

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

AGENDA DATE: October 25, 2022
PUBLIC HEARING DATE: Not Applicable

CONTACT PERSON(S) NAME AND PHONE NUMBER:
Yvette Hernandez, P.E. City Engineer, (915) 212-1860

DISTRICT(S) AFFECTED: 2

STRATEGIC GOAL: No. 4 Enhance El Paso's Quality of Life Through Recreational, Cultural, & Educational Environments

SUBGOAL: 4.2 Create Innovative recreational, educational, and cultural program.

SUBJECT:

Discussion and action that the City Manager be authorized to sign a Use, Construction, and Donation Agreement with Western Refining Company, LLC for use, construction and donation of improvements at Marina Rios Park.

BACKGROUND / DISCUSSION:

On July 9, 2019, City Council approved the use of Community Development Block Grant (CDBG) funds for the design and construction of a pocket park located at on a vacant 0.5-acre property at the corner of Cleveland Ave. and N. Clark Dr. (Marina Rios Park). During the design it was determined available funding was insufficient to construct the Park as planned and allowed only installation of landscaping and park amenities on approximately 0.25 acres located on the western side. Improvements in that area of the property were completed in November 2021.

Shortly after completion of construction, the Capital Improvement Department was approached by Representative Hernandez, the representative for the area of the City of when the park was constructed to assess the Department's interest in the Representative having discussions with Western Refining Company, LLC (WRC) regarding whether WRC would be willing to fund and construct the improvements for the undeveloped portion of the property. WRC agreed to fund the improvements and designs and an agreement were finalized. The improvements are valued at \$171,227.28.

SELECTION SUMMARY: N/A

CONTRACT VARIANCE: N/A

PROTEST: N/A

PRIOR COUNCIL ACTION: July 9, 2019 City Council approved the use of Community Development Block Grant (CDBG) funds for the design and construction of a pocket park located at on a vacant 0.5-acre property at the corner of Cleveland Ave. and N. Clark Dr. (Marina Rios Park).

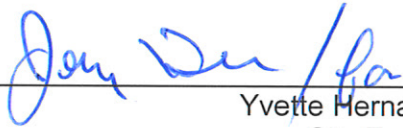
AMOUNT AND SOURCE OF FUNDING: \$171,227.28 Private funding no City Match

HAVE ALL AFFECTED DEPARTMENTS BEEN NOTIFIED? YES NO

PRIMARY DEPARTMENT: Capital Improvement Department
SECONDARY DEPARTMENT: Parks and Recreation

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

DEPARTMENT HEAD:

A handwritten signature in blue ink, appearing to read 'Yvette Hernandez', is written over a horizontal line.

Yvette Hernandez, P.E
.City Engineer

RESOLUTION

WHEREAS, the City seeks to promote healthy outdoor recreational activity to the citizens and visitors of El Paso through the use of its City parks; and

WHEREAS, Western Refining Company, LLC (Western) wishes to donate, construct and install park amenities and landscaping features, at Western's sole cost, in accordance with the City's design specifications to be used at the Marina Rios Park; and

WHEREAS, the City and Western are mutually desirous of entering into the Use, Construction, and Donation Agreement for the benefit of the public;

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

That the City Manager, or designee be authorized to sign a Use, Construction, and Donation Agreement for improvements at Marina Rios Park by and between the City of El Paso, Texas and Western Refining Company LLC.

APPROVED THIS _____ DAY OF _____ 2022

CITY OF EL PASO:

Oscar Leeser
Mayor

ATTEST:

Laura Prine
City Clerk

APPROVED AS TO FORM

Donald C. Davie

Donald Davie
Senior Assistant Attorney

APPROVED AS TO CONTENT

Assistant Director Capital Improvement
Jerry DeMuro/for

Yvette Hernandez, P.E.
City Engineer

THE STATE OF TEXAS

§

§ USE, CONSTRUCTION, AND DONATION

§ AGREEMENT

COUNTY OF EL PASO

§

THIS USE, CONSTRUCTION, AND DONATION AGREEMENT FOR CONSTRUCTION AND DONATION OF IMPROVEMENTS AT CLEVELAND CLARK PARK RECENTLY FORMALLY RENAMED MARINA RIOS PARK (hereinafter referred to as "**Agreement**") is made and entered into on this 13th day of October, 2022, ("Effective Date") by and between the Western Refining Company LLC (hereafter referred to as "**Western**") and the City of El Paso, Texas, a Texas home rule municipal corporation, (hereinafter referred to as "**City**"). Western and the City are sometimes referred to herein as a "Party" and collectively may be referred to herein as the "Parties".

