

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: MCAD

AGENDA DATE: September 29, 2020

CONTACT PERSON/PHONE: Ben Fyffe, Cultural Affairs and Recreation Director, (915) 212-1766

DISTRICT(S) AFFECTED: 2 & 4

STRATEGIC GOAL: NO. 8: Deliver prevention, intervention and mobilization services to promote a healthy, productive and safe community.

SUBJECT:

That the City Manager be authorized to sign a Facility Use Agreement by and between the City of El Paso and El Pasoans Fighting Hunger, a 501(c)(3) non-profit organization ("EPFH"), for EPFH's use of the Nolan Richardson Recreation Center located at 4435 Maxwell Dr, El Paso, Texas, 79904. EPFH intends to use the facility to serve as a drive-through food distribution site for participants of El Pasoans Fighting Hunger Weekly Pantry Program, (hereinafter the "Program").

BACKGROUND / DISCUSSION:

El Pasoans Fighting Hunger (EPFH) recently lost access to their distribution site in Northeast El Paso, creating lack of access for residents needing service in Districts 2 & 4. Community Development and EPFH approached Parks & Recreation to request access to a Parks facility that could serve these areas. Agreement will end either 90 days after Emergency Order ends or if renovation commences.

PRIOR COUNCIL ACTION:

Council approved EPFH to have service distribution from other Parks facilities on November 30, 2018, and December 6, 2018.

AMOUNT AND SOURCE OF FUNDING:

EPFH will reimburse City for hard costs including utilities and trash collection.

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



Ben Fyffe, Cultural Affairs and Recreation Director

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign a Facility Use Agreement by and between the City of El Paso and El Pasoans Fighting Hunger, a 501(c)(3) non-profit organization ("EPFH"), for EPFH's use of the Nolan Richardson Recreation Center located at 4435 Maxwell Dr, El Paso, Texas, 79904 ("Premises"). EPFH intends to use Premises as a drive-through food distribution site (hereinafter the "Program"). The purpose of the Program is distribute food to disadvantage communities throughout the City of El Paso. The City would provide Premises to EPFH for non-monetary consideration, consisting of the public benefit of providing food to community members, as well as performance of the other services and duties listed herein.

Dated this ____ day of _____ 2020.


CITY OF EL PASO

Dee Margo
Mayor

ATTEST:

Laura D. Prine
City Clerk

APPROVED AS TO FORM:



Roberta Brito
Assistant City Attorney

APPROVED AS TO CONTENT:



Ben Fyffe, Director
Parks and Recreation Director

THE STATE OF TEXAS §

FACILITY USE AGREEMENT

COUNTY OF EL PASO §

This Agreement ("Agreement") is made by and between the CITY OF EL PASO, TEXAS, a home rule municipal corporation, hereinafter referred to as "CITY", and the EL PASOANS FIGHTING HUNGER FOOD BANK, a public charity under IRS designation 501(c)(3), hereinafter referred to as "FOOD BANK".

WHEREAS, the CITY is the owner of the Nolan Richardson Recreation Center located at 4435 Maxwell Dr., El Paso, Texas, 79904, and hereinafter referred to as the "Premises;"

WHEREAS, FOOD BANK desires to enter into a facilities use agreement ("Agreement") with the CITY for the use of the Premises;

WHEREAS, FOOD BANK intends to use the Premises to serve as a drive-through food distribution site (hereinafter the "Program"); and

WHEREAS, the purpose of the Program is distribute food to disadvantage communities throughout the City of El Paso; and

WHEREAS, the CITY believes the agreement contemplated herein will further the objectives of all parties by combating hunger in the City of El Paso by increasing the availability of food to members of the community.

NOW, THEREFORE, for and in consideration of the covenants and agreements set forth herein, and other good and valuable consideration, the CITY and FOOD BANK enters this agreement for use of the Premises.

