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City of Las Cruces[®]
 PEOPLE HELPING PEOPLE

Council Action and Executive Summary

Item # 17 Ordinance/Resolution# 12-217

For Meeting of _____
 (Ordinance First Reading Date)

For Meeting of June 18, 2012
 (Adoption Date)

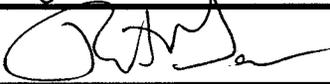
Please check box that applies to this item:

QUASI JUDICIAL LEGISLATIVE ADMINISTRATIVE

TITLE: A RESOLUTION TO APPROVE AN OPTION TO LEASE AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND LAS CRUCES COMMUNITY PARTNERS FOR CERTAIN CITY-OWNED PROPERTIES WITHIN THE DOWNTOWN TAX INCREMENT DEVELOPMENT DISTRICT AND OTHER SUPPORTING DOCUMENTS.

PURPOSE(S) OF ACTION:

To adopt the Option to Lease Agreement for Downtown's Master Developer.

COUNCIL DISTRICT: 1		
<u>Drafter/Staff Contact:</u> David Dollahon	<u>Department/Section:</u> Community Development / Planning & Neighborhood Services	<u>Phone:</u> 528- 3060
<u>City Manager Signature:</u>		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

As was presented at the May 14 City Council work session, the Las Cruces Community Partners has proposed to work to redevelop certain City-owned parcels within Downtown Las Cruces within the Tax Increment Development District (TIDD - See Attachment "A"). City staff has developed an Option to Lease Agreement and finalized negotiations with Las Cruces Community Partners (LCCP) for such efforts to redevelop those identified parcels. The proposed Agreement is agreeable to LCCP and the proposed Resolution authorizes its execution by the Mayor on the City's behalf. This Agreement starts the process for the involvement of a private entity in the continued redevelopment of Downtown Las Cruces and the TIDD and provides a new perspective to the City's efforts to recreate the heart of our community.

In general, the Option to Lease Agreement proposes a \$5,000 exclusive option on the identified parcels so that LCCP can market the properties and negotiate with adjacent land owners to continue the redevelopment of Downtown Las Cruces. This fee is minimal as LCCP assumes all the risks associated with redeveloping the parcels and negotiating with interested parties. Under the Agreement the City authorizes LCCP to market the properties, yet retains ownership of the parcels and their continued use until a long-term lease or purchase of the property is duly

exercised in accordance with State Statutes and City ordinances. Currently, the properties long-term redevelopment could be established through a long-term lease (at least 30 years or longer) and could result in the sale of any or all of the properties. The sample lease attached to the Agreement is informational only and should be seen as a starting point for future negotiations on long-term lease or purchase transactions and are subject to future Council consideration. The responsibilities of the parties document outlines respective tasks that each party will undertake as LCCP develops and implements their redevelopment plans.

SUPPORT INFORMATION:

1. Resolution.
2. Exhibit "A", Option to Lease Agreement.
3. Attachment "A", Property Listing.
4. Attachment "B", Sample Lease.
5. Attachment "C", Responsibilities of the Parties.

SOURCE OF FUNDING:

Is this action already budgeted? N/A	Yes	<input type="checkbox"/>	See fund summary below
	No	<input type="checkbox"/>	If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/>	Expense reallocated from: _____
	<input type="checkbox"/>	<input type="checkbox"/>	Proposed funding is from a new revenue source (i.e. grant; see details below)
		<input type="checkbox"/>	Proposed funding is from fund balance in the _____ Fund.
Does this action create any revenue?	Yes	<input checked="" type="checkbox"/>	Funds will be deposited into this fund: <u>1000</u> in the amount of <u>\$5,000</u> for FY <u>2012</u> or <u>2013</u> (depends on execution date).
	No	<input type="checkbox"/>	There is no new revenue generated by this action.

BUDGET NARRATIVE

The proceeds from the payment for the Option to Lease Agreement will be deposited in the General Fund in account 1000-590020, which is the account used for the sale of City-owned properties.

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
N/A	N/A	N/A	N/A	N/A	N/A

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will approve the Option to Lease Agreement between the City and LCCP for the re-development of certain city-owned parcels within Downtown Las Cruces.
2. Vote "No"; this will not approve the Option to Lease Agreement between the City and LCCP for the re-development of certain city-owned parcels within Downtown Las Cruces.
3. Vote to "Amend"; this would allow Council to modify the Option to Lease Agreement and other supporting documents as it deems appropriate.
4. Vote to "Table"; this would allow Council to postpone consideration of the Resolution to adopt the Option to Lease Agreement and direct staff accordingly.

REFERENCE INFORMATION:

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

1. N/A

RESOLUTION NO. 12-217**A RESOLUTION TO APPROVE AN OPTION TO LEASE AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND LAS CRUCES COMMUNITY PARTNERS FOR CERTAIN CITY-OWNED PROPERTIES WITHIN THE DOWNTOWN TAX INCREMENT DEVELOPMENT DISTRICT AND OTHER SUPPORTING DOCUMENTS.**

The City Council is informed that:

WHEREAS, the City has been actively working to redevelop Downtown Las Cruces for at least the last twenty years; and

WHEREAS, great strides have been made to return Downtown Las Cruces to the heart of the community, including the adoption of a master plan and implementation of a Tax Increment Development District; and

WHEREAS, to date, the majority of the redevelopment has been focused on and accomplished primarily through the City's or public efforts; and

WHEREAS, the City received a proposal from Las Cruces Community Partners (LCCP) to serve as a master developer for the City for Downtown Las Cruces through a proposed Option to Lease Agreement; and

WHEREAS, City staff has negotiated with LCCP and developed the agreed to attached Option to Lease Agreement and supporting documents.

NOW, THEREFORE, be it resolved by the governing body of the City of Las Cruces:

(I)

THAT the Option to Lease Agreement, as shown in Exhibit "A," attached hereto and made a part of this Resolution, is hereby approved.

(II)

THAT the Mayor is hereby authorized to execute the Agreement with LCCP on the City's behalf.

(III)

THAT City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

DONE AND APPROVED this _____ day of _____ 2012.

APPROVED:

Mayor

ATTEST:

City Clerk

(SEAL)

Moved by: _____

Seconded by: _____

VOTE:

- Mayor Miyagishima: _____
- Councillor Silva: _____
- Councillor Smith: _____
- Councillor Pedroza: _____
- Councillor Small: _____
- Councillor Sorg: _____
- Councillor Thomas: _____

APPROVED AS TO FORM:



City Attorney

OPTION TO LEASE AGREEMENT

THIS OPTION TO LEASE REAL PROPERTY AGREEMENT ("Agreement") is entered into this ____ day of _____, 2012 (the "Effective Date") by and between the City of Las Cruces, a New Mexico municipal corporation ("Owner"), and the undersigned limited liability company, Las Cruces Community Partners ("LCCP") and, together with Owner, each, a "Party" and together, the "Parties").

RECITALS:

Owner owns various parcels of land, any improvements located thereon and rights and easements appurtenant to the parcel (the "Property") in the City of Las Cruces, County of Dona Ana, State of New Mexico, and depicted on Exhibit A attached hereto and incorporated herein (The Property), and

Owner desires to grant to LCCP and LCCP desires to accept from Owner an option to lease the Property or a portion thereof, together with all appurtenant rights and easements in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the foregoing mutual promises of the Parties herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto hereby agree as follows:

1. **Option.** Owner hereby grants to LCCP the option (the "Option") to exercise the Lease Agreement ("Lease") attached hereto and incorporated herein as Exhibit B.

a. Option may be exercised by LCCP from the Effective Date to and including the day that is one (1) year from the Effective Date ("Option Period").

b. Within thirty (30) days prior to the expiration of the Option Period, LCCP may elect to extend its option rights for an additional twelve (12) months beyond the Option Period (the "Extended Option Period") by provision of written notice to Owner. In the event that LCCP elects to extend the Option, the terms and conditions of this Agreement shall continue in full force and effect. The Option Period and Extended Option Period shall collectively be referred to as "Option Periods".

c. LCCP shall pay Owner Five Thousand and No/100 Dollars (\$5,000.00) upon the Effective Date. Thereafter; provided the term is extended by LCCP, LCCP agrees to pay Owner Two Thousand Five Hundred and No/100 Dollars (\$2,500.00) on the first anniversary of the Effective Date. Such amounts shall be collectively referred to herein as "Option Payments".

d. During the "Option Period" or the "Extended Option Period" Owner shall not sell, lease, develop, offer to sell or lease nor otherwise encumber the Property.

e. The Option shall be exercisable in LCCP's sole discretion.

f. LCCP may unilaterally terminate this Option, at any time, for any reason or no

reason, with written notice to the Owner. In the event LCCP terminates this Agreement, Owner shall be entitled to retain all payments it has then received. If LCCP elects to terminate this Option, within fifteen (15) days of LCCP's notice to Owner, LCCP shall, at its sole cost and expense, remove all of its equipment and any materials or rubbish incidental to its use, surrender the Property and restore the Property in a manner reasonably satisfactory to Owner, reasonable wear and tear and damage by casualty excepted.

g. Contemporaneously with the execution of this Agreement, the Parties shall execute, acknowledge, deliver and record among the Land Records of Dona Ana County, New Mexico, a copy of this agreement. LCCP shall pay for the costs of recording the agreement.

