



TO THE HONORABLE MAYOR AND COUNCIL:

DATE: March 25, 2013

SUBJECT: EXTENSION OF INDEPENDENT CONTRACTOR AGREEMENT FOR PROFESSIONAL SERVICES WITH EAST BAY GOLF CENTERS, INC. (NO FISCAL IMPACT)

Report in Brief

Joseph Fernandez, dba East Bay Golf Centers, Inc. (EBGC), currently oversees the pro shop and various other golf operations at the City-owned Diablo Creek Golf Course. At the June 11, 2013 City Council meeting, Mr. Fernandez requested and the Council approved a nine month extension of his current independent contractor agreement, which was due to expire on June 30, 2013. Mr. Fernandez had requested this extension while he waited for a November hearing with the County Assessor's Office regarding a dispute over the amount of Possessory Interest Tax being levied on EBGC. Mr. Fernandez has resolved his dispute with the County Assessor's Office and is therefore, requesting to exercise the first of his two five-year extension options provided for in the agreement.

Staff recommends that the City Council approve the first of two five-year extension options to the independent contractor agreement with EBGC to be effective April 1, 2014 through March 31, 2019.

Background

The City retained the services of Joseph Fernandez as an independent contractor in July 1998 to manage and operate golf services at Diablo Creek Golf Course. The term of the agreement was for a total of fifteen years (one five-year term with two five-year renewal options). At the conclusion of the first five-year renewal option, Mr. Fernandez sought a change to the financial terms of his agreement and requested that an additional ten years be added to the term of his agreement. The City Council approved a new agreement on October 27, 2008. On June 11, 2013 prior to the conclusion of the first five-year term of the agreement, Mr. Fernandez sought a nine-month extension to the agreement pending the outcome of a dispute with the County Assessor's Office regarding the amount of Possessory Interest Tax levied on EBGC. City Council approved the nine-month extension to the first five-year term on June 11, 2013 extending the agreement to April 1, 2014.

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Discussion

Mr. Fernandez has settled his dispute with the County Assessor's Office and is, therefore, seeking to exercise the first of two five-year extensions to the independent contractor agreement effective April 1, 2014 through March 31, 2019 under the same terms and conditions as the original agreement approved on October 27, 2008. Provided EBGC is not in default under the Agreement, EBGC shall have the right to exercise one additional five-year option for the period April 1, 2019 through March 30, 2024, under the same terms and conditions as the initial term of this Agreement.

Fiscal Impact

There is no fiscal impact.

Public Contact

Posting of the City Council agenda. Copies of the agenda and staff report have been sent to East Bay Golf Center, Inc. and Wood, Smith, Henning & Berman, LLP.

Recommendation for Action

Staff recommends that the City Council approve the first of two five-year extension options to East Bay Golf Center's Independent Contractor Agreement held with Joseph Fernandez, Director of Golf dated March 25, 2014, and authorize the City Manager to execute the agreement (Attachment 1).



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INDEPENDENT CONTRACTOR AGREEMENT FOR PROFESSIONAL SERVICES

THIS AGREEMENT is made and entered into this ____ day of _____, 2014, by and between the City of Concord, a municipal California corporation, located in the County of Contra Costa, State of California, hereinafter referred to as City, and Joseph Fernandez, dba East Bay Golf Centers, Inc., hereinafter referred to as "EBGC," whose address is 1785 Giotto Drive, Brentwood, California 94513. City and EBGC are collectively referred to as the "Parties."

WITNESSETH:

WHEREAS, City owns, maintains and operates the Diablo Creek Golf Course ("Golf Course") located at 4050 Port Chicago Highway, Concord, California; and

WHEREAS, City requires the services of EBGC to manage and operate golf services, including providing the services of a Director of Golf; and

WHEREAS, EBGC represents that it is capable of and willing to render the services required by this AGREEMENT.

WHEREAS, the City represents that it is capable of and willing to provide the services required by this AGREEMENT.

WHEREAS, the City and EBGC previously entered into an exclusive agreement to manage and operate golf services, including the services of head golf professional at the Golf Course on June 9, 1998 and as amended June 14, 2005. The City thereafter approved EBGC's request to exercise the first of two five-year options effective July 1, 2003 through June 30, 2008. On October 27, 2008 the City entered into a new Independent Contractor Agreement for Professional Services ("2008 Agreement") which had a termination date of June 30, 2013. The 2008 Agreement was extended on June 21, 2013, with that extension effective through March 30, 2014.

