

GOLF COURSE OPERATION AND MANAGEMENT AGREEMENT

THIS GOLF COURSE OPERATION AND MANAGEMENT AGREEMENT (this “Agreement”) is entered into as of [REDACTED], 2014, by and between the CITY OF LANCASTER, a California municipal corporation and charter city (the “City”), and [REDACTED], a [REDACTED] doing business as Birdies (“Birdies”).

R E C I T A L S

A. The City owns the Lancaster Golf Center, located at 431 E. Avenue K-4, City of Lancaster, Los Angeles County, California, consisting of a nine-hole golf course (the “Golf Course”), clubhouse, restaurant, golf shop (“Pro Shop”) and other related improvements (collectively, the “Golf Facility”).

B. The City desires to utilize the services and experience of Birdies in connection with the management and operation of the Golf Facility and Birdies desires to render such services, upon the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City and Birdies agree as follows:

1. DEFINITIONS.

1.01 Defined Terms. When used in this Agreement, the following terms shall have the meaning ascribed to them in this Article I, unless the context clearly indicates a contrary intent:

“*Affiliated Facilities*” shall mean all golf course facilities managed or operated by Birdies.

“*City*” shall mean the City of Lancaster, a California municipal corporation and charter city.

“*City Manager*” shall mean the person holding the position of City Manager of the City of Lancaster or his/her designee.

“*City Representative*” shall mean the individual designated by the City to whom Birdies shall report.

“*Commencement Date*” shall have the meaning ascribed to that term in Section 6.01.

“*Effective Date*” shall mean the date Birdies first takes possession of the Golf Facility following the City’s completion of the Rehabilitation.

“*Equipment and Supplies*” shall mean all equipment and supplies used or useful at the Golf Facility, to be purchased and/or provided by Birdies, including, without limitation, the Pro Shop Inventory, golf course maintenance vehicles and equipment, rental golf clubs and bags, green flags, yardage markers, tee markers, flags, kitchen and restaurant equipment, appliances and supplies, janitorial equipment and supplies, office supplies, and all furniture, furnishings, fixtures, equipment, and supplies used in accordance with this Agreement; provided, however,

that the range hoods in the kitchen have been purchased and installed by the City and ownership of said hoods will remain with the City at all times during and after the term of this Agreement.

“*Golf Course*” shall have the meaning ascribed to that term in Recital A.

“*Golf Facility*” shall have the meaning ascribed to that term in Recital A.

“*Golf Facility Expenses*” shall mean all costs and expenses incurred in the operation, management, and maintenance of the Golf Facility, including, but not limited to, (a) all expenditures incurred by Birdies in the performance of its obligations under this Agreement; (b) the costs and expenses of re-ordering, restocking, maintaining, repairing and/or replacing Equipment and Supplies; (c) the costs and expenses of ordering/reordering foodstuffs and beverages for the Restaurant; and (d) all other expenses specifically identified as “Golf Facility Expenses” in this Agreement.

“*Gross Revenues*” shall mean, for the Operational Year, all revenues generated from the operation of the Golf Facility and/or its various components, determined in accordance with generally accepted accounting principles consistently applied, including without limitation, greens fees, rental fees, golf shop revenue, lesson fees (payable to the Golf Facility), merchandise sales, and any other revenue relating to the Golf Facility.

“*Improvements*” shall mean all buildings, structures and improvements now located or hereafter constructed on the land encompassing the Golf Facility (the “Site”) and all fixtures and equipment attached to, forming a part of and necessary or desirable for the operation of such buildings, structures or improvements (including, without limitation, heating, lighting, plumbing, sanitary system, air-conditioning, refrigeration, kitchen, elevators and similar items) and such (i) restaurants, bars and banquet, meeting and other public areas, (ii) commercial space, including concessions and shops, (iii) garage and parking space, (iv) storage and service areas, (v) recreational facilities and areas, (vi) public grounds and gardens, (vii) permanently affixed signage and (viii) other facilities and appurtenances, all as presently exist on the Site or are hereafter added thereon during the Term.

“*Legal Requirements*” shall mean any and all laws, statutes, ordinances, codes, orders, rules, regulations, permits, licenses, authorizations, entitlements, official orders and requirements of, or conditions imposed by, all federal, state and local governmental regulatory agencies and authorities which are as of the date hereof or hereafter become applicable to the Golf Facility, including, without limitation, any of the foregoing relating in any way to hazardous materials or hazardous waste.

