

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

DEPARTMENT: Economic Development

AGENDA DATE: November 18, 2014

CONTACT PERSON NAME AND PHONE NUMBER: Memo Sotomayor 915-212-1572

DISTRICT(S) AFFECTED: 1

SUBJECT:

That the City Manager be authorized to sign a Retail Lease Agreement between the CITY OF EL PASO and SUMATRA HOOKAH LOUNGE LLC, a Texas limited liability company, for the lease of approximately 3,750 square feet of the commercial retail space at the Glory Road Transit Terminal on that certain property described as Lots 11 through 20, Block 224, Alexander Subdivision, City of El Paso, El Paso County, Texas, commonly known as 100 Glory Road, Suite 100, for the operation of a retail business establishment for the on-site sale, serving, and consumption of alcoholic beverages for a five (5) year initial term with the option to extend for two additional five (5) year terms with an initial annual base rental amount of \$31,875.00 per annum (or \$2,656.25 per month) and escalated three percent (3%) annually provided however that the cumulative increase for the first three years will be payable on the first day of the fourth lease year, and to execute any necessary documents to accomplish the intent of this Resolution.

BACKGROUND / DISCUSSION:

The Glory Road Transit Terminal (GRTT) building was designed to have a retail space on the first floor. The existing space is currently vacant, as such it is underutilized. Leasing the space to David Aber will eliminate vacancy at the GRTT, provide an income stream, and will help bring the pedestrian alley between Glory Road and Cincinnati to life. The tenant is a good option as he is a local businessman that knows the business climate and has a well established reputation. The City is scheduled to make improvements to the space to the tune of \$125,000. Sun Metro had budgeted for tenant improvements and will provide the funding for this project. FTA and UTEP have both approved the lease. Staff will go back to UTEP for approval of construction design once the architectural designs are completed.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

\$125,000


From Sun Metro's Glory Road Terminal Account: 580270 – 560 – 3210 – 60070 – PCP09MT0030

BOARD / COMMISSION ACTION:

N/A

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

DEPARTMENT HEAD:


(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

CITY CLERK DEPT.

2014 OCT 29 PM 2: 36
RESOLUTION

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

That the City Manager be authorized to sign a Retail Lease Agreement between the CITY OF EL PASO and SUMATRA HOOKAH LOUNGE LLC, a Texas limited liability company, for the lease of approximately 3,750 square feet of the commercial retail space at the Glory Road Transit Terminal on that certain property described as Lots 11 through 20, Block 224, Alexander Subdivision, City of El Paso, El Paso County, Texas, commonly known as 100 Glory Road, Suite 100, for the operation of a retail business establishment for the on-site sale, serving, and consumption of alcoholic beverages for a five (5) year initial term with the option to extend for two additional five (5) year terms with an initial annual base rental amount of \$31,875.00 per annum (or \$2,656.25 per month) and escalated three percent (3%) annually provided however that the cumulative increase for the first three years will be payable on the first day of the fourth lease year, and to execute any necessary documents to accomplish the intent of this Resolution.

ADOPTED this _____ day of _____, 2014.

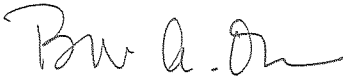
CITY OF EL PASO

ATTEST:

Oscar Leoser
Mayor

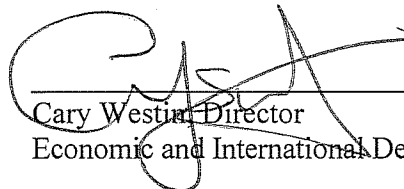
Richarda D. Momsen
City Clerk

APPROVED AS TO FORM:



Bertha A. Ontiveros
Senior Assistant City Attorney

APPROVED AS TO CONTENT:



Cary Westin, Director
Economic and International Development

**GLORY ROAD TRANSIT TERMINAL
RETAIL LEASE AGREEMENT**

**CITY OF EL PASO
LESSOR**

AND

**SUMATRA HOOKAH LOUNGE LLC
LESSEE**

**Glory Road Transit Terminal Retail
100 Glory Road, Suite 100, El Paso, Texas**

EFFECTIVE DATE

GLORY ROAD TRANSIT TERMINAL RETAIL LEASE AGREEMENT
SUMATRA HOOKAH LOUNGE LLC

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EXHIBIT A –Floor Plan for the Premises

EXHIBIT B – Ground Lease with Board of Regents, University of Texas System

EXHIBIT C - Floor Plan for the Glory Road Transit Terminal

EXHIBIT D - Federal Transit Administration Contract Clauses

EXHIBIT E - Initial Improvements to be Constructed by Lessor

- B. **Exhibit “B”** consists of a copy of the Ground Lease with the University of Texas at El Paso for the land on which the GRTT has been constructed.
- C. **Exhibit “C”** consists of the floor plan of the GRTT.
- D. **Exhibit “D”** consists of the provisions required by the Federal Transit Administration (the “FTA Clauses.”)
- E. **Exhibit “E”** consists of a list of Initial Improvements to the Premises to be completed by the LESSOR.

2. LEASED PREMISES.

- A. **Leased Premises.** Subject to and on the terms, conditions, covenants, agreements and undertakings hereinafter set forth, LESSOR does hereby demise and lease to LESSEE and LESSEE does hereby lease and takes from LESSOR, the Premises as more fully described in **Exhibit “A”**.
- B. **Ground Lease.** LESSOR has provided a copy of the Ground Lease to LESSEE, attached hereto as **Exhibit “B”**, who represents that it has reviewed the Ground Lease and is familiar with the terms and conditions thereof. LESSEE agrees that, at all times during the Term of this Lease, its leasehold is subject to the terms and conditions of the Ground Lease as applicable and that it will comply with the Ground Lease to the extent that it applies to the Leased Premises.
- C. **Right to Construct Leasehold Improvements.** LESSEE shall have the right and privilege to construct, maintain, and remove certain leasehold improvements upon the Premises subject to the terms, covenants, and conditions contained herein, including, but not limited to Section 9. Prior to the construction or any modifications to the Premises, the plans and specifications for any improvements, additions, alterations or changes as well as a schedule for completion of Tenant Improvements shall be submitted to the LESSOR’s Capital Assets Manager, for review and approval by the City and by UTEP. No work shall commence until the City Manager or her designee has given written approval.
- D. **Restriction of Privileges, Uses and Rights.** The rights and privileges granted LESSEE hereunder are subject and expressly limited for the operation of a retail business establishment open to the public for on-site sale, serving, and consumption of alcoholic beverages and, provided that the LESSEE pay for all related improvements to the Premises, the sale, serving and consumption of food and the use of the property for any smoking or use of tobacco is prohibited, as more specifically set forth in Section 4(E) and 4(G).

Any change of use will require the prior written approval of the City Council. Failure to obtain the prior written approval of the City Council prior to using the

Leased Premises for anything other than the approved use, shall constitute an event of default and may result in termination of the Lease.

The LESSEE acknowledges the Premises is located on real property owned by the University of Texas at El Paso

E. Conditions of Granting Lease. The granting of this Lease and its acceptance by LESSEE is conditioned upon the following covenants:

- 1) That no functional alteration of the Premises or improvements located thereon or functional change in the uses of such Premises shall be made without the prior written consent of LESSOR.
- 2) That the right to use the Premises shall be exercised only subject to and in accordance with the laws of the United States of America and the State of Texas; the rules and regulations promulgated by their authority and all reasonable and applicable rules, regulations and ordinances of LESSOR now in force or hereafter prescribed or promulgated by charter authority or by law.

3. OBLIGATIONS OF LESSOR.

A. Quiet Enjoyment. So long as LESSEE is not in default of any terms of this Lease Agreement, LESSEE shall have peaceful, quiet use and possession of the Premises throughout the term hereof. Such use and possession of the Premises is subject to the terms of this Lease Agreement.

B. Parking. LESSOR shall make four (4) monthly parking spaces in the GRTT parking facility available to the LESSEE with no more than access cards for each space, at the cost set forth in Section 5A of this Lease. Additional parking spaces may be purchased by LESSEE from the Property Manager at the then-current monthly parking rate. Any lost, stolen or damaged access cards may be replaced by Property Manager at the cost of \$10 per card, or the then current replacement cost established by the Property Manager for the parking facility access cards.

The LESSOR, through its Property Manager, will make available to the LESSEE 500 first hour validation coupons on the first day of each month. Additional first hour validation coupons may be purchased from Property Manager by LESSEE for the amount equal to 50% of then current posted first hour parking price.

