETIME TENNIS shall provide instructors, who shall be USPTA professionals or apprentices, unless otherwise approved by Director. LIFETIME TENNIS shall cause all tennis instructors to comply with the rules and regulations set forth in this Agreement. All instructors shall be employees of LIFETIME TENNIS, unless LIFETIME TENNIS proposes an alternative plan that is approved in advance by the Director. If subcontractors are allowed, then each subcontractor shall be required to obtain a City of Pleasanton business license and to comply with all terms of this Agreement. LIFETIME TENNIS shall be deemed responsible for such approved subcontractors. LIFETIME TENNIS may teach private and group lessons utilizing six (6) courts for a maximum of eight (8) hours per day, unless otherwise approved by the Director in advance.

4.04 **Drop-In/Open Play.** Of the ten (10) courts at Facilities, LIFETIME TENNIS shall maintain one (1) nonreservation courts at all regular hours of operation for residents of Pleasanton, and four (4) courts shall be available for reservations during weekday evenings and weekend mornings.

4.05 **Youth Programs.**

4.05.1 **Manual.** The Tennis Professional shall develop an instructor's manual for youths, which shall include at a minimum:

- a) Class syllabus for each player skill level as identified by standardized teaching organizations;
- b) Useful drills and instructional techniques;
- c) Sample communications, flyers and/or letters regarding class content at each participant level;
- d) Information on player skill level rating system/class card system;
- e) Other information designed to help instructors with class participants and/or designed to enhance participant's experience.

4.05.2 **Classes.** LIFETIME TENNIS shall offer an assortment of classes for youth:

Little Tennis	1, 2, 3 (4-6 years old)	6:1 Student/Instructor ("SI") ratio
Youth Tennis	Beginner, Intermediate, Advance (6-10 years old)	8:1 S/I ratio
Youth Tennis	Beginner, Intermediate, Advance (11-15 years old)	8:1 S/I ratio
Junior Teams	Bronze, Silver, Gold (8-17 years old)	8:1 S/I ratio

4.05.3 **Camps.** LIFETIME TENNIS shall offer an assortment of tennis camps for youth during those weeks when Pleasanton schools are on vacation, with a minimum of eight (8) camps over the summer, two (2) camps over the December holidays, and one (1) camp over Spring Break.

Little Tennis	(4-6 years old)
Improvement	(6-15 years old)
Match Play	(8-15 years old)

4.06 **Adult Programs.**

4.06.1 **Rating System.** LIFETIME TENNIS shall develop a player skill rating.

4.06.2 **Classes.** LIFETIME TENNIS shall offer Adult Tennis classes at the following levels for players 16 years and older:

- a) Beginner, Advanced Beginner, Intermediate, Drill Class      8:1 S/I Ratio

4.07 **Special Populations.** LIFETIME TENNIS shall create and offer tennis programs for disabled persons and seniors.

4.08 **Marketing and Promotional Plan.** LIFETIME TENNIS shall implement the Marketing and Promotional Plan for the Facilities described in Section 3.06, including any necessary press releases or media information for promotion of tennis programs.

4.08.1 **Tournaments and Socials.** LIFETIME TENNIS shall create, plan, advertise, supervise and direct tournaments, socials and special events such as tennis exhibitions and tennis clinics. Responsibilities shall include, but are not limited to, creation of promotional materials, development of social themes, distribution of invitations or tournament entries, management of tournament entries and ladders, or other related duties to ensure successful production of the tournaments, socials or events.

4.08.3 **City's Activities Guide.** LIFETIME TENNIS shall supply the Director with a class schedule for the Department of Community Services Activities Guide by the deadlines outlined in the production schedule. CITY will provide space on the front and back cover(s) of the CITY's Activities Guide at least one (1) time within the first four (4) years of the contract period.

4.08.4 **Community Contacts.** The Tennis Professional shall join the Pleasanton Chamber of Commerce, at LIFETIME TENNIS's expense, and maintain contacts with key tennis activists in Pleasanton, as well as various youth and senior groups. The Executive Director shall conduct quarterly meetings with the Pleasanton Tennis & Community park users. Scheduled meeting shall be posted in advance in the tennis lobby.

4.08.6 **Adult Programs.** LIFETIME TENNIS shall promote both lunchtime lessons for adults and walk-on group reservations from local companies. LIFETIME TENNIS shall offer programs and organize playing opportunities for at-home parents, retirees, workers with flexible schedules, telecommuters, and persons on vacation.

4.08.07 **Publicity.** Any commercial advertisements, press releases, articles, or other media information not provided for in the Annual Marketing Plan shall be subject to the prior approval of the Director.

4.08.8 **Ownership of Work.** LIFETIME TENNIS grants City the right to use all manuals, flyers and documents prepared by LIFETIME TENNIS in the course of this Agreement.

4.09 **Level of Usage.** The City expects that the tennis court usage at the Facilities shall be fifty percent (estimated as 25,000 hours) or more of all available hours (estimated as 50,000 hours annually).

4.09.01 **Days and Hours of Operation.** The minimum hours of operation shall be:

Monday through Friday	8 a.m. – 10 p.m.
Saturday	8 a.m. – 9 p.m.



Sunday

8 a.m. – 8 p.m.

The Facilities will be closed Thanksgiving Day, Christmas Day and New Year's Day. The facility will be open special holiday hours on Easter, July 4<sup>th</sup>, Christmas Eve, and New Years Eve. LIFETIME TENNIS shall make no changes in the days and hours of operation for the Facilities without the prior written approval of the Director. Temporary suspension of play shall be determined by LIFETIME TENNIS in conjunction with the Director.

**4.10 Website.** LIFETIME TENNIS shall maintain its Pleasanton tennis program website. Content changes must be approved by the city. CITY shall provide a URL (link) for Tennis website on CITY's website and program registration module as feasible.