2. Lease Premises.

a. Subject to its exercise of the Option, LCCP has the right to Lease the Property or a portion thereof, together with all appurtenant rights and easements ("Leased Premises").

b. The size and location of the Lease Premises shall be within or be all of the Property as determined by LCCP and will require the consent of Owner. Owner's consent shall not be unreasonably withheld, conditioned or delayed. Upon determination by LCCP of the specific size and location of the Leased Premises within the Property, LCCP will provide Owner a detailed description of such location to be leased.

c. Owner shall grant such easements or other rights necessary for the successful completion of the Downtown Development (as defined in the Lease), across, over, under or through land owned by Owner and not leased by LCCP. Owner has no obligation or responsibility to provide easements beyond land it owns.

d. The Parties acknowledge that the general depiction of the Leased Premises attached to this Agreement on the Effective Date may be legally insufficient. The Parties confirm to one another that, notwithstanding any insufficiency, the parties desire to enter this Agreement. The Parties agree that (i) they are experienced in transactions of the nature provided for in this Agreement, (ii) in fact, they are thoroughly familiar with the location of the Property, and (iii) the Parties waives any and all claims or defenses of an insufficient legal description in a cause of action for specific performance hereunder.

e. The Parties additionally agree that upon the exercise of the option to lease the Property or a portion thereof, the Parties agree to provide their best efforts to comply and carry out their respective responsibilities as set forth in Exhibit C attached to this agreement

3. Right of Entry.

a. During the Option Periods, LCCP, its employees, agents and independent contractors shall have full and complete access to the Property to evaluate, conduct, perform field inspections, invasive soil and water testing, environmental audits, engineering and boundary surveys, topographical, structural and geo-technical tests, and such other tests and inspections (collectively "Tests and Investigations") of the Property which LCCP may deem necessary or advisable in its sole discretion. However, LCCP shall provide the City Manager at

least seventy two (72) hours advance notice of same. For purposes of this Section 3.a, oral or electronic notice shall be sufficient. LCCP has the right, but not the obligation, to perform Tests and Investigations.

b. Upon request, and with prior consent and direction of City Manager, not to be unreasonably withheld, conditioned or delayed, LCCP shall have the right to use for ingress and egress other land or easement rights owned by Owner to access the Property.

c. With respect to this right of entry to the Property, the Parties agree as follows: (i) LCCP and LCCP's employees, agents and independent contractors shall have access to the Property twenty-four (24) hours a day, seven (7) days a week no additional charge, (ii) LCCP agrees to be responsible for any and all cost related to the permitted activities, including installation on and operation and removal of equipment on the Property, and (iii) Owner consents and agrees that LCCP may make and file applications, at LCCP's sole cost and expense, on Owner's behalf to such local, state and federal governmental entities whose approval may be necessary or advisable to enter the Property to perform said activities, and to take any actions in furtherance of LCCP's ability to proceed with timely implementation of the Downtown Development. Owner shall promptly execute any such application or other documentation, and take any other actions reasonably necessary at LCCP's sole cost, as required by said governmental entity or as would reasonably assist LCCP.

4. **Indemnification.** Neither party shall be responsible for liability incurred as a result of the other party's acts or omissions in connection with this Agreement. Any liability incurred in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act or other New Mexico law.

5. **Default.** A "default" shall be deemed to have occurred in the event either party breaches any obligations set forth in this Agreement and the same is not remedied within thirty (30) days of written notice being received by the defaulting party from the non-defaulting party.

In the event of default by LCCP, Owner shall be entitled to terminate this Agreement and retain the Option Payments, as it has then received, as liquidated damages for such default, and in such event, LCCP shall have no further right whatsoever in connection with this Agreement and Owner shall have no right to seek any further damages or remedy, at law or in equity against LCCP. The Parties agree that it would be impractical and/or extremely difficult to ascertain the actual damages that would be suffered by owner as a result of any such default by LCCP, and that under the circumstances existing as of the date of this Agreement, the liquidated damages provided for in this section represent a reasonable estimate of the damages which Owner will incur as a result of any such default by LCCP.

In the event of a default by Owner, LCCP may elect, in addition to any other right available at law or in equity, to terminate this Agreement and recover from the Owner the actual damages incurred as a result of such default.

6. **Notice of Exercise of Option.** The Option to lease the Property may be exercised by LCCP, in its sole discretion, during the Option Periods. LCCP shall give Owner and Escrow Agent (defined below) thirty (30) days written notice of its intention to exercise this Option at

any time during the Option Periods ("Option Notice"). Such Option Notice shall a) state that LCCP is exercising this Option, b) contain the date, time and place of Closing, which Closing must occur prior to the expiration of the Option Periods, and c) be sent to Owner at:

City Manager
City of Las Cruces
PO Box 20000
Las Cruces NM 88004

With a copy to:

City Attorney
City of Las Cruces
PO Box 20000
Las Cruces NM 88004

Or at such other address as shall be designated by Owner in writing by notice to LCCP.

Notices to the LCCP shall be delivered to LCCP at:

or at such other address as shall be designated by LCCP in writing by notice to Owner. Unless otherwise provided for herein, any other notices provided for in this Agreement shall be in writing, hand delivered, sent by registered or certified U.S. Mail, postage prepaid, with return receipt requested, or by commercial overnight delivery service and shall be deemed delivered to the addressee or its office when received at the address for notice specified above when hand delivered, and on the business day after being sent when sent by overnight delivery service (Saturdays, Sundays and legal holidays excluded), or five (5) business days after deposit in the mail when sent by U.S. mail.

7. **Closing.** The "Closing" shall be the date and time designated by LCCP, in accordance with this Agreement, that the Lease shall become effective. Notwithstanding the foregoing, Owner acknowledges and agrees that, unless waived by LCCP in its sole and absolute discretion, the following shall be express conditions precedent to LCCP's obligation to Closing of the transaction contemplated herein: (a) Owner's representations and warranties contained herein shall be true and correct, (b) Owner shall not otherwise be in default of the terms and conditions of this Agreement, and (c) a nationally recognized title insurance company of LCCP's choosing, ("Title Company") shall issue a "date down" endorsement to the Title Commitment subject only to those Exceptions approved by LCCP pursuant to Section 9, below. Time is of the essence in this Agreement.

8. **Costs and Property taxes.** LCCP shall pay for the cost of any survey, examination of title and title insurance, and payment of any other costs related to the exercise of this option agreement. Owner shall be responsible for real property taxes and any taxes payable by or assessed against Owner during the Option Periods. Each Party shall be responsible for its own attorneys and consultants fees.

9. **Condition of Title.** At LCCP's cost, LCCP may obtain during the Option Periods a preliminary report (the "Title Report") of the condition of title to the Property, as well as copies of each document underlying any matters set forth in said report (each matter, an "Exception"). If LCCP, in its sole discretion, determines that the existence, use, operation, implementation or exercise of any Exception could delay, interfere with, impair or prevent LCCP's development, operation or financing of the system, then LCCP shall notify Owner in writing of such issues ("Exception Notice"), and Owner shall seek in good faith to obtain a release, subordination, non-disturbance agreement, consent or other agreement (in a form and containing provisions reasonably acceptable to LCCP) (together the "Cure Document") from the holder(s) of the rights of such Exception that will eliminate such issue for the benefit of LCCP. If Owner is unable to deliver the Cure Document within thirty (30) business days (the "Cure Period") of LCCP's delivery of the Exception Notice to Owner, Owner shall be in default under this Agreement, provided that, at LCCP's option and upon written notice to Owner by the expiration of the Cure Period, the Cure Period shall be extended thirty (30) business days (the "Extended Cure Period") for the purpose of Owner obtaining and delivering the Cure Document to LCCP. In the event the LCCP grants an Extended Cure Period, the Option Periods shall be tolled on a day for day basis. Failure of Owner to deliver the Cure Document within the Extended Cure Period shall be a default under this Agreement.