Monthly parking and validated parking will not be valid during special events or during UTEP Premium or University use days (in compliance with the terms and conditions of the Ground Lease). Use of the parking facility during UTEP Premium or University use days will be solely based on a first-come, first-served basis.

4. OBLIGATIONS OF LESSEE.

- A. Net Lease.** This Lease shall be without cost to LESSOR except for LESSOR's obligations specifically set forth in Article 3 above and elsewhere in this Lease. LESSEE shall:
- 1) Keep and maintain the Premises and improvements located thereon in a good state of repair at all times;
 - 2) LESSEE agrees for the term of the Lease to pay any and all taxes assessed against the Premises, improvements located on the Premises, LESSEE's interest in the Premises and improvements, and all of LESSEE's personal property located on the Premises; and
 - 3) Pay all casualty, bond, and liability insurance premiums required in accordance with the terms of this Lease.
- B. Condition of Premises.** As of the Possession Date, LESSEE agrees it will accept the Premises in their then-present condition and agrees that the Premises are suitable for LESSEE's business, activities, and operations proposed to be conducted thereon relying on its own inspection and judgment. LESSOR has not made any warranties expressed or implied with regard to the condition of the Premises or improvements or their suitability for a particular use. LESSOR shall assume no responsibility as to the condition of the Premises and shall not assume responsibility for maintenance, upkeep, or repair necessary to keep the Premises in a safe and serviceable condition.
- C. Waiver of Warranty of Suitability.** **LESSOR DISCLAIMS ANY WARRANTY OF SUITABILITY THAT MAY OTHERWISE HAVE ARISEN BY OPERATION OF LAW. LESSOR DOES NOT WARRANT THAT EITHER: (i) THERE ARE NO LATENT DEFECTS IN THE FACILITIES THAT ARE VITAL TO LESSEE'S USE OF THE PREMISES OR THE GRTT FOR THEIR INTENDED PURPOSE; OR (ii) THAT THESE ESSENTIAL FACILITIES WILL REMAIN IN SUITABLE CONDITION. LESSEE ACCEPTS THE PREMISES "AS IS", WITH ALL FAULTS, RELYING ON LESSEE'S OWN INSPECTION AND JUDGMENT AND NOT IN RELIANCE ON ANY REPRESENTATIONS OF LESSOR. LESSEE LEASES THE PREMISES "AS-IS", WHETHER SUITABLE OR NOT, AND WAIVES THE IMPLIED WARRANTY OF SUITABILITY.**
- D. Annual Inspection.** At least once each calendar year during the term of this lease, LESSOR shall conduct an inspection of the Premises and improvements in order to insure they are being properly maintained. Upon completion of the inspections, LESSOR shall provide written notice of any repairs or maintenance which LESSOR in its sole discretion determines must be made to the Premises

and improvements. Failure to complete such repairs shall be an event of default and may result in termination of the Lease and a suit for collection of the sums necessary to make said repairs and court costs and attorney's fees for the collection action.

- E. Compliance with Laws.** LESSEE, at LESSEE's expense, agrees that it will construct, operate and maintain improvements on the Premises in accordance with the terms, conditions and processes contained herein, and in accordance with all laws, rules, orders, ordinances, directions, regulations and requirements of federal, state, county and municipal authorities, and UTEP'S Governmental Regulations (as defined and set forth in the Ground Lease, including, but not limited to, the UTEP Smoke and Tobacco Free Policy) now in force or which may hereafter be in force, including, but not limited to, those which shall impose any duty upon the LESSOR or LESSEE, with respect to the use, occupation or alteration of the Premises and any improvements thereon, and alcoholic beverages and food handling.

LESSEE, at LESSEE's expense, specifically agrees to make or cause to be made all such alterations to the Premises, and any improvements thereon, including, without limiting the generality of the requirements of this sentence, removing such barriers and providing such alternative services, as shall be required by the Americans with Disabilities Act of 1990, as amended, and any other laws, rules, orders, ordinances, directions, regulations and requirements of federal, state, county and municipal authorities, now in force or which may hereafter be in force, which relate to the use or occupation of the Premises and any improvements thereon by disabled persons ("Disabilities Laws").

- F. Environmental Laws.** LESSEE shall, at LESSEE's expense, comply with all present and hereinafter enacted Environmental Laws, and any amendments thereto, affecting LESSEE's use, operation, occupation or alteration of the Premises including any improvements thereon.

1) Definitions.

(a) "Environmental Laws" means any one or all of the following as the same are amended from time to time: the Comprehensive Environmental Response, Compensation, and Liability Act, 42 Section 9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6941 et seq.; the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq.; the Safe Drinking Water Act, 42 U.S.C. Section 300h et seq.; the Clean Water Act, 33 U.S.C. Section 1251 et seq.; the Clean Air Act, 42 Section 7401 et seq.; and the regulations promulgated thereunder and any other laws, regulations and ordinances (whether enacted by the local, state or federal government) now in effect or hereinafter enacted that deal with the regulation or protection of the environment, including the ambient air, ground water, surface water, and land use, including sub-strata land.

(b) "Hazardous Material" shall mean all substances, materials and wastes that are, or that become, regulated under or classified as hazardous or toxic under any Environmental Law and all petroleum products, such as gasoline, kerosene, and diesel fuel.

(c) "Release" shall mean any releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing, or dumping into the environment.

(2) Compliance.

(a) With the exception of medically necessary medicines, treatments, and/or equipment related to the mental health treatment provided to patients who receive services on the Premises, LESSEE shall not cause or permit any Hazardous Material to be used, generated, manufactured, produced, stored, brought upon, or released, on, under or about the Premises, or transported to and from the Premises, by LESSEE, its sublessees, agents, employees, contractors, invitees, or a third party in violation of any Environmental Law. LESSEE shall indemnify, defend and hold harmless LESSOR, its successors and assigns, its employees, agents and attorneys from and against any and all liability, loss, damage, expense, penalties and legal and investigation fees or costs, arising from or related to any claim or action for injury, liability, breach of warranty or representation, or damage to persons or property and any and all claims or actions brought by any person, entity or governmental body, alleging or arising in connection with contamination of, or adverse effects on, the environment or violation of any Environmental Law or other statute, ordinance, rule, regulation, judgment or order of any government or judicial entity which are incurred or assessed as a result (whether in part or in whole) of any activity or operation on or discharge from the Premises or any improvements thereon. This obligation includes, but is not limited to, all costs and expenses related to cleaning up the Premises, improvements, land, soil, underground or surface water as required under environmental law. LESSEE's obligations and liabilities under this paragraph shall continue so long as LESSOR bears any liability or responsibility under the Environmental Laws for any action that occurred on the Premises or any improvements thereon. This indemnification of LESSOR by LESSEE includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision because of Hazardous Material located on the Premises or any improvements thereon, or present in the soil or ground water on, under or about the Premises. The parties agree that LESSOR's right to enforce LESSEE's promise to indemnify is not an adequate remedy at law for LESSEE's violation of any provision of this Section.

LESSOR shall also have all other rights and remedies provided by law or otherwise provided in this Lease.

(b) Without limiting the foregoing, if the presence of any Hazardous Material on, under or about the Premises or in any improvements thereon or permitted by LESSEE results in any contamination of the Premises or any improvements thereon, LESSEE shall promptly take all actions, at its sole cost and expense, as are necessary to return the Premises or any improvements thereon to the condition existing prior to the introduction of any such Hazardous Material to the Premises or in any improvements thereon; provided that LESSOR's approval of such actions shall first be obtained, which approval shall not be unreasonably withheld so long as such actions would not potentially have any material adverse long-term effect on the Premises or on any improvements thereon.

(c) LESSEE shall, at LESSEE's own cost and expense, make all submissions to, provide all information to, and comply with all requirements of the appropriate governmental authority (the "Government") under the Environmental Laws. Should the Government determine that site characterization, site assessment and/or a cleanup plan be prepared or that a cleanup should be undertaken on the Premises or in any improvements thereon, then LESSEE shall, at LESSEE's own cost and expense, prepare and submit the required plans and financial assurances, and carry out the approved plans. At no cost or expense to LESSOR, LESSEE shall promptly provide all information requested by LESSOR to determine the applicability of the Environmental Laws to the Premises or to respond to any governmental investigation or to respond to any claim of liability by third parties which is related to environmental contamination.

(d) LESSEE shall immediately notify LESSOR of any of the following: (a) any correspondence or communication from any governmental entity regarding the application of Environmental Laws to the Premises or LESSEE's operation on the Premises, and (b) any change in LESSEE's operation on the Premises that will change or has the potential to change LESSEE's or LESSOR's obligations or liabilities under the Environmental Laws.

