

Staff Summary Report



Council Meeting Date: 06/11/2009

Agenda Item Number: _____

SUBJECT: Request approval of this resolution authorizing the adoption of an Amended and Restated Parking Agreement for the city property located at 909 E. Lemon Street between Raymond C. Boles, LLC and the City of Tempe.

DOCUMENT NAME: 20090611PWWS10 REAL PROPERTY LEASES (0903-19) RESOLUTION NO. 2009.48

COMMENTS: This Amended and Restated Parking Agreement amends the parking agreement entered into on September 6, 2007 thereby reducing the leased area covered by said agreement.

PREPARED BY: Wendy Springborn-Pitman, Engineering Services Administrator(x 8250)

REVIEWED BY: Andy Goh, Deputy PW Manager/City Engineer (x 8896)

APPROVED BY: Glenn Kephart, Public Works Manager (x 8205)

LEGAL REVIEW BY: Cynthia McCoy, Assistant City Attorney (x 2187)

FISCAL NOTE: N/A

RECOMMENDATION: Adopt Resolution No. 2009.48 and authorize the Mayor to execute any necessary documents.

ADDITIONAL INFO:

RESOLUTION NO. 2009.48

A RESOLUTION BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE ADOPTION OF AN AMENDED AND RESTATED PARKING AGREEMENT BETWEEN THE CITY OF TEMPE AND RAYMOND C. BOLES, LLC FOR A PORTION OF THE CITY PROPERTY LOCATED AT 909 EAST LEMON STREET (AKA: APN # 132-73-098B)

WHEREAS, it has been determined to be in the best interest of the City of Tempe to lease the city property located at 909 East Lemon Street for the private use of the adjoining property owner for parking purposes.

WHEREAS, the City of Tempe wishes to adopt an Amended and Restated Parking Agreement (See Attachment "A") and charge appropriate fees for such use and

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, MARICOPA COUNTY, ARIZONA, AS FOLLOWS

SECTION I. That the City of Tempe does hereby authorize said Parking Agreement as written.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA this _____ day of June, 2009.

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

AMENDED AND RESTATED PARKING AGREEMENT

THIS AMENDED AND RESTATED PARKING AGREEMENT is entered into as of this ____ day of June, 2009, by and between Raymond C. Boles LLC ("Boles"), and the CITY OF TEMPE, a Municipal Corporation ("Tempe").

RECITALS:

A. Boles owns the real property described on Exhibit "A" hereto (the "Boles Parcel"), and desires to secure long-term parking arrangements to fully comply with the parking requirements of the City of Tempe Zoning Ordinance No. 808.

B. Tempe owns the real property more particularly described on Exhibit "B" attached hereto (The "Tempe Parcel"), which is adjacent to the eastern boundary of the Boles Parcel, on which Tempe allowed Boles or its lessee to construct certain improvements.

C. The relationship between the parcels of Boles and Tempe and the related parking area is shown in "Exhibit "C" attached hereto.

D. Tempe and Boles are parties to that certain Parking Agreement dated as of September 6, 2007 (c94-13A), which is being amended and restated in its entirety as more fully set forth below.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

1. GRANT OF PARKING RIGHTS

Tempe hereby grants to Boles the exclusive right to use six (6) parking spaces (each, a "Licensed Space") within the parking area presently located on the Tempe Parcel for a period of fifteen (15) years from the date of this agreement. This agreement may be extended only with the written consent of both parties.

2. OBLIGATIONS OF BOLES

2.1 Rent. During the term of this Agreement, Boles shall pay to Tempe an annual fee of Two Hundred Dollars and No/100 (\$200.00) per Licensed Space, commencing June 1, 2009. The foregoing fee shall be increased by 5 percent (5%) at the end of the first five (5) years period and an additional five percent (5%) at the end of the second five (5) years per the following schedule.

