

**AGREEMENT FOR OPERATION OF  
THE CITY OF COSTA MESA TENNIS CENTER**

This Agreement for Operation of the City of Costa Mesa Tennis Center (“Agreement”) is made and entered into this day 1<sup>st</sup> day of April, 2024, (“Effective Date”) by and between the City of Costa Mesa, a municipal corporation, (“City”) and Top Seed Tennis Academy, Inc., a California Corporation (“Lessee”).

**RECITALS**

WHEREAS, City owns the Costa Mesa Tennis Center, a roughly 93,000 square foot facility including twelve (12) lighted courts, a pro shop, and courtyard located at TeWinkle Park, 880 Junipero Drive, Costa Mesa, CA (“Tennis Center”); and

WHEREAS, the City is authorized by the provision of Government Code Section 37396 to lease City park and recreation real property for the provision of services and property improvements consistent with public park and recreation purposes; and

WHEREAS, City and Lessee agree that the primary objective for Lessee’s performance under this Agreement is to maximize: (1) the public use of Tennis Center, including exploring, evaluating, and creating opportunities to incorporate Pickleball play into the Tennis Center, 2) availability to the community; and (3) the revenue to be received by the City as a result thereof.

WHEREAS, this Agreement is intended to supersede all prior agreements.

NOW, THEREFORE, the parties agree as follows:

**1. DEMISED PREMISES**

1.01 City hereby leases to Lessee for its management and operation the real property consisting of the Tennis Center. The name of the Tennis Center shall remain the same unless otherwise changed by City.

1.02 The premises, as shown on **Exhibit A**, shall be used only and exclusively for Tennis Center operations and tennis or Pickleball related activities and for no other purposes whatsoever.

1.03 Lessee acknowledges that they have personally inspected the premises and the surrounding area and evaluated the extent to which the physical condition thereof will affect the operation of the Tennis Center. Lessee accepts the premises in their present physical condition and agrees to make no demands upon City for any improvements or alteration except as provided herein.

1.04 Lessee shall improve the premises in accordance with the provisions set forth in Sections 6.01 through 6.05 hereinafter.

1.05 All improvements, additions, alterations or changes to the premises shall be subject to prior written approval by the City Manager, securing of applicable permits and compliance with such terms and conditions as may be imposed by the City Manager.

1.06 Lessee hereby acknowledges the title of City and to the premises and the improvements located thereon, in and covenants and agrees never to assail, contest or resist said title.

1.07 Ownership of all existing structures, and of all structures, buildings and/or improvements constructed by Lessee upon the premises and all alterations, additions or betterments thereto, shall immediately vest and be vested in City at all times during and after the term specified herein, without compensation paid to the Lessee. Such structures, buildings and/or improvements shall be surrendered to City with the remainder of the premises upon termination of this Agreement.

## **2. TERM**

2.01 The term of this Agreement shall be for a period of seven (7) years commencing on the Effective Date. The commencement of the term may be extended as provided in Section 2.03 on application by Lessee.

2.02 In the event Lessee holds over beyond the term with the consent, express or implied of City, such holding shall be from month to month only, subject to the conditions of this Agreement, shall not be a renewal thereof, and shall be at the monthly compensation provided herein.

2.03 Lessee shall have the option for three (3) extensions of the term of this Agreement, each for an additional one (1) year period, provided that prior to the expiration of the term City receives a written exercise of said option, signed by Lessee, no later than sixty (60) days before the expiration of the term. The extensions of the term of this Agreement for each additional one (1) year period shall be on the same terms and conditions as provided herein. Lessee's option to extend the term of this Agreement shall also be conditioned on all of the following:

- A. Lessee is in good faith compliance with the terms of this Agreement.
- B. This Agreement has not been canceled as outlined in Section 20 of this agreement by City prior to the expiration of the term of this Agreement.
- C. Lessee has not been found by City to be in default due to insolvency of Lessee.
- D. Lessee has not been found by City to have abandoned, vacated or discontinued operations for a period in excess of twenty-four hours.
- E. Lessee has received satisfactory performance evaluations from City.

## **3. LESSEE'S BASIC SERVICE OBLIGATIONS**

3.01 Lessee shall establish and provide recreational and competitive tennis programming to the general public, including a balance of play and court use for all ages, user groups and ability levels including, but not limited to, lessons, camps, league play, club use, tournaments, and court rentals and other miscellaneous tennis programs, such as exploring, evaluating, and creating opportunities to incorporate Pickleball play into the Tennis Center that will maximize participation, and will furnish and maintain a professional tennis shop and facility,

with an adequate inventory, at the Tennis Center facilities in TeWinkle Park in the City of Costa Mesa, under the terms and conditions set forth below:

- A. Center to be accessible to the public from 8:00 a.m. to 9:00 p.m., Monday through Friday and 8:00 a.m. to 5:00 p.m. Saturdays and Sundays, unless otherwise agreed to by the City. Center is to be open every day throughout the year, weather permitting, with a limited number of holiday exceptions approved by the City. Operator must submit an annual calendar of operating days and hours.
- B. Lessee shall have exclusive use of a maximum of six (6) courts for group or private instruction Monday through Sunday and a maximum of eight (8) courts for instruction Monday through Sunday for practices, league play, or tournaments until 5:00 p.m. The remainder of the courts to be left available for general public walk-on and/or individual reservation play. The following phrase shall have the following meaning assigned in this section: "private instruction" shall mean "one-on-one" individual training sessions.  
  
Should the courts not be reserved for individual general public use as of forty-eight (48) hours prior to the event, use of remaining available courts are allowed as available.  
  
Lessee may have use of all twelve (12) courts a maximum of four times per year for open tournaments will be permitted with days and operational times approved by CITY.
- C. There shall be no subleasing or private event rentals which preclude public access during normal operating hours, except through approval of a special event permit issued by the City, which is subject to the approval of the City Manager or designee.
- D. Courts for individual walk-on play and/or reservations will be made available to the public. Walk-on and reservation services are available for anyone, on a nondiscriminatory basis. Reservations may be made digitally online or over the phone. Court reservations and/or walk-on play shall be for sixty (60) or ninety (90) minute intervals. Time available for reservations and/or walk-on play, and the total number of courts available for this type of use, will vary dependent upon lesson instruction, school and other group court rental use, and tournaments, as provided for in Section 3.01(B) of this contract.
- E. Lessee shall develop and provide a website with an online reservation system that will allow users to easily reserve courts and provide transparency over court utilization. The online registration system should also provide a customer management system that creates patron accounts and tracks statistical facility use by patrons which shall include, but not limited to: facility user residency, age, demographics, time of use data, specific calendar system of dates/time periods/specific court/instructor/course, if applicable.
- F. Lessee shall stay up to date on Tennis Center best management practices and bring forward new ideas for programming, activities, and maximization of the Tennis Center. Examples of such programming include, but is not limited to: singles and doubles nights, recreation and competitive ladders, age and/or gender-specific activities, instructional clinics and academies, special events, etc.

- G. Scholarship and fee assistance programs for low-income children and youth, subject to City approval, are to be developed and provided by the Lessee. A minimum of two free one-hour long tennis lesson clinics per month for low income/disadvantaged Costa Mesa youth and adult participants held at the Costa Mesa Tennis Center.
- H. Lessee shall provide regular outreach to local Costa Mesa non-profit youth organizations to create opportunities for disadvantaged youth for both instruction and play free or at discounted rates.
- I. Lessee shall provide the City a list of Costa Mesa non-profits that will be receiving opportunities and fee reduction as well as the class schedule and transportation provided each quarter.
- J. Outreach, promotional and advertising efforts, subject to City approval, will be developed and provided by Lessee, with the purpose of attracting new tennis players to the facility and to tennis as a recreational activity. Promotion and advertising of the Tennis Center and its programs should utilize state of the art software, website, and marketing systems.
- K. Lessee shall provide their best efforts for priority access of courts to Costa Mesa residents and organizations through a system of advance registration which prioritizes Costa Mesa residents at least 24 hours prior to non-residents. Must have system or process in place to verify residency. Residency verification should be government issued ID which could be accompanied by current utility bill or lease agreement.
- L. A minimum of 48 hours of free drop-in open court time per quarter for Costa Mesa Residents. Must have at least 4 courts available but can utilize all 12 courts. Time may be accrued through multiple courts concurrently. Example is opening up all 12 courts for free open play for one day for 4 hours.
- M. Lessee shall be solely responsible for operation of the Pro Shop; hiring of Center instructors and other staff; all Pro Shop inventory and related items (discussed in subparagraph P); reservation scheduling during operational hours; controlling of lights; handling of all program registration and fees associated with all programming and court use rentals; keeping of accurate records of all revenue from programming, sales, court walk-ons and reservations, merchandise sales, concessions and other related services as approved by City; merchandise and concessions should serve Tennis Center patrons as well as Skatepark, Bark Park users, and park patrons, and all services provided at the Costa Mesa Tennis Center.
- N. Lessee has the right to set fees and charges for all activities, programs and services (which include court rental/tournament rates and fees for classes, camps and lessons), merchandise and concessions, however, all fees and charges, including any revenue sharing agreements with private instructors, shall be competitive with comparable facilities in the area and are subject to final approval by the City Manager or designee. Any and all adjustments, including new fees, rates, charges and revenue sharing agreements, must be approved by City Manager or designee prior to implementing.