10. **Owner Representations.** Owner hereby represents, warrants, agrees and covenants to LCCP that, to the best of its knowledge:

a. No underground storage tanks for petroleum or any other substance, are or have previously been located on the Premises, and no asbestos-containing thermal insulation or products containing PCB, formaldehyde, chlordane, or heptachlor or other Hazardous Materials have been placed on or in any structure on the Premises by Owner or, to the knowledge of Owner, by any prior Owner or user of the Premises, and there have been no release of or contamination by Hazardous Materials on the Premises. Owner has provided LCCP with all environmental studies, records and reports in its possession or control conducted by independent contractors, or Owner and all correspondence with any governmental entities concerning environmental conditions of the Premises, or which identify underground storage tanks or otherwise relate to contamination of the soil or groundwater of the Premises or effluent into the air. As used herein, "Hazardous Materials" means any substance designated as being under any applicable federal, state or local statutes, ordinances, codes, regulations, decrees, orders, laws, rulings, judgment or other governmental or judicial requirements.

b. (i) Owner has not received notice of or been served with any pending or threatened litigation, condemnation, foreclosure or sale in lieu thereof with respect to any portion of the Premises relating to or arising out of the ownership of the Premises by any person, company or governmental instrumentality, and (ii) the Premises has lawful and valid access from

the Premises to existing public highways and roads, and sewer, electrical or other utility services, and all utilities which serve the Premises enter the Premises through adjoining public streets or, if they pass through an adjoining private tract, do so in accordance with valid public easements, which easement(s) shall be sufficient for the purposes of LCCP.

c. Owner has no knowledge (i) if any of the Premises is within any area determined to be flood prone or within a flood zone under Federal designation; (ii) of the severance of any mineral rights and access rights related thereto; or (iii) of the existence of any archeological materials, graves, burial sites, buildings, foundations, wetlands or endangered or protected species.

d. Other than Owner, there are no other persons or entities having legal or beneficial title or ownership interests or possessor rights to the Premises. Owner has the full legal right, power and authority, without the consent of additional parties or party, to enter into this Agreement and to perform its obligations hereunder and the execution and delivery of this Agreement and the consummation of all transactions contemplated hereby have been duly authorized and will not result in a breach or violation of, or a default under, any lease (or other document) by which Owner or its properties are bound, or any law, administrative regulation, or court decree in a manner which could materially and adversely affect the rights of Owner hereunder. The person executing this Agreement on behalf of Owner has full power and authority to bind Owner to the obligations of Owner set forth herein, and upon execution and delivery of the same, this Agreement will constitute valid and binding instruments enforceable in accordance with their terms. The entry into and performance of Owner's obligations under this Agreement will not violate or result in a breach of any contract or agreement by which Owner is bound, the consequence of which violation would be to prevent the performance of Owner's obligations under this Agreement. No consent of any other party is required for the performance by Owner of its obligations hereunder.

e. Owner is a municipal corporation, duly formed and validly existing under the laws of the State of New Mexico. There is no litigation or injunctive action or proceeding pending or, to the best of Owner's knowledge, threatened against Owner which would prevent the performance of Owner's obligations under this Agreement.

f. Owner is not bankrupt or insolvent under any applicable federal or state standard, and Owner has not filed for protection or relief under any applicable bankruptcy or creditor protection statute and has not been threatened by creditors with an involuntary applicable of any applicable bankruptcy or creditor protection statute.

g. Owner is not entering into the transactions described in this Agreement with an intent to defraud any creditor or prefer the rights of one creditor over any other. Owner and LCCP have negotiated this Agreement at arms' length and the consideration paid represents fair value for the assets to be transferred.

The representations, warranties and covenants of Owner set forth herein shall survive Closing.

11. **LCCP Representations.** LCCP hereby represents, warrants, agrees and covenants to Owner that to the best of its knowledge:

a. LCCP is a (limited liability company duly formed, validly existing in the State of ***** and is in good standing with the State of New Mexico.) LCCP has the full legal right, power and authority, without the consent of additional parties or party, to enter into this Agreement and to perform, its obligations hereunder and the execution and delivery of this Agreement and the consummation of all transactions contemplated hereby have been duly authorized.

b. LCCP is not bankrupt or insolvent under any applicable federal or state standard, and LCCP has not filed for protection or relief under any applicable bankruptcy or creditor protection statute and has not been threatened by creditors with an involuntary bankruptcy of any applicable bankruptcy or creditor protection statute.

c. LCCP is not entering into the transactions described in this Agreement with an intent to defraud any creditor or prefer the rights of one creditor over any other. Owner and LCCP have negotiated this Option at arms' length and the consideration paid represents fair value for the Option.

d. LCCP shall, at all times, conduct its activities at the Property in a lawful manner and in compliance with all laws, statutes, codes, ordinances, orders, judgments, decrees, injunctions, rules, regulations, permits and licenses which now or at any time hereafter may be applicable to the Property, or any part thereof, any of the adjoining sidewalks, streets or ways, any condition of the Property, or any part thereof, or the operation or use of the Property, or any part thereof (collectively, the "Legal Requirements").

e. LCCP shall, at all times, have the financial ability to carry out the terms and conditions of the Agreement and the lease.

The representations, warranties and covenants of LCCP set forth herein shall survive Closing.

12. Insurance.

a. Owner shall maintain a self insurance fund adequate to address any liability under the New Mexico Tort Claims Act.

b. LCCP shall maintain Commercial General Liability Insurance with limits of not less than \$2,000,000 general aggregate, \$1,000,000 per occurrence in full force and effect throughout the term of this Agreement either through insurance policies or acceptable self - insured retentions.

c. LCCP shall carry (i) adequate property loss insurance on any property of LCCP, its employees, agents and contractors, and (ii) worker's compensation and employer's liability insurance with an insurance carrier admitted to do business in the State of New Mexico, covering all persons employed by LCCP in connection with the permitted activities of LCCP under this Agreement at the Property satisfying the requirements of the worker's compensation statutes of the State of New Mexico. The amount and terms of insurance coverage will be determined at LCCP's sole discretion. LCCP may, at its option, bring its obligations to insure under this Article

within the coverage of a "blanket" policy of insurance which it may now or hereafter carry, by appropriate amendment, rider, endorsement, or otherwise. LCCP shall name Owner as an additional insured on all insurance policies maintained in accordance with this Agreement.

13. **Preservation of Positions.** Pending the Closing, Owner shall operate and maintain the Property in the manner in which it is currently operated and maintained. Owner shall not take any action or enter into any contract affecting the Property without LCCP's consent, which consent LCCP may withhold in LCCP's sole discretion for any reason. Loss or damage to the Property during the Option Periods by fire or from an act of God shall be at the risk of Owner.

14. **Assignment.** LCCP may assign this Agreement or any interest therein, with the express prior written consent of Owner, which consent shall not be unreasonably withheld, conditioned or delayed. Owner shall have thirty (30) days within which to approve or disapprove any assignment requiring Owner's approval as set forth herein, and the failure of Owner to approve or disapprove within said period shall be deemed a disapproval of the assignment. Notwithstanding the foregoing, LCCP may, without the prior consent of Owner, (a) assign this Agreement to any other company directly or indirectly controlling, controlled by or under common control with LCCP or to an affiliate, subsidiary or parent of LCCP or a subsidiary or affiliate of LCCP's parent; (b) assign, mortgage, pledge, hypothecate or otherwise transfer this Agreement in connection with any financing of the acquisition or development of the property (including, without limitation, pursuant to a sale-leaseback transaction); or (c) assign this Agreement to any other company; provided the net worth of such company at the time of the proposed transfer is equal to or greater than the LCCP at the time of the proposed transfer, and further provided that such company shall use the Property in accordance with the Permitted Use (as defined in the Lease) and has experience operating systems similar to the system. If consent of the Owner is not required as provided for herein or if prior consent of the Owner is obtained, then in such event LCCP shall be relieved of its obligations hereunder provided that the assignee assumes all of the obligations of LCCP under this Agreement.

15. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which when taken together shall constitute but one and the same original.

16. **Governing Law.** This Agreement shall be governed by the laws of the State of New Mexico. The Parties agree that in the event of a dispute in connection with this Agreement, the courts of Dona Ana County shall have jurisdiction over all disputes.

17. **Representation on Authority of Parties.** Each person signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each Party represents and warrants to the other that the execution and delivery of the Agreement and the performance of such Party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such Party and enforceable in accordance with its terms.

18. **Waivers.** Any waiver by either Party shall be in writing and shall not be construed as a continuing waiver. No waiver will be implied from any delay or failure to take action on account of any default by any Party. Consent by any Party to any act or omission by another Party shall

not be construed to be a consent to any other subsequent act or omission or to waive the requirement for consent to be obtained in any future or other instance.

20. **Construction of Agreement.** Each Party acknowledges that it is freely and voluntarily entering into this Agreement, uncoerced by any other person and that it has been afforded the opportunity to obtain the advice of legal counsel of its choice with regard to this Agreement in its entirety and understands the same. Each Party and attorneys for each Party have had the opportunity to participate in the drafting and preparation of this Agreement. Therefore, the provisions of this Agreement shall not be construed in favor of or against either Party, but shall be construed as if both Parties equally prepared this Agreement.

21. **Headings.** The paragraph headings herein are used only for the purpose of convenience only and shall not be deemed to limit the subject of the sections or paragraphs of this Agreement or to be considered in their construction.

22. **Severability.** If any provision of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining provisions of this Agreement shall not be affected thereby and shall remain in force and effect to the full extent permissible by law.

23. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof and shall supersede all prior and contemporaneous agreements, representations, negotiations and understandings of the Parties, oral or written. The foregoing sentence shall in no way affect the validity of any instrument executed by the Parties in the form of the exhibits attached to this Agreement. This Agreement shall not be modified or amended unless such modification and/or amendment is in writing and signed by both Parties.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date hereinabove written.

