NOTICE OF SPECIAL CITY COUNCIL MEETING

PURSUANT to Texas Government Code §551.041, notice is hereby given that the City Council of the City of Midland, Texas, will meet in special session in the Council Chamber at City Hall, 300 North Loraine, Midland, Texas on July 9, 2012 at 9:00 a.m. for the following purposes:

1. Consider a resolution authorizing the execution of a Lease Agreement with the Midland Development Corporation regarding certain real property at Midland International Airport and described as Hangars S-11A and S-11B, and Tracts 4-A and 4-B, located in Lot 1, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas. (2012-208)

2. Consider a resolution authorizing the execution of a Lease Agreement between the City of Midland and XCOR Aerospace, Inc. regarding real property located at Midland International Airport and described as approximately 22,500 square feet of bunker space. (2012-209)

3. Consider a resolution approving an Economic Development Agreement between the Midland Development Corporation and XCOR Aerospace, Inc., as authorized by Chapter 501 of the Texas Local Government Code. (2012-210)

4. Consider a resolution approving a Sublease Agreement between the Midland Development Corporation and XCOR Aerospace, Inc. regarding certain real property located at Midland International Airport and described as Hangars S-11A and S-11B, and Tracts 4-A and 4-B, located in Lot 1, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas. (2012-211)

WITNESS my hand and seal of office on July 5, 2012.

Amy M. Turner, City Secretary

SEAL:

City Council Agenda

Approved for Agenda:
thudson
City Manager's Office

MEETING DATE: 7/9/2012

TO: City Council / City Manager

FROM: Marv Esterly, Director of Airports

SUBJECT: Consider a resolution authorizing the execution of Commercial Hangar Lease Agreement between Midland Development Corporation and the City of Midland, Texas

---

Purpose:

Consider a resolution authorizing the execution of Commercial Hangar Lease Agreement for Hangars S-11A, S-11B, and Tracts 4A and 4-B, located in Lot 1, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas.

Recommended City Council Action

☒ Approve ☐ Deny ☐ Directional / Informational

Fiscal Impact:

Annual Rental of $72,000.00

Discussion:

Midland Development Corporation (MDC) is requesting a Commercial Hangar Lease Agreement to lease Hangars S-11A, S-11B and Tracts 4-A and 4-B, located in Lot 1, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas.

The term of this Agreement shall commence on January 1, 2013, and terminate on December 31, 2022 (the "Lease Term") unless terminated earlier pursuant to the provisions of the agreement. During the Lease Term, Lessee has agreed to pay $6,000.00 monthly to the City for rental of the Leased Premises. In addition, provisions have been made for annual rental adjustments.

RESOLUTION NO.

RESOLUTION AUTHORIZING THE EXECUTION OF A LEASE AGREEMENT WITH THE MIDLAND DEVELOPMENT CORPORATION REGARDING CERTAIN REAL PROPERTY AT MIDLAND INTERNATIONAL AIRPORT AND DESCRIBED AS HANGARS S-11A AND S-11B, AND TRACTS 4-A AND 4-B, LOCATED IN LOT 1, BLOCK 13, INDUSTRIAL PARK REGIONAL AIR TERMINAL, UNIT 12, MIDLAND, MIDLAND COUNTY, TEXAS

WHEREAS, the City Council finds it to be in the public interest to authorize the execution of a lease agreement with the Midland Development Corporation to lease land from the City at Midland International Airport; and

WHEREAS, the Director of Airports and City Manager recommend that the Council approve this lease at Midland International Airport;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:

THAT the Mayor and City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, said lease agreement with the Midland Development Corporation. Said agreement shall be in a form substantially similar to that of Exhibit "A", which is attached hereto and incorporated herein for all legal purposes.

On motion of Council member ______________, seconded by Council member ______________, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the _______ day of ______________, A.D., 2012 by the following vote:

Council members voting "AYE":

Council members voting "NAY":

____
W. Wesley Perry, Mayor

ATTEST:

____
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

____
Courtney Sharp, City Manager

APPROVED AS TO FORM:

____
Keith Stretcher, City Attorney

APPROVED AS TO CONTENT
AND COMPLETENESS:

____
Marv Esterly, Director of Airports

COMMERCIAL HANGAR LEASE AGREEMENT
BETWEEN THE CITY OF MIDLAND, TEXAS
AND MIDLAND DEVELOPMENT CORPORATION

THIS LEASE AGREEMENT ("Agreement") is made this 10th day of July, 2012, by and between the City of Midland, Texas ("City"), a home rule municipal corporation, and the Midland Development Corporation ("Lessee"), a Type A corporation existing under the authority of Chapter 504 of the Texas Local Government Code.

RECITALS

WHEREAS, the City owns and operates the Midland International Airport, located in the City of Midland, Texas hereinafter referred to as "Airport"; and

WHEREAS, Lessee desires to lease certain City-owned facilities and land at the Airport for economic development purposes and to provide aviation services as hereinafter permitted;

NOW, THEREFORE, for and in consideration of the covenants and conditions herein stated, City and Lessee agree as follows:

ARTICLE 1. GRANT OF LEASE

1.01 **Leased Premises**: City agrees to lease to Lessee: Hangars S-11A and S-11B, and Tracts 4-A and 4-B, located in Lot 1, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas, and being more particularly described on Exhibit "A", attached hereto and incorporated by reference. Hangars S-11A and S-11B, and Tracts 4-A and 4-B, are hereinafter collectively referred to as the "Leased Premises." The City grants the Lessee the exclusive right and option to lease the property identified as "MDC Option" on Exhibit "A" during the term of this Agreement. In the event the Lessee exercises said option, then said property shall become a part of the Leased Premises and be subject to the terms and conditions of this Agreement.

1.02 **Easements**: This Agreement shall be subject to such easements, rights-of way, drill sites, or other rights or reservations affecting the Leased Premises which are of record or are clearly visible as of the date of this Agreement, or which are shown on Exhibit "A".

1.03 **Acceptance of Leased Premises**: Subject to the requirements of Section 6.01, BY EXECUTING THIS AGREEMENT THE LESSEE AGREES AND ACKNOWLEDGES THE LESSEE IS TAKING OR LEASING THE LEASED PREMISES **"AS IS" WITH ANY AND ALL LATENT AND PATENT DEFECTS AND THAT THERE IS NO WARRANTY, EXPRESS OR IMPLIED BEING MADE BY THE CITY THAT THE LEASED PREMISES ARE FIT FOR A PARTICULAR PURPOSE**. THE LESSEE ACKNOWLEDGES, BY EXECUTING THIS AGREEMENT, THAT LESSEE IS NOT RELYING UPON ANY REPRESENTATION MADE BY THE CITY WITH RESPECT TO THE CONDITION OF THE LEASED PREMISES, BUT IS RELYING UPON LESSEE'S EXAMINATION OF THE LEASED PREMISES. LESSEE ALSO RECOGNIZES BY EXECUTING THIS AGREEMENT, THAT THE LESSEE IS AGREEING TO ACCEPT THE LEASED PREMISES **"AS IS"**, THAT LESSEE AGREES TO MAKE LESSEE'S OWN APPRAISAL OF THE LEASED PREMISES AND TO ACCEPT THE RISK THAT LESSEE MAY BE WRONG. THE CITY GIVES NO ASSURANCES, EXPRESS OR IMPLIED CONCERNING THE VALUE OR CONDITION OF THE LEASED PREMISES SOLD. IN

NO EVENT SHALL A LESSEE HAVE A RIGHT TO RECOVER CONSEQUENTIAL DAMAGES. THEREFORE, THE LESSEE WILL TAKE THE LEASED PREMISES UNDER THE EXPRESS UNDERSTANDING THE LEASED PREMISES ARE ACCEPTED **"AS IS"** AND WITH ALL FAULTS, EXCLUDING EXPRESS OR IMPLIED WARRANTIES.

ARTICLE 2. TERM OF AGREEMENT

2.01 **Lease Term**: The term of this Agreement shall commence on January 1, 2013 and terminate on December 31, 2022, ("the Lease Term") unless terminated earlier pursuant to the provisions of this Agreement.

ARTICLE 3. RENT

3.01 **Amount of Base Rent**: During the Lease Term, Lessee agrees to pay monthly to City rent for the Leased Premises in the amount of $6,000.00, hereafter called the "Base Rent". The Base Rent shall be due on the first day of each month. For purposes of this agreement, the amount of square footage for ground and facilities being rented is agreed by the parties to be as set forth in Exhibit "A".

3.02 **Rental Adjustments**: It is agreed and understood that provision must be made herein for an adjustment of rentals annually. Therefore, as of January 15, 2014, the minimum monthly rent shall be increased only in the same proportion or percentage by which the cost of living has been increased as reflected by the Consumer Price Index for All Items, as maintained by the United States Government's Department of Labor, Bureau of Labor Statistics for the Dallas/Fort Worth SMA; such increase being measured by comparison with such cost-of-living indices at the end of the immediately preceding 12-month period of this lease, as compared with the indices at the commencement of the immediately preceding 12-month period of this lease. Provided, however, that any such rental increase shall not exceed five percent (5%) above the prior year's rent. In no event shall the monthly payment due be less than $6,000.00.

3.03 **Delivery of Rent**: All payments required of Lessee by this Agreement shall be delivered by mail, or in person, to the Office of the Director of Airports, Midland International Airport, 9506 LaForce Boulevard, P. O. Box 60305, Midland, Texas 79711, or to such other location as specified in writing by the City from time to time, no later than the date such payment is due, unless such due date falls on a Saturday, Sunday, or City holiday, in which case such rent shall be due on the first City business day following the date such payment is due.

3.04 **Delinquent Rent Payments**: All rent and other payments which are past due more than five (5) days shall accrue simple interest at the rate of six percent (6.0%) annually or (b) the maximum percentage rate allowed by law, whichever is less. Notwithstanding anything to the contrary in this Section 3.04, if at the time performance of the provisions set forth in this Section 3.04 becomes due, the interest to be paid in accordance with this Section 3.04 exceeds the limits on the payment of interest established by law, then the amount of interest to be paid shall be reduced to the maximum limit allowed by law; furthermore, if, from any circumstances, City should ever receive as interest an amount that would exceed the highest lawful rate, the amount that would be excessive interest shall be applied to the payment of rent owing pursuant to the provisions of this Lease Agreement and not to the payment of interest.

ARTICLE 4. USE OF LEASED PREMISES

4.01 **Permitted Uses**: Lessee shall be permitted to use the Leased Premises for the purpose of conducting for-profit commercial services or activities consisting of any or all of the following operations and no others:

(a) Location of corporate headquarters and operation of research and development activities related to rocket engine and space vehicle development;

(b) Operation of warehouse, freight distribution and storage services for commercial and non-commercial activities;

(c) Repair and maintenance service for aircraft, airframe, power plant, avionics, instruments, and related equipment;

(d) Sales of aircraft parts and equipment, and pilot supplies;

(e) Storage of such equipment and apparatus as may be incidental and/or necessary to Lessee’s operations, including motor vehicles operated and/or owned by Lessee; and

(f) Such other uses as may be permitted in writing by the City.

4.02 **Prohibited Uses**: Lessee agrees at all times to comply with the following:

(a) Lessee shall at no time use, or permit the use of, the Leased Premises in a manner that is contrary to applicable federal, state, or local laws, ordinances, rules, or regulations, which shall include, but not be limited to, applicable Federal Aviation Administration rules and regulations and applicable regulations for the use of the Airport as may from time to time be promulgated by the City;

(b) Lessee shall not permit any permanent, unshielded light or illumination source to cause glare as viewed from any street, adjacent properties or operating aircraft;

(c) Lessee shall not cause or permit the burial of storage above ground on the Leased Premises of any hazardous waste or materials, as defined by federal or state law, except in accordance with applicable Federal, State, or local laws, ordinances, regulations and rules, as may be adopted or amended from time to time;

(d) Lessee shall not cause or permit any use or activity on the Leased Premises which would create a hazardous condition for aircraft operating at the Airport;

(e) Lessee shall not allow the Leased Premises to be used for parking of motor vehicles, motorcycles, or motor driven equipment by anyone other than customers, employees, or contractors of Lessee except as may be authorized by the Director of Airports, with all such parking being limited to areas designated by the Department of Airports for such parking. Lessee shall not be in default for the improper parking of vehicles over which neither Lessee nor any of its subtenants, customers, employees, or contractors have any control;

(f) Less shall not operate, nor permit the operation of, a car rental business from the Leased Premises, unless the Lessee or the operator of said car rental business has executed a car rental concession or permit agreement with the City; and

(g) Lessee shall not allow schedules airline passenger operations to be conducted on the Leased Premises.

4.03 **Compliance with Minimum Standards**: All activities conducted upon the Leased Premises, whether by Lessee or its sublessees, shall be in substantial conformance with the City's Minimum Standards for Aeronautical Activities, as such standards exist or may be duly amended from time to time by the City Council to the extent that such Minimum Standards may apply to Lessee's operations. City agrees to provide Lessee with written notice not later than 30 days prior to adoption of substantive changes to the Minimum Standards for Aeronautical Activities which would apply to Lessee's operations.

4.04 **Non-exclusive Uses**: Lessee understands and acknowledged that, as to that part of the Airport not included within the Leased Premises, the allowable uses permitted herein are on a non-exclusive basis with respect to other potential providers of aeronautical services at the Airport.

ARTICLE 5. OBLIGATIONS OF LESSEE WITH REGARD TO CONSTRUCTION OF IMPROVEMENTS

5.01 **Approval of Plans Not Assurance of Design Quality:** The approval by the City of any plans and specifications applies only to the conformity of such plans to the general architectural and operational plan for the Leased Premises and the Airport. The approval of the City does not constitute approval of the quality of the architectural or engineering work performed. The City assumes no liability or responsibility for the architectural or engineering design or for any defect in any building or improvement constructed from the plans or specifications. Construction of any contemplated improvements shall be in accordance with the plans presented to and approved by the City. All construction work shall be subject to inspection by a representative employed by the City or an inspector from the Code Enforcement Division of the City, or both, to determine that such work conforms to the plans and specifications approved by the City.

5.02 **Contractor's Insurance; Bonds:** At any time construction activities are undertaken on the Leased Premises, Lessee shall require that its contractor or contractors keep in force insurance issued by a responsible insurance company or companies authorized to conduct business in the State of Texas insuring the improvements during construction under Completed Builder's All Risk Insurance, including fire, extended coverage, vandalism and malicious mischief, in an amount equal to the full insurable value of such construction as the same progresses in order to insure continuity of construction and ultimate completion despite damage or destruction suffered during the course thereof. **ALL INSURANCE SHALL NAME THE CITY AS ADDITIONAL INSURED AND CO-PAYEE AND PROVIDE FOR A WAIVER OF SUBROGATION IN FAVOR OF THE CITY.** Lessee shall require all contractors performing construction work on the Leased Premises to provide payment and performance bonds issued by a responsible bonding company or companies authorized to conduct business in the State of Texas for the full amount of the cost of the construction to be performed on forms which are in compliance with Tex. Gov't Code Ch. 2253, as amended. The foregoing shall be made a part of any contract between Lessee and its contractor or contractor. In the event Lessee does not complete the construction work itself; it shall comply with the All Risk Insurance provisions hereof.

5.03 **Compliance with Building Codes and Federal Standards**: All improvements made to the Leased Premises by Lessee shall comply with all applicable City Building Codes and Federal standards for construction of airport improvements in effect at the time construction commences as well as all other applicable federal aviation regulations, if any.

5.04 **Encumbrance of Leasehold Estate**: Lessee shall at no time encumber or attempt to encumber its leasehold interest in the Leased Premises by deed of trust, mortgage, security agreement or other security interest.

5.05 **Ownership of Buildings, Improvements and Fixtures**: Any and all buildings, improvements (including, but not limited to all aprons, taxiways and roadways), additions, alterations, and fixtures existing on the Commencement Date or constructed or placed on any part of the Leased Premises during the Lease Term by City or Lessee, shall be considered part of the real property of the Leased Premises, shall remain on the Leased Premises, and shall not be removed by Lessee or any sublessee without the written consent of City. All improvements, additions, alterations, and fixtures on the Leased Premises shall become the sole property of City upon termination of this Agreement without compensation to Lessee, it being understood and agreed by Lessee that the improvements located on the Leased Premises at the end of the Lease Term are additional consideration for this Agreement. Notwithstanding the above, Lessee shall have the right at any time during Lessee's occupancy of the Leased Premises, or within a reasonable time thereafter, to remove any and all furniture, machinery, equipment, but not fixtures owned or placed by Lessee, in, under, or on the Leased Premises; provided, however, prior to the termination of the Lease Term, Lessee shall repair any damage to any buildings or improvements on the Leased Premises resulting from their removal. Any such personal property items which are not removed within sixty (60) days after the termination date of this Agreement shall become the property of City as of that date.

ARTICLE 6. REPAIRS, MAINTENANCE AND RESTORATION

6.01 **Maintenance by City**: City shall, at City's sole discretion and expense, keep in good repair, condition and appearance the taxiways and roadways which have been or may be constructed by City. City may commence required repairs as soon as reasonably practicable after receiving written notice from Lessee thereof. Except as provided in this Section, City shall not be obligated to make repairs, replacements or improvements of any kind upon the Leased Premises, or to any equipment, merchandise, facilities or fixtures therein, all of which shall be Lessee's responsibility. The amount and extent of the repairs to be made by City are in the City's sole discretion.

6.02 **Maintenance by Lessee**: Lessee shall, at Lessee's sole expense, keep the Leased Premises and all improvements of any kind, which may be existing at the commencement of the Lease Term, not required herein to be maintained by City, in good repair, condition and appearance. Without limitation of the foregoing sentence, Lessee specifically acknowledges its obligations, at its sole expense, to keep in good repair, condition and appearance the foundation, roof, exterior walls and structural portions of the interior walls of the hangar(s) located on the Leased Premises. Lessee shall keep mowed and in a sightly condition all landscaping and grass areas within the

Leased Premises. City shall be the sole judge of the quality of Lessee's maintenance; provided, however, City shall not unreasonably withhold acceptance of said repairs or maintenance. Upon written notice by City to Lessee, Lessee shall be required to perform such reasonable maintenance under this section, as City considers necessary. If Lessee does not undertake such maintenance within ten (10) days after receipt of written notice, City shall have the right to enter on the Leased Premises and perform the necessary maintenance, the cost of which shall be borne by Lessee. Other items of maintenance for which Lessee shall be solely responsible shall include, but not be limited to, the following:

(a) Janitorial services, providing janitorial supplies, window washing, rubbish and trash removal;

(b) Supply and replacement of light bulbs in and on all buildings (except lighting removed for causing obstructions or glare);

(c) Replacement of cracked or broken glass in all buildings;

(d) Cleaning of interior stoppages in interior plumbing fixtures and drain lines up to the first manhole or clean out outside of the exterior of the building where the stoppage occurred;

(e) Replacement of floor covering;

(f) Maintenance of all doors and door operating systems, including weather stripping and glass replacement;

(g) Painting, repairing and replacement of interior walls not resulting from structural failure;

(h) Landscaping and grass cutting services within the Leased Premises, including, but not limited to, repair or replacement of exterior building flood lights and planter lights;

(i) Repair or replacement of heating, air conditioning, ventilation, electrical, plumbing, or mechanical systems, or their respective components; and

(j) Maintenance of all aprons, ramps, and roadways that are constructed by Lessee.

Subject to the provisions of Section 5.05, on the last day of the term hereof, or on any earlier termination, Lessee shall surrender the Leased Premises to City in the same condition as received, except for fire and casualty, ordinary wear and tear, clean and free of debris.

6.03 **Trash and Waste Removal**: Lessee agrees to cause to be removed from the Leased Premises, at its own expense, all waste, garbage and rubbish, and agrees not to deposit same on the Leased Premises except temporarily in waste or garbage containers provided by Lessee at Lessee's expense. Lessee further agrees that Lessee will store all parts, supplies, and other materials on the interior of buildings located on the Leased Premises, provided, however, that any parts or supplies which must be kept outside because of volatility of the supply item or the size of the part will be kept out of view of the public traveling on public rights of way or other surrounding tenants by installation of fencing or other means of screening approved by the Director of Airports.

