

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

AGENDA DATE: August 16, 2022
PUBLIC HEARING DATE: August 16, 2022

CONTACT PERSON(S) NAME AND PHONE NUMBER: Mary Lou Espinoza, Capital Assets Manager,
(915) 867-2629

DISTRICT(S) AFFECTED: ALL

STRATEGIC GOAL: No. 6: Set the Standard for Sound Governance and Fiscal Management

SUBGOAL: No. 6.6: Ensure continued financial stability and accountability through sound financial management, budgeting and reporting

SUBJECT:

A resolution authorizing the City Manager to sign a Lease Agreement by and between the CITY OF EL PASO ("Landlord") and WATERMILL EXPRESS, LLC. ("Tenant") for use of the property known as 8824 Alameda Ave., El Paso, Texas for an initial term of five (5) years with two (2) renewal terms of five (5) years each.

BACKGROUND / DISCUSSION:

The City of El Paso desires to enter into a new lease agreement with WATERMILL EXPRESS, LLC to lease the property located at 8824 Alameda Ave with a base rent of \$9,000 annually with a two (2) percent annual increase.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

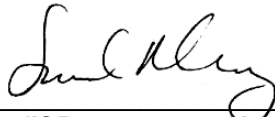
HAVE ALL AFFECTED DEPARTMENTS BEEN NOTIFIED? ___ YES x NO

PRIMARY DEPARTMENT: N/A

SECONDARY DEPARTMENT: N/A

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

DEPARTMENT HEAD:



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

RESOLUTION

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

That the City Manager be authorized to sign a Lease Agreement by and between the **CITY OF EL PASO** (“Landlord”) and **WATERMILL EXPRESS, LLC.** (“Tenant”) for use of the property known as 8824 Alameda Ave., El Paso, Texas for an initial term of five (5) years with two (2) renewal terms of five (5) years each.

APPROVED this ____ day of _____, 2022.


CITY OF EL PASO:

Oscar Leeser
Mayor

ATTEST:

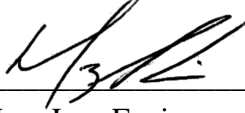
Laura D. Prine
City Clerk

APPROVED AS TO FORM:



Leslie B. Jean-Pierre
Assistant City Attorney

APPROVED AS TO CONTENT



Mary Lou Espinoza, Capital Assets Mgr.
Capital Improvement District

Tenant agrees that the Premises is suitable for the Tenant's Purpose. Landlord has not made any warranties expressed or implied with regard to the condition of the Premises or improvements or their suitability for a particular use. Tenant accepts the Premises and its surroundings "as is", including any improvements made by the Landlord, if any, with all faults, relying on the Tenant's own inspection and judgment and not in reliance on any representations of the Landlord. Landlord assumes no responsibility as to the condition of the Premises and assumes no responsibility for the maintenance, upkeep, or repair necessary to keep the premises in a safe and serviceable condition.

SECTION 2. TERM.

- A. **INITIAL TERM.** The initial term of this Agreement is five (5) years commencing on the Effective Date ("**Initial Term**").
- B. **RENEWAL.** The Tenant may extend the Initial Term of this Agreement for 2 periods of 5 years ("**Renewal Period**") by the mutual agreement of both parties. If the Tenant wishes to extend the Term of this Agreement, then the Tenant will notify the Landlord in writing that the Tenant wishes to extend the term at least 180 days before the expiration of the previous term. Any Renewal Period shall be subject to the provisions of this Agreement.

SECTION 3. RENTAL RATES OF LEASED PREMISES.

- A. **BASE RENTAL FEE.** Subject to the periodic increases outlined below, the Tenant will pay a monthly base rent of \$750.00 ("**Base Rental Fee**") every month during the term of this Agreement. The Tenant will pay the Landlord the Base Rental Fee no later than the first (1st) of every calendar month. The Base Rental Fee will be paid to the Landlord in the form of an ACH payment or check. If the Initial Term begins or ends on a day that is neither the first or the last day of the month, then the Base Rental Fee for that month will be prorated.
- B. **BASE RENTAL FEE ADJUSTMENT.** The Base Rental Fee will automatically increase by 2% every year after the Effective Date during the Initial Term and any Renewal Periods exercised by the Tenant. The Tenant is responsible for paying the Base Rental Fee increase regardless of whether the Landlord notifies the Tenant of the increase.
- C. **HOLDOVER.** If there is any holdover of the Premises by the Tenant at the expiration of this Agreement, then this Agreement will function as a month-to-month tenancy. During any holdover, the Tenant will pay the Landlord one and a half times the amount of the most recent Base Rental Fee. The Tenant will be liable to the Landlord for any loss or damage caused by the Tenant's holdover of the Premises. The Landlord may retake possession of the Premises during any holdover after providing a 30-day notice of such to the Tenant. The terms of this Agreement shall apply during any holdover period, including the Base

Rental Fee Adjustment provision above. The Tenant will not construe action or lack thereof on the part of the Landlord as waiver of the right of the Landlord to retake the possession of the Premises or as a reinstatement or extension of this Agreement.

