

**CITY OF SAN MARCOS, TEXAS  
SAN MARCOS REGIONAL AIRPORT**

**AIRPORT FACILITY USE AGREEMENT  
FOR COMMERCIAL USE**

**THIS AIRPORT FACILITY USE AGREEMENT FOR COMMERCIAL USE** (“*Use Agreement*”) is made between the City of San Marcos, a municipal corporation of the State of Texas (“*City*”), and Air Carriage Over Texas, LLC. (“*User*”).

**ARTICLE 1: USE AGREEMENT OF PREMISES; ACCEPTANCE OF EXISTING  
CONDITIONS; COMPLIANCE WITH REGULATIONS**

- 1.01 Airport. The City is the owner of the San Marcos Regional Airport (the “*Airport*”), situated in Caldwell County, Texas, by virtue of deeds from the United States of America.
- 1.02 Demise. For and in consideration of, and subject to, the terms, conditions and covenants herein, City hereby authorizes User to operate a business at the San Marcos Regional Airport and the nonexclusive use of the following described real property for the purpose of launching hot air balloons (hereinafter referred to as the “*Premises*”), located at the Airport in Caldwell County, Texas:
- a. Parking lot with an address of 4400 Highway 21 (the “*Parking Lot*”), the location of which is more particularly described in Exhibit A attached hereto;
- 1.03 Acceptance. User acknowledges that, subject to City’s obligations under paragraph 1.05 below: (i) City makes no representations or warranty regarding the suitability of the Premises for User’s intended purposes, or the presence of environmental, geologic, or other site conditions that may affect User’s use of the Premises; and (ii) User accepts full responsibility for determining the suitability of the Premises for its intended purposes.
- 1.04 Rules and Regulations; Minimum Standards. User agrees to comply with the (i) San Marcos Regional Airport Rules and Regulations (the “*Rules and Regulations*”), and (ii) San Marcos Regional Airport Minimum Standards (the “*Minimum Standards*”). Provided the same do not impair the material rights of User hereunder or adversely affect User’s ability to use the Premises for the Authorized Use (as defined below), City has the right to amend and/or restate the Rules and Regulations and/or the Minimum Standards and User shall comply with the same.
- 1.05 Airport Operation. During the Term, City covenants and agrees to operate and maintain the Airport and appurtenant facilities (including, without limitation, runways, taxiways, landing areas, entrance roads, driveways and existing parking lots leading to and/or contiguous to the Premises) as a public airport consistent with, at a minimum, current operations and the “sponsor” assurances given by City to the United States of America and, as applicable, the State of Texas. In connection with such sponsor assurances, User agrees that this Use Agreement and User’s rights and privileges hereunder shall be subordinate to such sponsor assurances.
- 1.06 Ingress and Egress. City agrees that User, its officers, directors, agents, representatives, contractors, employees, invitees and licensees shall have the right of ingress and egress to and from

the Premises by means of roadways for automobiles unless otherwise agreed to in writing by both parties. Such rights shall be consistent with the Rules and Regulations and applicable laws, rules and regulations (“*Applicable Law*”) of the City, the Federal Aviation Administration (“*FAA*”) and other governmental authorities with jurisdiction over the Airport and this Use Agreement.