ARTICLE 7. USE OF AIRPORT

7.01 **Right to Use Airport:** Lessee and Lessee's employees, sublessees, and guests shall have the right to use that part of the Airport and its facilities not included within the Leased Premises in common with others authorized to do so. Such use shall be subject to any and all applicable federal, state or local laws, ordinances, statutes, rules, regulations, or orders of any governmental authority, lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.

7.02 **Vehicular Operations on the Airfield**: No vehicles of Lessee, its employees, customers or invitees will be allowed to operate on, or cross, the runways and taxiways and their respective safety areas of the Airport. When necessary, Airport Operations Control Center personnel will provide Lessee escorted access to and from the airfield area.

7.03 **Airport Security Rules and Regulations**: Lessee, its directors, officers, employees, and contractors shall comply with all federal and local Airport Security Regulations adopted by the City or the Department of Airports as such rules and regulations exist or may hereafter be amended.

7.04 **14 C.F.R. Part 77 Requirements**: Lessee agrees to comply with the notification and review requirements set forth in Part 77 of the Federal Aviation Regulations [14 CFR Part 77] in the event any future structure, antenna or building is planned for the Leased Premises, or in the event of any planned modification of any present or future building, antenna or structure located on the Leased Premises.

7.05 **Control of Structures**: Lessee shall not erect nor permit the erection of any structure or object, nor permit the growth of any tree on the Leased Premises which highest point is above a mean sea level elevation established by the FAA and City as a height limitation on such structures or objects. City reserves the right to enter upon the Leased Premises and to remove the offending structure or object and cut the offending tree at Lessee's expense.

7.06 **Aerial Approaches**: Lessee understands and agrees that the City has the right to take any action it considers necessary to protect the aerial approaches of the Airport against obstruction together with the right to prevent Lessee from erecting or permitting to be erected any building or other structure on or adjacent to the Airport which, in the opinion of the City, would limit the usefulness of the Airport or constitute a hazard to aircraft.

7.07 **Right of Over-flight**: There is hereby reserved to the City, for the use and benefit of the public, a right of flight for the passage of aircraft above the surface of the Leased Premises, together with the right to cause in said airspace such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air, using said airspace for landing at, taking off from or operating on the Airport.

ARTICLE 8. INSURANCE

8.01 **Lessee's Minimum Insurance Amounts:** Lessee shall obtain and maintain continuously in effect at all times during the Lease Term, at Lessee's sole expense, at least the following minimum insurance with a carrier or carriers licensed to do business in the State of Texas and satisfactory to the City:

(a) Property and Casualty Insurance insuring against loss or damage to Lessee's or a sublessee's improvements and any and all property being maintained or repaired by Lessee due to fire, lightning and all other perils included in standard extended coverage policies, and vandalism and malicious mischief, all in amounts of not less than one-hundred percent (100%) of replacement value; and

(b) Commercial General Liability Insurance against claims for bodily injury, death, or property damage occurring on, in or about the Leased Premises, or any other portion of the Airport, in at least the amount of $10,000,000.00 per individual, $10,000,000.00 per occurrence and $10,000,000.00 with respect to property, and the statutory limits with respect to worker's compensation. The Commercial General Liability Insurance shall name the City as an additional insured.

8.02 **Lessee's Coverage Primary:** All insurance herein required shall apply as primary and not in excess of or contributing with other insurance which the Lessee may carry. Insurance provided pursuant to Section 8.01 shall name the City as an additional insured or loss payee as the case may be and provide for a waiver of subrogation in favor of the City. The comprehensive general liability policy as provided in Paragraph 8.01(b) shall provide contractual liability coverage sufficiently broad so as to include the liability assumed by Lessee under this Agreement. The Lessee's insurance policies as required by this Agreement shall apply separately to Lessee and City as if separate policies had been issued to Lessee and City.

8.03 **Contents of General Liability Policy:** Lessee's Comprehensive General Liability policy shall protect City and Lessee against any and all liability to any person or persons whose property damage or personal injury arises out of or is in connection with the occupation, use, or condition of the Leased Premises or resulting from any injury or damage occurring on or about the roads, driveways or other public areas of the Leased Premises used by Lessees, its trustees, officers, employees, students, invitees, and contractors at the Airport, whether or not such damage or injury is the result of negligence of the Lessee or its officers, employees, representatives, invitees, licensees, contractors, agents, guests, or students.

8.04 **Cancellation; Certificates of Insurance:** Lessee's insurance as required by this Agreement shall not be subject to cancellation or material alteration until at least thirty (30) days written notice has been provided to the City. Lessee shall furnish to the City, annually, Certificates of Insurance showing City as an additional insured and evidencing that all of the herein-stated requirements have been met.

8.05 **City's Right to Purchase Insurance:** In the event such insurance as required by Section 8.01 above shall lapse, the City reserves the right to obtain such insurance at Lessee's expense. Upon demand from City, Lessee shall reimburse City for the full amount of the premium paid on Lessee's behalf.

8.06 **Effect of Sublease:** In the event the Leased Premises are subleased by Lessee in accordance with Article 11, Lessee shall not be relieved of the insurance obligations set forth herein.

ARTICLE 9. UTILITIES

Lessee shall be solely responsible for the payment of all electric, telephone, water, refuse, natural gas and other public utility services used on the Leased Premises.

ARTICLE 10. SIGNS

10.01 **Consent Required:** Except with the prior written consent of the Director of Airports, Lessee shall not erect, maintain or display any signs or any advertising at, or on, the exterior part of structures on the Leased Premises, or inside any buildings located on the Leased Premises so as to be visible through the window or exterior doors thereof.

10.02 **Removal on Termination:** Upon the termination of this Agreement, Lessee shall remove, obliterate or paint out, as the City may direct, any and all signs and advertising on the Leased Premises or elsewhere at the Airport, and in connection therewith shall restore the Leased Premises to the same condition as prior to the placement of any such signs or advertising. In the event that there is a failure by Lessee to so remove, obliterate or paint out each and every sign or advertising and so to restore the Leased Premises, the City may, at its option, perform the necessary work at the expense of Lessee, and the charge therefor shall be paid by Lessee to the City on demand. In certain circumstances, the City may elect to allow specific signs to remain as existing at the termination of this Agreement. Such signs shall be identified and agreed upon mutually, in writing, by Lessee and City, and approved by the City.

ARTICLE 11. SUBLEASING

At no time shall Lessee sublease any portion of the Leased Premises or otherwise assign its interests or obligations in this Lease Agreement without the written consent of the City. Any such assignment or attempted assignment shall be void. Provided, however, that the parties agree that the Lessee may sublease the Leased Premises to XCOR Aerospace, Inc.

ARTICLE 12. TAX LIENS

Lessee shall be solely responsible for the collection and payment of all applicable federal, state, and local taxes, including, but not limited to, sales, use, amusement, or excise tax required to be collected and paid over by Lessee to the appropriate taxing authority. Furthermore, Lessee shall be responsible for the payment of any applicable ad valorem taxes and any taxes on Lessee's personal property located on the Leased Premises. Lessee shall at no time permit the foreclosure of any tax liens to Lessee's leasehold interest in the Leased Premises or the buildings, fixtures, or other improvements located on the Leased Premises. The City shall have the right to pay such taxes due after Lessee's refusal to pay such taxes, and upon demand Lessee shall reimburse the City for the amount of taxes paid plus any penalties, interests, and attorney's fees incurred, subject to Lessee's right to challenge the validity of such taxes in whole or in part. In the event that Lessee is successful in any challenge regarding the payment of any tax, the City shall be subrogated to any recovery obtained by Lessee to the extent of the amount of taxes, interests, penalties, and attorneys fees previously paid by the City and not already reimbursed by Lessee.

ARTICLE 13. DEFAULT AND REMEDIES

13.01 **Default by Lessee:** The following shall be deemed to be events of default by Lessee under this Agreement:

(a) Lessee shall fail to pay when due any installment of rent or any other payment required pursuant to this Agreement;

(b) Lessee shall abandon any substantial portion of the Leased Premises;

(c) Lessee or any guarantor of Lessee's obligations hereunder shall file a petition or be adjudged bankrupt or insolvent under any applicable federal or state bankruptcy or insolvency law or admit that it cannot meet its financial obligations as they become due, or a receiver or trustee shall be appointed for all or substantially all of the assets of Lessee of any guarantor of Lessee's obligations hereunder;

(d) Lessee or any guarantor of Lessee's obligations hereunder shall make a transfer in fraud of creditors or shall make an assignment for the benefit of creditors;

(e) Lessee shall do or permit to be done any act which results in a lien being filed against the Leased Premises;

(f) The liquidation, termination, dissolution of Lessee or any guarantor of Lessee's obligations hereunder; or

(g) Lessee shall be in noncompliance with any other term, provision or covenant of this Agreement, other than those specified in subparts (a) through (f) above.

13.02 **No Remedy Exclusive:** No remedy herein conferred upon or reserved to the City or Lessee is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or hereafter existing under law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the City and Lessee to exercise any remedy reserved to it in this section, it shall not be necessary to give any notice, other than such notice as may be herein expressly required.

13.03 **No Waiver of Breach:** City's failure or delay in declaring the existence of an event of default by Lessee shall not be construed as a waiver thereof, nor shall it be construed so as to waive or to lessen the right of the City to insist upon the performance by Lessee of any term, covenant or condition hereof, or to exercise any rights given it on account of any such event of default. A waiver of any particular event of default shall not be deemed to be a waiver of the same, similar of any other subsequent event of default.

13.04 **Expeditious Action:** Notwithstanding any provision as to notice in this Agreement herein contained, if in City's reasonable judgment the continuance of any event of default by Lessee for the full period of the notice to cure the event of default will jeopardize the operation of the Airport or the rights of the City or the other Airport tenants, City may, without notice, elect to perform those acts in respect to which Lessee is in default. Lessee shall reimburse City for any reasonable and necessary costs incurred by the City pursuant to this section.

ARTICLE 14. TERMINATION BY LESSEE

14.01 Except for the payment by Lessee to City of rents or other amounts past due accrued but not yet due, Lessee shall have the right to terminate this Agreement in its entirety, and all rights and obligations ensuing therefrom immediately upon the occurrence of the following:

(a) The issuance of any order, rule or regulation of the Federal Aviation Administration, or its successor Federal Agency, or other competent government authority, Federal or State, or the issuance and execution of any judicial process by any court of competent jurisdiction, materially restricting for a period of at least sixty (60) days, the use of the airport for aeronautical purposes; provided that none of the foregoing is due to any fault of Lessee; or

(b) The material restriction of the City's operation of the Airport by action of the Federal Government, or any department or agency thereof, under its wartime or emergency powers, and the continuance thereof for a period of not less than sixty (60) days; provided, however, that without prejudice to the rights of Lessee to terminate as above provided, the City and Lessee may mutually agree to adjust fees and charges; or

(c) The material restriction of the operation of the Airport arising from City's failure to maintain and keep in repair the landing area of the Airport; or

(d) In the event the Lessee subleases the Leased Premises in accordance with Article 11 and the sublease is terminated by the sublessee or the sublessee ceases operations at the Leased Premises.

14.02 If Lessee terminates this Lease for any of the reasons set forth in (a) through (d) of Article 14, City shall promptly repay Lessee any rent previously paid by Lessee attributable to the period following the date of such termination.

ARTICLE 15. MISCELLANEOUS PROVISIONS

15.01 **Quiet Enjoyment:** Upon the performance of the covenants and agreements on the part of the Lessee to be performed hereunder, the Lessee shall peaceable have and enjoy the Leased Premises, appurtenances, facilities, licenses and privileges granted in this Agreement.

15.02 **Force Majeure:** Neither the City nor Lessee shall be deemed in violation of this Agreement if it is prevented from performing any of its obligations hereunder except the obligation to pay rent by reason of strikes, boycotts, labor disputes, embargoes, shortages of materials, act of God, acts of the public enemy, act of superior governmental authority, weather conditions, floods, riots, rebellions, acts of sabotage or any other circumstances for which it is not responsible or which are not in its control.

15.03 **Independent Contractor:** It is expressly understood and agreed that Lessee shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant or employee of the City; that Lessee shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors; that the doctrine of respondeat superior shall not apply as between City and Lessee, its officers, agents, employees, contractors and subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between City and Lessee. No person performing any of the work and services described hereunder shall be considered an officer, agent, servant or employee of the City. Further, it is specifically understood and agreed that nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. Lessee shall be an independent contractor under this Agreement and shall assume all the rights, obligations and liabilities, applicable to it as such independent contractor hereunder and any provisions in this Agreement which may appear to give City the right to direct Lessee as to details of doing the work herein covered or to exercise a measure of control over the work shall be deemed to mean that Lessee shall follow the desires of City in the results of the work only. The City does not have the power to direct the order in which the work is done. The City shall not have the right to control the means, methods or details of the Lessee's work.

15.04 **Inspection by City:** City may enter upon the Leased Premises at any reasonable time for any purpose necessary, incidental to or connected with the performance of City's obligations hereunder, or in the exercise of its governmental functions, for fire protection or security purposes, or for inspecting or maintaining the Leased Premises, or doing any and all things City is obligated to do, or which may be deemed by City necessary or desirable for the proper conduct and operation of the Airport or the protection of City's interests.

15.05 **On-Site Representatives:** Lessee shall select and appoint a representative or representatives for its operations at the Airport. The representatives shall be qualified and experienced, and vested with the full power and authority to act in the name of the Lessee with respect to the method, manner and conduct of the operation of Lessee to be performed under this Agreement. City's on-site representative shall be the City's Director of Airports.

15.06 **Conformance with Rules and Regulations**: The use of the Airport by Lessee shall be subject to any and all rules, regulations and ordinances which are now in force or which may be hereafter adopted by the City with respect to the operation and use of the Airport, but no such rules, regulations, or ordinances shall increase the Base Rent or Additional Rent payable by Lessee under this Lease or otherwise materially and adversely affect Lessee's tenure of the Leased Premises under this Lease. Furthermore, this Agreement and Lessee's use of the Airport shall be subject to any and all applicable laws, ordinances, resolutions, statutes, rules, regulations or orders of any Federal, State or local governmental authority lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.

15.07 **Licenses and Permits**: Lessee hereby agrees that it shall, at its own expense and cost, procure and obtain all lawfully required licenses and permits, certificates and other authorizations required by any governmental authority, in connection with or covering the operations or activities permitted to be performed by it under the provisions of this Agreement.

15.08 **Notices**: Notices provided for in this Agreement shall be either hand delivered or sent by certified mail, return receipt requested, postage prepaid, and properly addressed as follows:

If to City:	Director of Airports P. O. Box 60305 9506 LaForce Boulevard Midland, Texas 79711
With Copy To:	City Manager P. O. Box 1152 300 North Loraine Midland, Texas 79702
If to Lessee:	Chairman Midland Development Corporation 109 N. Main (2nd Floor) Midland, Texas 79701

The parties may change the representative or address for delivery of notices from time to time by sending written notices to the other party. All notices shall be in writing and effective only upon actual receipt.

15.09 **Governing Law and Venue**: This Agreement shall be governed by the laws of the State of Texas. All performance and payment made pursuant to this Agreement shall be deemed to have occurred in Midland County, Texas. Exclusive venue for any claims, suits or any other action arising from or connected in any way to this Agreement or the performance of this Agreement shall be in Midland County, Texas. The obligations and undertakings of each of the parties to this Agreement shall be deemed to have occurred in Midland County, Texas.

15.10 **Severability**: If any provision of this Agreement is invalid or unenforceable, this Agreement shall be considered severable as to such provision, and the remainder of this Agreement shall remain valid and binding as though such invalid or unenforceable provisions were not included herein.

15.11 **Captions**: Section headings are inserted herein only as a matter of convenience and for reference, and in no way defines, limits or describes the scope or intent to any provision herein.

15.12 **Use of Language**: Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular shall be held to include the plural, unless the context otherwise requires.

15.13 **Counterparts**: This Agreement may be executed in multiple counterparts, each of which shall be deemed as original, and all of which constitute but one and the same instrument.

15.14 **Maintenance of the Airport**: City agrees to maintain and keep in repair the landing area of the Airport (including, but not limited to, runways, taxiways, landing lights, signals, signs and other conveniences for the takeoff, flying and landing of aircraft) and to maintain the Airport as a commercial airport; provided, however, if City decides to relocate the Airport, City may cancel this Agreement by providing Lessee notice of termination not later than 180 days prior to the date of termination. If City gives notice to Lessee of cancellation of the Agreement because of a planned relocation of the Airport, and the Airport continues to exist and remain in operation at its present location after the effective date of the termination, then this Agreement shall continue as a month-to-month tenancy.

15.15 **Development of the Airport**: Future development, changes, alterations, modifications or improvement to the Airport shall be at the sole discretion of the City, subject only to such notification to Lessee that the Federal Aviation Administration may dictate. The City will strive not to hinder the Lessee's operations in carrying out the provisions of this paragraph.

15.16 **Subordination to Federal Agreements**: This Agreement shall be subordinate to the provisions and requirements of any existing or future agreement between the City and the United States, relative to the development, operation or maintenance of the Airport.

15.17 **No Exclusivity on Aeronautical Services**: Nothing herein contained shall be construed to grant or authorize the granting of the exclusive right to provide aeronautical services to the public as prohibited by Section 308(a) of the Federal Aviation Act of 1958, as amended.

15.18 **Discrimination Prohibited**: The Lessee, for itself, its trustees, officers, legal representatives, successors-in-interest and assigns, as a part of the consideration hereof, agrees (1) that no person on the grounds of race, color, sex, national origin, veteran status or disability shall be excluded from participation in, denied the benefits of or be otherwise subjected to discrimination in the use of the Leased Premises; (2) that in the construction of any improvements on, over or under the Leased Premises and the furnishing of services thereon, no person on the grounds of race, sex, color, national origin, or disability shall be excluded from participation in, denied the benefits of or otherwise be subjected to discrimination; (3) that the Lessee shall use the Leased Premises and the Airport in compliance with all other requirements imposed by, or pursuant to, Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, office of the Secretary, Part 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said regulations may be amended. In the event of breach of any of the above nondiscrimination covenants, the City shall have the right to terminate this Agreement and to re-enter and repossess the Leased Premises and the improvements thereon, and hold the same as if said Agreement were terminated by its own term pursuant to Section 2.01, above.

15.19 **Affirmative Action Program**: Lessee assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, to ensure that no person shall on the grounds of race, creed, color, national origin, sex or disability be excluded from participating in any employment activities covered in 14 CFR Part 152, Subpart E. Lessee assures that no person shall be excluded on these grounds from participating in or receiving the services or benefits of any program or activity covered by this Agreement.

15.20 **Entire Agreement**: This Agreement embodies the entire agreement between the City and Lessee, and supersedes all prior agreements and understandings, whether written or oral, and all contemporaneous oral agreements and understandings relating to the subject matter hereof. This Agreement shall not be changed, modified, discharged or extended, except by written instrument duly executed by City and Lessee. The parties agree that no representations or warranties shall be binding upon either party unless expressed in writing in the aforesaid Agreement.

15.21 **Sovereign Immunity**: By executing this Agreement the City is not waiving its right of sovereign immunity. The City is retaining its immunity from suit. The City is not granting consent to be sued by legislative resolution or action.

THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.

15.22 **Third-Party Beneficiary**: The City's approval of this Agreement does not create a third party beneficiary. There is no third party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third party beneficiary or other rights hereunder.