“*Management Fee*” shall mean the difference between the Gross Revenues and the Golf Facility Expenses, except as provided in Section 4.02(e) of this Agreement. The Management Fee is further described in Section 2.02.

“*Operational Year*” shall mean [redacted] to [redacted] of each year during the Term of this Agreement.

“*Pro Shop Inventory*” shall mean the merchandise usually sold at golf shops at private and public golf course facilities, including without limitation, clubs, bags, balls, clothes, shoes, gloves, hats, and other golf apparel and accessories.

“*Rehabilitation*” shall mean the City’s rehabilitation of the Golf Course, including, without limitation, the greens, fairways, tee boxes, sand traps and all aesthetic landscaping, as may be necessary in order to make the Golf Course usable and playable based upon existing standards within the golf industry.

“*Term*” shall mean the period of time commencing upon the Effective Date and continuing until the date upon which this Agreement is terminated in accordance with the terms hereof. The Term is further described in Section 6.

1.02 Accounting Terms. For purposes of this Agreement, all accounting terms not otherwise defined herein or in any exhibit shall have the meanings ascribed to them in conformity with generally accepted accounting principles ("GAAP") consistently applied.

2. AGREEMENT; MANAGEMENT FEE; STANDARDS OF PERFORMANCE.

2.01 Agreement to Manage. The City hereby appoints and retains Birdies, and Birdies hereby accepts such appointment and retention to act as consultant to City and as operator and manager of the Golf Facility during the Term with full power and authority to carry out, at Birdies' sole cost and expense, all responsibilities of Birdies under this Agreement, and otherwise upon the terms and subject to the conditions hereinafter set forth.

2.02 Management Fee. Except as provided in Section 4.02(e), Birdies shall receive a Management Fee in an amount equal to the difference between the Gross Revenues and the Golf Facility Expenses. The parties acknowledge and agree that the Management Fee shall be funded exclusively by revenue generated from operating the Golf Facility and that under no circumstances shall the City incur any liability for or obligation to pay the Management Fee or any portion thereof. If during the Term or any portion thereof the Golf Facility Expenses exceed the Gross Revenues, the Management Fee for such period shall be zero.

2.03 Standards of Performance; Relationship Between City and Birdies. Birdies accepts the relationship of trust and confidence established between Birdies and the City by the terms of this Agreement. Birdies covenants with the City to furnish its best skill and judgment in performing its obligations hereunder, and shall at all times provide such consulting, operational and managerial services in a manner which maintains the good name and business reputation of the City and the Golf Facility. Birdies shall perform its duties and obligations under this Agreement in an efficient, expeditious, prudent and economical manner, consistent with the best interests of the City, in accordance with the standards followed by Birdies in its role as course manager of similarly situated golf facilities operated by Birdies, in such manner so as to maximize all Gross Revenues and minimize all Golf Facility Expenses, both as set forth in this Agreement and otherwise in connection with operation and maintenance of the Golf Facility.

Birdies is entering into this Agreement as an independent contractor to provide the services set forth in this Agreement. Birdies acknowledges that it is acquiring no rights whatsoever in the Golf Facility, or any portion thereof (including the Golf Course), except a nonexclusive and revocable license, during the Term, to enter upon the Golf Facility to carry out its obligations pursuant to this Agreement. In acknowledging that Birdies is acquiring no rights whatsoever in the Golf Facility, Birdies further agrees that it will not assert, in any legal action or otherwise, any right or interest in the Golf Facility, or any portion thereof. In no event shall Birdies make any alterations or improvements to any portion of the Golf Facility except as directed by the City, in writing, or as expressly permitted under this Agreement.

3. DUTIES AND OBLIGATIONS OF CITY

3.01 Rehabilitation of Golf Course. The City shall undertake the rehabilitation of the Golf Course, including irrigation system repair and other improvements.

3.02 Turnkey Playable Golf Course. At the time the City turns over possession and control of the Golf Facility to Birdies, all portions of the Golf Course shall be fully functional and operational, including but not limited to greens, which shall be in a condition that comports with industry standards, fairways, tee boxes, sand traps, and ancillary aesthetic landscaping (including, but not limited to trees and shrubs), with the exception of flags, yardage markers and tee markers, which shall be purchased and/or provided by Birdies.

