

OPERATING COVENANT AGREEMENT

THIS OPERATING COVENANT AGREEMENT (this “**Agreement**”) is dated as January ____, 2020 (“**Effective Date**”), and is entered into by and between the CITY OF COACHELLA, a California municipal corporation (“**City**”), and INDIVIDUAL, Jesus R. Gonzalez (“**Owner**”). The City and Owner (individually a “**Party**” and collectively, the “**Parties**”) enter into this Agreement with reference to the following recited facts (each a “**Recital**”):

RECITALS

A. The City has adopted a structural property improvement program (“**SPIP**”) to assist in the seismic retrofit of certain properties located in the downtown area of the City on Vine Avenue in the Downtown Pueblo Viejo District, between 4th Street and 5th Street. (“**Program Area**”); and

B. Owner owns a property located in the Program Area at 772 Vine Avenue in the City of Coachella, California, as further described in Exhibit A attached hereto and incorporated herein by this reference (“**Property**”), and has performed or will have perform certain seismic retrofit and other improvements to the Property (the “**Improvements**”); and

C. Owner has requested financial assistance from the City in an amount of Twenty Thousand Dollars (\$20,000.00) (“**SPIP Loan**”) for reimbursement of certain costs of the Improvements, and in consideration for the SPIP Loan, Owner has agreed to operate, or cause to be operated, a Business on the Property for the Operating Period (as defined below).

TERMS

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES AND COVENANTS SET FORTH IN THIS AGREEMENT, CITY AND OWNER AGREE, AS FOLLOWS:

1. **Definitions.** All initially capitalized terms used in this Agreement shall have the meanings set forth in this Section 1 or, if not defined in this Section 1, where such term first appears in this Agreement, unless the context of usage clearly requires another meaning.

1.1 **Approval.** Any license, permit, approval, consent, certificate, ruling, variance, authorization, conditional use permit, or amendment to any of the foregoing, as shall be necessary or appropriate under any applicable law to construct the Improvements or operate the Business.

1.2 **Business.** The business of the Owner, or of a tenant of the Owner, which is operated on the Property as of the date hereof, or such other business of the Owner, or a tenant of the Owner, as may be operated on the Property from time to time.

1.3 **Deed of Trust.** That certain Deed of Trust and Fixture Filing (With Security Agreement) dated as of the date hereof, executed by Owner, as trustor, in favor of the City, as beneficiary.

1.4 **Improvements Completion Date.** The later of the date on which the Owner is issued a Certificate of Occupancy or an approved final inspection by the City with respect to the Improvements.

1.5 **Note.** That certain Promissory Note dated as of the date hereof in the amount of the SPIP Loan, executed by Owner in favor of the City.

1.6 **Operating Period.** The time period beginning on the Improvements Completion Date and ending on the fifth (5th) anniversary of the Improvements Completion Date; provided that the Operating Period may be extended up to a maximum period of six (6) years from the Improvements Completion Date as provided in Section 2.

1.7 **Person.** Any association, corporation, governmental entity or City, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization or other entity of any kind.

2. **Operating Covenant.** Owner covenants to the City to continuously operate (for a period of not less than 8 hours per day for a minimum of four days per week), or cause a tenant of the Property (“**Tenant**”) to operate, a Business on the Property throughout the entirety of the Operating Period. Owner shall, for the entirety of the Operating Period, at Owner’s sole cost and expense (or at the expense of a Tenant, as applicable), obtain and maintain all franchises, permits, contractual arrangements, licenses, and registrations necessary for the continuous operation of the Business, or require the foregoing to be performed by a Tenant. Notwithstanding the foregoing, in the event the Business shall cease operation for any reason, Owner shall be permitted up to a period of six months to commence a new Business on the Property (or obtain a new Tenant to open a Business on the Property), provided that the Operating Period shall be extended by the same number of days as there was no Business in operation on the Property during such period; provided that in no event shall a Business not be in operation on the Property for more than six months during any twelve month period.

3. **Other Agreements.** The Agreement is being entered into concurrently with the execution of the Note and the Deed of Trust. The obligations of the Owner under this Agreement are secured by the Deed of Trust.

4. **Forgiveness of SPIP Loan.** Provided that Owner is not in default of this Agreement, City agrees to forgive the entire amount due on the SPIP Loan at the end of the Operating Period.