1. TERM AND CONSIDERATION

1.1 Term of Agreement. This Agreement shall be effective on the date executed as shown below and shall be for no more than 45 days after the termination of Emergency Ordinance No. 019036, as amended by any subsequent amendments, including City Ordinance No. 019090 ("Termination Date"). Notwithstanding the foregoing, CITY intends to begin renovations of the Premises in Spring 2021. Should the Emergency Ordinance still be in effect when renovations are scheduled to begin, CITY shall terminate this Agreement, providing FOOD BANK with 30 days prior notice.

1.2 Consideration. Consideration by FOOD BANK is non-monetary and consists of the public benefit of meals and related nutrition services that will be provided by FOOD BANK to community members at the Premises, as well as performance of the other services and duties listed herein. Consideration by the CITY will be to provide the non-assignable license to use the Premises to FOOD BANK.

2. USE OF PREMISES

2.1 Premises. The City owns and controls the Premises. FOOD BANK shall only use the Premises for operation of a drive-through food distribution site. FOOD BANK agrees that the building on the Premises shall be used solely for storing food and for staff and volunteer access

while providing food distribution services. Staff and volunteer access to the building may include access for work breaks, meetings, and restroom use. FOOD BANK agrees the building on the Premises is not open to the general public. FOOD BANK further agrees that food distribution services shall be provided on a non-discriminatory basis, although FOOD BANK may impose reasonable restrictions on services consistent with circumstances.

FOOD BANK expressly agrees not to use the Premises for any other purpose without first obtaining the CITY'S consent in writing. The CITY reserves the right to use the Premises for such purposes or activities not incompatible with FOOD BANK'S use of the Premises hereunder.

2.2 Premises Condition. FOOD BANK shall keep the Premises in good and clean condition during and after each food distribution event. FOOD BANK shall not be responsible for utilities, maintenance, or repair of the Premises, including the parking area, grounds, or landscaping. FOOD BANK shall promptly notify the CITY of any repair, defect, hazard, or problem with the Premises that may require the City's attention.

2.3 Costs. CITY will schedule janitorial services from CITY's contracted vendor, which may include other costs. CITY will invoice FOOD BANK for reimbursement of the janitorial services, trash pickup, and other incidental services or costs on a monthly basis. FOOD BANK shall pay the CITY the reimbursement costs within 15 business days of receipt of the CITY's invoice.

2.4 Garbage and Trash. Using the Premises bins or dumpsters, FOOD BANK shall properly dispose of all trash, garbage, and other refuse caused by FOOD BANK's use of the Premises. If existing dumpsters are not sufficient, FOOD BANK shall notify CITY.

2.5 Improvements and Fixtures. FOOD BANK shall not, without first obtaining the written consent of the CITY, or its designee, make any alterations, additions or improvements in, to, or about the Premises. All such alterations if any, shall be made at FOOD BANK's and/or its contractor's expense and may, at the CITY's option, become the property of the CITY at the end of the Agreement without reimbursement by the CITY. Depending on the circumstance, FOOD BANK and the CITY may agree in writing to share or appropriately allocate responsibility for the repair and maintenance of an alteration, addition, or improvement installed for use in the nutrition operation under this Agreement.

2.6 Improper Use. FOOD BANK shall not engage in or bring onto the Premises any use or activity that violates any federal, state and local laws and regulations.

2.7 Non Profit Use. FOOD BANK expressly agrees the Premises will only be used for government or non-profit community outreach activities that comply with this Agreement as well as applicable law or regulation.

2.8 Access by the City. The City will provide FOOD BANK with keys to the Premises, but City staff shall have access to the Premises at any time.

2.9 Returning the Premises to CITY. Prior to returning the Premises to the CITY pursuant to Paragraph 1.1 or Paragraph 8, FOOD BANK shall fully sanitized the Premises and return the Premises to the CITY in same condition it was received.

3. CONTRACTUAL RELATIONSHIP

3.1 FOOD BANK and the CITY are contracting parties under this Agreement. No partnership or joint venture is intended to be created by this Agreement, nor any principal-agent or employer-employee relationship between the parties or any of their officers, employees, agents, or contractors.