(e) LESSEE shall insert the provisions of this Section 3.03 in any lease agreement or contract by which it grants a right or privilege to any person, firm or corporation under this Lease.

G. Operating Covenants. LESSEE further covenants and agrees that it will not: (i) permit any sound system to be played at a level so as to disrupt the peace or permit any objectionable advertising medium to be visible from patrons of the GR TT; (ii) commit or permit waste or a nuisance upon the GR TT; (iii) permit or cause odors to emanated or be dispelled from the Premises; (iv) solicit business in the Common Areas of the GR TT nor distribute advertising matter to, in or upon

any such Common Areas except with the written authorization of Property Manager; (v) permit the loading or unloading or the parking or standing of delivery vehicles outside any area designated therefor, nor permit any use of vehicles which will interfere with the use of the Common Areas of the GRTT; (vii) permit any noxious, toxic or corrosive fuel or gas, dust, dirt, or fly ash on the Premises; or (viii) place a load on any floor in the GRTT, which exceeds the floor load per square foot for which such floor was designed to carry.

Since the Premises are located on real property owned by UTEP, pursuant to the UTEP Smoke and Tobacco Free Policy, the LESSEE further covenants and agrees that it will not permit any smoking or use of tobacco on the Premises.

The LESSEE shall, in the operation of the business allowed herein, employ or permit the employment of only such personnel as will assure a high standard of service to the public and shall be clean and properly attired for public sales. The management, maintenance and operation of LESSEE's business and the Premises shall, at all times be under the direct supervision of the LESSEE or an active, qualified, competent and experienced employee designated to represent LESSEE.

- H. Utilities.** LESSEE is solely responsible for the provision of all utilities services furnished during the term hereof, including, but not limited to, gas, electricity, telephone, cable, and water services required for the operation of LESSEE's business within the Premises. LESSEE agrees to pay before delinquency, all meter and any other utility charges including hook up, connection fees, or other charges which may accrue with respect to the Premises during the Initial Term of this Lease Agreement, and any Extension or Holdover periods, whether the same be charged or assessed at flat rates, measured by separate meters or prorated by the utility company. LESSOR shall in no event be liable to LESSEE for any interruption in the service of any such utilities to the Premises, without regard to the reason for such interruption; and this Lease Agreement shall continue in full force and effect despite any such interruptions.
- I. Trash, Garbage, and Other Refuse.** LESSEE shall provide a complete and proper arrangement for the adequate sanitary handling and disposal of all trash, garbage and other refuse caused as a result of its use and occupancy of the Premises. LESSEE shall provide and use suitable covered commercial type receptacles for all such garbage, trash and other refuse at the area designated by LESSOR, and will maintain these receptacles, screened from view of adjoining properties or public streets in an attractive, safe, and sanitary manner. Piling of boxes, cartons, barrels or other similar items, in an unsightly or unsafe manner, on or about the Premises, shall not be permitted.
- J. Fire Extinguishers.** LESSEE agrees to supply and maintain at its own expense any fire extinguishers, or other fire prevention equipment required by any and all applicable federal, state, and local laws, rules, orders, ordinances, and regulations, and/or as may be required by any underwriters association, bureau, or any other

similar body having jurisdiction over said Premises, except that the LESSOR will install and be responsible for maintaining the fire suppression and fire alarm systems, as set forth in **Exhibit “C”** and Section 7(A) herein..

- K. Hours of Operation.** The LESSEE will operate and conduct its business in the Premises during business hours that are typical of the industry in which it operates. The cost of such activities will be borne entirely by the LESSEE, at no cost to the LESSOR. LESSEE has accepted the Premises with the knowledge the site will be used by LESSOR in that manner.
- L. Alcoholic Beverages/Food Service.** Alcohol may be served on the Premises with but only to the extent that LESSEE obtains the legally required a Mixed Beverage Permit with Food and Beverage Certificate and such other licenses, permits and approvals required by state law.

In addition, the LESSEE may prepare, handle and serve food on the Premises, provided that the LESSEE shall pay for all of the costs for any necessary improvements to the Premises desired by LESSEE or required by law to permit the preparation, handling and serving of food on the Premises. LESSEE shall obtain all legal required licenses, permits and approvals required local, state or federal law for the preparation, handling or serving of food.

The LESSEE shall provide a copy of the current licenses to the LESSOR, and a copy of any renewed license within 15 days of the date it renews or obtains a new license during the Term. LESSEE specifically acknowledges that the failure to obtain and maintain the legally required licenses, permits and approvals shall be a material event of default and the LESSOR may terminate the Lease immediately upon written notice.

- M. Outdoor Seating Area.** To the extent provided by local law, LESSEE may establish an outdoor seating area by applying for and obtaining approval from the governmental authority for a Special Privilege for the encroachment area.

5. TERM AND RENEWAL OPTION.

- A. Initial Term.** The Lease shall be effective on the date that the LESSOR’S governing body approves this Lease (the “**Effective Date**”). The parties shall have vested rights immediately upon the Effective Date, and this Lease shall be binding and in full force and effect in accordance with its terms upon such execution; provided that the right of the LESSEE to possession of the Premises and its obligation to pay Rent hereunder shall commence simultaneously on the Possession Date, as defined herein.

It is understood by the parties hereto that the LESSEE will undertake certain leasehold improvements to the Premises, to make the Premises suitable for its specific purposes. The “Possession Date” shall commence following the date that the LESSOR completes the Landlord Improvements pursuant to Section 9 and the

LESSEE obtains the approval of the LESSOR and UTEP for the construction of the leasehold improvements or the date in which the LESSEE obtains the permits necessary for the construction of the Leasehold Improvements, whichever comes later. The LESSOR shall provide a written Notice to Proceed with the construction of the leasehold improvements to the LESSEE. The “**Possession Date**” shall be the date of the LESSOR’S Notice to Proceed.

The Initial Term of this Lease shall commence on the Possession Date and will end on the date that is five (5) years from the Rent Commencement Date (as defined in Section 6 herein).

- B. Lease Year.** The term “Lease Year” as used in this Lease Agreement shall mean a period during the Initial Term or any extensions thereof commencing on the Rent Commencement Date (as defined in Section 6 herein) and ending at midnight on the date same date in a the next subsequent calendar year.
- C. Option to Extend.** Provided no event of default shall then exist under this Lease Agreement, LESSEE shall have the right to extend the term of this lease for two (2) renewal terms of five (5) years each (individually, the “Extended Term”), provided however that written notice is given the LESSOR of such intention to extend the lease at least ninety (90) days prior to the End Date above stated; and further provided that all provisions of this Lease Agreement shall continue in full force and effect for the full period of any such extension. Minimum guaranteed rents, fees, and other charges for said additional term of years shall increase as set forth herein.
- D. Holding Over.** If LESSEE holds over or occupies the Premises beyond the Initial Term or any extensions thereto, LESSEE shall pay additional rents, fees, and other charges required for each day of such holding over upon the terms set forth in Section 5E herein. In such event, LESSEE shall occupy the Premises on a tenancy from month to month and all other terms and provisions of this Lease Agreement shall be applicable to such period.
- E. Public Necessity.** Should the public necessity require as determined by the Licensor, the LESSOR may terminate this Agreement upon ninety (90) day written notice to the LESSEE and this Lease Agreement shall expire with no additional costs or liabilities to either party.

6. RENT, FEES, AND OTHER CHARGES.

- A. Rent Abatement.** LESSOR and LESSEE acknowledge that LESSEE will make a significant investment of approximately \$50,000 in the Leasehold Improvements, trade fixtures and equipment in order to make the Premises ready for LESSEE’s operation. In recognition of the LESSEE’s initial capital investment, the LESSOR agrees that the Base Annual Rent as set forth in Section 6(B) has been

adjusted to an amount that is below the fair market value of the Premises for a period of five (5) years.

