

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

DEPARTMENT: Aviation

AGENDA DATE: September 12, 2023

CONTACT PERSON NAME AND PHONE NUMBER: Sam Rodriguez, Aviation Director, (915) 212-7301

DISTRICT(S) AFFECTED: District 3

CITY STRATEGIC GOAL 1: Create an Environment Conducive to Strong, Sustainable Economic Development.

SUBJECT:

That the City Manager, or designee, be authorized to sign a Lessor's Approval of Assignment by and between the City of El Paso ("Lessor"), Nutcracker Brands LLC, a Delaware limited liability company ("Assignor"), and Almond Opportunity, LLC, a Nebraska limited liability company ("Assignee") for the following described property:

A portion of Lots 4 and 5, Block 8, Butterfield Trail Industrial Park Unit One, Replat "A", in the City of El Paso, Texas, commonly known as 8 Zane Grey, El Paso, Texas.

BACKGROUND / DISCUSSION:

The Department of Aviation requests the approval of this Lessor's Approval of Assignment to allow the transfer of rights possessed by Harvest Manor Farms, LLC which merged into Flavor House Products, Inc. and changed its name to Nutcracker Brands, LLC, to Almond Opportunity, LLC. Almond Opportunity, LLC is also the lessee at 11 Leigh Fisher, El Paso, Texas, the adjacent property.

Rental Fee: 233,860 square feet at \$0.1452 = \$33,956.52 annually / \$2,829.71 monthly. No rental adjustment is due at this time.

Term: Initial term of thirty-eight (38) years and 3 months with two (2) options of ten (10) years and one (1) option of five (5) years.

PRIOR COUNCIL ACTION:

- November 1, 1986 – Approval of Butterfield Trail Industrial Park Lease
- February 6, 1990 – Easement Agreement
- December 15, 1990 – First Amendment to add one additional ten (10) year and one additional five (5) year option to the term
- September 24, 1991 – Lessor's Approval of Assignment to SNA Nut Company.
- February 20, 1996 – Lessor's Approval of Assignment to Morven Partners, L.P.
- February 8, 2005 – Lessor's Approval of Assignment to Harvest Manor Farms, LLC

AMOUNT AND SOURCE OF FUNDING:

N/A: This is a revenue generating item.

BOARD / COMMISSION ACTION:

N/A

DEPARTMENT HEAD:



Sam Rodriguez, P.E., Chief Operations & Transportation Officer/Director of Aviation

RESOLUTION

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

That the City Manager, or designee, be authorized to sign a Lessor's Approval of Assignment by and between the City of El Paso ("Lessor"), Nutcracker Brands LLC, a Delaware limited liability company ("Assignor"), and Almond Opportunity, LLC, a Nebraska limited liability company ("Assignee") for the following described property:

A portion of Lots 4 and 5, Block 8, Butterfield Trail Industrial Park Unit One, Replat "A", in the City of El Paso, Texas, commonly known as 8 Zane Grey, El Paso, Texas.

Approved this the ____ day of _____ 2023.

THE CITY OF EL PASO

Oscar Leeser
Mayor

ATTEST:

Laura D. Prine
City Clerk

APPROVED AS TO FORM:

Larry Phifer

Larry H. Phifer
Assistant City Attorney

APPROVED AS TO CONTENT:

Samuel Rodriguez

Samuel Rodriguez, P.E.
Director of Aviation

RESOLUTION

23-1129/Aviation/TRAN -497678/Reso/LAA Almond Opportunity, LLC (8 Zane Grey)/LHP

STATE OF TEXAS §
 § LESSOR'S APPROVAL OF ASSIGNMENT
COUNTY OF EL PASO §

WHEREAS, the City of El Paso ("Lessor") entered into a Butterfield Trail Industrial Park Lease with an Effective Date of November 1, 1986 (the "Lease"), between the Lessor and Kasco Ventures 215, as amended, and assigned to SNA Nut Company on September 24, 1991; and subsequently assigned to Morven Partners, L.P. on February 20, 1996; and subsequently assigned to Harvest Manor Farms, LLC, on February 8, 2005, which merged with and into Flavor House Products, Inc. (the surviving corporation) on September 30, 2012 (as evidenced by the Certificate of Merger filed with the Delaware Secretary of State's Office on September 27, 2012 under corporate file number 0919834), and in connection with said merger, changed its name to Nutcracker Brands, Inc. by Restated Certificate of Incorporation attached to said Certificate of Merger, which later converted into Nutcracker Brands LLC, a Delaware limited liability company ("Assignor"), evidenced by the Certificate of Conversion from a Corporation to a Limited Liability Company filed with the Delaware Secretary of State's Office on August 20, 2019 under corporate file number 0919834; said Assignor being the current Lessee under the Lease, which Lease covers the following described property:

