

STATE OF TEXAS

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**ECONOMIC DEVELOPMENT
LOAN AGREEMENT OF THE
CITY OF SAN ANTONIO**

COUNTY OF BEXAR

This Economic Development Loan Agreement (hereinafter referred to as the "Agreement") is made and entered into by and between the CITY of San Antonio, a municipal corporation of the State of Texas, (hereinafter referred to as "CITY"), acting by and through its City Manager or her designee, and O'liva, LLC. (hereinafter referred to as "Borrower"), and together referred to as the "Parties.

WHEREAS, pursuant to Chapter 380 of the Texas Local Government Code, CITY is authorized to loan municipal funds in furtherance of public purposes for economic development projects; and

WHEREAS, in accordance with City of San Antonio City Ordinance No. 100684, City created an economic development program for the purpose of making such loans available; and

WHEREAS, Borrower is engaged in an economic development project that will be located within the city limits of the City of San Antonio and will consist of the finish-out and leasing of a City-owned facility located at 115 Plaza de Armas, San Antonio, TX 78205 (the "Leased Premises") where it will operate a café (the "Project"); and

WHEREAS, Borrower has requested an economic development loan for the purpose of performing tenant finish-out on the Leased Premises which will support economic development in the downtown area and provide healthy dining options to employees, visitors and residents in the downtown area; and

WHEREAS, City has identified economic development funds available for Borrower to use to carry out the Project and to either repay to City in accordance with the terms and conditions of this Agreement or to have forgiven by City in accordance with the terms and conditions herein; and

WHEREAS, the City Council has authorized the City Manager, or her designee, to enter into this Agreement with Borrower under City Ordinance No. 2014-__-__-___, passed and approved on _____, 2014; **NOW THEREFORE:**

The Parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described:

SECTION 1. AGREEMENT PURPOSE

The Project is anticipated to further the public purposes of promoting local economic development and stimulating business and commercial activity in the City of San Antonio. The City is supporting the Project through this Economic Development Program Loan in accordance with Chapter 380 of the Texas Local Government Code.

SECTION 2. PROJECT REQUIREMENTS

- A. Borrower shall execute a three-year lease with the City for the Leased Premises. A copy of the fully executed Lease Agreement between City and Borrower shall be attached to this Agreement as Exhibit A.
- B. Borrower shall expend no less than ONE HUNDRED THOUSAND THREE HUNDRED AND SIXTY DOLLARS AND 0 CENTS (\$100,360.00) on finish-out work of the Leased Premises.
- C. Borrower shall operate a café in accordance with the Lease Agreement for no less than three (3) years.
- D. Borrower shall comply with all applicable laws and regulations, and shall develop and operate the Project in accordance with the terms and conditions of this Agreement and the Lease Agreement.

SECTION 3. ECONOMIC DEVELOPMENT PROGRAM LOAN

- A. **Economic Development Program Loan.** City agrees to provide Borrower with an Economic Development Program Loan in the amount of FORTY DOLLARS AND 0 CENTS (\$40.00) per square foot of the Leased Premises, not to exceed a cumulative amount of ONE HUNDRED THOUSAND THREE HUNDRED AND SIXTY DOLLARS AND 0 CENTS (\$100,360.00) (the “Loan Funds”). Because the Loan Funds can only be used to improve the Leased Premises and the Leased Premises is owned by City, the Parties agree that no lien is required to secure the Loan Funds.
- B. **Loan Disbursement.** Promptly following the execution of the Lease Agreement for the Leased Premises, but in no event later than sixty (60) days following the execution of this Agreement, the City will make the Loan Funds available to Borrower to be disburse to Borrower in one (1) lump sum payment.
- C. **Repayment of Program Loan.** Borrower shall be obligated to repay City the Loan Funds in annual installments of THIRTY-THREE THOUSAND FOUR HUNDRED AND FIFTY-THREE DOLLARS AND THIRTY-THREE CENTS (\$33,453.33) plus Accrued Interest (as defined below) for a period of three (3) years beginning on OCTOBER 31, 2015 in accordance with the following schedule:

SCHEDULE OF REPAYMENT*

OCTOBER 31, 2015	\$33,453.33
OCTOBER 31, 2016	\$33,453.33
OCTOBER 31, 2017	\$33,453.33

*This Schedule of Repayment is not subject to change.

