Staff Summary Report

Tempe

Council Meeting Date: 09/12/02 **Agenda Item Number:** _____

SUBJECT: This is a public hearing to grant a lease of City right of way to Mill Avenue Q. Co. L.L.C., for sidewalk cafe vending at 607 S. Mill Avenue and declare the existence of an emergency.

DOCUMENT NAME: (20020912PWDR01) **REAL PROPERTY/RIGHT OF WAY LEASE (TO OTHERS) (0903) ORDINANCE NO. 2002.33**

SUPPORTING DOCS: Yes

COMMENTS: Ordinance 97.24 (Mobile Merchants and Sidewalk Vendors) requires that the City enter into a lease with sidewalk cafe vendors. This ordinance is to authorize the Mayor to sign the lease agreement.

PREPARED BY: JAMES CRISTEA, ENGINEERING MANAGER, LAND SERVICES (x8417)

REVIEWED BY: NEIL MANN, DEPUTY PW MANAGER/CITY ENGINEER (x8250)

LEGAL REVIEW BY: JANIS BLADINE, ASSISTANT CITY ATTORNEY (x8609)

FISCAL NOTE: N/A

RECOMMENDATION: Adopt Ordinance No. 2002.33 and authorize the Mayor to execute any necessary documents.

ADDITIONAL INFO: At a public hearing of the downtown vending committee, held August 13, 2002, Mill Avenue Q. Co. L.L.C., was approved for the grant of a sidewalk cafe vending license and authorized to enter into a proposed lease agreement with the City of Tempe. Ordinance 97.24 requires that the City Council hold a public hearing on the proposed lease.

Due to the hardships caused by the passage of the Smoking Ordinance Amendments (City Code Chapter 22-40 et seq.) to downtown merchants, City Council has previously directed staff to expedite the approval of downtown café licenses and leases. In order to receive approval by fall 2002, an emergency has been declared.

Approved by Glenn Kephart, Public Works Manager

ORDINANCE NO. 2002.33

AN ORDINANCE BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE LEASE OF REAL PROPERTY LOCATED AT 607 S MILL AVENUE AND DECLARING THE EXISTENCE OF AN EMERGENCY.

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WHEREAS, the City of Tempe owns certain real estate described herein, and

WHEREAS, Mill Avenue Q. Co. L.L.C., having its place of business at 607 S. Mill Avenue, Tempe, AZ. 85281, is desirous of leasing the property to be used as a sidewalk cafe area, and

WHEREAS, the site described herein is a portion of the sidewalk located on the east side of Mill Avenue between 6th and 7th Streets, and is not necessary for adequate pedestrian movement, and that it would be in the best interest of the citizens of the City of Tempe to extend the lease herein described:

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

SECTION I. That the Mayor is hereby authorized to execute lease agreement number C-2002-117 which is on file in the City Clerk's Office.

SECTION II. That the immediate operation of the provisions of this Ordinance is necessary for the preservation of the public peace, health, safety, and general welfare of the community, an EMERGENCY is declared to exist, and this Ordinance shall be in full force and effect from and after the date of its adoption and passage by the City Council as required by City Charter, and is hereby exempt from the referendum clause of said Charter.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE,

ARIZONA this _____ day of _____, 2002.

_____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

LEASE AGREEMENT
NO. C-2002-117

THIS LEASE AGREEMENT is entered into the date below signed by and between the CITY OF TEMPE, a municipal corporation of the State of Arizona (Lessor) hereinafter referred to as the "CITY" and Mill Avenue Q. Co., L.L.C., having its place of business at 607 S. Mill Avenue, Tempe, AZ., 85281 (Lessee).

1. PREMISES

The CITY hereby leases to Lessee the tract of land, with the improvements thereon, in the City of Tempe, Arizona, described as follows:

See Exhibit "A" and "A-1" attached hereto

The CITY leases the Premises to Lessee subject to the following covenants, terms and conditions:

A. The condition and state of the Premises as the same may be on the date of the commencement of the term of this Lease; and

B. All easements, liens, encumbrances, restrictions and covenants affecting the Premises as may appear of record on the date hereof.

C. The provisions of City of Tempe Code Chapter 22-40 et seq.

2. TERM

The term of this Lease shall commence on September 12, 2002, and shall expire on December 31, 2007, subject to earlier termination as provided herein. The City of Tempe Council shall have the authority to extend the lease term by resolution provided that the conditions of the lease and all applicable City of Tempe Ordinances are fulfilled.