WHEREAS, it is the intent of City and EBGC that this Agreement supersede and replace the June 9, 1998 Agreement as amended, and the October 27, 2008 Agreement as amended.

NOW, THEREFORE, in consideration of the mutual premises, covenants and conditions herein contained, the Parties agree as follows:

SECTION 1 - TERM

- A. The term of this Agreement shall commence on April 1, 2014 and shall terminate on March 31, 2019. Provided EBGC is not in default under the Agreement, EBGC shall have the right to exercise one five-year option for the period April 1, 2019 through March 30, 2024, under the same terms and conditions as the initial

term of this Agreement. EBGC must exercise the renewal option ninety days prior to the Agreement termination date, and said option must be exercised by EBGC in writing to the attention of the City's Director of Parks & Recreation. The Director's consent shall be required for a renewal; however, if EBGC is not in default under the Agreement, the Director's consent will not be unreasonably withheld.

SECTION 2 - SERVICES PROVIDED BY EBGC

- A. During the term of this Agreement, EBGC shall provide the following services at the Golf Course. The City expects the services to achieve a customer satisfaction rating of 90% good or excellent as determined by an annual random sample of approximately 500 Golf Course customers surveyed by a mutually agreed upon consultant. The services shall also meet the applicable standard of a first class public golf course. If EBGC does not achieve the desired rating, EBGC will have ninety days to cure the identifiable deficiencies within the survey. EBGC's failure to cure said deficiencies may constitute a material breach of this Agreement.
1. Hold the title of "Director of Golf" at the Golf Course and be responsible for all Golf Professional Services at Diablo Creek including, without limitation, the following:
 - a. Operate, maintain, and staff the Golf Shop.
 - b. Rent golf carts secured by EBGC to customers for use on the golf course.
 - c. Collect all green fees and deposit those funds daily into City accounts. EBGC shall establish appropriate bank accounts at a financial institution or institutions acceptable to City for the deposit of green fees. All other monies due City under this Agreement shall be paid monthly to City by EBGC. Said monthly payment shall be made not later than the fifteenth day of the month following the monthly period. EBGC is responsible to pay City for any shortages in deposits and City is responsible to refund any excess deposits to EBGC. EBGC shall produce written statements of reconciliation relating to all monies collected under this Agreement to City in a form and duration as reasonably directed by City.
 - d. Employ, train, and supervise such personnel as may be necessary to ensure that Diablo Creek has adequate and competent staff capable of performing the services required by this Agreement.

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- e. Provide staffing and all necessary supplies to operate the Golf Driving Range, Golf Shop, and Golf Cart storage and maintenance. Said maintenance shall not include capital improvements of building structures or utilities.
- f. Provide qualified staff to give golf lessons to persons desiring same.
- g. Secure and pay for golf balls, range mats, and other customer service supplies, exclusive of signs, for the existing Driving Range.
- h. Provide on-premises cart service and maintenance, including maintenance of storage areas and related equipment;
- i. Clean and maintain on a daily basis to City standards and specifications the Golf Shop, Driving Range area, and public staging area including but not limited to floors, walls, ceilings, windows, carpets and counters.
- j. Provide a quality junior golf program, including participation in the "First Tee" program.
- k. Provide player assistance and marshals to promote expeditious play, including hiring, training and supervision, to endeavor to achieve an average playing time of four hours and thirty minutes (4 ½ hours) for 18 holes.
- l. Provide assistance to the City for the promotion, scheduling and coordination of up to five annual City-sponsored golf events.
- m. Provide a fleet of eighty (80) quality golf carts to serve the Golf Course, including general maintenance, fuel, electricity, and cleaning.

SECTION 3 - SERVICES PROVIDED BY CITY

- A. During the term of this Agreement, City shall maintain the Golf Course including rest rooms, parking lots, and Driving Range. The City shall endeavor to achieve a customer satisfaction rating of ninety percent good or excellent as determined by an annual random sample of approximately five hundred Golf Course customers surveyed by a mutually agreed-upon consultant. The maintenance services shall also meet or exceed the standard established by three other area public golf courses specifically Boundary Oak, Walnut Creek, California; Lone Tree, Antioch, California; and Delta View, Pittsburg, California. If City does not

receive the desired rating, the City will make the necessary changes to accomplish the desired rating within a ninety (90) day period.