A portion of Lots 4 and 5, Block 8, Butterfield Trail Industrial Park Unit One, Replat "A", in the City of El Paso, Texas, commonly known as 8 Zane Grey, El Paso, Texas, and being more particularly described by metes and bounds in Exhibit "A" attached hereto and made a part hereof (the "Property"); and

WHEREAS, Assignor has requested the Lessor's approval and consent to Assignor's assignment of the Lease to Almond Opportunity, LLC, a Nebraska limited liability company ("Assignee"), and Lessor has agreed to provide its approval and consent to such assignment (the "Assignment and Assumption") subject to the terms and conditions of this agreement (this "Agreement").

NOW THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. **INCORPORATION OF RECITALS.** The recitals set forth above are incorporated into this Agreement.
2. **REPRESENTATIONS AND WARRANTIES; ASSUMPTION OF LEASE BY ASSIGNEE; LESSOR'S CONSENT.**
 - (a) Assignor hereby warrants and represents to Lessor that (i) Assignor has full power and authority to assign its rights and obligations under the Lease to Assignee; (ii) there are no outstanding liens, lien claims, or security interests created by, through or under Assignor encumbering the Property or Assignor's interest in the Lease; and (iii) Assignor is not in default of the Lease and, to Assignor's knowledge, no condition exists

which with the giving of notice or the passage of time would constitute a lessee default under the Lease.

- (b) As of the effective date of the Assignment and Assumption, Assignee hereby assumes all of Assignor's right, title and interest in and to the Lease and agrees to perform and be bound by all of the covenants, agreements, provisions, conditions and obligations of "Lessee" as set forth in the Lease (including, without limitation, all indemnification obligations), as if the Lease had originally been executed between Lessor and Assignee, including, without limitation, all accrued, unfulfilled liabilities and obligations of Assignor under the Lease prior to the Assignment and Assumption.
- (c) Assignor and Assignee agree to deliver written notice of the effective date of the Assignment and Assumption to Lessor at Lessor's notice address in the Lease as soon as reasonably practicable after the Assignment and Assumption, but not less than ten (10) days thereafter.
- (d) In reliance on the foregoing, Lessor hereby consents to the Assignment and Assumption. If Lessor does not receive written notice of the Assignment and Assumption from Assignor and Assignee within sixty (60) days after the Effective Date of this Agreement, Lessor may, at its option, in its sole and absolute discretion, withdraw its consent to the Assignment and Assumption by delivering written notice of same to Assignor and Assignee to the notice addresses set forth below.

3. **PROOF OF INSURANCE.** Prior to taking possession of the Property, Assignee shall deliver to Lessor at Lessor's notice address in the Lease a certificate of insurance showing that Assignee is in compliance with the lessee insurance requirements of the Lease as of the effective date of the Assignment and Assumption.

4. **RELEASE.** If Section 2(a) in this Agreement is true on the effective date of the Assignment and Assumption, then as of the date Assignor and Assignee deliver written notice to Lessor of the effective date of the Assignment and Assumption, the following release will become effective:

Assignor is hereby released and discharged by Lessor from all obligations and liabilities under the Lease first arising and accruing after the effective date of the Assignment and Assumption (such release specifically excludes, without limitation, any obligations and liabilities arising from or relating to events occurring prior to the effective date of the Assignment and Assumption).

5. **SECURITY DEPOSIT.** Prior to taking possession of the Property and not less than ten (10) days after the effective date of the Assignment and Assumption, Assignee shall pay Lessor a security deposit of \$8,489.13 to guarantee performance of its obligations under the Lease. If Assignee timely pays all rent due under the Lease and Assignee is not in default of the Lease for eighteen (18) consecutive calendar months after the effective date of the Assignment and Assumption, such security deposit shall be returned to Assignee within twenty (20) days after Lessor receives written notice from Assignee that Assignee

is entitled to the return of its security deposit. If Lessor is not required to return the security deposit as set forth above, Lessor shall, after all just and lawful offsets, return the security deposit due Assignee, if any, within sixty (60) days after the expiration or earlier termination of the Lease.

