

DEVELOPMENT AGREEMENT

This DEVELOPMENT AGREEMENT (“Agreement”) is made and entered into this ____ day of _____, 2019 (“Effective Date”), by and between the FRANCISCO GUZMAN AND IRENE GUZMAN FAMILY WEALTH TRUST DATED DECEMBER 2, 2008 (“Trust”), Martin Guzman, Trust representative and effective property owner, (“Guzman”) (“Trust” and “Guzman” are collectively referred to herein as “Owner”) and the City of Yuma, Arizona, an Arizona municipal corporation (“City”). The Owner and City are collectively referred to herein as the “Parties,” and individually as a “Party”.

RECITALS

WHEREAS, Owner holds fee title to approximately one (1) acre of real property within the corporate limits of the City of Yuma located west of the Southwest corner of 17th Street & Pacific Avenue in Yuma, Arizona, known as Arizona Parcel Number 665-40-011, and more particularly described and depicted as lot number 11 in the attached Exhibit 1 (“Property”); and,

WHEREAS, in 2015, Owner, City, and another entity, Fortuna De Oro, LLC, developer of the Gomez Plaza, entered into a Memorandum of Understanding setting forth rights and responsibilities of Owner, City, and Fortuna De Oro, LLC, for contribution and perfected access to the Property and to Gomez Plaza; and,

WHEREAS, the Property’s current primary use is for mobile food vending court; and,

WHEREAS, Owner obtained a Yuma County-issued special use permit for the mobile food vending operation and pursuant to terms of the 2015 Memorandum of Understanding, Owner was to obtain a City-issued Conditional Use Permit and meet City development standards prior to the expiration of the Yuma County-issued special use permit; and,

WHEREAS, the Property’s current condition does not meet the City development standards for the current use; and,

WHEREAS, Owner desires and intends to develop the Property to bring it into conformance with City development standards applicable to the current use; and,

WHEREAS, Owner has presented a conceptual plan for the intended development and improvement of the Property, which includes the design, installation and construction of landscaping, lighting and the paving of a parking lot, each of which are depicted in Exhibit 2 (the “Plan”); and,

WHEREAS, Owner initiated a lawsuit in Yuma County Superior Court, Cause No. S1400CV201900159, asserting an inverse condemnation claim against the City relating to the Property (“Lawsuit”); and

WHEREAS, the Parties intend this Agreement, to among other things, be a full and final settlement of the Lawsuit; and

WHEREAS, Owner and City are entering into this Agreement pursuant to the provisions of ARIZ. REV. STAT. § 9-500.05 in order to facilitate the development of the Property by providing for, among other things the conditions, terms, restrictions and requirements for the construction and installation of infrastructure improvements related to the development of the Property; and,

WHEREAS, development of the Property in accordance with this Agreement will result in the planning, design, engineering, construction, acquisition, and installation of infrastructure improvements that will authorize the current use of the Property; and

WHEREAS, improving the Property will enhance the general area around the Property, and be of a public benefit; and,

WHEREAS, the Parties understand and acknowledge that the terms of this Agreement shall constitute and be interpreted as covenants running with the Property as more fully described in this Agreement.

NOW THEREFORE, in consideration of the above recitals, the Parties agree as follows:

1. Incorporation of Recitals. The foregoing Recitals are incorporated into this Agreement by reference as though fully restated.

2. Term. This Agreement will commence and become operative as of the Effective Date, and will terminate when the obligations of the Parties have been completed, including (i) the completion of the dedication of public rights-of-way; and (ii) the construction, dedication and final City acceptance of the public improvements contemplated herein; and (iii) any Owner surcharge or financial contribution contemplated by this Agreement has expired or been paid in full; or (iv) the Parties mutually provide for termination in writing; or (v) if no vertical construction requiring a building permit has commenced on the Property, upon the expiration of three (3) years from the Effective Date, whichever occurs first. Notwithstanding the provisions of this Section 2, and any other term of this Agreement, express covenants shall survive the term of this Agreement and shall run with the land.

3. Development of the Property.

A. Adherence to Plan. Owner acknowledges and agrees City is materially relying on Owners representations regarding its development of the Property, as depicted on the Attached Plan (See Exhibit 2, "Plan"), in entering into this Agreement.

4. MATERIAL TERMS

A. Landscaping. Owner shall (i) submit a substantially complete landscaping Plan to the City Department of Community Development no later than December 15, 2019, and upon City approval of the landscaping Plan and the issuance of any required permits; (ii) install

the landscaping and irrigation improvements in substantial conformance with the approved landscaping Plan, all of which shall be installed no later than January 15, 2020.