3.03 Repair & Improvement of Building Exteriors. Subject to the City's prior approval, Birdies shall undertake rehabilitation of building exteriors at the Golf Facility. The City may assist with the rehabilitation; said assistance shall not exceed \$20,000.00.

3.04 ADA Compliance. The City shall inspect, or cause an inspection of, the structures at the Golf Facility to ascertain whether each structure complies with accessibility requirements pursuant to the Americans with Disabilities Act (ADA) and/or similar state requirements. To the extent to which any retrofitting or alterations are required to bring any structure into compliance during the term of this Agreement, the City shall be responsible for such work.

3.05 Netting. The City may, in its sole discretion, elect to install protective netting around the Golf Course or any portion thereof.

3.06 Capital Improvements. It is expressly understood and agreed by the parties that all capital improvement projects are solely in the City's control and discretion. All costs and expenses of capital improvement projects shall be paid from City funds. Ownership of all capital improvements shall remain with the City at all times during and after the term of this Agreement.

4. DUTIES AND OBLIGATIONS OF BIRDIES

4.01 Building Rehabilitation.

(a) At the commencement of the term of this Agreement, the Parties shall perform a walk-through of the buildings at the Golf Facility to ascertain what, if any, rehabilitation will be undertaken. Birdies shall be responsible for the rehabilitation of the interior of all structures, including, but not limited to, minor painting, carpeting, fixtures, bathrooms and any such other additional rehabilitation as may be agreed upon between the Parties.

(b) It is understood and agreed that City is solely responsible for all capital improvements, in accordance with Section 3.06 of this Agreement.

4.02 Operational Requirements.

(a) Golf Facility. Birdies shall operate and maintain the Golf Facility and all of its amenities, including but not limited to, the Golf Course, Restaurant, and Pro Shop, in a manner and on a schedule that is substantially similar to that of other Affiliated Facilities.

(b) Restaurant. The Restaurant shall commence operations contemporaneously with the opening of the Golf Course. The Restaurant shall, at a minimum, serve breakfast and lunch on all days the Golf Course is open. Birdies may, in its sole discretion, use the Restaurant for banquets and/or private parties at times it is not required to be open to the public pursuant to this subsection, provided that the City and its affiliated persons and entities are named as additional insureds in accordance with Section 7 of this Agreement on all license or rental agreements for banquets and/or private parties.

(c) Pro Shop. The Pro Shop shall, at a minimum, do the following:

(i) Operate as the payment location for the Golf Course;

(ii) Sell golf equipment, tees, balls, golf apparel and other golf-related items;

(iii) Offer lessons to the general public, and offer lessons to children and seniors pursuant to subsection 4.02(e) of this Agreement;

(iv) Offer the services of a golf pro, who shall be a member of the PGA or LPGA;

(v) Offer golf equipment for rent.

(d) Driving Range. The parties agree to enter into discussions at a later date regarding the future rehabilitation and operation of the driving range at the Golf Facility. In the event the parties agree to such rehabilitation and operation, this Agreement will be amended in writing to reflect the addition of the driving range to the amenities offered at the Golf Facility.

(e) Children's and Seniors' Lessons. Birdies shall offer golf lessons to children, ages twelve (12) and under, and seniors, age sixty-two (62) and older, charging an hourly rate to be mutually agreed on by the parties.

4.03 Maintenance.

(a) Birdies shall be responsible for regular and continuous maintenance of the Golf Facility, including but not limited to, the interior and exterior of all structures, the grounds, the Golf Course and other amenities, netting, and all equipment and fixtures.

(b) Subject to City approval, Birdies will implement a Golf Course and landscape maintenance plan, and shall thereafter regularly and continuously maintain the Golf Course and all landscaped areas, including irrigation systems up to the water meter connection, in accordance with the approved plan.

(c) Birdies shall consent to and provide access for City inspection of the Golf Course and landscaped areas of the Golf Facility, to confirm continued compliance with the approved maintenance plan, as well as the interior of all structures, to confirm proper maintenance. Said inspections will not interfere with the regular operation of the Golf Facility.

4.04 Utilities. Birdies shall be responsible for establishing and paying for all utilities at the Golf Facility, including, but not limited to, water, electricity, gas, and waste management services, and shall keep all utility services active and current at all times during the term of this Agreement.

