



CITY COUNCIL AGENDA ITEM

TO: Mayor & City Council **DATE:** December 9, 2011

FROM: John McDonough, City Manager

AGENDA ITEM: Lease Agreement for Liquid Propane Fueling Station

MEETING DATE: For Submission onto the December 20, 2011, City Council Regular Meeting Agenda

BACKGROUND INFORMATION: (Attach additional pages if necessary)

See attached:

Ground Lease
Map

APPROVAL BY CITY MANAGER: JAM APPROVED

_____ NOT APPROVED

PLACED ON AGENDA FOR: 12/20/2011

CITY ATTORNEY APPROVAL REQUIRED: () YES () NO

CITY ATTORNEY APPROVAL: SAM

REMARKS:

GROUND LEASE

THIS GROUND LEASE (this "Lease") is entered into this 1st day of January, 2012, by and between BREI Sandy Springs, LP, hereinafter referred to as "Landlord" and City of Sandy Springs, Georgia, a municipal corporation, hereinafter referred to as "Tenant."

1. Property. In consideration of the obligation of Tenant to pay rent as herein provided and in consideration of the other terms, covenants, and conditions hereof. Landlord hereby leases to Tenant, and Tenant hereby takes from Landlord, that certain parcel of property more particularly described on Exhibit "A" attached hereto (the "Property"), together with an easement for ingress, egress, and utilities for the duration of the lease on the Property which is more particularly described on Exhibit "A" attached hereto (the "Easement Area").
2. Initial Term. The term of this Lease shall be one (1) year commencing on January 1, 2012 at 12:01 A.M., and ending on December 31, 2012 at 11:59 P.M.
3. Renewal Terms. Tenant shall have the right, provided that Tenant is not in default hereunder, to extend this Lease for successive one (1) year terms after the Initial Term ("Renewal Terms"). (Each Renewal Term shall be on the same terms and conditions as set forth in this Lease.)
4. Termination. Notwithstanding anything contained herein to the contrary, either Landlord or Tenant may terminate this Lease, without any penalty or further liability:
 - (i) by either party upon a default of any covenant or term hereof by the other party which default is not cured within thirty (30) days of receipt of written notice of default (or within ten (10) days of receipt of written notice of any monetary default hereunder); provided, however, that if the defaulting party commences efforts to cure such nonmonetary default within the time period provided and diligently pursues such efforts through completion of such cure, then in such event, the non-defaulting party shall no longer be entitled to declare a default:
 - (ii) upon 30 days' written notice by either party to the other if Tenant is unable to obtain or maintain any license, permit, or other governmental approval necessary to operate the Property in compliance with the Use provision hereof; or
 - (iii) upon sixty (60) days' written notice to the other party hereto.
5. Rent. Not later than the date on which the Initial Term hereof commences, and subsequently not later than the date on which any Renewal Term commences, Tenant

shall pay Landlord the sum of One Dollar (\$1.00) per annum as rental ("Rent"). Rent shall be paid to Landlord at landlord's notice address provided herein.

6. Use. The Property shall be used by Tenant solely for the purpose of installing, maintaining, and storing petroleum products and propane pumps to be used solely by Tenant to fill Tenant's authorized vehicles with propane. Tenant shall obtain all necessary permits, licenses, and other governmental authorizations as required to operate the Property in accordance with the Use set forth herein.

7. Improvements to Property. Tenant shall have the right, at Tenant's sole cost and expense, to erect and maintain on Property improvements, personal property and facilities incidental to or necessary for Tenant to use the Property in accordance with the Use set forth above. Landlord shall have the right to approve plans for any and all such improvements, personal property and facilities. Tenant shall comply with all applicable governmental laws, rules, and regulations with respect to installing and maintaining such improvements, personal property and facilities. Upon the expiration or termination of this Lease, Tenant shall remove all such improvements, personal property and facilities at Tenant's sole cost and expense. Landlord grants Tenant a non-exclusive easement in, over, across and through other real property owned by Landlord on or adjacent to the Property as reasonably required for construction, installation, maintenance, and operation of the improvements, personal property and facilities, subject to Landlord's prior written approval, which approval shall not be unreasonably withheld.