B. Base Annual and Monthly Rent. LESSEE shall pay to LESSOR as base rent for the Premises during the first year of the Initial Term, the annual sum of Thirty-One Thousand Eight Hundred Seventy-Five AND 00/100 DOLLARS (\$31,875.00.00) (the “Annual Rent” or “Annual Rental Amount”). The Annual Rent shall increase by three percent (3%) on the first day of the second and third Lease Years of the Initial Term but the cumulated increase shall be payable in monthly rental amounts beginning on the fourth Lease Year, as follows:

<u>YEAR</u>	<u>LEASE RATE</u>	<u>ANNUAL RENT</u>	<u>MONTHLY RENT</u>
1	\$8.50 sf	\$31,875.00	\$2,656.25
2	\$8.50 sf	\$31,875.00	\$2,656.25
3	\$8.50 sf	\$31,875.00	\$2,656.25
4.	\$14.20 sf	\$53,250.00	\$4,437.50
5.	\$14.60 sf	\$54,750.50	\$4,562.50

At any time beginning 60 days prior to the Lease Year 4 and continuing to the end of the Initial Term, the LESSOR may, at its option but no more often than every 12 months, get an appraisal of the fair market rent for the Property as set forth in Section 6(I) of this Lease.

The base Annual Rent includes an annual payment of \$3,120.00 for four (4) monthly parking spaces (\$780.00 per space annually), as further set forth in Section 3B herein.

Said Monthly Rent shall be paid in advance of each month of the Initial Term, with proration to occur for the partial first and last months, if the Rent Commencement Date is other than on the first day of the calendar month. All Monthly Rent payments by the LESSEE during the Initial Term shall be paid without deduction, offset, prior notice or demand, no later than the first (1st) day of each and every month during the Initial Term.

During the period in which the LESSEE constructs Leasehold Improvements (as further defined in Section 8 herein) and commencing with the Possession Date (as defined in Section 5A herein), the parties agree that the payment of the base Monthly Rent shall be abated for period not to exceed five (5) months from the Execution Date (the “Construction Period Rent”). The Construction Period Rent shall automatically cease i) thirty (30) days from the date that the City’s Building Permits and Inspections issues a certificate of occupancy; or ii) at the end of the permitted five (5) month construction period, whichever comes first, and the Monthly Rent payment for the such month shall be prorated proportionate to the number of days that the base Monthly Rent and the Construction Period Rent is due and payable.

- C. **Rent for Extended Term.** LESSEE shall pay to LESSOR as base Annual Rent and Monthly Rent for the Premises during each Extended Term in the amounts set by an appraisal as set forth in Section 6(G).

Said Monthly Rent shall be paid in advance of each month of the applicable Extended Term, with proration to occur for the partial first and last months, if the commencement of such extension is other than on the first day of the calendar month. All Monthly Rent by the LESSEE during the applicable Extended Term shall be paid without deduction, offset, prior notice or demand, no later than the first (1st) day of each and every month during the Extended Term.

- D. **Hold Over Rent.** If LESSEE holds over or occupies the Premises beyond the Initial Term or any extensions thereto, LESSEE shall pay a sum equal to one and one-half (1½) times the base Monthly Rent applicable for the Initial Term or the applicable Extended Term prorated for the number of days of such holding over. In addition, LESSEE shall also pay all other additional fees and charges required during the Initial Term and any extended periods, including Operating Expenses as Additional Rent as enumerated herein.

- E. **Unpaid Rent, Fees, and Other Charges.** Any installment of Rent, fees, or other charges accruing under any provision of this Lease Agreement that are not received by LESSOR by the tenth (10th) day of the month in which payment is due, shall bear interest at the highest maximum rate permitted by law.

- F. **Place and Manner of Payment.** All Rent, fees, and other charges required of LESSEE herein shall be paid to LESSOR at the following address, or at such place or by wire transfer as may be designated from time to time by LESSOR:

City of El Paso
Mass Transit Department (Sun Metro)
10151 Montana
El Paso, Texas 79925
Attn: Accts Receivable

- G. **Appraisal.** The fair market value of the Premises as set forth in Section 6(B) shall be determined by a lease appraisal.

LESSOR will select an appraiser (“First Appraiser”) from its list of qualified appraisers to establish the fair market value of the Premises. LESSOR shall notify LESSEE in writing of such selection and, if LESSEE is not satisfied with the selection of the First Appraiser, LESSEE, within fifteen (15) calendar days after receipt of said notice, shall notify LESSOR in writing of LESSEE’S selection of a qualified second appraiser (“Second Appraiser”). The selection of the Second Appraiser must be from the LESSOR’S list of qualified appraisers. If LESSEE does not respond within fifteen (15) calendar days after receipt of the written notice, or it does not select a Second Appraiser from LESSOR’S list of

qualified appraisers and notify LESSOR in writing as required herein, the First Appraiser shall proceed to establish the fair market value of the Premises. This will be the First Appraisal and the fair market value determined by the First Appraiser will be the Rent.

However, if a Second Appraiser is selected and LESSOR is satisfied with such selection, the Second Appraiser shall proceed to determine the fair market value of the Parcel. The fair market value determined by the Second Appraiser will be the Rent, and this value will become the First Appraisal.

If LESSOR is not satisfied with the selection of the Second Appraiser and LESSOR and LESSEE cannot mutually agree on the selection of one appraiser, then the First Appraiser will proceed to independently determine the fair market value of the Parcel.

If either LESSOR or LESSEE protests the fair market value of the Premises determined by the First Appraisal, the protesting party must notify the other party, in writing within fifteen (15) calendar days after receiving written notice of the fair market value of the Premises identified in the First Appraisal. LESSEE shall pay the Rent as determined by the First Appraisal under protest until there is a final determination of the fair market value for the Premises for which the Rent is determined. Should the final determination of the fair market value of the Premises be a lower rate than the fair market value of the Premises determined by the First Appraisal, LESSEE'S account will be credited by LESSOR accordingly.

The protesting party will select an appraiser ("Qualified Appraiser") from the LESSOR'S list of qualified appraisers to appraise the Premises. The Qualified Appraiser must complete the appraisal within thirty (30) calendar days of a notice to proceed. If the fair market value of the Premises determined in the appraisal by the Qualified Appraiser and the fair market value of the Premises identified in the First Appraisal are within ten percent (10%) of each other, then the fair market value of the Premises shall be the lower of the fair market values identified in the two appraisal reports. This amount will be the Rent.

If the fair market value of the Premises determined by the Qualified Appraiser and the fair market value of the Premises identified in the First Appraisal differ by fifteen percent (15%) or more, the fair market value of the Premises shall be established by the averaging of the fair market value of the Premises determined in the appraisal by the Qualified Appraiser and the fair market value of the Premises identified in the First Appraisal. This amount will be the Rent.

7. MAINTENANCE OF THE PREMISES.

- A. Maintenance by LESSOR.** LESSOR shall keep or cause to be kept the foundation, roof, and structural portions of walls, HVAC, plumbing and fire suppression and alarm systems of the Premises in good order, repair, and

condition except for damage due to the acts or omissions of LESSEE, its employees, or invitees. LESSOR shall commence required repairs as soon as reasonably practicable after receiving written notice from LESSEE of any required repair. Except as provided in this Section, LESSOR shall not be obligated to make repairs, replacements, or improvements of any kind upon the Premises, or to any equipment, merchandise, stock in trade, facilities, or fixtures therein, all of which shall be LESSEE's responsibility.

- B. Maintenance by LESSEE.** LESSEE shall at all times keep the Premises (including all entrances and vestibules) and all partitions, window and window frames and moldings, glass doors, door openers, fixtures, equipment and appurtenances thereof and any Leasehold Improvements it makes and all other parts of the Premises not required herein to be maintained by LESSOR in good order, condition and repair and clean, orderly, sanitary and safe, damage by unavoidable casualty excepted. Such maintenance responsibilities shall include but not limited to those activities necessary to cause the Premises to comply with applicable laws, ordinances, rules, regulations and orders or governmental and public bodies and agencies. If replacement of equipment, fixtures and appurtenances thereto are necessary and upon prior review and approval of LESSOR, LESSEE shall replace the same with equipment, fixtures and appurtenances of the same quality, and repair all damages done in or by such replacement.

LESSOR shall be the sole judge of the quality of maintenance and, upon written notice by LESSOR to LESSEE, LESSEE shall be required to perform whatever maintenance LESSOR deems necessary. If said maintenance is not undertaken by LESSEE within ten (10) days after receipt of written notice, LESSOR shall have the right to enter on the Premises and perform the necessary maintenance, the cost of which plus ten percent (10%) shall be borne by LESSEE. If LESSEE fails to perform work resulting from LESSEE's acts, actions or omissions LESSOR may add the cost of the same to the next installment of Rent due hereunder as Additional Rent.