- B. City will coordinate a quarterly meeting with EBGC, the Golf Course Superintendent, and the Director of Parks & Recreation Services or his/her designee to review and establish action plans to improve the physical condition of the Golf Course.

SECTION 4 - FINANCIAL TERMS AND CONDITIONS

- A. Pro Shops: From the proceeds from the Pro Shop, City shall receive on a monthly basis, subject to a year-end adjustment:
 - 1. Five percent (5%) of all Gross Sales received for the sale of merchandise up to Four Hundred Fifty Thousand Dollars (\$450,000).
 - 2. Three percent (3%) of all Gross Sales received for the sale of merchandise over Four Hundred Fifty Thousand Dollars (\$450,000).
 - 3. Definition of Gross Sales. The term "Gross Sales" means the money or its equivalent received by EBGC or his agents from the sale of merchandise or for services, by or through the operation upon the Golf Course of any form of business.

Gross Sales shall not include the following items, and such items shall be deducted from Gross Sales if included therein.

- (aa) all credits and refunds made to customers;
- (bb) amounts paid to or retained by third parties in connection with stamp machines, public telephones, and public toilets;
- (cc) sums and credits received in settlement of claims for loss or damage to merchandise, and for the return of unsold merchandise to the supplier, and for the transfer of merchandise from the Property to another location owned or controlled by EBGC;
- (dd) all taxes charged to or collected by EBGC upon services, merchandise, upon the receipt or purchase of merchandise by EBGC, and/or all taxes upon or based upon the receipts of EBGC or upon the sale or sales price of merchandise and which must be paid by EBGC whether or not the same may be commonly known

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as a "sales tax" and/or "use tax" to the extent any such taxes are included in Gross Sales;

- (ee) promotional payments from distributors, vendors, and other third parties;
- (ff) sales of trade fixtures, improvements, furniture, and other personal property used in the operation of EBGC's business and not normally held for sale to the public;
- (gg) all transfers, sales or exchanges of merchandise not subject to sales tax.

B. Driving Range: From the Driving Range at the Golf Course, City shall receive on a monthly basis, subject to a year-end adjustment:

- 1. Twenty five percent (25%) of all monies received per year up to Three Hundred Fifty Thousand Dollars (\$350,000);
- 2. Twenty percent (20%) of additional monies received per year over Three Hundred Fifty Thousand Dollars (\$350,000);
- 3. EBGC shall establish pricing of range balls consistent with area standards subject to approval of the Director of Parks & Recreation. Approval shall not be unreasonably withheld.

C. Golf Carts: From the Golf Carts, City shall receive on a monthly basis, subject to year-end adjustment:

- 1. Twenty percent (20%) of all monies collected per year up to Four Hundred Thousand Dollars (\$400,000).
- 2. Fifteen percent (15%) of additional monies collected per year over Four Hundred Thousand Dollars (\$400,000).

D. Golf Lessons: From Golf Lessons, City shall receive on a monthly basis, subject to a year-end adjustment:

- 1. Ten percent (10%) of all monies collected per year.
- 2. EBGC shall establish pricing of golf lessons consistent with area standards subject to approval of the Director of Parks & Recreation. Approval shall not be unreasonably withheld.

- E. Greens Fees and Tournament Surcharges: City shall receive One Hundred Percent (100%) of all Greens Fees and tournament surcharges, subject to the provisions outlined below in subsection (F).
- F. Paid Rounds Played Incentive: EBGC shall receive specified amounts for paid rounds generated during the applicable fiscal year as follows:

Rounds:

0-70,000	\$0.50/per round
70,001 - 80,000	\$1.00/per round
80,001 - 90,000	\$2.00/per round
90,001 - 100,000	\$3.00/per round
Over 100,001	\$4.00/per round

This subsection F shall be effective as of the effective date of this Agreement.

- G. Base Revenue: Base revenue figures for golf cart revenues will be reviewed whenever fees are raised and may be adjusted at City's option by a percent equal to the percent of the fee increase. City to approve all increases.
- H. Expenses: EBGC shall be responsible for all expenses associated with the services described in Section 2 at the Golf Course, including without limitation, the following:
 1. Actual cost to EBGC of goods sold at Pro Shop;
 2. Employee costs (including workers' compensation, fringe benefits and other benefits required by law) for personnel used in Pro Shop, Driving Range, lessons and golf cart operations;
 3. Cost of insurance coverage, including insurance required by this Agreement;
 4. Reasonable expenses of obtaining professional services, including accounting and legal services as they may apply to the terms of this Agreement;
 5. Bank charges and credit card discounts incurred for merchandise and lessons.
 6. Dues and licenses - expenses of dues to professional golfers associations for EBGC and assistant professionals, as well as any other dues and licenses;