- O. Lessee shall establish facility use rules, regulations and policies, which includes a refund policy, as approved by City Manager or designee.
- P. Lessee shall be responsible for all equipment necessary to operate and program the Tennis Center including but not limited to balls, racquets, sweepers, ball baskets and ball machines. A list of City owned equipment currently at the tennis center will be provided. Should the Lessee choose to utilize that equipment they will be responsible to maintain, repair and/or replace the listed equipment and deliver it to the City upon termination of this Agreement.
- Q. Lessee shall establish and maintain positive relationships with community and professional tennis groups, including the United States Tennis Association, USA Pickle Ball Association, area schools and higher learning institutions. This also includes working with existing instructors, leagues, schools and organizations who have an established home base at the Costa Mesa Tennis Center.
- R. Subject to City approval, Lessee shall create a method for collection of program participant and facility user satisfaction and evaluation information, for the purpose of review by City and Lessee.

### 3.02 Building and Equipment Maintenance

- A. Lessee shall be responsible for the security of courts and lights, including opening and closing the facility, including the locking and unlocking of all gates and doors to the facility.
- B. Lessee shall, at its expense, provide for the day-to-day custodial service and basic maintenance of the Tennis Center Pro Shop, patio, building, and all landscaping sections. This includes maintenance of the premises and all building, structures, improvements, fixtures, trade fixtures, equipment and utility systems which may now or hereafter exist thereon, in good, operable, useable and sanitary order and repair and in a good, safe and first-class condition throughout the term of this Agreement, providing for such repairs, replacements, rebuilding and restoration as may be required by the City Manager. Lessee shall be responsible for all janitorial supplies needed for the maintenance of the interior of the Pro Shop including:
  - Repair or maintenance of flooring and fixtures and minor paint touch ups.
  - Maintenance of restrooms including: daily cleaning and sanitizing of all floors, surfaces and fixtures; purchase and stocking of all restroom supplies including soap, paper towels, toilet paper and other necessary supplies. Regular inspections throughout the day to ensure cleanliness and safety of the restroom.
  - Maintenance and repairs, up to \$5,000 per single incident, for plumbing including fixtures, repair of leaks and addressing clogged drains including mainline is the responsibility of Lessee unless caused by the operations under this agreement.

- Maintenance and repair of electrical, up to \$5,000 per single incident. Fixtures and bulb replacement is the responsibility of the lessee unless caused by the operations under this agreement.
  - Contractors performing repairs must meet the following criteria: provide insurance and certified licenses. All repairs over \$2,000 require approval from the City. Emergency repairs shall be addressed immediately. The Lessee will immediately notify the City representative of any emergency repairs.
- C. Lessee shall maintain shrubs and landscaping inside the fenced tennis center, including the planters surrounding Pro Shop and in courtyard area as well as two grass strips within the fenced tennis center. This includes planting and replanting as needed. Any dead or dying plant material shall be replaced in order to maintain the aesthetics of the area. Lessee is precluded from utilizing the services of any current City landscape maintenance contract.
- D. All improvements, additions, alterations or changes to the premise shall be subject to written approval by the City Manager or designee, securing of applicable permits and compliance with such terms and conditions as may be imposed by the City Manager.
- E. Lessee shall utilize and maintain any extra storage units located on site. Must meet City's approved standards, (i.e., Tuff Shed) The storage units must be painted and maintained free of rust, peeling or exterior defects that are aesthetically displeasing.
- F. Lessee is to inspect and report all issues in a timely manner. Lessee is responsible for closing any court or area of facility that may be found to be unsafe at the time of inspection.
- G. Lessee shall pay all telephone and internet utilities in the Lessee's name.
- H. Lessee shall further be responsible for repair or replacement of damaged articles including broken windows, broken or clogged toilets, carpets, drapes, doors, interior furnishings, and fixtures. Lessee shall be responsible for annual cleaning of carpets and drapes, and for general cleaning of the interior of the Pro Shop. Pro Shop Lessee shall be responsible for emptying trash from the Pro Shop to outside receptacles for daily cleanup of the Pro Shop patio area.
- I. Lessee shall be responsible for minor maintenance of courts, including sweeping, blowing and general debris clearing, power washing courts as needed, washing nets, center straps, windscreens, touch ups to lines and striping. City shall be responsible for the replacement of nets and center straps, when deemed necessary by City, and shall be responsible for the re-striping of courts only when courts are resurfaced.
- J. Negligence of maintenance that results in a major repair will be the financial responsibility of the Lessee.
- K. Should Lessee fail, after ten (10) days' notice from City, to perform its obligations herein, City in addition to all other available remedies may, but shall not be obligated

to exercise its Right-of-Entry, enter upon the premises and perform Lessee's failed obligations, using any equipment or materials on the premises suitable for such purposes. Lessee shall forthwith on demand reimburse City for its costs so incurred including direct and indirect overhead costs as determined by the City Manager.

L. It is hereby understood and agreed by Lessee that City does not have any duty nor shall it be called upon to make any improvements, replacements or repairs whatsoever to the premises and any structures, improvements, fixtures, trade fixtures, equipment and utilities during the term hereof, except as provided by the following:

1. City shall provide a tennis Pro Shop structure and shall be responsible for maintenance of exterior lights, including replacing lights when necessary. Tennis Court light outages should be reported when a minimum of 3 lights need replacing. The City is allowed 15 business days to satisfy the request. Lessee is responsible for restricting the use of any court that is unsafe due to lighting or surface conditions. City shall also be responsible for maintenance of grounds outside of the fenced in tennis courts and courtyard area, including landscaping, lighting, parking lot paving, driveways and walkways. City will maintain fences and gates. Lessee to notify the City when such maintenance is needed. City shall identify fifty-five (55) parking spaces in the northwest parking lot closest to the Center for use by Tennis Center participants. City shall pay all utilities except telephones and internet. City shall be responsible for repainting the exterior of the Pro Shop as deemed necessary by City and for repair of any and all damage to the tile roof unless caused by the willful misconduct of Lessee's officers, employees or guests. City shall be responsible for repair of damage to the exterior of the Pro Shop due to weather.
2. Lessee may offer any additional maintenance services mutually agreed upon in writing by City and Lessee. Lessee shall be responsible for all damages, excluding tile roof, and losses to the Pro Shop due to vandalism. This includes the Pro Shop structure, excluding tile roof, and all fixtures and inventory within the Pro Shop.
3. The City shall have 24/7 access to the Tennis Center area and building.

#### **4. PAYMENT OF RENTAL**

4.01 Lessee shall pay City for the use granted herein on a monthly basis. The initial seven (7) year's payment schedule will commence at a minimum of 10% of gross from all court-use revenue sources (i.e. lessons, tournament entries, hourly court rentals and annual reservation passes, etc.) and Pro Shop sales per month OR \$5,000, whichever is greater. Subsequently, the percentage will increase annually as outlined below:

- 10.25% per month for the eighth year
- 10.25% per month for the ninth year
- 10.25% per month for the tenth year

4.02 Payment shall be made on a monthly basis to City on or before the fifteenth (15<sup>th</sup>) day of the calendar month following each month of the term provided for herein, unless that date

falls on a weekend or City holiday, in which case payment may be made on the first business day thereafter. Payment shall be made by check or draft issued and payable to the City of Costa Mesa and received by the City's Finance Director, 77 Fair Drive, Costa Mesa, California 92626, or such other place as may be designated in writing to Lessee. Payments made after the 15th of every month but prior to the 30 day delinquency shall incur a 5 percent penalty. Payments received after a 30-day delinquency shall incur a 10% late penalty per late week. However, the late payment charge may be waived whenever the City Manager makes written findings that the late payment is excusable by reason of extenuating circumstances. City shall not be obligated at any time during the term to notify Lessee of the accumulation of late payment charges. Multiple late payments may result in a breach of contract and termination of contract with Lessee.

## **5. ACCOUNTING RECORDS**

5.01 All sales shall be recorded by means of a point of sale (POS) system which displays the amount of each sale and automatically issues a customer's pre-numbered receipt or verification of the amount recorded. Said point of sale system shall in all cases have locked-in sales totals and transactions counters which are constantly accumulating and which cannot, in either case, be reset, and in addition thereto, a tape located within the register on which transaction numbers and sales details are imprinted. Beginning and ending POS readings shall be made a matter of daily record. Note: In the event of a technical or electrical failure of the POS, Lessee shall record by hand all collections, and issue a sequentially pre-numbered customer's receipt in like manner. Under no circumstances shall Lessee conduct sales where such sales are not recorded and customer receipts are not issued.

5.02 Cash transactions are allowed at the Pro Shop for the purchase of merchandise up to a \$30 cash limit. Amounts over the limit or for any reservation (including private instructor, court use, tournament fees, etc.) must be processed via a point of sale system that accepts credit cards. The Lessee must provide a detailed cash handling process that must be approved by the City, and available for review by an independent accounting firm contracted by the City.

5.03 All monetary transactions must go through a POS system and be linked to the electronic reservation system. Any transaction that takes place on court or through mobile wallet/payment systems and not through POS system may result in a breach of contract and termination of contract with the Lessee.

5.04 Lessee shall provide a POS that the City agrees with and that the City can access to track all financial and attendance information. Lessee shall utilize a separate bank account into which all payments received are deposited, either via the point of sale system or cash, and all expenses are paid from, including, but not limited to private instructor payments, maintenance expenses, staff salaries and benefits, etc.