- D. UNPAID BASE RENTAL FEE. Any Base Rental Fee, or any other fees or charges accruing under this Agreement, that are not received by Landlord by the tenth (10th) day of the month in which payment is due, shall bear interest from the date such Base Rental Fee or other amount was due at the lesser of the rate of eighteen percent (18%) per year or the then maximum nonusurious rate under applicable law.
- E. SECURITY DEPOSIT. To secure Tenant's performance under this Agreement, prior to or on the Effective Date, the Tenant will pay to Landlord a security deposit in the amount equivalent to three (3) months' rent, in the form of an irrevocable letter of credit ("**Security Deposit**"). The Security Deposit will be held for the duration of the Initial Term, and any Renewal Period. If the Base Rental Fee, or any other fees or charges accruing under this Agreement, are not paid in accordance with this Agreement, then Landlord may utilize the Security Deposit for any outstanding rent and fees. The Landlord will hold such Security Deposit until the end of the Initial Term and any Renewal Period. The Landlord will return the Security Deposit, minus any amounts owed by the Tenant to the Landlord at the termination of this Agreement. Tenant remains responsible for any amounts owed to the Landlord not covered by the Security Deposit.
- F. NET LEASE. This lease is an absolute net lease. Tenant will pay all expenses of every kind and nature whatsoever relating to or arising from the Premises; including any property taxes and other assessments of any kind on the Premises and/or improvements on the Premises and all expenses arising from the leasing, operation, management, construction, maintenance, repair, use, and occupancy of the Premises, except as otherwise expressly provided in this Lease. Notwithstanding the foregoing, Landlord agrees to pay the following expenses: (a) any expenses expressly agreed to be paid by Landlord in this Lease; (b) expenses incurred by Landlord to monitor and administer this Lease; (c) expenses incurred by Landlord prior to the Effective Date; and (d) expenses that are personal to Landlord.

SECTION 4. OPERATION AND OPERATION COSTS FOR COMMON AREAS.

- A. The Landlord will operate and maintain all Common Areas and Building. In addition to the Base Rental Fee, the Tenant will pay a share of the expenses for the maintenance of the Common Areas ("**Operation Cost**"). The Tenant will pay the Operation Cost in monthly installments of \$4.17 due at the same time and in the same manner as the Base Rental Fee. If the Initial Term begins or ends on a day that is neither for first or the last day of the month, the Operational Cost for that month will be prorated.

- B. The Tenant is responsible for the costs of repairs for any damages to the Common Areas caused by the Tenant or the Tenant's employees, contractors, agents, invitees, and/or licensees. If the Landlord discovers any damage to the Common Areas caused by the Tenant or the Tenant's employees, contractors, agents, invitees, and/or licensees, then the Landlord will send an invoice for the costs or repairs to the Tenant. The Tenant will pay an invoice from the Landlord regarding repairs to the Common Areas within 30 calendar days of receiving such invoice. The Landlord is responsible for performing all repairs to the Common Areas.
- C. UNPAID OPERATION COST. If there are any unpaid Operation Cost by the Tenant, the unpaid Operation Cost will be handled in the same manner as any unpaid Base Rental Fee as outlined in this Agreement.

SECTION 5. LANDLORD'S OBLIGATIONS, RIGHTS, AND WARRANTIES REGARDING THE PREMISES.

- A. OBLIGATIONS. Dependent upon the Tenant fulfilling its obligations under this Agreement, the Landlord will provide the following regarding the Premises:
 - 1. Intentionally deleted;
 - 2. Access to the Premises;
 - 3. Connection points for water, sewer, and electrical.
- B. Intentionally deleted.
- C. Intentionally deleted.
- D. RIGHTS.
 - 1. The Landlord reserves the right to enter the Premises to inspect the condition of the Premises, perform any maintenance or repairs under this Agreement, and/or show the Premises to prospective tenants. Prior to entering the Premises, the Landlord will provide the Tenant with 24 hours notice. The exercise of Landlord's right to enter the Premises for the purposes under this Section do not constitute an eviction or disturbance of the Tenant's rights under this Agreement.
 - 2. The Landlord may allow the Tenant and the Tenant's employees, agents, and contractors access to the Premises before the Effective Date of this Agreement to allow the Tenant make the Premises ready for Tenant occupancy. If the Landlord permits the Tenant or the Tenant's employees, agents, or contractors access to the Premises before

the Effective Date of this Agreement, then the Tenant and the Tenant's employees, agents, and contractors will not interfere with the activities in the Building of the Landlord or other occupants in the Building. The Landlord may withdraw the early access permission granted to the Tenant and the Tenant's employees, agents, and contractors with 24 hours prior notice.

3. The Landlord is not responsible for making any improvement to the Premises before Tenant occupancy at the Effective Date of this Agreement.
4. Tenant agrees that in the event all or substantially all of its assets be placed in the hands of a receiver or trustee, and in the event such receivership or trusteeship continue for a period of ten (10) days, or should Tenant make an assignment for the benefit of creditors, or be adjudicated a bankrupt, or should Tenant institute any proceedings under any state or federal bankruptcy act wherein Tenant seeks to be adjudicated a bankrupt, or seeks to be discharged of its debts, or should any voluntary proceeding be filed against such Tenant under such bankruptcy laws and Tenant consents thereto or acquiesces therein by pleading or default, then this lease or any interest in and to the demised premises shall not become an asset in any such proceedings and, in any of such events and in addition to any and all rights or remedies of Landlord hereunder or as provided by law, it shall be lawful for Landlord at his option to declare the term hereof ended and to re-enter the demised premises and take possession thereof and remove all persons therefrom and Tenant shall have no further claim, therein or hereunder. This provision shall be binding upon all of Tenant's heirs, assigns and other successors in interest.

E. WARRANTIES.

1. Provided that the Tenant performs all obligations under this Agreement, the Landlord warrants that the Tenant may have quiet enjoyment of the Premises.
2. The Landlord makes no warranties to the Tenant regarding the condition of the Premises or the suitability of the Premises for use as intended by the Tenant. This disclaimer of warranty applies, but is not limited to, any issues of zoning and platting. It is up to the Tenant to verify that all zoning and platting requirements needed to use the Premises for the Purpose stated in this Agreement are in place.