## **ARTICLE 2: COMMENCEMENT, TERM AND RENT**

- 2.01 Commencement. User Fees (“*Fee*”) shall accrue commencing upon October 20, 2020 (the “*Effective Date*”). Fees shall be payable at the place designated in Section 2.04.
- 2.02 Term. The term of this Use Agreement (“*Term*”) will commence on the Effective Date and will continue on a month-to-month basis unless terminated by either party by providing written notice of termination. **The City reserves the right to immediately terminate the use of the Premises verbally at any time with or without cause.**
- 2.03 Fee. User hereby promises and agrees to pay City a Fee equal to \$35 per launch, per balloon on a monthly basis. User shall submit a launch log in conjunction with the Fee.
- 2.04 Form and Place of Payment. The monthly Fee is to be made within five (5) days of the last day of the previous month and shall be based on User’s launch activity during the previous month. A payment shall be considered past due if, after the fifth (5<sup>th</sup>) day of the calendar month in which the payment is due, City has not received full payment by the end of such day (which shall end during normal working hours) physically at 4400 Airport Highway 21, San Marcos, Texas, or by mail to 1807 Airport Drive Suite 200, San Marcos, Texas 78666. Payments submitted via United States Postal Service or other means are considered paid when received, not on the date posted.
- 2.05 Late Charges. Payments not received in full by 5:00 p.m. San Marcos, Texas, time, on the fifth (5<sup>th</sup>) day of the calendar month in which such Fee is due will be considered late, and a \$15.00 per day late charge will be assessed. In addition, User shall reimburse City for each check that is returned or not honored.
- 2.06 No Release. User (i) will not be released from liability pursuant to this Use Agreement for any reason, including, but not limited to, a change in business conditions, voluntary or involuntary job transfer, change of marital status, loss of content, loss of employment, bad health or the sale or disposition of any hot air balloon; and (ii) ***is obligated to the terms and conditions of this Use Agreement, including the payment of Fees as provided herein.***
- 2.07 Other Fees and Charges. Provided all other tenants and users at the Airport are required to pay for tie-down and other public Airport Facilities (as defined below) use, User agrees to pay for such use offsite of the Premises, in addition to the monthly Fee, in an amount equal to the lowest amount City charges similar tenants and users at the Airport for use.

## **ARTICLE 3: USE AND CARE OF PREMISES**

- 3.01 Authorized Use. During the Term and any renewal thereof, the Premises may be used by User for the following, and for no other purpose: the launch of hot air balloons and temporary customer parking (herein, the “*Authorized Use*”). In addition to the Authorized Use, with the express consent of Airport Management (as defined below), User may conduct incidental activities on the Premises reasonably related to the Authorized Use. The Premises may not be used for any other purpose without the prior written consent of City, and any commercial use of the Premises not expressly authorized under the terms of this Use Agreement may, at City’s election, be set forth in an

amendment hereto or separate contract with City. Use of Airport Management office and restroom facilities is prohibited.

- 3.02 Conduct of Business. User covenants and agrees that it shall not make any unlawful use of, nor shall it permit the unlawful use of, the Premises by any person(s).
- 3.03 No Insurance Invalidation; Risk of User. User shall not place or keep anything on the Premises or conduct any unauthorized use of the Premises which invalidates any insurance policy carried on the Premises without City's prior written consent. User agrees that the risk of loss and damage for property kept, stored or maintained by it within the Premises is that of User.
- 3.04 No Waste or Nuisance; Compliance with Laws. User shall not use or permit the use of the Premises in any manner which results in waste of the Premises or constitutes a nuisance. During the Term and any renewal thereof, User shall comply with Applicable Laws of the City, the FAA and other governmental authorities with jurisdiction over the Premises.
- 3.05 Trash and Debris. User shall keep the Premises and adjacent areas, together with any User signage on or near the Airport, neat, clean and free from dirt and trash at all times.
- 3.06 No Outside Storage. Outside storage is specifically prohibited without the advance written consent of City.
- 3.07 Parking. User shall have nonexclusive use of the public parking spaces adjacent to the Airport Management office for User's employees and customers during launch operations. The City reserves the right to assign specific areas for User's vehicle parking.

#### **ARTICLE 4: MAINTENANCE AND REPAIR OF PREMISES**

- 4.01 User Obligations. User shall, at its sole cost and expense, maintain the Premises in good, clean condition. The User shall comply with all governmental laws, ordinances, and regulations that apply to the Premises, at its sole cost and expense. User shall maintain the Premises, with the exception of normal wear and tear and gaining consistent with normal usage and passage of time, and will repair damages to any part of the Premises caused by the actions or by the negligence or misconduct of User, its agents, servants, employees, contractors, subcontractors, licensees, patrons, invitees, or trespassers.
- 4.02 City's Right of Access. City and Airport Management, acting by and through their authorized representatives, shall have the right to access the Premises for the purpose of (i) determining whether the Premises are in good condition and repair, or (ii) performing any maintenance or repairs for which City is responsible under this Use Agreement.