15.23 **Notice of Alleged Breach**: **As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Agreement, Lessee or its legal representative, shall give the City Manager, or any other reasonable official of the City, notice in writing (consisting of one original and seven copies of notice attached to a copy of this agreement) of such damages, duly verified, within one hundred and twenty (120) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which the Lessee will settle, the physical and mailing addresses of Lessee at the time and date the claim was presented and the physical and mailing addresses of Lessee for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom the Lessee relies to establish its claim; and a failure to so notify the City Manager within the time and manner provided herein shall exonerate, excuse and except the City from any liability whatsoever. The City is under no obligation to provide notice to Lessee that Lessee's notice is insufficient. City reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.**

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, Lessee's failure to comply with the requirements herein shall perpetually bar Lessee's claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless if City has actual or constructive notice or knowledge of said claim or alleged damages. Lessee agrees that the requirements of this entire agreement are reasonable.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be legally executed in duplicate this __________ day of ______________________, 2012.

THE CITY OF MIDLAND, TEXAS

W. Wesley Perry, Mayor

ATTEST:

Amy Turner, City Secretary

APPROVED AS TO CONTENT
AND COMPLETENESS:

Marv Esterly, Director of Airports

APPROVED AS TO FORM:

Keith Stretcher, City Attorney

MIDLAND DEVELOPMENT CORPORATION

Laura Roman, Chairman

ATTEST:

Robert Rendall, Secretary

L:\Contracts\Airport\2012\MDC Hangar Agreement.Doc


Pilot Ave
ACCESS ROAD
CITY
Perma Sand
12058 S.F.
N 41°1'16" E
848.60'
1048.17'
RAILROAD SPUR AND UTILITY EASEMENT
N 41°1'16" E
660.50'
860.08'
MDC OPTION
P.S. 2
0.589 Acres
25636 S.F.
513.86'
130.00'
Perma Sand
12793 S.F.
152.3'
197.20'
255.74'
349.89'
285.61'
TRACT 4-B
1.432 Acres
62,371 S.F.
AREA
TRACT 4-A
1.752 Acres
76,309 S.F.
218.09'
120.0'
260.6'
218.09'
Hangar S-11A
39442 S.F.
(City Owned)
224.80'
151.35'
151.5'
Hangar S-11B
18180 S.F.
Sewer Plant Tract
1.924 Acres
83792 S.F.
145.00'
349.89'
25.88'
260.6'
379.61'
S 41°01'16" W
755.45'
56°02'06" W
233.41'
99.98'
P
120.14'
1.799 Acres
78373 S.F.
217.46'
134.91'
© 2012 Google
260.43'
25.46'
Google earth
231 ft
Imagery Date: 6/17/2011
1995
31°55'52.71" N 102°12'29.76" W elev 2859 ft
Eye alt 3862 ft

City Council Agenda

Approved for Agenda:
thudson
City Manager's Office

MEETING DATE: 7/9/2012

TO: City Council / City Manager

FROM: Marv Esterly, Director of Airports

SUBJECT: Consider a resolution authorizing the execution of Commercial Land Lease Agreement between XCOR Aerospace and the City of Midland, Texas

---

Purpose:

Consider a resolution authorizing the execution of CommercialLand Lease Agreement for a 22,500 sq. ft. land tract located within Tract G, Midland County, Section 5, Block 40, T2S, T&P Ry. Co. Survey, between XCOR Aerospace and the City of Midland, Texas.

Recommended City Council Action

☒ Approve ☐ Deny ☐ Directional / Informational

Fiscal Impact:

Annual Rental of $1,800.00

Discussion:

XCOR Aerospace is requesting a Land Lease Agreement leasing a 22,500 sq. ft. tract of land located adjacent to a WWII bunker at Midland International Airport. The area will be utilzed for testing reusable rocket engines as part of their R&D facility.

The term of this Agreememt shall commence on January 1, 2013, and terminate on December 31, 2022, (the"Lease Term") unless terminated earlier pursuant to the provisions of the Agreement. During the Lease Term, Lessee has agreed to pay $150.00 monthly to the City of Midland for rental of the Leased Premises. In addition, provisions have been made for annual rental adjustments.

RESOLUTION NO.

RESOLUTION AUTHORIZING THE EXECUTION OF A LEASE AGREEMENT BETWEEN THE CITY OF MIDLAND AND XCOR AEROSPACE, INC. REGARDING REAL PROPERTY LOCATED AT MIDLAND INTERNATIONAL AIRPORT AND DESCRIBED AS APPROXIMATELY 22,500 SQUARE FEET OF BUNKER SPACE

WHEREAS, the City Council finds it to be in the public interest to authorize the execution of a lease agreement with XCOR Aerospace, Inc., to lease land from the City at Midland International Airport; and

WHEREAS, the Director of Airports and City Manager recommend that the Council approve this lease at Midland International Airport;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:

THAT the Mayor and City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, said lease agreement with XCOR Aerospace, Inc. Said agreement shall be in a form substantially similar to that of Exhibit "A", which is attached hereto and incorporated herein for all legal purposes.

On motion of Council member _____________, seconded by Council member _____________, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the _______ day of _____________, A.D., 2012 by the following vote:

Council members voting "AYE":

Council members voting "NAY":

____
W. Wesley Perry, Mayor

ATTEST:

____
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

____
Courtney Sharp, City Manager

APPROVED AS TO FORM:

____
Keith Stretcher, City Attorney

APPROVED AS TO CONTENT
AND COMPLETENESS:

____
Marv Esterly, Director of Airports

MIDLAND INTERNATIONAL AIRPORT
LEASE AGREEMENT BETWEEN THE CITY OF MIDLAND
AND XCOR AEROSPACE, INC.

THIS LEASE AGREEMENT ("Agreement") is made and effective this 10th day of July, 2012, by and between the CITY OF MIDLAND, TEXAS ("City") and XCOR AEROSPACE, INC. ("Lessee").

WHEREAS, Lessee desires to lease certain City-owned facilities and land located at Midland International Airport ("Airport"); and

WHEREAS, the parties have agreed that said facilities and land shall be leased by the City to the Lessee upon terms and conditions as set forth herein;

NOW, THEREFORE, for and in consideration of the covenants and conditions herein stated, City and Lessee agree as follows:

ARTICLE I. GRANT OF LEASE

1.01 CONVEYANCE OF LEASED PREMISES

City hereby leases to Lessee and Lessee does hereby accept and lease 22,500 square feet of space ("Leased Premises") as shown on Exhibit "A", which is attached hereto and made a part hereof for all legal purposes.

1.02 EASEMENTS

Lessee is to have and to hold the Leased Premises, together with all rights, privileges, easements, and appurtenances belonging to or in any way connected with the Leased Premises and subject to such easements, rights-of-way, drill sites, or other rights or reservations affecting the Leased Premises.

1.03 ACCEPTANCE OF LEASED PREMISES

Lessee accepts the Leased Premises, and any improvements thereto, including all fixtures, apparatus and equipment located therein "AS IS" WITH ANY AND ALL LATENT AND PATENT DEFECTS AND THAT THERE IS NO WARRANTY, EXPRESS OR IMPLIED BEING MADE BY THE CITY THAT THE LEASED PREMISES ARE FIT FOR A PARTICULAR PURPOSE. LESSEE ACKNOWLEDGES THAT LESSEE IS NOT RELYING UPON ANY REPRESENTATION MADE BY THE CITY WITH RESPECT TO THE CONDITION OF THE LEASED PREMISES, BUT IS RELYING UPON LESSEE'S EXAMINATION OF THE LEASED PREMISES. LESSEE ALSO RECOGNIZES BY EXECUTING THIS AGREEMENT, THAT THE LESSEE IS AGREEING TO LEASE THE LEASED PREMISES "AS IS" AND THAT LESSEE AGREES TO

MAKE ITS OWN APPRAISAL OF THE LEASED PREMISES AND TO ACCEPT THE RISK THAT LESSEE MAY BE WRONG. THE CITY GIVES NO ASSURANCES, EXPRESS OR IMPLIED CONCERNING THE VALUE OR CONDITION OF THE LEASED PREMISES. IN NO EVENT SHALL LESSEE HAVE A RIGHT TO RECOVER CONSEQUENTIAL DAMAGES. THEREFORE, THE LESSEE WILL TAKE THE LEASED PREMISES UNDER THE EXPRESS UNDERSTANDING THE LEASED PREMISES ARE ACCEPTED "AS IS" AND WITH ALL FAULTS.

ARTICLE II. TERM OF AGREEMENT

2.01 LEASE TERM

The term of this Agreement ("Lease Term") shall commence on January 1, 2013 and terminate on December 31, 2022, unless terminated earlier under the provisions hereof.

2.02 HOLDOVER BY LESSEE

If Lessee holds over or remains in possession of the Leased Premises after the termination of this Agreement in the absence of a new lease agreement between the City and Lessee, such continuation beyond the date of termination, or the collection or acceptance of rent, fees and/or charges by the City, shall not be construed as a renewal or extension of this Agreement, but shall be construed solely as creating a tenancy from month-to-month and not for any other term whatever. During the term of such tenancy from month-to-month, Lessee shall pay to City the fees and charges herein reserved, and each party shall be bound by and comply with all the relevant terms and provision of this Agreement. The City may terminate said tenancy from month-to-month by giving Lessee at least thirty (30) days' written notice thereof.

ARTICLE III. RENT

3.01 AMOUNT OF RENT

Lessee agrees to pay rent to the City for the use of the Leased Premises in the following amounts:

$1,800.00 annually during the Lease Term, payable in monthly installments of $150.00.

Each monthly installment shall be due and payable in advance on or before the first day of each month during the Lease Term.

Annual Consumer Price Index Adjustment: It is agreed and understood that provision must be made herein for an adjustment of rentals annually. Therefore, as of the date of this Agreement, it is further agreed and understood that the minimum annual rental shall be $1,800.00. Thereafter, as of January of each following year, the minimum annual rent shall be increased only in the same proportion or percentage by which the cost of living has been increased as reflected by the Consumer Price Index for All Items, as maintained by the United States Government's Department of Labor, Bureau of Labor Statistics for the Dallas/Fort Worth SMA; such increase being measured by comparison with such cost-of-living indices at the end of the immediately preceding 12-month period of this lease, as compared with the indices at the commencement of the immediately preceding 12-month period of this lease. Provided, however, that any such rental increase shall not exceed five percent (5%) above the prior year's rent. In no event shall the monthly payment due be less than $150.00.

3.02 DELIVERY OF RENT

All rent payments shall be made to the Department of Airports, ATTN: Director of Airports, P. O. Box 60305, Midland, Texas 79711.

3.03 LATE RENT CHARGE

Lessee agrees that in the event rent payments are not received by the City on or before the 10th day of the month for which such rent is due, Lessee shall pay to the City a late charge of five percent (5%) of the amount due to City for that month. Rent amounts due and unpaid for more than thirty (30) days shall accrue interest at an annual rate of six percent (6%) or the maximum amount permitted by law, whichever is less. Payments due the City shall be received by the City only on normal business days of Monday through Friday, and shall not be considered late if the due date falls on a weekend or a legal City holiday. Payment by Lessee and acceptance by City of a delinquent charge shall not be construed as a waiver or forfeiture of any other rights or remedies of the City contained elsewhere in this Agreement, or as provided by law.

For the purposes of this Section, the date payments are received by the City shall be the U.S. Postal Service cancellation date on the envelope transmitting the payment, or the date such payment is received by an authorized representative of the City if the payment is hand delivered. In the event of a dispute as to the amount to be paid, the City may accept without prejudice the sum tendered and, if a deficiency is determined, the foregoing delinquency charge shall apply only to such deficiency. The City may waive, for good cause, any delinquency charge upon written application of Lessee.

ARTICLE IV. USE OF LEASED PREMISES

4.01 PERMITTED USES

The Leased Premises shall be used for testing operations in connection with Lessee's rocket engine and commercial space transportation business and such other uses as may be incidental thereto. Lessee shall have the right to conduct rocket propulsion testing on the Leased Premises, including access to and the use of Bunker #2, as indicated on Exhibit "A". Lessee may use the Leased Premises for other such uses related to the development and testing of rocket engines and rocket propulsion systems for commercial space flight and human transport applications.

4.02 PROHIBITED USE OF LEASED PREMISES

In addition to any prohibited or restricted use of the Airport or Leased Premises as established by federal, state or local laws, regulations or ordinances, the following are specifically prohibited:

A. The above or below ground storage of any hazardous materials or hazardous waste, either solid, liquid or gaseous, except in accordance with applicable federal, state and local laws, ordinance, rules and regulations.

B. Any use or activity which would cause or constitute a hazardous condition for aircraft operating at the Airport.

C. Use of any part of the Leased Premises for airline or aircraft passenger loading and unloading.

D. Use of any area not a part of the Leased Premises for the purpose of parking or storage of materials, vehicles or other equipment, unless authorized in writing by the Director of Airports.

4.03 INGRESS AND EGRESS

Lessee, its officers, employees, customers, patrons, guests or invitees, and its suppliers of materials or services shall have the right of ingress and egress to the Leased Premises over designated Airport roadways, subject to such rules and regulations as may be established from time to time by the City or by law. Lessee shall prevent the obstruction of ingress and egress to the Leased Premises by any vehicle owned or used by Lessee, its officers, employees or suppliers.

ARTICLE V. OBLIGATION OF LESSEE REGARDING IMPROVEMENTS

5.01 CONSTRUCTION OF IMPROVEMENTS

Lessee shall make no alterations, additions, or improvements in or to the Leased Premises without obtaining prior written approval from the City Manager. Any such repairs and alterations shall be at the sole cost of the Lessee. In the installation and erection of such alterations, additions and improvements, the Lessee shall take care to avoid interference with the operation of the Airport, and shall further take care to avoid interference with the operations of any other Airport tenant. At no time shall Lessee permit the installation of any permanent, unshielded light or illumination source causing glare as viewed from any street, adjacent properties or from operating aircraft.

5.02 APPROVAL OF CONSTRUCTION PLANS

A. SUBMITTAL OF PLANS

At any time during the term of this Agreement, and prior to the commencement of any construction, alteration, or changes to the Leased Premises, Lessee shall submit to the City scaled plans and specifications of such construction, alterations, or changes. Lessee shall be responsible for ascertaining the requirements of state and local government agencies with regard to permit and application procedures necessary to obtain the final approvals and building permits prior to the beginning of any construction on the Leased Premises. Lessee shall not commence any construction until it has received prior written approval from the City. Upon completion of construction, Lessee shall provide City, at Lessee's cost, one set of as-built drawings for all electrical, communicative, and mechanical system included in any construction.

B. NO LIABILITY FOR DESIGN

The approval by the City of any plans and specifications applies only to the conformity of such plans and specifications to the general architectural plan for the Leased Premises. The City's approval does not constitute approval of the architectural or engineering design, and the City, by approving such plans and specifications, assumes no liability or responsibility for the architectural or engineering design or for any defect in any building or improvement constructed from the plans or specifications. Construction of the contemplated improvements shall be in accordance with the plans presented to and approved by the City. All construction work shall be subject to inspection by an engineer employed by the City or an inspector employed by the City, or both, to determine that such work conforms to the plans and specifications approved by the City.

5.03 CONTRACTOR'S INSURANCE; BONDS

At any time construction activities are undertaken on the Leased Premises, Lessee shall require that its contractor or contractors keep in force insurance issued by a responsible insurance company or companies authorized to conduct business in the State of Texas insuring the improvements during construction under Completed Builder's All Risk Insurance, including fire, extended coverage, vandalism and malicious mischief, in an amount equal to the full insurable value of such construction as the same progresses in order to insure continuity of construction and ultimate completion despite damage or destruction suffered during the course thereof. **ALL INSURANCE SHALL NAME THE CITY AS ADDITIONAL INSURED AND CO-PAYEE AND PROVIDE FOR A WAIVER OF SUBROGATION IN FAVOR OF THE CITY.** Furthermore, Lessee shall require all contractors performing construction work on the Leased Premises to provide payment and performance bonds issued by a responsible bonding company or companies authorized to conduct business in the State of Texas for the full amount of the cost of the construction to be performed in forms which are enforceable under the applicable provisions of the Tex. Gov't Code Ch. 2253, as amended. The foregoing shall be made a part of any contract between Lessee and its contractor or contractors. In the event Lessee does any construction work itself, it shall comply with the all-risk insurance provisions hereof.

5.04 COMPLIANCE WITH BUILDING CODES

All improvements made to the Leased Premises by Lessee shall comply with all applicable City Building Codes in effect at the time construction commences as well as all applicable federal aviation regulations, if any.

5.05 ENCUMBRANCE OF LEASEHOLD ESTATE

Lessee shall at no time encumber or attempt to encumber its leasehold interest in the Leased Premises by deed of trust, mortgage, security agreement or other security interest.

5.06 MECHANIC'S LIENS

Lessee shall not cause or permit any mechanic's liens or other liens to be filed against the Leased Premises or against Lessee's leasehold interest in any buildings or improvements on the Leased Premises by reason of any work, labor, services, or materials supplied or claimed to have been supplied to Lessee or to anyone holding the Leased Premises or any part of them through or under Lessee. If a mechanic's lien or materialman's lien is recorded against the Leased Premises or any buildings or improvements on the Leased Premises, Lessee shall either cause the same to be removed or, if Lessee in good faith desires to contest the lien, take timely action to do so, at Lessee's sole expense. If Lessee contests the lien, Lessee agrees to indemnify City and hold City harmless from all liability for damages occasioned by the lien or the lien contest and shall, in the event of a judgment of foreclosure on the lien, cause the lien to be discharged and removed prior to the execution of the judgment.

5.07 OWNERSHIP OF BUILDINGS, IMPROVEMENTS AND FIXTURES

Any and all buildings, improvements (including, but not limited to all aprons, taxiways and roadways), additions, alterations, and fixtures, except furniture and trade fixtures, existing or constructed, placed, or maintained on any part of the Leased Premises during the Lease Term by City, Lessee, or any sublessee shall be considered part of the real property of the Leased Premises, shall remain on the Leased Premises, and shall not be removed by Lessee or any sublessee. All improvements, additions, alterations, and fixtures made to the Leased Premises by Lessee, shall become the sole property of City upon completion and acceptance by City of such improvements, subject to the Leasehold granted by this Agreement.

5.08 RIGHT TO REMOVE IMPROVEMENTS

Lessee shall have the right at any time during Lessee's occupancy of the Leased Premises to remove any and all machinery, or equipment, owned or placed by Lessee or its licensees, in, under, or on the Leased Premises, or acquired by Lessee, whether before or during the Lease Term; however, prior to the termination of the Lease Term, Lessee shall repair any damage to any buildings or improvements on the Leased Premises resulting from their removal. Any such items which are not removed by the termination date of this Agreement shall become the property of City as of that date.

ARTICLE VI. MAINTENANCE, REPAIR AND RESTORATION OF LEASED PREMISES

6.01 MAINTENANCE OF LEASED PREMISES

The Lessee shall maintain the Leased Premises, and all other areas leased to the Lessee for its exclusive use, in good condition. Lessee shall further maintain, repair and replace all or any part of the improvements on the Leased Premises, which may be damaged or destroyed by use, the elements, wear, weather, deterioration or the acts or omissions of the Lessee, its sublessees, employees, agents, representatives, contractors, customers, guests or invitees. Lessee is responsible for, and shall perform at its own cost, all such repairs and replacements.

6.02 RESTORATION OF LEASED PREMISES

A. TOTAL DESTRUCTION

If the Leased Premises are entirely destroyed by fire or any other cause, the City shall have the option to either (1) terminate this Agreement, or (2) to rebuild the Leased Premises as expeditiously as possible, and to treat this Agreement as continuing in effect. If Lessee has not received written notice within sixty (60) days after the date of such destruction from City of which alternative it elects, Lessee shall have the right to terminate this Agreement. In the event the City elects to rebuild the Leased Premises and to treat this Agreement as continuing in effect, the City is not obligated to provide to Lessee reasonable temporary facilities during the period of reconstruction for Lessee to conduct the permitted uses hereunder, but shall abate the amount due from Lessee for the period in which Lessee cannot use the Leased Premises. In the event City elects to terminate this Agreement, Lessee's obligation to pay rent hereunder shall terminate as of the date of such destruction and any rent attributable to dates after termination shall be refunded. The amount and extent of any repairs to be made by the City hereunder are in the City's sole discretion.