5. **Defaults.** The failure by Owner to perform any of its obligations set forth in this Agreement, which failure is not cured within thirty (30) days after the Owner’s receipt of written notice from the City that such obligation was not performed, shall constitute an event of default under this Agreement. Any event of default under this Agreement shall also constitute an event of default under the Note and the Deed of Trust, entitling the City to pursue any available legal or equitable action or remedy provided therein or by applicable law.

6. **Indemnification.**

6.1 **Owner Indemnity Obligations.** In addition to any other specific indemnification or defense obligations of the Owner set forth in this Agreement, the Owner agrees to indemnify, defend (upon written request by the City and with counsel reasonably acceptable to the City) and hold harmless the City, its governing board, commissions, agents, officers, employees and attorneys (the “**Indemnified Parties**”) from any and all losses, liabilities, charges, damages, claims, liens, causes of action, awards, judgments, costs and expenses (“**Claims**”), including, but not limited to reasonable attorney’s fees of counsel retained by the City, expert fees, costs of staff time, and investigation costs, of whatever kind or nature, that are in any manner directly or indirectly caused, occasioned or contributed to in whole or in part, through any act, omission, fault or negligence, whether active or passive, of the Owner or the Owner’s officers, agents, employees, independent contractors or subcontractors of any tier, relating in any manner to this Agreement. Without limiting the generality of the foregoing, the Owner’s obligation to indemnify the City shall include injury or death to any person or persons, damage to any property, regardless of where located, including the Property, of the City, any workers’ compensation or prevailing wage determination, claim or suit or any other matter arising from or connected with any goods or materials provided or services or labor performed regarding the Business on behalf of the Owner by any person or entity.

6.2 **Survival of Indemnification and Defense Obligations.** The indemnity and defense obligations of the Parties under this Agreement shall survive the expiration or earlier termination of this Agreement, until any and all actual or prospective Claims regarding any matter subject to an indemnity obligation under this Agreement are fully, finally, absolutely and completely barred by applicable statutes of limitations.

7. **Governing Law.** The substantive and procedural laws of the State of California shall govern the interpretation and enforcement of this Agreement, without application of conflicts or choice of laws principles.

8. **Assignment.** Owner may only assign its rights or obligations under this Agreement with the prior written consent of the City, which shall not be unreasonably withheld, delayed or conditioned.

9. No Effect on City's Authority. Nothing in this Agreement shall limit or restrict the authority of the City to take any other actions with respect to the Business or the Property or Owner without notice to or consent from Owner, except as may otherwise be expressly provided by applicable law. The approval of this Agreement by the City shall not be binding on the City, or any other commission, committee, board or body of the City regarding any Approvals regarding the Property or the Business required by such bodies. No action by the City with reference to this Agreement or any related documents shall be deemed to constitute issuance or waiver of any required City Approval regarding the Property or Business.

10. Non-liability of City Officials and Employees. No elected official, officer, contractor, consultant, attorney, employee or agent of the City shall be personally liable to Owner, any voluntary or involuntary successor or assign of Owner, or any lender or other Person holding an interest in Owner, in the event of any default or breach of this Agreement by the City, or for any obligations of the City arising under this Agreement.

11. Notices.

11.1 **Delivery.** Any and all notices submitted by either Party to the other Party pursuant to or as required by this Agreement shall be in writing and addressed to the City or Owner (and their designated copy recipients) as set forth in Section 11.2. Notices (including any required copies) shall be delivered personally, by Federal Express, United Parcel Service or other nationally recognized overnight (one-night) courier service or by registered or certified United States mail, return receipt requested and postage prepaid, to the addresses set forth in Section 11.2, in which case they shall be deemed delivered on the date of delivery (or when delivery has been attempted twice, as evidenced by the written report of the courier service) to such address(es) or on the fourth (4th) day following deposit with the United States Postal Service for delivery. Either Party may change its address for delivery of notices by notice in compliance with this Agreement. Notice of a change of address shall be effective only upon receipt.

11.2 **Addresses.** The following are the authorized addresses for the submission of notices, demands or communications to the Parties, under this Agreement, as of the Effective Date:

To City: City of Coachella
City Hall
53990 Enterprise Way
Coachella, CA 92236
Attention: Economic Development Manager

With a copy to: Best Best & Krieger LLP
74-760 Hwy. 111, Suite 200
Indian Wells, CA 92210
Attention: Carlos Campos, Esq.

