REVISED

CITY OF COSTA MESA
CITY ATTORNEY'S OFFICE
INTEROFFICE MEMORANDUM

TO: Allan Roeder, City Manager

CC: Kimberly Hall Barlow, City Attorney
Jana Ransom, Recreation Manager
Mark Taylor, Management Analyst

FROM: Linda Nguyen, Deputy City Attorney

DATE: January 31, 2005

SUBJECT: Tennis Center Renewal

This memo addresses the concerns raised by Council Member Katrina Foley regarding the renewal of the Costa Mesa Tennis Center Operation Agreement. I would be happy to address any further questions that the City Manager or Council Member Foley may have regarding the renewal of this agreement.

Background Facts

On February 9, 1998, the City entered into a contract with Hank Lloyd's Orange County Tennis, Inc. ("Hank Lloyd") for the operation of the Costa Mesa Tennis Center at Tewinkle Park (the "Agreement"). The original term of the Agreement was 5 years, with options for two 5-year extensions, provided that the City receives written notice at least 60 days prior to the expiration of the existing term. Thus, if Hank Lloyd wanted to extend the term of the Agreement, it had to submit written notice to the City prior to December 9, 2002.

On November 26, 2002, the City received from Hank Lloyd written notice of its election to extend the Agreement for another five-year term. Upon recent review of the Agreement, the City and Hank Lloyd determined that an amendment to the scope of Hank Lloyd's services was necessary. The City Attorney's Office prepared an amendment to the Agreement (the "Amendment") that accomplished the following: 1) officially changed the expiration date of the Agreement from February 8, 2003 to February 8, 2008; 2) deleted portions of the Agreement that were no longer applicable; 3) added to the scope of Hank Lloyd's responsibilities; and 4) required Hank Lloyd to comply with applicable employment and labor laws.

1. Renegotiation of Terms

There has been some confusion regarding whether the extension of the Agreement is mandatory or if the City and Hank Lloyd are re-negotiating the Agreement, in which case

Council Member Foley expressed an interest in improving some of the services provided by Hank Lloyd. As stated above, Hank Lloyd has the right to extend the Agreement and has properly exercised this right. The CAO has edited the recitals in the Amendment to clarify that the Amendment is a mandatory extension with some agreed changes. If Hank Lloyd is amenable to additional changes suggested by Council Member Foley, then these changes can be incorporated into the Amendment. However, if Hank Lloyd is not amenable to the changes, the City does not have any power to insist on the changes.

2. Maintenance

Council Member Foley questioned whether the Agreement addresses maintenance of the Tennis Center, in particular the lighting and the landscaping. Section 3.02 of the Agreement, which currently remains in full force and effect, requires Hank Lloyd to "maintain the premises [of the Tennis Center] and all buildings, structures, improvements, fixtures, trade fixtures equipment and utility systems which may now or hereafter exist thereon." The CAO interprets this section to mean that Hank Lloyd is responsible for maintaining the lighting of the Tennis Center. Furthermore, Section 3.02 also requires Hank Lloyd to "maintain the shrubs and landscaping surrounding the pro shop and in courtyard area, including proper watering and weeding." Any maintenance responsibility not specifically required by Section 3.02 of the Agreement would be the City's obligation.

3. Arbitration Clause

Council Member Foley questioned whether the Agreement included an arbitration clause. The Agreement currently does not include an arbitration clause. Although the CAO does not recommend arbitration clauses in contracts of this size or scope, the CAO can certainly include such a clause in the Amendment subject, of course, to Hank Lloyd's consent. Therefore, should Council Member Foley still desire an arbitration clause, the City will need to determine if Hank Lloyd is amenable to the inclusion of such a clause.

4. Severability and Entire Agreement Clauses

Council Member Foley questioned whether the Agreement included: 1) an integration clause, i.e. a provision that the Agreement represents all agreements and representations regarding the operation of the Tennis Center and that expressly revokes all other agreements and representations; and 2) a severability clause. Section 32 of the Agreement includes a standard "entire agreement" provision and Section 30 of the Agreement includes a standard severability provision. Because the Agreement already includes a severability clause, it is not necessary to incorporate another one into the Amendment. However, because the parties are changing the terms of the Agreement, the CAO has added a new integration clause to the Amendment.

Attachment