B. PARTIAL DESTRUCTION

In the event that any part of the Leased Premises is so damaged by fire or other cause as to make part unusable for the purposes set forth herein, then City may repair any such damage as expeditiously as possible and without cost to Lessee and may make reasonable efforts to permit Lessee to use habitable parts of the Leased Premises as fully as possible during the period of reconstruction. Lessee's obligation to pay rent hereunder shall be adjusted on a reasonable basis from the time of such damage until the time that the Leased Premises is restored so as to be practicably usable. The amount and extent of any repairs to be made by the City hereunder are in the City's sole discretion.

C. PARTIAL DESTRUCTION WITH FULL USE POSSIBLE

In the event that any part of the Leased Premises is partially damaged by fire or other casualty beyond the control of Lessee so as to require repair even though it is usable for the purposes set forth herein, above, City may repair any such damage as expeditiously as possible and without cost to Lessee; provided, however, this Agreement shall remain in full force and effect without an abatement or adjustment in rent. The amount and extent of any repairs to be made by the City hereunder are in the City's sole discretion.

6.04 WASTE REMOVAL

Lessee agrees to cause to be removed from the Airport, at its own expense, all waste, garbage and rubbish generated by Lessee, and agrees not to deposit same on the Leased Premises except in properly marked and located trash collection receptacles.

ARTICLE VII. ACCESS TO AND USE OF AIRPORT

7.01 VEHICULAR OPERATIONS ON THE AIRFIELD

No vehicles of Lessee, its employees, customers or invitees will be allowed to operate on the Air Operations Areas (AOA) of the Airport without written permission of the Director of Airports for the specific vehicles desired. The insurance required by Article X below, shall protect the City from any and all liability created by Lessee's use of motor vehicles in the Aircraft Operating Areas of the Airport. Vehicles shall be further equipped with amber rotating roof-mounted beacon lights and shall clearly display some form of signage, logos, decals, or other identification which readily determines the entity who operates the vehicles. Lessee and all vehicle operators shall obey the rules and regulations of the Airport and Federal Aviation Administration concerning the use and operation of vehicles on the Aircraft Operating Areas.

7.02 AIRPORT CERTIFICATION RULES

Lessee shall comply with such rules that pertain to its operation on the Airport under the Airport Certification Rules and Federal Aviation Regulations, Part 139.

7.03 PART 77 REQUIREMENTS

Lessee agrees to comply with the notification and review requirements covered in Part 77 of the Federal Aviation Regulations in the event any future structure, sign, antenna, or building is planned for the Leased Premises, or in the event of any planned modification or alteration of any present or future building, sign, antenna, or structure situated on the Leased Premises. No structure, antenna, or sign may be erected on the Leased Premises without the prior written approval of the City.

7.04 SECURITY REQUIREMENTS

Lessee shall sign an agreement for security identification badges with the Department of Airports for Lessee operations on the Air Operations Area. Lessee shall obtain, and its employees shall display at all times when inside the Air Operations Areas and other marked security areas at the Airport, Airport-issued security identification badges for each of its employees. Lessee and its employees shall observe all Airport and Transportation Security Administration (TSA) rules and regulations pertaining to airport security. Lessee agrees to indemnify and hold harmless the City, its officers and employees, from any charges, fines or penalties that may be assessed or levied by the TSA, or any other department or agency of the United States or of the State of Texas by reason of failure of Lessee, its officers, employees, agents, representatives, customers, or contractors to comply with any TSA security requirement.

7.05 LICENSES AND PERMITS

Lessee hereby agrees that it shall, at its own expense and cost, procure and obtain all licenses and permits lawfully required by any governmental authority, in connection with or covering the operations or activities allowed to be performed by it under the provisions of this Agreement.

7.06 COMPLIANCE WITH GOVERNMENTAL REQUIREMENTS

The Lessee shall comply with all federal, state and local laws and ordinances, governmental rules, regulations and orders applicable to the operation of the Airport or to the Lessee's operations at the Airport. The Lessee shall, after receipt of any notice, warning, summons or other legal process for the enforcement of any such laws, ordinances, rules, regulations or orders, deliver a true copy of the same to the Director of Airports. The Lessee shall indemnify and hold the City and its employees harmless from and against all claims, actions, damages, liabilities, fines, penalties, costs and expenses suffered or incurred by the City as a result of the Lessee's noncompliance with such laws, ordinances, resolutions, rules, orders or regulations.

ARTICLE VIII. GENERAL LEASE CLAUSES

8.01 RELEASE

NOTWITHSTANDING ANY OTHER PROVISIONS, LESSEE HEREBY RELEASES, ACQUITS, RELINQUISHES AND FOREVER DISCHARGES CITY, CITY'S EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS, CLAIMS, DAMAGES, OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH LESSEE HAS OR MIGHT HAVE IN THE FUTURE, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, QUANTUM MERUIT, CLAIMS UNDER THE DUE PROCESS AND TAKINGS CLAUSES OF THE TEXAS AND UNITED STATES CONSTITUTIONS, TORT CLAIMS, OR CITY'S NEGLIGENCE.

8.02 INDEMNITY

LESSEE SHALL INDEMNIFY AND HOLD HARMLESS AND DEFEND CITY AND ALL OF CITY'S OFFICERS, AGENTS AND EMPLOYEES FROM ALL SUITS, ACTIONS, CLAIMS, DAMAGES, PERSONAL INJURIES, LOSSES, PROPERTY DAMAGE AND EXPENSES OF ANY CHARACTER WHATSOEVER, INCLUDING REASONABLE ATTORNEY'S FEES, BROUGHT FOR OR ON ACCOUNT OF ANY INJURIES OR DAMAGES RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS OR PROPERTY, ON ACCOUNT OF ANY NEGLIGENT ACT OF LESSEE, its agents or employees, or any subcontractor, arising out of, or resulting from, Lessee's use of, or activities on, the Leased Premises, and Lessee will be required to pay any judgment with costs which may be obtained against City or any of its officers, agents or employees, including reasonable attorney's fees.

8.03 ATTORNEY'S FEES

BY EXECUTING THIS AGREEMENT, LESSEE AGREES TO WAIVE AND DOES HEREBY KNOWINGLY, CONCLUSIVELY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY CLAIM IT HAS OR MAY HAVE IN THE FUTURE AGAINST THE CITY, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THIS AGREEMENT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THIS AGREEMENT. LESSEE SPECIFICALLY AGREES THAT IF THE LESSEE BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS AGREEMENT, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET SEQ., AS AMENDED), OR CHAPTER 271 OF THE TEXAS LOCAL GOVERNMENT CODE, THE LESSEE AGREES TO ABANDON, WAIVE AND RELINQUISH

ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH LESSEE MIGHT OTHERWISE BE ENTITLED.

LESSEE AGREES THAT THIS IS THE VOLUNTARY AND INTENTIONAL RELINQUISHMENT AND ABANDONMENT OF A PRESENTLY EXISTING KNOWN RIGHT. LESSEE ACKNOWLEDGES THAT IT UNDERSTANDS ALL TERMS AND CONDITIONS OF THE AGREEMENT. THE LESSEE FURTHER ACKNOWLEDGES AND AGREES THAT THERE WAS AND IS NO DISPARITY OF BARGAINING POWER BETWEEN THE CITY AND THE LESSEE. THIS SECTION SHALL NOT BE CONSTRUED OR INTERPRETED AS A WAIVER OF SOVEREIGN IMMUNITY.

THE LESSEE AND CITY ARE RELYING ON THEIR OWN JUDGMENT. EACH PARTY HAD THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH LEGAL COUNSEL PRIOR TO ITS EXECUTION.

8.04 INDEPENDENT CONTRACTOR

It is expressly understood and agreed that Lessee shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant or employee of the City; that Lessee shall have exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors; that the doctrine of *respondeat superior* shall not apply as between City and Lessee, its officers, agents, employees, contractors and subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between City and Lessee. No person performing any of the work and services described hereunder by Lessee shall be considered an officer, agent, servant or employee of the City. Further, it is specifically understood and agreed that nothing in this contract is intended or shall be construed as creating a "Community or Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. Lessee shall be an independent contractor under this Agreement and shall assume all of the rights, obligations and liabilities applicable to it as such independent contractor hereunder and any provisions in this Agreement which may appear to give City the right to direct Lessee as to details of doing the work herein covered or to exercise a measure of control over the work shall be deemed to mean that Lessee shall follow the desires of City in the results of the work only. The City does not have the power to direct the order in which the work is done. The City shall not have the right to control the means, methods or details of the Lessee's work. Lessee shall assume exclusive responsibility for the work. Lessee is entirely free to do the work in its own way.

8.05 THIRD PARTY BENEFICIARY

The City's approval of this Agreement does not create a third party beneficiary. There is no third party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third party beneficiary or other rights hereunder.

8.06 TERMINATION WITHOUT CAUSE

The City shall have the right, at its sole option, to terminate this Agreement at any time, with or without cause, by giving at least 180 days' written notice to Lessee of City's election to so terminate.

The parties to this Agreement understand and agree that it is in City's sole discretion to cancel the Agreement during the term of the Agreement without penalty to the City. Neither party to this Agreement has any expectation nor has any party received any guarantees that this Agreement will not be terminated before the end of the Agreement term. The parties have bargained for the flexibility of terminating this Agreement upon tender of the requisite notice at any time during the term of the Agreement.

8.07 INSURANCE REQUIREMENTS

Lessee shall procure and maintain, in full force and effect during the term of this Agreement and any extension thereof, at its sole expense, a public liability insurance policy covering personal injury and property damage risks, including products liability, from a company authorized to do business in the State of Texas, with a minimum coverage of:

A. Commercial General Liability Insurance (including Contractual liability) against claims for bodily injury, death, or property damage occurring on, in or about the Leased Premises, or any other portion of the Airport, in at least the amount of \$10,000,000.00 per individual, \$10,000,000 per occurrence and \$10,000,000.00 with respect to property damage; the Commercial General Liability shall be on a per project aggregate, including completed operations, and shall be on an occurrence basis.

B. During any period of construction, excavation or demolition on the Leased Premises, a Builder's Risk Completed Value Policy with an all risk endorsement.

C. Automobile Liability Coverage on all motor vehicles owned and/or operated by Lessee or its employees on the Leased Premises or other Airport property in amounts of not less than \$2,000,000; provided, however, separate automobile coverage shall not be required if such coverage is provided under Lessee's comprehensive general liability policy.

All insurance **shall name the City as an additional insured and all insurance shall provide for a waiver of subrogation** as to the City, and shall further provide a broad form of contractual liability protection to include this Agreement between the City and Lessee. In addition, said policy shall provide that it will not be canceled or materially altered unless a thirty (30) day written notice of cancellation, material change or non-renewal has been served upon the City. In the event such policy of insurance is canceled, Lessee shall, prior to the effective date of such cancellation, procure other insurance in the amounts and in accordance with conditions set forth herein.

8.08 CERTIFICATE OF INSURANCE

Prior to the execution of this Agreement and for so long as this Agreement is in effect, Lessee shall provide the City a current certificate of insurance executed by the insurance carrier issuing said policy certifying that said insurance is in full force and effect, that all operations of Lessee are covered by such policy, that City is named as an additional insured and that there is a waiver of subrogation in favor of City. The Director of Airports shall not execute this Agreement until all appropriate certificates of insurance are received.

8.09 INSURANCE NOT LIMITATION ON INDEMNITY

The amount or amounts of all required policies shall not be deemed a limitation of the Lessee's agreement to indemnify and hold harmless the City, its officers and employees in the event Lessee or City, its officers or employees shall become liable in an amount in excess of the amount or amounts of such policies as a result of Lessee's sole negligence.

8.10 CITY'S RIGHT TO PURCHASE INSURANCE

In the event such insurance as required herein shall lapse, the City reserves the right to obtain such insurance at Lessee's expense. Upon demand from City, Lessee shall reimburse City for the full amount of the premium paid on Lessee's behalf or, at City's option, such amounts shall be added as amounts due City as rent.

8.11 ASSIGNMENT AND SUBLEASING

Lessee shall not, either directly or indirectly, sublease or assign, or attempt to sublease or assign any part of this Agreement or any interest, right or privilege herein, without the prior written consent of the City. Any such sublease or assignment is void at inception. The issue on whether or not to grant consent to an assignment or sublease is in the sole discretion of the City.

8.12 GOVERNING LAW AND VENUE

All performance and payment made pursuant to this Agreement shall be deemed to have occurred in Midland County, Texas. Exclusive venue for any claims, suits or any other action arising from or connected in any way to this Agreement or the performance of this Agreement shall be in Midland County, Texas. This Agreement shall be governed by the laws of the State of Texas. The obligations and undertakings of each of the parties to this Agreement shall be deemed to have occurred in Midland County, Texas.

8.13 SOVEREIGN IMMUNITY

By executing this contract the City is not waiving its right of sovereign immunity. The City is retaining its immunity from suit. The City is not granting consent to be sued by legislative resolution or action.

THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.

8.14 NOTICE OF ALLEGED BREACH; STATUTORY PREREQUISITES

As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Agreement, Lessee or its legal representative, shall give the City Manager, or any other reasonable official of the City, notice in writing (consisting of one original and seven copies of notice attached to a copy of this agreement) of such damages, duly verified, within one hundred and eighty (180) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which the Lessee will settle, the physical and mailing addresses of Lessee at the time and date the claim was presented and the physical and mailing addresses of Lessee for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom the Lessee relies to establish its claim; and a failure to so notify the City Manager within the time and manner provided herein shall exonerate, excuse and except the City from any liability whatsoever. The City is under no obligation to provide notice to Lessee that Lessee's notice is insufficient. City reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, Lessee's failure to comply with the requirements herein shall perpetually bar Lessee's claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless if City has actual or constructive notice or knowledge of said claim or alleged damages. Lessee agrees that the requirements of this entire agreement are reasonable.

8.15 PARTIES AGREEMENT

The parties hereby agree that this Agreement is supported by good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged.

ARTICLE IX. SIGNS

No signs shall be placed on the Leased Premises without the prior written approval of the City. Prior to installation, construction or placing of any such signs or advertising matter on the Leased Premises, the Lessee shall submit to the City drawings, sketches, design dimensions and type, number and character of the sign to obtain such approval. The approval of signs shall be within the sole discretion of the City.

ARTICLE X. DEFAULT AND REMEDIES

10.01 EVENTS OF DEFAULT

The following events shall constitute events of default of Lessee pursuant to this Agreement:

A. The failure of Lessee to pay at the time and place due any installment of rent or any other payment due to City by Lessee pursuant to this Lease;

B. The abandonment of the Leased Premises by Lessee;

C. The violation by Lessee of any other covenant, term or provision in this Agreement binding upon Lessee and the failure of Lessee to remedy such violation within a period of thirty (30) days after written notice thereof by City to Lessee;

D. Failure of a trustee in bankruptcy to affirm this Agreement within thirty (30) days after the filing of any voluntary petition by or against Lessee, or by or against any then owner of Lessee's estate and interest in this Agreement, under any provision of the United States Bankruptcy Code or any other similar law;

E. Any assignment by Lessee for the benefit of creditors; or

F. Any appointment of a receiver of the assets of Lessee.

10.02 REMEDIES

Upon the occurrence of any event of uncured default by Lessee, except a default relating to the filing of bankruptcy, City shall have the right, at its sole option, to terminate this Agreement at any time by giving at least thirty (30) days' written notice to Lessee of City's election to so terminate. Such termination shall be effective upon the expiration of thirty (30) days from the date such notice of such termination is given to Lessee. Upon such termination, City shall have the right immediately to re-enter and repossess the Leased Premises. Upon such termination, the rent for the entire stated term of this Lease, and all other indebtedness, if any, payable under the provisions hereof by Lessee to City, shall be and become immediately due and payable without notice to Lessee or anyone else, and without regard to whether possession of the Leased Premises shall have been surrendered to or taken by City, and Lessee agrees to pay the same to City at once, together with payment of all loss or damage which City shall have suffered by reason of such event or default. In the event the default arises from the filing of bankruptcy by Lessee, or the filing of an involuntary petition of bankruptcy by Lessee's creditors, City shall have the right to terminate this Agreement by providing at least thirty (30) days' notice to the bankruptcy trustee or the trustee in possession if said trustee has failed to ratify this Agreement within 45 days after filing of said bankruptcy petition.

10.03 REMEDIES NOT EXCLUSIVE

The remedies to which City may resort hereunder are cumulative and are not intended to be exclusive of any other remedies or means of a redress to which City may lawfully be entitled at any time. City may invoke any remedy allowed at law or in equity as if specific remedies were not provided for herein.

10.04 NO WAIVER OF BREACH

City's failure or delay in declaring the existence of an event of default by Lessee shall not be construed as a waiver thereof, nor shall it be construed so as to waive or to lessen the right of the City to insist upon the performance by Lessee of any term, covenant or condition hereof, or to exercise any rights given it on account of any such event of default. A waiver of any particular event of default shall not be deemed to be a waiver of the same, similar or any other subsequent event of default.

10.05 EXPEDITIOUS ACTION

Notwithstanding any provision as to notice in this Agreement herein contained, if in City's reasonable judgment the continuance of any event of default by Lessee for the full period of the notice to cure the event of default will jeopardize the operation of the Airport or the rights of the City or the other Airport tenants, City may, without notice, elect to perform those acts in respect to which Lessee is in default. Lessee shall reimburse City for any reasonable and necessary costs incurred by the City or, at City's option, City may add such amounts as additional rents due hereunder.

ARTICLE XI. MISCELLANEOUS PROVISIONS

11.01 INSPECTION AND ACCESS BY CITY

City may enter upon the Leased Premises at any reasonable time for any purpose necessary, incidental to or connected with the performance of its obligations hereunder, or in the exercise of its governmental functions, for fire protection or security purposes, or for inspecting or maintaining the Leased Premises, or doing any and all things City is obligated to do, or which may be deemed necessary or desirable for the proper conduct and operation of the Airport.

11.02 RELATIONSHIP OF PARTIES

It is mutually understood and agreed that nothing in this Agreement is intended or shall be construed as in any way making the Lessee an agent of the City, the relationship at all times being that of landlord and tenant.

11.03 MAINTENANCE OF THE AIRPORT

The City reserves the right, but shall not be obligated to maintain and keep in repair the landing area of the Airport and all publicly owned facilities of the Airport, together with the right to direct and control all activities of the Lessee in this regard.

11.04 DEVELOPMENT OF THE AIRPORT

Future development, changes, alterations, modifications or improvements to the Airport shall be at the sole discretion of the City.

11.05 SUBORDINATION TO FEDERAL AGREEMENTS

This Agreement shall be subordinate to the provisions and requirements of any existing or future agreement between the City and the United States, relative to the development, operation or maintenance of the Airport.

11.06 UTILITIES

Lessee shall pay a pro rata share of the cost of water, sewer, electricity, and gas provided to the Facility, such share to be determined by the ration of the sum of the square footage of the Leased Premises compared to the square footage of the Facility; provided, however, if Lessee separately submeters any utilities used on the Leased Premises, Lessee shall pay the actual charges attributed to such submeter(s).

11.07 CHANGES

City reserves the right to make, at any time, such changes in or to the Leased Premises as it may deem necessary, provided that it does not impair Lessee's use of the Leased Premises. Lessee agrees to allow the City to make such changes and to require no compensation or to seek to attach any liability to the City for those changes, even if the City is negligent therein.