8. Insurance Indemnification. Tenant shall purchase and maintain in full force and effect throughout the Initial Term and any and all Renewal Terms of this Lease a general public liability and property damage insurance policy in the following amounts:

Bodily Injury -- \$1,000,000 for injury to any person, and \$1,000,000 for all injuries sustained by more than one person in any one occurrence.

Property Damage -- \$1,000,000 per damage as a result of any one accident.

To the extent allowed by law, Tenant hereby agrees to indemnify and hold harmless Landlord from any claim, loss, or damage which arises in occurrence with the use of the Property, whether in compliance with or in violation of the Use provision contained herein, or the installation, maintenance or storage of any improvements or products on the Property, whether in compliance with or in violation

of this Lease, excepting only claims arising solely from the gross negligence or malfeasance of Landlord.

9. Environmental Compliance. Tenant warrants that, to the best of its knowledge, the Property, the Easement and the improvements thereon are and will be throughout the Initial Term and any and all Renewal Terms of this Lease, free of contaminants, oils, asbestos, PCB's, hazardous substances or wastes as defined by federal, state or local environmental laws, regulations or administrative orders or other materials the removal of which is required or the maintenance of which is prohibited, regulated or penalized by any federal, state or local governmental authority ("Hazardous Materials"); or, to the extent that any Hazardous Materials are or will be on the Property, such Hazardous Materials shall be stored, maintained, and disposed of in compliance with any and all federal, state or local laws, regulations or administrative orders regulating in any manner the maintenance, storage and disposal of such Hazardous Materials ("Environmental Laws").

10. Environmental Indemnification. To the extent allowed by law, Tenant, its heirs, officers, directors, managers, employees, grantees, successors and assigns shall indemnify, defend, reimburse and hold harmless Landlord from and against any and all environmental claims, demands, actions, lawsuits, and damages arising from the presence of Hazardous Materials upon, about or beneath the Property or migrating to or from the Property (or to the extent such Hazardous Materials are allowed to exist on the Property, the maintenance, storage, presence, or disposal of such Hazardous Materials in violation of any Environmental Laws pertaining to the Property and any activities thereon) brought on the Property by Tenant.

11. Indemnification. To the extent allowed by law, Tenant hereby agrees to indemnify and save Landlord harmless from and against any and all liability for any injury to or death of any person or persons or any damage to property in any way arising out of or connected with the condition, use or occupancy of the Property, of the Tenant, its assigns or sublessees or of the respective agents, employees, licensees, concessionaires or invitees of Tenant, its assigns, or sublessees and from all costs, expenses and liabilities, including, but not limited to, court costs and reasonable attorney's fees, incurred by Landlord in connection therewith, excepting however, liability caused by Landlord's gross negligence or willful misconduct.

Tenant covenants and agrees that, except for acts or omissions constituting negligence or willful misconduct, Landlord shall not be liable to Tenant for any injury to or death of any person or persons or for damage to the business or any property of Tenant, or any person claiming through Tenant, arising out of any accident or occurrence on the Property or any adjacent property owned by Landlord, including, without limiting the

generality of the foregoing, injury, death or damage caused by the Property (or Landlord's adjacent property) becoming out of repair or caused by any defect, or caused by fire or smoke.

Except for acts or omissions constituting negligence or willful misconduct, Landlord shall not be responsible or liable at any time for any loss or damage to Tenant's equipment, improvements, facilities, or other personal property; and Landlord shall not be responsible or liable for any defect, latent or otherwise, in the Property or in Landlord's property adjacent thereto.

12. Landlord's Representations and Warranties. Landlord represents and warrants that the execution of this Lease by Landlord will not cause a breach or an event of default of any other agreement to which Landlord is a party.
13. Assignment and Subletting. Tenant shall not assign or transfer all or any portion of its interest in this Lease or in the Property, or sublet all or any portion of the Property, without the prior written consent of Landlord, which Landlord may withhold in its sole discretion. Any assignment or sublease without Landlord's prior written consent shall be voidable, and, at Landlord's election, shall constitute a default of Tenant hereunder. Tenant shall not mortgage, pledge or otherwise encumber its interest under this lease. Tenant has only a usufruct, not subject to levy, sale or other transfer, whether voluntary or by operation of law. The term "sublet" shall be deemed to include the granting of licenses, concessions, and any other rights of occupancy of any portion of the Property.