**4.11 Food and Beverage Services.** LIFETIME TENNIS may provide food and beverage service at the Facilities with the Director's prior approval. Alcohol sales are prohibited.

**4.12. Licenses.** LIFETIME TENNIS shall obtain and maintain for the term of this Agreement any and all health certificates, permits and licenses required by any federal, state or local governmental agency in connection with the services to be provided by LIFETIME TENNIS under this Agreement, including a City of Pleasanton business license.

**4.13 Maintenance Services.** Lifetime shall be responsible for the repair and maintenance of the Facilities. LIFETIME TENNIS shall be responsible for washing the courts at least two (2) times per month and general clean-up from LIFETIME TENNIS's activities and operations. Except in the event of an emergency threatening imminent injury to persons or damage to property, LIFETIME TENNIS shall make no improvements, additions, alterations or changes to the Facilities. Upon termination of this Agreement, the Facilities shall be returned to CITY in as good or better condition than at the start of the Agreement, reasonable wear and tear excepted. LIFETIME TENNIS shall promptly empty the trash containers at the Facilities if necessary when the containers are full during hours of operation. LIFETIME TENNIS shall use its best efforts to reduce the amount of trash and waste generated from Facilities and to acquire products for use at the Facilities that reuse or recycle packaging. LIFETIME TENNIS shall dispose of all waste in compliance with all laws, rules and regulations of all appropriate governmental authorities.

- a) That after Lifetime uses the clubroom for activities, Lifetime shall be responsible for the cleaning of the clubroom;
- b) Tennis court nets and windscreens are the responsibility of Lifetime to maintain and replace;
- c) Lifetime will conduct its operations so as to avoid damages to City assets, including, but not limited to, buildings, fencing, benches, net posts and court surfaces. Any damage or wear that City reasonably determines as beyond normal wear may be repaired by the City with costs paid by Lifetime;
- d) Lifetime shall be responsible for all court light bulb repairs;

e) Lifetime shall be responsible for daily cleaning of facility and restrooms; and

f) Lifetime shall be responsible for providing soap, paper towels, and toilet seat covers for the bathrooms.

4.14 **Supplies, Furnishings and Equipment.** LIFETIME TENNIS shall procure and maintain all necessary and appropriate Supplies, Furnishings and Equipment of good quality and in sufficient number to fulfill the requirements of this Agreement, including but not limited to:

a) Supplies such as tennis balls, league or tournament awards, teaching aides, cones, marketing trinkets, office supplies and other similar items; and

b) Furnishings and Equipment necessary and appropriate to operate the Facilities, including but not limited to rental tennis rackets, ball equipment (including ball retrievers), benches, uniforms, office equipment, facsimile machines, telephone systems (not including pay telephones). Lifetime Tennis shall provide and install security cameras at facility. Vendor and contractor must be approved in advance by city.

4.15 **Customer Service.** LIFETIME TENNIS shall create and distribute customer evaluation forms, which shall also be visible and readily available. Completed forms shall be sent to the Director as requested.

## **5.0 LIFETIME TENNIS'S OPERATING RESPONSIBILITIES.**

### **5.01 Personnel.**

5.01.1 **General.** LIFETIME TENNIS shall employ its own employees and set all terms and conditions of the employment. LIFETIME TENNIS shall recruit, hire, train, discharge, promote, evaluate, supervise and pay its employees. All employees shall be properly qualified for their positions. LIFETIME TENNIS shall provide reports showing all employees and their job titles, as requested by the Director.

Lifetime will provide its own personnel to be present in the administrative building during its hours of operation. Lifetime shall have a minimum of two employees at the Facilities during all hours of operations. The parties acknowledge that the City shall no longer have a City staff person present in the administrative building to provide any public services. To the extent that members of the public come to the Facility seeking City services, Lifetime personnel shall direct such persons to the Parks and Community Services Department at 200 Old Bernal Avenue, Pleasanton or to (925) 931-5340 if such persons seek other City services not related to tennis or the Park. Lifetime acknowledges that the Park and restrooms remain open to the public.

5.01.2 **Department of Justice Background Checks.** No employees or instructors with supervision authority over children age 18 or younger shall work at the Facilities until a

Department of Justice background check has been completed and the person authorized to work with children. Lifetime shall either: (a) certify that it has screened employees and instructors using form attached as Exhibit A to this Agreement; or (b) arrange with City staff to fingerprint and submit the required information to the Department of Justice. All such background checks shall be at Lifetime's expense.

5.01.3 Employee Benefits. LIFETIME TENNIS shall have the obligation to provide all legally mandated employee benefits to its employees.

5.01.4 Management Staff. The Management Staff shall be the Executive Director of LIFETIME TENNIS, the General Manager and the Tennis Professional. CITY shall approve the Management Staff and shall be informed prior to the termination or transfer of any of the Management Staff.

a) Executive Director. Dana Gill, the Executive Director, has committed to be at the Facilities at least ten (10) hours per week and available to assist customers.

b) General Manager. The General Manager shall be on site at least thirty (30) hours per week throughout the terms of the Agreement; and that the General Manager shall be responsible for overseeing tennis operations at the Facilities and managing the Pro Shop.

c) Tennis Professional. The Tennis Professional shall be certified by the United States Professional Tennis Association and have at least three (3) years of experience as a tennis professional.

5.01.5 Uniforms. All LIFETIME TENNIS employees or subcontractors, if approved, shall wear appropriate tennis uniforms to project a professional image, as agreed upon by CITY and LIFETIME TENNIS.

5.01.6 Employee Training. LIFETIME TENNIS shall develop an employee training manual and ensure that all employees, or approved subcontractors providing tennis instruction, are trained regarding customer service, responding to accidents, First Aid and CPR certification, sexual harassment prevention, and any other appropriate or legally-mandated training.

