

**RESOLUTION NO. 49-2008**

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF BENSON, ARIZONA, APPROVING AND AUTHORIZING THE EXECUTION OF A SETTLEMENT AGREEMENT IN THE CASE OF ARIZONA GOLF SYSTEMS, L.L.C. V. CITY OF BENSON, COCHISE COUNTY SUPERIOR COURT, CASE NO. CV200400507.

WHEREAS, the City of Benson is engaged in litigation with Arizona Golf Systems, L.L.C., in the case of Arizona Golf Systems, L.L.C. v. City of Benson, Cochise County Superior Court, Case No. CV200400507 (the "Lawsuit"); and

WHEREAS, the City of Benson and Arizona Golf Systems, L.L.C., entered into settlement discussions concerning the Lawsuit; and

WHEREAS, the City of Benson and Arizona Golf Systems, L.L.C., have reached an agreement to settle the Lawsuit; and

WHEREAS, the staff of the City of Benson and Arizona Golf Systems, L.L.C., have drafted a settlement agreement (the "Agreement") attached hereto as Exhibit "A" and incorporated herein by this reference, settling the claims of the parties to the Lawsuit and dismissing the parties from the Lawsuit; and

WHEREAS, the Mayor and Council of the City of Benson have reviewed the terms and conditions of the Agreement and find that entering into it is in the best interests of the City and its residents.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Council of the City of Benson that the City enter into the Agreement with Arizona Golf Systems, L.L.C., attached hereto as Exhibit "A," and the Mayor is hereby authorized to execute the Agreement.

BE IT FURTHER RESOLVED that the City's officers and staff are hereby authorized to take all steps necessary and proper to implement the Agreement and carry out its intents and purposes.

PASSED AND ADOPTED by the Mayor and City Council of the City of Benson, Arizona, this 23rd day of June, 2008.



MARK M. FENN, Mayor

ATTEST:



VICKI L. VIVIAN, City Clerk

APPROVED AS TO FORM:



THOMAS A. BENAVIDEZ, City Attorney

EXHIBIT A

[Settlement Agreement]

## SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2008, by and between Arizona Golf Systems, L.L.C. ("AGS"); and the City of Benson (the "City").

### RECITALS

A. On or about June 15, 2001, AGS, as tenant, and the City, as owner and landlord, entered into a Lease Agreement (the "Lease") for certain property legally described in the Lease, and generally located around the City Sewer Treatment Facility in the northeastern portion of the City (the "Property").

B. AGS developed a golf course on the Property. Pursuant to the Lease, the City agreed to undertake various obligations, including providing AGS with certain amounts of water for the development and maintenance of the golf course.

C. Disputes are arisen between the parties regarding the various obligations due under the Lease, including, but not limited to, allegations that the City (i) failed to provide to AGS all required water in a timely manner; (ii) failed to remove all existing waste from the Property; (iii) failed to provide AGS with all necessary building permits free and charge to AGS; and (iv) failed to indemnify AGS from any and all liability AGS may incur in connection with the Property (the "Allegations").

D. In August, 2004, AGS filed a lawsuit in Cochise County Superior Court, entitled Arizona Golf Systems, L.L.C. v. City of Benson, Case No. CV200400507 (the "Lawsuit")

E. The City denies any and all liability to AGS in connection with the Lease; the Property; the Allegations and/or the Lawsuit.

F. Without admitting liability with respect to any claim, defense, demand, or cause of action, AGS and the City desire to settle and compromise all claims which exist among them, asserted or unasserted, which arise out of or relate to the Lease; the Property; the Allegations and/or the Lawsuit.

### COVENANTS

Therefore, in consideration of the mutual covenants and agreements set forth below, AGS and the City agree as follows:

1. Recitals. The Recitals set forth above are incorporated by reference herein.

2. Conveyance of the Property to AGS. The City agrees to convey the Property to AGS via a Warranty Deed in the form attached as Exhibit "A." The intention of the parties is to convey the exact Property that is subject to the Lease, no more and no less.

3. Provision of Water to AGS. For as long as AGS maintains and operates a golf course on the Property in substantially the same size and scope as presently exists, the City agrees to provide to AGS, free of charge, from any source, the minimum amount of water provided for in Exhibit D of the Lease, which Exhibit is incorporated herein by this reference. AGS shall use this water only on the Property, and will not use it outside the Property or sell it to third parties. If for any reason AGS decides not to continue using the City's effluent on the Property, AGS shall provide 180 days advance written notice to the City of such discontinuance.

4. Dismissal of the Lawsuit. Contemporaneous with the execution of this Agreement, the parties shall execute and file a Stipulation for Dismissal With Prejudice of the Lawsuit in the form attached as Exhibit "B."