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7. Cost of operating supplies, including stationery, cleaning supplies, storage containers, business cards, first aid supplies, small tools, towels and soaps;
8. Cost of electrical utilities for the driving range lights, cart barns, and Pro Shop;
9. Custodial services for the Driving Range and Pro Shop;
10. Unrecovered cart damage;
11. Phone Services;
12. Postage and delivery;
13. Range balls and mats;
14. Ball washer maintenance repairs and replacement;
15. Ball dispenser maintenance, repairs and replacement;
16. Range ball picker maintenance, and repair, that is not covered by the applicable range ball picker lease;
17. All applicable governmental fees, charges and taxes resulting from EBGC's possession, occupancy, management and/or use of the Golf Course Facilities. In accordance with California Revenue and Taxation Code section 107.6(a), City confirms that by entering into this Independent Contractor Agreement, a possessory interest subject to property taxes may be created, and if so, EBGC shall pay the taxes upon the assessed value of that possessory interest, as determined by the Contra Costa County Assessor. Nothing contained in this paragraph is intended to cause Manager to pay any tax for which it is otherwise exempt.
18. City's representative and EBGC may, by written agreement, add or delete expenses from EBGC's expense responsibility, not to exceed Five Thousand Dollars (\$5,000) per fiscal year.
19. Sales tax paid to the State of California and any business license fee paid to the City of Concord;

SECTION 5 - ACCOUNTING

- A. EBGC shall keep records in accordance with fiscal procedures established by City consistent with generally accepted accounting principles. Each business day's total revenue shall be properly balanced and prepared for deposit as directed as a separate unit by procedures approved by City. An itemized statement prepared in a format approved by City of all business done for each preceding month shall be rendered to City on or before the 20th day of each succeeding month. The books of EBGC containing such records shall be subject to inspection by City at all reasonable times. City, at City's expense, may audit EBGC's financial records at any time for any fiscal year period within the limits of this Agreement. EBGC agrees to pay the City expense for the audit if the audit reveals discrepancies of more than 5% (five percent) for any one year period. Failure of EBGC to keep and maintain such records in a manner, which in the judgment of City, is fiscally irresponsible is cause for City to terminate this Agreement. EBGC's operating fiscal year shall be the same as the City's fiscal year, currently July 1 through June 30.

SECTION 6 - PERFORMANCE

- A. EBGC and his entire staff shall endeavor to meet all requirements for services in a good and workmanlike manner, and shall maintain themselves in such matters as to sobriety and moral character that they shall, at all times, be able to deal effectively and properly with the golfing public.
- B. EBGC shall adhere to all policies and procedures governing golf operations at the Golf Course as developed from time to time by agreement of the Parties.
- C. As this Agreement is a contract for the personal services of EBGC, EBGC is expected to be on site during the days and hours normally expected of a working Director of Golf and businessperson. At such times as EBGC is not on site, it shall specifically name a Manager on Duty and provide City with the names of those selected/qualified for this position. One of the so named Parties shall be on duty at all times EBGC is absent. EBGC may have financial interests not to exceed 49% in other retail golf operations but not as Director of Golf. Said operations shall not be inconsistent with any of EBGC 's obligations under this Agreement.
- D. EBGC shall develop an annual schedule (e.g. tournaments, leagues, lessons, demos, etc.) for the Golf Course. EBGC shall provide monthly statistical reports for City's Performance Based Budget.

SECTION 7 - INDEMNIFICATION

- A. With respect to all acts, errors or omissions in the performance of professional services, EBGC agrees to indemnify and hold harmless City, its officers, agents, employees, representatives and volunteers from and against any and all claims, demands, defense costs, liability or consequential damages of any kind or nature arising out of EBGC's negligent acts, errors or omissions in the performance of his professional services under the terms of this contract.

- B. With respect to all acts or omissions which do not arise out of the performance of professional services, including but not limited to those acts or omissions normally covered by general and automobile liability insurance, EBGC agrees to indemnify, defend (at City's option), and hold harmless City, its officers, agents, employees, representatives, and volunteers from and against any and all claims, demands, defense costs, liability, or consequential damages of any kind or nature arising out of or in connection with EBGC's (or EBGC's subcontractor's, if any) performance or failure to perform, under the terms of this contract; excepting those which arise out of the sole negligence of City.

