

**TEMPORARY  
AGREEMENT FOR TREATED EFFLUENT**

**BETWEEN**

**CITY OF SPARKS, a municipal corporation**

**AND**

**D'ANDREA PHOENIX ACQUISITION, LLC,  
a Nevada Limited Liability Company**

THIS AGREEMENT (“Agreement”) is made and entered into this \_\_\_\_ day of April, 2020 by and between the City of Sparks, a municipal corporation and a political subdivision of the State of Nevada (the “City”) and D’Andrea Phoenix Acquisition, LLC, a Nevada limited liability company (“D’Andrea”)(collectively the “parties” and each a “party”).

WHEREAS, D’Andrea desires to temporarily purchase Treated Effluent (as hereinafter defined) from the City to control dust, irrigate and for other related uses at the D’Andrea Golf Course located within the D’Andrea Planned Unit Development as described in Document #4288544 (Washoe County Recorder) in Sparks, Nevada.

WHEREAS, D’Andrea has the authority from the owner of the real property known as D’Andrea Golf Course as evidenced by the Owner’s Affidavit attached hereto and incorporated herein to maintain and operate the D’Andrea Golf Course and to water the property with effluent.

WHEREAS, D’Andrea is in good standing in its state of formation with the State of Nevada and the City of Sparks, and D’Andrea agrees to notify the City immediately if its status in this regard changes;

WHEREAS, the Truckee River Operating Agreement (TROA) requires effluent use to be offset with dedicated Truckee River instream flows for return flow management, and instream flows are established through the dedication of Truckee River water rights.

WHEREAS, performance of this Agreement is contingent upon D’Andrea receiving the approval to use Treated Effluent from all Federal, State, or local governments and the receipt of any and all required permits; and

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, it is mutually agreed by and between the parties as follows:

1. Definitions. Terms not defined elsewhere in this Agreement shall have the meanings stated below in this Section 1.
  - 1.1. “Rate” means the fee, pursuant to Section 6, that D’Andrea shall pay to the City for use of the Treated Effluent.
  - 1.2. “City” means the City of Sparks and may be referred to individually as a “City”.
  - 1.3. “Effective Date” means the day stated in the first paragraph of this Agreement.
  - 1.4. “DEWSS” (D’Andrea Effluent Water Supply System) means the existing water system beginning immediately after the City’s meter vault including but not limited to the facilities, equipment and appurtenances now or hereafter owned, operated or controlled

by D'Andrea that are necessary or used to contain, convey, treat, store and deliver nonpotable water to be used on the Golf Course including without limitation, pipes, transmission and distribution mains, treatment facilities, reservoir, ponds, storage facilities, pump stations, valves, fittings and appurtenant facilities and interconnection facilities necessary to connect into the City's existing effluent distribution system.

- 1.5. "Treated Effluent" means the treated water used for irrigation, and other related irrigation applications other than for potable water use for domestic purposes (e.g., sinks, showers, toilets, indoor faucets, etc.) delivered by the City from TMWRF.
- 1.6. "D'Andrea Reservoir" means the existing water storage lake, pond, or facility located on the Golf Course in Sparks south of Signa Drive and west of Ineisa Court.
- 1.7. "Sparks" means the City of Sparks, Nevada.
- 1.8. "TMWRF" means the Truckee Meadows Water Reclamation Facility located in Washoe County, Nevada.

## 2. General.

- 2.1. Charter. The Sparks City Charter Section 2.110 permits the City to provide utilities and fix the rate for such utilities.
- 2.2. TMWRF. TMWRF is partially owned by the City and TMWRF provides centralized wastewater treatment for residents of the Truckee Meadows. The City through TMWRF, delivers Treated Effluent to various public and private facilities for use as an irrigation water supply.
- 2.3. Authority. The City hereby warrants that it has the authority to sell and deliver Treated Effluent to D'Andrea pursuant to this Agreement. City's authority is subject and limited to any Federal and State limitations, licensing and Federal and State agencies' approval.
- 2.4. D'Andrea. D'Andrea Phoenix Acquisition, LLC is a Nevada limited liability company that has leased and/or acquired the Golf Course and has repaired the existing irrigation system including the pipes, pump stations, water mains, sprinklers, timers, computers and associated facilities on the Golf Course.
- 2.5. Agreement to Take/Deliver Treated Effluent. Subject to and in accordance with the provisions of this Agreement, D'Andrea shall buy, accept and utilize Treated Effluent on the Golf Course by using the DEWSS to open and operate the Golf Course; and the City agrees to provide Treated Effluent to D'Andrea.