3.1.1 The parties understand and agree each will be responsible for its respective acts or omissions and shall in no way be responsible as an employer to or for the other party's officers, employees, agents, representatives or contractors who perform any service in connection with this Agreement.

3.1.2 FOOD BANK shall use its own employees or qualified contractors. FOOD BANK employees shall be under the exclusive supervision and control of FOOD BANK.

3.2 Neither party will receive any compensation or benefits from the other except as may be described herein.

3.3 The CITY and FOOD BANK understand and expressly agree that, in all things relating to this Agreement, the CITY is performing a governmental function, as defined by the Texas Tort Claims Act. The parties hereby agree the CITY enters into this Agreement as a governmental entity for the purpose of performing a governmental function. Nothing in this Agreement modifies or waives any sovereign immunity, lien or indemnity prohibition, defense, or limitation of liability enjoyed by CITY its elected officials, or employees at common law, under Texas tort or other law.

4. LIABILITY AND INSURANCE

4.1 LIABILITY INSURANCE. FOOD BANK shall provide public liability insurance for personal injuries and death growing out of any one accident or other cause in a minimum amount of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) per person, and Five Hundred Thousand and No/100 Dollars (\$500,000.00) for two (2) or more persons in any one accident, and, in addition, shall provide property damage liability insurance in a minimum sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) for property damage growing out of any one accident or other cause.

4.1.1 FOOD BANK is required to purchase liability insurance on behalf of the CITY or, alternatively, may name the CITY as an additional insured on the policy of general liability insurance referenced above. Such insurance shall provide coverage for any alleged acts or omissions of the CITY, its agents, employees or independent groups, alleged or asserted by any individual, in connection with the performance of this Agreement.

4.1.2 FOOD BANK shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all claims and lawsuits that arise and will pay any final judgment of a court of competent jurisdiction against the CITY, its officers, agents, servants or employees and groups, its officers, agents, servants or employees.

4.1.3 The Premises shall not be made available by the CITY until FOOD BANK files a copy of the policy or certificate of liability insurance as herein set forth with the City Clerk, and the Department. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without ten (10) days prior written notice to the City Clerk.

Failure to keep the policy in full force and effect during each annual even during the term of this Agreement shall be grounds for cancellation of this Agreement.

4.2 INDEMNITY. As a condition of this Agreement, FOOD BANK or its insurer will INDEMNIFY, DEFEND AND HOLD the CITY, its officers, agents and employees, HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE, (INCLUDING BUT NOT LIMITED TO ALL JUDGMENTS, SETTLEMENT AMOUNTS, ATTORNEYS' FEES, COURT COSTS AND EXPENSES INCURRED IN THE INVESTIGATION, HANDLING, DEFENSE AND LITIGATION OF ANY CLAIM OR SUIT, INCLUDING BUT NOT LIMITED TO ANY CLAIM OR SUIT) FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON REGARDLESS OF THE MERITS OF OR OUTCOME OF SUCH CLAIM OR SUIT ARISING OUT OF OR RELATED TO THIS AGREEMENT. THIS INDEMNIFICATION PARAGRAPH SHALL APPLY EVEN WHERE SUCH BODILY OR PERSONAL INJURY, ILLNESS, LOSS OF SERVICES, PHYSICAL OR MENTAL IMPAIRMENT TO OR DEATH OF ANY PERSON, OR FOR DAMAGE OR DESTRUCTION TO ANY PROPERTY RESULTS FROM OR INVOLVES NEGLIGENCE OR ALLEGATIONS OF NEGLIGENCE ON THE PART OF THE CITY, ITS OFFICERS, AGENTS OR EMPLOYEES. Without modifying the conditions precedent for preserving defenses, asserting claims or enforcing any legal liability, against the CITY as required by the City Charter or any law, the CITY shall promptly forward to FOOD BANK every demand, notice, summons or other process received by the CITY in any claim or legal proceeding contemplated herein. FOOD BANK will 1) investigate or cause the investigation of accidents or occurrences involving such injuries or damages; 2) negotiate or cause to be negotiated the claim as FOOD BANK may deem expedient; and 3) defend or cause to be defended on behalf of the CITY all suits for damages even if groundless, false or fraudulent, brought because of such injuries or damages. FOOD BANK shall pay all judgments in actions defended by FOOD BANK pursuant to this section along with all attorneys' fees and costs incurred by the CITY including interest accruing to the date of payment by FOOD BANK, and premiums on any appeal bonds. The CITY, at its election shall have the right to participate in any such negotiations or legal proceedings to the extent of its interest. The CITY shall not be responsible for any loss of or damage to FOOD BANK's property from any cause.