5.02 Contracts and Agreements. All third-party contracts relating to the operation and maintenance of the Facilities (including, without limitation, tennis professional contracts if approved by CITY, contracts for Supplies, and contracts for tournaments and other group functions) shall abide by the requirements in this Agreement. If the term of the contract or agreement is for more than one (1) year or extends beyond the expiration date of this Agreement, or if the date for performance under such contract is after the expiration date of this Agreement, then advance approval of the Director is required and the contract shall allow assignment to CITY without approval of the other party.

5.02.1. Approval of the City. If a contract has not been approved through the Annual Plan, approval of the Director is required.

5.02.2 Requirements for Third-Party Contracts. Subcontractors, lessees, concessionaires, tenants and any other third-party contractors shall:

a) Maintain and carry insurance in the amounts set forth in Article 9.0, with the CITY named as additional insured by endorsement, unless covered by LIFETIME TENNIS's insurance.

b) Comply with the requirements of this Agreement, including but not limited to the nondiscrimination provision set forth in Section 5.03 and the drug free workplace provision in Section 5.04, which shall be included in all subcontracts, leases, concessionaire and other third-party contracts.

5.02.3 Reports. LIFETIME TENNIS shall provide a list of all open contracts and agreements related to the Facilities, with a brief description of the contract, term, dollar amount, contact name and phone number, as requested by the Director.

5.03 Nondiscrimination. During the performance of this Agreement, LIFETIME TENNIS and its subcontractors shall not unlawfully discriminate against any employee, applicant for employment, or customer, because of race, color, ancestry, religion, sex, national origin, marital status, age, physical disability, mental disability, medical condition or sexual orientation. Equal opportunity for employees extends, but is not limited to, recruitment, compensation, benefits, layoff, termination, and all other conditions of employment. LIFETIME TENNIS and its subcontractors shall ensure that the evaluation and treatment of employees, applicants for employment, patrons and invitees are free of such discrimination. LIFETIME TENNIS and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.) and the applicable regulations promulgated hereunder (California Code of Regulations Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12900, set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this Agreement by reference and made part hereof as if set forth in full.

5.04 Drug Free Workplace. LIFETIME TENNIS shall certify that it complies with Sections 8350-8355 of Chapter 5.5 of the Government Code, Drug Free Workplace Act.

5.05 Signs. LIFETIME TENNIS shall not post outdoor signs without the prior written approval of the Director, as well as the approval of the Planning and Community Development Department, as required by law, with the exception of temporary directional or advisory signs (e.g. "Front entrance closed; use side entrance"; "Temporary no parking area"; "Wet Steps.")

5.06 Utilities. CITY shall be responsible for arranging for utility service for the Facilities, including but not limited to water, gas, electricity, and sewer. LIFETIME TENNIS shall be responsible for any utility costs not related to this Agreement, such as personal telephone calls.

5.07 **Safety and Security.** LIFETIME TENNIS shall exercise caution at all times for the protection of persons and property. LIFETIME TENNIS shall post appropriate caution signs to alert personnel or the public of unsafe conditions. LIFETIME TENNIS shall comply with all applicable laws relating to safety precautions, including, without limits, the safety regulations of the California Division of Industrial Safety, OSHA. LIFETIME TENNIS shall immediately protect any unsafe condition of the Facilities and correct any unsafe practices, and then notify CITY. Promptly but no more than 24 hours after the occurrence of injury or damage to persons or property occurring at the Facilities, LIFETIME TENNIS shall submit to the Director a City incident/accident report. LIFETIME TENNIS shall cooperate fully with CITY in any further investigation of any injury or damage to persons or property occurring on or about the Facilities.

5.08 **Use of Facilities: Restrictions.** Unless LIFETIME TENNIS has obtained the prior written approval of the Director, which approval may be withheld or conditioned in the sole and absolute discretion of the Director, LIFETIME TENNIS shall not conduct, authorize or permit: (a) any events or activities at the Facilities not otherwise specifically provided for and authorized in this Agreement; or (b) any events or activities requiring the exclusive use of the Facilities or any portion thereof.

5.09 **Prices and Fees.**

5.09.1 **Goods and Services.** LIFETIME TENNIS shall at all times maintain a complete list or schedule of the prices charged for all items supplied to the public on or from the Facilities. Such list or schedule of prices shall be provided to the Director with the Annual Plan. The prices shall be fair and reasonable based on the following considerations: that the operation of the Facilities is intended to serve the needs of the public for the goods and services, supplied at a fair and reasonable cost; that the prices charged should be comparable to prices charged for similar goods and services in the general area; and that the margin of profit should be reasonable considering the cost of providing the goods and services in compliance with the obligations of this Agreement. If the Director notifies LIFETIME TENNIS that the prices being charged are not fair and reasonable, LIFETIME TENNIS shall have the right to confer with the Director and justify such prices. Following reasonable conference and consultation thereon, LIFETIME TENNIS shall make such price adjustments as may be ordered by the Director; provided, however, that in no event shall LIFETIME TENNIS be required to price any item below its wholesale cost.

5.09.2 **Fees.** CITY hereby reserves the right to establish all tennis-related fees for the Premises. No changes in fees may be made by LIFETIME TENNIS without the advance written consent of CITY in CITY's sole and absolute discretion.

If LIFETIME TENNIS desires changes to the fees beyond any automatic increases that may be in place, LIFETIME TENNIS shall submit with the Annual Plan a written request and analysis of fees charged by comparable public agencies in Northern California, as well as the change in the Bay Area Consumer Price Index -Wage Earners for the applicable period. Upon Director's concurrence with the fee increase, the proposal shall be submitted to the Parks & Recreation Commission. LIFETIME TENNIS shall post notices of

the proposed fee increase at prominent locations in the Clubhouse, which notices shall include information concerning the time and place of the Parks & Recreation Commission meeting at which CITY intends to consider the fee increase.