5.05 All transactions, including cash can be audited at the City's discretion at any time.

5.06 Lessee shall be required to maintain a method of accounting, to the satisfaction of City, which correctly and accurately reflects the gross receipts, and disbursements, construction costs, and construction financing of Lessee in connection with the authorized operations. The financial reports should include bank accounts established for the authorized operations, shall be separate from the accounting system used for any other business operated by Lessee or for financial



reports of personal financial affairs. Such method shall include the keeping of the following documents:

- A. Regular books of accounting such as general ledgers.
- B. Journals including any supporting and underlying documents such as vouchers, checks, tickets, bank statements, etc.
- C. State and Federal income tax returns and sales tax returns and checks and other documents providing payment of sums shown which shall be kept in confidence by City.
- D. Cash register tapes and/or Point-of-sale (POS) system electronic records (daily tapes or electronic records may be separate but shall be retained so that from day to day the sales can be identified).
- E. Any other reporting records that the Finance Director and/or City Manager deems necessary for proper reporting of receipts.

5.07 City shall, at its expense, retain an independent accounting firm. Lessee shall cooperate therewith and provide pertinent accounting materials, books and records requested by the City from time to time with respect to Lessee's tennis-related programs and operations of the Tennis Center.

5.08 All documents, books and accounting records shall be open for inspection and reinspection at any reasonable time during the term of this Agreement and for four (4) years thereafter. In addition, City will conduct an audit of the books and business conducted by Lessee and observe the operation of the business so that accuracy of the above records can be confirmed. Lessee acknowledges that City intends to audit the books and records of Lessee at least once prior to the expiration of the first year of the term of this Agreement. All information obtained in connection with City's inspection of records or audit shall be treated as confidential information and exempt from public disclosure thereof to the extent possible under law, excepting upon notification of termination of this contract, the averaged revenues from the most recent five (5) year period from Lessee operations may be made available to the prospective bidders.

5.09 In the event that an audit or review conducted by the City finds that due to Lessee's non-compliance with its obligation to report gross receipts in connection with its operations authorized herein, an actual loss and/or a projected loss of revenue to City can be determined, the Finance Director and/or City Manager may, at their option, (1) bill Lessee for said losses, said amount to be paid to City within thirty (30) days following billing therefore unless otherwise extended by the City Manager, and/or (2) use the Security Deposit as provided for herein; and/or (3) assess liquidated damages. The parties agree that it will be impracticable or extremely difficult to fix the extent of actual damages resulting from the failure of Lessee to correctly report gross receipts; and a projected loss of revenue due to City. The parties hereby agree that under the current circumstances a reasonable estimate of such damages is \$500 per day for each day of the loss period as determined by City, and that Lessee shall be liable to City for liquidated damages in said amount.

5.010 Should the City Manager find that the additional rental payment due to City exceeds two percent (2%) of the total amount which should have been paid as determined by such review or audit and observation, and there being no reasonable basis for the failure to report and pay thereon, Lessee shall pay any applicable penalties for the delinquent payments.

5.011 Lessee shall furnish the Finance Director and/or City Manager with a cash basis monthly gross receipts report showing the amount payable therefrom to City. Such a report shall accompany each monthly payment required to be made as provided herein. The reporting period shall be by calendar month. In addition, Lessee shall furnish the Finance Director and/or City Manager with a cash basis monthly revenue and expense reports and an annual profit and loss statement, and a balance sheet prepared by a certified accountant and in a form acceptable to said City Manager or designee. The monthly revenue and expense report shall be submitted with the monthly rental payment. The annual financial statement shall be submitted within sixty (60) days of the close of an Agreement year. Said closing date shall be determined by reference to the date for commencement of the term herein provided.

5.012 Lessee shall at all times maintain a complete list or schedule of the prices charged for all goods and services, or combinations thereof, supplied to the public on or from the premises which shall be maintained on site. Said prices shall be fair and reasonable based upon the following considerations: that said operation is intended to serve the needs of the public for the goods and/or services supplied at a fair and reasonable cost; comparability with prices charged for similar goods and/or services supplied in the Orange County area; and reasonableness of profit margin in view of the cost of providing same in compliance with the obligations assumed in this Agreement. In the event the City Manager notifies the Lessee that the prices being charged are not fair and reasonable, Lessee shall have the right to confer with the City Manager and justify said prices. Following reasonable conference and consultation thereon, Lessee shall make such price adjustments as may be ordered by the City Manager. Lessee may appeal the determination of the City Manager to the City Council, whose decision thereon shall be final and conclusive. However, the Lessee shall comply with the ordered price adjustment pending the appeal and final ruling thereon by the City Council.

5.013 The State of California Constitution (art. XVI, § 6), prohibits the giving or lending public funds to any person or entity, public or private without a public purpose. Should the City's external independent auditor, in its review of the Lessee's accounting records, find that the Lessee's profit margins are not reasonable and may appear to violate the State constitution as it relates to a gift of public funds the City, will create a Capital Fund into which the excess, as determined by an independent accounting firm contracted by the City, would be deposited into. Funds deposited into the Capital Funds account will be available to the City for the capital needs of the tennis center, as outlined in this Agreement as the responsibility of the City.

5.014 Lessee shall not commingle any financial earnings or expenses from the City's tennis center operations towards any stakeholder contribution, payment, disbursement, reimbursement that may be related to the Lessee.

## **6. REQUIRED CAPITAL IMPROVEMENT PROGRAM**

6.01 All capital improvements (which include lighting upgrades, court resurfacing, expansion projects, and major Pro Shop improvements) will be the responsibility of the City.

6.02 All capital improvements shall be requested, considered and approved on an annual basis through the City's budget cycle.

6.03 The City Manager and Lessee may mutually agree from time to time that various capital improvement(s) shall be completed as necessary to improve and/or ensure the useability of the premises.

6.04 No modification of said plans, specifications, or improvements, including landscaping, shall be made by Lessee without approval thereof by the City Manager. Lessee agrees that City may have on the site at any time during the construction. improvement period an inspector who shall have the right of access to the premises and the construction work.

6.05 The parties agree that any delay in the construction due to fire, earthquake, war, labor dispute or other events beyond the control of Lessee shall extend the time in which said construction must be completed by the length of time of such delay.

## **7. OPERATING RESPONSIBILITIES**

7.01 Compliance with Laws: Lessee shall conform to and abide by all City and county ordinances, and all state and federal laws and regulations, including, but not limited to the Americans with Disabilities Act, insofar as the same or any of them are applicable; and where permits and/or licenses are required for the Tennis Center operation hereunder and/or any construction authorized herein, the same must be first obtained from the regulatory agency having jurisdiction thereover.

7.02 Compliance with Rules and Regulations: Lessee shall conform to and abide by all rules and regulations of the City Council and the City Manager insofar as the same or any of them are applicable. Lessee shall conform to City's Drug Free Workplace Policy, Policy No. 100-5, which is attached hereto and incorporated herein by this reference as **Exhibit B**. Failure to establish a program, notify employees, or inform City of a drug related workplace conviction will constitute a material breach of this Agreement upon which City may immediately terminate this Agreement.

7.03 Disorderly Persons: Lessee shall exercise every reasonable effort not to allow any loud, boisterous or disorderly persons to loiter about the premises.

7.04 Illegal Activities: Lessee shall not knowingly permit any illegal activities to be conducted upon the premises.

7.05 Signs: Lessee shall not post signs upon the premises unless prior written approval is obtained from the City Manager.

7.06 Public Use: Lessee shall use its best efforts to maximize the public use of Tennis Center and the facilities thereon.

7.07 Lessee's Staff and Employment Practices: Lessee is responsible for hiring, supervising and compensating all Tennis Center instructors and staff required for operation. Lessee shall complete background checks for all staff members and instructors that are consistent with the California Department of Justice guidelines which includes Live Scan fingerprinting and report

them to the City prior to employment/or performance of any contract work, including but not limited to instructing. City has the right to disapproval of staff or instructors based on background check results.

7.08 The City Manager may at any time give Lessee written notice to the effect that the conduct or action of a designated employee of Lessee is, in the reasonable belief of the City Manager, detrimental to the interest of the public patronizing the premises. Following City Manager's written notice therefore Lessee shall, at City Manager's discretion: (1) terminate such employee's work assignment at the demised premises or (2) Lessee shall meet with representatives of the City Manager to consider the appropriate course of action with respect to such matter and Lessee shall take reasonable measures under the circumstances to assure the City Manager that the conduct and activities of Lessee's employee will not be detrimental to the interest of the public patronizing the premises.

7.09 Lessee warrants that it fully complies with all laws regarding employment of foreign nationals and others, and that all its employees performing services hereunder meet the citizenship or immigration status requirements contained in federal and state statutes and regulations including, but not limited to, the Immigration Reform and Control Act of 1986 (P.L. 99-603). Lessee shall obtain from all covered employees performing services hereunder, all verification and other documentation of employment eligibility status required by federal statutes and regulations as they currently exist and as they may be hereafter amended. Lessee shall retain such documentation for all covered employees for the period prescribed by law. Lessee shall indemnify, defend, and hold harmless, the City, its officers and employees from employer sanctions and any other liability which may be assessed against Lessee or City or both in connection with any alleged violation of federal statutes or regulations pertaining to the eligibility for employment of persons performing services under this Agreement.