SECTION 6. TENANT'S RIGHTS AND OBLIGATIONS REGARDING THE PREMISES.

A. OBLIGATIONS. The Tenant will abide by all of the following:

1. Pay all ad valorem taxes on all improvements made by the Tenant on the Premises and all personal property of the Tenant that is located on the Premises.

2. Maintain the Premises, for the term of this Agreement, in a clean and attractive condition. At the latter of the expiration of the Initial Term or any Renewal Period, the Tenant will return the Premises to the Landlord in the same condition that the Tenant received the Premises, except any improvements that are now part of the Premises and become property of the Landlord.
3. The Tenant is responsible for maintaining, repairing, or replacing all Non-Structural elements of the Premises. “**Non-Structural**” elements of the Premises are all those elements of the Premises that are not considered “**Structural**” (with Structural being the roof, foundation, load bearing walls, exterior walls, and exterior paint) under this Agreement.
4. Tenant is responsible for verifying and obtaining all zoning and platting requirements needed to use the Premises for the Purpose stated in this Agreement.
5. The Tenant is responsible for the costs of repairing damages to Structural elements of the Premises caused by the Tenant or the Tenant’s employees, contractors, agents, invitees, and/or licensees. The Landlord will send an invoice for the costs or repairs to the Tenant. The Tenant will pay an invoice from the Landlord regarding repairs to the Structural elements of the Premises within 30 calendar days of receiving such invoice. The Landlord is responsible for performing all repairs to the Structural elements of the Premises.
6. The Tenant will not make any improvements to the Premises without the advance written permission of the Landlord. The Landlord may impose additional conditions on the Tenant in order to allow improvements on the Premises. The Tenant will abide by all additional conditions when making any improvements to the Premises. The Tenant will follow all federal, state, and local laws when performing any improvements to the Premises, including the ADA accommodations. The Tenant will obtain all building permits as required by law. Upon completion of the improvements, the Tenant will deliver “as-built” records of the construction signed and sealed by a professional engineer or architect licensed in Texas. The construction or removal of Improvements creates no liability on the Landlord.
7. The Tenant will keep improvements and personal property located on the Premises in a good state of repair. Tenant will be responsible for repairing any damages to improvements and personal property caused by the Tenant’s employees, operation, or patrons.

8. Tenant is responsible for extending utility lines to areas of the Premises as required by the Tenant. Landlord is only required under this Agreement to provide connection points. Tenant will obtain all permits required under law for the extension of utilities.
9. The Tenant is responsible for obtaining all utilities needed by the Tenant including but not limited to water, sewer, electricity, and solid waste removal.
10. Tenant will not place any signs without the advance approval of the Landlord.
11. If a federal agency assesses a civil penalty against the Landlord for a violation related to an action or lack of action taken by the Tenant or the Tenant's agents, employees, contractors, or patrons, then the Tenant will reimburse the Landlord the civil penalty amount. The Tenant will reimburse the Landlord for the civil penalty within 30 days of receipt of notice from the Landlord of the civil penalty.
12. Tenant will comply with all environmental laws as outlined by this Agreement.
13. Tenant will not encumber the Building or Premises with any lien. If there is a lien that is filed, the Tenant will promptly discharge of the lien.
14. Tenant will allow access to any part of the Premises to the Landlord within 24 hours' notice from the Landlord to allow the Landlord to inspect and to make repairs or alterations to the Premises. If the Landlord gives 24 hours' notice to the Tenant, then the Tenant will allow the Landlord to access the Premises to show it to any prospective purchasers or tenants, or for any other purpose that the Landlord deems necessary. The Landlord entering the Premises for the purposes under this Section do not constitute an eviction or disturbance of the Tenant's rights under this Agreement.

B. RIGHTS.

1. If the Tenant has prior written consent from the Landlord, then the Tenant may make changes or improvement to the Premises in accordance to any conditions imposed by the Landlord as provided in this Agreement. Any improvement that are attached to the Building and the Premises become property of the Landlord and will be surrendered with the Premises at the expiration of this Agreement without compensation. Tenant agrees that the title to all Personalty of the Tenant and improvements made by the Tenant to the Premises, now or hereafter located on the Premises, shall be vested in Tenant until either the termination or expiration of this lease, at which time all title to and ownership of the improvements made by the Tenant to the Premises and Personalty shall automatically and immediately vest (without the necessity of any further action being taken by Tenant or Landlord or any instrument being executed and delivered by

Tenant to Landlord) in Landlord, and Tenant shall have no rights pertaining to such improvements or Personalty. Notwithstanding anything to the contrary, nothing in this subsection relieves the Tenant from any duties under this Agreement, including but not limited to the removal of the improvements and the restoration of the Premises. For purposes of this Agreement, "**Personalty**" means all machinery, equipment, appliances, furniture, and any other personal property of any kind or description owned or leased by Tenant located on the Premises and used in the operation of the Premises, excluding trucks and cars.

SECTION 7. ENVIRONMENTAL LAWS.

A. For purposes of this Agreement:

1. "**Environmental Laws**" means any one or all of the following as the same are amended from time to time: the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6941 et seq.; the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq.; the Safe Drinking Water Act, 42 U.S.C. Section 300h et seq.; the Clean Water Act, 33 U.S.C. Section 1251 et seq.; the Clean Air Act, 42 U.S.C. Section 7401 et seq.; and the regulations promulgated thereunder and any other laws, regulations and ordinances (whether enacted by the local, state or federal government) now in effect or hereinafter enacted that deal with the regulation or protection of the environment, including the ambient air, ground water, surface water, and land use, including sub-strata land.
2. "**Hazardous Material**" means all substances, materials and wastes that are, or that become, regulated under or classified as hazardous or toxic under any Environmental Law and all petroleum products, such as gasoline, kerosene, diesel fuel, and the like.
3. "**Releasing**" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing, or dumping into the environment.