To Owner: Jesus R. Gonzalez
P.O. BOX 1144
Coachella, CA 92236
Attention: Jesus R. Gonzalez

12. Jurisdiction and Venue. The Parties each acknowledge and agree that this Agreement is entered into and is to be fully performed in the City of Coachella, County of Riverside, State of California, and that all legal actions arising from this Agreement shall be filed in the Superior Court of the State of California in and for the County of Riverside, California, or the United States District Court with jurisdiction in the County of Riverside, California.

13. Tax Consequences. Owner acknowledges that it may experience tax consequences as a result of its receipt of the SPIP Loan provided for in this Agreement, and any forgiveness thereof in accordance with the Agreement, and agrees that it shall bear any and all responsibility, liability, costs, and expenses connected in any way therewith.

14. Incorporation of Recitals. The Recitals of fact set forth preceding this Agreement are true and correct and are incorporated into this Agreement, in their entirety, by this reference.

15. Principles of Interpretation. No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted any part of this Agreement. The Parties have both participated substantially in the negotiation, drafting, and revision of this Agreement, with advice from legal counsel and other advisers of their own selection. A term defined in the singular in this Agreement may be used in the plural, and vice versa, all in accordance with ordinary principles of English grammar, which also govern all other language in this Agreement. The words “include” and “including” shall be construed to be followed by the words: “without limitation.” Each collective noun shall be interpreted as if followed by the words “(or any part of it),” except where the context clearly requires otherwise. Every reference to any document, including this Agreement, refers to such document as modified from time to time (excepting any modification that violates this Agreement), and includes all exhibits, schedules, addenda and riders to such document. The word “or” includes the word “and.”

16. Counterpart Originals; Integration. This Agreement may be executed in multiple counterpart originals, each of which is deemed to be an original, but all of which taken together shall constitute one and the same instrument. This Agreement and the exhibits attached to this Agreement, together with the Note and the Deed of Trust, represent the entire understanding of the Parties and supersede all previous negotiations, letters of intent, and memoranda of understanding or agreements between the Parties with respect to all or any part of the subject matter of this Agreement.

17. Severability. If any term or provision of this Agreement or its application to any Person or circumstance shall to any extent be invalid or unenforceable, then the remainder of this Agreement or the application of such term or provision to Persons or circumstances, except those as to which it is invalid or unenforceable, shall not be affected by such invalidity. All remaining provisions of this Agreement shall be valid and be enforced to the fullest extent permitted by applicable laws.

18. No Waiver. Failure by a Party to insist on any one occasion upon strict compliance with any of the terms, covenants or conditions of this Agreement shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any rights or powers under this Agreement at any one time or more times be deemed a waiver or relinquishment of such right or power at any other time or times.

19. Time is of the Essence. Time is of the essence in the performance of the Parties’ obligations under this Agreement.

20. No Third Party Beneficiaries. The performances of the Parties’ respective obligations under this Agreement are not intended to benefit any Person other than the City and Owner, except as may be expressly provided otherwise in this Agreement. No Person not a signatory to this Agreement shall have any rights or causes of action against any Party to this Agreement as a result of that Party’s performance or non-performance under this Agreement, except as otherwise expressly provided in this Agreement.

21. Relationship of Parties. The Parties agree and intend that the City and Owner are independent contracting entities and do not intend by this Agreement to create any partnership, joint venture, or similar business arrangement, relationship or association between them.

[Signatures on following page]

**SIGNATURE PAGE
TO
OPERATING COVENANT AGREEMENT**

CITY:

CITY OF COACHELLA, a California municipal corporation

By: _____
WILLIAM B. PATTISON, JR.
City Manager

OWNER:

INDIVIDUAL

By: _____
JESUS R. GONZALEZ
Owner

Approved as to form:

Best, Best & Krieger LLP

By: _____
City General Counsel

EXHIBIT "A"
TO
OPERATING COVENANT AGREEMENT

Property Legal Description

.22 ACRES
Land Use: C05 Commercial, General Office Building
LOTS 2 BLK 26
MB 004/052 COACHELLA

APN: 778-060-006

Zoning: CG