- C. Condition at Surrender of Premises.** At the expiration or termination of this Lease Agreement, LESSEE shall surrender the Premises in the same condition as they were in on the Commencement Date, reasonable wear and tear excepted, and deliver all keys for, and all combinations on locks, safes, and vaults in, the Premises to LESSOR.
- D. Repairs to GRTT.** From time to time during the lease term, LESSOR may find it necessary to make repairs to the improvements located on the GRTT. Every effort will be made to not interfere with LESSEE's use and enjoyment of the site but LESSEE understands and agrees that the use of the GRTT will sometimes require the cooperation of LESSEE and adjustments to LESSEE's operations.

8. ALTERATIONS, ADDITIONS, AND IMPROVEMENTS.

- A. Initial Improvements.** The parties agree that the interior condition of the Premises and requires certain build out of the shell space by LESSOR prior to the LESSEE'S construction of Leasehold Improvements.

The LESSOR shall complete construction of those certain improvements to the interior shell of the Premises, at its sole cost and expense, as set forth in the attached **Exhibit "E"** ("Initial Improvements") prior to the Possession Date and the LESSEE'S construction of the Leasehold Improvements. It is anticipated that the Initial Improvements shall be completed within [120] days ("Projected Delivery Date") of the Execution of this Lease, provided that prior to the LESSOR'S obligation to commence construction of the Initial Improvements, the LESSEE shall provide a copy of the final financing commitment from its lender and LESSOR'S approval of the Leasehold Improvements within 60 days of the Effective Date.

- B. Leasehold Improvements.** Pursuant to the provisions in this Lease and the UTEP Ground Lease, the LESSEE shall obtain the LESSOR's and UTEP'S approval prior to the construction of any leasehold improvements. Within 90 days of the Effective Date of the Lease, or at least 60 days prior to the date of any subsequent improvements proposed by LESSEE, the LESSEE shall submit to the LESSOR and UTEP the LESSEE'S plans, specifications and working drawings for LESSEE's construction or alterations of any improvements to the Premises (the "Leasehold Improvements"), and a schedule for completion of such Leasehold Improvements for review and approval. Such Leasehold Improvements shall include, but not be limited to the installation of any signs, awnings, canopies, landscaping or fixtures on the Premises or GRTT. In addition, the LESSEE shall pay for all of the costs for any necessary improvements to the Premises desired by LESSEE or required by law to permit the preparation, handling and serving of food on the Premises. During construction, the construction of the Leasehold Improvements shall not interfere with access from the Premises to the common areas of GRTT and the area designated as the Pedestrian Plaza. LESSEE shall have no right whatsoever to the interior or exterior walls or the roof of the Premises or any portion of the GRTT outside the Premises except as expressly approved. Any Leasehold Improvements permitted to be installed by LESSEE shall incorporate new or completely reconditioned fixtures and materials.

No work shall commence until the City Manager or her designee has given written approval. It is specifically understood that the Real Estate division is only one of numerous departments of the LESSOR and that, in addition to obtaining approval of the Real Estate Manager, LESSEE shall be required to obtain the approval of other departments as well, such as Engineering, Municipal Services, or Building and Planning Services.

In addition, pursuant to the terms and conditions of the Ground Lease, the LESSEE agrees that the approval of the Leasehold Improvements from UTEP shall also be required.

- B. Compliance with Applicable Regulations and Ground Lease.** In the event LESSEE receives approval for any proposed Improvements, any and all such Improvements shall comply with all applicable laws, codes, and regulations, including but not limited to the El Paso City Code regulations and UTEP 'S Governmental Regulations (as defined and fully set forth in the Ground Lease). The construction of all Leasehold Improvements shall comply with the applicable requirements and construction standards set forth in the Ground Lease.
- D. Improvements Upon Termination or Expiration.** All Improvements, including leasehold improvements, made by LESSEE, or made by LESSOR on LESSEE's behalf, whether or not paid for wholly or in part by LESSOR, shall remain LESSEE's property for the Lease Term. Upon expiration or termination of this Lease Agreement, any such Improvements shall immediately become LESSOR's property, be considered part of the Premises, and shall not be removed without LESSOR's prior written consent unless LESSOR, in writing, requests LESSEE to remove same. If LESSEE removes any shelving, decoration, equipment, trade fixtures, or personal property, LESSEE shall repair or pay for the repair of any damage done to the Premises resulting from removing the same.
- E. Discharge of All Liens.** Where applicable, LESSEE shall promptly pay all contractors and materialmen, and not permit or suffer any lien to attach to the Premises, the GRTT, or any part thereof. LESSEE shall and does hereby indemnify and save harmless LESSOR against the same. LESSOR shall have the right to require LESSEE to furnish a bond or other indemnity satisfactory to LESSOR prior to the commencement of any work by LESSEE or its contractors or subcontractors on the Premises or GRTT. LESSEE shall be fully responsible for the full discharge of any and all contractor, materialmen, or other lien claimed.

9. TAXES AND GOVERNMENTAL CHARGES.

- A.** LESSEE shall pay all taxes and governmental charges of any kind whatsoever that may be assessed against the LESSEE or the LESSOR, with respect to the Premises, LESSEE's leasehold interest or any improvements thereon, during the Term of this Lease Agreement, including any extensions or option periods.
- B.** The LESSEE in good faith may contest any tax or governmental charge; provided that the LESSEE may not permit such tax or governmental charge to remain unpaid during the period of such contest and any appeal therefrom unless, in the opinion of counsel satisfactory to the LESSOR, such action will not adversely affect any right or interest of the LESSOR.

10. INSURANCE AND INDEMNIFICATION.

A. Fire and Other Risks Insurance. LESSEE, at its sole cost and expense, shall throughout the Initial Term of this Lease Agreement and any extensions thereto, keep or cause to be kept all improvements now or hereafter located upon the Premises, including, but not limited to the Leasehold Improvements, insured for the mutual benefit of LESSOR, UTEP and LESSEE against loss or damage by fire and against loss or damage by other risks embraced by “extended coverage” and against civil commotions, acts of war, riots, vandalism, and malicious mischief, in an amount equal to the actual replacement cost of such improvements. Neither LESSOR nor UTEP shall be liable for any loss by any casualty, fire, or theft. LESSEE is solely responsible for carrying adequate insurance at its sole cost and expense to cover LESSEE for any such losses.

B. Liability Insurance. LESSEE, at its sole cost and expense shall, throughout the Initial Term of this Lease Agreement and any extensions thereto, provide and keep in force for the benefit of LESSEE, with LESSOR as additional insured, comprehensive general liability insurance in an amount not less than:

\$1,000,000 - Per Occurrence

\$1,000,000 – General Aggregate

\$1,000,000 – Products/Completed Operations – Occurrence & Aggregate

The following endorsements shall be added to the policy:

(1) A Waiver of Subrogation in favor of the City of El Paso; and

(2) A thirty (30) day Notice of Cancellation/Material Change in favor of the City of El Paso.

C. Workers Compensation. In addition, LESSEE, at its sole cost and expense shall, throughout the Initial Term of this Lease Agreement and any extensions thereto, shall obtain and maintain Workers’ Compensation and Employers Liability coverage with limits consistent with statutory benefits outlined in the Texas Workers’ Compensation Act and minimum policy limits for employers liability of \$1,000,000 bodily injury each accident, \$1,000,000 bodily injury by disease policy limit and \$1,000,000 bodily injury by disease each employee. The following endorsements shall be added to the policy:

(3) A Waiver of Subrogation in favor of the City of El Paso and Board of Regents of University of Texas System; and

(4) A thirty (30) day Notice of Cancellation/Material Change in favor of the City of El Paso and Board of Regents of University of Texas System.

D. Authorized Insurance Companies. All such policies of insurance shall be written by insurance companies authorized to do business in the State of Texas and shall be written by companies approved by LESSOR, such approval not to be unreasonably withheld. Certificates of insurance shall be delivered to LESSOR at least ten (10) days prior to the effective date of the insurance policy for which the certificate is issued. Each such certificate shall contain:

- (1) A statement of the coverage provided by the policy;
- (2) A statement certifying the LESSOR to be listed as an additional insured in the policy;
- (3) A statement of the period during which the policy is in effect;
- (4) A statement that the annual premium or the advance deposit premium for such policy has been paid in advance; and
- (5) An agreement by the insurance company issuing such policy that the policy shall not be materially altered, canceled, or reduced in any amount for any reason whatsoever without at least thirty (30) days prior written notice to LESSOR.