(NAME OF LCCP)

By: _____

Name: _____

CITY OF LAS CRUCES, NEW MEXICO

By: _____

Robert L. Garza, P.E.
City Manager

Approved as to form:

City Attorney

STATE OF NEW MEXICO)
) ss.
COUNTY OF DOÑA ANA)

This instrument was acknowledged before me on this _____ day of _____
_____, 20 __, by _____ (Name) as
_____ (Title) of _____
(Name of LLC), a limited liability company organized under the laws of the state of _____
_____ (State), on behalf of said limited liability company.

Notary Public

My Commission Expires:

STATE OF NEW MEXICO)
) ss.
COUNTY OF DOÑA ANA)

The foregoing instrument was acknowledged before me on this _____ day of _____
_____, 20 __, by Robert L. Garza, P.E., City Manager of the City of Las Cruces, a
New Mexico municipal corporation, on behalf of said corporation.

Notary Public

My Commission Expires:

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OPTION TO LEASE - ATTACHMENT "A"



Las Cruces Community Partners

OPTION TO LEASE - ATTACHMENT "A"

SCHEDULE OF CITY OWNED PARCELS			
PARCEL #	MAP ID #	LOCATION	SIZE (ACRES)
1	02-05993	SE CORNER OF WATER & GRIGGS	.93
2	02-05925 02-05931	NW CORNER OF GRIGGS & WATER	.76 + .32
3	02-05950	SE CORNER OF LAS CRUCES & WATER	.64
4	02-06091	OLD CITY HALL SE CORNER OF LAS CRUCES & CHURCH	1.35
5	02-06042	NW CORNER OF LAS CRUCES & CHURCH	1.58
6	02-06067	HISTORIC POST OFFICE NW CORNER OF GRIGGS & CHURCH	.87
7	02-05964	OLD CITY OFFICE ANNEX SE CORNER OF LOHMAN & ALAMEDA	2.48
8	02-06072 02-06073	SW CORNER OF GRIGGS & CHURCH	.29 + .18
9	02-05944	SE CORNER OF COURT & WATER	.17
10	02-06042	SW CORNER OF HADLEY & CHURCH	1.58
11	02-06075	NW CORNER OF HADLEY & CAMPO	.64
12	02-06095	SW CORNER OF WATER & CHURCH	.39
13	02-06081	NW CORNER OF WATER & CHURCH	.25
14	02-05990	CAMUNEZ BUILDING NW CORNER OF MAIN ST. & ORGAN AVE.	.20
TOTAL ACRES			12.63

LEASE AGREEMENT

THIS LEASE AGREEMENT (the "Lease") is entered is entered into this ____ day of _____, 2012 (the "Effective Date") by and between the City of Las Cruces, a New Mexico municipal corporation ("Landlord"), and the undersigned limited liability company, its successors or assigns, ("Tenant" and, together with Landlord, each, a "Party" and together, the "Parties"). Landlord represents it has sole and exclusive authority for all matters concerning the Premises, as defined below, and sole and exclusive authority to enter into this Lease.

RECITALS:

1. Landlord owns parcels of land located within the City of Las Cruces Downtown area any improvements located thereon and appurtenant rights and easements situate in the City of Las Cruces, County of Dona Ana, State of New Mexico, being ("Property"), and

2. Landlord desires to lease to Tenant and Tenant desires to lease from Landlord a portion of the Property, together with all appurtenant rights and easements (the "Premises") subject to the terms and conditions stated herein. The Premises is more particularly described in **Exhibit A** attached hereto and incorporated herein, and

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the rent to be paid, and other good and valuable consideration, the legal sufficiency of which is hereby acknowledged by the Parties hereto, Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Premises.

TO HAVE AND TO HOLD THE SAME, subject to the terms and conditions set forth herein.

ARTICLE 1 -PERMITTED USE

During the Term, Tenant shall use the Premises for any lawful purpose related to downtown development including but not limited to new construction, remodeling, repair, renovation, and maintenance. Tenant has the right to evaluate, conduct and perform field inspections, invasive soil and water testing, environmental audits, engineering and boundary surveys, topographical, structural and geo-technical tests, and such other tests and inspections as Tenant may deem necessary or desirable. The Premises shall not be used in such manner as to violate any applicable Federal, State, or local laws, regulations, codes, or ordinances. Tenant shall comply at all times with all Federal, State, and local laws, regulations, codes, and ordinances that are applicable to Tenant's development, and use of the Premises and the construction, operation, and maintenance of the Premises. Tenant's use of the Premises shall at all times be consistent with the City's Downtown Master Plan (as amended or may be amended in the future, provided Tenant is provided with a copy of any such amendments, the Building Code requirements of the New Mexico Construction Industries Division, and any City of Las Cruces ordinance now or hereafter in effect (collectively, "City Requirements"). Landlord hereby represents and warrants that, as of the Effective Date, the use of the Premises for the construction, operation and renovation of Downtown Las Cruces in accordance with the terms of this Lease is in compliance with the City Requirements. Tenant shall use the Premises for the construction, operation and

renovation of Downtown Las Cruces in accordance with the terms of this Lease as long as it does not create a nuisance. Notwithstanding anything to the contrary contained herein, any and all buildings, structures and improvements to be placed on the Premises shall be subject to approval by the City Community Development Department and other administrative processes of the Landlord.

ARTICLE 2 -TERM

2.1 **Term.** The Lease "Term" shall commence on the Effective Date and continue for a term of thirty (30) years and shall expire on the last day of the month thirty (30) years after the Effective Date. The term "Lease Year" shall mean the following: the first Lease Year shall be the period commencing with the Effective Date and expiring on the last day of the twelfth (12th) full calendar month thereafter, and each subsequent Lease Year during the Lease Term shall be the full twelve (12) month period following the expiration date of the immediately preceding Lease Year.

2.2 **Termination.** Tenant or Landlord may unilaterally terminate this Lease, at any time, for any reason or no reason, with at least thirty (30) days written notice to other Party. Such written notice shall set forth the effective termination date, which shall be not less than thirty (30) days or more than one hundred eight (180) days after the day on which such termination notice is received by other Party. In the event Tenant terminates this Lease, Landlord shall be entitled to retain all payments it has then received based on a prorated amount applicable up to the effective termination date, and Landlord shall return all remaining amounts to Tenant within thirty (30) days of the effective termination date. If Tenant elects to terminate this Lease, Tenant shall, at its sole cost and expense prior to the effective termination date, remove all of its equipment and any materials or rubbish incidental to its use, surrender the Property and restore the Property in a manner reasonably satisfactory to Landlord, reasonable wear and tear and damage by casualty excepted and shall thereafter be released from any further liability under this Lease. If Landlord elects to terminate this Lease, Landlord shall pay Tenant's reasonable cost in having Tenant's equipment removed.

ARTICLE 3 -RENT

3.1 **Rent.** As rental for the Premises ("Rent"), Tenant shall pay to Landlord during the Term, \$0.25 per square foot per year. Such amount shall be paid annually, in advance, for each Lease Year during the Term. The annual rent shall be due and payable on the first day of the Lease Year. Effective on the first (1st) day of the (i) fifth (5th) Lease Year, (ii) tenth (10th) Lease Year, (iii) fifteenth (15th) Lease Year, (iv) twentieth (20th) Lease Year and (v) twenty-fifth (25th) Lease Year, the Rent then in effect shall be increased by two percent (2%).

3.2 **Interest on Late Payments.** If Tenant fails to pay any installment of the Rent within fifteen (15) days after the same is due and payable, then, without limiting Landlord in the exercise of any other right or remedy of Landlord with respect to such failure, Tenant shall pay Landlord interest on any such late Rent payment amount at the rate of per annum equal to the "prime rate" (as reported in The Wall Street Journal) plus two percent (2%). Notwithstanding the foregoing, in no event shall such interest exceed twelve percent (12%) at any time.

ARTICLE 4 - TAXES AND UTILITY CHARGES

4.1 **Real Property Taxes and Assessments.** Tenant is responsible for all taxes and assessments assessed against the Premises.

4.2 **Personal Property Taxes.** Tenant shall pay directly to the taxing authority all personal property taxes and assessments, or installments thereof, which are levied, assessed, charged or imposed on or against the personal property on the Premises during the Term.

4.3 **Utilities; Services.** Tenant shall make arrangements for obtaining and, during the Term, shall pay for all utilities and services furnished to, or to be used on behalf of Tenant on the Premises. Landlord shall cooperate with Tenant and will allow a third party service provider, with the required permits from governmental agencies, to install, operate, maintain a data, telecommunication or fiber optic line and such other lines as required to support of the system and Tenant's business operations on the Premises, as determined in Tenant's sole discretion.

ARTICLE 5 - ACCESS TO PREMISES

5.1 **Tenant Access to Premises.** Tenant and Tenant's employees, agents, representatives, contractors, and vendors shall have access to the Premises twenty-four (24) hours a day, seven (7) days a week, at no additional charge, during the Term. In connection with Tenant's access, construction, and use of the Premises, including, without limitation, access to electrical distribution or transmission facilities, Tenant and Tenant's employees, agents, representatives, contractors, and vendors shall have access to public road(s) maintained by State or local government authorities. During the Term, Tenant shall have access to the land contiguous to the Premises which is owned by Landlord for ingress and egress to the Premises.