4.05 Costs and Expenses. Birdies shall be solely responsible all Golf Facility Expenses, as defined in Section 1.01 of this Agreement.

5. GENERAL MANAGEMENT REQUIREMENTS.

5.01 Price Setting. Birdies may set prices for services and goods offered at the Golf Facility, provided, however, that said rates shall be competitive with those at similar facilities in the Antelope Valley.

5.02 Financial Reporting.

(a) Within thirty (30) days after the end of each calendar quarter, Birdies shall deliver to the City the following information, in a form reasonably acceptable to the City:

(i) A profit and loss statement, balance sheet, cash flow statement, and budget variance report showing the results of operation of the Golf Facility for such quarter and for the Operational Year to date, which statement shall include sufficient detail to reflect all Gross Revenues and Golf Facility Expenses, and which shall further breakdown revenues and expenses between the Golf Course, Restaurant, Pro Shop sales, rentals and lessons, and other categories as appropriate and/or as reasonably required by City; and

(ii) A report indicating the number of golfers who used the Golf Course, the number of general public patrons who took lessons, the number of children and seniors who took lessons, the number of rentals of the Golf Facility or any portion thereof, and the number of golf tournaments held at the Golf Facility.

5.03 Human Resources. Birdies shall be the employer of all employees at the Golf Facility, and shall be solely responsible for all human resource issues, including but not limited to wages, payroll taxes, tax withholding, worker's compensation, hiring and firing, compliance with applicable federal occupational, health, and safety laws and regulations, and all other matters.

Birdies shall be responsible for any employment-related liability, fine, penalty or award (including the cost of defense and attorney fees) with respect to claims, demands, arbitration or litigation brought by an employee or employees of Birdies at the Golf Facility resulting from violations by (a) Birdies' corporate office, and/or (b) Golf Facility supervisory staff, of federal, state or local laws, ordinances or regulations governing the employment or working conditions of the employees at the Golf Facility ("Damages"). Birdies shall not be entitled to any reimbursement by City for such Damages unless such Damages were the result of a policy or procedure which was required in writing by the City.

In the performance of this Agreement, Birdies shall not discriminate against any employee because of race, color, religion, ancestry, gender, national origin, sexual orientation, physical or mental disability or age. The Company will take affirmative measures to ensure that employees are treated without regard to their race, color, religion, ancestry, gender, national origin, sexual orientation, physical or mental disability or age. Affirmative measures relating to employment shall include,

but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment; layoff or termination; and rates of pay or other forms of compensation.

5.04 Marketing. Birdies shall be responsible for the development of all marketing materials, including brochures, promotional fliers, scorecards, etc., and shall be responsible for all advertising and marketing, including but not limited to website, internet and/or e-mail marketing efforts. The parties agree that the City may use Birdies' marketing/advertising materials on the City's website, billboards, publications and in other promotional materials.

5.05 Legal Compliance. At all times during the term of this Agreement, Birdies shall do the following:

(a) Comply with all, applicable local, state and federal laws and regulations, and all other Legal Requirements.

(b) Maintain in full force and effect all applicable permits, licenses, franchises, authorizations, approvals, consents and variances, pursuant to local, state and/or federal laws or regulations.

(c) Immediately advise the City of any discovery by Birdies of any hazardous waste in, on or about the Golf Facility; jointly determine with the City the actions which should be taken to ensure that the presence of such hazardous waste in, on or about the Golf Facility will not constitute a violation of any Legal Requirement; and upon approval by the City of any action recommended by Birdies promptly take, or cause to be taken, such actions or, in the alternative, allow the City to enter the premises in order to take such actions it deems necessary to abate or mitigate the condition.

(d) Comply with all federal, state and local laws and regulations pertaining to the storage, use and disposal of "hazardous or toxic wastes, substances, or materials" as defined by applicable law.

(e) Immediately advise the City of any discovery by Birdies of any condition or event which may have a material adverse impact upon the Golf Facility or its operations.

5.06 Meetings. Birdies shall be available to meet with the City Manager or the City Representative either personally or by telephone conference call on an as requested basis to assure the successful performance of Birdies duties hereunder, and of the operations of the Golf Facility.

5.07 Equipment and Supplies. Birdies shall arrange for and procure, at its sole cost and expense, all Equipment and Supplies and other goods and services that Birdies deems necessary for the normal and ordinary course of operation of the Golf Facility and to operate the Golf Facility in accordance with this Agreement.