7.010 Sanitation: No offensive matter or refuse or substance constituting an unnecessary, unreasonable, or unlawful fire hazard, or material detrimental to the public health shall be permitted to remain on the premises and Lessee shall prevent any accumulation thereof from occurring.

7.011 Security Devices: Lessee may provide any legal devices, mechanism, or equipment designed for the purpose of protecting the premises from theft, burglary or vandalism, provided written approval for installation thereof is first obtained from the City Manager. Lessee is required to install, maintain and pay for onsite cameras. City shall have access to all cameras including video recordings within and surrounding the tennis center, with recordings required to be retained for 30 days. Cameras should be located inside the areas where, and positioned to observe, payment transactions occur, tennis court areas, and Pro Shop. All purchases and installation of such security devices shall be at Lessee's expense. During the last thirty (30) days preceding the termination of this Agreement, Lessee shall remove the said devices, mechanism, or equipment from the premises, other than for those items of personal property which have been furnished by City or have been so affixed that their removal therefrom cannot be accomplished without damage to the real property as determined by the City Manager.

7.012 Safety: Lessee shall immediately correct any unsafe condition of the premises, as well as any unsafe practices occurring thereon. Lessee shall obtain emergency medical care for

any member of the public who is in need thereof, because of illness, or injury occurring on the premises. Lessee shall cooperate fully with City in the investigation of any injury or death occurring on the premises, including a prompt report thereof to the City Manager.

7.013 Habitation: The premises shall not be used for human habitation, other than a night watchman or patrolman as approved by the City Manager.

## **8. ADVERTISING AND PROMOTIONAL MATERIALS**

8.01 Lessee shall not promulgate nor caused to be distributed any advertising, or promotional materials unless prior approval is obtained from City Manager. Said approval shall not be unreasonably withheld or delayed and shall be deemed to be given if no objection is made within fifteen (15) days following the request for approval. Such materials include, but are not limited to: advertising in newspaper, magazines and trade journals, and radio and/or television commercials.

8.02 Credit in Promotional Materials: Lessee agrees that any advertising or promotional materials promulgated by Lessee shall contain the words "City of Costa Mesa" and "Costa Mesa Tennis Center" prior to listing the Lessee business name unless specifically approved otherwise by the City Manager.

## **9. DESTRUCTION OF DEMISED PREMISES**

9.01 In the event the demised premises shall be totally or partially destroyed by a risk covered by the insurance coverage required herein, Lessee shall either restore the premises or terminate this Agreement. The City shall make the loss adjustment with the insurance company insuring the loss and receive payment of the proceeds of insurance. If the destruction is from a risk for which insurance coverage is not required or provided under said policy of insurance, the City shall either restore the premises or terminate this Agreement. Said insurance proceeds, if any, shall be held for the benefit of Lessee only in the event of an election by Lessee to restore the premises and shall be disbursed in installments as construction progresses for payment of the costs of restoration upon satisfactory performance of the work required, as evidenced by certification of completion by the City Manager and release of mechanic's liens by all persons furnishing labor and materials thereon. If the proceeds of insurance are insufficient to pay the actual costs of restoration, Lessee shall deposit the amount of the deficiency with the City upon demand therefore by the City Manager, and said sums shall be held for payment of said costs and disbursed in the manner heretofore provided. Any undistributed funds shall be retained by City and credited to the rental reserved over the remaining term of this Agreement. If Lessee elects to restore the demised premises, plan, specifications, and construction cost estimates for the restoration thereof shall be prepared by Lessee and forwarded to the City Manager for approval prior to the performance of any work thereon. Said documents shall be prepared and submitted in a timely manner following adjustments of the loss and receipt of the proceeds of insurance by the City. The required construction shall be performed by Lessee and/or licenses and bendable contractor(s) thereof who shall be required to carry comprehensive liability and property damage insurance, workers' compensation insurance, and standard fire, and extended coverage insurance, with vandalism and malicious mischief endorsements, during the period of construction, in amounts equal to the insurance limits required herein, or as otherwise determined by City. Said construction shall be commenced promptly following the approval thereof by the City Manager, issuance of permits

therefore by governmental agencies having jurisdiction thereover and posting of the construction site by City with notice of non-responsibility and shall be diligently prosecuted to completion. All work shall be performed in accordance with the approved plans and specifications, unless changes therein are approved in advance thereof by the City Manager. Lessee agrees that the City may have an inspector or City Staff member onsite at any time during the construction period, who shall have the right of access to the demised premises and the work occurring thereon. Lessee, at the commencement of the construction work, shall notify the City Manager in writing of the identity, place of business, and telephone number of responsible person(s) in charge of the construction to be occurring thereon. All construction shall be performed in a proficient and skillful manner. Upon completion of the restoration, Lessee shall immediately record a Notice of Completion with the County Clerk-Recorder.

9.02 If the premises are restored, this Agreement shall continue in full force and effect, except that the payment to be made by Lessee shall be abated and/or other relief afforded to the extent that the City Manager may determine the damage and/or restoration interferes with the Tennis Center operation provided a claim therefore is filed with the City Manager within one hundred (100) days of notice of election to restore premises. Any such claim shall be denied if the destruction of the demised premises is found by the City Manager to have been caused by the fault or neglect of Lessee. Lessee agrees to cooperate in the determination of the abatement and/or other relief to be provided by furnishing all information requested relative to the Tennis Center operation and permitting examination and audit of all accounting records kept in connection with the conduct thereof.

9.03 Lessee shall cooperate in the restoration of the demised premises by vacating and removing all items of inventory, trade fixtures, equipment and furnishings for such periods as are required for the restoration thereof.

9.04 The aforesaid provisions for abatement and/or other relieve shall also be applicable to a total or partial destruction of the demised premises by the aforementioned causes, except that the relief to be provided shall be based upon the extent the City Manager may determine that the reduction in the public's use of the demised premises due to the partial or total closure thereof has affected the Tennis Center operation.

9.05 Lessee agrees to accept the remedy heretofore provided in the event of a destruction of the demised premises and hereby waives any and all additional rights and remedies for relief or compensation that are presently available or may hereafter be made available under the laws and statutes of this State.

## **10. CONSTRUCTION BY CITY AFFECTING DEMISED PREMISES**

10.01 In the event the City shall construct or cause to be constructed a new facility on the demised premises, this Agreement shall continue in full force and effect, except that the payments to be made by Lessee shall be abated and/or other relief afforded to the extent that the City Manager may determine the construction interferes with the authorized operations, provided a claim therefore is filed with the City Manager within one hundred (100) days of the commencement of construction. Lessee agrees that the provisions of Section 10 shall not apply to improvements constructed pursuant to the Capital Improvements Plan.

10.02 Lessee agrees to cooperate with City in the event the construction affects the premises by vacating and removing all items of inventory, trade fixtures, equipment and furnishings for such periods as are required by the construction of the new facilities. Lessee further agrees to cooperate in the determination of the abatement and/or other relief to be provided by furnishing all information requested relative to the operation and permitting examination and audit of all accounting records kept in connection with the conduct thereof.

10.03 Following completion of the new facility, Lessee shall resume its operations therefrom within thirty (30) days of written notice from the City Manager that the premises are tenantable.

10.04 The aforementioned provisions of this section shall also be applicable in the event of performance of work on the demised premises that requires a partial or total closure thereof, except that the abatement and/or other relief to be provided shall be based upon the extent the City Manager may determine that the reduction in the public's use of the demised premises due to the partial or total closure thereof, has affected Lessee's operations.

10.05 Lessee agrees to accept the remedy heretofore provided in the event of construction upon the demised premises, and hereby waives any and all additional rights and remedies for relief or compensation that are presently available or may be made available hereafter under the laws and statutes of this State.

## **11. INDEPENDENT CONTRACTOR**

11.01 This Agreement is by and between the City and Lessee and is not intended, and shall not be construed, to create the relationship of agent, servant, employee, partnership, joint venture or association, as between City and Lessee.

11.02 Lessee understands and agrees that all persons furnishing services to Lessee pursuant to this Agreement are, for purposes of Workers' Compensation liability, employees solely of Lessee and not of the City.

11.03 Lessee shall bear the sole responsibility and liability for furnishing and shall furnish Workers' Compensation benefits to any person for injuries from or connected with services performed on behalf of Lessee pursuant to this Agreement.

## **12. SECURITY DEPOSIT**

12.01 Prior to the commencement of the term of this Agreement, Lessee shall pay to the City a sum of \$1,000 equal to one (1) month's minimum rent. In lieu thereof, Lessee may deposit said amount in a bank whose deposits are insured under the Federal Deposit Insurance Act (123 U.S.C. Section 1811 et seq), provided that a certificate of deposit is delivered to the City Manager giving City the exclusive right to withdraw any or all of said amount during the term of this Agreement. Lessee shall be entitled to any and all interest accruing from said certificate of deposit. Said sum shall serve as security for faithful performance of all covenants, promises and conditions assumed by Lessee herein, and may be applied in satisfaction and/or mitigation of damages arising from a breach thereof, including, but not limited to, delinquent payments; correction of maintenance deficiencies; securing required insurance; loss of revenue due to abandonment,

vacation or discontinuance of Tennis Center operations; completion of construction; and payment of mechanic's liens. Application of amounts on deposit in satisfaction and/or mitigation of damages shall be without prejudice to the exercise of any other rights provided herein or by law to remedy a breach of this Agreement. In the event any or all said amounts are applied in satisfaction and/or mitigation of damages Lessee shall immediately deposit such sums as are necessary to restore the security deposit to the full amount required hereunder. Said sum shall be returned to Lessee upon termination of this Agreement less any amounts that may be withheld by City as previously specified.