5.2 **Landlord Access to Premises.** Landlord may enter the Premises at all reasonable times, after not less than forty-eight (48) hours prior written notice (unless in the event of an emergency) to inspect the same to the extent reasonably required. A Tenant representative shall accompany Landlord during its entry to the Premises at all times. Notwithstanding the foregoing, Tenant shall in no event be restricted from installing gates, locks or other devices or systems, including without limitation alarm systems, which would in any way restrict access to the Premises.

ARTICLE 6 - CONSTRUCTION OF BUILDINGS OR STRUCTURES; REPAIRS AND MAINTENANCE; ALTERATIONS AND IMPROVEMENTS AND REMOVAL

6.1 **Construction of the Buildings or Structures.** Tenant, at Tenant's sole option, cost and expense, shall construct or cause to be constructed on the Premises buildings or structures, as well as any and all appurtenant facilities and equipment necessary, in Tenant's sole and absolute discretion, for the development of the Downtown area, as approved by Landlord, if such approval is required.

6.2 **Approvals.** At any time and from time to time during the Term, Landlord may cooperate with Tenant, at no out of pocket expense to Landlord, in making application for and obtaining all

licenses, permits and any and all other necessary approvals ("Approvals") that may be required for Tenant's Permitted Use of the Premises.

6.3 Alterations and Improvements. Tenant shall have the right, at any time and from time to time during the Term, at its sole cost and expense, to (a) make additions, changes, alterations, or improvements, structural or otherwise, to the leased property; and (b) demolish and remove any other structures hereafter located on the Premises as approved in writing by Landlord.

6.4 Landlord Not Obligated to Make Improvements. Landlord shall not interfere with Tenant's use, operation and maintenance of the Premises in any way, and shall in no event be obligated to make any repairs, improvements, alterations, replacements or renewals of any kind, nature or description whatsoever to the Premises.

ARTICLE 7 – LIENS

7.1 Landlord Liens. Landlord shall not directly or indirectly cause, create, incur, assume or suffer to exist any mortgage, pledge, lien (including mechanics', labor or materialmen's lien), charge, security interest, encumbrance or claim of any nature ("Liens") on or with respect to the Premises, the Lease or any interest therein. If, because of any act or omission of Landlord, any mechanics' or other lien or order for the payment of money shall be filed against the Premises (whether or not such lien or order is valid or enforceable as such), Landlord shall, at Tenant's cost and expense, forthwith use commercially reasonable efforts to cause the same to be canceled and discharged of record or insured against by an insurance company or bonded by a surety company. If Landlord shall fail to discharge any such mechanic's or materialmen's lien within the fifteen (15) day period provided for above, Tenant shall, at its option, discharge such lien and treat the cost thereof (including reasonable attorneys' fees incurred in connection therewith) as a Rent credit against the next installment of Rent falling due; it being expressly agreed that such discharge by Tenant shall not be deemed to waive or release the default of Landlord in not discharging such lien.

7.2 Waiver of Landlord's Lien. Landlord acknowledges that Tenant has entered into, or will enter into, a financing arrangement which may include promissory notes and financial and security agreements for the financing of the Premises, as collateral, with a third party financing entity (and may in the future enter into additional financing arrangements with other entities) ("Tenant Financing"). In connection therewith, Landlord (i) hereby consents to the Tenant Financing; (ii) disclaims any interest in the premises, as fixtures or otherwise; (iii) agrees that the Premises are exempt from execution, foreclosure, sale, levy, attachment, or distress for any Rent due or to become due and (iv) shall take no action to impede or interfere with a third party financing entity enforcing its rights pursuant to its agreement(s) with Tenant

7.3 Mechanics' Liens. Tenant shall not suffer or permit any mechanics' or other liens to be recorded or filed against the Premises or against the interest therein of Landlord. If, because of any act or omission of Tenant, any mechanics' or other lien or order for the payment of money shall be filed against the Premises or against Landlord (whether or not such lien or order is valid or enforceable as such), Tenant shall, at Tenant's own cost and expense, forthwith use commercially reasonable efforts to cause the same to be canceled and discharged of record or insured against by an insurance company or bonded by a surety company in the event Tenant

elects to contest the validity thereof. Subject to the foregoing, Tenant shall have the right at its own expense to contest all such liens and orders.

ARTICLE 8 –INDEMNIFICATION

Neither party shall be responsible for liability incurred as a result of the other party's acts or omissions in connection with this Lease. Any liability incurred by Landlord in connection with this Lease is subject to the immunities and limitations of the New Mexico Tort Claims Act or other New Mexico law.

ARTICLE 9 -CONDEMNATION AND DESTRUCTION OF PREMISES

9.1 **Complete Taking.** If, at anytime during the Term, the whole of the Premises is taken for any lawful power or authority by the exercise of the right of condemnation or eminent domain, including any such taking by "inverse condemnation," then this Lease shall terminate. If this Lease terminates, it shall terminate as of the earlier of the date that title vests in the condemnor or the date that the condemnor takes possession of the property so taken ("Date of Taking"). In such event, Rent and all other charges payable hereunder shall be prorated and paid to the date of termination.

9.2 **Partial Taking.** If, at anytime during the Term, a portion of the Premises, or other access way which is reasonably necessary for access to the Premises, is taken for the purposes set forth in this Article, and such taking materially affects the Downtown development on the Premises, Tenant shall have the right to terminate this Lease. If Tenant so elects to terminate this Lease, Tenant shall give written notice of such termination to Landlord within ninety (90) days after the date of Tenant's receipt of notice of such taking. Such notice shall state the effective termination date which shall be determined by Tenant. In such event, Rent and all other charges payable hereunder shall be prorated and paid to the effective termination date.

9.3 **Allocation of Condemnation Award.** If the whole or a part of the Premises is taken by condemnation, Tenant and Landlord shall each have the unqualified right to pursue its remedies against the condemnor for the full value of its fee or leasehold interest, as applicable, and other interests in and to the Premises. Tenant shall be entitled to that portion of the award given for the value of Tenant's leasehold interest in the Premises, Tenant's relocation expenses and other expenses of Tenant included within such recovery or award. The provisions of this section shall survive any termination of this Lease.

ARTICLE 10 –BANKRUPTCY

If, at any time during the Term, bankruptcy, insolvency or other similar proceedings shall be instituted by or against either party (the "Bankrupt Party"), whether or not such proceedings result in an adjudication against the Bankrupt Party, or should a receiver of the business or assets of the Bankrupt Party be appointed, such proceedings or adjudication shall not affect the validity of this Lease so long as the other party does not exercise its right to terminate this Lease and the rent and other amounts owing hereunder continue to be paid when due, and the other terms, covenants and conditions of this Lease on the part of the Bankrupt Party to be performed are

performed, and in such event this Lease shall remain in full force and effect in accordance with its terms.

ARTICLE 11 -ASSIGNMENT AND SUBLETTING

Tenant may assign this Lease, or sublet or license the Premises, any interest therein or portion thereof, (collectively, an "Assignment") with the prior written consent of Landlord. Any Assignment by Tenant without any required prior written consent of Landlord shall not release Landlord of its obligations hereunder and shall not relieve Tenant of all future performance, liabilities, and obligations under this Lease. This Lease runs with the Land and is binding upon and inure to the benefit of the Parties, their respective successors, personal representatives, heirs and assigns. Notwithstanding anything to the contrary contained in this Lease, Tenant, without the prior consent of Landlord, may) assign and sublet the Premises, any interest therein or portion thereof to any other company directly or indirectly controlling, controlled by or under common control with Tenant, or an affiliate, subsidiary or parent of Tenant or a subsidiary or affiliate of Tenant's parent; and b) assign, mortgage, pledge, hypothecate or otherwise transfer without notice or consent its interest in this Lease to any financing entity, or agent on behalf of any financing entity, or to any other entity to whom Tenant has, including, but not limited to, (i) obligations for borrowed money or in respect of guaranties thereof, (ii) obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof, or (c) assign this Lease to any other company; provided the net worth of such company at the time of the proposed transfer is equal to or greater than the Tenant at the time of the proposed transfer, and further provided that such company shall use the Premises in accordance with the Permitted Use and has experience operating systems similar to the system. Landlord shall have thirty (30) days within which to approve or disapprove any assignment requiring Landlord's approval as set forth herein, and the failure of Landlord to approve or disapprove within said period shall be deemed a disapproval of the assignment, provided that such consent is not being unreasonably withheld, conditioned or delayed. Any permitted Assignment shall relieve Tenant of all future performance, liabilities, and obligations under this Lease.

ARTICLE 12 -EVENTS OF DEFAULT; REMEDIES

12.1 **Events of Default.** The occurrence of anyone or more of the following events (in this Article sometimes called an "Event of Default") shall constitute a default and breach of this Lease:

(a) Failure to pay any monetary obligation required to be paid and such failure shall continue for a period of thirty (30) days after written notice that the same is due and payable.