The term "Landlord" as used in this Lease means only the owner or entity from time to time owning the property containing the Property, so that in the event of any sale or sales thereof, the Landlord who is a grantor in any such sale shall be and hereby is, without further agreement, entirely freed and relieved of all the obligations of Landlord hereunder. Any such sale or sales of the Property, unless pursuant to a foreclosure sale or deed in lieu of such foreclosure, shall be subject to this Lease and it shall be deemed and construed without further agreement that the purchaser at any such sale has assumed and agreed to carry out any and all obligations of Landlord under this Lease so long as such purchaser shall be the owner of the property containing the Property.

14. Taxes. Tenant shall pay any and all personal property taxes assessed on, or any portion of such taxes attributable to, the improvements, facilities and personal property erected or placed on the Property by Tenant. Tenant shall pay as additional Rent any increase in real property taxes levied against the Property or Landlord's property adjacent thereto which are attributable to Tenant's use of the Property.

15. Damage by Casualty. If the Property or the improvements, facilities, or personal property placed or erected thereon by Tenant are destroyed or damaged so as to hinder the use of the Property in accordance with the Use, either party may elect to terminate the Lease as of the date of the damage or destruction by so notifying the other party within thirty (30) days of the occurrence of such destruction or damage. In such event, all obligations of each party to the other shall cease as of the date of the damage or destruction, excepting only post-termination obligations contained herein.
16. Condemnation. If a condemning authority takes all of the Property, or so much of the Property as to render the Property unsuitable to be operated in accordance with the Use, then this Lease shall, upon written notice by either party to the other, terminate as of the date that title to the Property or portion thereof vests in the condemning authority. Landlord and tenant shall be entitled to pursue separate awards from the condemning authority.
17. Inspection. Landlord shall have the right, but not the duty, to enter upon the Property at any time for the purpose of inspecting the same, or of making repairs to the Property, or of making repairs, alterations, or additions to adjacent property, or of showing the Property to lenders or to prospective purchasers or tenants.
18. Liens. Tenant shall not suffer or permit any materialman's, mechanics', artisans' or other liens to be filed or placed or exist against the Property or any portion thereof or against landlord's property adjacent to the Property, or of Tenant's interest in the Property, by reason of work, services or materials supplied or claimed to have been supplied to Tenant or anyone holding the Property or any part thereof through or under Tenant, and nothing contained in this Lease shall be deemed or construed in any way as constituting the consent or request of Landlord, expressed or implied, to any contractor, subcontractor, laborer or materialman for the performance of any labor or the furnishing of any materials for any improvements, alterations or repairs of or to the Property or any part thereof, nor as giving Tenant any right, power of authority to contract for or permit the rendering of any services or the furnishing of any materials that would give rise to the filing of a materialmen's, mechanics' or other lien against the Property or any portion thereof or against any property of Landlord adjacent to the Property. If any such lien should, at any time, be filed. Tenant shall cause the same to be discharged of record within fifteen (15) days after the date of filing the same. If Tenant shall fail to discharge such lien within such period, then, in addition to any other right or remedy of Landlord, Landlord may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due or by procuring the discharge of such lien by a deposit in court or by posting a bond. Any amount paid by Landlord for any of the aforesaid purposes, or for the

satisfaction of any other lien not caused by Landlord, and all reasonable expenses of Landlord in defending any such action or in procuring the discharge of such lien, shall be deemed additional rent hereunder and shall be repaid by Tenant to Landlord on demand.