#### **ARTICLE 5: CONSTRUCTION, ALTERATIONS, AND FIXTURES**

- 5.01 Alterations. The User shall not make any alterations, additions, or improvements to the Premises without the prior written consent of City. All buildings, structures, improvements, alterations, additions, and fixtures which may be made or installed upon the Premises shall become the property of the City upon the expiration of the term of this Use Agreement unless the City requests their removal, in which event the User shall remove them and restore the Premises at the User's expense.
- 5.02 Condition on Surrender. Subject to the provisions of Section 4.01, User shall surrender the Premises in good condition and repair, normal wear and tear excepted.

- 5.03 No Liens. User shall not permit, or permit any contractor or other person or entity claiming by or through User, to place a lien or similar obligation on the Premises for any alteration, repair, labor performed or materials furnished to the Premises, and User shall promptly (and in all events prior to foreclosure) discharge any such lien or similar obligations. In the event User disputes the lien or obligation, however, User shall have the right to promptly pursue the settlement or litigation thereof without paying the claim until the claim becomes final and subject to no further appeal by User. USER SHALL HOLD HARMLESS CITY AND AIRPORT MANAGEMENT, AND INDEMNIFY AND DEFEND THE PREMISES, FROM AND AGAINST ANY CLAIMS, DEMANDS OR SUITS RELATED TO ANY SUCH LIENS OR OBLIGATIONS.
- 5.04 Exterior Lighting and Signage. No signs, posters, or other similar devices shall be placed on any portion of the Premises without the prior written consent of the City. User shall, at its sole expense, be responsible for creation, installation and maintenance of all signs, posters or other similar devices. User agrees to pay for the installation, maintenance and repair of any such signs, posters or other similar devices. Any signs, posters or other similar devices placed on the Premises shall be maintained at all times in a safe, neat, slightly and good physical condition and shall be removed from the Premises immediately upon receipt of instructions for the removal of same from the City.

#### **ARTICLE 6: TAXES**

- 6.01 Taxes.
- a. In entering into this Use Agreement, User understands that it will be solely responsible for the payment of ad valorem taxes, if any, that are assessed against all or any portion of User's equipment, inventory and other personal property, including, but not limited to, any hot air balloons used for commercial purposes.
  - b. User shall pay, when due, all sales, excise, income and other taxes levied upon its business operations at the Premises.
  - c. User may, at User's expense, contest the validity or amount of any taxes for which User is responsible, in which event, the payment thereof may be deferred, as permitted by Applicable Law, during the pendency of such contest. Notwithstanding the foregoing, no such taxes shall remain unpaid for such length of time as would permit the Premises, any Improvements or any part thereof to be sold or seized by any governmental authority for nonpayment of the same. If at any time, in City's reasonable judgment, it shall become necessary to do so, City may, after notice to User, under protest, pay such amount of the taxes as may be required to prevent a sale or seizure of or foreclosure of any lien created thereon by such item. The amount so paid by City shall be promptly paid on demand by User to City, and, if not so paid, such amount, together with interest thereon from the date advanced until paid, shall be deemed to be additional Rent. User shall promptly furnish Airport Management with copies of all proceedings and documents with regard to any tax contest, and City may, at its expense, participate therein.

#### **ARTICLE 7: RIGHTS AND PRIVILEGES OF USER**

- 7.01 Grant of Rights. City hereby grants to User the following general rights and privileges, in common with others, all of which shall be subject to the terms, conditions and covenants hereinafter set forth and all of which shall be non-exclusive on the Airport. Nothing in this Use Agreement shall be construed to grant User a permanent right in any particular public Airport Facility should City deem it advantageous to the operation of the Airport to close or relocate any such facility.