3. Duties and Commitments.

- 3.1. D'Andrea's Responsibility. D'Andrea shall be responsible for the planning, engineering, repair and/or construction of all necessary improvements and the DEWSS to deliver Treated Effluent on the Golf Course.
- 3.2. No Discharge. All Treated Effluent provided to D'Andrea by the City pursuant to this Agreement shall be beneficially used in a manner that is consistent with applicable federal and state law. D'Andrea is responsible for using the Treated Effluent in a lawful manner with no return flow to the Truckee River. If any return flow occurs, it will be the sole responsibility of D'Andrea.
- 3.3. Priority, Commitment of Use, and Payment of Fees.
- A. D'Andrea agrees to pay a reinstatement fee in the amount of Three Thousand Dollars (\$3000.00) within three (3) days of execution of this Agreement.
  - B. D'Andrea agrees to purchase and the City agrees to sell to D'Andrea up to 500 acre feet annually of Treated Effluent.
  - C. D'Andrea agrees to pay the Rate for the Treated Effluent to the City within thirty (30) days of receipt of monthly invoice from the City. The invoice to D'Andrea is deemed received upon City's mailing through the US Postal Service the invoice to:  
D'Andrea Phoenix Acquisition LLC  
c/o Whittmore Group  
P.O. Box 8849  
Reno, NV 89507
- 3.4. Operation and Maintenance. D'Andrea shall operate and maintain at its expense the DEWSS necessary to deliver Treated Effluent from the D'Andrea Reservoir to the Golf Course. The City shall have no responsibility for any costs to operate or maintain any D'Andrea facilities. Compliance with all applicable laws and regulations governing the use of Treated Effluent and all required reporting of such usage for all D'Andrea facilities shall be the sole responsibility of D'Andrea.
- 3.5. NDEP Requirements. D'Andrea shall be solely responsible for obtaining or amending its NDEP Discharge Permit and acquiring or re-instating NDEP approval of its Treated Effluent Management Plan utilizing the Treated Effluent. D'Andrea shall be liable for any sanctions imposed by the State of Nevada for use of Treated Effluent not in conformance with its discharge permit or Effluent Management Plan.

- 3.6. Metering and Reporting. The City shall repair the existing or install a new meter at the existing location on Vista Boulevard where the City previously provided effluent to the Golf Course. Monthly effluent flow will be reported to D'Andrea in a manner determined by the City.
- 3.7. Compliance with Laws. D'Andrea shall be solely liable for the use of Treated Effluent on the Golf Course and shall at all times comply with any and all standards for performance, including requirements specified, issued or promulgated by any government agency, board, department or authority which has jurisdiction over the Treated Effluent.
- 3.8. Indemnities. The City shall not be liable for any injury to persons or damage to property arising from the use of the Treated Effluent, and D'Andrea shall indemnify, defend and hold harmless the City from any claims, causes of action or liability therefrom. D'Andrea shall be responsible for all legal services and costs, administrative and engineering costs and fees, including permit fees, associated with any legal or administrative challenge relating thereto.
- 3.9. Operation. D'Andrea shall be solely responsible for providing, operating, maintaining and repairing its irrigation facilities, as are or may be necessary to accept, convey, control and use Treated Effluent in compliance with the requirements of all applicable federal, state, city and local regulatory agencies.
- 3.10. Notification. D'Andrea shall notify the City by telephone within twenty-four (24) hours if D'Andrea becomes aware of any condition which violates federal, state, city and local applicable regulatory agency requirements or discharge standards. D'Andrea shall notify the City in writing within five (5) business days with all available details of the condition necessitating the notification, including the type, location and volume of any discharge of Treated Effluent not allowed by permit, and the ultimate fate of that discharge. These notifications to the City shall not absolve D'Andrea of any responsibility to notify NDEP of any permit violation.
- 3.11. Permits Compliance. D'Andrea shall be responsible for adhering to all conditions of its discharge Permit and Effluent Management Plan.
- 3.12. Notice of Violations. D'Andrea shall notify the City and all relevant state and federal environmental agencies within twenty-four (24) hours of any situation that knowingly constitutes a material violation of D'Andrea's discharge Permit or Effluent Management Plan.
- 3.13. Best Practices. D'Andrea agrees to use and manage the Treated Effluent in a manner consistent with best management practices and any approved Effluent Management Plan