B. COMPLIANCE.

1. Tenant will not cause or permit any Hazardous Material to be used, generated, manufactured, produced, stored, brought upon, or released, on, under or about the Premises, or transported to and from the Premises or the Building, by Tenant, its sublessees, agents, employees, contractors, invitees, licensees, or a third party in violation of any Environmental Law. **Tenant will indemnify, defend and hold harmless the Landlord, its successors and assigns, its officers, directors, employees, agents and attorneys from and against any and all liability, loss,**

damage, expense, penalties and legal and investigation fees or costs, arising from or related to any claim or action for injury, liability, breach of warranty or representation, or damage to persons or property and any and all claims or actions brought by any person, entity or governmental body, alleging or arising in connection with contamination of, or adverse effects on, the environment or violation of any Environmental Law or other statute, ordinance, rule, regulation, judgment or order of any government or judicial entity which are incurred or assessed as a result (whether in part or in whole) of any activity or operation on or discharge from the Premises or any improvements thereon caused by the act or omission of the Tenant, its sublessees, agents, employees, contractors, licensees or invitees. This obligation includes, but is not limited to, all costs and expenses related to cleaning up the Premises, improvements, land, soil, underground or surface water to the extent required under Environmental Laws. Tenant's obligations and liabilities under this paragraph shall continue so long as the Landlord bears any liability or responsibility under the Environmental Laws for any action that occurred on the Premises or any improvements thereon. This indemnification of the Landlord by the Tenant includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work to the extent required by any federal, state or local governmental agency or political subdivision having authority to enforce Environmental Laws because of Hazardous Material located on the Premises or any improvements thereon, or present in the soil or ground water on, under or about the Premises. The parties agree that the Landlord's right to enforce the Tenant's promise to indemnify is not an adequate remedy at law for the Tenant's violation of any provision of this Section. Landlord will also have all other rights and remedies provided by law or otherwise provided in this Agreement.

2. Without limiting the foregoing, if the presence of any Hazardous Material on, under or about the Premises or in any improvements thereon or permitted by the Tenant results in any contamination of the Premises or any improvements thereon, or any surrounding property, the Tenant will promptly take all actions at its sole cost and expense as are necessary to return the Premises or any improvements thereon or the surrounding property to the condition existing prior to the introduction of any such Hazardous Material to the Premises or in any improvements thereon or the surrounding property; provided that the Landlord's approval of such actions shall first be obtained.
3. Tenant will, at the Tenant's own expense, make all submissions to, provide all information to, and comply with all requirements of the appropriate governmental authority ("Government") under the Environmental Laws. If the Government determines that site characterization, site assessment and/or a cleanup plan be prepared

or that a cleanup should be undertaken on the Premises or in any improvements thereon or on surrounding property to comply with applicable Environmental Laws, then the Tenant will, at the Tenant's own expense, prepare and submit the required plans and financial assurances, and carry out the approved plans. At no expense to the Landlord, the Tenant will promptly provide all information requested by the Landlord to determine the applicability of the Environmental Laws to the Premises to respond to any governmental investigation or to respond to any claim of liability by third parties which is related to environmental contamination of the Premises or the improvements thereon or the surrounding property.

4. Tenant will notify the Landlord promptly after the Tenant becomes aware of any of the following: (a) any correspondence or communication from any governmental entity regarding the application of Environmental Laws to the Premises or the Tenant's Purpose on the Premises, and (b) any change in the Tenant's Purpose on the Premises that will change or has the potential to change the Tenant's or Landlord's obligations or liabilities under the Environmental Laws.

C. RELEASING HAZARDOUS MATERIAL.

1. In the event of a Release of Hazardous Materials in violation of Environmental Laws on the Premises that presents an immediate threat of injury to persons or property that is not immediately remediated to the satisfaction of the Landlord or the expiration of cure periods provided for in this Agreement, then notwithstanding any other provision in this Agreement to the contrary, Landlord may "self-help" or similar remedy in order to minimize any damages, expenses, penalties and related fees or costs, arising from or related to a violation of any law on, under or about the Premises. The Tenant will be responsible for the cost of the Landlord's "self-help" in this Section, which can include but are not limited to attorneys' fees. Landlord will use its best efforts to notify the Tenant prior to its exercise of such self-help rights.
2. Tenant's failure or the failure of its agents, employees, contractors, licensees, invitees, or a third party to comply with any of the requirements and obligations of this section is a material default of this Agreement. As such, Landlord may pursue the remedies as set forth in this Agreement, in addition to all other rights and remedies provided by law.

D. REPORTING.

1. At any time that the Tenant submits any filing or response pertaining to its property, operations, or presence on City property with any governmental entity (other than the

Internal Revenue Service) by way of example but not in limitation, the EPA or the TCEQ, or any successor agencies, the Tenant provide duplicate copies to Landlord of such filing(s) and response(s) with any related documents at the time same are made.

SECTION 8. MUTUAL COVENANTS.