## 5.10 **Hazardous Materials**

5.10.1 **Definition of Hazardous Materials.** Hazardous Materials shall mean a) petroleum; b) asbestos; c) polychlorinated biphenyls; d) radioactive materials; e) any and all substances, products, by-products, waste or other materials of any nature or kind which is or becomes listed, regulated or addressed by any federal, state or local laws, statutes, ordinances, regulations, resolutions, decrees, rules, regulations, directives, orders, guidelines or court decisions (collectively "Environmental Laws"); f) any materials, substances, products, by-products, waste or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products or waste give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decision of the state or federal court; or g) any substances, products, by-products, waste or other materials which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational, health, safety or general welfare conditions.

5.10.2 **Use and Storage of Hazardous Materials Prohibited.** LIFETIME TENNIS is prohibited from using or storing any Hazardous Materials at the Park or Facilities, unless approved by the Director.

5.10.3 **LIFETIME TENNIS's Responsibility.** LIFETIME TENNIS shall be responsible for clean up, removal and disposal for any Hazardous Materials release on the Facilities or any Hazardous Materials release caused or exacerbated by LIFETIME TENNIS's activities, including but not limited to a release of gasoline, petroleum products, diesel fuel or oil from vehicles or equipment parked or used in connection with LIFETIME TENNIS's activities. LIFETIME TENNIS shall immediately notify the Director and all other applicable regulatory agencies of any Hazardous Materials release. LIFETIME TENNIS shall timely comply with all requirements of regulatory agencies. If LIFETIME TENNIS does not promptly commence and diligently pursue any required investigation, remediation or clean-up activities, CITY, in its discretion and in addition to any other rights or remedies that the CITY may have, may perform the investigation, remediation or clean-up activities at LIFETIME TENNIS's cost. If the Facilities or a portion of it is closed in order to investigate, remediate or clean-up a Hazardous Materials release, then the Director may require the cessation of some or all activities at the Facilities.

5.11 **Taxes.** LIFETIME TENNIS shall be responsible for any taxes and assessments arising out of LIFETIME TENNIS's operations at the Facilities, including, without limitation, possessory interest taxes, if any, and personal property taxes.

**6.0 USE OF FURNISHINGS AND EQUIPMENT.** The Furnishings and Equipment purchased by LIFETIME TENNIS shall remain the property of LIFETIME TENNIS, but shall be available for general, public use throughout the term of the Agreement, including

Furnishings in the clubroom. CITY shall not be responsible for damage caused by such public use.

**7.0 COMPENSATION.**

- a) January 1, 2011 – December 31, 2011 – 10% of all gross revenues up to \$400,000; and 5% of all gross revenues over \$400,000 shall be paid to the CITY.
- b) January 1, 2012 – December 31, 2012 – 10% of all gross revenues up to \$425,000; and 5% of all gross revenues over \$425,000 shall be paid to the CITY.
- c) January 1, 2013 – December 31, 2013 – 10% of all gross revenues up to \$450,000; and 5% of all gross revenues over \$450,000 shall be paid to the CITY.
- d) January 1, 2014 – December 31, 2014 – 10% of all gross revenues up to \$475,000; and 5% of all gross revenues over \$475,000 shall be paid to the CITY.
- e) January 1, 2015 – December 31, 2015 – 10% of all gross revenues up to \$500,000; and 5% of all gross revenues over \$500,000 shall be paid to the CITY.

7.01 **Rent Abatement** – At anytime during this agreement if LIFETIME TENNIS makes any improvements to the Tennis and Community Park which would meet the definition of “Improvements” in Section 3.05, the cost of the improvements may be deducted from the annual rent payment.

7.02 **Transactions.** Lifetime shall handle all of its own financial transactions through a point of sale (POS) system, and shall deposit cash and check receipts daily.

7.03 **Tips and Gratuities.** LIFETIME TENNIS, its employees and approved subcontractors shall not accept tips or gratuities.

7.04 **Payment.** LIFETIME TENNIS shall make its payment to the city within 90 days of audit true up. Due quarterly by the 15<sup>th</sup> day of March, June, September, and December of the operating year.

**8.0 BUSINESS RECORDS**

8.01 **Types of Records.** LIFETIME TENNIS shall maintain a method of accounting that complies with generally accepted accounting principles for its operations. The accounting, books, and records for the operation of the Facilities shall be separate from the accounting, books and records for any other business operated or managed by LIFETIME TENNIS. Such accounting, books and records shall include the keeping of at least the following documents:

- a) Regular books of account such as general ledgers showing fixed assets and equipment inventory;

b) Journals, including, without limitation, any supporting and underlying documents such as vouchers, checks, tickets, bank statements, etc.; and

d) Any other accounting, books and records for the operation of the Facilities that CITY, in its sole discretion, deems necessary or appropriate.

8.02 **Audit of Records.** All documents, books and accounting and financial records kept by LIFETIME TENNIS and relating in any manner to the Facilities, shall be open for inspection by CITY at any reasonable time during the term of this Agreement and for at least three (3) years after this Agreement is terminated or cancelled. In addition, CITY or its authorized representatives may, from time to time, conduct an audit of the records or operation of the Facilities and observe the operation of the business. CITY shall use reasonable efforts to minimize the interruption to the normal operation of the Facilities during any inspection or audit performed pursuant to the provisions of this Section.

8.03 **Annual Financial Statements.** CITY shall require LIFETIME TENNIS to submit audited financial statements for the operation of the Facilities, including an independent certified public accountant's audit report and the audit management letter to CITY within ninety (90) days after the end of each Operating Year. The cost of the audit shall be the responsibility of LIFETIME TENNIS.

8.04 **Public Records.** All information obtained in connection with CITY's inspections of LIFETIME TENNIS's records or audits, with respect to the Facilities, may be or become subject to public inspection and/or reproduction as public records.