and discharge Permit in effect. D'Andrea understands that it is receiving Treated Effluent, which is not intended for human consumption, and further agrees that it assumes any and all risks associated with the use of the Treated Effluent under this Agreement.

#### 4. City's Duties and Commitments.

- 4.1. Effluent. The City warrants and represents that they are the owners of sufficient Treated Effluent pursuant to state permits and permit conditions that can be provided for the Golf Course.
- 4.2. Operation of TMWRF. The City shall be responsible for providing, operating and maintaining TMWRF facilities, at their expense.
- 4.3. Quality Requirements. City shall use its best efforts to supply Effluent which meets or exceeds the Category B effluent requirements as defined in NAC 445A.276.
- 4.4. Quantity Requirements. The City agrees to reserve the Treated Effluent contemplated hereunder.
- 4.5. Compliance with Laws. The City shall be responsible for operating TMWRF in order to provide the Treated Effluent in compliance with applicable requirements of federal, state, city and local laws and regulations.
- 4.6. Notification. The City shall notify D'Andrea if the City becomes aware of any condition which violates federal, state, city and local regulatory agency requirements or discharge standards at TMWRF that effects delivery of Treated Effluent.
- 4.7. Discharge Permit. The City shall be responsible for maintaining an NDEP Discharge Permit necessary to supply Treated Effluent. D'Andrea shall be responsible for maintaining NDEP Discharge Permits as may be necessary to utilize Treated Effluent.
- 4.8. Effluent Management Plan. To the extent required by law, the City shall be responsible for maintaining with NDEP an amended Effluent Management Plan, if needed. The plan shall convey all information regarding planned operating and management criteria for delivery of Treated Effluent to the Golf Course.
- 4.9. Flow Rates. The parties acknowledge that the daily use of Treated Effluent may fluctuate in accordance with the season and needs of the Golf Course.

#### 5. Term of Agreement.

5.1. Initial Term. This Agreement shall have an initial term of twenty-four (24) months.

5.2. Extensions. After the initial term of this Agreement, this Agreement may be extended by mutual written agreement of the parties for one (1) period of twelve (12) months upon notice in writing six (6) months before the termination of the initial twenty-four (24) month period.

6. Rate.

Rate "A:" With Dedication of Water Rights or filing of temporary applications to change the point of diversion for 500 acre feet to instream flow:

D'Andrea agrees to pay a usage rate of \$0.660 per thousand (1000) gallons rounded up to the next 1000 gallons (\$215.06 per acre foot) of Treated Effluent delivered by the City for the term of this Agreement.

If Rate "A" is utilized, D'Andrea agrees, for the duration of this Agreement, to dedicate to the City 500 acre feet of Truckee River instream water rights or to file temporary applications to change the point of diversion of 500 acre feet of Truckee River rights for instream flow. Dedication of the water rights or filing of temporary applications shall occur within ninety (90) days of the execution of this Agreement by the parties. If at any time D'Andrea fails to provide the necessary dedicated water rights or temporary applications, D'Andrea will be billed the \$0.96 rate for any delivered treated effluent, as set out in Rate "B" in this section.

Rate "B:" Without Dedication of Water Rights or filing of temporary applications to change the point of diversion for 500 acre feet to instream flow:

D'Andrea agrees to pay a usage rate of \$0.96 per thousand (1000) gallons rounded up to the next thousand (1000) gallons (\$312.82 per acre foot) of Treated Effluent delivered by the City for the term of this Agreement. D'Andrea agrees to pay the \$0.96 per thousand (1000) gallon rate for any treated effluent delivered that is not matched with dedicated water rights or application changes.