WHEREAS, the City seeks to promote healthy outdoor recreational activity to the citizens and visitors of El Paso through the use of its City parks; and

WHEREAS, Western wishes to donate and install park amenities and landscaping features in accordance with the City's design specifications to be used at the Cleveland Clark Park, as described herein.

WHEREAS, the City and Western are mutually desirous of entering into this Agreement for the benefit of the public;

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES HEREIN, WESTERN AND CITY AGREE TO THE FOLLOWING TERMS AND CONDITIONS:

1. Contractual Relationship:

- 1.1. The Parties to this Agreement are independent contractors. Except as may be expressly and unambiguously provided in this Agreement, no partnership or joint venture is intended to be created by this Agreement, nor any principal-agent or employer-employee relationship between the Parties or any of their officers, employees, agents or representatives.
- 1.2. As an independent contractor, Western understands and agrees that it will be responsible for its respective acts or omissions, and the City will in no way be responsible as an employer to Western's officers, employees, agents or representatives who perform any service in connection with this Agreement.
- 1.3. As an independent contractor, the City understands and agrees that it will be responsible for its respective acts or omissions, and Western will in no way be responsible as an employer to the City's officers, employees, agents or representatives who perform any service in connection with this Agreement.
- 1.4. Western acknowledges and agrees that it does not have, and will not attempt to assert, the authority to make commitments for or to bind the City to any obligation other than the obligations set forth in this Agreement. The City also acknowledges and agrees that it does not have, and will not attempt to assert, the authority to make commitments for or to bind Western to any obligations other than the obligations set forth in this Agreement. Western agrees that its personnel will participate in the donation, construction, and installation of park amenities, landscaping features

and public art, as applicable, in compliance with all applicable federal, state, and/or local rules and regulations.

2. **Term:** This Agreement will commence on the Effective Date and will terminate upon completion of the Improvements by Western and their acceptance by City, unless terminated earlier in accordance with this Agreement (“Term”).

3. Use of City Property

- 3.1. In consideration of the construction of Improvements and donation thereof to City, as hereafter described, City does hereby grant to Western during the Term of this Agreement the use of the area described in **Exhibit A**, referred to and incorporated herein by reference, in Cleveland Clark Park (hereafter “Park”) for the purpose of constructing and installing park amenities and landscaping within the Park (“Improvements”).
- 3.2. Western agrees to maintain City’s Park in a safe and clean condition during Western’s use of the Park. Western further agrees and covenants that City’s Park and all Improvements will at all times be subject to inspection by City, however, City has no duty to inspect the property.

4. Construction of Improvements

- 4.1. [RESERVED].
- 4.2. During the Term of this Agreement, Western will construct the Improvements in accordance with this Agreement and as substantially shown in the “Construction Plans Design Documents” contained in Exhibit B, referred to and incorporated herein by reference.
- 4.3. Western will include in all Western construction agreements for the Improvements the following provisions:
 - 4.3.1. Typical market based indemnification obligations of a contractor doing business on Western’s property.
- 4.4. Western will also require the contractors, in all Western construction agreements for the Improvements, to furnish insurance at no cost to the City, that provides, but is not limited to the indemnification provisions of this Agreement, insuring contractor’s liability for injury to or death of employees of the contractor and third Parties. Western and all of its contractors and their subcontractors will maintain insurance with limits that meet the following requirements:
 - 4.4.1. Commercial General Liability: \$2,000,000 per occurrence and \$1,000,000 aggregate for bodily injury, personal injury and property damage. This policy will have no coverages removed by endorsement.
 - 4.4.2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage. Coverage will be provided for any auto, including hired and non-owned vehicles.