- C. To the fullest extent permitted under California law, the City shall defend, indemnify, and hold harmless EBGC, its officers, agents, employees, and volunteers from any and all claims or causes of action for death or injury to persons, or damage to or loss of property arising out of an alleged dangerous condition on the City's property by reason of errant golf balls that may enter onto property adjacent to the golf course, and more specifically, by reason of the placement of the 10th tee on the golf course, except where such claim or cause of action arises from the sole negligence, active negligence, or willful misconduct of EBGC, its officers, agents, employees, or volunteers. The City shall bear all costs and fees relating to this indemnification provision.

The respective obligations arising out of the preceding subsections shall remain in effect following the expiration of this Agreement.

SECTION 8 - CONFLICT OF INTEREST

- A. EBGC represents that neither it nor any of its officers, partners or employees has a financial interest, as defined in §87103 of the Government Code, in the subject matter of this AGREEMENT, other than the right to receive payment from City for the services performed.

- B. EBGC agrees that it shall not make, participate in making, nor in any way attempt to use its position as the Director of Golf to influence any decision of City in which EBGC knows or has reason to know that EBGC or any of its officers,

partners or employees has a financial interest as defined in §87103 of the Government Code.

- C. EBGC represents that neither EBGC nor any of its officers, partners or employees have any financial interest in any real property, building or structure within 2,500 feet of the location of the project(s) to which this AGREEMENT relates. EBGC agrees it will disclose to City any such financial interest which EBGC or any of its officers, partners or employees may acquire in any location.

SECTION 9 - INSURANCE

- A. Without limiting City's right to indemnification, it is agreed that EBGC shall secure prior to commencing any activities under this AGREEMENT, and maintain during the term of this Agreement, insurance coverage as follows:
1. Workers' Compensation Insurance as required by California statute;
 2. Comprehensive General Liability Insurance, or Commercial General Liability Insurance including coverage for Premises and Operations, Contractual Liability, Personal Injury Liability, Products/Completed Operations Liability, and EBGC's Liability (if applicable), in an amount of not less than One Million Dollars (\$1,000,000.00) per occurrence, combined single limit, written on an occurrence form.
 3. Theft and Fire Insurance sufficient to cover EBGC's property at Golf Course;
 4. Comprehensive Automobile Liability coverage, including, as applicable, owned, non-owned and hired autos, in an amount of not less than One Million Dollars (\$1,000,000.00) per occurrence, combined single limit, written on an occurrence form.
 5. Professional Liability Insurance coverage in an amount not less than One Million Dollars (\$1,000,000.00), and EBGC shall maintain such coverage for at least one (1) year from the termination of this AGREEMENT.
 6. Appropriate Fidelity Bond to insure against loss of monies collected by EBGC for benefit of City.
- B. City's Risk Manager is hereby authorized to reduce or increase the requirements set forth above in the event it determines that such reduction/increase is in City's best interest.

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Each insurance policy required by this AGREEMENT shall contain the following clauses:

"This insurance shall not be cancelled, or limited in scope or coverage, until after thirty (30) days' prior written notice has been given to the City Clerk, City of Concord, 1950 Parkside Drive, Concord, CA 94520."

- C. Each insurance policy required by this AGREEMENT, excepting policies for workers' compensation and professional liability, shall contain the following clauses:

"It is agreed that any insurance maintained by EBGC pursuant to this AGREEMENT shall be primary to, and not contribute with, any insurance or self-insurance maintained by the City of Concord."

"The City of Concord, its officers, agents, employees, representatives and volunteers are added as named additional insureds as respects operations or activities of, or on behalf of the named insured, performed under contract with the City of Concord."

- D. Prior to commencing any work under this AGREEMENT, EBGC shall deliver to City insurance certificates confirming the existence of the insurance required by this AGREEMENT, and including the applicable clauses referenced above. Also, within thirty (30) days of the execution date of this AGREEMENT, EBGC shall provide to City endorsements to the above-required policies, which add to these policies the applicable clauses referenced above. Said endorsements shall be signed by an authorized representative of the insurance company, and it shall be EBGC's responsibility to see that City receives documentation acceptable to City which sustains that the individual signing said endorsements is indeed authorized to do so by the insurance company. Insurance required hereunder shall be placed with insurers reasonably acceptable to City. Also, City has the right to demand, and to receive within a reasonable time period, copies of any insurance policies required under this AGREEMENT.
- E. In addition to any other remedies City may have if EBGC fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option:

1. Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
2. Order EBGC to stop work under this AGREEMENT and/or withhold any payment(s) which become due to EBGC hereunder until EBGC demonstrates compliance with the requirements hereof;
3. Terminate this AGREEMENT.