Annual Amounts:

June 1, 2009 through June 30, 2014	\$1,200
July 1, 2014 through June 30, 2019	\$1,260
July 1, 2019 through June 30, 2024	\$1,323

Rental due under this Agreement shall be paid in equal monthly installments, in advance, on or before the first day of each month.

2.2 Taxes. Boles shall pay to Tempe, within 5 days after written request therefore, a sum equal to the aggregate of any municipal city, county, state or federal excise, sales, use or transaction privilege taxes legally levied or imposed against or on account of the rent payable by Boles hereunder or the receipt thereof by Tempe.

2.3 Liability and Property Damage Insurance. Boles shall at all times during the term of the Agreement carry public liability and property damage insurance with a company authorized to do business in the state of Arizona insuring Boles and Tempe as the insured therein against any and all loss or claims arising out of the operation of Boles' businesses on the Tempe Parcel or any act or omission of Boles, its agents, servants, employees or invitees. A complete copy of said policies of public liability and property damage insurance shall be filed with the Engineering Services Administrator of Tempe and shall provide that no cancellation thereof shall be permitted without thirty (30) days prior written notice thereof given to said Tempe Engineering Services Administrator. If Boles elects to maintain insurance under a "Blanket policy", it shall furnish Tempe with a complete copy of "blanket policy" with endorsements, riders, or other documents or instruments showing that such insurance covers the Tempe Parcel. Said policies of insurance shall be in the following minimum amounts, to wit: Public liability insurance of One Million dollars (\$1,000,000.00) for one person; Three Million Dollars (\$3,000,000.00) for one accident, and Five Hundred Thousand Dollars (\$500,000.00) for property damage. Such public liability insurance shall be primary to Tempe's public liability coverage which shall be secondary. The foregoing minimum limits shall be subject to adjustment at five (5) year intervals upon the reasonable request of Tempe in order to reflect changes in economic conditions.

2.4 Indemnity.

a. Boles shall indemnify, defend and save harmless Tempe, its agents, officers, officials, employees and volunteers from and against any and all claims, damages, liabilities, losses and expenses, of any nature whatsoever (including without limitation attorney's fees, court costs, and the costs of all appellate proceedings), arising out of or relating to Boles' occupancy of the Tempe Parcel, the Licensed Spaces or the operation of any improvements or facilities thereon, including without limiting the generality of the foregoing, any act or omission of Boles, its agents, servants, employees, invitees or any other person for whose acts, errors, omissions, work, or services Boles may be legally liable. Boles' duty to provide the foregoing indemnity. The amount and

type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of indemnity in this paragraph. This indemnity shall survive the termination of this Agreement.

b. During the term of this Agreement, Boles shall not permit any liens to attach to the Tempe Property as a result of its acts or omissions, and if any such liens do attach, Boles shall immediately cause them to be released or bonded over to the reasonable satisfaction of Tempe.

2.5 Maintenance. Tempe shall not be obligated, responsible or liable for maintaining, repairing or restoring the parking area or any other improvements on the Tempe Property; for any disruption in the supply of services or utilities to the parking area or other improvements being used by Boles on the Tempe Property; or for any other cost, expense, duty, obligation, service or function related to the parking area or other improvements on the Tempe Property being used by Boles.

2.6 Compliance with Laws. Boles shall comply with, conform to and obey, and cause each of its agents and invitees to comply with, conform to and obey all laws, ordinances, rules, regulations and all other legal requirements applicable to them, including, without limitation, laws and regulations relating to occupational safety and health and environmental protection, and all orders, writs, judgments, injunctions, decrees or awards of any court or governmental authority with jurisdiction over Boles or the City Property.

2.7 Security. Boles shall at all times minimize the risk of loss, theft or damage by vandalism, sabotage or other means to the Tempe Property. Tempe shall not be responsible for any damage done to any property of Boles or other third parties while located at the Tempe Property.