3. CONSIDERATION FOR LEASE

3.1 Annual Rental Fee

Per code revision Section 24-26(C)(2) no-fee lease for sidewalk cafes.

4. USE OF PREMISES

Lessee shall use the Premises in accordance with the following conditions:

A. The Premises may only be used for a sidewalk café and only as permitted by the zoning ordinances of the City of Tempe and for no other use during the term of this Lease;

B. Lessee shall operate the sidewalk cafe so as not to impact the adjacent pedestrian right of way;

C. No unlawful use shall be made of the Premises or any part thereof, nor shall any nuisance be allowed thereon;

D. Lessee shall promptly comply with all applicable federal, state, or municipal statutes, laws, ordinances, regulations or requirements, now or hereafter in effect during the term of this Lease.

E. Lessee shall comply with the stipulations and conditions set forth in the Sidewalk Café license or permit authorized by the Downtown Vending Committee at its August 13, 2002 meeting and as approved by the Council of the City of Tempe at its meeting of September 5, 2002.

5. REMOVAL OF IMPROVEMENTS AND PROPERTY

At the termination of this Lease, the CITY shall have the option and may require Lessee to remove all improvements, fixtures, equipment and other property owned by Lessee, or erected or placed on said Premises by Lessee or its agents during the term of this Lease Agreement. Lessee shall restore the Premises to as good as condition as existed prior to the alterations. If Lessee does not restore the Premises then the CITY shall have the option to perform or cause to be performed such reasonable and necessary work on behalf of Lessee and charge Lessee for the costs incurred. Upon the receipt of a demand for payment by the CITY, Lessee shall reimburse the CITY for such costs.

6. TERMINATION

Lessee shall be deemed in default under this Agreement upon the occurrence of any of the following events:

A. The failure to pay any amounts due under this Agreement and the failure to cure such non-performance within ten (10) days after written notice from the CITY.

B. The failure to perform any other term or condition of this Agreement or any other term or condition of the City of Tempe sidewalk café license or permit and the failure to cure such non-performance within thirty (30) days after written notice thereof from the CITY.

C. The failure to maintain a City of Tempe sidewalk café license or permit.

This Agreement may be terminated upon default after the running of grace periods as set forth herein by CITY.

7. ASSIGNMENT

This Lease Agreement shall not be assigned except with the approval of the Council of the City of Tempe. This Lease Agreement shall not be used as collateral or security for any loan or similar transaction.

8. INSURANCE

8.1 Minimum Limits of Insurance

Lessee shall procure and maintain, for the duration of this Lease, insurance against claims for injuries to persons and damages to property, which may arise from or in connection with the use of the Premises by Lessee, its agents, representatives, employees or subcontractors. Lessee shall maintain limits of no less than $1,000,000 combined single limit per occurrence for bodily injury and property damage, including coverage for contractual liability (including defense expense coverage for additional insured), personal injury, broad form property damage, products and completed operations. The general aggregate limit shall apply separately to this location or the general aggregate shall be twice the required occurrence limit.

8.2 Deductibles and self-insured retentions

Any deductibles or self-insured retentions must be declared and approved by the CITY. At the option of the CITY, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the CITY, its officials, employees, and volunteers, or Lessee shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

8.3 Insurance provisions

A. The CITY, its officials, employees, and volunteers are to be covered as additional insured as respects: liability arising out of activities performed by or on behalf of Lessee including the insured's general supervision of Lessee; products and completed operations of

Lessee; Premises owned, occupied or used by the Lessee. The coverage shall contain no special limitations on the scope of protection afforded to the CITY, its officials, employees, or volunteers.

B. Lessee's insurance coverage shall be primary as respects the CITY, its officials, employees, and volunteers. Any insurance or self-insurance maintained by the CITY, its officials, employees, or volunteers shall be in excess of Lessee's insurance and shall not contribute to it.

C. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the CITY, its officials, employees, or volunteers.

D. Coverage shall state that Lessee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

E. Each insurance policy required by this contract shall be endorsed to state the coverage shall not be suspended, voided, and/or cancelled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City's Risk Manager.

8.4 <u>Insurance related requirements</u>

A. Prior to commencement of use, furnish the CITY with certificates of insurance, in form and with insurers acceptable to the City's Risk Manager (or designee) which shall clearly evidence all insurance required in this contract and provide that such insurance shall not be cancelled, allowed to expire or be materially reduced in coverage except on thirty (30) days prior written notice to the CITY.

B. Provide certified copies of endorsements and policies if requested by the CITY in lieu of or in addition to certificates of insurance.