7. Termination by City. The City may terminate the obligations hereunder upon thirty (30) days written notice to D'Andrea under the following circumstances:

1. D'Andrea fails to comply with any federal, state or local laws or permit conditions pertaining to the use of the treated effluent;
2. D'Andrea's failure to pay any amount within thirty (30) days of its due date; or
3. The City is unable to provide or economically provide water consistent with federal, state or local laws now or hereafter existing.

8. Assignments.

8.1. Assignment by City. The City shall not assign any rights or obligations under this Agreement unless D'Andrea approves the assignment and said approval will not be unreasonably withheld. However, an assignment by the City is hereby approved by D'Andrea in the event of an assignment to an assignee which owns TMWRF and becomes the purveyor of Treated Effluent, provided said assignee receives an assignment of all the City's rights hereunder and said assignee assumes all the City's obligations hereunder.

8.2. Assignment by D'Andrea. D'Andrea shall not assign any rights or obligations under this Agreement.

9. Interruption of Delivery.

9.1. Force Majeure. The City shall not be liable for any failure to deliver Treated Effluent under the terms of this Agreement as a result of a force majeure event to the extent such event causes the City to be unable to fulfill its duties or obligations. For the purposes of this Agreement, a force majeure event is defined as a war, act of terrorism, insurrection, riot, flood, drought, earthquake, fire, casualty, act of God, act of a public enemy, quarantine restrictions or other effects of epidemic or disease, contamination of water supply or Treated Effluent by third parties, freight embargo, order from the Federal Water Master, State Engineers Office, or any other regulatory authority, restraining order or injunction in a lawsuit challenging this Agreement, or any other cause whatsoever, in each case, to the extent such event is beyond the City's control, except for the City's own voluntary acts or failure to exercise reasonable care and diligence in the performance of this Agreement.

9.2. Other Causes. The City's obligation to deliver Treated Effluent under this Agreement will be subject to the following.

A. The City must have the legal right to divert Treated Effluent from TMWRF.

B. The City shall use reasonable efforts to ensure the Treated Effluent is delivered to the D'Andrea Reservoir without interruption. The City may temporarily interrupt or reduce delivery of the Treated Effluent for TMWRF system emergencies, and necessary maintenance or management.

9.3. User Acknowledgement. D'Andrea acknowledges that TMWRF is not equipped to detect, treat, or remove harmful chemicals or toxic materials except as required to meet current federal, state, city, and local regulatory agency discharge standards, as of the signing of this agreement.



10. Disclaimers.

- 10.1. Warranties. ALL WATER DELIVERED TO THE GOLF COURSE WILL BE THROUGH THE FACILITIES OWNED AND MAINTAINED BY D'ANDREA. THEREFORE, THE CITY SPECIFICALLY DISCLAIMS ANY REPRESENTATION OR WARRANTY AS TO THE FUNCTIONALITY OR COMPLETENESS OF D'ANDREA'S FACILITIES. EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, THE CITY MAKES NO OTHER WARRANTY, EXPRESS OR IMPLIED, AND ALL OTHER WARRANTIES WHETHER EXPRESS OR IMPLIED, ARE HEREBY DISCLAIMED, INCLUDING, WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
- 10.2. Limitation on Damages. THE CITY SHALL NOT BE LIABLE FOR OR OBLIGATED IN ANY MANNER FOR SPECIAL, CONSEQUENTIAL, OR INDIRECT DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF USE, LOSS OF PROFITS OR SYSTEM DOWNTIME.

11. Miscellaneous Provisions.

- 11.1. Integration. This Agreement constitutes the complete and integrated agreement between the parties with respect to the matters recited herein, and supersedes any prior or contemporaneous written or oral agreements or understandings with respect thereto.
- 11.2. Amendment/Waiver. This Agreement shall not be modified, amended, supplemented, rescinded, cancelled or waived, in whole or in part, except by written amendment signed by duly authorized representatives of D'Andrea and the City. No waiver of any of the provisions of this Agreement shall be deemed to be a waiver of any other provision, regardless of similarity, and no waiver shall constitute a continuing waiver. Forbearance of failure to declare a default or pursue a remedy shall not constitute a waiver except as provided in this Agreement.
- 11.3. Binding Nature. This Agreement shall be binding on and shall inure to the benefit of the parties to this Agreement and their respective heirs, legal representatives, successors and permitted assigns.
- 11.4. No Third-Party Beneficiary Rights. This Agreement is not intended and shall not be construed to provide any person or entity not a party to this Agreement with any benefits or cause of action, or to obligate the parties to this Agreement to any entity or person not a party.