(b) Breach any material non-monetary obligation, covenant or representation or warranty under this Lease for a period of twenty (20) days after written notice of breach; provided that if more time is required to complete such performance, Parties commence such performance within the twenty (20) day period and thereafter diligently pursue its completion without interruptions.

12.2 Parties' Remedies in Case or Default.

(a) Upon a Landlord Event of Default and upon the expiration of any cure or notice period required by this Lease, Tenant may: (i) terminate the Lease and recover from Landlord the actual damages incurred as a direct result of the Event of Default; and/or (iii) except as limited by the Lease, exercise any other remedy Tenant may have at law or equity or under the Lease.

(b) Upon a Tenant Event of Default, Landlord shall be entitled to terminate the Lease and retain the Rent payments, as it has then received, as liquidated damages for such Event of Default of Tenant, and in such event, Tenant shall have no further right whatsoever to lease the Premises and Landlord shall have no right to seek any further damages or remedy, at law or in equity. The Parties agree that it would be impractical and/or extremely difficult to ascertain the actual damages that would be suffered by owner as a result of any such Event of Default by Tenant, and that under the circumstances existing as of the date of this Lease, the liquidated damages provided for in this section represent a reasonable estimate of the damages which Landlord will incur as a result of any such Event of Default by Tenant.

ARTICLE 13 - SURRENDER OF THE PREMISES

At the expiration of this Lease pursuant to the provisions hereof, Tenant shall quit and surrender the Premises to Landlord in good order, condition and repair in accordance with the provisions of this Article. Provided Landlord is not in default under this Lease beyond any applicable cure period, such surrender of the Premises shall be accomplished at Tenant's sole cost and expense. If Landlord is in default under this Lease beyond any applicable cure period, the Tenant's expenses incurred in the surrender of the Premises shall be a recoverable expense. On a mutually convenient date, but in no case later than ninety (90) days after the termination of the Lease, Tenant shall remove from the Premises all additions, alterations, and improvements thereto or replacements thereof and all appurtenant fixtures, machinery and equipment installed if requested by the Landlord, and shall make commercially reasonable efforts to restore the Premises to substantially the condition in which it existed upon start of construction, reasonable wear and tear and loss by casualty or other causes beyond Tenant's reasonable control excepted.

ARTICLE 14 - QUIET ENJOYMENT

14.1 **Covenant of Quiet Enjoyment.** Landlord hereby covenants and agrees that if Tenant shall perform all the covenants and agreements herein stipulated to be performed on Tenant's part, Tenant shall at all times during the continuance hereof have the peaceable and quiet enjoyment and possession of the Premises without any hindrance from Landlord or any person or persons lawfully claiming the Premises.

14.2 **Right to Possession.** Landlord covenants, warrants and represents that Landlord alone has the full right to lease the Premises, has rights of access thereto from the nearest public roadway, which Tenant is legally permitted to use and the Premises and access rights are free and clear of all liens, encumbrances and restrictions and that possession of the Premises will be delivered to Tenant as of the Effective Date, subject to the terms and conditions of this Lease. Landlord acquired fee simple title to the Land by (put in legal description of property included in lease agreement) in the Official Land Records of Dona Ana County, New Mexico.

ARTICLE 15 -TRADE FIXTURES

Anything contained in this Lease to the contrary notwithstanding, Landlord acknowledges, consents and agrees that all fixtures and equipment which are installed or placed in, on or about the Premises by Tenant (collectively the "Trade Fixtures"), whether affixed to the Premises or otherwise shall be and at all times remain the property of Tenant. Provided that Tenant is not in default under the terms of this Lease beyond any applicable cure period, Tenant may remove its Trade Fixtures at any time during the term or upon the expiration or sooner termination of this Lease. Notwithstanding the aforesaid third party financing entity, including a financing entity under a sale/leaseback arrangement, irrespective of any default of Tenant, may remove its Collateral at any time.

ARTICLE 16 -NOTICES AND DEMANDS

16.1 Notices to Landlord. Notices to Landlord and rent shall be delivered to:

City Manager
City of Las Cruces
PO Box 20000
Las Cruces NM 88004

With a copy to:

City Attorney
City of Las Cruces
PO Box 20000
Las Cruces NM 88004

Or at such other address as shall be designated by Landlord in writing by notice to Tenant.

16.2 Notice to Tenant. Notices to Tenant shall be delivered to: _____
or at such other address as shall be designated by Tenant in writing by notice to Landlord.

16.3 Notice. Unless otherwise provided for herein any notice provided for in this Lease shall be hand delivered, sent by registered or certified U.S. Mail, postage prepaid, with return receipt requested, or by commercial overnight delivery service and shall be deemed delivered to the addressee or its office when received at the address for notice specified above when hand delivered, and on the business day after being sent when sent by overnight delivery service (Saturdays, Sundays and legal holidays excluded), or five (5) business days after deposit in the mail when sent by U.S. mail.

16.4 Notice of Damage or Emergency. Landlord shall (a) promptly notify Tenant if it becomes aware of any damage to or loss of the use of the Premises or that could reasonably be expected to adversely affect the Premises, and (b) immediately notify Tenant when it becomes aware of any event or circumstance that poses an imminent risk to human health, the environment, or the Premises.

ARTICLE 17 –BROKERAGE

Landlord and Tenant warrant that there are no claims for broker's commissions or finder's fees in connection with its execution of this Lease.

ARTICLE 18 -FORCE MAJEURE

18.1 **Definition.** "Force Majeure Event" means any act or event that prevents the affected Party from performing its obligations in accordance with the Lease, if such act or event is beyond the reasonable control, and not the result of the fault or negligence, of the affected Party and such Party had been unable to overcome such act or event with the exercise of due diligence (including the expenditure of reasonable sums). Subject to the foregoing conditions, Force Majeure Event shall include without limitation the following acts or events: (i) natural phenomena, such as storms, hurricanes, floods, lightning, excessive snowfall, volcanic eruptions and earthquakes; (ii) explosions or fires arising from lightning or other causes unrelated to the acts or omissions of the Party seeking to be excused from performance; (iii) acts of war or public disorders, civil disturbances, riots, insurrection, sabotage, epidemic, terrorist acts, or rebellion; (iv) strikes or labor disputes (except strikes or labor disputes caused solely by employees of a Party or as a result of such Party's failure to comply with a collective bargaining Lease); and (v) action by a governmental authority causing a moratorium on any activities related to the Lease. A Force Majeure Event shall not be based on the economic hardship of either Party.

18.2 **Excused Performance.** Except as otherwise specifically provided in the Lease, neither Party shall be considered in breach of the Lease or liable for any delay or failure to comply with the Lease (other than the failure to pay amounts due hereunder), if and to the extent that such delay or failure is attributable to the occurrence of a Force Majeure Event; provided that the Party claiming relief under this Section 19 shall immediately (i) notify the other Party in writing of the existence of the Force Majeure Event, (ii) exercise all reasonable efforts necessary to minimize delay caused by such Force Majeure Event, (iii) notify the other Party in writing of the cessation or termination of said Force Majeure Event and (iv) resume performance of its obligations hereunder as soon as practicable thereafter.

ARTICLE 19 –INSURANCE

19.1 **Landlord Insurance.** Owner shall maintain a self insured fund adequate to address any liability under the New Mexico Tort Claims Act.

19.2 **Tenant Insurance.** Tenant shall maintain the following insurance coverage in full force and effect throughout the Term of this Lease either through insurance policies: Commercial General Liability Insurance with limits of not less than \$2,000,000 general aggregate, \$1,000,000 per occurrence. Additionally, Tenant shall carry (i) adequate property loss insurance on any property of Tenant, its employees, agents and contractors which need not be covered by the Landlord's property coverage; (ii) worker's compensation and employer's liability insurance with an insurance carrier admitted to do business in the State of New Mexico, covering all persons employed by Tenant in connection with the operation of the Leased Premises and the improvements satisfying the requirements of the worker's compensation statutes of the State of New Mexico; and (iii) at any time during the course of any construction, Builder's Risk

insurance in such amounts with such companies and for so long as reasonably acceptable to Landlord. The amount and terms of insurance coverage will be determined at Tenant's sole discretion; provided, however, Landlord shall have the right to increase the minimum limits set forth herein during the Term in accordance with reasonably industry standards. Tenant may, at its option, bring its obligations to insure under this Article within the coverage of a "blanket" policy of insurance which it may now or hereafter carry, by appropriate amendment, rider, endorsement, or otherwise. Tenant shall name Landlord as an additional insured on all insurance policies maintained in accordance with this Lease.

19.3 Certificates of Insurance. Each Party shall furnish evidence that the insurance required under this Section is being maintained. Each Party's insurance policy provided hereunder shall contain an endorsement providing that such coverage may not be canceled or materially altered with respect to the Premises except after forty-five (45) days prior written notice (ten days prior written notice for non-payment of premium) from the insurance company to the other Party.