5.08 Restricted Activities of Birdies. Without the prior written consent of the City, which consent may be granted or withheld in the City's sole discretion, Birdies shall not do, or cause or permit to be done, any of the following throughout the Term:

(a) Borrow or lend money in the name of the Golf Facility or the City.

(a) Enter into any lease, license, management or other agreement or contract relating, directly or indirectly, to occupancy or operation of the Golf Facility, other than license/rental agreements related to banquets and/or private parties.

(b) Make, execute or deliver in the name of the City, or with respect to any of the assets of the City or the Golf Facility, any assignment for the benefit of creditors or any bond, confession of judgment, chattel mortgage, security instrument, deed, guarantee, indemnity bond or surety bond.

(c) In the name of or on behalf of the City, endorse any note, or become a surety, guarantor, or accommodation party to any obligation.

(d) Commence or maintain in the name of or on behalf of the City any action or proceeding, whether judicial, administrative or otherwise.

(e) Use any trade names, trademarks, logos, emblems or similar identifying marks of the City.

6. TERM.

6.01 Term. The term of this Agreement shall commence ten (10) days following the date the City provides written notice to Birdies that the Rehabilitation of the Golf Course is complete (the "Commencement Date"). Subject to such earlier termination as set forth in Section 6.02, the term of this Agreement shall terminate on the three-year anniversary of the Commencement Date. This Agreement may be extended for an additional term of two (2) years, subject to negotiation and approval by both parties.

6.02 Termination by City Upon the Occurrence of Certain Events. The City may terminate this Agreement immediately and without additional notice and without any additional compensation owing to Birdies hereunder, in the event that (i) Birdies has committed an Event of Default which has not been cured in accordance with the terms of Section 10.01 herein, (ii) Birdies engages in conduct which materially impacts adversely the reputation of the Golf Facility after written notice from the City specifying in detail the conduct of Birdies in that regard, and an opportunity to cure as specified in said notice, or (iii) Birdies files a petition of any type in bankruptcy, is declared bankrupt, becomes insolvent, makes an assignment for the benefit of creditors, or goes into liquidation or receivership.

6.03 Transition to New Management Company or Operator. Subsequent to Birdies receiving written notification of the termination or expiration of this Agreement pursuant to Sections 6.01 and 6.02 above, Birdies shall cooperate reasonably with the City in the transition of management responsibility to a new management company or operator. In connection therewith, Birdies agrees to provide all requested documents and information in its possession relating to the Golf Facility (other than Birdies' proprietary information), and shall provide reasonable training, assistance, and direction to the new management company or operator, and shall in good faith, endeavor to facilitate a smooth, seamless and efficient transition of management responsibility. Birdies' failure to comply with this Section 6.03 shall be a material default of this Agreement.

7. INSURANCE REQUIREMENTS.

7.01 General Insurance Provisions.

(a) All insurance provided for under this Section 6 shall be effected by policies issued by insurance companies that have sound financial strength and maintain a rating of A:VII in Am Best's Key rating guide, or equivalent.

(b) Certificates of insurance shall be delivered to City on or before the date of this Agreement and all insurance policies shall be renewed (or replaced, as applicable) prior to their respective expiration dates.

(c) All applicable insurance policies described in this Section 7 shall be written in the name of Birdies, with the City of Lancaster, the Lancaster Successor Agency, the Lancaster Financing Authority, the Lancaster Housing Authority, the Lancaster Boulevard Corporation, the Lancaster Community Services Foundation, and the Lancaster Museum and Public Art Foundation, as well as each of their elected officials, officers, employees, agents and representatives named as an additional insured thereon, except for worker's compensation insurance and any other insurance with respect to which it is impractical or inappropriate to name the City, or any other parties as a named insured or an additional insured.

(d) All property insurance policies shall be endorsed specifically to the effect that the proceeds of any building, contents or business interruption losses shall be made payable to the City (except for the proceeds of any business interruption insurance which shall be payable to Birdies as provided herein). All such policies of insurance shall also be endorsed specifically to the effect that such policies shall not be canceled or materially changed without at least thirty (30) calendar days prior written notice to the City.

(e) Certificates of insurance shall be sent to the City at the address shown in Section 13.03 below.