## **ARTICLE 8: RIGHTS, RESERVATIONS AND OBLIGATIONS OF CITY**

- 8.01 Aerial Approaches. Subject to the provisions of this Use Agreement, City reserves the right to take any action it considers necessary to protect the aerial approaches of the Airport against obstructions, together with the right to prevent User from erecting or permitting to be erected any building or other structure which, in the opinion of City, would limit the usefulness of the Airport or constitute a hazard to aircraft or diminish the capability of existing or future avigational and/or navigational aids used on the Airport.
- 8.02 Temporary Closure. City reserves the right, consistent with industry standard operations, to temporarily close the Airport or any of the facilities thereon for maintenance, improvement, safety or security of the Airport or the public, or for other aviation-related cause deemed reasonably necessary by City, without being liable to User for any damages caused by disruption of User's business operations or for any other reason; provided, City shall take reasonable steps to avoid or mitigate interference with the operation of User's business at the Premises.
- 8.03 Subordination. This Use Agreement is subject to the provisions of any agreement made between City and the United States of America and/or the State of Texas relative to the operation or maintenance of the Airport, the execution of which has been required as a condition precedent to the transfer of federal or State of Texas rights or property to City for the development, maintenance and repair of Airport infrastructure. City covenants and agrees that it has no existing agreements with the United State of America or the State of Texas in conflict with the express provisions of this Use Agreement and that it will not enter into any such agreements.
- 8.04 War; National Emergency. During time of war or national emergency, City shall have the right to lease the landing area or any part thereof to the United States of America for military or naval use and, if such lease is executed, the provisions of this Use Agreement, insofar as they are inconsistent with the provisions of the lease to the Government, shall be suspended.
- 8.05 Operation as Public Airport. City covenants and agrees that during the Term and any renewal thereof it will operate and maintain the Airport and its public Airport Facilities as a public use airport.

## **ARTICLE 9: OPERATION OF THE AIRPORT**

- 9.01 Non-Discrimination Requirements.
- a. It is specifically understood and agreed that this Use Agreement does not grant or authorize an exclusive right for conducting any aeronautical activity which is unlawfully discriminatory. User specifically agrees not to discriminate in its use of the Premises in any manner prohibited by applicable FAA regulations.
  - b. User, for itself, its personal representative, successors in interest and assigns, as part of the consideration herein, agrees that no person shall be excluded from participation in or denied the benefits of User's use of the Airport on the basis of race, color, national origin, religion, handicap or gender. User further agrees for itself, its personal representatives, successors in interest and assigns that no person shall be excluded from the provision of any service on or in the construction of any improvements or alterations to the Premises on grounds of race, color, national origin, religion, handicap or gender. In addition, User covenants and agrees that it will at all times comply with any applicable requirements imposed by or pursuant to Title 49 of the Code of Federal Regulations, Part 121, Non-

Discrimination in Federally Assisted Programs of the Department of Transportation, and with any applicable future amendments thereto.

IF ANY CLAIM ARISES FROM A VIOLATION OF THE FOREGOING NON-DISCRIMINATION COVENANT BY USER, USER AGREES TO HOLD HARMLESS AND INDEMNIFY CITY AND AIRPORT MANAGEMENT FROM ANY ACTUAL LOSS OR EXPENSE, BUT NOT CONSEQUENTIAL, SPECIAL OR EXEMPLARY COSTS, EXPENSES OR DAMAGES, INCURRED BY EITHER OF THEM IN CONNECTION WITH SUCH VIOLATION.

- 9.02 Airport Development. The City reserves the right to further develop and improve the Airport as it may see fit.
- 9.03 Aeronautical Services Grant and Requirements. The right to furnish aeronautical services to the public is granted to User by City, subject to the following:
- a. User shall furnish such services on a fair, equal and nondiscriminatory basis to all users.
  - b. Any discounts, rebates or similar price reductions to volume purchasers shall be fair, reasonable and nondiscriminatory.