11.08 INABILITY TO PERFORM

If, by reason of (a) strike, (b) work stoppage, (c) governmental preemption in connection with a national emergency, (d) any rule, order or regulation of any governmental agency, (e) conditions of supply or demand which are affected by war or other national, state or municipal emergency, or (f) other cause beyond the control of City, whether or not similar to any of the causes listed in clauses (a) through (f) above, City shall after a reasonable time be unable to fulfill its obligations under this Agreement, including but not limited to delivery of possession of the Leased Premises, or shall be unable to supply any service which City is obligated to supply to Lessee or to the Leased Premises, this Agreement and Lessee's obligation to pay rent hereunder shall abate, provided that City shall not be liable to Lessee or to anyone else for damages for or on account of any failure of City to perform because of any such liability.

11.09 RULES AND REGULATIONS

Lessee and Lessee's employees, officers, and agents shall faithfully observe and comply with the rules and regulations regarding the use of facilities and the Airport in general and such reasonable changes therein that the Director of Airports at any time or times hereafter may make and communicate in writing to Lessee.

11.10 QUALIFIED PERSONNEL

Lessee shall select and appoint a manager for its operations at the Airport. The manager shall be vested with the full power and authority to act in the name of the Lessee with respect to the method, manner and conduct of the operations of Lessee to be performed under this Agreement. The manager shall be available at the Airport during regular business hours, and during the manager's absence, a duly authorized subordinate shall be available.

11.12 NOTICES

Whenever any notices required by this Agreement are to be made, given or transmitted to the parties, such notice shall be hand delivered or sent by certified mail, postage prepaid, and addressed to:

City:

City Manager
City of Midland
P.O. Box 1152
Midland, Texas 79701

with a copy to:

Director of Airports
Midland International Airport
P.O. Box 60305
Midland, Texas 79711

Lessee:

XCOR Aerospace, Inc.
Attn: Andrew Nelson
Chief Operating Officer
P.O. Box 1163
Mojave, California 93502

11.13 SURRENDER

On the termination of this Agreement, or upon any re-entry by City into the Leased Premises, Lessee shall quit and surrender the Leased Premises to City in good order, condition and repair except for ordinary wear and tear and such damage or destruction as City is required to repair or restore under this Agreement, and the Lessee shall remove all of Lessee's property therefrom except as otherwise expressly provided in this Agreement. Lessee's obligations to observe or perform this covenant shall survive the expiration or other termination of this lease.

11.14 QUIET ENJOYMENT

City covenants and agrees that upon Lessee's paying the rent and observing and performing all the terms, covenants and conditions of this Agreement on Lessee's part to be observed and performed, Lessee may peaceably and quietly enjoy the Leased Premises, subject to the terms and conditions of this Agreement.

11.15 AFFIRMATIVE ACTION PROGRAM

The Lessee assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, to ensure that no person shall on the grounds of race, creed, color, national origin, or sex be excluded from participating in any employment activities covered in 14 CFR Part 152, Subpart E. The Lessee assures that no person shall be excluded on these grounds from participating in or receiving the services or benefits of any program or activity covered by this subpart. The Lessee assures that it will require that its covered suborganizations provide assurances to the City, and they similarly will undertake affirmation action programs and that they will require assurances from their suborganizations, as required by 14 CFR Part 152, Part E, to the same effect.

11.16 NONDISCRIMINATION

The Lessee, for itself, its personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree as a covenant running with the land that: (a) no person on the grounds of race, color, or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination; (b) that in the construction of any improvements on, over, or under the Leased Premises, no person on the grounds of race, color, or national origin shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination; and (c) that the Lessee shall use the Leased Premises in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as those regulations may be amended. In the event of breach of any of the above nondiscrimination covenants, City shall have the right to terminate this Agreement and to re-enter and repossess the Leased Premises, and hold the same as if this Agreement had never been made or issued. This provision shall not be effective until the procedures of Title 49, Code of Federal Regulations, Part 21 are followed and completed including exercise or expiration of appeal rights.

11.17 TAXES AND ASSESSMENTS

Lessee will pay before delinquency of any and all taxes, license fees, occupational taxes or assessments, special or general, lawfully levied on account of Lessee's occupancy, and upon Lessee's fixtures, equipment and personal property in and on the Leased Premises.

11.18 SEVERABILITY

If any provision of this Agreement is invalid or unenforceable, this Agreement shall be considered severable as to such provision, and the remainder of this Agreement shall remain valid and binding as though such invalid or unenforceable provision were not included herein.

11.19 AMENDMENTS, MODIFICATIONS, ALTERATIONS

No amendment, modification, or alteration of the terms of this Agreement shall be binding unless it is in writing, dated subsequent to the date of this Agreement, and duly executed by the parties to this Agreement.

11.20 CUMULATIVE RIGHTS AND REMEDIES

The rights and remedies provided by this Agreement are cumulative, and the use of any one right or remedy by either party shall not preclude or waive its rights to use any or all other remedies. The rights and remedies provided in this Agreement are given in addition to any other rights the parties may have by law, statute, ordinance, or otherwise.

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

CITY OF MIDLAND, TEXAS

____
W. Wesley Perry, Mayor

ATTEST:

____
Amy M. Turner, City Secretary

APPROVED AS TO CONTENT AND
COMPLETENESS:

____
Marvin Esterly, Director of Airports

APPROVED AS TO FORM:

____
Keith Stretcher, City Attorney

XCOR AEROSPACE, INC.

____
Andrew Nelson, Chief Operating Office

THE STATE OF __________ §
§
COUNTY OF ____________ §

BEFORE ME,____________________, a notary public, on this day personally appeared ANDREW NELSON of XCOR AEROSPACE, INC., known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of said company for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS _______ day of ______________, A.D., 2012.

____
Notary Public, in and for
the State of __________________

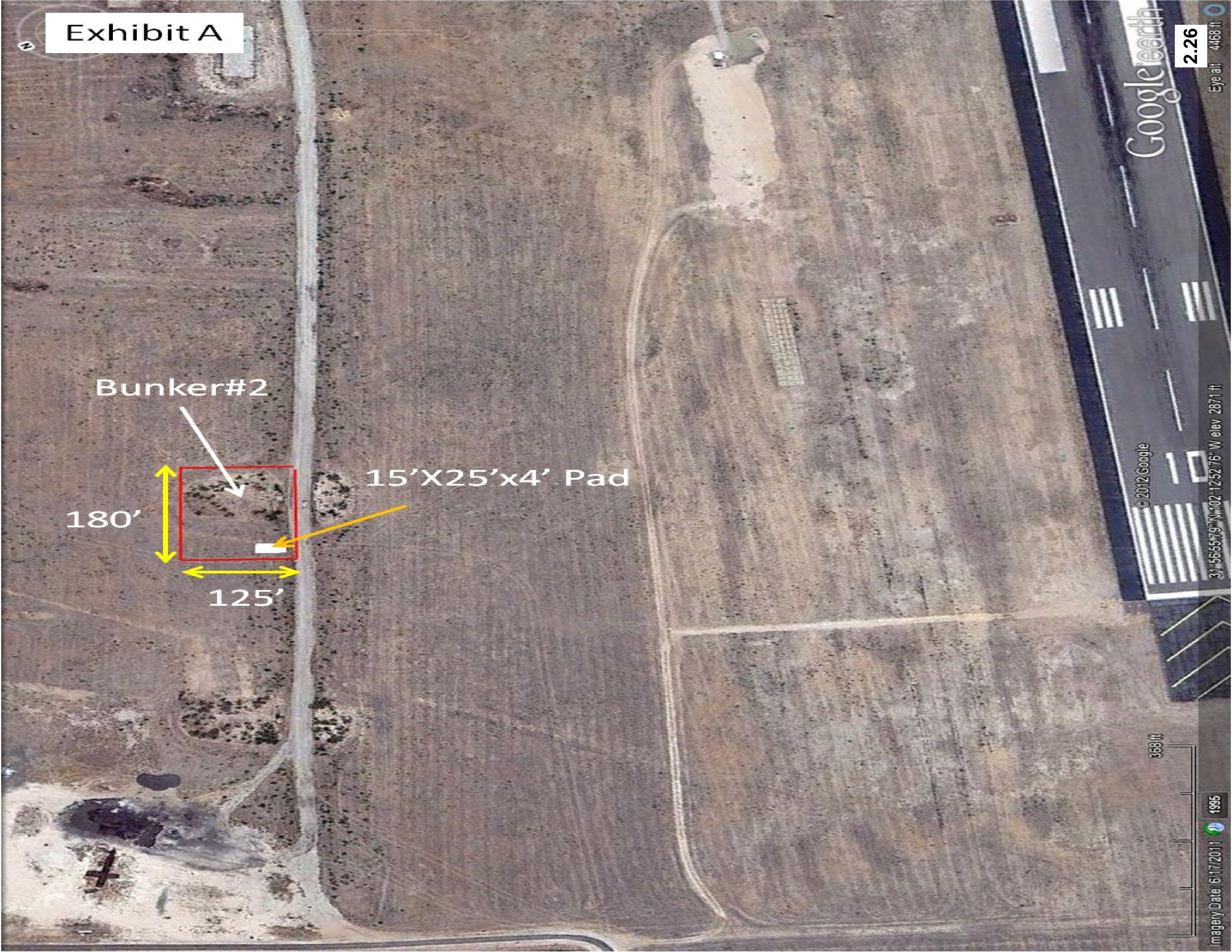
Exhibit A
Bunker#2
180’
125’
15’X25’x4’ Pad
© 2012 Google
2.26
Imagery Date: 6/17/2011
1995
31°56'55.79" N 102°12'52.76" W elev 2871 ft
Eye alt 4468 ft
368 ft

City of Midland

CITY ATTORNEY'S OFFICE

Office Memorandum

DATE: July 3, 2012

TO: The Honorable Mayor and City Council Members

FROM: John Ohnemiller, First Assistant City Attorney

SUBJECT: ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE MIDLAND DEVELOPMENT CORPORATION (MDC) AND XCOR AEROSPACE, INC. (XCOR)

The MDC Board of Directors has authorized the execution of an economic development agreement with XCOR. The agreement terms are summarized below.

XCOR OBLIGATIONS

The agreement requires XCOR to create $12,000,000 in payroll. In addition, the agreement requires XCOR to expend $4,000,000 in capital investment at certain City-owned property at Midland International Airport.

MDC OBLIGATIONS

Under the agreement, the MDC will be obligated to pay a total of $9,000,000 to XCOR as follows:

(1) $3,000,000 within 15 days after the agreement is approved by the Council and executed by the parties;

(2) $2,000,000 within 15 days after the Airport receives all necessary approvals to operate a commercial space launch site; and

(3) $4,000,000 within 15 days after XCOR certifies that it has commenced relocation of its operations to the Airport.

In addition to these payments, the MDC has agreed to lease Hangars S-11A and S-11B, and Tracts 4-A and 4-B, from the City at market rate, and then to sublease the hangar to XCOR for $1.00 a year over a 10-year term. This lease allowance is valued at $1,000,000, bringing total MDC incentives under the agreement to $10,000,000.

CLAWBACK PROVISIONS

The clawback provisions in the agreement are summarized as follows:

(1) For failure to meet $200,000 in payroll by the Spaceport Licensing Date or 18 months after the effective date of the agreement, XCOR must repay the MDC $2,000,000 *times the percentage below the obligation XCOR reported;*

(2) For failure to meet $1,000,000 in payroll 12 months later, XCOR must repay the MDC $4,000,000 *times the percentage below the obligation XCOR reported;*

(3) For failure to meet $3,000,000 in payroll 24 months later, XCOR must repay the MDC $5,000,000 *times the percentage below the obligation XCOR reported;*

(4) For failure to meet $5,000,000 in payroll 36 months later, XCOR must repay the MDC $7,000,000 *less the cumulative amount of capital investment certified by XCOR times the percentage below the obligation XCOR reported;*

(5) For failure to meet $8,000,000 in payroll 48 months later, XCOR must repay the MDC $7,000,000 *less the cumulative amount of capital investment certified by XCOR times the percentage below the obligation XCOR reported; and*

(6) For failure to meet $12,000,000 in payroll 60 months later, XCOR must repay the MDC $7,000,000 *less the cumulative amount of capital investment certified by XCOR times the percentage below the obligation XCOR reported.*

Under the agreement (and shown above in italics), any clawback amount in the first 3 compliance periods will be calculated on a percentage basis. In the last 3 compliance periods, any clawback amount will continue to be calculated on a percentage basis; provided, however, that the calculation will include a credit for the amount XCOR has invested in capital assets thereby reducing any clawback amount. This is the first economic development agreement in which the MDC has instituted this clawback structure.

The proposed resolution approves this economic development agreement between the MDC and XCOR.

If you have any questions, please do not hesitate to contact me or City Attorney Keith Stretcher.

JO/lo

L:\John\Memos\Council\2012\MDC - XCOR Aerospace.wpd

RESOLUTION NO.

RESOLUTION APPROVING AN ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE MIDLAND DEVELOPMENT CORPORATION AND XCOR AEROSPACE, INC., AS AUTHORIZED BY CHAPTER 501 OF THE TEXAS LOCAL GOVERNMENT CODE

WHEREAS, the Midland Development Corporation authorized the execution of an economic development agreement with XCOR Aerospace, Inc. on July 9, 2012; and

WHEREAS, the City Council must consider and approve all economic development agreements approved by the Midland Development Corporation before the agreements can become effective; and

WHEREAS, the City Council finds it to be in the public interest to approve an economic development agreement between the Midland Development Corporation and XCOR Aerospace, Inc.;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:

THAT the economic development agreement between the Midland Development Corporation and XCOR Aerospace, Inc. is hereby approved and shall be in a form substantially similar to that of Exhibit "A", which is attached hereto and incorporated herein for all purposes.

On motion of Council member _____________, seconded by Council member _____________, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the _______ day of _____________, A.D., 2012, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

____
W. Wesley Perry, Mayor

ATTEST:

____
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

____
Courtney Sharp, City Manager

APPROVED AS TO FORM:

____
Keith Stretcher, City Attorney

ECONOMIC DEVELOPMENT AGREEMENT

THIS AGREEMENT is entered into by and between the MIDLAND DEVELOPMENT CORPORATION (hereinafter referred to as “MDC”), a Type A corporation pursuant to Chapter 504 of the Texas Local Government Code, as amended, and XCOR AEROSPACE, INC. (hereinafter referred to as the “Company”).

I.
Recitals

A. The Company will sublease from the MDC certain hangar space at Midland International Airport described as Lot 1, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas, and commonly known as the AMI Hangar (the “Property”).

B. The Company will relocate the corporate headquarters and research and development activities of its rocket engine and space vehicle development business (the “Business”) to the Property.

C. The MDC and the Company desire to set forth the terms and conditions upon which incentives will be provided to the Company as consideration for the Company’s creation of primary jobs and payroll, and for the Company’s capital investment expenditures.

D. The Company will exercise its best reasonable efforts to employ Midland residents and to advertise the availability of job openings in Midland, Texas.

E. The Company anticipates creating jobs at the Business on the Property with total “Annual Salaries and Wages” (as defined in Section VII(A)(1)) of at least $12,000,000 within six years of relocating to Midland.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the MDC and the Company hereby agree as follows:

II.
Obligations of the MDC

A. **MDC Funding.** The MDC agrees to provide the Company funding in the following amounts for the following purposes.

1. **Relocation Costs.** MDC agrees to pay the Company $2,000,000 for (a) relocating existing machinery and equipment, inventory, raw materials, supplies, computer equipment and other items used in the operation of the Company’s Business, including the costs of disassembling, packing and reassembling any such items in Midland, Texas; (b) the down time loss associated with relocating; and (c) relocating Company personnel to Midland, Texas.

2. **Lease Allowances for, and Renovations to, the Property.** MDC agrees to commit to the Company a total of Three Million Dollars ($3,000,000) for costs and expenses associated with lease allowances and renovations to the Property. The lease allowance shall be over a ten (10) year period valued at One Million Dollars ($1,000,000) whereby the Property annual sublease price to Company shall be one dollar ($1) per year. Two Million Dollars ($2,000,000) shall be for renovating or improving the Property as necessary for the Company's operations, including but not limited to enabling the operation of the Company's machinery and equipment, and providing sufficient office space for personnel.

3. **Performance Incentive.** MDC agrees to the pay the Company $5,000,000 for the Company operating the Business at the Property and creating the Annual Salaries and Wages set forth in Section III.

B. **Payment Provisions.** The MDC's funding obligations under Sections II(A)(1), (2) and (3) above constitute an aggregate total of Ten Million Dollars ($10,000,000) of which Nine Million Dollars ($9,000,000) shall be disbursed in three (3) tranches in the amount of a "First Payment" of Three Million Dollars ($3,000,000.00), a "Second Payment" of Two Million Dollars ($2,000,000.00), and a "Third Payment" of Four Million Dollars ($4,000,000.00), subject to the following provisions.

1. **First Payment.** MDC agrees to disburse the First Payment commencing within fifteen (15) days after this Agreement is approved by the Midland City Council and fully executed by the parties.

2. **Second Payment.** MDC agrees to disburse the Second Payment commencing within fifteen (15) days after Midland International Airport receives all necessary licensing and approvals from the Federal Aviation Administration to operate a commercial space launch site ("Spaceport Licensing Date").

3. **Third Payment.** MDC agrees to disburse the Third Payment within fifteen (15) days after the MDC receives certification from the Company, in accordance with Section VII(B)(1) below, that the Company has commenced relocation of the Business to the Property.

4. **Limitations.** The parties agree that the payments provided hereunder shall be subject to the Company's obligations and the recapture provisions set forth in Section III.

First and Second Payment will be available for disbursement upon the Company providing a request for payment on not more than once a month basis to the Executive Director of MDC. The request for payment shall include a brief summary of the use of the funds. The Executive Director may request any back-up information reasonably required to confirm the funds will be used for the intended purposes set forth herein.

C. **Job Training.** MDC agrees to provide the Company up to a maximum of $250,000 for costs and expenses associated with job training for its employees to be employed at the Property over a three year period commencing upon the Spaceport Licensing Date. MDC and the Company will make arrangements to establish the necessary job training programs with local education institutions. In the event, it is determined it is more economical or preferred for the Company to establish its own job training program, MDC will reimburse the Company upon being provided an invoice reflecting the employee name(s), the training received and the cost thereof, and any other costs and expenses associated with the training. Within thirty (30) days of receipt of an invoice, the MDC shall pay the full amount of such invoice; provided, however, that if the MDC objects to any portion of an invoice, the MDC shall notify the Company of the MDC's objection and the grounds therefor within thirty (30) days of the date of receipt of the invoice, and the parties immediately shall make every effort to settle the disputed portion of the invoice. The MDC in any event shall pay those portions of the invoice that are not in dispute within the 30-day period for payment. The Company agrees that should other sources of funding be available from other governmental entities, MDC shall receive a dollar for dollar credit toward its obligations in this Section.

III.
Obligations of the Company

A. **Payroll Obligation.** By 60 months after the First Compliance Date, as defined below, , the Company shall create and maintain full-time jobs at the Business on the Property with total Annual Salaries and Wages of said jobs being at least $12,000,000. The Company shall create and maintain said Annual Salaries and Wages in accordance with the following schedule:

> (1) $ 200,000 in total Annual Salaries and Wages by Spaceport Licensing Date or eighteen (18) months after the Effective Date, whichever is last ("First Compliance Date");
> (2) $ 1,000,000 in total Annual Salaries and Wages by 12 months after the First Compliance Date (the Second Compliance Date);
> (3) $ 3,000,000 in total Annual Salaries and Wages by 24 months after the First Compliance Date (the Third Compliance Date);
> (4) $ 5,000,000 in total Annual Salaries and Wages by 36 months after the First Compliance Date (the Fourth Compliance Date);
> (5) $ 8,000,000 in total Annual Salaries and Wages by 48 months after the First Compliance Date (the Fifth Compliance Date); and
> (6) $ 12,000,000 in total Annual Salaries and Wages by 60 months after the First Compliance Date (the Sixth Compliance Date).

Should the Company exceed the targets defined above by the Compliance Date, the excess Salary and Wages shall be applied to the following Compliance Date.