E. Indemnification. LESSEE AGREES TO INDEMNIFY AND HOLD LESSOR AND UTEP HARMLESS AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS, AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY'S FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY, OR INDIRECTLY TO THE OPERATION, CONDUCT OR MANAGEMENT OF LESSEE'S BUSINESS ON THE PREMISES OR THE GRTT, ITS USE OF THE PREMISES OR THE GRTT, OR FROM ANY BREACH ON THE PART OF LESSEE OF ANY TERMS OF THIS LEASE AGREEMENT, OR FROM ANY ACT OR NEGLIGENCE OF LESSEE, ITS AGENTS, CONTRACTORS, EMPLOYEES, SUBTENANTS, CONCESSIONAIRES, OR LICENSEES IN OR ABOUT THE PREMISES OR THE GRTT INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE, OR IN PART, FROM THE NEGLIGENCE OF LESSOR OR UTEP. IN CASE OF ANY ACTION OR PROCEEDING BROUGHT AGAINST LESSOR BY REASON OF ANY SUCH CLAIM, LESSEE, UPON NOTICE FROM LESSOR, AGREES TO DEFEND THE ACTION OR PROCEEDING BY COUNSEL ACCEPTABLE TO LESSOR.

11. RIGHT OF ENTRY. LESSOR, UTEP or their agents and employees shall have the right to enter the Premises from time to time at reasonable times to examine and make such repairs, alterations, improvements, or additions as LESSOR or UTEP deems desirable. Rent shall in no way abate while any such repairs, alterations, improvements,

or additions are being made. During the last six (6) months of the Initial Term or any extensions thereto, LESSOR, or their agents and employees may exhibit the Premises to prospective lessees and maintain upon the Premises notices deemed advisable by LESSOR. In addition, during any apparent emergency, LESSOR, UTEP or their agents and employees may enter the Premises forcibly without liability therefore and without in any manner affecting LESSEE's obligations under this Lease Agreement. Nothing herein contained, however, shall be deemed to impose upon LESSOR or UTEP any obligation, responsibility, or liability whatsoever, for any care, maintenance, or repair except as otherwise herein expressly provided.

12. DESTRUCTION OF IMPROVEMENTS BY FIRE OR OTHER CASUALTY.

A. Obligations of LESSEE. During the term hereof, except as provided in Section 7.03 below, should the improvements on the Premises be damaged or destroyed in whole or in part by fire or other casualty, LESSEE shall give prompt notice thereof to LESSOR, and LESSOR shall repair, replace and rebuild the same, at least to the same extent as the value and as nearly as practical to the character of the buildings and improvements existing immediately prior to such time. Such repairs, replacements or rebuilding shall be made by LESSOR as aforesaid and LESSOR shall bill LESSEE for the repairs, replacements or rebuilding.

B. Insurance Proceeds. Upon receipt by LESSEE of the proceeds of the insurance policy or policies, LESSEE shall deposit same in an escrow account to pay for the cost of such repair, replacement or rebuilding. Such proceeds shall be disbursed by LESSEE during construction to pay the cost of such work. If the amount of such insurance proceeds is insufficient to pay the costs of the necessary repair, replacement or rebuilding of such damaged improvements, LESSEE shall pay any additional sums required, and if the amount of such insurance proceeds is in excess of the costs thereof, the amount of such excess shall be retained by LESSEE.

C. Cancellation of Lease. Should the improvements on the Premises be damaged or destroyed in whole or in part by fire or other casualty during the last year of the initial term or last year of any renewal term of this Lease, LESSEE shall be relieved of the obligation to repair, replace and rebuild the same and shall have the right to cancel this Lease by giving LESSOR written notice of such election within thirty (30) days after the date of any such damage or destruction. In such event, this Lease shall terminate as of the date of such destruction and the insurance proceeds received or receivable under any policy of insurance shall be paid to and retained by LESSOR, unless LESSOR has elected to have the Premises returned to it clear of all improvements in accordance with Section 10.06 herein below, in which case LESSEE shall be entitled to such insurance proceeds. All rents payable under this Lease shall be prorated and paid to the date of such cancellation. The receipt of insurance proceeds by LESSOR will relieve LESSEE from any responsibility to restore the Premises to their former condition.

13. EMINENT DOMAIN/CONDEMNATION

A. Definitions. The following definitions apply in construing the provisions of this Lease relating to the taking of or damage to all or any part of the Premises, or improvements thereon, or any interest in them by eminent domain or condemnation:

- (1) "Taking" means the taking or damaging, including severance damage by eminent domain or by condemnation for any public or quasi-public use under any statute. The transfer of title may be either a transfer resulting from the recording of a final order in condemnation or a voluntary transfer or conveyance to the condemning agency or entity under threat of condemnation and avoidance proceedings are pending. The taking shall be considered to take place the date actual physical possession is taken by the condemning authority.
- (2) "Total taking" means the taking of the fee title to all of the Premises and improvements thereon.
- (3) "Substantial taking" means the taking of so much of the Premises or improvements or both that one or more of the following conditions results:
 - (a) The remaining portion of the Premises and improvements thereon after such taking would not be economically and feasibly useable by LESSEE;
 - (b) The conduct of LESSEE's business on the Premises would be substantially prevented or impaired;
 - (c) The portion of the Premises not so taken cannot be so repaired or reconstructed, taking into consideration the amount of the award available for repair or reconstruction, as to constitute a complete rentable structure capable of producing a proportionately fair and reasonable net annual income after payment of all operation expenses including the rent and after performance of all covenants and conditions required of LESSEE under this Lease.
- (4) "Partial taking" means the taking of a fee title that is not either a total or substantial taking.
- (5) "Improvements" includes, but is not limited to, all buildings, structures, fixtures, fences, utility installations, parking facilities and landscaping on the Premises.
- (6) "Notice of intended taking" means any notice or notification on which a reasonably prudent person would rely and which such person would interpret as expressing an existing intention of Taking as distinguished by a mere preliminary inquiry or proposal. It includes, but is not limited to, the service of a condemnation summons and complaint on a party to this Lease. The notice is considered to have been received when a party to this Lease receives from the

condemning agency or entity a notice of intent to take in writing containing a description or map reasonably defining the extent of the Taking.

- (7) "Award" means compensation paid for the Taking, whether pursuant to judgment, or by agreement, or otherwise.
- (8) "Date of Taking" means the date that LESSEE is required to vacate the Premises pursuant to a final order of condemnation or agreement between the parties hereto.

B. Notice of Condemnation. The party receiving any notice of the kind specified below shall promptly give the other party notice of the receipt, contents and date of the notice received:

- (1) Notice of intended Taking;
- (2) Service of any legal process relating to condemnation of the Premises or improvements; or
- (3) Notice in connection with any proceedings or negotiations with respect to such a condemnation.

C. Rights of Parties During Condemnation Proceeding. LESSOR and LESSEE shall each have the right to represent its respective interest in each proceeding or negotiation with respect to a Taking or intended Taking and to make full proof of its claims. No agreement, settlement, sale or transfer to or with the condemning authorities shall be made without the consent of all parties. Each party agrees to execute and deliver to any other party hereto any instrument that may be required to facilitate the provisions of this Lease relating to the condemnation.

D. Taking of Leasehold. Upon a Total Taking, LESSEE's obligation to pay Rent and other charges hereunder shall terminate on the Date of Taking, but LESSEE's interest in the leasehold shall continue until the Taking is completed by deed, contract or final order of condemnation. If the Taking is substantial under the aforementioned definition, LESSEE may, by notice to LESSOR within ninety (90) days after LESSEE receives Notice of the intended Taking, elect to treat the Taking as a Total Taking. If LESSEE does not so notify LESSOR, the Taking shall be deemed a partial Taking. Upon a partial Taking, this Lease shall remain in full force and effect covering the balance of the Premises not so taken, except that the Rent payable hereunder by LESSEE shall be reduced in the same ratio as the percentage of the area of the Premises taken bears to the total area of the Premises.

E. Total Taking. All of LESSEE's obligations under the Lease shall terminate as of the Date of Taking. Upon a Total Taking, all sums awarded for any LESSEE-owned improvements and the leasehold estate shall be disbursed to LESSEE. All

sums awarded for the Premises, as unencumbered by any LESSEE-owned improvements, but subject to the Lease, shall be disbursed to LESSOR.

F. Partial Taking. Upon a Partial Taking, all Awards shall be disbursed as follows:

- (1) To the cost of restoring the improvements on the Premises; and
- (2) The balance, if any, to LESSOR and LESSEE as follows: LESSEE shall receive all sums awarded for LESSEE-owned improvements and the Leasehold estate. LESSOR shall receive all sums awarded for the Premises, as unencumbered by the LESSEE-owned improvements but subject to the Lease.