## 9.0 **INSURANCE AND INDEMNIFICATION**

9.01 **Insurance Policies.** During the term of this Agreement, LIFETIME TENNIS shall maintain in full force and effect, as a Direct Cost, the following minimum insurance coverages:

9.01.1 **General Liability and Automobile Liability Insurance.** LIFETIME TENNIS shall take out and maintain, through the term of this Agreement, the following policies of insurance placed with insurers authorized to do business in California, with a current A.M. Best's rating of no less than A: VII or its equivalent, against injury/death to persons or damage to property:

a) Commercial General Liability Insurance on an occurrence basis, at least as broad as Insurance Services Office Commercial General Liability coverage (occurrence form CG 0001), with combined single limits (CSL) of not less than \$1,000,000 per occurrence.

b) Automobile Liability Insurance with coverage at least as broad as Insurance Services Office form CA 0001, Code 1 (any auto), for vehicles used in the performance of this Agreement with limits of not less than \$1,000,000 per accident combined single limit (CSL).



c) The General Liability and Automobile Liability policies are to contain, or be endorsed to contain, the following provisions:

- i. The CITY, its officers, officials, employees and volunteers are to be covered as additional insureds as respects: liability arising out of activities performed by or on behalf of LIFETIME TENNIS; products and completed operations of LIFETIME TENNIS; premises owned, occupied or used by LIFETIME TENNIS; or automobiles owned, leased, hired or borrowed by LIFETIME TENNIS. The coverage shall contain no special limitations on the scope of protection afforded to the CITY, its officers, officials, employees or volunteers.
- ii. LIFETIME TENNIS's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the CITY, its officers, officials, employees or volunteers shall be excess of LIFETIME TENNIS's insurance and shall not contribute with it.
- iii. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the CITY, its officers, officials, employees or volunteers.
- iv. LIFETIME TENNIS's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

d) LIFETIME TENNIS shall either require each subcontractor, licensee, concessionaire or tenant providing services under this Agreement to procure and to maintain Commercial General Liability and Automobile Liability Insurance in the amounts specified in Subsections (a) and (b), above, or shall insure the activities of subcontractors in the policies specified therein.

9.01.2 Workers' Compensation Insurance. During the term of this Agreement, LIFETIME TENNIS shall secure statutory Workers' Compensation Insurance for all LIFETIME TENNIS's employees and Employers Liability Insurance in an amount not less than \$1,000,000 per accident, disease or injury, and an endorsement for waiver of subrogation.

LIFETIME TENNIS shall ensure that all of the employees of any subcontractor, licensee, concessionaire or tenant providing services under this Agreement are similarly covered by workers' compensation and employer's liability insurance.

9.01.3 Commercial Crime Insurance. LIFETIME TENNIS shall obtain and keep in full force and effect during the term of this Agreement a commercial crime policy which includes, without limitation, a blanket bond for all employee dishonesty and coverage for theft, disappearance and destruction of monies and securities in or at the Facilities, or outside the Facilities in an amount not less than \$50,000. LIFETIME TENNIS shall obtain Director's

written permission before individually bonding any individual employee and if allowed shall be in an amount not less than \$10,000.

9.01.4 **Certificates of Insurance.** LIFETIME TENNIS shall complete and file with the City Attorney's Office of the City, within fifteen (15) days of its execution of this Agreement, and prior to engaging in any operation or activity set forth in this Agreement, certificates of insurance and endorsements evidencing the coverage's specified above, which shall provide that no cancellation, change in coverage or nonrenewal by the insurance company(s) will be made during the term of this Agreement, without thirty (30) days' prior written notice to CITY. All certificates shall be signed by a person authorized by the insurance company to bind coverage on its behalf. Neither the procuring of insurance by LIFETIME TENNIS nor the delivery by LIFETIME TENNIS to CITY of certificates of insurance evidencing such coverages shall be construed as a limitation of LIFETIME TENNIS's indemnity obligations under Section 9.04 of this Agreement.

9.01.5 **Inspection of Policies; Change in Coverage Amounts.** LIFETIME TENNIS shall permit CITY, at all reasonable times, to inspect any policies of insurance of LIFETIME TENNIS covering risks upon the Facilities. CITY reserves the right to change the coverage limits of the insurance policies set forth above as CITY may deem advisable, in CITY's sole and absolute discretion.

9.01.6 **Deductibles.** LIFETIME TENNIS shall disclose all deductibles to CITY and obtain written consent for deductibles exceeding \$10,000.

9.02 **Waiver of Subrogation.** LIFETIME TENNIS shall not assert against the CITY and waives any claims and rights of recovery for any losses, damages, liability or expenses (including attorneys' fees) incurred or sustained on account of injury to persons or damage to property arising from the operations at the Facilities to the extent that the same are covered by the insurance required under this Article 9. LIFETIME TENNIS hereby grants on behalf of any insurance company providing insurance covering the Facilities a waiver of any right of subrogation which any insurer or party may acquire by virtue of payment of any loss under any insurance policy. LIFETIME TENNIS shall give notice to the insurance companies providing insurance under this Agreement of the waiver of subrogation contained in this Section 9.02.

9.03 **Umbrella Policy.** Notwithstanding any provision of this Article 9.0 to the contrary, LIFETIME TENNIS's obligation to provide for insurance may be brought within the coverage of so-called "umbrella" or "blanket" policy or policies of insurance carried and maintained by LIFETIME TENNIS, provided that: (i) CITY, LIFETIME TENNIS and such other persons as CITY may specify from time to time are named as additional insureds, to the extent their interests appear; (ii) the coverage afforded CITY and the other persons will not be reduced or diminished by reason of the use of such umbrella or blanket policy; and (iii) the other insurance requirements as set forth in Article 9.0 are satisfied.