#### **ARTICLE 10: INSPECTION**

- 10.01 Fire Safety. User will permit the Fire Marshal to make inspection of the Premises during regular business hours, except in the event of an emergency, and User will comply with Applicable Laws as required to ensure the Premises comply with fire and building provisions regarding fire safety. User shall maintain, in proper condition, accessible fire extinguishers in number and type required or approved by fire underwriters for the particular hazard involved.

#### **ARTICLE 11: INSURANCE AND INDEMNITY**

- 11.01 Liability Insurance: User shall procure and maintain at all times during the Term and any renewal thereof, in full force and effect, a policy or policies of commercial general liability insurance as set forth in the Minimum Standards and related to User's lease, use and occupancy of Premises. Such insurance shall be written so that City must be notified in writing at least thirty (30) days in advance of cancellation or non-renewal, and User shall not amend such insurance in any manner which fails to comply with the Minimum Standards. To the extent not already in City's possession, User shall provide certificates of insurance which satisfy the foregoing within three (3) Business Days of the Effective Date and, thereafter, at least once per calendar year during the Term. All required insurance shall be primary over any other insurance coverage City may have and shall name the City and Airport Management as additional insureds (as applicable, to the extent of their interests therein).
- 11.02 Casualty Coverage: User shall procure and maintain at all times during the Term and any renewal thereof, in full force and effect, a policy or policies of fire and extended coverage for all contents, goods, stock and any personal property which is or may be situated upon the Premises, to the extent the same are insurable by User. Such insurance shall be written so that City must be notified in writing at least thirty (30) days in advance of cancellation or non-renewal, and User shall not amend such insurance in any manner which fails to comply with this section and the Minimum Standards. To the extent not already in City's possession, User shall provide certificates of insurance which satisfy the foregoing within three (3) Business Days of the Effective Date and, thereafter, at least

once per calendar year during the Term. All required insurance shall be primary over any other insurance coverage City may have and shall name the City and Airport Management as additional insureds (as applicable, to the extent of their interests therein).

#### 11.03 Indemnity and Hold Harmless.

- a. Indemnity. USER SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS CITY AND ITS OFFICERS, EMPLOYEES, AGENTS (INCLUSIVE OF AIRPORT MANAGEMENT) AND REPRESENTATIVES (COLLECTIVELY, THE “**INDEMNIFIED PARTIES**”), FROM AND AGAINST ALL COSTS, EXPENSES (INCLUDING REASONABLE ATTORNEYS’ FEES, EXPENSES AND COURT COSTS), LIABILITIES, DAMAGES (EXCLUSIVE OF CONSEQUENTIAL, INCIDENTAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES), CLAIMS, SUITS, ACTIONS AND CAUSES OF ACTIONS. (“**CLAIMS**”), TO THE EXTENT ARISING DIRECTLY OR INDIRECTLY, OUT OF (i) ANY BREACH OF THIS USE AGREEMENT BY USER AND ITS AGENTS, CONTRACTORS, EMPLOYEES, LICENSEES AND INVITEES, (COLLECTIVELY THE “**USER PARTIES**”), (ii) ANY FALSE REPRESENTATION OR WARRANTY MADE BY USER HEREIN, AND (iii) ANY NEGLIGENT ACT OR OMISSION, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE USER PARTIES IN CONNECTION WITH THIS USE AGREEMENT, THE CONSTRUCTION, DEVELOPMENT, OPERATION AND USE OF THE PREMISES AND USE OF AIRPORT IMPROVEMENTS. USER IS NOT EXCUSED OR RELIEVED OF ITS OBLIGATIONS UNDER THIS SECTION IF A CLAIM ARISES OUT OF, OR IS CAUSED BY, THE NEGLIGENCE OR WILLFUL MISCONDUCT OF THE USER PARTIES CONCURRENT WITH THAT OF THE INDEMNIFIED PARTIES. USER SHALL ASSUME ON BEHALF OF THE INDEMNIFIED PARTIES AND CONDUCT WITH DUE DILIGENCE AND IN GOOD FAITH THE DEFENSE OF ALL CLAIMS AGAINST ANY OF THE INDEMNIFIED PARTIES. USER MAY CONTEST THE VALIDITY OF ANY CLAIMS, IN THE NAME OF THE INDEMNIFIED PARTIES OR USER, AS USER MAY IN GOOD FAITH DEEM APPROPRIATE, PROVIDED THE EXPENSES THEREOF SHALL BE PAID BY USER. IN NO EVENT MAY USER ADMIT LIABILITY ON THE PART OF CITY OR AIRPORT MANAGEMENT WITHOUT THE EXPRESS PRIOR WRITTEN CONSENT OF CITY’S CITY ATTORNEY.
- b. Limitation of Liability. The foregoing and any other indemnity of User herein shall not be interpreted as requiring User to indemnify any of the Indemnified Parties from any liability arising solely out of willful misconduct, gross negligence, breach of this Use Agreement or breach of any strict liability obligations.
- c. Waiver of Consequential Damages. EACH PARTY HEREBY WAIVES ANY AND ALL RIGHTS TO RECOVER ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES FROM THE OTHER PARTY, INCLUDING CLAIMS OF PERSONS AND ENTITIES CLAIMING BY OR THROUGH ANY OF THEM AND OTHER SIMILAR CLAIMS OR DAMAGES.
- d. Claims Against User. If any claim, demand, suit or other action is made or brought by any person or entity against User arising out of or concerning this Use Agreement, User shall give written notice thereof, to City and Airport Management within ten (10) days after receipt of such claim, demand, suit or action.