- 11.5. Governing Law. The laws of the State of Nevada shall govern this Agreement without regard to conflicts of law principles. This Agreement shall be construed and interpreted in accordance with the laws of the State of Nevada.
- 11.6. Attorney's Fees. In the event of litigation or arbitration arising out of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs to be fixed by the court or by the arbitrator.
- 11.7. Jurisdiction; Venue. Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement must be brought in the Second Judicial District Court of the State of Nevada, County of Washoe. Each Party consents to the jurisdiction of said court (and of the appropriate appellate court) in any such action or proceeding and waive any objection to venue.
- 11.8. Claims. Pursuant to NRS 268.020, which the parties agree to abide by contractually, all demands and accounts against Sparks must be presented to the Sparks City Council, as the case may be, in writing within six months from the time the demands or accounts become due. No demand or account may be audited, considered, allowed or paid by the City unless this requirement is strictly complied with.
- 11.9. Duplicate Originals/Counterparts. This Agreement may be executed simultaneously in one or more duplicate originals or counterparts and is binding on a party only when all parties have signed.
- 11.10. Subject Headings. The subject headings of the sections and subsections of this Agreement are included for convenience only and shall not affect the construction or interpretation of any of its provisions.
- 11.11. Drafting Presumption. The parties acknowledge that this Agreement has been agreed to by all of the parties, that all of the parties have consulted or have had the opportunity to consult with their attorneys with respect to the terms, and that no presumption shall be created against any party as the drafter of the Agreement.
- 11.12. Additional Documents. The parties agree to execute such additional documents and to take such additional action as is reasonably necessary to carry out the purposes hereof.
- 11.13. Due Authorization. Each party represents that all required authorizations have been obtained to execute this Agreement and for the compliance with each and every term hereof. Each person signing this Agreement warrants and represents to the other parties that he or she has the actual authority to execute this Agreement and bind the party for whom he or she is signing.

11.14. Notice. Unless written notice of a new designee is sent in accordance with this subsection, all communications or notices required pursuant to this Agreement shall be in writing and shall be delivered in person, transmitted by facsimile, email, or mailed by certified mail, postage prepaid, return receipt requested, to the individuals at the addresses indicated below. Notices that are mailed are deemed received the third day after they have been postmarked by the U. S. Postal Service.

D'ANDREA:           Mike Harris  
                              National Landscape  
                              Or  
                              Harvey Whittemore  
                              Whittemore Group  
                              P.O. Box 8849  
                              Reno, NV 89507  
                              Facsimile: (775) 682-8258  
                              Email: hwhittemore8@gmail.com

CITY:                   City of Sparks  
                              Attn: City Manager  
                              P. O. Box 857  
                              Sparks, Nevada 89432-0857  
                              Facsimile: (775) 353-2489  
                              Email: nkrutz@cityofsparks.us

11.15. Severability.

- A. Each term and provision of this Agreement shall be valid and enforceable to the extent permitted by law. If any term or provision of this Agreement or the application thereof is held to be invalid or unenforceable by a court of competent jurisdiction, the remainder of this Agreement, or the application of such term or provision to circumstances other than those to which it is invalid or unenforceable, shall not be affected.
  
- B. To prevent windfall or unintended consideration, if any term or provision of this Agreement is deemed invalid or unenforceable, or enforceable only to a limited extent, the parties agree to negotiate in good faith to adjust any counter performance, condition or corresponding consideration.

11.16. Time. Time is of the essence in all matters relating to this Agreement.

IN WITNESS WHEREOF, the parties have duly executed this Agreement as of the date first above written.

**D'Andrea Phoenix Acquisition LLC, a Nevada limited liability company**

**CITY OF SPARKS, a municipal corporation and a political subdivision of the State of Nevada**


By:   
Harvey Whitemore, Manager

By: \_\_\_\_\_  
Ron Smith, MAYOR

**ATTEST:**

\_\_\_\_\_  
Lisa Hunderman, City Clerk

**APPROVED AS TO FORM:**

  
CHESTER H. ADAMS  
Sparks City Attorney