G. Obligations of LESSEE Under Partial Taking. Promptly after any such Partial Taking, LESSEE, at its expense, shall repair, alter, modify or reconstruct the improvements on the Premises so as to make them reasonably suitable for LESSEE's continued occupancy for the uses and purposes for which the Premises are leased. Notwithstanding the foregoing to the contrary, should there be a Partial Taking in the last year of the initial term or any renewal term, LESSEE shall be relieved of the responsibility to so repair or reconstruct the improvements on Premises as aforesaid by notifying LESSOR of its intention to that effect; provided however, that all sums awarded for LESSEE owned improvements and the Leasehold estate shall be disbursed to LESSOR.

H. Taking of Temporary Use of Premises and Improvements. Upon any Taking of the temporary use of all or any part or parts of the Premises or improvements, or both, for a period of any estate less than a fee ending on or before the expiration date of the term, neither the term nor the rent shall be reduced or affected in any way and LESSEE shall be entitled to any award for the use or estate taken. If a result of the Taking is to necessitate expenditures for changes, repairs, alterations, modifications or reconstruction of the improvements to make them reasonably suitable for LESSEE's continued occupancy for the uses and purposes for which the Premises are leased, after the termination of such Taking, LESSEE shall receive, hold and disburse the Award in trust for such work. At the completion of the work and the discharge of the Premises and improvements from all liens or claims arising therefrom, LESSEE shall be entitled to any surplus and shall be liable for any deficiency.

If any such Taking is for a period extending beyond the expiration date of the term, the Taking shall be treated under the foregoing provisions for total, substantial and Partial Takings.

14. ENCUMBRANCES.

LESSEE may not encumber its leasehold estate and its interest in the improvements constructed and to be constructed on the Premises.

15. ASSIGNMENT AND SUBLETTING.

- A. LESSEE shall not assign this Lease Agreement or any interest therein, whether voluntarily, by operation of law, or otherwise and shall not sublet the Premises or any part thereof, except upon receipt of prior written permission and consent of LESSOR. LESSEE acknowledges that the consent to assignment is a discretionary action of the City Council of the City of El Paso. Consent of LESSOR to any such assignment or subletting shall not be permitted if: (i) at the time of such assignment or subletting, LESSEE is in default in the performance and observance of any of the covenants and conditions of this Lease Agreement; (ii) the assignee, sublessee, or LESSEE will not expressly assume in writing all of LESSEE's obligations hereunder; and (iii) LESSEE's provision of proof to LESSOR that the assignee's or sublessee's financial condition is not satisfactory to LESSOR. Any assignment made without LESSOR's consent shall be void.
- B. Any such assignment or subleasing, even with the approval of LESSOR shall not relieve LESSEE from liability for payment of all forms of rental, fees, and other charges herein provided or from the obligations to keep and be bound by the Initial Term, conditions, and covenants of this Lease Agreement. LESSOR's acceptance of rent, fees, or other charges from any person or entity other than LESSEE shall not be deemed to be a waiver of any of the provisions of this Lease Agreement, or a consent in the assignment or subletting of the Premises. Consent to any assignment or subletting shall not be deemed a consent to any further assignment or subletting.
- C. Any sale or transfer of the LESSEE's business shall be permitted but shall constitute an assignment of and be subject to the conditions of this Section. Any merger, consolidation, or transfer of corporate shares of LESSEE, if LESSEE is a corporation, so as to result in a change in the present voting control of LESSEE by the person or persons owning a majority of said corporate shares on the date of this Lease Agreement, shall constitute an assignment and be subject to the conditions of this Section.

16. LESSOR'S PERFORMANCE FOR ACCOUNT OF LESSEE.

If LESSEE shall continue in default in the performance of any of the covenants or agreements herein contained, LESSOR may perform the same for the account of LESSEE. Any amount paid or expense or liability incurred by LESSOR in the performance of any such matter for the account of LESSEE shall be deemed to be additional rent and the same (together with interest thereon at the maximum rate permitted by law from the date upon which any such expense shall have been incurred) may, at the option of LESSOR, be added to any rent then due or thereafter falling due hereunder.

17. DEFAULT BY LESSEE.

A. Events of Default. The following shall be considered for all purposes to be events of default under and breaches of this Lease Agreement:

- (i) LESSEE fails to pay rent, fees, other charges or other amounts when due hereunder;
- (ii) LESSEE fails to perform or observe any other of the terms, provisions, conditions, and covenants of this Lease for more than ten (10) days after receiving written notice of such failure;
- (iii) LESSOR determines that LESSEE had submitted any false report required to be furnished hereunder;
- (iv) LESSEE does anything upon or in connection with the Premises or the construction of any part thereof, which directly or indirectly interferes in any way with, or results in a work stoppage in connection with, construction or other activities of LESSOR in, on, under, or above any part of the GRTT;
- (v) LESSEE becomes bankrupt or insolvent or file or have filed against it a petition in bankruptcy or for the appointment of a receiver or trustee of all or a portion of LESSEE's property, or LESSEE makes an assignment for the benefit of creditors;
- (vi) LESSEE abandons or vacates or does not do business in the Premises for ten (10) consecutive calendar days; or
- (vii) the Premises comes into the hands of any person other than LESSEE, in a manner other than as expressly permitted under this Lease Agreement.
- (viii) Any action or inaction on the part of LESSEE that causes the LESSOR to be or become in default under the Ground Lease

B. Default and Re-Entry. Should any such event of default occur, and without any grace period, demand or notice, except as herein provided (the same being hereby waived by LESSEE), LESSOR, in addition to all other rights or remedies it may have, shall have the right thereupon or at any time thereafter to terminate this Lease Agreement by giving notice to LESSEE stating the date upon which such termination shall be effective. LESSOR shall further have the right, either before or after any such termination, to re-enter and take possession of the Premises, remove all persons and property from the Premises and store such property at LESSEE's expense, all without notice or resort to legal process and without being deemed guilty of trespass or becoming liable for any loss or damage occasioned thereby. Nothing herein shall be construed to require LESSOR to give notice before exercising any of its rights and remedies provided for in this Lease Agreement.

C. Right to Relet. If LESSOR re-enters as provided herein, or if LESSOR takes possession pursuant to legal proceedings or otherwise, LESSOR may either terminate this Lease Agreement or LESSOR may, from time to time, without terminating this Lease Agreement, make such alterations and repairs as it deems

advisable to relet the Premises, and relet the Premises or any part thereof for such term or terms (which may extend beyond the Term or any extensions thereof) and at such rentals and upon such other terms and conditions as LESSOR in its sole discretion deems advisable. Upon each such reletting all rentals, fees, or charges received by LESSOR through reletting shall be applied: (i) to any indebtedness other than rent due hereunder from LESSEE of LESSOR; (ii) to pay any costs and expenses of reletting, including brokers and attorneys' fees and costs of alterations and repairs; (iii) to rent due hereunder; and (iv) the residue, if any, shall be held by LESSOR and applied in payment of future rent as it becomes due hereunder.

- D. Deficiency of Reletting Rentals.** If rentals received from such reletting during any month are less than that to be paid during that month by LESSEE hereunder, LESSEE shall immediately pay any such deficiency to LESSOR. No re-entry or taking possession of the Premises by LESSOR shall be construed as an election to terminate this Lease Agreement unless a written notice of such termination is given by LESSOR.
- E. Termination Damages.** Notwithstanding any such reletting without termination, LESSOR may at any time thereafter terminate this Lease Agreement for any prior breach or default. If LESSOR terminates this Lease Agreement for any events of default or breach, in addition to any other remedies LESSOR may have, LESSOR may recover from LESSEE all damages incurred by reason of such default or breach, including all costs of retaking the Premises and including the excess, if any, of the total rent, fees, and charges reserved in this Lease Agreement for the remainder of the Lease Term over the then reasonable rental value of the Premises for the remainder of the Term or any extensions thereof, all of which shall be immediately due and payable by LESSEE.
- F. Waiver of Rights of Redemption.** To the extent permitted by law, LESSEE waives any and all rights of redemption granted by or under any present or future laws if LESSEE is evicted or dispossessed for any cause, or if LESSOR obtains possession of the Premises due to LESSEE's default hereunder or otherwise.

18. APPLICATION OF PAYMENTS RECEIVED FROM LESSEE.

LESSOR shall have the right to apply any payments made by LESSEE to the satisfaction of any debt or obligation of LESSEE according to LESSOR's sole discretion and regardless of the instructions of LESSEE as to application of any such sum, whether such instructions be endorsed upon LESSEE's checks or otherwise, unless otherwise agreed upon by both parties in writing. The acceptance by LESSOR of a check or checks drawn by others than LESSEE shall in no way affect LESSEE's liability hereunder nor shall it be deemed an approval of any assignment of this Lease Agreement by LESSEE.