Exercise of any of the above remedies, however, is an alternative to other remedies City may have and is not the exclusive remedy for EBGC's failure to maintain insurance or secure appropriate endorsements.

- F. Nothing herein contained shall be construed as limiting in any way the extent to which EBGC may be held responsible for payments of damages to persons or property resulting from EBGC's (or EBGC 's contractors/subcontractors, if any) performance of the work covered under this AGREEMENT.

SECTION 10 - DEFAULTS

- A. If any payments by EBGC hereunder shall be due and unpaid, or if default shall be made on the part of EBGC in any of the covenants or agreements contained herein, City may, at its option, at any time after such default or breach and without any demand on or notice to EBGC or to any other person of any kind whatsoever, terminate EBGC in accordance with Section 25 reenter and take possession of the Pro Shop at the Golf Course, the Driving Range, and cart storage and remove all persons therefrom. In addition to the above, in the event of such default, City may exercise any and all remedies available in law or equity.

SECTION 11 - RIGHTS OF CITY

- A. City may, from time to time at its option, exercise all rights or remedies which it may have either at law or in equity. Nothing herein contained shall be construed as in any way abridging or waiving any such rights or remedies and consent, waiver or compromise by City of or under any of the provisions of this AGREEMENT or as to any breach or default hereunder by EBGC shall not constitute nor be construed as a waiver of City's right to force strict interpretation and performance of the conditions and terms hereby by EBGC at all other times and as to the same and all other matters herein contained.

SECTION 12 - NON-REMOVAL OF PROPERTY

- A. EBGC expressly agrees as a part of the consideration for the execution of this AGREEMENT by City that it shall not remove any of its personal property and

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equipment from the Pro Shop concessions premises until all sums owing City shall have been paid.

SECTION 13 - CITY'S REVIEW AND APPROVAL

- A. Green fees and cart rental fees shall be established, and may be periodically adjusted, solely by formal action of the City Council.
- B. City shall be consulted, in advance, of all significant changes in services offered and/or significant changes in equipment at Golf Course.

SECTION 14 - CITY-EBGC MEETINGS

- A. City agrees that its designated representative will meet with EBGC periodically to discuss issues which may arise in the performance of the obligations required by this AGREEMENT. EBGC shall with reasonable notice attend all City meetings at which his presence is requested. At least one of the Assistant Pros is required to attend Concord Men's Golf Club and Concord Women's Golf Club board meetings.
- B. In addition, the Golf Course Maintenance Supervisor and the EBGC will meet weekly to discuss operations, program and maintenance schedules and other matters which may arise in the performance of the obligations required by this AGREEMENT.

SECTION 15 - PERSONAL SERVICES AGREEMENT - NON ASSIGNMENT

- A. City is hiring EBGC based on its qualifications and is engaging the personal services of EBGC. EBGC shall not assign this AGREEMENT without the prior written consent of City at City's absolute and sole discretion. Any purported assignment without such approval shall be null and void. EBGC may assign to an entity 100% owned and controlled by EBGC subject to approval by City. Approval of such assignment shall not be unreasonably withheld.

SECTION 16 - PROFESSIONAL STANDING

- A. EBGC warrants that it is, and will remain, during the terms of this AGREEMENT, a "Class A" member in good standing in the Professional Golfers Association of America. EBGC further warrants that the Assistant Golf Pros at the Golf Course will be members in good standing in the Professional Golfers Association of America or Ladies Professional Golf Association.

SECTION 17 - HOURS OF OPERATION

- A. The Driving Range and Pro Shop at the Golf Course shall be open for business, staffed and maintained from thirty (30) minutes before dawn to 9:00 p.m. The operating hours, with Agreement of EBGC and City's representative, may change from time to time. City will attempt to give EBGC at least two (2) weeks notice of any proposed change in the hours of operation.

SECTION 18 - SALE OR LEASE

- A. In the event City ceases actively operating Golf Course, or sells or disposes of the Golf Course, or leases the options of the Golf Course to any parties whatsoever, City's successor in interest shall take subject to this AGREEMENT.