Final Execution Version

- 4.4.3. Workers' Compensation and Employers' Liability: If applicable under law, Statutory Workers' Compensation with Employers' Liability limits of \$1,000,000 each accident, \$1,000,000 each employee for disease and \$1,000,000 policy limit for disease.
- 4.4.4. All insurance policies of the contractors for the Improvements will be written with Western as an additional insured and will be written through companies duly authorized to transact that class of insurance in the State of Texas. The policies will also waive subrogation rights for loss or damage so that insurers have no right to recovery or subrogation against Western. Contractors will provide a certificate of insurance evidencing the coverage to Western who will, if requested, provide a copy of such certificates to the City.
- 4.5. Western agrees that all work to be performed by it or its contractors, including all workmanship and materials, will be of first-class quality and will be performed in full compliance and in accordance with all federal, state and local laws, ordinances, codes and regulations, and such work will be subject to City inspection during the performance thereof and after it is completed. However, City has no duty to inspect the property.
- 4.6. Western will discharge all obligations to contractors, subcontractors, materialmen, workmen and/or other persons for all work performed and for materials furnished for or on account of Western as such obligations mature. Western expressly agrees that it will neither give nor grant, nor purport to give or grant any mechanic's or materialmen's lien upon the City's Park or upon any Improvements thereupon in the process of construction or repair, nor allow any condition to exist or situation to develop whereby any Party should be entitled, as a matter of law, to a mechanic's or materialmen's lien against the City's Park or Improvements thereon, and Western will discharge any such lien within 30 days after notice of filing thereof. Western will obtain All Bills Paid Affidavits from its contractors upon completion of the Improvements.
- 4.7. All construction upon the City's Park will comply with all applicable federal, state or municipal laws, ordinances, rules, regulations and requirements. During the progress of all work, City's duly authorized representative may enter upon the premises and make such inspections as may be reasonably necessary for the purpose of satisfying City that the work or construction meets the requirements or standards.
- 4.8. Western will conduct its operations under this Agreement in an orderly and proper manner, considering the nature of such operation, so as not to unreasonably annoy, disturb, endanger or be offensive to others.
- 4.9. Western will repair any damage to offsite property of the City, the Park, the Improvements at the Park and which are caused by or resulting from any activities or construction by Western, or Western's contractors, ordinary wear and tear excepted.
5. **Cost of Improvements:** The complete cost of developing all necessary plans and specifications, as provided in this Agreement, and the cost of construction of the Improvements by Western will be borne solely by Western and be at no expense to the City.
6. **Ownership of Improvements:** Upon completion of the Improvements, it is Western's desire to donate the Improvements to City. All alterations and Improvements on or in City's Park at the commencement of the Term, or those that may be installed or erected during the Term, will become

part of City's Park upon completion of the construction and installation of the Improvements by Western and acceptance by City. Any warranties given to the Western for the Improvements, or their construction, will be conveyed to the City at the same time as the Improvements are transferred to the City.

7. Ingress and Egress: Western will have the right to obtain ingress and egress to and from the Park by means of all existing roadways or access ways, to be used in common with others having the right of ingress and egress.

8. Rules and Regulations, Signage and Development Standards.

8.1. Western agrees to observe and obey any and all rules and regulations and all other federal, state and municipal rules, regulations, ordinances and laws, including but not limited to the impact fees, subdivision rules and regulations, zoning, landscape standards, general park standards, and the construction sections of the Code of the City, and require its contractors, and suppliers to observe and obey the same. Signage placed at the Park as part of the construction of the Improvements will comply with City ordinances.

8.2. Western agrees to obtain from all governmental authorities having jurisdiction, all licenses, certificates and permits necessary for the conduct of its operations and to keep them current.

9. Default: If at any time during the Term of this Agreement, Western will fails to commence the work in accordance with the provisions of this Agreement or fails to diligently provide services in an efficient, timely and careful manner and in strict accordance with the provisions of this Agreement, or fails to use an adequate number or quality of personnel or equipment to complete the work or fails to perform any of its obligations under this Agreement, then City will have the right, if Western will not cure any such default after 30 days written notice thereof, to terminate this Agreement and complete the work in any manner it deems desirable, including engaging the services of other Parties. Any such act by City will not be deemed a waiver of any other right or remedy of City.

10. Western's Responsibilities: Including all other responsibilities of Western identified in this Agreement, Western will:

10.1. Order playground equipment, exercise equipment, other related park amenities and landscaping features in accordance with City design specifications detailed on Exhibit B. All donated park equipment, park amenities, warranties and related documentation will become the Park of the City upon transference from Western upon inspection and acceptance.