5. RELEASE

FOOD BANK releases the City from all claims of property damage, property loss, personal injury, illness, and death sustained by the FOOD BANK while performing the services under this Agreement regardless of whether such property damage, property loss, personal injury, illness, or death was caused by the negligence of the City or the City's officers, employees, and/or agents. This provision survives the term of the Agreement.

6. DAMAGES TO CITY PROPERTY

FOOD BANK is responsible for all damages caused by FOOD BANK to City property. If FOOD BANK damages any City property, then CITY will repair such damage to the CITY's standards and CITY will send an invoice to FOOD BANK for the full cost of repairs. FOOD BANK will pay in full any invoice sent by CITY under this Paragraph 6 within 15 business days of receipt of invoice.

7. SERVICES, MAINTENANCE & STAFF

7.1 City Responsibility. So long as FOOD BANK is not in default under this Agreement, the CITY will furnish the Premises with the following services and maintenance at its sole expense:

- 7.1.1 City will provide room / working space to setup pantry once a week for participants to choose their food items.
- 7.1.2 Staff will assist El Pasoans Fighting Hunger staff with participants' registration logistics as per proper room ambiance and tables and chairs.
- 7.1.3 Promote the program at the center as needed.
- 7.1.4 City will not be responsible to the keeping or storage of food items.

7.2 FOOD BANK'S Responsibilities. FOOD BANK shall provide its own staff, volunteers and any other assistants, none of whom shall be considered employees or agents of the City, as necessary for the execution of the services to FOOD BANK'S clients at the Premises. These individuals shall include supervisory staff for any children FOOD BANK brings to the Premises, and set-up and clean-up help.

- 7.2.1 Identify and register eligible individuals.
- 7.2.2 Set up a community pantry to give out food items.
- 7.2.3 Deal with all logistics, to include community comments and concerns.
- 7.2.4 FOOD BANK agrees to abide by all security precautions and procedures established by the CITY through the Director, or his designated representative(s).
- 7.2.5 Except as provided in this Section 5.1, FOOD BANK shall maintain the Premises and keep it free from waste or nuisance during each weekly event. After each event, FOOD BANK must deliver the Premises in as good a state of repair and condition as existed when the CITY delivered possession to FOOD BANK, except for reasonable wear and tear. If FOOD BANK neglects to reasonably maintain the Premises, the CITY may, but is not required to, cause repairs or corrections to be made. Any reasonable costs incurred for repairs or corrections for which FOOD BANK is responsible under this section are payable by FOOD BANK to the CITY as an additional user fee.

8. TERMINATION

8.1 Termination for Convenience. Either party may terminate this Agreement for any reason, upon 15 business days' prior written notice to the non-terminating party.

8.2 Termination by Either Party For Cause. Either party may terminate this Agreement in whole or in part for cause. Such termination may be made for failure of one party to fulfill its contractual obligations, pursuant to this Agreement, and through no fault of the other party. Prior to termination under this provision, the terminating party will: a) provide written notice of intent to terminate enumerating the failures for which the termination is being sought; and b) provide a minimum of 10 consecutive calendar days to the non-terminating party to cure such failure. CITY may immediately terminate this Agreement for default if FOOD BANK violates any local, state, or federal law, rules, or regulations that relate to the performance of this Agreement.

8.3 Termination by CITY. If FOOD BANK ceases to use the Premises for the purposes herein contemplated, CITY may immediately terminate this Agreement.