19.4 Additional Insureds. Each Party's insurance policy shall be written on an occurrence basis and shall include the other Party as an additional insured as its interest may appear.

19.5 Insurer Qualifications. All insurance maintained hereunder shall be maintained with companies either rated no less than A-as to Policy Holder's Rating in the current edition of Best's Insurance Guide (or with an association of companies each of the members of which are so rated) or having a parent company's debt to policyholder surplus ratio of 1:1.

ARTICLE 20 -REPRESENTATIONS

20.1. Representations. Landlord hereby represents, warrants, agrees and covenants to Tenant that, to the best of its knowledge:

a. No underground storage tanks for petroleum or any other substance are or have previously been located on the Premises, and no asbestos-containing thermal insulation or products containing PCB, formaldehyde, chlordane, or heptachlor or other Hazardous Materials have been placed on or in any structure on the Premises by Landlord or, to the knowledge of Landlord, by any prior Landlord or user of the Premises, and there have been no release of or contamination by Hazardous Materials on the Premises. Landlord has provided Tenant with all environmental studies, records and reports in its possession or control conducted by independent contractors, or Landlord and all correspondence with any governmental entities concerning environmental conditions of the Premises, or which identify underground storage tanks or otherwise relate to contamination of the soil or groundwater of the Premises or effluent into the air. As used herein, "Hazardous Materials" means any substance designated as being under any applicable federal, state or local statutes, ordinances, codes, regulations, decrees, orders, laws, rulings, judgment or other governmental or judicial requirements.

b. (i) Landlord has not received notice of or been served with any pending or threatened litigation, condemnation, foreclosure or sale in lieu thereof with respect to any portion of the Premises relating to or arising out of the ownership of the Premises by any person, company or governmental instrumentality, and (ii) the Premises has lawful and valid access from the Premises to existing public highways and roads, and sewer, electrical or other utility services,

and all utilities which serve the Premises enter the Premises through adjoining public streets or, if they pass through an adjoining private tract, do so in accordance with valid public easements, which easement(s) shall be sufficient for the purposes of Tenant.

c. Landlord has taken no action or failed to take actions that would cause a material increase in real property taxes or additional assessments on the Premises prior to Closing. The Premises is subject to "rollback taxes".

d. Landlord has no knowledge (i) if any of the Premises is within any area determined to be flood prone or within a flood zone under Federal designation; (ii) of the severance of any mineral rights and access rights related thereto; or (iii) of the existence of any archeological materials, graves, burial sites, buildings, foundations, wetlands or endangered or protected species.

e. Other than Landlord, there are no other persons or entities having legal or beneficial title or ownership interests or possessor rights to the Premises. Landlord has the full legal right, power and authority, without the consent of additional parties or party, to enter into this Lease and to perform, its obligations hereunder and the execution and delivery of this Lease and the consummation of all transactions contemplated hereby have been duly authorized and will not result in a breach or violation of, or a default under, any Lease (or other document) by which Landlord or its properties are bound, or any law, administrative regulation, or court decree in a manner which could materially and adversely affect the rights of Landlord hereunder. The person executing this Lease on behalf of Landlord has full power and authority to bind Landlord to the obligations of Landlord set forth herein, and upon execution and delivery of the same, this Lease will constitute valid and binding instruments enforceable in accordance with their terms. The entry into and performance of Landlord's obligations under this Lease will not violate or result in a breach of any contract or agreement by which Landlord is bound, the consequence of which violation would be to prevent the performance of Landlord's obligations under this Lease. No consent of any other party is required for the performance by Landlord of its obligations hereunder.

f. Landlord is a duly formed and validly existing Home Rule Municipality under the laws of the State of New Mexico. There is no litigation or injunctive action or proceeding pending or, to the best of Landlord's knowledge, threatened against Landlord which would prevent the performance of Landlord's obligations under this Lease.

g. Landlord is not bankrupt or insolvent under any applicable federal or state standard, and Landlord has not filed for protection or relief under any applicable bankruptcy or creditor protection statute and has not been threatened by creditors with an involuntary bankruptcy of any applicable bankruptcy or creditor protection statute.

h. Landlord is not entering into the transactions described in this Lease with intent to defraud a creditor or prefer the rights of one creditor over any other. Landlord and Tenant have negotiated this Lease at arms' length and the consideration paid represents fair value for the assets leased.

i. During the Term, Landlord (i) will not interfere with the Premises and (ii) shall grant such additional easements or rights to Tenant, across, above or below other property owned by the Landlord as may be reasonably necessary to create Downtown development.

20.2. **Representations.** Tenant hereby represents, warrants, agrees and covenants to Landlord:

a. Tenant is a limited liability company duly formed, validly existing in (State of Incorporation) and is in good standing with the State of New Mexico. Tenant has the legal right, power and authority, without the consent of additional parties or party, to enter into this Lease and to perform, its obligations hereunder and the execution and delivery of this Lease and the consummation of all transactions contemplated hereby have been duly authorized.

b. Tenant is not bankrupt or insolvent under any applicable federal or state standard, and Tenant has not filed for protection or relief under any applicable bankruptcy or creditor protection statute and has not been threatened by creditors with an involuntary bankruptcy of any applicable bankruptcy or creditor protection statute.

c. Tenant is not entering into the transactions described in this Lease with intent to defraud any creditor or prefer the rights of one creditor over any other. Landlord and Tenant have negotiated this Lease at arms' length and the consideration paid represents fair value for the assets to be transferred.

d. Tenant shall, at all times, conduct its activities at the Premises in a lawful manner and in compliance with all laws, statutes, codes, ordinances, orders, judgments, decrees, injunctions, rules, regulations, permits and licenses which now or at any time hereafter may be applicable to the Premises, or any part thereof, any of the adjoining sidewalks, streets or ways, any condition of the Premises, or any part thereof, or the operation or use of the Premises, or any part thereof (collectively, the "Legal Requirements"). Tenant's obligations hereunder shall include the obligation to repair or alter the Premises, if necessary, to effect such compliance with all Legal Requirements first in effect after the Effective Date and applicable to the Premises as a direct result of Tenant's Permitted Use.

ARTICLE 21 -GENERAL PROVISIONS

21.1 **Binding on Succession.** This Lease, and the rights and obligations of the Parties hereto, shall be binding upon and inure to the benefit of the Parties and their respective successors, heirs, executors, administrators and assigns.

21.2 **Severability.** If any provision of this Lease shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining provisions of this Lease shall not be affected thereby and shall remain in force and effect to the full extent permissible by law.

21.3 **Entire Agreement.** This Lease constitutes the entire agreement between the Parties pertaining to the subject matter hereof and shall supersede all prior and contemporaneous agreements, representations, negotiations and understandings of the Parties, oral or written. The foregoing sentence shall in no way affect the validity of any instrument executed by the Parties

in the form of the exhibits attached to this Lease. This Lease shall not be modified or amended unless such modification and/or amendment is in writing and signed by both Parties.

21.4 Recitals and Captions. The captions used in this Lease are inserted as a matter of convenience only, and in no way define, limit or describe the scope of this Lease or the intentions of the Parties hereto, and shall not in any way affect the interpretation or construction of this Lease. The Recitals set forth above are hereby incorporated and made part of this Lease.

21.5 No Waiver. Any waiver by any Party shall be in writing and shall not be construed as a continuing waiver. No waiver will be implied from any delay or failure to take action on account of any default by any Party. Consent by any Party to any act or omission by another Party shall not be construed to be a consent to any other subsequent act or omission or to waive the requirement for consent to be obtained in any future or other instance.

21.6 Holdover. If Tenant holds over after the Term (subject to Tenant's rights set forth in Article 13), such holding over shall be construed to be a tenancy from month-to-month only, and Tenant shall pay the rent which shall be increased from the annual rent in effect immediately prior to the holdover period, by twenty percent (20%) on an annual basis, but paid on a monthly basis, during any holdover period and other sums as herein required for such further time as Tenant continues in occupancy. Nothing in this Section shall be construed as Landlord's consent for Tenant to hold over.

21.7 Governing Law.

(a) This Lease shall be governed by and construed in accordance with the laws of the State of New Mexico. The Parties agree that in the event of a dispute in connection with this Lease, the courts of Dona Ana County shall have jurisdiction.

(b) The parties agree that alternative dispute resolution as set forth in the Public Works Mediation Act will be used before litigation can be filed.

21.8 Counterparts. This Lease may be executed in any number of counterparts. Each of which shall be deemed an original but all of which when taken together shall constitute but one and the same original.

21.9 Further Assurances. The Parties shall at their own cost and expense execute and deliver such further documents and instruments and shall take such other actions as may be reasonably required or appropriate to carry out the intent and purposes of this Lease. Landlord agrees to execute such further documentation as may reasonably be requested by a third party providing financing to Tenant.

21.10 Short Form Lease. This Lease shall not be recorded. Notwithstanding the aforesaid, the Parties shall execute and record in the Land Records of Dona Ana County a short form memorandum of this Lease, which shall identify the Parties, the Premises, and Term. The recording costs shall be paid by Tenant.