C. Replace certificates, policies, and endorsements for any such insurance expiring prior to completion of services.

D. Maintain such insurance for the duration of this Lease. Should any required insurance lapse during the contract term, requests for payments originating after such lapse shall not be processed until the CITY receives satisfactory evidence of reinstated coverage as required by this contract, effective as of the lapse date. If insurance is not reinstated, CITY may at its sole option, purchase insurance for the Lessee and invoice Lessee for the cost of the insurance.

E. Place such insurance with insurers and agents licensed and authorized to do business in Arizona and having a Best's rating of no less than A-, XIII.

F. Maintain such coverage continuously throughout the term of this Agreement and without lapse for a period of five years beyond the contract expiration, should any of the required insurance be provided under a claims-made form, to the extent that should occurrences during the contract term give rise to the claims made after expiration of the contract, such claims shall be covered by such claims-made policies.

F. Any questions relative to insurance requirements may be referred to Risk Manager, City of Tempe, P. O. Box 5002, Tempe, AZ 85280, (480) 350-2975.

9. INDEMNIFICATION

Lessee shall indemnify, defend, and hold harmless the CITY from any and all claims, demands, losses, damages, liabilities, fines, penalties, administrative and judicial proceedings, all costs and expenses, including reasonable attorney's fees and costs of defense arising out of the exercise of this Lease by Lessee.

10. WAIVER OF BREACH

No waiver by CITY of any default herein shall be construed as a waiver of any preceding or succeeding default under the same or any other provisions of this Agreement.

11. EMINENT DOMAIN

Should said Premises, or a part thereof sufficient in Lessee's judgment to render the remainder unsuitable for a Lessee's purposes, be taken or condemned for public use, then Lessee may cancel and terminate this Lease upon giving the CITY thirty (30) days written notice.

12. HOLDOVER

If, at the expiration or termination of this Lease, Lessee shall hold over for any reason, the tenancy of Lessee thereafter shall be from month to month only and be subject to all other terms and conditions of this Lease.

13. NOTICE

All notices which shall or may be given pursuant to this Lease shall be in writing and transmitted through the United States mail, by means of private delivery systems, or by facsimile transmission, if a hard copy of the same is followed by delivery through the U.S. mail or by private delivery systems.

14. ENTIRETY OF AGREEMENT

No prior stipulation, agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in the provisions of this Lease.

15. GOVERNMENT PROPERTY LEASE EXCISE TAX

If it is determined that A.R.S. §42-1901 et seq. is applicable to this Lease Agreement, then Lessee shall be responsible for any excise tax imposed by said State statute in a timely fashion.

16. CONFLICT OF INTEREST

This Agreement may be cancelled pursuant to A.R.S. §38-511.

17. CONTINGENT APPROVAL

This Lease Agreement can only be effective pursuant to the execution of an ordinance by the City of Tempe approving this Lease Agreement in accordance with the Tempe City Charter Section 2.11.

IN WITNESS WHEREOF, Lessor and Lessee have hereunto subscribed their names the day and year first above written.

LESSOR:

City of Tempe,
a municipal corporation
P. O. Box 5002
Tempe, AZ 85280

By _____
Mayor
City of Tempe

LESSEE:

Mill Avenue Q. Co. L.L.C.
607 S. Mill Avenue
Tempe, AZ 85280

By _____

Its _____

APPROVED AS TO FORM:

_____
Brad Woodford
City Attorney

EXHIBIT "A'

LEGAL DESCRIPTION

A parcel of land being a portion of Mill Avenue right of way as shown on the plat of "Tempe" according to Book 2 of Maps, Page 26, Maricopa County Recorder, Arizona, being more particularly described as follows:

Beginning at a point on the West line of Block 10 of said plat of "Tempe," lying 72.50 feet South of the Northwest corner of said Block 10, said point also being on the East right of way of Mill Avenue;

Thence continuing South along said West line of Block 10, 25.00 feet;

Thence departing said West line, West parallel with and 97.50 feet South of the North line of said Block 10, 6.30 feet;

Thence North parallel with and 6.30 feet West of the West line of said Block 10, 8.00 feet;