B. **Capital Investment Obligation.** By December 31, 2017, the Company shall invest a minimum of Four Million Dollars ($4,000,000) for the purchase of machinery, equipment, fixtures and furniture at the Property, and for the cost of constructing improvements at the Property.

C. **Annual Compliance Certifications.** Beginning with the First Compliance Date, and continuing every year during the term of this Agreement the Company shall certify to the MDC, as described in Section VII(B) below, the following:

1. The total Annual Salaries and Wages of jobs at the Business on the Property during the preceding year.

2. The total amount of investment in capital assets made at the Business on the Property during the preceding year and on a cumulative basis. The Company shall describe or list the capital investments or improvements and provide certification as to the purchase price or cost of such investments and improvements until such time as the Company has invested the amount noted in Section III(B).

Pursuant to this Section, there will be a total of six (6) Compliance Certifications due, covering Salaries and Wages created and maintained, and capital investment expenditures as defined above in Section III(A) and Section III(B), respectively.

Provided, however, the Company may certify to the MDC that Company has met the capital investment obligation of Section III(B) at the actual time of completion.

D. **Failure to Meet Payroll Obligations**. If the Company fails to meet the payroll obligations set forth in Section III (A) above, then the following recapture schedule shall apply:

(1) For failure to meet the obligations of Section III(A)(1), Company shall repay MDC Two Million Dollars ($2,000,000.00) times the percentage below the obligation the company reported;

(2) For failure to meet the obligations of Section III(A)(2), Company shall repay MDC Four Million Dollars ($4,000,000.00) times the percentage below the obligation the company reported;

(3) For failure to meet the obligations of Section III(A)(3), Company shall repay MDC Five Million Dollars ($5,000,000.00) times the percentage below the obligation the company reported;

(4) For failure to meet the obligations of Section III(A)(4), Company shall repay MDC Seven Million Dollars ($7,000,000.00) less the cumulative amount certified in Section III(C)(2) times the percentage below the obligation the company reported;

(5) For failure to meet the obligations of Section III(A)(5), Company shall repay MDC Seven Million Dollars ($7,000,000.00) less the cumulative amount certified in Section III(C)(2) times the percentage below the obligation the company reported; and

(6) For failure to meet the obligations of Section III(A)(6), Company shall repay MDC Seven Million Dollars ($7,000,000.00) less the cumulative amount certified in Section III (C)(2).

Any amount(s) repayable to the MDC hereunder shall be repaid, without interest, within thirty (30) days after the MDC gives written notice to the Company that the Company is required to pay a recapture payment as defined above. Notwithstanding anything to the contrary contained anywhere in this Agreement, under no circumstances shall the Company be obligated to repay the MDC an amount in excess of the total dollar amount of the funds actually received by the Company from the MDC under this Agreement. Should the Company fail to pay the recapture payment within thirty (30) days of MDC written notice or notifies MDC that they cannot make the recapture payment, the company shall be considered in default, unless alternative arrangements or a Cure Plan pursuant to Section III(E) has not been agreed with MDC in writing.

E. **Cure Period.** In lieu of demanding a recapture payment within thirty (30) days that MDC anticipates will cause the company to default, or after the MDC gives the Company written notice of its recapture payment and the Company defaults by notifying MDC it cannot meet the repayment obligation, the MDC may, in its sole discretion, elect to allow the Company a period not to exceed one hundred eighty (180) days to cure any such default. Any such election by the MDC to allow the Company to cure such a default shall in no way be construed as, or shall operate as, a waiver of any of the MDC's rights contained herein, including but not limited to the MDC's rights to repayment under this Agreement.

IV.
Term

Upon execution by all of the parties, this Agreement becomes effective July 1, 2012 (the "Effective Date") and shall terminate sixty (60) days following the Sixth Compliance Date when terminated by mutual agreement of the parties, or when terminated as hereinafter provided.

V.
Law

The parties are aware of statutory limitations on the Loans, and the use of funds under the Development Corporation Act, and the parties acknowledge that the funds herein granted or guaranteed shall be utilized solely for purposes authorized under that law and by the terms of this Agreement.

VI.
Documents

A. **Executed Agreement.** Prior to any payment by MDC, the Company shall deliver to MDC an executed copy of this Agreement.

B. **Lease Agreement.** Contemporaneous with the execution of this Agreement, the Company shall enter into a separate agreement with the MDC for the lease of the Property.

VII.
Special Conditions

A. **Jobs and Payments.** The following provisions shall apply:

1. A full-time job is defined as an individual who (a) works a minimum of 1,820 hours per year, including allowance for vacation, sick leave, earned time off, or other Company policies and practices, (b) earns a base hourly wage of at least $9.00 per hour, and (c) spends a substantial amount of his or her performing job duties in the Midland area arising out of the operations of the Midland, Texas facility, and is on the payroll of the Company. “Annual Salaries and Wages” as used in this Agreement shall mean payments made to individuals employed in a full-time job as defined herein. Payments shall include base pay, paid vacation, paid sick leave, or other pay, pursuant to Company policies or practices.

2. Notwithstanding any provision hereof which might be interpreted otherwise, the MDC’s total financial commitment during a fiscal year of the MDC, October 1 to September 30, shall not exceed the amount it is obligated to pay to the Company during that fiscal year.

3. Notwithstanding any provision hereof which might be interpreted otherwise, the MDC’s total financial commitment during the term of this Agreement shall not exceed Ten Million Two Hundred Fifty Thousand Dollars ($10,250,000) in the aggregate.

B. **Certification.** The Company agrees to the following certification requirements:

1. As to the certification required in Section II(B)(3), the Company shall provide a letter from the Company President or other appropriate officer stating that the Company has commenced relocation of the Business to the Property located in Midland, Texas.

2. As to the certifications required in Section III(C), the Company shall provide reasonable evidence or supporting documentation of Salaries and Wages.

Notwithstanding the above requirements, the Company may maintain its records in accordance with its record retention policies and shall not be required to create any additional records. Upon a reasonable request, the MDC may review the Company’s records of Salaries and Wages but may not copy or retain a copy of said reports. In addition to the above requirements, the Company shall provide to MDC a supplemental Salary and Wages report as of September 30 each year during the term of this Agreement evidencing the running total or Annual Salaries and Wages of the Company.

3. The Company shall allow MDC reasonable access to the Property for purposes of determining the Company’s compliance with the Salary and Wages certifications given

by the Company, provided that such access shall be with representatives of the Company and during normal business hours. The Company acknowledges that the MDC is subject to the Texas Public Information Act.

4. When requested in writing by the MDC to do so, the Company will provide an annual statement in a form acceptable to the Company that, to the Company's knowledge, the Company is in compliance with each applicable term of this Agreement.

5. All certifications required under this Agreement shall be signed by the Company President or other appropriate officer before a notary. E-mail shall not be an acceptable form of certification under this Section of the Agreement.

C. **Covenants.** The Company makes the following covenants to MDC and agrees that in the event of failure of the Company to comply with such covenants (a non-compliance event), the breach of any one of which shall constitute an event of default should the non-compliance event not be cured within 30 days of notification by the MDC, MDC may terminate this Agreement at its sole discretion. In the event of such termination, if any consideration has been paid to or on behalf of the Company, and not earned, the Company must reimburse MDC for such consideration based on the Recapture Schedule of Section III(D):

1. Upon relocation and thereafter until the term of this agreement is expired, the Company shall be a legal entity duly organized, validly existing and in good standing and is duly authorized to do business in the State of Texas.

2. The execution of this Agreement has been duly authorized by the Company's board of directors or other governing body, or by an officer of the Company empowered to execute such agreements and bind the Company, and is not in contravention of the provisions of the Company's articles of incorporation or by-laws, or of any agreement or instrument to which the Company is a party or by which it may be bound, the breach of which would have a material, adverse effect on the Company and its operations.

3. There are no bankruptcy proceedings currently pending by or against the Company.

D. **Suspension.** MDC, under the following circumstances and at its sole discretion, may terminate this Agreement, and the Company must reimburse any of the unearned consideration paid by MDC pursuant to the recapture schedule of Section III(D):

1. The insolvency of the Company. "Insolvent" shall have the meaning set forth in the federal bankruptcy law.

2. The appointment of a receiver of the Company, or of all or any substantial part of its property, and the failure of such receiver to be discharged within sixty (60) days thereafter.

3. The adjudication of the Company as bankrupt, the filing by the Company of a petition to be adjudged bankrupt, or a petition or answer seeking reorganization or admitting the

material allegations of a petition filed against it in any bankruptcy or reorganization proceeding.

E. **Additional Covenants.** If the Company should fail to comply with any of the following provisions, and such failure continues for thirty (30) days following MDC written notice to the Company or a mutually agreed upon Cure Plan that has been agreed that allows more than thirty (30) days to cure and this extended cure period has elapsed, (each, an "event of default"), MDC may terminate this Agreement. In the event that the Agreement is terminated, the Company shall be required to reimburse MDC pursuant to the recapture schedule of Section III(D). .

1. The Company, or any affiliate of, or successor to the Company, shall continue its full-time business activities on the Property at all times during the period of this Agreement, except for periods of temporary interruption due to force majeure, or for periods not longer than six (6) months due to restructuring, reorganizations or other corporate activities.

2. The Company shall pay before delinquent all ad valorem taxes assessed against personal property owned by Company and owing by it to the taxing authorities having jurisdiction. In addition, the Company will pay before delinquent all employment, income, franchise and all other taxes to all local, state and federal entities. Nothing herein shall be deemed to preclude the Company from contesting any such taxes as provided by applicable law.

3. The Company shall obtain and maintain all necessary rights, licenses, and permits to carry on its business.

4. The Company agrees that, as to all of the programs and activities arising out of this Agreement, it shall comply in all material respects with all Civil Rights Acts and specifically will not discriminate against any person on the basis of race, color, national origin, religion, age, sex or by reason of being disabled.

5. The Company agrees that it shall comply with Texas Government Code Section 2264.001 *et seq.*, as amended.

F. **Payments.** Payments to be made to the Company under Section II hereof shall be made upon a written request from the Company and completion of all necessary supporting documentation as provided in Sections III and VII(B) hereof. The payment request and documentation should be directed to MDC Chairman, c/o City Secretary, City of Midland, P.O. Box 1152, Midland, Texas 79702.

VIII.
General Terms

A. **Entire Agreement.** This Agreement embodies the complete agreement of the parties hereto, superseding all oral or written, previous and contemporary agreements between the parties relating to matters in this Agreement; and except as otherwise provided herein, this Agreement cannot be modified or amended without a written agreement of the parties.

B. **No Third-Party Beneficiary.** The parties approval of the Agreement does not create a third-party beneficiary. There is no third-party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third-party beneficiary or other rights hereunder.

C. **Legal Relationships.** The parties are not, and shall not be considered as, joint venturers, partners, or agents of each other; and neither shall have the power to bind nor obligate the other, except as set forth in this Agreement. The parties agree not to represent to anyone that they are agents of one another or have any authority to act on behalf of one another. It is mutually understood and agreed that nothing in this Agreement is intended or shall be construed as in any way creating or establishing any partnership, joint venture, or agency between the MDC and the City. Further, it is specifically understood and agreed that nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability.

D. **Terminations.** This Agreement may be terminated by mutual agreement of the parties or by either party, upon the failure of the other party to fulfill an obligation as set forth herein if the default is not cured within thirty (30) days after written notice from the other party, unless agreed to otherwise in writing.

E. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument.

F. **Venue.** The obligations of the parties to this Agreement are deemed to have been performed in Midland County, Texas, and if legal action is necessary to enforce same, exclusive venue shall be in Midland County, Texas. All payments under this Agreement are deemed to have taken place in Midland County, Texas. The obligations and undertakings of each of the parties to this Agreement shall be deemed to have been performed in Midland County, Texas.

G. **Legal Construction.** In case one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

H. **Law.** This Agreement is subject to all applicable state and federal laws, and the Company agrees that it will comply in all material respects with all such applicable laws, regulations, orders and rules of the State of Texas and other such governmental agencies. This Agreement shall be governed by and construed in accordance with the laws and court decisions of the State of Texas.

I. **Assignment.** This Agreement shall be binding upon the parties hereto and their successors and assigns. This Agreement may not be assigned by the Company without the prior written consent of the MDC.

J. **Notices.** All notices to either party required under this Agreement shall be sent by certified U.S. mail, postage prepaid, addressed to such party at the addresses shown below. All notices shall be deemed given on the date so deposited in the mail, unless otherwise provided herein. Either party hereto may change the address below by sending written notice of such change to the other in the manner provided herein.

If to MDC:
MDC Chairman
c/o City Secretary
City of Midland
P.O. Box 1152
Midland, Texas 79702

If to the Company:
XCOR Aerospace, Inc.
Attn: Andrew Nelson
Chief Operating Officer
P.O. Box 1163
Mojave, CA 93502

with copy to:

MDC Executive Director
Midland Development Corp.
109 N. Main
Midland, Texas 79701

K. **Waiver of Attorney Fees.** By executing this Agreement, **COMPANY AND MDC AGREE TO WAIVE AND DO HEREBY WAIVE ANY CLAIM THEY HAVE OR MAY HAVE AGAINST THE OTHER PARTY, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THE AGREEMENT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THE AGREEMENT. THE COMPANY AND MDC SPECIFICALLY AGREE THAT IF THE COMPANY OR MDC BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS AGREEMENT, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET SEQ., AS AMENDED), THE COMPANY AND MDC EACH AGREES TO WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH COMPANY OR MDC MIGHT OTHERWISE BE ENTITLED.**

Company and MDC agree that this is the intentional relinquishment of a presently existing known right. Each party acknowledges that it understands all terms and conditions of the Agreement.

By execution of the Agreement, Company hereby represents and warrants to the MDC that Company has read and understood the Agreement. This section shall not be construed or interpreted as a waiver of sovereign immunity.

L. **Amendment.** This Agreement may be amended by written instrument executed by both parties expressly stating the intention to amend this Agreement.

M. **Payments.** All payments to either party required under this Agreement shall be sent by certified U.S. mail, postage prepaid, addressed to such party at the addresses shown below. All payments shall be deemed given on the date so deposited in the mail, unless otherwise provided herein. Either party hereto may change the address below by sending written notice of such change to the other in the manner provided herein.

If to MDC:	**If to The Company:**
MDC Chairman	XCOR Aerospace, Inc.
c/o City Secretary	Andrew Nelson
City of Midland	Chief Operating Officer
P. O. Box 1152	P.O. Box 1163
Midland, Texas 79702	Mojave, California 93502

N. **Release. NOTWITHSTANDING ANY OTHER PROVISION CONTAINED HEREIN, COMPANY HEREBY RELEASES, ACQUITS, RELINQUISHES AND FOREVER DISCHARGES MDC, MDC'S EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS CLAIMS, DAMAGES, OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH COMPANY HAS OR MIGHT HAVE IN THE FUTURE, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, QUANTUM MERUIT, CLAIMS UNDER THE DUE PROCESS AND TAKINGS CLAUSES OF THE TEXAS AND UNITED STATES CONSTITUTIONS, TORT CLAIMS, OR MDC'S NEGLIGENCE.**

O. **Sovereign Immunity.** By executing this Agreement the MDC is not waiving its right of sovereign immunity. The MDC is retaining its immunity from suit. The MDC is not granting consent to be sued by legislative resolution or action.

P. This Agreement shall not be effective until approved by the Midland City Council.

IN WITNESS WHEREOF, the MDC and the Company have executed this Agreement on the ______ day of ____________, 2012.

MIDLAND DEVELOPMENT CORPORATION

____
Laura Roman, Chairman

ATTEST:

____
Robert Rendall, Secretary

APPROVED AS TO FORM:

____
Keith Stretcher, Attorney for the
Midland Development Corporation

XCOR AEROSPACE, INC.

By: __________________________________
Andrew Nelson, Chief Operating Officer

THE STATE OF __________§
§
COUNTY OF ____________ §

BEFORE ME,____________________, a notary public, on this day personally appeared ANDREW NELSON of XCOR AEROSPACE, INC., known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of said company for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS _______ day of ______________, A.D., 2012.

Notary Public, in and for the State of ___________________

City of Midland

CITY ATTORNEY'S OFFICE

Office Memorandum

DATE: July 3, 2012

TO: The Honorable Mayor and City Council Members

FROM: John Ohnemiller, First Assistant City Attorney

SUBJECT: SUBLEASE AGREEMENT BETWEEN THE MIDLAND DEVELOPMENT CORPORATION (MDC) AND XCOR AEROSPACE, INC. (XCOR)

The MDC Board of Directors has authorized the execution of a sublease agreement with XCOR regarding the Hangars S-11A and S-11B, and Tracts 4-A and 4-B, at Midland International Airport. This property is owned by the City. Subject to the Council approving a lease between the MDC and the City regarding this property, the MDC has agreed to sublease the property to XCOR in connection with the economic development agreement between the parties.

The proposed resolution approves this sublease agreement between the MDC and XCOR.

If you have any questions, please do not hesitate to contact me or City Attorney Keith Stretcher.

JO/lo

L:\John\Memos\Council\2012\MDC - XCOR Aerospace Sublease Agreement.wpd

RESOLUTION NO.

RESOLUTION APPROVING A SUBLEASE AGREEMENT BETWEEN THE MIDLAND DEVELOPMENT CORPORATION AND XCOR AEROSPACE, INC. REGARDING CERTAIN REAL PROPERTY LOCATED AT MIDLAND INTERNATIONAL AIRPORT AND DESCRIBED AS HANGARS S-11A AND S-11B, AND TRACTS 4-A AND 4-B, LOCATED IN LOT 1, BLOCK 13, INDUSTRIAL PARK REGIONAL AIR TERMINAL, UNIT 12, MIDLAND, MIDLAND COUNTY, TEXAS

WHEREAS, the Midland Development Corporation ("MDC") Board of Directors previously authorized the execution of a sublease agreement with XCOR Aerospace, Inc. regarding certain real property located at Midland International Airport and described as Hangars S-11A and S-11B, and Tracts 4-A and 4-B, located in Lot 1, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas; and

WHEREAS, the City Council finds it to be in the public interest to approve said agreement between the MDC and XCOR Aerospace, Inc.;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:

THAT the sublease agreement between the Midland Development Corporation and XCOR Aerospace, Inc. is hereby approved and shall be in a form substantially similar to that of Exhibit "A", which is attached hereto and incorporated herein for all purposes.

On motion of Council member _____________, seconded by Council member _____________, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the _______ day of _____________, A.D., 2012, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

W. Wesley Perry, Mayor

ATTEST:

Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

Courtney Sharp, City Manager

APPROVED AS TO FORM:

Keith Stretcher, City Attorney

SUBLEASE AGREEMENT
BETWEEN THE MIDLAND DEVELOPMENT CORPORATION
AND XCOR AEROSPACE, INC.

THIS SUBLEASE AGREEMENT ("Agreement") is made and effective this 10th day of July, 2012, by and between the Midland Development Corporation ("MDC"), a Type A corporation existing under the authority of Chapter 504 of the Texas Local Government Code, and XCOR Aerospace, Inc. ("Lessee").

RECITALS

WHEREAS, the City of Midland, Texas ("City") owns and operates Midland International Airport (the "Airport") at which Lessee desires to locate its corporate headquarters as well as research and development activities related to its rocket engine and space vehicle development business; and

WHEREAS, the MDC has leased from the City certain existing hangar space and land at the Airport, which is further described herein; and

WHEREAS, the MDC and Lessee desire to set forth the terms and conditions under which Lessee will sublease said existing hangar space and land from the MDC for purposes of said business;

NOW, THEREFORE, for and in consideration of the covenants and conditions herein stated, City and Lessee agree as follows:

ARTICLE 1. GRANT OF LEASE

1.01 **Leased Premises**: MDC agrees to lease to Lessee: Hangars S-11A and S-11B, and Tracts 4-A and 4-B, located in Lot 1, Block 13, Industrial Park Regional Air Terminal, Unit 12, Midland, Midland County, Texas, and being more particularly described on Exhibit "A," attached hereto and incorporated by reference. Hangars S-11A and S-11B, and Tracts 4-A and 4-B, are hereinafter collectively referred to as the "Leased Premises." The parties hereby agree that any adjacent real property the MDC subsequently leases from the City of Midland through an option agreement may be included as part of the Leased Premises upon written approval of such inclusion by both parties. Any such real property included as part of the Leased Premises shall be subject to the terms and conditions of this Agreement.