- D. **Accrued Interest.** There shall be zero-percent (0%) accrued interest on the Loan Funds.
- E. **Sufficient Amounts.** Each payment made pursuant to SECTION 3(C) above shall be sufficient to pay the total amount of repayment due and payable upon that date.
- F. **Unconditional Obligation to Repay the Program Loan.** The obligations of Borrower to repay the Loan Funds are absolute and unconditional, irrespective of any defense or any rights of set-off, re-

couponment or counterclaim it might otherwise have against the City, and during the Term of this Agreement, Borrower shall pay all payments required to be made on account of this Agreement (which payments shall be net of any other obligations of Borrower) as prescribed in Section 3(C) above free of any deductions and without abatement, diminution or set-off. Until such time as the principal of the Loan Funds is fully paid or provision for the payment thereof shall have been made.

G. **Prepayment.** Should Borrower repay the amount of the Loan Funds in whole, or in part, prior to the scheduled payment dates or the expiration of the dates specified in Section 3(C) of this Agreement, no penalty for such prepayment shall be applied.

H. **Loan Forgiveness.** In consideration of full and satisfactory performance of the obligations of this Agreement and the Lease Agreement, CITY shall forgive a portion of the Loan Funds as follows:

1. For each year of operation in accordance with the Lease Agreement, from the commencement of the Term of Lease Agreement to each 12th month anniversary, City shall forgive THIRTY-THREE PERCENT (33%) of the Loan Funds owed by Borrower.
2. Following the 36th month anniversary, City shall forgive ONE HUNDRED PERCENT (100%) of the Loan Funds provided Borrower has complied with the terms of this Agreement and the Lease Agreement.

SECTION 4. LOAN DEFAULT AND CITY'S REMEDIES

A. **Loan Default Events.** Any one of the following which occurs and continues shall constitute a Loan Default Event:

1. Failure of Borrower to make any Loan Payment required by SECTION 3(C) when due; and/or
2. Failure of Borrower to observe and perform in any material respect any covenant, condition or agreement on its part required to be observed or performed under this Agreement or the Lease Agreement following the expiration of thirty (30) days written notice to cure; and/or
3. The dissolution or liquidation of Borrower or the filing by Borrower of a voluntary petition in bankruptcy, or failure by Borrower to promptly cause to be lifted any execution, garnishment or attachment of such consequence as will impair Borrower's ability to carry on its obligations under this Agreement and/or the Lease Agreement; and/or
4. The commission by Borrower of any act of voluntary or involuntary bankruptcy under any state or federal law; and/or
5. The admittance of Borrower, in writing, of its inability to pay its debts generally as they become due, or a receiver, trustee or liquidator of Borrower shall be appointed in any proceeding brought against Borrower and shall not be discharged within ninety (90) days after such appointment.

B. **Remedies to CITY upon a Loan Default Event.** Should Borrower cause or allow a Loan Default Event to occur and it shall be continuing:

1. City, by written notice to Borrower, shall declare the unpaid balance of the Loan Funds payable under SECTION 3(C) of this Agreement, and due immediately. Should Borrower not

pay the unpaid balance due within ten (10) business days of the City providing written notice, then Borrower shall be assessed a ten-percent (10%) fee onto the total amount due; and

2. City shall have access to and may inspect, examine and make copies of the books and records and any and all accounts, data and federal income tax and other tax returns of Borrower; and

3. City may take whatever action at law or in equity as may be necessary or desirable to collect the payments and other amounts then due and thereafter to become due or to enforce performance and observance of any obligation, agreement or covenant of Borrower under this Agreement.

C. **Attorneys' Fees and Expenses.** In the event Borrower should default under any of the provisions of this Agreement or the Lease Agreement and the City should employ attorneys or incur other expenses for the collection of the payments due under this Agreement or the enforcement of performance or observance of any obligation or agreement on the part of Borrower herein contained, Borrower agrees to pay to the City reasonable fees of such attorneys and such other expenses so incurred by the City.

D. **No Remedy Exclusive.** No remedy herein conferred upon or reserved to the City is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity or by statute. NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT TO THE CONTRARY, IN NO EVENT SHALL EITHER PARTY HERETO BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, PUNITIVE, EXEMPLARY, CONSEQUENTIAL, INCIDENTAL OR INDIRECT LOSSES OR DAMAGES (IN TORT, CONTRACT OR OTHERWISE) UNDER OR IN RESPECT OF THIS AGREEMENT.

SECTION 5. AGREEMENT PERIOD

This Agreement shall commence upon its execution and shall only terminate upon full and final payment from BORROWER on or before OCTOBER 31, 2017.