(f) City and Birdies shall review all coverage limits and deductible amounts set forth in this Section 7 from time to time for the purpose of determining the coverage limits and deductible amounts then appropriate for properties similar in type and construction to the Golf Facility and for the nature of the business being conducted.

7.02 Insurance to be Maintained by Birdies. At all times during the Term, Birdies shall procure and maintain, as a Golf Facility Expense, the following insurance coverage:

(a) Comprehensive or commercial general liability insurance written on an "occurrence" basis against claims for personal property (including bodily injury and death) and property damage, with a combined single limit for bodily injury and property damage of at least Two Million Dollars (\$2,000,000) per occurrence;

(b) Owned, hired and non-owned automobile liability insurance covering all use of all automobiles, trucks and other motor vehicles utilized by Birdies and Birdies' employees in connection with this Agreement with a combined single limit for bodily injury and property damage of at least One Million Dollars (\$1,000,000) per occurrence;

(c) Employment practices liability coverage with a combined single limit of at least Two Million Dollars (\$2,000,000.00) to cover any Golf Facility employees on Birdies' payroll;

(d) Workers' compensation and employer's liability insurance as may be required under applicable laws covering all of Birdies' employees employed at the Golf Facility;

(e) Umbrella or excess liability coverage with a limit of not less than Ten Million Dollars (\$10,000,000.00);

(f) Pollution insurance policy (not limited to Herbicide and Pesticide coverage) with a limit of not less than One Million Dollars (\$1,000,000) per single occurrence, including coverage for on-site and off-site clean up as well as third party coverage for on-site and off-site third party claims for bodily injury and property damage;

(g) Such other insurance in amounts as the City, in its reasonable judgment, deems advisable for protection against claims, liabilities and losses arising out of or in connection with the operation of the Golf Facility.

8. DAMAGE OR DESTRUCTION; EMINENT DOMAIN; FORCE MAJEURE EVENTS.

8.01 Damage or Destruction. Should the Golf Facility be destroyed or substantially damaged by fire, flood, acts of God, or other casualty, the City, by written notice to Birdies given within sixty (60) days following the occurrence of such event, shall have the right to terminate this Agreement on the basis that the City does not choose to rebuild or restore the Golf Facility, 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 termination. For the purpose of this Section 8.01, the Golf Facility shall be deemed to have been substantially damaged if the estimated length of time required to restore the Golf Facility substantially to its condition and character just prior to the occurrence of such casualty shall be in excess of six (6) months, as indicated by an architect's certificate or other evidence reasonably satisfactory to Birdies. If this Agreement is not terminated in the event of damage to the Golf Facility either because (i) the damage does not amount to substantial damage as described above, or (ii) notwithstanding destruction of or substantial damage to the Golf Facility, the City elects to restore the Golf Facility, then the City shall proceed, at the City's own expense, with all due diligence to commence and complete restoration of the Golf Facility to its condition and character just prior to the occurrence of such casualty.

8.02 Eminent Domain. If all of the Golf Facility (or such a substantial portion of the Golf Facility so to make it unfeasible, in the reasonable opinion of the City, to restore and continue to operate the remaining portion of the Golf Facility for the purposes contemplated in this Agreement) shall be taken through the exercise (or by agreement in lieu of the exercise) of the power of eminent domain, then upon the date that the City shall be required to surrender possession of the Golf Facility or of that substantial portion of the Golf Facility, 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. If such taking of a portion of the Golf Facility shall not make it unfeasible, in the reasonable opinion of the City, to restore and continue to operate the remaining portion of the Golf Facility for the purposes contemplated in this Agreement, then this Agreement shall not terminate, and the City shall proceed,

at the City's own expense, with all due diligence to alter or modify the Golf Facility so as to render it a complete architectural unit which can be operated as a golf course of substantially the same type and character as before.

8.03 Force Majeure Events. As used in this Agreement, the term "Force Majeure Event" means declared or undeclared war, acts of terrorism, sabotage, riot or acts of civil disobedience, acts or omissions of third-party governmental agencies, accidents, fires, explosions, floods, earthquakes, or other acts of God, strikes, labor disputes, shortages of materials, or any other event not within the control of Birdies and not caused by the gross negligence or intentional wrongful conduct of Birdies. For purposes of this Agreement, any disruption to the operation of the Golf Facility caused by a capital improvement project shall also constitute a Force Majeure Event.