9.04 **Indemnification and Hold Harmless.** LIFETIME TENNIS shall fully defend, indemnify and hold harmless CITY and its elective and appointive boards, commissions, officers, agents, and employees, from and against any and all damages, liabilities, claims, costs

or expenses, including but not limited to reasonable attorneys' fees and costs, for economic damage to third parties, property damage or bodily injury, including but not limited to death:

a) which result from any act or omission by LIFETIME TENNIS or any officer, director, employee or subcontractor of LIFETIME TENNIS in connection with LIFETIME TENNIS's performance under this Agreement or operation of the Facilities;

b) which result from any action taken by LIFETIME TENNIS relating to the Facilities (i) that is prohibited by this Agreement, or (ii) that is not within the scope of LIFETIME TENNIS's duties under this Agreement, or (iii) that is not within LIFETIME TENNIS's delegated authority under this Agreement;

c) which result from LIFETIME TENNIS's violation of any laws, statutes, ordinances, orders, rules, regulations or requirements of any governmental authority; or

d) which CITY, by reason of any alleged breach of a "non-delegable duty," is subject to, because of the LIFETIME TENNIS's violation of any national, state or local law, regulation or order which pertains to providing safe working conditions for LIFETIME TENNIS's employees or independent contractors, or because of LIFETIME TENNIS's failure to provide safe working conditions for LIFETIME TENNIS's employees.

9.05 **Indemnification for Fines.** LIFETIME TENNIS shall fully defend, indemnify and hold CITY and its elective and appointive boards, commissions, officers, agents, and employees, harmless from and against any fines imposed by administrative or regulatory bodies for actions caused by LIFETIME TENNIS or its officers, employees or agents.

## 10.0 **DEFAULT**

10.01 **LIFETIME TENNIS'S Default.** The breach of any provision of this Agreement, the failure to keep, observe or perform any material covenant including, without limitation, the occurrence of any one or more of the following events shall constitute a default and breach of this Agreement by LIFETIME TENNIS:

a) LIFETIME TENNIS's abandonment or vacation of the Facilities;

b) The levy of a writ of attachment or execution on this Agreement or on any of the property of LIFETIME TENNIS located in or on the Facilities and such levy or execution is not stayed prior to the enforcement of such writ of attachment or execution; or

c) An event of bankruptcy or insolvency including but not limited to: (i) LIFETIME TENNIS applies for or consents to the appointment of a receiver, trustee or liquidator of LIFETIME TENNIS or of all or a substantial part of its assets; (ii) LIFETIME TENNIS files a voluntary petition in bankruptcy or commences a proceeding seeking reorganization, liquidation, or an arrangement with creditors; (iii) LIFETIME TENNIS files an answer admitting the material allegations of a bankruptcy petition, reorganization proceeding, or insolvency proceeding filed against LIFETIME TENNIS; (iv) LIFETIME TENNIS admits

in writing its inability to pay its debts as they come due; (v) LIFETIME TENNIS makes a general assignment for the benefit of creditors; or (vi) an order, judgment or decree is entered by a court of competent jurisdiction, on the application of a creditor, adjudicating LIFETIME TENNIS as bankrupt or insolvent or approving a petition seeking reorganization of LIFETIME TENNIS or appointing a receiver, trustee or liquidator of LIFETIME TENNIS or of all or a substantial part of its assets, and such order, judgment or decree continues unstayed and in effect for any period of thirty (30) consecutive days.

10.02 **Curing Default.** Except as otherwise expressly stated in this Agreement, LIFETIME TENNIS shall have ten (10) days after receipt of written notice from CITY to cure any default under this Agreement. Notwithstanding the foregoing, LIFETIME TENNIS shall be in default under this Agreement, with or without written notice from CITY, in the event LIFETIME TENNIS abandons or vacates the Facilities for any period exceeding twenty-four (24) hours.

10.03 **Remedies.**

10.03.1. CITY's ability to do the work at LIFETIME TENNIS'S expense. In the event of LIFETIME TENNIS's default as described in Section 10.01 and LIFETIME TENNIS fails to cure the default by the date specified, CITY may elect to undertake the work that LIFETIME TENNIS has failed to do at the sole expense of LIFETIME TENNIS. If LIFETIME TENNIS fails to pay the costs incurred by CITY within thirty (30) days of the date the demand is made, CITY may bring legal action to collect the sums due and/or may deduct such costs from any compensation otherwise payable to LIFETIME TENNIS. If legal action is necessary or appropriate to collect the amounts expended by CITY, LIFETIME TENNIS shall pay CITY all attorneys' fees and costs, court costs, and staff costs together with interest from the date which is thirty (30) days after CITY has made demand for payment. If CITY, in its sole discretion, elects to use in-house attorneys from the Office of the City Attorney, attorneys' fees recovered by CITY pursuant to this section shall be at the hourly rate paid by the Association of Bay Area Governments for litigation counsel. Any actions taken by CITY pursuant to this Section 10.03 shall not cure any default by LIFETIME TENNIS.

10.03.2 Termination of the Agreement. In the event LIFETIME TENNIS fails to cure any default of this Agreement within the applicable cure period, CITY may terminate this Agreement after ten (10) days of written notice to LIFETIME TENNIS. If CITY terminates this Agreement, CITY shall have the following rights:

- a) to collect from LIFETIME TENNIS any and all monies owing CITY under this Agreement;
- b) to take sole possession of all equipment and materials; and
- c) to pursue any and all other appropriate civil and criminal remedies.

10.03.3. Remedies Cumulative. Neither the right of termination, nor the right to sue for damages, nor any other remedy available to a party under this Agreement shall be exclusive of any other remedy given under this Agreement or now or hereafter existing at law or in equity.

**11.0 CONTRACT CANCELLATION AND CONTINGENCY**

11.01 **Cancellation.** CITY may cancel this Agreement, without penalty or cause by giving, LIFETIME TENNIS ninety (90) days of notice under circumstances outlined in article 13.