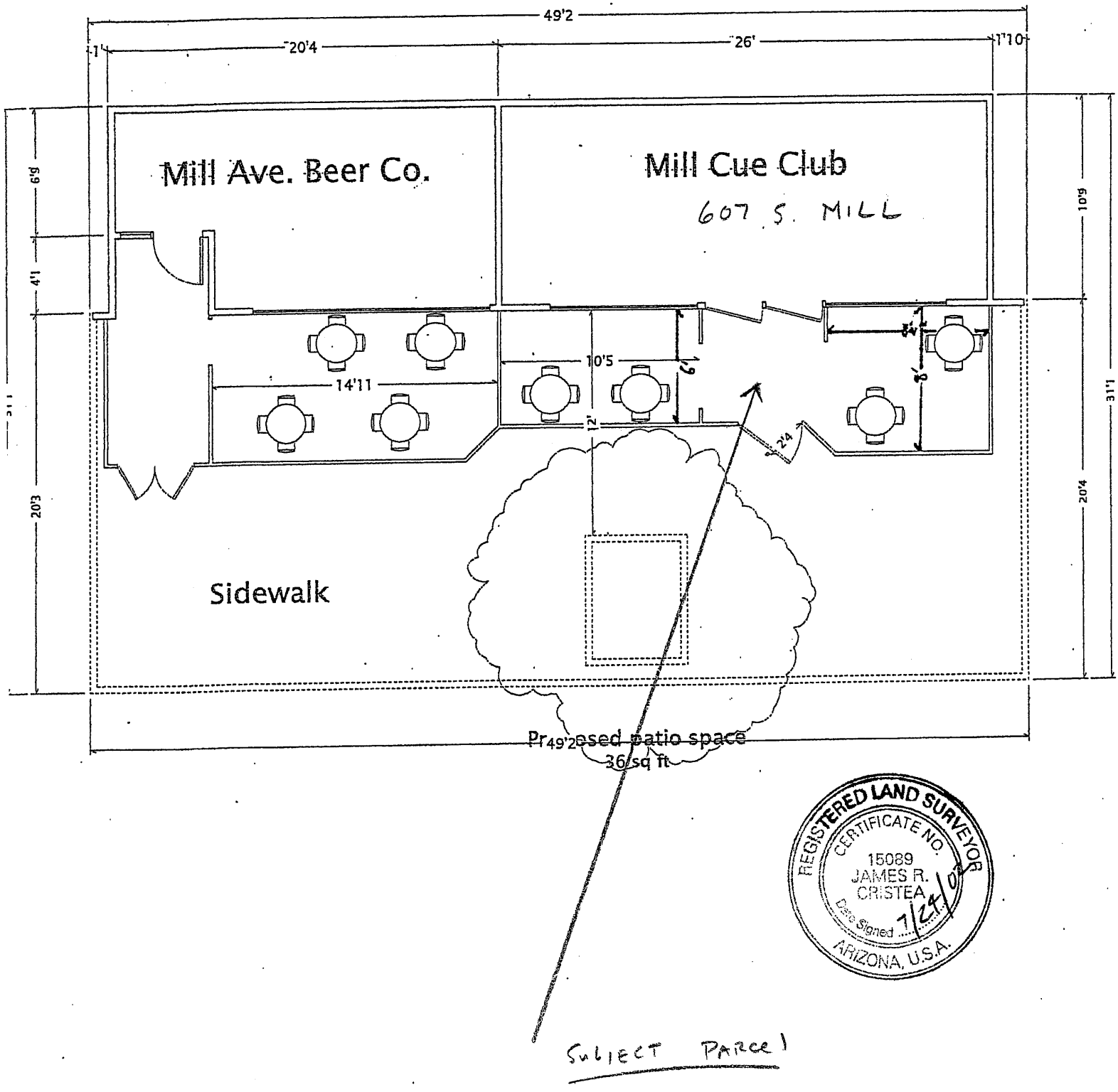
Thence North 45° 00' 00" East, 2.83 feet to a point 4.30 feet West of the West line of said Block 10;

Thence North parallel with and 4.30 feet West of the West line of said Block 10, 15.00 feet;

Thence East parallel with and 72.50 feet South of the North line of said Block 10, 4.30 feet to the Point of Beginning.

REGISTERED LAND SURVEYOR
CERTIFICATE NO.
15089
JAMES R.
CRISTEA
Date Signed 7/24/02
ARIZONA, U.S.A.

EXHIBIT A-1



49'2
1'
20'4
26'
1'10
Mill Ave. Beer Co.
Mill Cue Club
607 S. MILL
6'9
4'1
20'3
10'9
20'4
31'1
10'5
14'11
6'
12'
2'4
8'
Sidewalk
Proposed patio space
36 sq ft
49'2
REGISTERED LAND SURVEYOR
CERTIFICATE NO.
15089
JAMES R.
CRISTEA
Date Signed 7/24/02
ARIZONA, U.S.A.
SUBJECT PARCEL