10.2. Provide donations for landscaping that meet City Park standards.

10.3. Oversee the delivery of all park equipment at the Park.

10.4. Install all park equipment, amenities and landscaping features at the Park.

11. City's Responsibilities: Including all other responsibilities of City identified in this Agreement, City will:

Final Execution Version

- 11.1. Provide the design and layout of the park equipment, amenities and landscaping for the Park.
 - 11.2. Issue all necessary permitting & approvals under customary procedures of the City.
 - 11.3. Provide installation approvals under customary procedures of the City.
 - 11.4. Provide point of contact for all communications to Western.
 - 11.5. Be responsible for maintenance and repairs to the Improvements upon conveyance and transfer from Western to City upon inspection and acceptance by City.
- 12. Amendment of Agreement:** No amendment to this Agreement will be effective unless reduced to writing, executed by the authorized representatives of the City and Western. The City Manager for the City or a designee is authorized to enter into amendments to this Agreement that do not affect the City Budget.
- 13. Notices:** All notices under this Agreement will be in writing and delivered either by personal delivery or by United States certified mail, return receipt requested. Such notices will be deemed given when received by such Party's designated representative.

WESTERN: Western Refining Company LLC
Attn.: Vice President of Refining or Refining Division Manager
2121 N. Clark.
El Paso, TX 79905

With copies to:

Western Refining Company LLC
539 South Main Street
Findlay, OH 45840
Attn: Manager, Title and Contract

Western Refining Company LLC
212 N. Clark
El Paso, Texas 79901
Attn: Manager, State Government Affairs

CITY: City of El Paso
Attn.: City Manager
P.O. Box 1890
El Paso, Texas 79950-1890

COPY TO: City of El Paso
Yvette Hernandez
City Engineer
218 N. Campbell St.

El Paso, TX 79901

14. Assignment. This Agreement is not assignable in whole or in part by any Party hereto without prior written consent of the other Party.

15. Force Majeure. This agreement may be terminated by either Party due to acts of God, war, government regulations, disaster, strikes (save and except strikes involving employees of the Party seeking the protections of this provision), civil disorder, curtailment of transportation facilities, or other emergencies making it illegal or impossible to perform obligations under this agreement. In order to terminate this agreement under this provision for any one or more of such reasons, the terminating Party must provide written notice to the other Party within 5 days of the occurrence of any of these events. In the event that services are suspended for a time period not to exceed 30 days because of an act of nature, act of God or other force majeure event, beyond the reasonable control of a Party, either Party may terminate this Agreement immediately without cause or penalty and any monies paid for such services in advance will be refunded immediately.

16. Termination

16.1. **Termination - Cause.** The Parties agree that either Party may terminate this Agreement in whole or in part. Such termination may be made for failure of one Party to substantially fulfill its contractual obligations, pursuant to this Agreement, and through no fault of the other Party. No such termination will be made unless the other Party being terminated is granted (a) written notice of intent to terminate enumerating the failures for which the termination is being sought; (b) a minimum of 30 calendar days to cure such failures; and (c) an opportunity for consultation with the terminating Party prior to such termination.

16.2. **Termination - Convenience.** Either Party may terminate this Agreement without cause upon 90 days written notice to the other Party if the purchase or donation of equipment has not yet been executed by Western.

16.3. **Termination Shall Not Be Construed as Release.** Termination by either Party will not be construed as a release of any claims that the terminating Party may lawfully be entitled to assert against the other Party. Further, the terminated Party will not be relieved of any liability for damages sustained by the terminating Party by virtue of any breach of this Agreement.

16.4. Except as otherwise provided herein, all duties and obligations of the City and Western will cease upon termination or expiration of this Agreement.

17. Insurance and Indemnification

17.1. **AS A CONDITION OF THIS AGREEMENT, WESTERN WILL INDEMNIFY, DEFEND AND HOLD THE CITY, ITS OFFICERS, AGENTS AND EMPLOYEES, HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE, INCLUDING BUT NOT LIMITED TO ALL JUDGMENTS, SETTLEMENT AMOUNTS, ATTORNEYS' FEES, COURT COSTS AND EXPENSES INCURRED IN THE INVESTIGATION, HANDLING, DEFENSE AND LITIGATION**