11.02 **Rights Upon Cancellation.**

11.02.1. **CITY's Rights upon Cancellation.** Upon cancellation of this Agreement by CITY pursuant to Section 11.01, CITY shall have the following rights:

- a) to collect from LIFETIME TENNIS any and all monies owing to CITY under this Agreement;
- b) to require LIFETIME TENNIS to vacate the Facilities.

**12.0 TRANSITION PROCEDURES**

12.01 **Contract Transition Period.** The "Contract Transition Period" shall mean: (i) the three (3) month period immediately prior to expiration of the term; (ii) the period from the date CITY gives notice of default under Article 10.0 until the date of termination; or (iii) the period from the date the CITY gives notice of cancellation under Article 11.0 until the date of cancellation.

12.02 **Contract Transition Procedures.** During the Contract Transition Period:

- a) LIFETIME TENNIS shall allow CITY and others to interview and discuss employment opportunities with LIFETIME TENNIS's employees and subcontractors.
- b) LIFETIME TENNIS shall not transfer any Management Staff without the consent of Director.
- c) LIFETIME TENNIS and CITY shall refrain from coercing, threatening or harassing any employee who expresses interest in being employed by CITY, LIFETIME TENNIS, or other party after the Agreement has expired, has been terminated or cancelled.
- d) LIFETIME TENNIS and CITY shall cooperate in good faith on post-contract support services, data management, inventory control, transfer of employees and other issues necessary and appropriate to ensure smooth transition of operating responsibilities from one party to another. Nothing in this paragraph shall be construed to require CITY to hire additional personnel or spend additional monies.
- e) LIFETIME TENNIS shall deliver to CITY all records and information related to tournaments, lessons and other events booked at the Facilities for the Contract Transition Period, or any time thereafter.

f) LIFETIME TENNIS shall deliver to CITY current copies of all contracts, permits and licenses affecting Facilities.

g) LIFETIME TENNIS shall transfer possession of the Facilities, Furnishings and Equipment, Supplies, software, databases, books, records and materials purchased, prepared or maintained by CITY under this Agreement to the new operator or CITY, as CITY shall direct. LIFETIME TENNIS shall reimburse CITY for the cost of repair or replacement of any item that is not in useable and good condition, normal wear and tear excepted.

h) LIFETIME TENNIS shall transfer all keys, convey all alarm codes, and vacate the Facilities by the date and time set forth by CITY.

### **13.0 DAMAGE OR DESTRUCTION**

13.01 **Damage or Destruction.** Should the Facilities be destroyed or substantially damaged by fire, flood, acts of God, or other casualty, CITY, by written notice to LIFETIME TENNIS, shall have the right to cancel this Agreement pursuant to Article 11 on the basis that CITY does not choose to rebuild or restore the Facilities, and in such event neither party shall have any further obligation to the other party under this Agreement, except with respect to liabilities accruing, or based upon events occurring, prior to the effective date of such cancellation. If, as a result of any damage or destruction to the Facilities as provided in this Section, the responsibilities of LIFETIME TENNIS under this Agreement are substantially changed, then the parties shall meet and discuss in good faith appropriate modifications to this Agreement including the Management Fees. Any insurance proceeds made available after such damage or destruction shall be payable to CITY.

13.02 **Eminent Domain.** If all or a portion of the Facilities shall be taken through the exercise of the power of eminent domain, or by agreement in lieu of the exercise of eminent domain, then upon the date that CITY shall be required to surrender possession of the Facilities, this Agreement shall terminate and neither party shall have any further obligation to the other party under this Agreement except with respect to liabilities accruing, or based upon events occurring, prior to the effective date of such termination.

13.03 **Force Majeure Events.** As used in this Agreement, the term "Force Majeure" means declared or undeclared war, sabotage, riot or acts of civil disobedience, acts or omissions of governmental agencies, accidents, fires, explosions, floods, earthquakes, or other acts of God, shortages of materials, or any other event not within the control of LIFETIME TENNIS and not caused by the negligence or intentional wrongful conduct of LIFETIME TENNIS.

If LIFETIME TENNIS or CITY is unable by reason of Force Majeure to carry out any obligation under this Agreement, such obligation shall be suspended only so far as it is physically affected by such Force Majeure. The party unable to perform shall give the other party prompt notice of such Force Majeure with a detailed explanation and the probable extent to which it will be unable to perform or be delayed in performing such obligation. The party unable to perform shall use all possible diligence to remove such Force Majeure as quickly as possible. The requirement that any Force Majeure shall be removed with all possible diligence

shall not require the settlement by the party unable to perform because of strikes, lockouts or other labor disputes or the meeting of any claims of or demands by any supplier or government entity which reasonably may be harmful to the best interests of the CITY or LIFETIME TENNIS. If, as a result of the occurrence of a Force Majeure, the responsibilities of LIFETIME TENNIS under this Agreement are substantially changed, then the parties shall meet and discuss in good faith appropriate modifications to this Agreement including the Management Fee.

#### **14.0 MISCELLANEOUS PROVISIONS**

14.01 **Notices.** Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other party shall be in writing and shall be deemed given as of the time of hand delivery to the addresses set forth below, or three (3) days after deposit into the United States mail, postage prepaid, by first class mail. Unless notice of a different address has been given in accordance with this Section, all such notices shall be addressed as follows:

If to CITY:                      Director of Community Services  
   City of Pleasanton  
   P.O. Box 520  
   Pleasanton, CA 94566  
   facsimile (925) 931-5477

With a copy to:                      City Attorney  
   City of Pleasanton  
   P.O. Box 520  
   Pleasanton, CA 94566  
   facsimile (925) 931-5482

If to OPERATOR:                      Dana Gill, Executive Director  
   Lifetime Tennis, Inc.  
   1901 South Bascom Avenue, Suite 1225  
   Campbell, CA 95008  
   Facsimile (925) 484-9579

14.02 **Waiver.** No delay or failure on the part of any party in exercising any right hereunder shall impair any such right or any remedy of the party so delaying or failing. No waiver of any provision of this Agreement shall be binding unless executed in writing by the party making the waiver. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver.