### **13. HOLD HARMLESS AND INDEMNIFICATION**

13.01 Lessee agrees to indemnify, defend with the attorneys of City's choosing and save harmless City, its agents, elected and appointed officials and employees from and against any and all liability, expense, including defense costs and legal fees, and claims for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury, or property damage arising from or connected with Lessee's operations or its services herein, including any worker's compensation suits, liability or expense, arising from or connected with services performed on behalf of Lessee by any person pursuant to this Agreement. Lessee's duty to indemnify City shall survive the expiration or other termination of this Agreement.

### **14. INSURANCE**

14.01 Without limiting Lessee's indemnification of City, Lessee shall provide and maintain at its own expense during the term of this Agreement the following program(s) of insurance covering its operations hereunder. Such insurance shall be provided by insurer(s) satisfactory to City's Risk Manager or City Attorney and evidence of such programs satisfactory to City shall be delivered to the City Manager on or before the effective date of this Agreement. Such evidence shall specifically identify this Agreement and shall contain express conditions that City is to be given written notice at least thirty (30) days in advance of any modification or termination of any program of insurance. Such insurance, with the exception of Workers' Compensation insurance, shall be primary to and not contributing with any other insurance maintained by City, and shall name City and its officers and employees as additional insureds.

14.01.01 During the periods of time of normal operations and non-construction periods, Lessee shall provide and maintain the following forms and amounts of insurances:

- A. Liability: Comprehensive General Liability insurance endorsed for Independent-Contractor, remises- Operations, Products/Completed Operations, Contractual, Broad Form Property Damage, and Personal Injury with a combined single limit of not less than one million dollars (\$1,000,000.00) per occurrence. If such insurance is written on a Claims Made Form, such insurance shall be endorsed to provide an extended reporting period of not less than five (5) years following termination of this Agreement.
- B. Workers' Compensation: A program of Workers' Compensation insurance in an amount and form to meet all applicable requirements of the Labor Code of the State of California, including Employers' Liability with a one million dollar (\$1,000,000) limit covering all persons providing services by or on behalf of Lessee and all risks to such persons under this Agreement.



C. Property Coverage: (1) Personal Property Insurance for the actual cash value against the hazards of fire, theft, burglary, vandalism and malicious mischief.

14.02 Failure on the part of Lessee to procure or maintain required insurance, including but not limited to naming the City as an additional insured and providing certificates of insurance, shall constitute a material breach of contract upon which City may immediately terminate this Agreement.

14.03 Conduct of Lessee's operations shall not commence until Lessee has complied with the aforementioned insurance requirements. Further, said operations, whether in whole or in part, shall be subject to suspension by the City Manager during any period that Lessee fails to maintain said policies in full force and effect.

14.04 The specified amount of liability insurance required herein may be subject to renegotiation on an annual basis. Should either party request renegotiation with respect to the amount of liability insurance to be provided, the determination thereof shall be established through mutual negotiations between the parties. Lessee shall continue to provide liability insurance in the amount currently being provided pending final renegotiation thereof in the manner heretofore provided.

14.04.01 Subsequent to such renegotiation as described herein, and with the concurrence of City's Risk Manager and City Attorney, the City Manager shall prepare and execute, and the Lessee shall execute, the appropriate amendment to this Agreement.

14.05 The cancellation provision in any insurance policies shall not be interpreted as relieving the Lessee of their ongoing obligation to maintain the required insurance throughout the duration of the Agreement. Lessee assumes the responsibility to maintain the required insurance for the duration of this Agreement. At least thirty (30) days prior to the expiration of any such policy, a signed, and complete certificate of insurance, with all endorsements required by this Section, showing that such insurance coverage has been renewed or extended shall be filed with the City Manager.

## **15. TAXES AND ASSESSMENTS**

15.01 The property interest conveyed herein may be subject to personal property taxation and/or assessment, and in the event of such taxation or assessment, Lessee shall pay before delinquency all lawful taxes, assessments, fees or charges which at any time may be levied by the State, County, City or any other tax assessment-levying body upon the premises and any improvements located thereon.

15.02 Lessee shall also pay all taxes, assessments, fees and charges on goods, merchandise, fixtures, appliances and equipment owned or used therein.

## **16. TRANSFERS**

16.01 Lessee shall not, without the prior written consent of the City Manager assign, hypothecate, or mortgage this Agreement or sublease or license any portion of the premises. Any

attempted assignment, hypothecation, mortgage, sublease or license without the consent of the City Manager shall render this Agreement null and void.

16.02 Each and all of the provisions, agreements, terms, covenants and conditions herein contained to be performed by Lessee shall be binding upon any transferee thereof.

16.03 The operations herein authorized shall not be transferable by testamentary disposition or the state laws of intestate succession, as the rights, privileges, and use conferred by this Agreement shall terminate prior to the date for expiration thereof in the event of the death of Lessee occurring within the term herein provided. Additionally, neither this Agreement nor any interest therein shall be transferable in proceedings in attachment or execution against Lessee or in voluntary or involuntary proceedings in bankruptcy or insolvency or receivership taken by or against Lessee, or by any process of law including proceedings under the Bankruptcy Act.

16.04 Shareholders and/or partners of Lessee may transfer, sell, exchange, assign or divest themselves of any interest they may have therein. However, in the event any such sale, transfer, exchange, assignment or divestment is affected in such a way as to give majority control of Lessee to any persons, corporation, partnership or legal entity other than the majority controlling interest therein at the time of execution of this Agreement, approval thereof shall be required. Consent to any such transfer shall only be refused if the City Manager finds that the transferee is lacking in experience and/or financial ability to render and provide service for the operation of the Tennis Center.

16.05 The prohibition herein contained shall not be applicable with respect to transfers of this Agreement arising from the exercise of a power of sale or judicial foreclosure pursuant to the terms and conditions of a hypothecation or mortgage previously approved by the City Manager.

16.06 In reference to Section 16.05, the City's consent with regard to successive transfers of this Agreement arising from the exercise of a power of sale or judicial foreclosure or the assignment of the Agreement in lieu of foreclosure, pursuant to the terms of a deed of trust previously approved by City, shall not be unreasonably withheld.

16.07 In the event Lessee shall request the prior written consent of City Manager to give, assign, transfer or grant control of this Agreement, and subsequently the City Manager gives written consent to the assignment, a transfer fee equal to one percent (1%) of the gross sales price shall be paid to City. Said sum shall be payable to City in full either within thirty (30) days after said consent is given or prior to the close of any escrow, whichever occurs first. Prior to the City Manager's consent to such assignment, the assignor (1) shall deliver to assignee a written schedule of all sums due and owing to City from the assignor with such schedule being in form and content subject to the approval of the City Manager in all respects and (2) shall deliver to the City Manager, as part of the acceptance of the assignment, a written acknowledgment by the assignee that the assignee (a) affirms the sums due and owing to City and (b) accepts responsibility for payment of such sums directly to City.

## **17. NON-DISCRIMINATION AND CIVIL RIGHTS COMPLIANCE**

17.01 Lessee hereby certifies and agrees that it will comply with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of

1975, the Americans With Disabilities Act of 1991, Title IX of the Education Amendments of 1972, where applicable, and Title 43, part 17 of the Code of Federal Regulations Subparts A and B, to the end that no persons shall, on the grounds of race, creed, color, national origin, political affiliation, marital status, sex, age or handicap, be subjected to discrimination under the privileges and use granted by this Agreement or under any project, program or activity supported by this Agreement.

17.02 Lessee certifies and agrees that all persons employed thereby, are and shall be treated equally without regard to or because of race, creed, color, national origin, political affiliation, marital status, sex, age or handicap and in compliance with all federal and state laws prohibiting discrimination in employment, including but not limited to, the Federal Civil Rights Act of 1964; the Unruh Civil Rights Act; the Cartwright Act; the State Fair Employment Practices Act and Americans With Disabilities Act.

17.03 Lessee certifies and agrees that subcontractors, bidders and vendors thereof are and shall be selected without regard to or because of race, creed, color, national origin, political affiliation, marital status, sex, age or handicap.

17.04 All employment records shall be open for inspection and reinspection at any reasonable time during the term of this Agreement for the purpose of verifying the practice of non-discrimination by Lessee in the areas heretofore described.

17.05 If City finds that any of the above provisions have been violated, the same shall constitute a material breach of contract upon which City may determine to cancel, terminate, or suspend this Agreement. While City reserves the right to determine independently that the non-discrimination provisions of this Agreement have been violated, in addition, a determination by the California Fair Employment and Housing Department or the Federal Equal Employment Opportunity Commission that Lessee has violated State or Federal non-discrimination laws or regulations shall constitute a finding by City that Lessee has violated the non-discrimination provisions of this Agreement.

17.06 The parties agree that in the event Lessee violates the non-discrimination provisions contained herein, City shall, at its option, be entitled to a sum of One Thousand Dollars (\$1,000) pursuant to California Civil Code Section 1671 as liquidated damages in lieu of canceling, terminating or suspending this Agreement. Lessee further agrees that One Thousand Dollars (\$1,000) is a reasonable sum under all of the circumstances existing at the time of the execution of this Agreement.