- e. Notice. User shall give immediate verbal notice, and prompt written notice to the City and Airport if it is involved in any accident on the Premises or Airport. To the extent User's officers are aware of any defects in Airport runways, taxiways, landing areas, lighting systems or other facilities which may require immediate attention, User shall promptly notify Airport Management of the same (City acknowledging that inspection and reporting is not User's obligation, and that such notice is provided as a courtesy to City).
- f. Security. City does not guarantee police protection or security to User or its property and, except as provided in subsection b above, (i) City and Airport Management shall not be responsible for injury to any person on the Premises or for harm to any property which belongs to User or those claiming by or through User, or which may be stolen, destroyed or damaged; and (ii) USER SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS CITY AND AIRPORT MANAGEMENT AND THEIR RESPECTIVE OFFICERS, EMPLOYEES, AGENTS AND REPRESENTATIVES HARMLESS FROM AND AGAINST ANY AND ALL SUCH CLAIMS.

#### **ARTICLE 12: CONDEMNATION**

- 12.01 Total: If the whole of the Premises is taken by eminent domain, then this Use Agreement shall terminate as of the date the title vests in the condemning authority.
- 12.02 Partial: If a portion of the Premises is taken by eminent domain, and the partial taking renders the Premises unsuitable for the business of User, then this Use Agreement shall terminate. If the partial taking is not extensive enough to render the Premises unsuitable for the business of User, then this Use Agreement shall continue in effect with respect to the remainder of the Premises.
- 12.03 Fee. If this Use Agreement is terminated as provided in this section, Fees shall be paid up to the date of the last balloon launch.
- 12.04 Definition of Taking. As used in this Article 12, "taken" or "taking" shall include a sale, transfer or conveyance in avoidance or in settlement of condemnation or a similar proceeding.

#### **ARTICLE 13: DAMAGE BY CASUALTY**

- 13.01 Notice Required. User shall give immediate verbal notice (within one [1] hour of knowledge), followed by prompt written notice, to City of any material damage caused to the Premises by fire or other casualty.
- 13.02 Restoration Upon Casualty Loss. If the Premises are totally destroyed by fire, tornado or other casualty not the fault (in whole or in part) of User or any person in or about the Premises with the express or implied consent of User, or if not totally destroyed, if the Premises should be so damaged by such a cause that rebuilding or repairs cannot reasonably be completed within one hundred eighty (180) working days after the date of City's receipt of insurance proceeds in connection with the casualty, this Use Agreement shall terminate

#### **ARTICLE 14: ASSIGNMENT AND SUBLETTING**

- 14.01 Assignment by User. User shall not assign all or part of its interest in this Use Agreement without the advance written consent of the City. Consent by the City to one (1) or more assignments shall not operate as a waiver of the City's rights as to any subsequent assignments.