19. NOTICES.

All notices required to be given hereunder shall be in writing and shall be hand delivered or mailed by registered mail, postage prepaid, to the following locations, as may be amended from time to time by the parties in writing:

LESSOR: Mass Transit Department Board
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890
Attn: City Manager

copy to: Mass Transit Department (Sun Metro)
City of El Paso
10151 Montana
El Paso, Texas 79925
Attn: Director

Economic and International Development Dept.
City of El Paso
811 Texas Street
El Paso, Texas 79901
Attn: Real Estate Manager

LESSEE: Sumatra Hookah Lounge LLC
Attn: David Aber, Principal
c/o Tony Conde, Jr.
2244 Trawood, Suite 206
El Paso, TX 79935

20. ATTORNEY'S FEES.

If either party brings any action or proceedings to enforce, protect, or establish any right or remedy under the terms and conditions of this Lease Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, as determined by a court of competent jurisdiction, in addition to any other relief awarded.

21. WAIVER.

No delay or omission in the exercise of any right or remedy of LESSOR on any default by LESSEE shall impair such a right or remedy or be construed as a waiver. The receipt and acceptance by LESSOR of delinquent rent shall not constitute a waiver of any other default; it shall constitute only a waiver or timely payment for the particular rent payment involved. No act or conduct of LESSOR including, without limitation, the acceptance of the keys to the Premises, shall constitute an acceptance of the surrender of the Premises by LESSEE before the expiration of this Lease Agreement. Only notice from LESSOR to LESSEE shall constitute acceptance of the surrender of the Premises and accomplish a termination of this Lease Agreement. LESSOR's consent to or approval of any act by LESSEE requiring LESSOR's consent or approval shall not be deemed to waive or render unnecessary LESSOR's consent to or approval of any subsequent act by LESSEE. Any waiver by LESSOR of any default must be in writing.

22. SECURITY DEPOSIT.

LESSOR hereby acknowledges receipt from LESSEE of the sum of one month's rent to be held as collateral security for the payment of any rentals and any other sums of money for which LESSEE shall become liable to LESSOR under this Lease, and for the faithful performance by LESSEE of all other covenants and agreements made herein.

23. BROKERAGE COMMISSION.

LESSOR and LESSEE have each respectively contracted and entered into an agreement with a Texas licensed real estate broker to represent each party's respective interests in connection this transaction. All obligations of the parties for payment of brokers' fees are contained in separate written agreements. The parties are informed that the brokers have entered into an agreement to split the commission that the LESSOR has agreed to pay its broker, TVO International/RJL but neither LESSOR nor LESSEE is a party to that agreement.

24. FEDERAL PROVISIONS.

- A. The Premises and the GRTT are subject to the terms of various Certifications and Assurances made to guarantee the public use of the GRTT arising from certain grant agreements between City of El Paso and the United States of America, as set forth in **Exhibit D**, which provisions are incorporated into this Lease as if fully set forth herein.
- B. This Lease Agreement shall not be construed to grant or authorize the granting of an exclusive right within the meaning ascribed within federal regulations applicable to the Federal Transportation Administration.
- C. If the Federal Transportation Administration requires modifications to this Lease Agreement as a condition precedent to the approval of this Lease, LESSEE agrees to

consent to such modifications as may be reasonably required to obtain such approval.

D. Nondiscrimination Covenant. LESSEE, for itself, its heirs, personal representatives, successors in interest and assigns, as part of the consideration hereof, does hereby covenant and agree as follows:

1. That no person on the grounds of race, creed, color, sex, age, disability, or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of the Premises or GRTT pursuant to this Lease Agreement.
2. That in the construction of any improvements in the Premises and the furnishing of services therein, no person on the grounds of race, creed, color, sex, age disability, or national origin shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination.
3. That LESSEE shall use the Premises in compliance with all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, and Department of Transportation, Subtitle A. Part 21, Nondiscrimination in federally assisted programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations might be amended.
4. That, in the event of breach of any of the above nondiscrimination covenants, LESSOR shall have the right to cancel this Lease Agreement immediately and re-enter and repossess the Premises and hold the same as if said Lease Agreement had never been made or issued.

25. GENERAL PROVISIONS.

- A. **Successors and Assigns.** The covenants hereby contained shall, subject to the assignment and subletting provision herein, apply to and bind the heirs, successors, executors, administrators, and assigns of the parties.
- B. **Invalidity of any Provision.** If any term, covenant, condition, or provision of this Lease Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.
- C. **Headings.** The headings of Articles and Sections in this Lease Agreement are designed to facilitate prompt reference to subject matter and shall be disregarded when resolving any dispute concerning the meaning or interpretation of any language contained in this Lease Agreement.

- D. Interpretation.** As used in this Lease Agreement, whenever required by the context hereof, each number, both singular and plural, shall include all numbers, and each gender shall include all genders.
- E. Applicable Laws and Venue.** The laws of the State of Texas shall govern the validity, interpretation, performance, and enforcement of this Lease Agreement. Venue shall be in the courts of El Paso, El Paso County, Texas.
- F. Time is of the Essence.** Time is and shall be deemed of the essence in respect to the performance of each provisions of this Lease Agreement.
- G. Joint and Several Liability.** If LESSEE is a partnership or other business organization the members of which are subject to personal liability, the liability of each such member shall be deemed to be joint and several.
- H. Entire Agreement and Amendment.** There are no representations, covenants, warranties, promises, agreements, conditions, or undertakings, oral or written between LESSOR and LESSEE other than as set forth herein, including compliance with the Ground Lease as applicable to the Leased Premises. Except as provided herein, no subsequent alteration, amendment, charge, or addition to this Lease Agreement shall be binding upon LESSOR or LESSEE unless in writing and signed by both parties. LESSOR and LESSEE agree that in the event of a conflict between the Ground Lease and this Lease, the terms of the Ground Lease will prevail.
- I. Legal Relationship.** Nothing in this Lease Agreement shall be construed or deemed to create any partnership or other relationship between the parties, other than as expressly provided for herein. Subject to the provisions of this Lease Agreement, LESSEE shall be solely responsible for and shall wholly control the Premises referenced in this Agreement.
- J. Force Majeure.** If either party hereto shall be delayed or hindered in or prevented from performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure material, failure of power, restrictive governmental laws or regulations, riots, insurrection, acts of war or other reason of the like nature not the fault of the party delayed in performing work or doing acts required under this Lease Agreement, the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. However, LESSEE shall not be excused from any obligations for payment of rents, fees, or other payments required by the terms of the Lease Agreement when same are due, and all such amounts shall be paid when due.
- K.** LESSEE hereby consents to any individual or corporate credit checks, which may be required by LESSOR or any financial institutions connected with the financing of LESSOR as may relate to the leasing of the GRTT or any portion thereof.

- L. Authorization to Enter Agreement.** Each of the persons executing this Lease Agreement on behalf of LESSEE warrants to LESSOR he/she is authorized to do so. Upon LESSOR's request, LESSEE will provide evidence satisfactory to LESSOR confirming these representations.

(SIGNATURES BEGIN ON THE FOLLOWING PAGE)

EXHIBIT B
GROUND LEASE WITH BOARD OF REGENTS, UNIVERSITY OF TEXAS SYSTEM

EXHIBIT D
FEDERAL TRANSIT ADMINISTRATION CONTRACT CLAUSES

EXHIBIT E
INITIAL IMPROVEMENTS TO BE CONSTRUCTED BY LESSOR

1. DEMOLITION
 - Building Interior Demolition
2. PARTITIONS AND FOUNDATION
 - Gypsum Drywall (Taped, Finish and Paint)
 - 4 inch thick Concrete Floor
3. DOORS AND WINDOWS
 - Hardware Revisions
4. ROOFS AND HVAC
 - Piping
 - Controls
 - HVAC Equipment
5. PLUMBING
 - Water Line Prep
 - New Sanitary Sewer line
6. FIRE PROTECTION SYSTEM
 - Fire Suppression System
 - Fire Alarm Connections
7. ELECTRICAL
 - Wiring
 - Submeter
 - Telephone: Alarm Connection/Misc Wiring/Conduit
 - Light Fixtures and outlets
8. MISCELLANEOUS
 - Cut and patch to match existing
 - Dust Protection
 - Construction Mobilization
 - Protection of Existing Work