B. Lighting. Owner shall (i) submit a substantially complete lighting Plan to the City Department of Community Development no later than September 15, 2020, and upon City approval of the lighting Plan and the issuance of any required permits; (ii) Owner shall install the lighting improvements in substantial conformance with the approved lighting Plan no later than October 15, 2020.

C. Paving. Owner is required to pave all areas in which vehicles will be driven or parked. Owner shall (i) submit a substantially complete paving Plan to the City Department of Community Development no later than January 15, 2021, and upon City approval of the paving Plan and the issuance of any required permits; (ii) install the paving improvements in substantial conformance with the approved paving Plan no later than July 15, 2021.

D. Paving Location. Paving is only required on the areas where vehicles will park, drive or where the mobile food vendors will operate, each of which areas are depicted on the Plan.

E. Recognition of Use. City, in reliance of Owner's commitments relating to improvements to the Property contained in this Agreement and provided Owner is not in breach of this Agreement, will recommend approval of Owner's application for a Conditional Use Permit for a mobile food vending court. Provided Owner is not in breach of this Agreement and does not cause a condition to occur upon the Property relating to the current use that is a violation of the City of Yuma City Code or Arizona or federal laws, Owner may continue the current use now existing on the Property. In the event the City issues a Conditional Use Permit for the mobile food vending court and Owner fails to satisfy the conditions of approval for the Conditional Use Permit, City shall revoke the Conditional Use Permit.

F. Conditional Use Permit Revocation. If any material terms of this Agreement are breached by Owner, the City shall revoke the Conditional Use Permit.

G. Primary Use. Mobile food vending court is the primary use.

H. Mobile Food Vending Court. Pursuant to city ordinance and state law, mobile food vendors must be mobile. City will delay Owner's compliance with the vendor mobility requirements and site development requirements as set forth in City Code Section 154-15.13 for a period 18 months from the Effective Date, but in no case shall the City delay Owner's compliance beyond January 15, 2021.

5. Development Standards. The development and use of the Property shall be subject to all applicable City, county, state, and federal laws, regulations, rules, policies, standards, and fees in effect at the time of such development ("Applicable Laws").

6. Notice. Except as otherwise required by law, any notice, demand or other communication given shall be in writing by personal delivery or sent by certified or registered

U.S. Mail, return receipt requested, addressed to the Parties at their respective addresses set forth below, or at such other address as a Party may designate in writing pursuant to the terms of this paragraph, or by any nationally recognized express or overnight delivery service (e.g., Federal Express or UPS), with all postage and other delivery charges prepaid:

To City:
City Administrator
One City Plaza
Yuma, Arizona 85364-1436

To Owner:
Francisco Guzman & Irene Guzman Family
Wealth Trust Dated December 2, 2008
c/o Martin Guzman
3766 W. 25th Ln.
Yuma, AZ 85364

All such notices, demands or other communications will (i) if delivered personally or delivered through a same day delivery/courier service be deemed effective upon delivery or refusal to accept delivery by the addressee, and (ii) if delivered by U.S. mail in the manner described above be deemed effective upon the earlier of receipt or three (3) business days after deposit in a post office operated by the United States or with a United States postal officer (in each case regardless of whatever such notice, demand or other communication is received by any other person to whom a copy of such notice, demand or other communication is to be delivered pursuant to this paragraph). Any notice sent by a recognized national overnight delivery service shall be deemed effective one (1) business day after deposit with such service. Notwithstanding the foregoing, no payment shall be deemed to be made until actually received in good and available funds by the intended payee.

7. Default. If either Party defaults (the “Defaulting Party”) with respect to any of such Party’s obligations, then the other Party (the “Non-Defaulting Party”) shall give written notice in the manner described in Section 6 above to the Defaulting Party. The notice shall state the nature of the default claimed and make demand that such default be corrected. The Defaulting Party shall then have:

A. Twenty (20) days from the date of receipt of such notice within which to correct such default if it can be reasonably corrected by the payment of money, or

B. Sixty (60) days from the date of receipt of such notice to cure such default if action other than payment of money is reasonably required, or

C. If any such non-monetary default cannot reasonably be cured within sixty (60) days for reasons beyond the Defaulting Party’s control (financial inability, construction delays and unexpected market conditions), then such longer period as may be reasonably required, provided, and so long as, such cure is promptly commenced within such period and diligently prosecuted to completion.

8. Owner Representations. Owner represents and warrants that:

A. Owner has the full right, power and authorization to enter into and perform this Agreement and the obligations and undertakings of Owner under this Agreement,

and the execution, delivery and performance of this Agreement by Owner has been duly authorized, agreed to, and is in compliance with any organizational documents of Owner.