SECTION 19 - STANDARDS

- A. EBGC shall, in the performance of this AGREEMENT, conform to applicable ordinances and rules, and state, federal and local laws, rules and regulations.
- B. EBGC's services shall be furnished in accordance with the applicable standard of a first class public golf course.
- C. City's services shall be furnished in accordance with the applicable standard of a first class public golf course.

SECTION 20 - ENTIRE AGREEMENT

- A. This writing constitutes the entire agreement between the Parties with respect to the subject matter hereof, and supersedes all oral or written representations or written agreements which may have been entered into between the Parties. No modification or revision shall be of any force or effect, unless the same is in writing and executed by the Parties thereto.

SECTION 21 - GOVERNING LAWS

- A. This AGREEMENT shall be governed by the laws of the State of California. If any portion of this AGREEMENT is held invalid under any applicable statute or rule of law, then such portion only shall be deemed invalid.

SECTION 22 - DESIGNATION OF AGENTS

- A. The Director of City's Parks & Recreation Department, or his or her designee, shall represent City in all matters to this AGREEMENT.

SECTION 23 - OWNERSHIP OF DOCUMENTS

- A. It is understood and agreed between the parties that all documents and records developed by EBGC pursuant to this AGREEMENT shall be delivered to City upon completion of the services or upon termination of this AGREEMENT for any reason.

SECTION 24 - INDEPENDENT CONTRACTOR

- A. EBGC is at all times an independent contractor pursuant to this AGREEMENT and shall not, in any way, be considered to be an officer, agent or employee of City. In consideration for the compensation paid to EBGC by City, EBGC agrees that City shall not be liable or responsible for any benefits, including, but not limited to, worker's compensation, disability, retirement, life, unemployment, health or any other benefits and EBGC agrees that it shall not sue or file a claim, petition or application relating to the aforementioned benefits therefore against City or any of its officers, employees, agents, representatives or sureties either for himself or for the individuals it employs at the Golf Course, whether as Assistant Golf/Professionals, or otherwise.

SECTION 25 - TERMINATION

- A. City may terminate this AGREEMENT for cause upon giving EBGC ten (10) days prior written notice. Cause shall be:
 - 1. Failure of EBGC to pay or deposit sums after five (5) days notice to cure.
 - 2. Failure of EBGC to cure after thirty (30) days notice, a violation of any laws, ordinances, rules, and regulations of any public authority having jurisdiction over the Golf Course.
 - 3. Failure of EBGC to cure after thirty (30) days notice, any material breach of this AGREEMENT.

SECTION 26 - MEDIATION

- A. Prior to commencement of any civil action relating to this AGREEMENT, the Parties agree to mediate the dispute through a mutually agreed upon third party mediator.

SECTION 27 - FORCE MAJEURE

- A. Obligations Suspended. If the City is unable by reason of Force Majeure (as herein defined) 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 during the continuance thereof. The party unable to perform shall give the other party prompt notice of such Force Majeure with reasonably full particulars thereof and, insofar as is known, 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.
- B. Removal of Force Majeure. 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.
- C. Definition. For the purpose of paragraphs 27(A) and (B) hereof, "Force Majeure" shall mean an act of God, strike, lockout or other industrial disturbance, act or a public enemy, war, blockade, public riot, lightning, fire, storm, earthquake, flood, explosion, governmental restraint, breakage, or accidents to equipment and any other cause whether of the kind specifically enumerated above or otherwise, which shall not reasonably be within the control of the party claiming suspension.

SECTION 28 - GOLF COURSE RENOVATION

- A. If in the event future construction and/or renovation projects are undertaken at the Golf Course which materially and adversely affect the operations of the Golf Course, City and EBGC agree to negotiate reasonable adjustments to the financial terms of this AGREEMENT.

SECTION 29 - FISCAL YEAR

- A. All references in this AGREEMENT to "annual," "yearly" or "per year" shall be a fiscal year commencing July 1 and ending June 30. EBGC may utilize a calendar year for tax reporting purposes.

SECTION 30 - NON REVENUE ROUNDS

- A. City and EBGC shall endeavor to reduce the current number of non-revenue rounds. EBGC shall have the right to issue up to 1,200 non-revenue rounds per year for the purpose of promotions and marketing and 2,000 non revenue-rounds for marshal compensation.