3. TERMINATION; ENFORCEMENT

3.1 Default. Notwithstanding any other provision of this Agreement to the contrary, neither party shall be in default under this Agreement unless the non-breaching party first gives written notice to the breaching party of any breach hereunder and allows said breaching party to cure the same within the following time periods:

a. If the breach relates to the nonpayment of money; ten (10) days after receipt of such written notice.

b. If the breach relates to the nonperformance of any other covenant herein made by the breaching party; thirty (30) days after receipt of such written notice, or such additional period of time as may be reasonably necessary under the circumstances to cure such breach.

Notwithstanding the foregoing, there shall be no grace period for the failure to provide insurance coverage required herein.

If the defaulting party fails to cure the breach within the applicable grace period, if any, the non-defaulting party shall have the right to terminate this Agreement immediately without further notice, and to pursue any additional rights or remedies it may have at law or in equity.

3.2 Attorney's Fees and Costs. If suit is brought to enforce, or declare rights under this Agreement, or as the result of any alleged breach of any provision of this Agreement, then the prevailing party or parties in such suit shall be entitled to recover their costs and expenses, including reasonable attorneys' fees, from the losing party or parties, and any judgment or decree rendered in such proceedings shall include an award thereof.

3.3 Injunctive Relief and Damages. In the event of any breach or threatened breach by a party of any provision of this Agreement, the other party may prosecute any proceedings at law or in equity to enjoin such breach threatened breach and to recover damages for any such breach. Notwithstanding the foregoing, in no event shall Tempe be liable for incidental, consequential or punitive damages.

3.4 Adequacy of Remedies. The parties hereby acknowledge and agree that the remedies provided herein are adequate to protect their interests hereunder, and that neither party shall pursue any other remedies available at law or in equity to enforce its rights under this Agreement.

3.5 Termination. Either party may terminate this agreement by giving 90 days prior written notice to the other.

4. GENERAL PROVISIONS

4.1 Severability. Invalidation of any of the provisions of this Agreement shall in no way affect any of the other provisions of this Agreement.

4.2 Waiver. Neither party shall be deemed to have waived any right it may have with respect to any breach of any of the provisions of this Agreement unless such waiver is expressly stated in writing, and any such waiver shall not be construed as a waiver of any succeeding breach of the same or any other provision hereof.

4.3 Headings. The captions and headings of the various Articles and Paragraphs of this Agreement are for convenience and identification only, and shall not be deemed to limit or define the contents of their respective Articles or Paragraphs.

4.4 Notices. All notices, consents, approvals or other communications required or permitted to be given to any party hereunder shall be in writing and delivered in person or sent by registered or certified mail, postage prepaid, as follows:

TEMPE: City of Tempe
 31 E. 5th Street

P.O. Box 5002
Tempe, AZ 85280
Attention: Gary Patchett

BOLES: Randy Boles
7550 S. Willow Dr.
Tempe, AZ 85283

Notice shall be deemed to have been given upon receipt, if delivered in person, or seventy- two (72) hours after deposit in the mail in the manner provided above, if delivered by mail. The addressees, and addressees for the purpose of this paragraph may be changed by giving written notice of such change in the manner provided herein for giving notice. However, unless and until such written notice is given, the last address and addressee as stated by written notice, or as provided herein, if not written notice of change has been received, shall be deemed to continue in effect for all purposes hereunder.

4.5 Time of Essence. Time is of the essence of this Agreement and all covenants and provisions hereof. This Agreement in its entirety shall be binding upon, and inure to, the benefit of the successors, assigns, heirs, administrators and executors of the parties.

4.6 No Partnership or Joint Venture. Nothing contained in this Agreement is intended to give rise to nor shall be construed to give rise or create a partnership or joint venture between Tempe and Boles. No term or provision of this Agreement is intended to, or shall be, for the benefit of any person, firm, organization or corporation not a party hereto, and no such other person, firm, organization or corporation shall have any right or cause of action hereunder.