21.11 **Estoppel Certificate.** Each party agrees that within fifteen (15) days after receipt of a written request from the other party, the recipient of the request ("Recipient") shall execute and deliver to the requesting party a certificate certifying (a) that this Lease is unmodified and in full force and effect; or, if modified, stating the nature of the modifications and that, as so modified, this Lease is in full force and effect; (b) the date to which the rent and other charges hereunder are paid in advance, if any; (c) the then-scheduled expiration date of the Term; (d) that to Recipient's knowledge, as of the date of the certificate, there are no uncured defaults hereunder on the requesting party's part or specifying such defaults as are claimed by Recipient; and (e) as to such other matters as may be reasonably requested by the requesting party and agreed upon by the Recipient.

21.12 **Due Authorization.** Each person executing this Lease on behalf of Landlord and Tenant, respectively, warrants and represents that the party for whom he or she is acting has been duly formed, is in good standing, and has duly authorized the transactions contemplated herein and the execution of this Lease by him or her and that, when so executed, this Lease shall constitute a valid and binding obligation of the party on whose behalf it is so executed.

21.13 **Relationship of Parties.** Nothing contained in this Lease shall be deemed to create a partnership or joint venture between Landlord and Tenant. Landlord and Tenant's relationship in this Lease shall be deemed to be one of landlord and tenant only.

21.14 **Attorneys' Fees.** In the event of any litigation arising out of or relating to this Lease, or the breach or performance of it, the prevailing Party shall be entitled to recover reasonable attorneys fees incurred in connection therewith.

21.15 **Incorporation of Exhibits.** All exhibits attached to this Lease are hereby incorporated herein as though set forth in full in this Lease itself.

21.16 **Construction.** The Lease shall be construed without regard to any presumption or other rule requiring construction against the party causing the Lease to be drafted.

ARTICLE 22 -TITLE VII CIVIL RIGHTS ASSURANCES

Tenant, for itself, its personal representatives, successors in interest, and assigns, as part of the consideration under this Lease, does hereby covenant and agree as a covenant running with the land that:

a. No person on the grounds of race, color, sex, disability or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities.

b. In the construction of any improvements on, over, or under such land and the furnishing of services thereon, no person on the grounds of race, color, sex, disability or national origin shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination. Tenant shall use the Premises in compliance with all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination, in Federally-assisted programs of the

Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

IN WITNESS WHEREOF, the parties have executed this Lease as of the date and year hereinabove first written.

(NAME OF LESSEE)

By: _____

Name: _____

CITY OF LAS CRUCES, NEW MEXICO

By: _____

Robert L. Garza, P.E.
City Manager

Approved as to form:

City Attorney

STATE OF NEW MEXICO)
) ss.
COUNTY OF DOÑA ANA)

This instrument was acknowledged before me on this _____ day of _____
_____, 20____, by _____ (Name) as

(Title) of _____
(Name of LLC), a limited liability company organized under the laws of the state of _____
_____, on behalf of said limited liability company.

Notary Public

My Commission Expires:

STATE OF NEW MEXICO)
) ss.
COUNTY OF DOÑA ANA)

The foregoing instrument was acknowledged before me on this _____ day of _____
_____, 20____, by Robert L. Garza, P.E., City Manager of the City of Las Cruces, a
New Mexico municipal corporation, on behalf of said corporation.

Notary Public

My Commission Expires:

RESPONSIBILITIES OF THE PARTIES

- a. The City of Las Cruces will:
- i. Notify LCCP of any litigation potential, environmental liabilities or administrative proceedings, of which the City has actual knowledge, affecting any property identified.
 - ii. Provide parcels leased to LCCP free and clear of all liens.
 - iii. On a mutually agreeable timetable and as needed will provide to LCCP copies of all prior environmental studies or related documents if available for properties to be leased.
 - iv. Assuming individual projected economies and return on investment (ROI) justifies the City's anticipated expense, paying for remediation costs if required and identified under the Phase I or Phase II report.
 - v. Provide boundary and topographic surveys for all parcels, showing all property lines, easements, all adjacent streets, existing utilities on and adjacent to each parcel with size and pressure shown, all utility stub-outs to property, all existing improvements including sidewalks, curb and gutter, paved areas, structures, signage, fencing, landscape, and lighting; the survey shall also include topographic information with contours at 0.5-foot intervals, and spot elevations at a 50-foot x 50-foot grid.
 - vi. Pursue funding from one of its sources for a market study for a mixed-use Downtown development (market rate apartments and rental), as well as additional planning, marketing and other studies the Parties may agree to from time to time;
 - vii. Complete the public infrastructure projects underway in the Downtown area and as noted in the TIDD and/or ICIP plan in the Downtown area.
 - viii. Note which utilities are available and the current capacities with respect to potential property that may be leased/sold
 - ix. As incentives to LCCP per the infill policy.
 1. Expedite the approval process, including but not limited to rezoning, plan checking and building permits

2. Identify and pursue funding sources that may cover the costs of required studies for planning, market determination and economic studies
 3. Through the use of TIDD funds or other resources, assuming individual projected economies and return on investment (ROI) justifies the City's anticipated expense, extend City utilities to building sites or property boundaries to the extent possible
 4. Minimize or eliminate building permit fees that would accrue to planned vertical developments (per LEDA)
 5. If requested, consider demolition of public buildings and existing infrastructure to make a site ready for building
 6. Assuming individual projected economies and return on investment (ROI) justifies the City's anticipated expense, install sidewalks, lighting, widening paving, parking drive pads and landscaping the public right of way and in platted alleyways
 7. As mutually agreed with LCCP, provide signage and other Downtown "way finding" improvements
 8. Explore the LEDA to enhance the Downtown development plan
 9. Provide ongoing maintenance for the Plaza after completion
 10. Coordinate with Downtown LC Partnership ("DLCP") to take the lead on championing the revised Downtown Master Plan through the City process
 11. Work with the Dona Ana Arts Council, Court Youth Center, NMSU Art School and others to identify funding sources to implement a public art program for the Downtown Area
 12. Initiate, pay for, and coordinate asbestos and lead studies for all existing buildings on the Property.
- b. LCCP, will:
- i. Facilitate the acquisition and construction of the proposed Plaza site and other mutually agreeable properties.
 - ii. Initialize the effort to have Las Cruces designated a "Great Place in America"

- iii. Meet with DLCP as necessary to:
 - 1. Keep its members up-to-date on the Downtown area status
 - 2. Solicit its support in Community Partner's efforts
 - 3. Coordinate public and stakeholder review and input
- iv. Facilitate and coordinate PlaceMakers charrettes
- v. With the cooperation and concurrence of City representatives, will develop Design Guidelines and a form-based Smart Code that will be considered by City Council for all future development in the Downtown area
- vi. Initiate and coordinate a market study for market rate apartments (mixed use, with retail)
- vii. Initiate discussions with various Downtown property owners to relocate and vacate various downtown sites in order to promote Downtown development
- viii. Work with Alameda Depot and Mesquite neighborhood Committees to incorporate their parks (and the corridors from Downtown to their parks) into the revised Downtown Master Plan
- ix. Coordinate with DLCP to take lead on championing the revised Downtown Master Plan through the City process
- x. Initiate discussions with all Downtown landowners, providing incentives to contribute their assets to Las Cruces Community Partners LP in return for ownership in that entity.
- xi. Will initiate discussions with potential users for Old City Hall, such as:
 - 1. Hispano Chamber
 - 2. Day Care Center
 - 3. Other appropriate uses
- xii. Initiate discussions with potential users for City and other Downtown properties.
- xiii. Assist the City in finding a "home" for the Convention and Visitors Bureau and the Municipal Court

- xiv. Carry general liability insurance with limits acceptable to the City, and name the City as an additional insured on such policy/policies
 - xv. Prepare and present status reports to City representatives on as-needed basis, but not less than a semi-annual basis
 - xvi. To achieve the mutually desired result of a redeveloped Downtown, LCCP may sublease all or a portion of the Property through lease provisions contained in the Lease to an affiliate, end users or “vertical” developers. LCCP will require that any vertical development be submitted to the DRC and receive DRC approval prior to submittal of plans to the appropriate City department for plan check and building permits
 - xvii. In coordination with the City, LCCP will spearhead an overall marketing effort for the benefit of Downtown Las Cruces and its business owners
- c. Miscellaneous
- i. Nothing contained in this agreement shall be construed to create a partnership, joint venture or agency relationship between City, LCCP, or any third party
 - ii. No member, official or employee of the City shall be personally liable to LCCP in the event of any default or breach by the City, or for any amount which may become due to LCCP, or on any obligations under the terms of this Agreement
 - iii. No Affiliate of LCCP, and no officer, director, partner, member, official or employee of LCCP or any Affiliate of LCCP shall be personally liable to the City in the event of any default or breach by LCCP, or for any amount which may become due to the City, or on any obligations under the terms of this Agreement
 - iv. The parties are aware of the New Mexico Governmental Conduct Act and its various provisions and will inform all of their employees of those provisions concerning conflict of interest