- 14.02 No Release. Except for an assignment which City has consented pursuant to Section 14.01, no assignment, sublease or grant of use and occupancy rights shall relieve User of its obligations to City hereunder. Any assignment, transfer or sublease that is not permitted under this Use Agreement and has not been authorized by City in writing shall be void.
- 14.03 Assignment by City. In the event of an assignment by City of all of its interest in the Premises to a person or entity that assumes all of City's obligations pursuant to this Use Agreement, User agrees to look solely to such assignee.

#### **ARTICLE 15: EVENTS OF DEFAULT AND REMEDIES; TERMINATION**

- 15.01 Events of Default. The following events shall constitute "events of default" by User under this Use Agreement:
- a. Fee. User fails to pay when due any Fees or any other sums or charges due under this Use Agreement, and such failure continues for ten (10) days following written notice thereof (provided, however, that City shall be obligated to give only two such notices in any calendar year, and after such two notices, City will no longer be obligated to give any other notice under this section within such calendar year); or
  - b. Other Breaches. Failure by User to observe or perform any of the covenants, conditions or provisions of this Use Agreement or Airport Minimum Standards or Rules and Regulations may result in immediate termination of this Use Agreement.

#### **ARTICLE 16: MISCELLANEOUS**

- 16.01 Gender Neutral. When the singular number is used in this Use Agreement, it will include the plural when appropriate, and the neuter gender will include the feminine and masculine genders when appropriate.
- 16.02 Severability. If any clause or provision of this Use Agreement is illegal, invalid or unenforceable under present or future laws, this Use Agreement will remain in effect, and the remaining provisions will continue in force if they can be given effect without the invalid portion.
- 16.03 Amendment. This Use Agreement may be amended only by an instrument in writing signed by both parties. This Use Agreement shall apply to and be binding upon the parties and their permitted successors in interest and legal representatives.
- 16.04 Headings. The captions used in this Use Agreement are for convenience only and do not in any way limit or amplify the terms and provisions of this Use Agreement.
- 16.05 Nonwaiver of Rights. No waiver of default by either party of any terms, covenants and conditions hereof to be performed, kept and observed by the other party shall be construed as, or shall operate as, a waiver of any subsequent default of any of the terms, covenants or conditions herein contained, to be performed, kept and observed by the other party.
- 16.06 Force Majeure. Whenever a period of time is prescribed for action to be taken by City or User, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, governmental laws, regulations or restrictions or any other causes beyond the reasonable control of City or User (herein, "*force majeure*") shall be excluded from the computation of any such period of time.

- 16.07 Quiet Enjoyment. City represents and warrants that it has the lawful authority to enter into this Use Agreement and has title to the Premises. This Use Agreement is subject to the rights of the United States of America during periods of national emergency and its right to take all or a portion of the Airport for federal activities, as provided herein.
- 16.08 No Partnership. This Use Agreement shall not be construed as creating the relationship of principal and agent or of partnership or of joint venture between the parties. The only relationship between the parties is that of City and User.
- 16.09 No Brokers. User warrants that it has had no dealings with any broker or agent in connection with the negotiation or execution of this Use Agreement, and User agrees to indemnify and hold City and Airport Management harmless from and against any and all costs, expense or liability for commissions or other compensation charges payable to any broker or agent of User with respect to this Use Agreement.
- 16.10 Governing Law; Venue; Dispute Resolution. The parties agree that the laws of the State of Texas shall govern this Use Agreement and that exclusive venue for enforcement of this Use Agreement shall lie in Hays County, Texas.
- 16.11 Charitable Immunity or Exemption. If User is a charitable association, corporation, partnership, individual enterprise or entity and claims immunity to or an exemption from liability for any kind of property damage or personal damage, injury or death, User hereby expressly waives its rights to plead defensively any such immunity or exemption as against City and Airport Management.
- 16.12 Notices. Notices required of either party pursuant to the provisions of this Use Agreement shall be conclusively determined to have been delivered to the other party when (i) hand-delivered to the other party, or (ii) mailed in the United States Mail, postage prepaid, certified, with return receipt requested, to the address specified below:

If to City:

City of San Marcos  
630 East Hopkins  
San Marcos, Texas 78666

and

1807 Airport Drive, Suite 200  
San Marcos, Texas 78666

If to User:

Air Carriage Over Texas, LLC.  
ATTN:

A party hereto may change its address by giving notice thereof to the other party in conformity with this Section 18.12.

- 16.13 Entire Agreement. This Use Agreement and the exhibits hereto constitute the entire understanding and agreement by the parties hereto concerning the Premises, and any prior or contemporaneous agreement, oral or written, which purports to vary from the terms hereof shall be void.
- 16.14 Action through Airport Management. All parties agree that City may choose to exercise any of its non-delegable powers under this Use Agreement through its Airport Management. Unless City notifies User in writing of new Airport Management, Airport Management is Texas Aviation Partners, LLC, a Texas limited liability company, with an address of 1807 Airport Drive, Suite 200, San Marcos, Texas 78666.
- 16.15 Attorney Fees. Each party will be required to pay its own attorneys' fees incurred in connection with the negotiation of this Use Agreement or any action or proceeding arising between City and User regarding this Use Agreement. Further, except as expressly provided herein, each party waives any and all rights under law or in equity to seek or recover attorney's fees from the other party in any civil or administrative litigation or dispute resolution proceeding for breach of this Use Agreement or to enforce any provision of this Use Agreement.
- 16.16 Reservation of Immunities. TO THE EXTENT PROVIDED IN TEXAS LOCAL GOVERNMENT CODE CHAPTER 271 SUBCHAPTER I, AND OTHER APPLICABLE LAW, CITY WAIVES ITS RIGHTS TO ASSERT GOVERNMENTAL IMMUNITY FROM SUIT FOR BREACH OF THIS USE AGREEMENT BY CITY OR LIABILITY FOR CONTRACT CLAIMS ASSERTED BY USER SEEKING THE REMEDIES OF USER SET FORTH HEREIN, INCLUSIVE OF SECTION 15.04. EXCEPT AS PROVIDED IN THE PRECEDING SENTENCE, CITY DOES NOT WAIVE, AND EXPRESSLY RESERVES, ALL IMMUNITIES EXISTING UNDER APPLICABLE LAW AVAILABLE TO CITY AS A TEXAS HOME-RULE MUNICIPAL CORPORATION. IT IS EXPRESSLY AGREED AND UNDERSTOOD THAT THE FOREGOING WAIVER IS A LIMITED AND NOT A GENERAL WAIVER, AND THAT ITS EFFECT IS LIMITED TO SPECIFIC CONTRACT CLAIMS UNDER THIS USE AGREEMENT.
- 16.17 No Third Party Beneficiaries. This Use Agreement is for the sole benefit of the parties hereto and their permitted assigns and nothing herein expressed or implied shall give or be construed to give to any person or entity other than the parties hereto and their assigns any legal or equitable rights hereunder.
- 16.18 Survival. Any terms and provisions of this Use Agreement pertaining to rights, duties or liabilities extending beyond the expiration or termination of this Use Agreement shall survive the same.
- 16.19 Exhibits. The exhibits to this Use Agreement are as follows:

Exhibit A      Location of Premises

**IN WITNESS WHEREOF,** the parties hereto have executed this Use Agreement effective as of the Effective Date.

**CITY:**

City of San Marcos, Texas

By: \_\_\_\_\_

Name Printed: \_\_\_\_\_

Title: \_\_\_\_\_

**ATTEST:**

\_\_\_\_\_

**USER:**

Air Carriage over Texas LLC

DocuSigned by:

By: 

Name Printed: ARTHUR MOLLER

Title: owner/operator

**EXHIBIT A**  
Location of Premises



EXHIBIT A