4.7 Prior Agreements. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof, and no prior agreements or understanding pertaining to the subject matter hereof shall be effective for any purpose. No provision of this Agreement may be amended or added to except by a writing signed by the parties hereto or their respective successors in interest. This Agreement shall not be effective or binding on any party until fully executed by the parties hereto.

4.8 Recording. Upon execution hereof, the parties shall cause this Agreement to be recorded in the Official Records of Maricopa County, Arizona.

4.9 Interest. Any amounts due hereunder which are not paid when due shall bear interest from the date due until paid in full at a rate equal to ten percent (10%) per annum.

4.10 Exhibits. All exhibits attached to this Agreement are incorporated into this Agreement as if set forth herein in their entirety.

4.11 Counterparts. This Agreement may be executed in one or more counterparts, each of which may be executed by one or more of the parties hereto, with the same force and effect as through all parties executing such counterparts had executed but one instrument. For purposes of recording, the signature and acknowledgement page(s) may be detached from one or more counterparts and reattached to a single copy of this Agreement.

4.12 Agreement Non-Assignable. This agreement may not be assignable by either party without the consent of the other; provided that Boles may allow any lessee of the Boles Property to use the Licensed Spaces.

4.13 Cancellation. This agreement is subject to Section 38-511 of the Arizona Revised Statutes, as amended.

IN WITNESS WHEREOF, the parties executed this Agreement as of the day and year first set forth above.

CITY OF TEMPE, an Arizona municipal corporation

By: _____
Hugh L. Hallman, Mayor

Raymond C. Boles LLC

By: 
Randy Boles, Managing Member

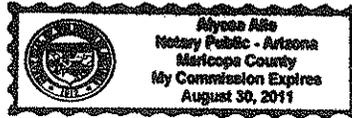
STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

This instrument was acknowledged before me this ____ day of _____, 2009, by
Hugh L. Hallman, Mayor of the City of Tempe.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)



This instrument was acknowledged before me this day 22 of May, 2009, by
Randy Boles, Managing Member.

Alyson Aiko
Notary Public

My Commission Expires:

August 30, 2011

EXHIBIT "A"

A portion of the Northwest quarter of Section 23, Township 1 North, Range 4 East, of the Gila and Salt River Base and Meridian described as follows:

Commencing at the West quarter corner of said Section 23;

Thence North (assumed bearing) along the West line of said Section 23, 609.25 feet;

Thence South 88 degrees 35 minutes 12 seconds East 55.02 feet to the Point of Beginning on the Easterly right of way line of Rural Road.

Thence continuing South 88 degrees 35 minutes 12 seconds East 125.51 feet;

Thence South 0 degrees 03 minutes 40 seconds East 167.16 feet;

Thence North 71 degrees 43 minutes 14 seconds West 132.33 feet to a point on said Easterly right of way line;

Thence North, along said right of way line, 128.75 feet to the Point of Beginning.

EXHIBIT "B"
TEMPE PARCEL

A tract of land in the Southwest quarter of the Northwest quarter of Section 23, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

From the Southwest corner of said Northwest quarter of said section, marked by an iron pipe, fixed in the center line of the pavement of the Tempe-Mesa State Highway, run North (bearing assumed) 751.38' to an iron pipe at the intersection of the West line of said Northwest quarter of said section, with the center line of a street known as Dorsey Lane (Lemon Street), thence South 88 degrees 34 minutes East, 180.57 feet to a point on said center line of said Dorsey Lane;
thence South 25.01 feet to the South boundary line of Dorsey Lane and the true point of beginning; which point is the Northwest corner of this tract; thence South 26:3.33 feet to a point on the Northeasterly boundary line of the 20 feet wide prescriptive easement;
thence South 71 degrees 35 minutes 30 seconds East, along said Northeasterly boundary line of said easement 76.41 feet;
thence North 285.65 feet to the said Southerly boundary line of said Dorsey lane, which point is the Northwest corner of this tract;
thence North 88 degrees 34 minutes West 72.53 feet along said boundary line, to the point of beginning.

EXCEPT the North 185 feet thereof.