## **18. EASEMENTS**

18.01 City reserves the right to establish, grant or utilize easements or rights-of-way over, under, along and across the demised premises for utilities and/or public access to the demised premises provided City shall exercise such rights in a manner as will avoid any substantial interference with the operations to be conducted hereunder. Should the establishment of such easements permanently deprive Lessee of the use of a portion of the premises, an abatement of payments shall be provided in an amount proportional to the total area of the premises in the before and after conditions.

## 19. CANCELLATION

19.01 Upon the occurrence of any one or more of the events of default hereinafter described, this Agreement shall be subject to cancellation. As a condition precedent thereto, the City Manager shall give Lessee ten (10) days' notice by registered or certified mail of the date set for cancellation thereof; the grounds therefore; and that an opportunity to be heard thereon will be afforded on or before said date, if request is made therefore.

19.02 Upon cancellation City shall have the right to take possession of the premises, including all improvements, equipment, and inventory located thereon, and use same for the purpose of satisfying and/or mitigating all damages arising from a breach of this Agreement.

19.03 Action by City to effectuate a cancellation and forfeiture of possession shall be without prejudice to the exercise of any other rights provided herein or by law to remedy a breach of this Agreement.

19.04 Any trustee, beneficiary, mortgagee or lender ("Lender") under a hypothecation or mortgage previously approved by the City Manager shall have the right at any time during the term of this Agreement to undertake any and all action that may be required in order to prevent a cancellation of this Agreement and a forfeiture of the operation. Accordingly, the City Manager shall send a copy of any intended cancellation of this Agreement to any of the aforementioned parties whose security would be affected thereby; and upon request thereof for postponement, extend the date set therefore by such time as the City Manager finds reasonable in order to allow said parties to correct the grounds therefore or to provide a new Lessee under a power of sale or foreclosure contained in the hypothecation or mortgage, who upon transfer thereto shall become responsible for the correction thereof within such time as may be allowed by the City Manager.

19.05 In reference to Section 20.04 of this Agreement, the City Manager shall provide a notice of default to Lender, provided that such Lender shall have previously registered with the City Manager by written notice specifying the name and address of said Lender, at the same time the City Manager provides such notice to the Lessee. With regard to monetary defaults and other non-monetary defaults which are curable by Lender, the City Manager shall not terminate this Agreement so long as Lender, after receiving notice of such defaults and within a reasonable time after the expiration of Lessee's curative periods to cure the defaults as provided in Section 21, commences promptly to pay or to institute foreclosure proceedings to foreclose the deed of trust and proceeds with the due diligence thereafter to prosecute such proceedings to a conclusion or to cure the defaults. With regard to defaults which cannot be cured by Lender, the City Manager shall not terminate this Agreement so long as Lender, after receiving notice of such defaults and with a reasonable time after the expiration of the Lessee's curative periods to cure the defaults, institutes promptly for foreclosure proceedings to foreclose the deed of trust and proceeds with due diligence thereafter to prosecute such proceedings to a conclusion. In the event that this Agreement is rejected by a trustee in bankruptcy due to Lessee's bankruptcy, City shall provide to Lender or its assignee an option to enter into a new lease Agreement with City upon the same terms and conditions as are contained in this Agreement and for the balance of the term thereof.

**20. EVENTS OF DEFAULT**

20.01 The abandonment, vacation or discontinuance of Tennis Center operations on the demised premises for more than twenty-four (24) consecutive hours.

20.02 The failure of Lessee to punctually pay or make the payments herein when due, where the delinquency continues beyond ten (10) days following written notice for payment thereof.

20.03 The failure of Lessee to operate in the manner required by this Agreement, where such failure continues for more than ten (10) days after written notice from the City Manager to correct the condition therein specified.

20.04 The failure to maintain the premises and the improvements constructed thereon in the state of repair required herein, and in a clean, sanitary, safe and satisfactory condition, where such failure continues for more than ten (10) days after written notice from the City Manager for correction thereof, provided that where fulfillment of such obligation requires activity over a period of time and Lessee shall have immediately, following receipt of such notice, commenced to perform whatever may be required to cure the particular default and continues such performance diligently, said time limit may be waived in the manner and to the extent allowed by the City Manager.

20.05 Should Lessee fail to uphold or fulfill any other commitments, covenants, conditions, or agreements outlined in this Agreement, and such failure persists for over thirty (30) days after receiving written notice from the City Manager for rectification, there is a requirement to address the default. However, should the fulfillment of the obligation involve actions over a duration, and Lessee initiates corrective measures within ten (10) days of the notice and diligently continues such efforts, the specified time limit may be waived, subject to the discretion of the City Manager.

20.06 The filing of a voluntary petition in bankruptcy by Lessee; the adjudication of Lessee as a bankrupt; the appointment of any receiver of Lessee's assets; the making of a general assignment for the benefit of creditors; a petition or answer seeking an arrangement for the reorganization of Lessee under any Federal Reorganization Act, including petitions or answers under Chapters X or XI of the Bankruptcy Act; the occurrence of any act which operates to deprive Lessee permanently of the rights, powers and privileges necessary for the proper conduct and operation of the Tennis Center; the levy of any attachment or execution which substantially interferes with Lessee's operations under this Agreement and which attachment or execution is not vacated, dismissed, stayed or set aside within a period of sixty (60) days.

20.07 Determination by the City Manager, the State Fair Employment Commission, or the Federal Equal Employment Opportunity Commission of discrimination having been practiced by Lessee in violation of state and/or federal laws thereon.

20.08 Transfer of the majority controlling interest of Lessee to persons other than those who are in control at the time of the execution of this Agreement without approval thereof by the City Manager.

20.09 Lessee's material misrepresentation of fact(s) in its "Affidavit to Accompany Proposals", which was required to be submitted in response to the "Request For Proposals", which was to be submitted in response to the Request for Proposals used in the solicitation process for this Agreement, and which by this reference is incorporated herein as if fully set forth.

20.010 Failure to have submitted schematic plans and/or working drawings on or before the date(s) designated in this Agreement for submission thereof.

20.011 Failure to have commenced required construction or any phase thereof on or before the date designated in this Agreement for commencement thereof.

20.012 Failure to have completed construction on or before the date designated in this Agreement for completion thereof.

## **21. DEFAULT FOR INSOLVENCY**

21.01 The City, through its City Manager, may immediately terminate this Agreement for default in the event of the occurrence of any of the following:

- A. The City Manager determines that Lessee is insolvent. Lessee shall be deemed to be insolvent if it has ceased to pay its debts in the ordinary course of business or cannot pay its debts as they become due, whether it has committed an act of bankruptcy or not, and whether insolvent within the meaning of Federal Bankruptcy Law or not.
- B. The appointment of a Receiver or Trustee for Lessee.
- C. The execution by Lessee of an assignment for the benefit of creditors.

21.02 The rights and remedies of City provided in this section shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

21.03 Any discretion vested in the City Manager pursuant to the provisions of Section 22.01 shall be reasonably exercised.

## **22. WAIVER**

22.01 Any waiver by the City of any breach of any one or more of the covenants, conditions, terms and agreements herein contained shall not be construed to be a waiver of any subsequent or other breach of the same or of any other covenant, condition, term or agreement herein contained, nor shall failure on the part of City to require exact, full and complete compliance with any of the covenants, conditions, terms or agreements herein contained be construed as in any manner changing the terms of this Agreement or stopping City from enforcing the full provisions thereof.

22.02 No delay, failure, or omission of City to re-enter the premises or to exercise any right, power, privilege or option, arising from any default, nor any subsequent acceptance of payments then or thereafter shall impair any such right, power, privilege or option, or be construed as a waiver of or acquiescence in such default or as a relinquishment of any right.

22.03 No notice to Lessee shall be required to restore or revive "time of the essence" after the waiver by City of any default.

22.04 No option, right, power, remedy or privilege of the City shall be construed as being exhausted by the exercise thereof in one or more instances. The rights, powers, options, privileges and remedies given City by this Agreement shall be cumulative.

### **23. RIGHT-OF-ENTRY**

23.01 Should Lessee be deemed deficient, as determined by City Manager, in its performance of its obligations required herein, the City in addition to all other available remedies may, but shall not be so obliged, enter upon the premises and correct Lessee's deficiencies using City forces, and equipment and materials on the premises suitable for such purposes, or by employing a separate private contractor. The City's costs so incurred, including direct and indirect overhead costs as determined by the City Manager, shall be reimbursed to the City by Lessee and/or its sureties within thirty (30) days of demand thereof.

23.02 In the event of an abandonment, vacation or discontinuance of operations for a period in excess of twenty-four (24) hours, Lessee hereby irrevocably appoints City as an agent for continuing operation of the services granted herein, and in connection therewith authorizes the officers and employees thereof to (1) take possession of the premises, including all improvements, equipment and inventory thereon; and (2) remove any and all persons or property on said premises and place any such property in storage for the account of and at the expense of Lessee; and (3) sublease or license the premises; and (4) after payment of all expense of such subleasing or licensing apply all payments realized therefrom to the satisfaction and/or mitigation of ail damages arising from Lessee's breach of this Agreement. Entry by the officers and employees of City upon the premises for the purpose of exercising the authority conferred hereon as agent of Lessee shall be without prejudice to the exercise of any other rights provided herein or by law to remedy a breach of this Agreement.