A. FIRE OR OTHER CASUALTY.

1. If the Building and the Premises are entirely destroyed by fire or another casualty that was not caused by Tenant, then the Landlord may choose to rebuild. If the Landlord chooses not to rebuild the Building or the Premises, then either party may terminate this Agreement, with the termination date being the date of the fire or other casualty that caused the damage. Tenant is responsible for paying the Base Rental Fee and Operation Cost until the date of termination. If the Landlord chooses to rebuild, then the Landlord will be responsible for repairing the building and the Structural elements of the Premises and the Tenant is responsible for repairing the Non-Structural elements of the premises and improvements, if any. If the Landlord chooses to rebuild, then the Base Rental Fee and Operation Cost will be abated during the time the Landlord is rebuilding the Building and the Premises and will resume when the Landlord repairs the Premises and the Building to a condition where the Landlord can fulfil the obligations of this Agreement, regardless of whether the Tenant has completed the repairs to the improvements and personal property needed to resume the Purpose on the Premises.
2. If only the Premises is damaged by fire or another casualty, then the Landlord may choose whether or not to rebuild. If the Landlord chooses not to rebuild the Premises, then either party may terminate this Agreement, with the termination date being the date of the fire or other casualty that caused the damage. The Tenant is responsible for paying the Base Rental Fee and Operation Cost until the date of termination. If the Landlord chooses to rebuild the Premises, then the Landlord will be responsible for rebuilding the Structural elements of the Premises and the Tenant will be responsible for rebuilding the Non-Structural elements of the Premises. The Base Rental Fee and the Operation Cost will be abated for the time period that it takes the Landlord to repair the Structural elements of the Premises.
3. If the Building is damaged by fire or another casualty that was not caused by the Tenant, but the Premises remained unharmed, then the Landlord may choose to repair the building. If the Landlord chooses not to repair the Building, then either party may terminate this Agreement, with the termination date being the date of the fire or other casualty that caused the damage. If the Landlord chooses to repair the Building, then the Base Rental Fee and the Operation Costs will be abated during the time of repair.

4. If only the Premises is partially destroyed by a fire or another casualty but the Building remains unharmed, then the Landlord may choose to repair the Premises. If the Landlord chooses not to repair the Premises, then either party may terminate this Agreement, with the termination date being the date of the fire or other casualty that caused the damage. If the Landlord chooses to repair the Premises, then the Landlord will be responsible for repairing the Structural elements of the Premises and the Tenant will be responsible for repairing the Non-Structural elements of the Premises. The Tenant will pay the Base Rental Fee and Operation Costs only for the parts of the Premises that remained unharmed.

B. CONDEMNATION AND LOSS OR DAMAGE.

1. If the entire Building and Premises are condemned leaving the Premises untenable, then either party may terminate this Agreement, with the date of termination being the condemnation date.
2. If the Building is condemned, but the Premises remains tenable, then either party may terminate this Agreement, with the termination date being the date of the condemnation. If this Agreement is not terminated then the Tenant will only be responsible for paying the Base Rental Fee and Operation Costs to the point that the Premises and Building are tenable and function for the Purpose needed by the Tenant.
3. If the Premises is completely condemned and deemed untenable but the Building remains unharmed, then either party may terminate this Agreement, with the termination date being the date of condemnation.
4. If the Building remains unharmed and the Premises is only partially condemned, then either party may terminate this Agreement with the termination date being the date of condemnation. If this Agreement is not terminated, then the Tenant will only be responsible for paying the Base Rental Fee and Operation Cost for the portion of the Premises that is still tenable.

C. SUBORDINATION, NON-DISTURBANCE, ATTORNMENT, AND ESTOPPEL.

1. At the request of the Landlord, the Tenant will sign a Subordination, Nondisturbance, and Attornment agreement (“SNDA”). The Tenant agrees to the following which will also be included in the SNDA:
 - a. SUBORDINATION. The Tenant’s interest under this Agreement is, at all times, subordinate to other present and future liens on the Building or Premises and any

modifications, supplements, extensions, amendments, renewals, consolidations, and replacements of said liens.

- b. **NON-DISTURBANCE.** If the ownership of the Building or Premises changes in any way, then the Tenant's right to quiet enjoyment and other rights under this Agreement will not be disturbed or terminated, provided that this Agreement is in full force and effect and that there are no defaults by the Tenant.
 - c. **ATTORNMENT.** By signing this Agreement, the Tenant agrees to recognize any future owners of the Building or Premises as the Landlord and will continue to perform the obligations outlined in this Agreement until the termination or expiration of this Agreement to the full effect as with the original Landlord of this Agreement.
2. **ESTOPPEL.** At the Landlord's request the Tenant will execute an estoppel certificate addressed to the Landlord and Landlord's Mortgagee, or any third party that the Landlord requests. The Tenant will include the following in the estoppel certificate: the Effective Date and expiration date of this Agreement, the amounts that are to be paid under this Agreement, a statement that there have been no defaults on the part of the Landlord and that the Tenant has no claims against the Landlord, and any other information pertaining to this Agreement that the Landlord may request. However, the Tenant will not be obligated to sign any estoppel certificate if the Landlord is in material default of this Agreement.

SECTION 9. TERMINATION, DEPOSIT, AND OTHER LANDLORD REMEDIES.

- A. This Agreement may be terminated as provided by this Section.
 - 1. **Expiration of Term.** This Agreement will automatically terminate at the end of the Initial Term of this Agreement or, if exercised by the Tenant, at the end of any Renewal Periods.
 - 2. **TERMINATION BY EITHER PARTY FOR CAUSE.** Either party may terminate this Agreement if one party fails to fulfill the obligations set out in this Agreement. Before terminating this Agreement pursuant to this provision, the terminating party will provide written notice of the intent to terminate enumerating the failure for which the termination is being sought and provide at least 30 calendar days to the non-terminating party to cure such failure. If the Landlord terminates this Agreement pursuant to this provision, then the Tenant will surrender the Premises to the Landlord immediately after being provided 30 calendar days to cure the default.