14.03 **Integration.** This Agreement is the entire agreement between the parties, and supersedes all prior and contemporaneous agreements, representations and understanding of the parties concerning the subject matter hereof.

14.04 **Approvals.** Neither CITY's execution of this Agreement nor any consent or approval given by CITY hereunder in its capacity as a party to this Agreement shall waive, abridge, impair or otherwise affect CITY's power and duties as a governmental body. Any requirements under this Agreement that LIFETIME TENNIS obtain consents for approvals of CITY are in addition to and not in lieu of any requirements of law that LIFETIME TENNIS obtain approvals or permits. However, CITY shall attempt to coordinate its procedures for giving contractual and governmental approvals so that LIFETIME TENNIS's requests and applications are not unreasonably denied or delayed.

14.05 **Modification of Agreement.** No modification, amendment or supplement to this Agreement shall be binding unless executed in writing by both of the parties.

14.06 **Severability.** If any court of competent jurisdiction holds that any provision of this Agreement is void, voidable, illegal or unenforceable, or that this Agreement would be void, voidable, illegal or unenforceable unless any provision of it were severed, that provision shall be severable from and shall not affect the continued operation of the rest of this Agreement; provided that if the provision to be severed is a material part of this Agreement, the foregoing shall not apply, and the parties shall in good faith renegotiate such provision.

14.07 **Time of the Essence.** Time is of the essence in the performance of all obligations under this Agreement for which specific time periods have been specified.

14.08 **Cumulative Remedies.** The remedies granted under the terms of this Agreement shall not be exclusive but shall be cumulative and in addition to all other remedies allowed under law.

14.09 **Assignment.** CITY shall have the right to assign its interest in this Agreement without limitation. Upon any such assignment, CITY shall be relieved of any further obligation under this Agreement provided such assignee assumes all of CITY's obligations under this Agreement.

14.10 **Time References.** Except as otherwise specifically provided in this Agreement, all references to "days" herein shall mean calendar days and not business days.

14.11 **No Third Party Beneficiaries.** This Agreement is not intended for the benefit of any specific person, entity or third party beneficiary other than the named parties hereto and no person or entity who is not specifically named as a party herein shall have any right to enforce the provisions of this Agreement.

14.12 **Independent Contractor.** LIFETIME TENNIS shall at all times be considered an independent contractor under this Agreement. Nothing contained in this Agreement shall be construed to be or create a partnership or joint venture between CITY and its successors and assigns, on the one part, and LIFETIME TENNIS and its successors and assigns, on the other part. LIFETIME TENNIS agrees to be solely responsible for its own matters including payment of its employees, compliance with Social Security, withholding and other such personnel regulations. LIFETIME TENNIS's employees shall not be entitled to any salary,



fringe benefits, pension, workers' compensation, sick leave, insurance or any other benefit or right connected with employment with CITY.

14.13 **Headings.** The Article, Section and Subsection headings contained in this Agreement are for convenience and reference only and are not intended to define, limit or describe the scope or intent of any provision of this Agreement.

14.14 **Survival of Covenants.** Any covenant, term or provision of this Agreement, which in order to be effective must survive the termination of this Agreement, shall survive any such termination.

14.15 **Applicable Law.** This Agreement shall be construed and interpreted in accordance with, and shall be governed by, the laws of the State of California. The parties agree that the Superior Court of the State of California, County of Alameda shall have jurisdiction of any litigation between the parties relating to this Agreement.

14.16 **No Presumption Regarding Drafter.** The language of each and all paragraphs, terms and/or provisions of this Agreement, shall, in all cases and for any and all purposes, and in any way and all circumstances whatsoever, be construed as a whole, according to its fair meaning. CITY and LIFETIME TENNIS acknowledge and agree that the terms and provisions of this Agreement have been negotiated and discussed between CITY and LIFETIME TENNIS, and that this Agreement reflects their mutual agreement regarding the subject matter of this Agreement. Because of the nature of such negotiations and discussions, it would be inappropriate to deem either CITY or LIFETIME TENNIS to be the drafter of this Agreement, and therefore no presumption for or against the drafter shall be applicable in interpreting or enforcing this Agreement.

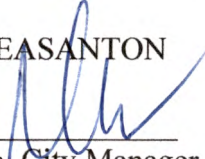
14.17 **Counterparts.** This Agreement and any amendment may be executed in counterparts, and upon all counterparts being so executed each such counterpart shall be considered as an original of this Agreement or any amendment and all counterparts shall be considered together as one agreement.

14.18 **Authority.** The parties represent for themselves that (a) such party is duly organized and validly existing, (b) the person or persons executing this Agreement on behalf of such party is/are duly authorized to execute and deliver this Agreement on behalf of such party, (c) by so executing this Agreement, such party is formally bound to the terms and provisions of this Agreement, and (d) the execution of this Agreement does not violate any provision of any other agreement to which such party is bound.

14.19 **Conflict of Interest.** LIFETIME TENNIS shall avoid all conflict of interest or the appearance of conflict of interest in performance of this Agreement. The parties hereto hereby covenant that during the term of this Agreement they will not employ any person to administer any portion of this Agreement that has an interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement.

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

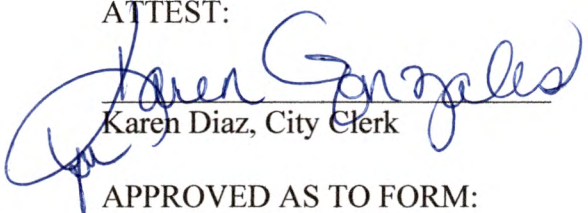
CITY OF PLEASANTON

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

OPERATOR

By:   
\_\_\_\_\_  
Dana Gill, Lifetime Tennis

ATTEST:

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

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Jonathan Lowell, City Attorney