B. All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, deliver and performance.

C. Owner will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence and enforce this Agreement.

D. As of the date of this Agreement, Owner knows of no litigation, proceeding or investigation pending or threatened against or affecting Owner, which could have a materially adverse effect on Owner's performance under this Agreement that has not been previously disclosed in writing to City.

E. This Agreement (and each undertaking of Owner contained herein) constitutes a valid, binding and enforceable obligation of Owner according to its terms, except to the extend limited by bankruptcy, insolvency and other laws of general application affecting creditors' rights and by equitable principals, whether considered at law or in equity.

F. The execution, delivery and performance of this Agreement by Owner are not prohibited by, and does not conflict with, any other agreements, instruments, judgments or decrees to which Owner is a party or to which Owner is otherwise subject.

G. Owner has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement other than normal costs or conducting business and costs of professional services such as the services of contractors.

H. Owner understands the previously issued Yuma County Special Use Permit is expired and there is no City issued Conditional Use Permit for Owner's current use of the Property and this Agreement shall serve as the basis for City staff's recommendation of approval of a Conditional Use Permit for a mobile food vending court.

I. Owner has had the opportunity for independent legal review of this Agreement by counsel of its choosing prior to the execution hereof.

9. City Representations. City represents and warrants to Owner that:

A. City has the right, power and authorization to enter into and perform this Agreement and each of City's obligations and undertakings under this Agreement, and City's execution, delivery and performance of this Agreement has been duly authorized and agreed to in compliance with the requirements of the Yuma City Charter and the Yuma City Code.

B. All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

C. City will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence and enforce this Agreement.

D. City knows of no litigation, proceeding, initiative, referendum, investigation or threat of any of the same contesting the powers of City or its officials with respect to this Agreement that has not been disclosed in writing to Owners.

E. This Agreement (and each undertaking of City contained herein), constitutes a valid, binding and enforceable obligation by City, enforceable according to its terms, except to the extent limited by bankruptcy, insolvency, referendum, and other laws of general application affecting creditor's rights and by equitable principles, whether considered at law or in equity.

F. The execution, delivery and performance of this Agreement by City is not prohibited by, and does not conflict with, any other agreements, instruments or judgments or decrees to which City is a party or is otherwise subject.

G. City has been assisted by counsel of its own choosing in connection with the preparation and execution of this Agreement.

10. Rights of Lenders. Financing or refinancing for acquisition, development and/or construction of the Property and/or improvements may be provided, in whole or in part, from time to time, by one or more Third Parties (individually a "Lender", and collectively the "Lenders"). If a Lender is permitted, under the terms of a non-disturbance agreement with City to cure the event of default and/or to assume Owner's position with respect to this Agreement, City agrees to recognize such rights of the Lender and to otherwise permit the Lender to assume all of the right and obligations of Owner under this Agreement.

11. Attorneys' Fees and Costs. In the event of commencement of a legal action in an appropriate forum by a Party to enforce any covenant or any of such Party's rights or remedies under this Agreement, including any action for declaratory or equitable relief, the prevailing Party in any such action shall be entitled to reimbursement of its reasonable attorneys' fees and litigation costs, including, but not limited to, its costs of expert witnesses, transportation, lodging and meal costs of the Party and witnesses, costs of transcript preparation and other reasonable and necessary direct and incidental costs of such dispute.

12. Miscellaneous.

A. Consents and Approvals. Whenever this Agreement requires or permits the consent or approval of a Party to any act, document, use, or other matter, such consent or approval shall be given or denied by such Party in its reasonable discretion, unless this Agreement expressly provides otherwise.

B. Governing Law/Choice of Forum. This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the internal,

substantive laws of the State of Arizona (without reference to conflict of laws principles). Any action brought to interpret, enforce, or construe any provision of this Agreement shall be commenced and maintained in the Superior Court of the State of Arizona in and for the County of Yuma (or, as may be appropriate, in the Justice Courts of Yuma County, Arizona, or the United States District Court for the District of Arizona, if, but only if, the Superior Court lacks or declines jurisdiction over such action). The Parties irrevocably consent to jurisdiction and venue in such courts and agree not to seek transfer or removal of any action commenced by or through the subject of this Agreement.

C. Construction; Severability. Captions of the paragraphs are for convenience only and shall not govern the interpretation of the terms and provisions hereof. This Agreement represents the results of negotiations between the Parties, each of which has been or has had the opportunity to be represented by counsel of its own choosing, and none of which has acted under any duress or compulsion, whether legal, economic or otherwise. Consequently, the terms and provisions of this Agreement shall be interpreted and construed in accordance with their usual and customary meanings, and the Parties each waive the application of any rule of law that ambiguous or conflicting terms or provisions shall be interpreted or construed against the Party who prepared the Agreement.