OF ANY CLAIM OR SUIT, INCLUDING BUT NOT LIMITED TO ANY CLAIM OR SUIT FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON REGARDLESS OF THE MERITS OF OR OUTCOME OF SUCH CLAIM OR SUIT ARISING OUT OF WESTERN'S NEGLIGENT ACTS, WILLFUL MISCONDUCT, GROSS NEGLIGENCE OR OMISSIONS RELATED TO THIS AGREEMENT. WITHOUT MODIFYING THE CONDITIONS PRECEDENT FOR PRESERVING DEFENSES, ASSERTING CLAIMS OR ENFORCING ANY LEGAL LIABILITY, AGAINST THE CITY AS REQUIRED BY THE CITY CHARTER OR ANY LAW, THE CITY WILL PROMPTLY FORWARD TO WESTERN EVERY DEMAND, NOTICE, SUMMONS OR OTHER PROCESS RECEIVED BY THE CITY IN ANY CLAIM OR LEGAL PROCEEDING CONTEMPLATED HEREIN. THE CITY, AT ITS ELECTION WILL HAVE THE RIGHT TO PARTICIPATE IN ANY SUCH NEGOTIATIONS OR LEGAL PROCEEDINGS TO THE EXTENT OF ITS INTEREST.

- 18. Consideration.** Western agrees to perform the services for no monetary compensation and that the opportunity to provide the donation constitutes full and complete consideration. For documentation purposes only, Western estimates that the value of the donation is approximately \$171,227.28.
- 19. Governmental Function.** The Parties expressly agree that, in all things relating to this Agreement, the City enters into this Agreement for the purpose of performing a governmental function and is performing a governmental function, as defined by the Texas Tort Claims Act. Neither Party waives any immunity under the Texas Tort Claims Act. The Parties further expressly agree that every act or omission of the City, which in any way pertains to or arises out of this Agreement, falls within the definition of governmental function.
- 20. Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the State of Texas, along with applicable provisions of the federal law, the El Paso City Code, and any Ordinance of the City.
- 21. Entire Agreement.** This agreement contains the entire understanding between the Parties and supersedes any and all prior agreements, arrangements, communications, or representations, whether oral or written concerning the same subject matter. This Agreement may not be amended, altered, modified or changed except in writing, signed by both Parties.
- 22. Severability.** In the event any one or more of the provisions of the Agreement will be held by a tribunal of competent jurisdiction to be invalid, illegal or unenforceable, the remaining provisions of this Agreement will be unimpaired, and the invalid, illegal or unenforceable provision will be replaced by a mutually acceptable provision, which, being valid, legal and enforceable, comes closest to the intention of the Parties underlying the invalid, illegal or unenforceable provision. If any provision of this Agreement is held to be excessively broad as to duration, geographical scope, activity or subject, it is to be construed by limiting and reducing it, so as to be enforceable to the extent compatible with applicable law.

23. Headings. The headings of sections and subsections of this Agreement are for reference only and will not alter the terms and conditions of this Agreement.

24. Authorization to Enter into Agreement. The Parties warrant and represent that they have full authority to enter into this Agreement and to consummate the transactions contemplated hereby and that this Agreement is not in conflict with any other agreement to which the Parties are a Party or by which they may be bound.

IN WITNESS WHEREOF, the Parties hereto by their duly authorized representatives have executed this Agreement as of the Effective Date.


WESTERN REFINING COMPANY LLC

Signed By: 
Travis Beltz (Oct 14, 2022 15:38 EDT)
Printed Name: Travis Beltz
Title: General Manager, El Paso Refinery


Timothy Berry (Oct 13, 2022 15:41 CDT)
Approved as to Form

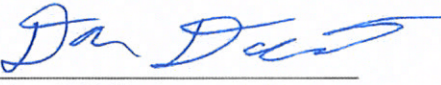
VJ Smith (Oct 13, 2022 14:43 MDT)

CITY OF EL PASO:



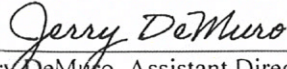
Avette Hernandez, P.E., City Engineer
Capital Improvement Department

APPROVED AS TO FORM:



Donald C. Davie
Assistant City Attorney

APPROVED AS TO CONTENT:



Jerry DeMuro, Assistant Director
Capital Improvement Department

Exhibit A
Property Description and Depiction of the Park

Plans and Specification too large to scan – plans and specifications on file with CID