- a. If the Landlord terminates the lease for the fault of the Tenant, then the Tenant will owe the Landlord the remainder of the Base Rate Fee and Operation Costs for the term of the Agreement minus whatever the Landlord can recover. The Landlord will make a good faith attempt to mitigate damages in this instance.
 - b. If the Tenant terminates the lease for the fault of the Landlord, then the Tenant will only be responsible for paying the Base Rental Fee and Operation Costs until the date of termination.
 - c. Abandonment of the Premises by the Tenant also constitutes a default under this Agreement.
3. **TERMINATION FOR CONVENIENCE.** Either party may terminate this Agreement for any reason by sending a written notice to the non-terminating party at least 30 calendar days before termination. If either party terminates this Agreement pursuant to this provision, the Landlord will allow the Tenant 30 days to return the Premises to the state the Tenant received it in and surrender the Premises to the Landlord. If the Landlord terminates this Agreement pursuant to this provision, the Tenant will be responsible for paying the amount that is due up until the date of termination. If the Tenant terminates this Agreement pursuant to this provision, the Tenant will pay the Base Rental Fee and Operational Costs that would be due until 30 days following the termination date. Regardless of the party that terminates this Agreement pursuant to this provision, the Landlord will return the Security Deposit to the Tenant minus any amount that is needed to repair damages to the Premises or to pay Base Rental Fees or any other fees accruing under the Agreement.
4. **TERMINATION AS PROVIDED IN OTHER PARTS OF THIS AGREEMENT.** This Agreement may be terminated as otherwise provided in other sections of this Agreement.
5. **TERMINATION NOT A RELEASE.** Termination by either party is not a release of any claims that the terminating party may be lawfully entitle to assert against the terminated party. Further, the terminated party is not relieved of any liability for damages sustained by the terminating party by virtue of any breach of this Agreement.

SECTION 10 RIGHTS AND OBLIGATIONS FOLLOWING EXPIRATION OR TERMINATION.

- A. At the expiration of this Agreement or termination of this Agreement, the Tenant will surrender and return the Premises to the Landlord. The Tenant will surrender the Premises

to the Landlord no later than the expiration or termination date of this Agreement. The Tenant will be responsible for paying the Landlord the Base Rental Fee while occupying the Premises to comply with the obligations under this section. Tenant will perform all obligations under this Section in accordance to all federal, state, and local laws and regulations. If the Tenant does not surrender the Premises over to the Landlord after the time enumerated in the provisions above, the Landlord may take possession of the Premises. The Tenant will be responsible for any costs incurred by the Landlord in retaking possession of the Premises.

- B. In the event of default by Tenant under this Agreement, following all required notifications, the Landlord may:
- a. Enter into and upon the Premises or any part thereof and repossess the same, change the locks on the Premises, install fences and gates, expelling therefrom Tenant and all personal property of Tenant (which property may be removed and stored at the cost of and for the account of Tenant), using such force as may be necessary; and/or
 - b. Either cancel this Lease by notice or without canceling this Lease, relet the Premises or any part thereof upon such terms and conditions as shall appear advisable to Landlord. If Lessor shall proceed to relet the Premises and the amounts received from reletting the Premises during any month or part thereof be less than the rent due and owing from Tenant during such month or part thereof under the terms of this Lease, Tenant shall pay such deficiency to Landlord immediately upon calculation thereof, providing Landlord has exercised good faith in the terms and conditions of reletting. Payment of any such deficiencies shall be made monthly within ten (10) days after receipt of notice of deficiency.
 - c. If it appears that the Premises have been abandoned by the Tenant as defined by Chapter 93 of the Texas Property Code, then the Landlord may enter the Premises and may intentionally exclude the entrance of the Tenant to the Premises for the purpose of removing the contents of the Premises that were abandoned by the Tenant. The Landlord may remove and store the abandoned property of the Tenant to the Tenant's own expense. The Landlord will send a notice to the Tenant that the Landlord has the right to dispose of the Tenant's property if the Tenant does not claim the property within 60 days of the date the Landlord stored the property, pursuant to Chapter 93 of the Texas Property Code.
 - d. In the event of default in the payment by the Tenant to the Landlord as outlined by this Agreement, then the Landlord will have a lien upon all goods, chattels, personal property or equipment, save and except delivery vehicles or rolling stock belonging to the Tenant which are placed in, or become a part of, the Premises, as security for

payment due and to become due for the remainder of the Lease term. This lien is not in lieu of or does not in any way affect the statutory landlord's lien given by law, but is in addition to the statutory lien. Tenant grants to the Landlord a security interest in all of Tenant's personal property placed in or on the Premises for purposes of this contractual lien. Provided, however, that the terms of this provision are only effective to the extent they are not inconsistent with the rules and regulations of the Interstate Commerce Commission and any other laws pertaining thereto and the Railroad Commission of the State of Texas. Landlord agrees that the Landlord will not levy a landlord's lien against any delivery vehicle or rolling stock or any of the goods or personal property of third parties in the possession of Tenant, any sublessee or any assignee of the Tenant. If the Landlord exercises the option to terminate this Agreement as provided by this section, then the Landlord, after providing notice to Tenant as provided in this section of its intent to take possession and giving an opportunity to cure the default, may take possession of all of Tenant's property on the Premises and sell it at public or private sale after giving Tenant reasonable notice of time and place of any public sale or of the time after that any private sale is to be made, for cash or credit, for such prices and terms as the Landlord deems best. The proceeds of the sale will be applied first to the necessary and proper expense of removing, storing and selling such property, then to the payment of any rent due or to become due under this Agreement, with the balance, if any, to be paid to the Tenant.