### **24. SURRENDER**

24.01 Upon expiration of the term hereof, or cancellation thereof as herein provided, Lessee shall peaceably vacate the premises and any and all improvements located thereon and deliver up the same to City in a reasonably good condition, ordinary wear and tear expected, subject to the right of City to demand removal thereof.

24.02 Upon expiration of the term of this Agreement, Lessee shall execute and deliver to City within thirty (30) days after service of written demand, a good and sufficient quitclaim deed of the Lessee's interest in this Agreement and the demised premises. Should Lessee fail or refuse to deliver to the City a quitclaim deed as aforesaid, a written notice by City reciting the failure of the Lessee to execute and deliver the quitclaim deed, shall after ten (10) days from the date of recordation of the notice be conclusive evidence against Lessee and all persons claiming under Lessee of the termination of this Agreement.

## 25. INTERPRETATION

25.01 This Agreement shall be interpreted according to the rules which govern the interpretation of contracts, as prescribed in Part 2 of Division 3 of the California Civil Code commencing with Section 1635.

25.02 The headings herein contained are for convenience and reference only and are not intended to define or limit the scope of any provision thereof.

25.03 The following words as used herein shall be construed to have the following meaning, unless otherwise apparent from the context in which they are used:

“City Manager”: City Manager of the City including his or her designee.

“State”: The State of California.

“Finance Director”: Finance Director of the City including his or her designee.

“Tennis Center Operation”: The privilege of engaging in the activities authorized herein on the public property designated therefore.

“Capital Improvement”: Any construction project which extends the useful life and/or increases the capacity of the tennis Center facilities.

“Building Official”: Director of Economic and Development Services including his or her designee.

“Gross Receipts”: Except as specifically provided by policy statement issued by the City Manager, the term “gross receipts” as used in this lease, is defined to be all money, cash receipts, assets, property or other things of value, including but not limited to: gross charges, sales, rentals, fees, gratuities and commissions made or earned by Lessee and/or all the assignees, sublessees, licensees, permittees or concessionaires thereof, whether collected or accrued from any business, use or occupation, or any combination thereof, originating, transacted, or performed in whole or in part, on the premises, including but not limited to rentals, the rendering or supplying of services and the sale of goods, wares or merchandise. Gross receipts shall include the amount of any manufacturer’s or importer’s excise tax included in the prices of any property or material sold, even through the manufacturer or importer is also the retailer thereof, and it is immaterial whether the amount of such excise tax is stated as a separate charge.

25.03.01 Except as specifically provided below or by written policy statement issued by the City Manager, there shall be no deduction from gross receipts for any overhead cost or expense of operations, such as, but without limitation to salaries, wages, commissions, gratuities, costs of goods, interest, debt amortization, credit, collection costs, discount from credit card operations, insurance and taxes. Bona fide bad debts actually incurred by Lessee or its sublessees, assignees, licensees, concessionaires and permittees may be deducted from gross receipts. There shall however, be no deduction for bad debts based on past experience or transfers to a bad debt reserve. The subsequent collection of bad debts previously not reported as gross receipts shall be included in gross receipts at the time they are collected.



25.03.02 Except as specifically provided below or by written policy statement issued by the City Manager, gross receipts reported by Lessee and its sublessees, assignees, licensees, concessionaires and permittees, must include the full usual charge for any services, goods, rentals or facilities provided by Lessee or its sublessees, assignees, licensees, concessionaires or permittees. Gross receipts shall not include the following: direct taxes imposed upon the consumer and collected therefrom by Lessee such as, but not limited to, Federal, State, or Municipal retail sales taxes, or related direct taxes, which are direct taxes paid periodically by Lessee to a governmental agency accompanied by a tax return statement; receipts from fees or charges made for tennis instructions; receipts derived from the rental of tennis equipment which are leased by Lessee specifically for tournament purposes but not to exceed the cost to Lessee of leasing such tennis equipment; and receipts from entry fees or charges made for special tournaments.

25.03.03 The City Manager, by written policy statement consistent with recognized and accepted business and accounting practices, upon consultation with Lessee, and with the approval of the Finance Director and City Attorney, may further interpret the term "gross receipts" as used in this Agreement.

25.04 In the event of any conflict in the definition or interpretation of any word, responsibility, service or schedule between the Lease Agreement and the exhibits attached hereto, said conflict or inconsistency shall be resolved by giving precedence in the following priority order: first to the Agreement; then to the Exhibits to the Agreement.

## **26. FORCE MAJEURE/TIME EXTENSIONS**

26.01 Except as otherwise specifically provided herein, and in the event either party hereto shall be delayed or prevented from performance of any act required hereunder by reason of Acts of God, litigation to which Lessee is not a plaintiff, or other cause without fault and beyond control of the party obligated, performance of such act shall be excused for the period of time of the delay as determined by the City Manager. An extension of time for any such cause shall only be for a period of time equivalent to the enforced delay. Lessee's inability to obtain financing shall not be grounds for an extension of time. The City Manager shall prepare and execute, and Lessee shall execute the appropriate document acknowledging any extension of time granted pursuant to this section.

## **27. LESSEE'S NON-COMPLIANCE AND LIQUIDATED DAMAGES**

27.01 If the City Manager determines that there are deficiencies in Lessee's performance of the Tennis Center operations authorized and required herein, the City Manager will provide a written notice to the Lessee to correct said deficiencies within twenty-four (24) hours following notification.

27.02 In the event that Lessee fails to correct the deficiencies within the prescribed time frames the City Manager may, at his option; (1) use the Security Deposit as provided for herein, (2) exercise its rights under paragraph 23.01 (Right-of- Entry) herein, and/or (3) assess liquidated damages pursuant to the schedule hereinafter listed.

27.01.01 The parties agree that it will impracticable or extremely difficult to fix the extent of actual damages resulting from the failure of the Lessee to comply with the obligations for Tennis

Center operations herein required, authorized, and specified. The parties hereby agree that under the current circumstances a reasonable estimate of such damage is \$500 per day for each day of the period of time that the deficiencies exist, and that Lessee shall be liable to City for liquidated damages in said amount.

27.01.02 The parties further agree that it will be impracticable or extremely difficult to fix the extent of actual damages resulting from the failure of the Lessee to comply with the obligations for demised premises grounds maintenance required and specified. The parties hereby agree that under the current circumstances a reasonable estimate of such damages is \$500 per day for each day of the period of time that the deficiencies exist, and that Lessee shall be liable to City for liquidated damages in said amount.

## **28. TENNIS CENTER EVALUATION REPORTING**

28.01 The City and Lessee agree that the overall condition and playability of the Tennis Center, the quality of service provided by Lessee, and the condition of the buildings thereon is of the primary importance to both parties. As this Agreement specifies, the standards of performance deemed necessary for proper maintenance and services. The City Parks and Community Services Department, in conjunction with the City's Public Works Department will complete routine inspections of the Tennis Center, along with a facility maintenance report (minimally quarterly inspections) and Lessee or their authorized representative will be invited to participate in the inspection tour of the premises. City can inspect the facility and grounds at anytime without prior advance notice to the Lessee.

28.02 Lessee shall submit an annual report to the Parks and Community Services Director including data and statistics of operations including but not limited to attendance, activities, improvements, programs, trends, and specific scholarship, discount and low-cost programming by January 31 that covers the previous year.

28.03 Lessee shall track and record complaints from the public regarding the operation and maintenance of the Tennis Center. Provide monthly updates to City staff with detailed explanation of the resolution for each complaint along with point of sales financial reports with payment to City.

## **29. NOTICES**

29.01 Any notice required to be given under the terms of this Agreement or any law applicable thereto may be: (1) delivered by personal service; or (2) placed in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, return receipt requested, and deposited in a post office, mailbox, sub-post office, substation or mail chute, or other like facility regularly maintained by the United States Postal Service; or (3) transmitted electronically to the designated email address of the recipient.

Any notice served by mail and/or email upon City shall be addressed to the City Manager, 77 Fair Drive, Costa Mesa, California 92626; cityclerk@costamesaca.gov or as later designated in writing to Lessee by the City Manager. Service by mail and email shall be deemed complete upon deposit/transmission in the above-mentioned manner.

Any notice served by mail and/or email upon the Lessee shall be addressed to Steve McAvoy, 23400 Park Sorrento, Calabasas, CA 91302; Steve@topseed.us or as later designated in writing to the City by the Lessee. Service by mail and email shall be deemed complete upon deposit/transmission in the above-mentioned manner.

**30. SEVERABILITY**

30.01 If any provision of this Agreement is determined to be illegal, invalid, or unenforceable by a court of competent jurisdiction, the remaining provisions hereof shall not be affected thereby and shall remain in full force and effect.

**31. CONTRACT ENFORCEMENT AND AMENDMENTS TO THIS AGREEMENT**

31.01 The City Manager shall be responsible for the enforcement of this Agreement on behalf of City and shall be assisted therein by those officers and employees of City having duties in connection with the administration thereof.

31.02 Any officers and/or authorized employees of City may enter upon the demised premises at any and all reasonable times for the purpose of determining whether or not Lessee is complying with the terms and conditions hereof, or for any other purpose incidental to the rights of City within the demised premises.