SECTION 31 - NAVAL WEAPONS STATION CLAUSE

- A. The City and EBGC acknowledge that the inland portion of the Concord Naval Weapons Station (“CNWS”) was recommended for closure by the Base Reuse and Realignment Commission in 2005. City was selected by the Federal Government to act as the Local Reuse Authority (LRA) to develop and adopt a Reuse Plan for the CNWS. A portion of the Diablo Creek Golf Course is part of the CNWS and is owned by the Navy and leased to the City under a long term lease. The City owns the other portion of the golf course.

During the course of the reuse planning process, the golf course site has been identified as an area for possible redevelopment, although such redevelopment is not a certainty. In the event the Golf Course is slated for redevelopment during the term or any authorized extension of the term pursuant to this Agreement, the parties agree to undertake a business asset valuation of EBGC’s golf course operations for the purpose of establishing an equitable valuation of EBGC’s business assets and to establish a purchase price by the City of the remaining value of the business assets at such time the golf course is closed. For the purposes of this Section 31, business assets shall be limited to the fair market value of any golf carts that remain unsold and any unsold inventory during the one (1) year period following City’s notice to EBGC that the Golf Course will be closed. EBGC expressly waives any right it may have to relocation costs and loss of goodwill.

EBGC shall undertake reasonable and good faith efforts to sell or otherwise dispose of its golf carts and inventory during the one (1) year period following City’s notice to EBGC that the Golf Course will be closed.

EBGC and City representatives shall meet informally to discuss and determine an equitable value of EBGC’s remaining business assets as defined above to be purchased by the City. If the parties are unable to arrive on an agreed value of the business assets, the parties agree to have the business assets appraised as set forth below.

B. APPRAISAL

(1) Selection of Appraiser

- (i) In General---Not later than 9 months after the City provides EBGC notice that the Golf Course will be closed for redevelopment purposes, the City and EBGC shall each select a qualified appraiser to conduct an appraisal of EBGC’s business assets as defined above to arrive at the fair market value of the

remaining golf carts and inventory. Any sales of golf carts and inventory during the ensuing three month period up to the date of the closure of the Golf Course shall be deducted from the appraised value of the business assets.

- (ii) Selection of Third Appraiser---The two selected appraisers shall, not later than 45 days after being selected by the City and EBGC, designate a third appraiser who is qualified to review and evaluate each party's appraisal.
- (iii) Methodology of Appraisal--- The appraisers shall meet and agree on a proposed methodology for valuing the business and will state separately the value of the business assets. If they fail to agree, they will submit their differences to a third appraiser. A decision agreed to by any two will be binding.
- (iv) Each party shall bear the cost of their appraisers and shall share equally the cost of the third appraiser.

SECTION 32 - NOTICES

- A. Any notices required or permitted by this AGREEMENT shall be in writing and shall be personally served or shall be sufficiently given or deemed served upon the other party if sent by United States Postal Service, postage prepaid, and addressed as follows:

To City: Director of Parks and Recreation
 City of Concord
 1950 Parkside Drive MS/10
 Concord, California 94519

To EBGC: Joseph Fernandez
 1785 Giotto Dr.
 Brentwood, CA 94513

Joseph Fernandez
Director of Golf
4050 Port Chicago Hwy
Concord, California 94520

- B. Notices shall be deemed given as of the date of personal service or upon the date of deposit in the course of transmission with the United States Postal Service.

Attachment No. 1

C. EBGC and EBGC's signators represent that the signators hold the positions set forth below their signatures and that the signators are authorized to execute this AGREEMENT on behalf of EBGC and to bind EBGC hereto.

The effective date of this Agreement shall be the latest date of execution hereinafter set forth opposite the names of the signators hereto. In the event EBGC fails to set forth a date of execution opposite the name(s) of EBGC's signator(s), EBGC hereby authorizes City, by and through its representative, to insert the date of execution by EBGC's signator(s) as the date of said AGREEMENT, as executed by EBGC, is received by City.

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed on the date hereinafter respectively set forth.

JOSEPH FERNANDEZ, dba East Bay Golf Centers, Inc.,

By: _____

DATED: _____

CITY OF CONCORD, a municipal corporation

By: _____
City Manager

ATTEST:

CITY OF CONCORD CITY CLERK

By: _____
MARY RAE LEHMAN, CMC, City Clerk

DATE OF EXECUTION:

APPROVED AS TO FORM:

CITY OF CONCORD

By: _____
MARK S. COON, City Attorney

DATED: _____