- C. In the event of a default by the Tenant the Landlord may perform all of Tenant's obligations which the Tenant failed to fulfill under this Agreement. The Landlord may deduct from any deposits paid by the Tenant any expenses incurred by the Landlord for performing obligations of the Tenant and/or the Landlord may invoice the Tenant for the costs incurred by the Landlord for performing the Tenant's obligations. The Tenant will pay any invoices received from the Landlord within 30 calendar days of receipt.

SECTION 11. INDEMNIFICATION.

- A. WITHOUT LIMITING THE GENERALITY OF ANY OTHER INDEMNITY CONTAINED IN THIS AGREEMENT, TENANT AGREES TO INDEMNIFY AND HOLD LANDLORD AND ITS OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES HARMLESS AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS, LIABILITIES AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY'S FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY OR INDIRECTLY TO THE OPERATION, CONDUCT OR MANAGEMENT OF TENANT'S ACTIVITIES ON THE PREMISES, ITS USE OF THE PREMISES, OR FROM ANY BREACH ON THE PART OF TENANT OF ANY TERMS OF THIS AGREEMENT, OR FROM ANY**

ACT OR NEGLIGENCE OF TENANT, ITS AGENTS, CONTRACTORS, EMPLOYEES, CONCESSIONAIRES, OR LICENSEES IN OR ABOUT THE PREMISES INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE, OR IN PART, FROM THE NEGLIGENCE OF THE LANDLORD. IN CASE OF ANY ACTION OR PROCEEDING BROUGHT AGAINST THE LANDLORD BY REASON OF ANY SUCH CLAIM, TENANT, UPON RECEIPT OF WRITTEN NOTICE FROM THE LANDLORD, AGREES TO DEFEND THE ACTION OR PROCEEDING BY COUNSEL ACCEPTABLE TO THE LANDLORD. THE OBLIGATIONS OF TENANT UNDER THIS SECTION SHALL SURVIVE THE EXPIRATION OR SOONER TERMINATION OF THE LEASE.

SECTION 12. INSURANCE.

- A. **LIABILITY INSURANCE.** Tenant shall obtain, provide proof of, and maintain for the term or any holdover of this Lease:
1. Comprehensive General Liability Insurance in amounts not less than \$1,000,000 for bodily injury to one person for each occurrence, \$2,000,000 for bodily injury to more than one person for each occurrence, and \$1,000,000 for property damage for each occurrence.
 2. Comprehensive Pollution Liability Insurance in amounts not less than \$1,000,000 for each occurrence, which insurance shall cover, at a minimum, bodily injury, property damage, including natural resource damage, loss of use of damaged property or of property that has not been physically injured or destroyed, cleanup costs, removal, storage, disposal, and or use of the pollutant, and defense costs, including costs and expenses incurred in the investigation, defense, or settlement of claims, all covering the Premises and surrounding the Landlord's property.
- B. **FIRE AND OTHER RISKS INSURANCE.** Tenant, at the Tenant's sole cost and expense, will insure all improvements made on the Premises and personal property of the Tenant against loss or damage by fire and against loss or damage by other risks embraced by "extended coverage" and against civil commotions, riots, vandalism and malicious mischief in an amount equal to the actual replacement cost of such improvements, including costs of replacing excavations and foundation, but without deduction for depreciation ("**Full Insurable Value**") throughout the term of this Agreement. If a dispute arises as to the Full Insurable Value and cannot be resolved by the Tenant and the Landlord, then the Tenant will conduct an appraisal of the Premises and improvements at the Tenant's own expense. The Tenant will ensure the appraiser is approved by the Landlord.

- C. Tenant will maintain the insurance policies described above throughout the Initial Term, the any Renewal Period, and any Holdover period of this Agreement. The Tenant will ensure that all policies comply with the following:
1. The Tenant may provide the insurances required in this section in more policies of insurance, the form of which must be approved by the City's Risk Manager.
 2. Prior to taking possession of the Premises, the Tenant will provide the City copies of all insurance policies along with all endorsements and certificates of insurance. If the Tenant is providing insurance policies to the Landlord for improvements made after taking possession of the Premises, then the Tenant will provide the insurance policies along with all endorsements and certificates of insurance to the Landlord before the improvements are completed. All polices will provide through an endorsement attached to the policy, that the insurance cannot be canceled or the amount of coverage changed without 30 calendar days prior written notice to the Landlord.
 3. The Tenant will provide the Landlord all certificates evidencing renewal of replacement of said policies of insurance at least 15 calendar days prior to the expiration or cancellation of any such policies.
 4. The issuer of any policy must have a certificate of authority to transact insurance business in the State of Texas. Each issuer must be responsible, reputable, and have financial capability consistent with the risks covered. The Landlord may reject an issuer if an insurance policy in the Landlord's sole discretion.
 5. Each policy, must name the Landlord's (and their elected and appointed officials, officers, agents and employees) as Additional Insured parties on the original policy and all renewals or replacements during the term of this Agreement.
 6. Tenant will obtain the prior written approval if the City's Risk Manager for any deductibles, aggregate caps, and endorsements on any insurance policy required under this Agreement.