19. Defaults and Remedies. If Tenant fails to keep or perform any covenant or provision of this Lease (except payment of any installment of Rent or other charge or money obligation herein required to be paid by Tenant) or violates any such covenant or provision. Landlord may without notice, and in addition to any other remedies at law or in equity or elsewhere in this Lease provided, enjoin Tenant from any such failure or violation hereunder. If such failure or violation shall continue for a period of ten (10) days after written notice by Landlord, or in case of a failure or violation which cannot with due diligence be cured within a period of ten (10) days, if Tenant fails to cure such failure or violation promptly after the service of such notice and with all due diligence, then Landlord may, in addition to any other remedies at law or in equity or elsewhere in this Lease provided, cure or prosecute the curing of such failure or violation at reasonable expense, which expense shall be deemed to be additional Rent hereunder and shall be paid to Landlord by Tenant on demand. Tenant agrees that in the event of any failure or violation covered by this provision and Landlord's failure to give notice or to exercise any rights under this provision, all rights of Landlord under this provision may be exercised by persons acting on behalf of Landlord, under authority granted by Landlord, with full right of reimbursement as provided hereunder. Tenant agrees that neither Landlord nor any such person acting on Landlord's behalf shall be liable for any loss or damage suffered by Tenant resulting from the exercise of the rights granted under this section.

Any installment of Rent or any other charge or money obligation herein required to be paid by Tenant which is not paid when due shall bear interest at the rate of eighteen (18%) percent per annum or at the maximum rate allowed by law, whichever is less, from the due date until paid, and Landlord may treat any such charge or money obligation as additional Rent hereunder.

In addition, the happening of any one or more of the following shall be deemed to be events of default under this lease:

- (i) The levying of a writ of execution or attachment on or against the property of Tenant on the Property and the same not being released or discharged within fifteen (15) days thereafter.
- (ii) The doing, or permitting, of any act by Tenant which creates a lien or claim therefor against the land or improvements of which the Property are a part and the same not being released or otherwise provided for by indemnification satisfactory to landlord within fifteen (15) days thereafter;

- (iii) Failure of Tenant to pay any installment of rent or other charge or money obligation herein required to be paid by Tenant as and when such payment is due and payable within ten (10) days after written notice of such failure to pay is given by landlord; or
- (iv) Failure of Tenant to comply with any covenant or provision of this Lease (except payment of any installment of Rent or other charge or money obligation herein required to be paid by Tenant) within ten (10) days after written notice of such failure to comply is given by Landlord, or if it is not feasible to cure such failure within such period, to begin performance of such covenant within such period and to diligently pursue performance to completion in a reasonable time thereafter.

Upon the occurrence of any of such events of default, Landlord shall have the option to pursue any one or more of the following remedies without any notice or demand whatsoever;

- (a) Terminate this lease, in which event Tenant shall immediately surrender the Property to Landlord, and Landlord may, without prejudice to any other remedy which it may have, enter upon and take possession of the Property and expel or remove Tenant and any other person who may be occupying the Property or any part thereof, by force, if necessary, without being liable for prosecution or any claim of damages therefor.
- (b) Should Landlord at any time terminate this Lease for any breach, in addition to any other remedies it may have, it may recover from Tenant all damages it may incur by reason of such breach, including the cost of recovering the Property and reasonable attorneys' fees.

Pursuit of any of the foregoing remedies shall not preclude pursuit of any of the other remedies herein provided or any other remedies provided by law or in equity, nor shall pursuit of any remedy herein provided constitute a forfeiture or waiver of any rent due to Landlord to enforce one or more of the remedies herein provided upon an event of default shall not be deemed or construed to constitute a waiver of such default. If, because of any breach or default by Tenant in Tenant's obligations hereunder, it shall become necessary for Landlord to employ an attorney to enforce or defend any of the Landlord's rights or remedies hereunder. Tenant agrees to pay reasonable attorneys' fees incurred by landlord in such connection.