31.03 In the event either party commences legal proceedings for the enforcement of this Agreement, the prevailing party shall be entitled to recover its attorney's fees and costs incurred in the action brought thereon.

31.04 This document may be modified only by further written agreement between the parties. Any such modification shall not be effective unless and until executed by Lessee and in the case of the City, unless otherwise specifically authorized hereinbefore, until executed by the Mayor of the City.

**32. ENTIRE AGREEMENT**

32.01 This document, and the exhibits attached hereto, constitutes the entire agreement between City and Lessee for the Tennis Center operations and use granted herein. All other agreements, promises and representations with respect thereto, other than contained herein, are expressly revoked, as it has been the intention of the parties to provide for a complete integration within the provisions of this document, and the exhibits attached hereto, the terms, conditions, promises and covenants relating to the Tennis Center operation and the demised premises to be used in the conduct thereof.

[SIGNATURES ON FOLLOWING PAGE]

Executed this 1<sup>st</sup> day of April, 2024, at Costa Mesa, California.

CITY OF COSTA MESA, A CALIFORNIA  
MUNICIPAL CORPORATION

*Lori Ann Farrell Harrison*  
Lori Ann Farrell Harrison  
City Manager

Date: *March 28, 2024*

TOP SEED TENNIS ACADEMY, INC.

*Steve McAvoy*  
Name: Steve McAvoy  
Title: President  
Top Seed Tennis Academy, Inc.

Date: *March 25, 2024*

APPROVED AS TO FORM FOR CITY  
OF COSTA MESA:

*Kimberly Hall Barlow*  
Kimberly Hall Barlow  
City Attorney

Date: *March 28, 2024*

*Stacy León*  
*Deputy* City Clerk

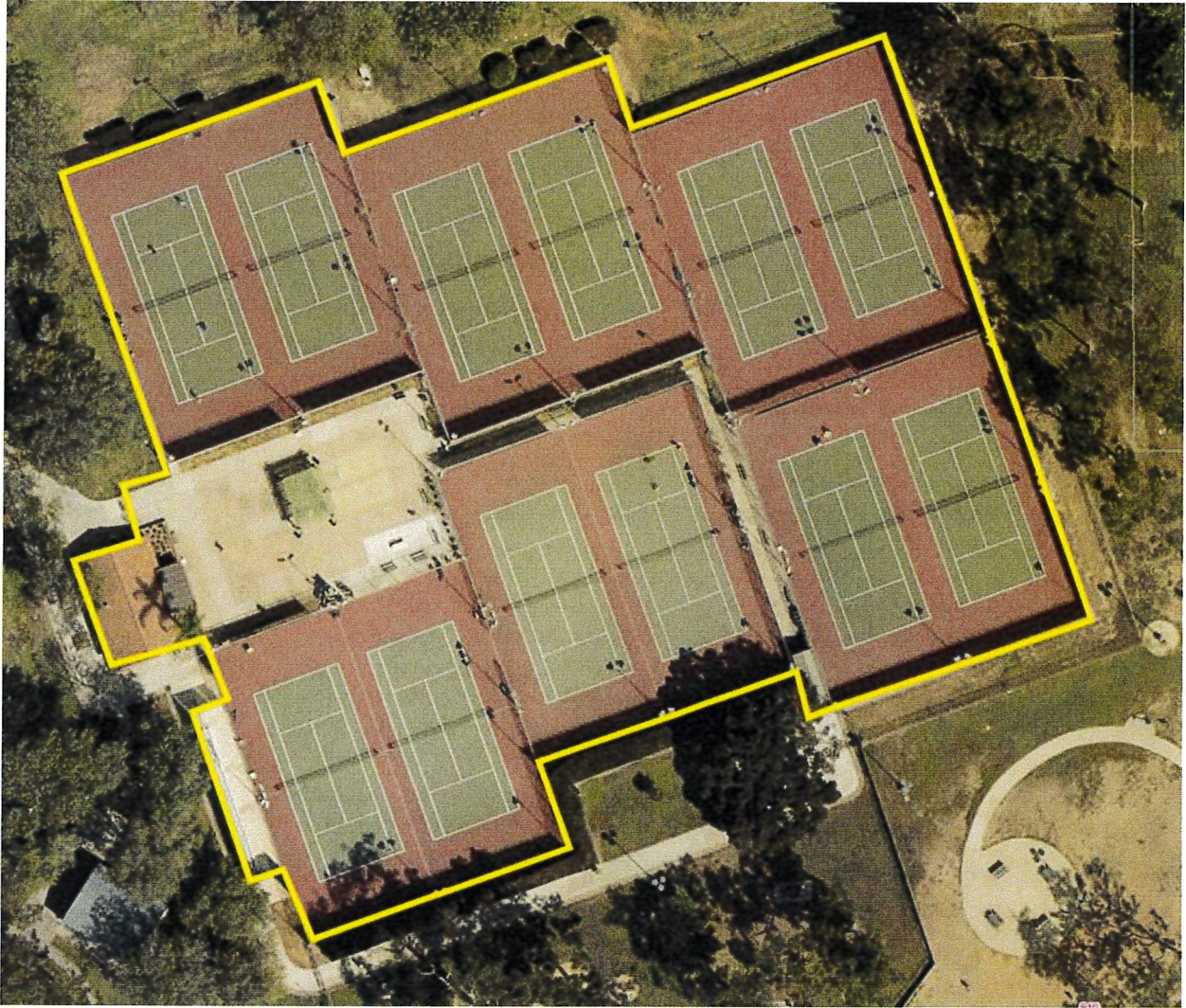


Date: *5/2/2024*

# EXHIBIT A



Costa Mesa Tennis Center – Facility Boundaries



# EXHIBIT B

City Council Policy 100-5

# CITY OF COSTA MESA, CALIFORNIA

## COUNCIL POLICY

### BACKGROUND

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Under the Federal Drug-Free Workplace Act of 1988, passed as part of omnibus drug legislation enacted November 18, 1988, contractors and grantees of Federal funds must certify that they will provide drug-free workplaces. At the present time, the City of Costa Mesa, as a sub-grantee of Federal funds under a variety of programs, is required to abide by this Act. The City Council has expressed its support of the national effort to eradicate drug abuse through the creation of a Substance Abuse Committee, institution of a City-wide D.A.R.E. program in all local schools and other activities in support of a drug-free community. This policy is intended to extend that effort to contractors and grantees of the City of Costa Mesa in the elimination of dangerous drugs in the workplace.

### PURPOSE

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It is the purpose of this Policy to:

1. Clearly state the City of Costa Mesa's commitment to a drug-free society.
2. Set forth guidelines to ensure that public, private, and nonprofit organizations receiving funds from the City of Costa Mesa share the commitment to a drug-free workplace.

### POLICY

The City Manager, under direction by the City Council, shall take the necessary steps to see that the following provisions are included in all contracts and agreements entered into by the City of Costa Mesa involving the disbursement of funds.

1. Contractor or Sub-grantee hereby certifies that it will provide a drug-free workplace by:
  - A. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in Contractor's and/or sub-grantee's workplace, specifically the job site or location included in this contract, and specifying the actions that will be taken against the employees for violation of such prohibition;
  - B. Establishing a Drug-Free Awareness Program to inform employees about:



SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8-8-89	2 of 3

1. The dangers of drug abuse in the workplace;
  2. Contractor's and/or sub-grantee's policy of maintaining a drug-free workplace;
  3. Any available drug counseling, rehabilitation and employee assistance programs; and
  4. The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
- C. Making it a requirement that each employee to be engaged in the performance of the contract be given a copy of the statement required by subparagraph A;
- D. Notifying the employee in the statement required by subparagraph 1 A that, as a condition of employment under the contract, the employee will:
1. Abide by the terms of the statement; and
  2. Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction;
- E. Notifying the City of Costa Mesa within ten (10) days after receiving notice under subparagraph 1 D 2 from an employee or otherwise receiving the actual notice of such conviction;
- F. Taking one of the following actions within thirty (30) days of receiving notice under subparagraph 1 D 2 with respect to an employee who is so convicted:
1. Taking appropriate personnel action against such an employee, up to and including termination; or
  2. Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health agency, law enforcement, or other appropriate agency;

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8-8-89	3 of 3

- G. Making a good faith effort to maintain a drug-free workplace through implementation of subparagraphs 1 A through 1 F, inclusive.
2. Contractor and/or sub-grantee shall be deemed to be in violation of this Policy if the City of Costa Mesa determines that:
    - a. Contractor and/or sub-grantee has made a false certification under paragraph 1 above;
    - b. Contractor and/or sub-grantee has violated the certification by failing to carry out the requirements of subparagraphs 1 A through 1 G above;
    - c. Such number of employees of Contractor and/or sub-grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor and/or sub-grantee has failed to make a good faith effort to provide a drug-free workplace.
  3. Should any contractor and/or sub-grantee be deemed to be in violation of this Policy pursuant to the provisions of 2 A, B, and C, a suspension, termination or debarment proceeding subject to applicable Federal, State, and local laws shall be conducted. Upon issuance of any final decision under this section requiring debarment of a contractor and/or sub-grantee, the contractor and/or sub-grantee shall be ineligible for award of any contract, agreement or grant from the City of Costa Mesa for a period specified in the decision, not to exceed five (5) years. Upon issuance of any final decision recommending against debarment of the contractor and/or sub-grantee, the contractor and/or sub-grantee shall be eligible for compensation as provided by law.