8.4 Force Majeure. Neither party to this Agreement will be liable for failure to comply with any term of this Agreement when such failure is caused by an event of war, fire, earthquake, flood,

strike, any law, rule, regulation or act of governmental authority, or any other act, event, cause or occurrence not within a party's reasonable control and rendering that party unable to perform its obligations. The party so affected by such event will immediately notify the other party in writing.

9. GENERAL PROVISIONS

9.1 Assignments and Subletting. FOOD BANK shall not assign this Agreement nor rent the Premises or any part thereof without the prior written consent of the CITY, except FOOD BANK may grant permission for the use of the Premises consistent with the purposes of this Agreement, but such permission shall not impair or diminish the rights of the CITY hereunder. The CITY shall have the right to refuse any such permission or license when it authorizes a use not contemplated by this Agreement.

9.2 Liens and Encumbrances. FOOD BANK shall not give nor permit any liens or encumbrances on the Premises, including but not limited to the facilities, buildings and improvements. Upon termination of this Agreement, FOOD BANK shall peacefully surrender such Premises to the CITY free of any liens or encumbrances.

9.3 Inspections. The CITY shall have the right to enter the Premises at all reasonable times, on twenty-four hour (24) notice, including notice via email, to the FOOD BANK (except that no notice need be given in case of an emergency) for the purpose of inspecting the same and determining compliance with the terms of this Agreement.

9.4 Compliance with Laws. The CITY shall observe and comply with all applicable federal, state and local law, codes and ordinances. The FOOD BANK shall observe and comply with all applicable federal, state and local laws, codes and ordinances including, but not limited to those related to the preparation, handling and distribution of food, and with such further reasonable rules and regulations as the CITY may prescribe, on written notice to FOOD BANK, for the safety, care and cleanliness of the Premises.

9.5 Survival. Each party shall remain obligated to the other under all clauses of this Agreement that expressly or by their nature extend beyond the expiration or termination of this Agreement.

9.6 Amendment. The parties may amend this Agreement or the Attachment at any time by mutual consent. Unless otherwise provided herein, this Agreement may be amended only by written instrument duly executed on behalf of each party.

9.7 Complete Agreement. This Agreement constitutes the entire understanding between the parties relating to the terms and conditions of the Agreement. The parties expressly acknowledge and warrant there exists no other written or oral understanding, agreements or assurances with respect to such matters except as are set forth herein. Unless expressly stated, this Agreement confers no rights on any person(s) or business entity (ies) not a party hereto. This Agreement shall not be construed against or unfavorably to any party because of such party's involvement in the preparation or drafting of this Agreement.

9.8 Governing Law. This Agreement shall be governed by the laws of the State of Texas, its conflicts or choice of law provisions notwithstanding.

9.9 Severability. All agreements and covenants contained in this Agreement are severable.

Should any term or provision herein be declared invalid by a court of competent jurisdiction, the parties intend that all other terms and provisions of this Agreement should be valid and binding and have full force and effect, to the extent practicable, as if the invalid portion was not included.

9.10 Notices. All notices required between the parties shall be in writing and sent to the address listed below. The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

CITY: CITY OF EL PASO
Attention: City Manager
300 N. Campbell
El Paso, Texas 79901

COPY TO: Parks and Recreation Department
Attention: Director
801 Texas Avenue
El Paso, Texas 79901

FOOD BANK: El Pasoans Fighting
Hunger Food Bank
Attention: Susan Goodell
9451 Plaza Circle
El Paso, Texas 79927

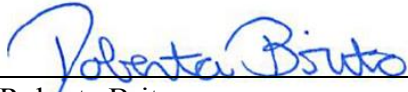
[Signatures begin on the following page]

Executed on the _____ day of _____, 2020.

CITY OF EL PASO

Tomás González,
City Manager

APPROVED AS TO FORM:



Roberta Brito
Assistant City Attorney

APPROVED AS TO CONTENT:



Ben Fyffe, Director
Parks and Recreation Director

**EL PASOANS FIGHTING HUNGER
FOOD BANK**

Susan Goodell
CEO