20. Notices. Whenever any notice is required or permitted hereunder, such notice shall be in writing. Any notice or document required or permitted to be given to Landlord hereunder shall be given by (i) hand delivery to any employee of landlord physically inside Landlord's business office, or (ii) FedEx, United Parcel Services, or other comparable carrier to Landlord's address for notices; or (iii) deposited in the United

States Mail, postage prepaid, certified mail, return receipt requested, addressed to the Landlord at the following address:

BREI Sandy Springs, LP
6780 Roswell Road, Suite C200
Sandy Springs, GA 30328

Any such notice or document required or permitted to be given to Tenant hereunder shall be given by (i) hand delivery to any employee of Tenant physically on the Property or (ii) FedEx, United Parcel Services, or other comparable carrier to Tenants address for notices, or (iii) deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed to Tenant at the following address:

City of Sandy Springs
Attn. City Manager
7840 Roswell Road
Sandy Springs, GA 30328

21. Captions. The captions and headings used in this Lease are for convenience only and do not in any way limit or amplify the terms and provision hereof. Whenever the singular number is used the same shall include the plural, and words of any gender shall include each other gender.
22. No Waiver. One or more waivers of any covenant, term or condition of this Lease by either party shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by either party to or of any act by the other party requiring such consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act.
23. Quiet Enjoyment. Landlord hereby covenants and agrees that if Tenant shall perform all of the covenants and agreements herein required to be performed on the part of Tenant, Tenant shall, subject to the terms of this Lease, at all times during the continuance of this Lease have the peaceable and quiet enjoyment and possession of the Property.
24. Entire Agreement. This Lease contains the entire agreement between the parties and no agreement, representation or inducement shall be effective to change, modify or amend this Lease in whole or in part unless in writing and signed by the parties.
25. Successors and Assigns. The terms, provisions and covenants contained in this Lease shall apply to, inure to the benefit of, and be binding upon the parties hereto and their

respective heirs, assigns, successors in interest and legal representatives except as otherwise herein expressly provided, provided, however, that all claims, demands, or causes of action which Tenant may at any time thereafter have against Landlord because of Landlord's failure to comply with any provisions hereof, shall be enforceable solely against Landlord's right, title and interest in the Property and no other property of Landlord shall be subject to any such claim, demand or cause of action.

26. Time of the Essence. Time is of the essence in this Lease.
27. Choice of Law; Severability. The laws of the State of Georgia shall govern the interpretation, validity, performance, and enforcement of this Lease. If any provision of this Lease shall be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this lease shall not be affected thereby.
28. Surrender of Premises. Tenant shall, on or before the last day of the Term hereof, or on the sooner termination hereof, peaceably and quietly leave, surrender and yield up unto Landlord the Property, together with all alterations, additions, improvements, fixtures and equipment including thereon and other personal property of Tenant, any lessee, sublessee, licensee or concessionaire of Tenant, or any other occupant of the Property. Such alterations, additions, improvements, fixtures and equipment to be in good order and repair, ordinary wear and tear, obsolescence, damage by fire or other casualty, acts of God, condemnation, civil riot and commotion excepted. All such trade fixtures and other personal property shall be removed by Tenant on or before the last day of the Term hereof, and all such property not so removed shall be deemed abandoned by Tenant and conveyed to Landlord unless Landlord shall give notice to Tenant to remove all or any part hereof, in which event Tenant shall promptly at its expense remove same, or Landlord may remove and dispose of such fixtures and personal property at Tenant's expense, which if paid by landlord shall be reimbursed by Tenant within ten (10) days of demand by Landlord. This provision shall survive any termination of this Lease and may be enforceable against Tenant by Landlord notwithstanding the fact that the Lease has been terminated.
29. Invalidity of Provision. If any term, covenant, or condition of this Lease or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term, covenant, or condition to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term, covenant, or condition of this lease shall be valid and be enforced to the fullest extent permitted by law.

30. No Partnership. Nothing herein contained shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and agent or of partnership or joint venture between the parties hereto, it being understood and agreed that neither the method of computation of Rent, nor any other provision contained herein, nor any acts of the parties hereto, shall be deemed to create any relationship hereto other than that of landlord and tenant.

IN WITNESS WHEREOF, the parties have caused this Lease to be executed by their duly authorized officers and their corporate seals, if applicable, to be hereunto affixed on the day and year first above written.

Landlord
BREI Sandy Springs, LP

Tenant:
City of Sandy Springs, Georgia
A Municipal Corporation

EXHIBIT "A"

LEGAL DESCRIPTION OF PROPERTY / EASEMENT AREA

Revised Exhibit “A”