1.02 **Easements**: This Agreement shall be subject to such easements, rights-of way, drill sites, or other rights or reservations affecting the Leased Premises which are of record or are clearly visible as of the date of this Agreement, or which are shown on Exhibit "A."

1.03 **Acceptance of Leased Premises**: Subject to the requirements of Section 6.01, BY EXECUTING THIS AGREEMENT THE LESSEE AGREES AND ACKNOWLEDGES THE LESSEE IS TAKING OR LEASING THE LEASED PREMISES **"AS IS" WITH ANY AND ALL LATENT AND PATENT DEFECTS AND THAT THERE IS NO WARRANTY, EXPRESS OR IMPLIED BEING MADE BY THE MDC OR CITY THAT THE LEASED PREMISES ARE FIT FOR A PARTICULAR PURPOSE**. THE LESSEE ACKNOWLEDGES, BY EXECUTING THIS AGREEMENT, THAT LESSEE IS NOT RELYING UPON ANY REPRESENTATION MADE BY THE MDC OR CITY WITH

RESPECT TO THE CONDITION OF THE LEASED PREMISES, BUT IS RELYING UPON LESSEE'S EXAMINATION OF THE LEASED PREMISES. LESSEE ALSO RECOGNIZES BY EXECUTING THIS AGREEMENT, THAT THE LESSEE IS AGREEING TO ACCEPT THE LEASED PREMISES **"AS IS,"** THAT LESSEE AGREES TO MAKE LESSEE'S OWN APPRAISAL OF THE LEASED PREMISES AND TO ACCEPT THE RISK THAT LESSEE MAY BE WRONG. THE MDC GIVES NO ASSURANCES, EXPRESS OR IMPLIED CONCERNING THE VALUE OR CONDITION OF THE LEASED PREMISES SOLD. IN NO EVENT SHALL A LESSEE HAVE A RIGHT TO RECOVER CONSEQUENTIAL DAMAGES. THEREFORE, THE LESSEE WILL TAKE THE LEASED PREMISES UNDER THE EXPRESS UNDERSTANDING THE LEASED PREMISES ARE ACCEPTED **"AS IS"** AND WITH ALL FAULTS, EXCLUDING EXPRESS OR IMPLIED WARRANTIES.

ARTICLE 2. TERM OF AGREEMENT

2.01 **Lease Term**: The term of this Agreement shall commence on January 1, 2013, and terminate on December 31, 2022, ("the Lease Term") unless terminated earlier pursuant to the provisions of this Agreement.

ARTICLE 3. RENT

3.01 **Amount of Base Rent**: Beginning in January 2013 and continuing through January 2022, each year by January 5, Lessee agrees to pay annual rent to the MDC for the Leased Premises in the amount of $1.00.

3.02 **Delivery of Rent**: All payments required of Lessee by this Agreement shall be delivered by mail, or in person, to the Midland Development Corporation, 109 N. Main Street, Midland, Texas 79701, or to such other location as specified in writing by the MDC from time to time, no later than the date such payment is due, unless such due date falls on a Saturday, Sunday, or City holiday, in which case such rent shall be due on the first business day following the date such payment is due.

ARTICLE 4. USE OF LEASED PREMISES

4.01 **Permitted Uses**: Lessee shall be permitted to use the Leased Premises for the purpose of conducting for-profit commercial services or activities consisting of any or all of the following operations and no others:

(a) Location of corporate headquarters and operation of research and development activities related to rocket engine and space vehicle development;

(b) Operation of warehouse, freight distribution and storage services for commercial and non-commercial activities;

(c) Repair and maintenance service for aircraft, airframe, power plant, avionics, instruments, and related equipment;

(d) Sales of aircraft parts and equipment, and pilot supplies;

(e) Storage of such equipment and apparatus as may be incidental and/or necessary to Lessee's operations, including motor vehicles operated and/or owned by Lessee; and

(f) Such other uses as may be permitted in writing by the MDC.

4.02 **Prohibited Uses**: Lessee agrees at all times to comply with the following:

(a) Lessee shall at no time use, or permit the use of, the Leased Premises in a manner that is contrary to applicable federal, state, or local laws, ordinances, rules, or regulations, which shall include, but not be limited to, applicable Federal Aviation Administration ("FAA") rules and regulations and applicable regulations for the use of the Airport as may from time to time be promulgated by the City;

(b) Lessee shall not permit any permanent, unshielded light or illumination source to cause glare as viewed from any street, adjacent properties or operating aircraft;

(c) Lessee shall not cause or permit the burial of storage above ground on the Leased Premises of any hazardous waste or materials, as defined by federal or state law, except in accordance with applicable federal, state, or local laws, ordinances, regulations and rules, as may be adopted or amended from time to time;

(d) Lessee shall not cause or permit any use or activity on the Leased Premises which would create a hazardous condition for aircraft operating at the Airport;

(e) Lessee shall not allow the Leased Premises to be used for parking of motor vehicles, motorcycles, or motor driven equipment by anyone other than customers, employees, or contractors of Lessee except as may be authorized by the Director of Airports, with all such parking being limited to areas designated by the Department of Airports for such parking. Lessee shall not be in default for the improper parking of vehicles over which neither Lessee nor any of its subtenants, customers, employees, or contractors have any control; and

(f) Less shall not operate, nor permit the operation of, a car rental business from the Leased Premises, unless the Lessee or the operator of said car rental business has executed a car rental concession or permit agreement with the City; and

(g) Lessee shall not allow schedules airline passenger operations to be conducted on the Leased Premises.

4.03 **Compliance with Minimum Standards**: All activities conducted upon the Leased Premises, whether by Lessee or its sublessees, shall be in substantial conformance with the City's Minimum Standards for Aeronautical Activities, as such standards exist or may be duly amended from time to time by the City Council to the extent that such Minimum Standards may apply to Lessee's operations. MDC agrees to provide Lessee with written notice not later than 30 days prior to adoption of substantive changes to the Minimum Standards for Aeronautical Activities which would apply to Lessee's operations.

4.04 **Non-exclusive Uses**: Lessee understands and acknowledged that, as to that part of the Airport not included within the Leased Premises, the allowable uses permitted herein are on a non-exclusive basis with respect to other potential providers of aeronautical services at the Airport.

ARTICLE 5. OBLIGATIONS OF LESSEE WITH REGARD TO CONSTRUCTION OF IMPROVEMENTS

5.01 **Approval of Plans Not Assurance of Design Quality:** The approval by the MDC and the Director of Airports of any plans and specifications applies only to the conformity of such plans to the general architectural and operational plan for the Leased Premises and the Airport. The approval of the MDC and the Director of Airports does not constitute approval of the quality of the architectural or engineering work performed. Neither the MDC, City nor the Director of Airports assumes any liability or responsibility for the architectural or engineering design or for any defect in any building or improvement constructed from the plans or specifications. Construction of any contemplated improvements shall be in accordance with the plans presented to and approved by the MDC and the Director of Airports. All construction work shall be subject to inspection by a representative employed by the City or an inspector from the Code Enforcement Division of the City, or both, to determine that such work conforms to the plans and specifications approved by the MDC and the City.

5.02 **Contractor's Insurance; Bonds:** At any time construction activities are undertaken on the Leased Premises, Lessee shall require that its contractor or contractors keep in force insurance issued by a responsible insurance company or companies authorized to conduct business in the State of Texas insuring the improvements during construction under Completed Builder's All Risk Insurance, including fire, extended coverage, vandalism and malicious mischief, in an amount equal to the full insurable value of such construction as the same progresses in order to insure continuity of construction and ultimate completion despite damage or destruction suffered during the course thereof. **ALL INSURANCE SHALL NAME THE MDC AND THE CITY AS ADDITIONAL INSUREDS AND CO-PAYEES AND PROVIDE FOR A WAIVER OF SUBROGATION IN FAVOR OF THE MDC AND THE CITY.** Lessee shall require all contractors performing construction work on the Leased Premises to provide payment and performance bonds issued by a responsible bonding company or companies authorized to conduct business in the State of Texas for the full amount of the cost of the construction to be performed on forms which are in compliance with Tex. Gov't Code Ch. 2253, as amended. The foregoing shall be made a part of any contract between Lessee and its contractor or contractor. In the event Lessee does not complete the construction work itself; it shall comply with the all-risk insurance provisions hereof.

5.03 **Compliance with Building Codes and Federal Standards**: All improvements made to the Leased Premises by Lessee shall comply with all applicable City Building Codes and federal standards for construction of airport improvements in effect at the time construction commences as well as all other applicable federal aviation regulations, if any.

5.04 **Encumbrance of Leasehold Estate**: Lessee shall at no time encumber or attempt to encumber its leasehold interest in the Leased Premises by deed of trust, mortgage, security agreement or other security interest.

5.05 **Ownership of Buildings, Improvements and Fixtures**: Any and all buildings, improvements (including, but not limited to all aprons, taxiways and roadways), additions, alterations, and fixtures existing on the Commencement Date or constructed or placed on any part of the Leased Premises during the Lease Term by City, MDC or Lessee shall be considered part of the real property of the Leased Premises, shall remain on the Leased Premises, and shall not be removed by Lessee or any sublessee without the written consent of the MDC. All improvements, additions, alterations, and fixtures on the Leased Premises shall become the sole property of City upon termination of this Agreement without compensation to Lessee, it being understood and agreed by Lessee that the improvements located on the Leased Premises at the end of the Lease Term are additional consideration for this Agreement. Notwithstanding the above, Lessee shall have the right at any time during Lessee's occupancy of the Leased Premises, or within a reasonable time thereafter, to remove any and all furniture, machinery, equipment, but not fixtures owned or placed by Lessee, in, under, or on the Leased Premises; provided, however, prior to the termination of the Lease Term, Lessee shall repair any damage to any buildings or improvements on the Leased Premises resulting from their removal. Any such personal property items which are not removed within sixty (60) days after the termination date of this Agreement shall become the property of City as of that date.

ARTICLE 6. REPAIRS, MAINTENANCE AND RESTORATION

6.01 **Maintenance by Lessee**: Lessee shall, at Lessee's sole expense, keep the Leased Premises and all improvements of any kind, which may be existing at the commencement of the Lease Term in good repair, condition and appearance. Lessee specifically acknowledges its obligations, at its sole expense, to keep in good repair, condition and appearance the foundation, roof, exterior walls and structural portions of the interior walls of the hangars located on the Leased Premises. Lessee shall keep mowed and in a sightly condition all landscaping and grass areas within the Lease Premises. MDC shall be the sole judge of the quality of Lessee's maintenance; provided, however, MDC shall not unreasonably withhold acceptance of said repairs or maintenance. Upon written notice by MDC to Lessee, Lessee shall be required to perform such reasonable maintenance under this Section 6.01, as MDC considers necessary. If Lessee does not undertake such maintenance within ten (10) days after receipt of written notice, MDC shall have the right to enter on the Leased Premises and perform the necessary maintenance, the cost of which shall be borne by Lessee. Other items of maintenance for which Lessee shall be solely responsible shall include, but not be limited to, the following:

(a) Janitorial services, providing janitorial supplies, window washing, rubbish and trash removal;

(b) Supply and replacement of light bulbs in and on all buildings (except lighting removed for causing obstructions or glare);

(c) Replacement of cracked or broken glass in all buildings;

(d) Cleaning of interior stoppages in interior plumbing fixtures and drain lines up to the first manhole or clean out outside of the exterior of the building where the stoppage occurred;

(e) Replacement of floor covering;

(f) Maintenance of all doors and door operating systems, including weather stripping and glass replacement;

(g) Painting, repairing and replacement of interior walls not resulting from structural failure;

(h) Landscaping and grass cutting services within the Leased Premises, including, but not limited to, repair or replacement of exterior building flood lights and planter lights;

(i) Repair or replacement of heating, air conditioning, ventilation, electrical, plumbing, or mechanical systems, or their respective components; and

(j) Maintenance of all aprons, ramps, and roadways that are constructed by Lessee.

Subject to the provisions of Section 5.05, on the last day of the term hereof, or on any earlier termination, Lessee shall surrender the Leased Premises to MDC in the same condition as received, except for fire and casualty, ordinary wear and tear, clean and free of debris.

6.02 **Trash and Waste Removal**: Lessee agrees to cause to be removed from the Leased Premises, at its own expense, all waste, garbage and rubbish, and agrees not to deposit same on the Leased Premises except temporarily in waste or garbage containers provided by Lessee at Lessee's expense. Lessee further agrees that Lessee will store all parts, supplies, and other materials on the interior of buildings located on the Leased Premises, provided, however, that any parts or supplies which must be kept outside because of volatility of the supply item or the size of the part will be kept out of view of the public traveling on public rights of way or other surrounding tenants by installation of fencing or other means of screening approved by the MDC and the Director of Airports.

ARTICLE 7. ACCESS TO AND USE OF AIRPORT

7.01 **Access to Airport:** City shall maintain all roads on the Airport giving access to the Leased Premises in good and adequate condition for use by cars and trucks and shall maintain free and uninterrupted access to the Leased Premises over said roads at all times; provided, however, MDC shall not be in default of this Agreement if access is interrupted.

7.02 **Right to Use Airport:** Lessee and Lessee's employees, sublessees, and guests shall have the right to use that part of the Airport and its facilities not included within the Leased Premises in common with others authorized to do so. Such use shall be subject to any and all applicable federal, state or local laws, ordinances, statutes, rules, regulations, or orders of any governmental authority, lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.

7.03 **Vehicular Operations on the Airfield**: No vehicles of Lessee, its employees, customers or invitees will be allowed to operate on, or cross, the runways and taxiways and their respective safety areas of the Airport. When necessary, Airport Operations Control Center personnel will provide Lessee escorted access to and from the airfield area.

7.04 **Airport Security Rules and Regulations**: Lessee, its directors, officers, employees, and contractors shall comply with all federal and local Airport Security Regulations adopted by the City or the Department of Airports as such rules and regulations exist or may hereafter be amended.

7.05 **14 C.F.R. Part 77 Requirements**: Lessee agrees to comply with the notification and review requirements set forth in Part 77 of the Federal Aviation Regulations [14 CFR Part 77] in the event any future structure, antenna or building is planned for the Leased Premises, or in the event of any planned modification of any present or future building, antenna or structure located on the Leased Premises.

7.06 **Control of Structures**: Lessee shall not erect nor permit the erection of any structure or object, nor permit the growth of any tree on the Leased Premises which highest point is above a mean sea level elevation established by the FAA and City as a height limitation on such structures or objects. City reserves the right to enter upon the Leased Premises and to remove the offending structure or object and cut the offending tree at Lessee's expense.

7.07 **Aerial Approaches**: City reserves the right to take any action it considers necessary to protect the aerial approaches of the Airport against obstruction together with the right to prevent Lessee from erecting or permitting to be erected any building or other structure on or adjacent to the Airport which, in the opinion of the City, would limit the usefulness of the Airport or constitute a hazard to aircraft.

7.08 **Right of Over-flight**: There is hereby reserved to the City, for the use and benefit of the public, a right of flight for the passage of aircraft above the surface of the Leased Premises, together with the right to cause in said airspace such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air, using said airspace for landing at, taking off from or operating on the Airport.

ARTICLE 8. INSURANCE AND INDEMNITY

8.01 **Lessee's Minimum Insurance Amounts:** Lessee shall obtain and maintain continuously in effect at all times during the Lease Term, at Lessee's sole expense, at least the following minimum insurance with a carrier or carriers licensed to do business in the State of Texas and satisfactory to the MDC:

(a) Property and Casualty Insurance insuring against loss or damage to Lessee's improvements and any and all property being maintained or repaired by Lessee due to fire, lightning and all other perils included in standard extended coverage policies, and vandalism and malicious mischief, all in amounts of not less than one-hundred percent (100%) of replacement value;

(b) Commercial General Liability Insurance against claims for bodily injury, death, or property damage occurring on, in or about the Leased Premises, or any other portion of the Airport, in at least the amount of $10,000,000.00 per individual, $10,000,000.00 per occurrence and $10,000,000.00 with respect to property, and the statutory limits with respect to worker's compensation.

8.02 **Lessee's Coverage Primary:** All insurance herein required shall apply as primary and not in excess of or contributing with other insurance which the Lessee may carry. Insurance provided pursuant to Section 8.01 shall name the MDC and the City as additional insureds or loss payees as the case may be and provide for a waiver of subrogation in favor of the MDC and the City. The comprehensive general liability policy as provided in Paragraph 8.01(b) shall provide contractual liability coverage sufficiently broad so as to include the liability assumed by Lessee under this Agreement. The

Lessee's insurance policies as required by this Agreement shall apply separately to the MDC and City as if separate policies had been issued to Lessee and MDC and City.

8.03 **Contents of General Liability Policy:** Lessee's Comprehensive General Liability policy shall protect the MDC, the City and Lessee against any and all liability to any person or persons whose property damage or personal injury arises out of or is in connection with the occupation, use, or condition of the Leased Premises or resulting from any injury or damage occurring on or about the roads, driveways or other public areas of the Leased Premises used by Lessees, its trustees, officers, employees, students, invitees, and contractors at the Airport, whether or not such damage or injury is the result of negligence of the Lessee or its officers, employees, representatives, invitees, licensees, contractors, agents, guests, or students.

8.04 **Cancellation:** Certificates of Insurance: Lessee's insurance as required by this Agreement shall not be subject to cancellation or material alteration until at least thirty (30) days written notice has been provided to the MDC. Lessee shall furnish to the MDC, annually, Certificates of Insurance showing MDC and City as additional insureds and evidencing that all of the herein-stated requirements have been met.

8.05 **MDC's Right to Purchase Insurance:** In the event such insurance as required by Section 8.01, above, shall lapse, the MDC reserves the right to obtain such insurance at Lessee's expense. Upon demand from MDC, Lessee shall reimburse MDC for the full amount of the premium paid on Lessee's behalf.

8.06 **Effect of Sublease:** In the event the Leased Premises are subleased by Lessee in accordance with Article 11, Lessee shall be relieved of the insurance obligations set forth herein provided that the sublessee obtains and maintains insurance that fully complies with Article 8.

8.07 Indemnity: LESSEE WILL INDEMNIFY AND HOLD HARMLESS AND DEFEND MDC AND CITY AND ALL OF MDC'S AND CITY'S OFFICERS, AGENTS AND EMPLOYEES FROM ALL SUITS, ACTIONS, CLAIMS, DAMAGES, PERSONAL INJURIES, LOSSES, PROPERTY DAMAGE AND EXPENSES OF ANY CHARACTER WHATSOEVER, INCLUDING REASONABLE ATTORNEY'S FEES, BROUGHT FOR OR ON ACCOUNT OF ANY INJURIES OR DAMAGES RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS OR PROPERTY, ON ACCOUNT OF ANY NEGLIGENT ACT OF LESSEE, its agents or employees, or any subcontractor, arising out of, or resulting from, Lessee's use of, or activities on, the Leased Premises, and Lessee will be required to pay any judgment with costs which may be obtained against MDC or City or any of MDC's or City's officers, agents or employees, including reasonable attorney's fees.

ARTICLE 9. UTILITIES

Lessee shall be solely responsible for the payment of all electric, telephone, water, refuse, natural gas and other public utility services used on the Leased Premises.

ARTICLE 10. SIGNS

10.01 **Consent Required:** Except with the prior written consent of the Director of Airports, which shall not be unreasonably withheld, Lessee shall not erect, maintain or display any signs or any advertising at, or on, the exterior part of structures on the Leased Premises, or inside any buildings located on the Leased Premises so as to be visible through the window or exterior doors thereof.