SECTION 13. GENERAL PROVISIONS

- A. **NO WAIVER.** Either party may waive any default without waiving any prior or subsequent defaults. Either party's failure to exercise or delay in exercising any right under this Agreement, will not operate as a waiver of such right.
- B. **INDEPENDENT CONTRACTOR RELATIONSHIP.** This Agreement does not create an employee-employer relationship between the Tenant and the Landlord. As such, the

Landlord is not subject to the liabilities or obligations the Tenant obtains under the performance of this Agreement.

- C. **TIME IS OF THE ESSENCE.** The times and dates specified in this contract are material to this Agreement. For the purpose of this agreement “**business days**” means Monday through Friday excluding City of El Paso holidays and “**calendar days**” means Monday through Sunday excluding City of El Paso holidays.
- D. **NOTICES.** The parties will send all notices required by this Agreement either in person, e-mail, or in writing postmarked and delivered by certified mail. All notices that are mailed are considered received 3 business days after the postmark date. All notices that are delivered in person or by e-mail are considered received on the date sent to the addresses or persons listed below. Parties may change their addresses or designated persons by sending a written notice to the other party. A new address is not official until the change of address notice is received by the other party as provided in this section. Upon receipt of proper notification of change of address the notified party will send all further notifications to the new address. Parties will address notices as follows:

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

With a Copy to: The City of El Paso
Attn: Real Estate Division
218 N. Campbell St., 3rd Floor
El Paso, Texas 79901
Email: realestate@elpasotexas.gov

To the Tenant: Watermill Express, LLC
Attn: Rick Kelly & Haley Pryor
Address: 1177 S 4th Ave.
Brighton, Colorado 80601-6806
Email: Rick.kelly@watermillexpress.com
Haley.pryor@watermillexpress.com

- E. **CONFIDENTIALITY.** The Tenant acknowledges that this Agreement is subject to Chapter 552 of the Texas Government Code (Texas Public Information Act). The release of the Agreement as a whole or in part must comply with Chapter 552 of the Texas Government Code (Texas Public Information Act).
- F. **GOVERNING LAW.** This Agreement is governed by Texas law.

- G. VENUE. The venue for disputes regarding this Agreement between the parties will be El Paso County, Texas.
- H. SEVERABILITY. A future finding of invalidity of any provision of this Agreement does not affect the validity of any remaining provisions of this Agreement.
- I. HEADINGS. The headings and subheadings of this Agreement are for information purposes only and are not substantive terms.
- J. GOVERNMENTAL FUNCTIONS. The parties agree that the Landlord is entering this Agreement in the exercise of its governmental functions under the Texas Tort Claims Act. The parties also agree that the City is entering into this Agreement as a governmental entity performing a governmental function.
- K. COMPLIANCE WITH THE LAWS. The parties will comply with all applicable laws, administrative orders, and any rules or regulations relating to the obligations under this Agreement. If applicable, then the Tenant will procure all licenses and pay all fees or other charges as required to complete the Work under this agreement.
- L. AUDITING RECORDS FOR THE SPECIFIC PROJECT. The Tenant will allow the Landlord to inspect and copy all records pertaining to the Purpose to be performed on the Premises provided in this Agreement.
- M. FORCE MAJEURE. There is no breach of contract should either party's obligations within this Agreement be delayed due to an act of God, outbreak of hostilities, riot, civil disturbance, acts of terrorism, the act of any government or authority, fire, explosion, flood, theft, malicious damage, strike, lockout, or any cause or circumstances whatsoever beyond either party's reasonable control. The delayed party must resume performing its obligations in this Agreement after the reason for the delay is resolved.
- N. SUCCESSORS AND ASSIGNS. This Agreement is binding on the Landlord and the Tenant, and the Tenant's successors and assigns. Tenant may not assign, sublet, or transfer its interest or obligations in this Agreement without the written consent of the Landlord.
- O. THIRD-PARTY BENEFICIARIES. There are no third-party beneficiaries for this Agreement.
- P. PROVISIONS SURVIVING THIS AGREEMENT. Representations, releases, warranties, covenants, indemnities, and confidentiality survive past the execution, performance, and termination of this Agreement.

Q. REPRESENTATIONS AND WARRANTIES. The Tenant warrants to the Landlord that the Tenant has all required licenses, permits, and expertise to perform the Purpose of this Agreement. The person executing this Agreement on behalf of both parties have the authority to sign on behalf of their respective parties.

R. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties.

(Signatures begin on the following pages)

CITY OF EL PASO:

Tomás González
City Manager

APPROVED AS TO FORM:

J. Flores (for)

Leslie Jean-Pierre
Assistant City Attorney

APPROVED AS TO CONTENT:

M. Lou Espinoza

Mary Lou Espinoza
Capital Assets Manager

(Acknowledgement)

STATE OF TEXAS)
COUNTY OF EL PASO)

This Instrument was acknowledged before me on the _____ day of _____, 2022 by Tomás González, as City Manager of the City of El Paso, a municipal corporation, on behalf of said corporation.

Notary Public, State of Texas

Notary's Commission Expires:
Notary's Name (printed)

(Tenant's Signature on following page)

TENANT:

Watermill Express, LLC

Heath Weidert

Name: *Heath Weidert*

Title: *So. VP - Development*

(Acknowledgement)

STATE OF ~~TEXAS~~ Kansas)

COUNTY OF ~~EL PASO~~ Crawford)

This Instrument was acknowledged before me on the 27th day of July, 2022, by Heath Weidert, as Senior V.P. of the company, on behalf of Watermill Express.

Robin Browning

Notary Public, State of ~~Texas~~ Kansas

Notary's Commission Expires: 1/7/09

Notary's Name (printed)

Robin Browning