D. If any term, covenant, condition or provision of this Agreement is declared void or unenforceable, such provision shall be severed from this Agreement, which shall otherwise remain in full force and effect. If any applicable law or court of competent jurisdiction prohibits or excuses City or Owners from undertaking any contractual commitment to perform under any provision hereunder, the remaining portions of this Agreement shall remain in full force and effect, and the Parties will negotiate diligently in good faith for such amendments of this Agreement as may be necessary to achieve the original intent of this Agreement, notwithstanding such invalidity or unenforceability.

E. No Partnership, Third Person. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other arrangement between the Parties. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, corporation or other entity not a Party to this Agreement (including, without limitation, any broker), and no such other person, firm, corporation or entity shall have any right or cause of action hereunder, except for permitted transferees or assignees to the extent that they assume or succeed to the rights and/or obligations of Owners under this Agreement.

F. Counterparts. For the convenience of the Parties, this Agreement may be executed in two or more counterparts and each executed counterpart shall for all purposes be deemed an original and shall have the same force and effect as an original, but all of which together shall constitute in the aggregate but one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all Parties may be physically attached to a single document. Neither Party shall have any right, duty or obligation under this Agreement unless nor until this Agreement or counterparts have been executed by both Parties and approved by the Yuma City Council

G. Successors and Assigns; All Terms and Covenants Run With Land. All of the provisions hereof shall inure to the benefit of and be binding upon the successors in interest and assigns of each of the Parties and will run with the land during the Term of the Agreement or such longer period where the covenant expressly survives the termination of this Agreement. Wherever the term "Party" or the name of any particular Party is used in this Agreement such term shall include any such Party's permitted successors and assigns, tenants, lessees and sublessees.

H. A.R.S. § 38-511 and A.R.S. § 35-393.01 (Boycott of Israel). Notice is hereby given of the applicability of A.R.S. § 38-511 to this Agreement. Additionally, pursuant to A.R.S. § 35-393.01, Owners certify that they are not engaged in a boycott of Israel as of the Effective Date of this Agreement, and agree for the duration of this Agreement to not engage in a boycott of Israel.

I. Recordation. City shall record a copy of this Agreement no later than ten (10) days from the date of entering into this Agreement pursuant to A.R.S. § 9-500.05.

J. Further Acts. Each Party agrees to perform such other and further acts and to execute and deliver such additional agreements, documents, affidavits, certifications, acknowledgments and instruments as any other Party may reasonably require to consummate, evidence, confirm or carry out the matters contemplated by this Agreement or confirm the status of (i) this Agreement as in full force and effect, and (ii) the performance of the obligations hereunder at any time.

K. Amendment. No change or addition is to be made to this Agreement except by written amendment executed by City and Owner. Within ten (10) days after any amendment to this Agreement, such amendment shall be recorded in the Official Records of the Yuma County Recorder, Yuma, Arizona.

L. Individual Nonliability. In the event of any default or breach by City, no Yuma City Council member, official, representative, agent, attorney or employee shall be personally liable to any of the other Parties hereto, or to any successor in interest to such Parties, nor for any amount which may become due to a Party or its successor, or with respect to any obligation of City under the terms of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, the liability of Owners shall be limited solely to the Property and the assets of Owners related to the Property, and shall not extend to or be enforceable against: (i) the individual assets of any of the individuals or entities who are members, stockholders, officers, agents, trustees, or beneficiaries of Owners.

M. Proposition 207 Waiver. Owners waive and release City from any and all claims under A.R.S. § 12-1134, et seq., including any right to compensation for reduction to the fair market value of the Property or any portion thereof, as a result of City's approval or failure to approve this Agreement. The terms of this waiver shall run with the land and shall be binding upon all subsequent landowners, assignees, lessees and other successors, and shall survive the termination of this Agreement.

N. Avigation Easement. Owners acknowledge the subject Property is located within the vicinity of the Yuma County International Airport and the United States Marine Corps Air Station, both of which may result in aircraft overflight, vibrations or related noise as may be inherent in the operation of aircraft now known or hereafter used for flying within Navigable Airspace.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

CITY:
City of Yuma, an Arizona municipal corporation

OWNER:
TRUST: Francisco Guzman and Irene Guzman Family Wealth Trust Dated December 2, 2008

By: _____
John D. Simonton, City Administrator

By: _____
Its: Trustee _____

-and-

GUZMAN: Martin Guzman, an individual

By: _____

ATTEST

By: _____
Lynda L. Bushong
City Clerk

APPROVED AS TO FORM

By: _____
Richard W. Files
City Attorney