5. Mutual Releases. AGS and the City hereby irrevocably release and discharge the other and its applicable individual directors, members, managers, officers, and partners, agents, employees, representatives, servants, predecessors, successors, assigns, affiliated entities, heirs, personal representatives, insurers and any applicable spouses, and all other related or associated persons, firms, corporations, associations or partnerships from any and all claims, actions, causes of actions, demands, liability or obligations of any nature or kind, whether presently known or unknown, which they may now have against each other or which hereafter accrues on account of, or in any way arises out of, or in connection with the Lease; the Property; the Allegations and/or the Lawsuit.

6. No Other Pending Legal or Administrative Actions. AGS represents that, other than the Lawsuit, it is not a party to any actions at law or administrative proceedings currently pending that concern or relate in any way to the City.

7. Nonassignment of Claims. AGS represents and warrants that it has not assigned or subrogated any claims it has or may have against the City or authorized any person or entity to assert such a claim or claims on its behalf.

8. Knowing Release. AGS and the City hereby represent to each other that the releases, waivers and discharges provided for in this Agreement have been knowingly and voluntarily granted after thorough consultation with counsel as to the binding and irrevocable effect of them. AGS and the City hereby represent and warrant to each other that this Agreement is binding upon and for the benefit of each of them, their successors, assigns and

personal representatives, in accordance with the terms of this Agreement.

9. Fees and Costs. Each party shall bear their own respective costs, fees and other expenses incurred to date, and in connection with the preparation of this Agreement.

10. Construction. This agreement is intended to express the mutual intent of the parties, and is the product of mutual negotiation between the parties, who are represented by attorneys. Each party and its counsel have reviewed this Agreement. Therefore, irrespective of the identity of the parties preparing or revising this Agreement or any related document, no rule of strict construction shall be applied against any party.

11. Entire Agreement. This Agreement constitutes and embodies the full and complete understanding and agreement of the parties and supersedes all prior understandings and agreements whether oral or in writing, pertaining to the subject matter described above. Neither party has made any parol promises or inducements to the other party other than what is contained in this Agreement.

12. No Waiver of Failure to Act. Neither any failure nor any delay on the part of any Party to this Agreement in exercising any right hereunder shall operate as a waiver of that right, nor shall any single or partial exercise of any right preclude any other or further exercise of the same or any other right under this Agreement.

13. Enforcement. In the event legal proceedings are commenced for the construction or enforcement of this Agreement, the party prevailing in any such action shall recover its reasonable attorneys' fees and costs from the adverse party whether or not formal suit is actually filed.

14. Modifications and Amendments. This Agreement shall not be altered, modified or amended except by a writing signed by the party sought to be charged with such alteration, modification, or amendment.

15. Capacity to Execute. Each party to this Agreement warrants and represents that they are duly and properly authorized to enter into this Agreement and that all necessary corporate, partnership, administrative or governmental approvals have been obtained prior to execution of this Agreement.

16. Governing Law/Choice of Forum. This Agreement shall be construed and interpreted in accordance with the laws of the State of Arizona and any action arising under this Agreement shall be commenced and maintained in the Superior Court of Cochise County, Arizona.

17. Severability of Invalid Provisions. If any term or provision of this Agreement, or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such terms to persons or circumstances other than those to which it is invalid and unenforceable, shall not be affected thereby, and each term and provision hereof shall be valid and enforced to the fullest extent permitted by law so long as the parties substantially realize the benefits conferred by the Agreement.

18. Additional Instruments and Acts. The parties to this Agreement agree to execute any further or additional instruments and perform any additional acts which may become necessary in order to effectuate and carry out the purposes of this Agreement.

19. Miscellaneous. The paragraph headings used herein are for convenience and reference only, and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.

20. Execution in Counterparts. This Agreement may be executed in counterparts.

21. THE SIGNATORIES HAVE CAREFULLY READ THIS ENTIRE AGREEMENT AND RELEASE. ITS CONTENTS HAVE BEEN FULLY EXPLAINED TO THEM BY THEIR ATTORNEYS. THE SIGNATORIES FULLY UNDERSTAND THE FINAL AND BINDING EFFECT OF THIS AGREEMENT. THE ONLY PROMISES OR REPRESENTATIONS MADE TO ANY SIGNATORY ABOUT THIS AGREEMENT, OR TO INDUCE THEM TO SIGN THIS AGREEMENT, ARE CONTAINED IN THIS AGREEMENT. THE SIGNATORIES ARE SIGNING THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, the Parties have executed this Agreement.

CITY OF BENSON

DATED: 7-15-08

By 

Its \_\_\_\_\_

ARIZONA GOLF SYSTEMS, L.L.C.

DATED: \_\_\_\_\_

By \_\_\_\_\_

Its \_\_\_\_\_