9. INDEMNIFICATION.

9.01 Birdies' Indemnity. Birdies agrees to and shall indemnify and hold harmless the City and its officials, officers, employees, agents and volunteers from and against any and all claims, demands, actions, lawsuits, proceedings, damages liabilities, judgments, penalties, fines, attorneys' fees, costs, and expenses:

(a) which result from any act or omission arising from or relating to Birdies' operation and/or management of the Golf Facility pursuant to this Agreement; or

(b) which result from any action taken by Birdies relating to the Golf Facility that is expressly prohibited by this Agreement; or

(c) which result from Birdies' breach of any covenant or obligation contained in this Agreement.

9.02 City's Indemnity. The City agrees to and shall indemnify and hold harmless Birdies and its owners, officers, directors, employees, members and managers from and against any and all claims, demands, actions, lawsuits, proceedings, damages, liabilities, judgments, penalties, fines, attorneys' fees, costs, and expenses which result from the City's breach of this Agreement.

9.03 Nature of Indemnity. The indemnity obligations of Birdies set forth in this Section 9 shall be offset to the extent of any applicable insurance proceeds paid to the City. The provisions of this Section 9 shall survive the expiration or termination of this Agreement.

10. DEFAULT.

10.01 Events of Default. The occurrence of any one or more of the following events which is not cured in the time permitted shall constitute a default under this Agreement ("Event of Default"):

(a) Birdies' failure to pay any sums payable under this Agreement, including, without limitation, any Golf Facility Expense, when due.

(b) Either party's failure to comply with any of the material covenants, agreements, terms, or conditions of this Agreement or such failure shall continue for a period of thirty (30) days after written notice to the defaulting party specifying in detail the nature of such failure. Notwithstanding the foregoing, in the event any failure

cannot with due diligence be cured within such thirty (30) day period, if the defaulting party proceeds promptly and diligently to cure the same and thereafter diligently prosecutes the curing of such failure, the time within which the failure may be cured shall be extended for such period as may be reasonably necessary for the defaulting party to cure the failure.

11. REPRESENTATIONS AND WARRANTIES.

11.01 Birdies' Representations. As a material inducement to the City to enter into this Agreement, Birdies represents and warrants the following:

(a) Birdies is a [REDACTED] duly organized, validly existing and in good standing under the laws of the State of [REDACTED]; that it is duly qualified to do business and is in good standing in the State of California; that it has all necessary power and authority to enter into this Agreement and to carry out the transactions contemplated herein; and that the execution and delivery hereof and the performance by Birdies of its obligations hereunder will not violate or constitute a default under the terms and provisions of any agreement, law or court order to which Birdies is a party or by which Birdies is bound.

(b) All actions required to be taken by or on behalf of Birdies to authorize it to execute, deliver and perform its obligations under this Agreement have been taken, and that this Agreement is a valid and binding obligation of Birdies enforceable in accordance with its terms, except as the same may be affected by bankruptcy, insolvency, moratorium or similar laws, or by legal or equitable principles relating to or limiting the rights of contracting parties generally.

(c) The person(s) executing this Agreement on behalf of Birdies have full power and authority to bind Birdies to the terms hereof.

11.02 City's Representations. As a material inducement to Birdies to enter into this Agreement, the City represents and warrants the following:

(a) The City is a California municipal corporation and charter city, validly existing and in good standing under the laws of the State of California; that it is duly qualified to do business and is in good standing in the State of California; that it has all necessary power and authority to enter into this Agreement and to carry out the transactions contemplated herein; and that the execution and delivery hereof and the performance by the City of City's obligations hereunder will not violate or constitute a default under the terms and provisions of any agreement, law or court order to which the City is a party or by which the City is bound.

(b) All actions required to be taken by or on behalf of the City to authorize it to execute, deliver and perform its obligations under this Agreement have been taken, and that this Agreement is a valid and binding obligation of the City enforceable in accordance with its terms, except as the same may be affected by bankruptcy, insolvency, moratorium or similar laws, or by legal or equitable principles relating to or limiting the rights of contracting parties generally.

(c) The persons executing this Agreement on behalf of the City have full power and authority to bind the City to the terms hereof.

12. TRANSFERS AND ASSIGNMENTS.

12.01 Limitation on Birdies. Birdies shall not sell, convey, assign, transfer, hypothecate, pledge, or otherwise dispose of (or agree to do any of the foregoing) all or any part of its interest, if any, in this Agreement, or any contractual rights or obligations related hereto (except for Birdies' rights to receive payments hereunder), without the prior written consent of the City.