10.02 **Removal on Termination:** Upon the termination of this Agreement, Lessee shall remove, obliterate or paint out, as the MDC may direct, any and all signs and advertising on the Leased Premises or elsewhere at the Airport, and in connection therewith shall restore the Leased Premises to the same condition as prior to the placement of any such signs or advertising. In the event that there is a failure by Lessee to so remove, obliterate or paint out each and every sign or advertising and so to restore the Leased Premises, the MDC may, at its option, perform the necessary work at the expense of Lessee, and the charge therefor shall be paid by Lessee to the MDC on demand. In certain circumstances, the MDC may elect to allow specific signs to remain as existing at the termination of this Agreement. Such signs shall be identified and agreed upon mutually, in writing, by Lessee and MDC.

ARTICLE 11. SUBLEASING

At no time shall Lessee sublease any portion of the Leased Premises or otherwise assign its interests or obligations in this Lease Agreement without the written consent of the MDC. Any such assignment or attempted assignment shall be void.

ARTICLE 12. TAX LIENS

Lessee shall be solely responsible for the collection and payment of all applicable federal, state, and local taxes, including, but not limited to, sales, use, amusement, or excise tax required to be collected and paid over by Lessee to the appropriate taxing authority. Furthermore, Lessee shall be responsible for the payment of any applicable ad valorem taxes and any taxes on Lessee's personal property located on the Leased Premises. Lessee shall at no time permit the foreclosure of any tax liens to Lessee's leasehold interest in the Leased Premises or the buildings, fixtures, or other improvements located on the Leased Premises. The MDC shall have the right to pay such taxes due after Lessee's refusal to pay such taxes, and upon demand Lessee shall reimburse the MDC for the amount of taxes paid plus any penalties, interests, and attorney's fees incurred, subject to Lessee's right to challenge the validity of such taxes in whole or in part. In the event that Lessee is successful in any challenge regarding the payment of any tax, the MDC shall be subrogated to any recovery obtained by Lessee to the extent of the amount of taxes, interests, penalties, and attorneys fees previously paid by the MDC and not already reimbursed by Lessee.

ARTICLE 13. DEFAULT AND REMEDIES

13.01 **Default by Lessee:** The following shall be deemed to be events of default by Lessee under this Agreement:

(a) Lessee shall fail to pay when due any installment of rent or any other payment required pursuant to this Agreement;

(b) Lessee shall abandon any substantial portion of the Leased Premises;

(c) Lessee or any guarantor of Lessee's obligations hereunder shall file a petition or be adjudged bankrupt or insolvent under any applicable federal or state bankruptcy or insolvency law or admit that it cannot meet its financial obligations as they become due, or a receiver or trustee shall be appointed for all or substantially all of the assets of Lessee of any guarantor of Lessee's obligations hereunder;

(d) Lessee or any guarantor of Lessee's obligations hereunder shall make a transfer in fraud of creditors or shall make an assignment for the benefit of creditors;

(e) Lessee shall do or permit to be done any act which results in a lien being filed against the Leased Premises;

(f) The liquidation, termination, dissolution of Lessee or any guarantor of Lessee's obligations hereunder; or

(g) Lessee shall be in noncompliance with any other term, provision or covenant of this Agreement, other than those specified in subparts (a) through (f) above.

13.02 **Abandonment of Business by Lessee:** Lessee further agrees that the abandonment for a period of thirty (30) days by Lessee of the conduct of its business activities at the Airport shall terminate Lessee's rights under this Agreement. By so terminating this Agreement, MDC does not waive any other claim or rights against Lessee. For the purposes of this paragraph, the term "abandonment" shall mean the failure of Lessee to be open for business on the Leased Premises except in the case of war, strike, catastrophe or causes beyond Lessee's control.

13.03 **No Remedy Exclusive:** No remedy herein conferred upon or reserved to the MDC or Lessee is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or hereafter existing under law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the MDC and Lessee to exercise any remedy reserved to it in this section, it shall not be necessary to give any notice, other than such notice as may be herein expressly required.

13.04 **No Waiver of Breach:** MDC's failure or delay in declaring the existence of an event of default by Lessee shall not be construed as a waiver thereof, nor shall it be construed so as to waive or to lessen the right of the MDC to insist upon the performance by Lessee of any term, covenant or condition hereof, or to exercise any rights given it on account of any such event of default. A waiver of any particular event of default shall not be deemed to be a waiver of the same, similar of any other subsequent event of default.

13.05 **Expeditious Action:** Notwithstanding any provision as to notice in this Agreement herein contained, if in MDC's reasonable judgment the continuance of any event of default by Lessee for the full period of the notice to cure the event of default will jeopardize the operation of the Airport or the rights of the MDC or the other Airport tenants, MDC may, without notice, elect to perform those acts in respect to which Lessee is in default. Lessee shall reimburse MDC for any reasonable and necessary costs incurred by the MDC pursuant to this Section 13.05.

ARTICLE 14. TERMINATION BY LESSEE

14.01 Except for the payment by Lessee to MDC of rents or other amounts past due accrued but not yet due, Lessee shall have the right to terminate this Agreement in its entirety, and all rights and obligations ensuing therefrom immediately upon the occurrence of the following:

(a) The issuance of any order, rule or regulation of the Federal Aviation Administration, or its successor federal agency, or other competent government authority, federal or state, or the issuance and execution of any judicial process by any court of competent jurisdiction, materially restricting for a period of at least sixty (60) days, the use of the Airport for aeronautical purposes; provided that none of the foregoing is due to any fault of Lessee; or

(b) The material restriction of the City's operation of the Airport by action of the federal government, or any department or agency thereof, under its wartime or emergency powers, and the continuance thereof for a period of not less than sixty (60) days; provided, however, that without prejudice to the rights of Lessee to terminate as above provided, the MDC and Lessee may mutually agree to adjust fees and charges; or

(c) Material restriction of the operation of the Airport arising from City's failure to maintain and keep in repair the landing area of the Airport.

14.02 If Lessee terminates this Agreement for any of the reasons set forth in (a) through (c) of Article 14, MDC shall promptly repay Lessee any rent previously paid by Lessee attributable to the period following the date of such termination.

ARTICLE 15. MISCELLANEOUS PROVISIONS

15.01 **Quiet Enjoyment:** Upon the performance of the covenants and agreements on the part of the Lessee to be performed hereunder, the Lessee shall peaceable have and enjoy the Leased Premises, appurtenances, facilities, licenses and privileges granted in this Agreement.

15.02 **Force Majeure:** Neither the MDC nor Lessee shall be deemed in violation of this Agreement if it is prevented from performing any of its obligations hereunder except the obligation to pay rent by reason of strikes, boycotts, labor disputes, embargoes, shortages of materials, act of God, act of superior governmental authority, weather conditions, floods, riots, rebellions, acts of sabotage or any other circumstances for which it is not responsible or which are not in its control.

15.03 **Independent Contractor:** It is expressly understood and agreed that Lessee shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant or employee of the MDC; that Lessee shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder, and all persons performing the same; and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors; that the doctrine of *respondeat superior* shall not apply as between MDC and Lessee, its officers, agents, employees, contractors and subcontractors; and that nothing herein shall be construed as creating a partnership or joint enterprise between MDC and Lessee. No person performing any of the work and services described hereunder shall be considered an officer, agent, servant or employee of the MDC. Further, it is specifically understood and agreed that nothing in this Agreement is intended or shall be construed as creating a "Community of Pecuniary Interest" or "An Equal Right of Control" which would give rise to vicarious liability. Lessee shall be an independent contractor under this Agreement and shall assume all the rights, obligations and liabilities, applicable to it as such independent contractor hereunder and any provisions in this Agreement which may appear to give MDC the right to direct Lessee as to details of doing the work herein covered or to exercise a measure of control over the work shall be deemed to mean that Lessee shall follow the desires of MDC in the results of the work only. The MDC does not have the power to direct the order in which the work is done. The MDC shall not have the right to control the means, methods or details of the Lessee's work.

15.04 **Inspection by MDC:** MDC may enter upon the Leased Premises at any reasonable time for any purpose necessary, incidental to or connected with the performance of MDC's obligations hereunder, or in the exercise of its governmental functions, for fire protection or security purposes, or for inspecting or maintaining the Leased Premises, or doing any and all things MDC is obligated to do, or which may be deemed by MDC necessary or desirable for the proper conduct and operation of the Airport or the protection of MDC's interests.

15.05 **On-Site Representatives:** Lessee shall select and appoint a representative or representatives for its operations at the Airport. The representatives shall be qualified and experienced, and vested with the full power and authority to act in the name of the Lessee with respect to the method, manner and conduct of the operation of Lessee to be performed under this Agreement.

15.06 **Conformance with Rules and Regulations**: The use of the Airport by Lessee shall be subject to any and all rules, regulations and ordinances which are now in force or which may be hereafter adopted by the City with respect to the operation and use of the Airport, but no such rules, regulations, or ordinances shall increase the payable by Lessee under this Agreement or otherwise materially and adversely affect Lessee's tenure of the Leased Premises under this Lease. Furthermore, this Agreement and Lessee's use of the Airport shall be subject to any and all applicable laws, ordinances, resolutions, statutes, rules, regulations or orders of any federal, state or local governmental authority lawfully exercising jurisdiction over the Airport or the activities and business operations of Lessee, including any limitations, restrictions or prohibitions affecting the aviation activities or operations of Lessee.

15.07 **Licenses and Permits**: Lessee hereby agrees that it shall, at its own expense and cost, procure and obtain all lawfully required licenses and permits, certificates and other authorizations required by any governmental authority, in connection with or covering the operations or activities permitted to be performed by it under the provisions of this Agreement.

15.08 **Notices**: Notices provided for in this Agreement shall be either hand delivered or sent by certified mail, return receipt requested, postage prepaid, and properly addressed as follows:

If to MDC: Executive Director
Midland Development Corporation
109 N. Main St.

Midland, Texas 79701

With Copy To: City Manager
P. O. Box 1152
300 North Loraine
Midland, Texas 79702

If to Lessee: XCOR Aerospace, Inc.
Attn: Andrew Nelson
Chief Operating Officer
P.O. Box 1163
Mojave, California

The parties may change the representative or address for delivery of notices from time to time by sending written notices to the other party. All notices shall be in writing and effective only upon actual receipt.

15.09 **Governing Law and Venue**: This Agreement shall be governed by the laws of the State of Texas. All performance and payment made pursuant to this Agreement shall be deemed to have occurred in Midland County, Texas. Exclusive venue for any claims, suits or any other action arising from or connected in any way to this Agreement or the performance of this Agreement shall be in Midland County, Texas. The obligations and undertakings of each of the parties to this Agreement shall be deemed to have occurred in Midland County, Texas.

15.10 **Severability**: If any provision of this Agreement is invalid or unenforceable, this Agreement shall be considered severable as to such provision, and the remainder of this Agreement shall remain valid and binding as though such invalid or unenforceable provisions were not included herein.

15.11 **Captions**: Section headings are inserted herein only as a matter of convenience and for reference, and in no way defines, limits or describes the scope or intent to any provision herein.

15.12 **Use of Language**: Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular shall be held to include the plural, unless the context otherwise requires.

15.13 **Counterparts**: This Agreement may be executed in multiple counterparts, each of which shall be deemed as original, and all of which constitute but one and the same instrument.

15.14 **Development of the Airport**: The parties understand and agree future development, changes, alterations, modifications or improvement to the Airport are in the sole discretion of the City, subject only to such notification to Lessee that the Federal Aviation Administration may dictate

15.15 **Subordination to Other Agreements**: This Agreement shall be subordinate to the provisions and requirements of any existing or future agreement between the MDC and the City relative to the Leased Premises, including the lease agreement between the MDC and the City regarding the Leased Premises, which is attached hereto and incorporated herein as Exhibit “B”; and the City and the United States, relative to the development, operation or maintenance of the Airport.

15.16 **No Exclusivity on Aeronautical Services**: Nothing herein contained shall be construed to grant or authorize the granting of the exclusive right to provide aeronautical services to the public as prohibited by Section 308(a) of the Federal Aviation Act of 1958, as amended.

15.17 **Discrimination Prohibited**: The Lessee, for itself, its trustees, officers, legal representatives, successors-in-interest and assigns, as a part of the consideration hereof, agrees (1) that no person on the grounds of race, color, sex, national origin, veteran status or disability shall be excluded from participation in, denied the benefits of or be otherwise subjected to discrimination in the use of the Leased Premises; (2) that in the construction of any improvements on, over or under the Leased Premises and the furnishing of services thereon, no person on the grounds of race, sex, color, national origin, or disability shall be excluded from participation in, denied the benefits of or otherwise be subjected to discrimination; (3) that the Lessee shall use the Leased Premises and the Airport in compliance with all other requirements imposed by, or pursuant to, Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, office of the Secretary, Part 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said regulations may be amended. In the event of breach of any of the above nondiscrimination covenants, the MDC shall have the right to terminate this Agreement and to re-enter and repossess the Leased Premises and the improvements thereon, and hold the same as if said Agreement were terminated by its own term pursuant to Section 2.01 above.

15.18 **Affirmative Action Program**: Lessee assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, to ensure that no person shall on the grounds of race, creed, color, national origin, sex or disability be excluded from participating in any employment activities covered in 14 CFR Part 152, Subpart E. Lessee assures that no person shall be excluded on these grounds from participating in or receiving the services or benefits of any program or activity covered by this Agreement.

15.19 **Entire Agreement**: This Agreement embodies the entire agreement between the MDC and Lessee, and supersedes all prior agreements and understandings, whether written or oral, and all contemporaneous oral agreements and understandings relating to the subject matter hereof. This Agreement shall not be changed, modified, discharged or extended, except by written instrument duly executed by MDC and Lessee. The parties agree that no representations or warranties shall be binding upon either party unless expressed in writing in the aforesaid Agreement.

15.20 **Sovereign Immunity**: By executing this Agreement the MDC is not waiving its right of sovereign immunity. The MDC is retaining its immunity from suit. The MDC is not granting consent to be sued by legislative resolution or action.

THERE IS NO WAIVER OF SOVEREIGN IMMUNITY.

15.21 **Third-Party Beneficiary**: The MDC’s approval of this Agreement does not create a third-party beneficiary. There is no third-party beneficiary to this Agreement. No person or entity who is not a party to this Agreement shall have any third-party beneficiary or other rights hereunder.

15.22 **Notice of Alleged Breach**: As a condition precedent to filing suit for alleged damages incurred by an alleged breach of an express or implied provision of this Agreement, Lessee or its legal representative, shall give the Chairman of the MDC, or any other reasonable official of the MDC, notice in writing of such damages, duly verified, within one hundred and twenty (120) days after the same has been sustained. The discovery rule does not apply to the giving of this notice. The notice shall include when, where and how the damages occurred, the apparent extent thereof, the amount of damages sustained, the amount for which the Lessee will settle, the physical and mailing addresses of Lessee at the time and date the claim was presented and the physical and mailing addresses of Lessee for the six months immediately preceding the occurrence of such damages, and the names and addresses of the witnesses upon whom the Lessee relies to establish its claim; and a failure to so notify the MDC within the time and manner provided herein shall exonerate, excuse and except the MDC from any liability whatsoever. The MDC is under no obligation to provide notice to Lessee that Lessee's notice is insufficient. MDC reserves the right to request reasonable additional information regarding the claim. Said additional information shall be supplied within thirty (30) days after receipt of notice.

The statutory prerequisites outlined herein constitute jurisdictional requirements pursuant to Section 271.154 of the Texas Local Government Code and Section 311.034 of the Texas Government Code. Notwithstanding any other provision, Lessee's failure to comply with the requirements herein shall perpetually bar Lessee's claim for damages under Chapter 271 of the Texas Local Government Code, and Section 311.034 of the Texas Government Code, regardless if MDC has actual or constructive notice or knowledge of said claim or alleged damages. Lessee agrees that the requirements of this entire agreement are reasonable.

15.23 **Release**: **LESSEE HEREBY RELEASES, RELINQUISHES, ACQUITS AND FOREVER DISCHARGES MDC, MDC'S EMPLOYEES AND OFFICERS, FROM ANY AND ALL DEMANDS, CLAIMS, DAMAGES OR CAUSES OF ACTION OF ANY KIND WHATSOEVER WHICH LESSEE HAS OR MIGHT HAVE IN THE FUTURE, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, QUANTUM MERUIT, DUE PROCESS AND TAKINGS CLAUSES UNDER THE TEXAS AND UNITED STATES CONSTITUTION, TORT CLAIMS OR MDC'S NEGLIGENCE.**

15.24 **Waiver of Attorney Fees**: **By executing this Agreement, LESSEE AND MDC AGREE TO WAIVE AND DO HEREBY WAIVE ANY CLAIM THEY HAVE OR MAY HAVE AGAINST THE OTHER PARTY, REGARDING THE AWARD OF ATTORNEY'S FEES, WHICH ARE IN ANY WAY RELATED TO THE AGREEMENT, OR THE CONSTRUCTION, INTERPRETATION OR BREACH OF THE AGREEMENT. LESSEE AND MDC SPECIFICALLY AGREE THAT IF LESSEE OR MDC BRINGS OR COMMENCES ANY LEGAL ACTION OR PROCEEDING RELATED TO THIS AGREEMENT, THE CONSTRUCTION, INTERPRETATION, VALIDITY OR BREACH OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY ACTION PURSUANT TO THE PROVISIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 37.001, ET SEQ., AS AMENDED), LESSEE AND MDC EACH AGREES TO WAIVE AND RELINQUISH ANY AND ALL RIGHTS TO THE RECOVERY OF ATTORNEY'S FEES TO WHICH LESSEE OR MDC MIGHT OTHERWISE BE ENTITLED.**

Lessee and MDC agree that this is the intentional relinquishment of a presently existing known right. Each party acknowledges that it understands all terms and conditions of the Agreement.

By execution of the Agreement, Lessee hereby represents and warrants to the MDC that Lessee has read and understood the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be legally executed in duplicate this __________ day of ______________________, 2012.

MIDLAND DEVELOPMENT CORPORATION

____
Laura Roman, Chairman

ATTEST:

____
Robert Rendall, Secretary

APPROVED AS TO FORM:

____
Keith Stretcher, City Attorney

XCOR AEROSPACE, INC.

____
Andrew Nelson, Chief Operating Officer

THE STATE OF _______________ §
§
COUNTY OF __________________§

BEFORE ME, ____________________, a notary public, on this day personally appeared _________________________, of XCOR AEROSPACE, INC., known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of said company for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS _______ day of ______________, A.D., 2012.

Notary Public, in and for
the State of _______________


Pilot Ave
ACCESS ROAD
CITY
N 41°1'16" E
848.60'
1048.17'
RAILROAD SPUR AND UTILITY EASEMENT
N 41°1'16" E
660.50'
860.08'
MDC OPTION
P.S. 2
0.589 Acres
25636 S.F.
513.86'
130.00'
Perma Sand
12793 S.F.
152.3'
Perma Sand
12058 S.F.
77.87'
197.20'
255.74'
349.89'
285.61'
TRACT 4-B
1.432 Acres
62,371 S.F.
AREA
TRACT 4-A
1.752 Acres
76,309 S.F.
218.09'
120.0'
260.6'
218.09'
Hangar S-11A
39442 S.F.
(City Owned)
151.35'
224.80'
Sewer Plant Tract
1.924 Acres
83792 S.F.
Hangar S-11B
18180 S.F.
151.5'
145.00'
349.89'
25.88'
260.6'
379.61'
S 41°01'16" W
755.45'
56°02'06" W
233.41'
99.86'
P
120.14'
217.46'
1.799 Acres
78373 S.F.
134.91'
260.43'
25.46'
© 2012 Google
Google earth
231 ft
Imagery Date: 6/17/2011
1995
31°55'52.71" N 102°12'29.76" W elev 2859 ft
Eye alt 3862 ft

4.21