5. **RATIFICATION OF LEASE.** Except as expressly set forth herein, no provision of this Agreement alters or modifies any of the terms and conditions of the Lease, and all other terms and conditions of the Lease shall remain in full force and effect.
6. **ADDRESS FOR NOTICE.** Notices to Assignee and Assignor shall be sufficient if sent by certified mail, postage prepaid, addressed to:

 ASSIGNOR: c/o King & Spalding LLP
 Nutcracker Brands, LLC
 1100 Louisiana, Ste. 4100
 Houston, Texas 77002

 ASSIGNEE: Almond Opportunity, LLC
 129 N. 10th Street, Suite 313
 Lincoln, NE 68508
 Attn: Monte Froehlich
7. **AUTHORIZED REPRESENTATIVE.** The persons signing this Agreement on behalf of the Assignee and Assignor represent and warrant that they have the legal authority to bind the Assignee and Assignor, respectively, to the provisions of this Agreement.
8. **NON-WAIVER.** Approval of the Assignment and Assumption hereby given by Lessor shall not end the need for Lessor's consent for any future assignments.
9. **EFFECTIVE DATE.** The Effective Date of this Agreement will be the date this document is approved by the El Paso City Council.
10. **COUNTERPARTS.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original for all purposes, and all of which shall constitute one and the same instrument as if all parties had signed the same signature page.
11. **GOVERNING LAW.** This Agreement shall be construed and enforced in accordance with the laws of the State of Texas.

(Signatures begin on the following page)

APPROVED THIS ____ day of _____, 2023.

LESSOR: CITY OF EL PASO:

Cary S. Westin
Interim City Manager

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Larry Phifer

Larry H. Phifer
Assistant City Attorney

Samuel Rodriguez

Samuel Rodriguez, P.E.
Director of Aviation

LESSOR'S ACKNOWLEDGEMENT

STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on the ____ day of _____, 2023 by Cary S. Westin, Interim City Manager of the City of El Paso, a Texas municipal corporation, on behalf of said corporation.

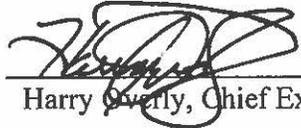
Notary Public, State of Texas

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

(Signatures continue on the following page)

ASSIGNOR:

Nutcracker Brands LLC,
a Delaware limited liability company

By: 
Harry Overly, Chief Executive Officer

ASSIGNOR'S ACKNOWLEDGEMENT

THE STATE OF Minnesota)
COUNTY OF Hennepin)

This instrument was acknowledged before me on this 24 day of August, 2023 by Harry Overly, Chief Executive Officer of Nutcracker Brands LLC, a Delaware limited liability company, on behalf of said limited liability company.

My Commission Expires:
1-31-27

Kelly Marie Wells
Notary Public, State of Minnesota

(Signatures continue on the following page)

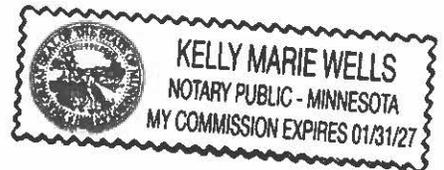


Exhibit "A"

**PROPERTY DESCRIPTION
5.369 ACRES**

Being the description of a portion of Lots 4 and 5, Block 8, Butterfield Trail Industrial Park Unit 1, Replat "A", City of El Paso, El Paso County, Texas, and being more particularly described by metes and bounds as follows:

COMMENCING for reference at a City Monument at the centerline intersection of Leigh Fisher Boulevard (120.00 feet wide) and Zane Grey Street (90 feet wide);

THENCE, along the centerline of said Zane Grey Street, North $00^{\circ}59'34''$ West, a distance of 546.48 feet to a point;

THENCE, leaving said centerline, North $89^{\circ}00'26''$ East, a distance of 45.00 feet to a point in the easterly right-of-way line of said Zane Grey Street and POINT OF BEGINNING for the herein described tract;

THENCE, along said easterly right-of-way line, North $00^{\circ}59'34''$ West, a distance of 467.72 feet to a point for corner;

THENCE, leaving said right-of-way line, North $89^{\circ}00'26''$ East, a distance of 500.00 feet to a point for corner in the westerly right-of-way line of a thirty-foot railroad right-of-way;

THENCE, along said westerly right-of-way line, South $00^{\circ}59'34''$ East, a distance of 467.72 feet to a point for corner;

THENCE, leaving said right-of-way line, South $89^{\circ}00'26''$ West, a distance of 500.00 feet to the POINT OF BEGINNING and containing 5.369 acres of land.