12.02 Limitation on City. The City may assign or transfer this Agreement to a governmental or other public agency related to the City. The City may also assign and transfer its rights under this Agreement to a purchaser or new owner of the Golf Facility that assumes the obligation of City hereunder. Otherwise, the City may not assign or transfer its rights hereunder.

12.03 Successors and Assigns. This Agreement is personal to the City and Birdies and except as otherwise provided herein, Birdies shall have no right, power or authority to assign this Agreement, or any portion hereof or any monies due or to become due hereunder, or to delegate any duties or obligations arising hereunder, either voluntarily, involuntarily or by operation of law, without the prior written approval of the City. Except as otherwise provided herein, Birdies shall not have any right, power or authority to subcontract its services, or any portion thereof, without the prior written approval of the City. Any approval by the City of any subcontract of Birdies' services or any part thereof shall not be construed to make the City a party to such subcontract or to expose the City to any claims or liabilities arising thereunder. Without waiver of the foregoing provisions, all of the rights, benefits, duties, liabilities and obligations of the parties hereto shall inure to the benefit of and be binding upon their respective successors and assigns.

13. MISCELLANEOUS.

13.01 Waiver. The waiver by either the City or Birdies of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition herein contained. No covenant, term or condition of this Agreement shall be deemed to have been waived by City or Birdies, unless such waiver is in writing signed by the party against whom such waiver is asserted.

13.02 Entire Agreement. This Agreement sets forth all the covenants, promises, agreements, conditions and understandings between the City and Birdies, oral or written, relating to the subject matter of this Agreement. The City has made no representations or promises not expressly contained herein. No subsequent alterations, amendment, change or addition to this Agreement shall be binding upon the City and Birdies unless reduced to writing and signed by them.

13.03 Notices. Notices, statements and other communications to be given under the terms of this Agreement shall be delivered in a timely fashion (and in any event within any time limits established elsewhere in this Agreement) and shall be in writing and delivered by hand (including pre-paid courier) or sent by a reputable overnight delivery service such as Federal Express and addressed as follows:

To City: City of Lancaster
44933 North Fern Avenue
Lancaster, California 93534
Attention: City Manager

To Birdies: 

or at such other address as from time to time designated by the party receiving the notice in accordance with this Section 12.03. The date of service of such notices shall be the date such notices are delivered to the party to whom the notice is given.

13.04 Applicable Law. This Agreement and all provisions thereof, irrespective of the place of execution or performance, shall be construed and enforced in accordance with the laws of the State of California. Venue for any action arising out of this Agreement shall be Los Angeles County.

13.05 Cumulative Rights. The rights and remedies conferred upon both the City and Birdies in this Agreement and by law are cumulative.

13.06 Severability. If any provisions of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by any party hereunder or substantially increase the burden on any party hereto, shall be held to be invalid or unenforceable to any extent, the same shall not affect in any respect whatsoever the validity or enforceability of the remainder of this Agreement.

13.07 Further Assurances. Birdies and the City each agree to execute and deliver from time to time, promptly following any reasonable request therefore by the other party, any and all instruments, agreements and documents, and promptly shall take such other actions as may be necessary or appropriate in the reasonable determination of the other party, to carry out the transaction described in this Agreement.

13.08 Possessory Interest. Pursuant to California Revenue and Taxation Code Section 107.6, the City hereby informs Birdies that this Agreement may create a possessory interest subject to property taxation, and in such event Birdies may be subject to the payment of property taxes levied on such interest. The parties agree that in the event possessory interest property taxes are levied against Birdies in connection with this Agreement, such taxes shall be considered a Golf Facility Expense.

13.09 Titles and Captions. Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Agreement or of any of its terms. Reference to section numbers are to sections in this Agreement, unless expressly stated otherwise.

IN WITNESS WHEREOF, the City and Birdies have signed this Agreement as of the date first written above.

CITY:
CITY OF LANCASTER, a California municipal corporation and charter city
By: _____
Name: _____
Its: _____

BIRDIES:
_____ a _____ doing business as BIRDIES
By: _____
Name: _____
Its: _____

APPROVED AS TO FORM:

City Attorney

ATTEST:

City Clerk