SECTION 6. DEPARTMENT OBLIGATIONS

A. In consideration of full and satisfactory performance of activities required by Section 2 of this Agreement, City will make an Economic Development Loan in an amount not to exceed the Loan Funds available to Borrower.

B. City will not be liable to Borrower or other entity for any costs incurred by Borrower.

SECTION 7. RETENTION AND ACCESSIBILITY OF RECORDS

A. Borrower shall maintain the fiscal records and supporting documentation for expenditures of funds associated with this Agreement. Borrower shall retain such records, and any supporting documentation, for the greater of: (1) Five (5) years from the end of the Agreement period; or (2) the period required by other applicable laws and regulations.

B. Borrower shall, following reasonable advance written notice from the City, give the City, its designee, or any of their duly authorized representatives, access to and the right to examine all books, accounts, records, audit reports, reports, files, documents, written or photographic material, videotape and other papers, things, or property belonging to or in use by Borrower pertaining to the Economic Development Loan (the "Records"). The City's access to Borrower's books and records will be limited to information needed to verify that Borrower is and has been complying with the terms of this Agreement

and to verify advances made by the City and re-payments made by Borrower and to verify that the proceeds of the Economic Development Loan are or were used in connection with the development and operation the Project. Any information that is not required by law to be made public shall be kept confidential by City. Borrower shall not be required to disclose to the City any information that by law Borrower is required to keep confidential. Should any good faith dispute or question arise as to the validity of the data provided, the City reserves the right to require Borrower to obtain an independent firm to verify the information. This certified statement by an independent firm shall be provided at the sole cost of Borrower. The rights to access the Records shall continue as long as the Records are retained by Borrower. Failure to provide reasonable access to the Records to authorized City representatives shall give the City the right to suspend or terminate this Agreement as provided for in Section 15 and 16 below, or any portion thereof, for reason of default. All Records shall be retained by Borrower for a period of five (5) years after all performance requirements are achieved for audit purposes until such audits or other administrative, civil or criminal matters including, but not limited to, investigations, lawsuits, administrative inquiries and open record requests are completed. Borrower agrees to maintain the Records in an accessible location and to provide citizens reasonable access to the Records consistent with the Texas Public Information Act on the same terms as the Records are made available to the City as set forth above. All of the above notwithstanding, the City and the citizens shall have no right to access any confidential or proprietary records of Borrower, including but not limited to the ownership and capital structure of Borrower.

SECTION 8. MONITORING

City reserves the right to confirm Borrower's compliance with the terms and conditions of this Agreement. City will provide Borrower with a written report of the monitor's findings. If the monitoring report notes deficiencies in Borrower's performances under the terms of this Agreement, the monitoring report shall include a listing of requirements for the correction of such deficiencies by Borrower and a reasonable amount of time in which to attain compliance. Failure by Borrower to take action specified in the monitoring report may be cause for suspension or termination of this Agreement, in accordance with Sections 15 and 16 herein.

SECTION 9. RESERVED.

SECTION 10. CONFLICT OF INTEREST

A. Borrower shall use reasonable business efforts to ensure that no employee, officer, or individual agent of Borrower shall participate in the selection, award or administration of a subcontract supported by funds provided hereunder if a conflict of interest, real or apparent, would be involved. Such conflict of interest would arise when: (1) the employee, officer, or individual agent; (2) any member of his or her immediate family; (3) his or her partner; or, (4) any organization which employs, or is about to employ any of the above, has a financial or other interest in the firm or person selected to perform the subcontract and the relationship calls for payments to be made to such subBorrower on terms which are greater than those which are customary in the industry for similar services conducted on similar terms. Borrower shall comply with Chapter 171, Texas Local Government Code as well as the City's Code of Ethics.

SECTION 11. SECTARIAN ACTIVITY

A. None of the performances rendered by Borrower under this Agreement shall involve, and no portion of the funds received by Borrower under this Agreement shall be used in support of, any sectarian or religious activity, nor shall any facility used in the performance of this Agreement be used for sectarian instruction or as a place of religious worship.

B. Borrower shall include the substance of this Section 11 in all agreements associated with the funds made available through this Agreement.

SECTION 12. LEGAL AUTHORITY

A. Each party assures and guarantees to the other that they possesses the legal authority to enter into this Agreement, to receive/deliver the funds authorized by this Agreement, and to perform their obligations hereunder.

B. The person or persons signing and executing this Agreement on behalf of each party or representing themselves as signing and executing this Agreement on behalf of a party, do hereby guarantee that he, she or they have been duly authorized to execute this Agreement on behalf of that party and to validly and legally bind that party to all terms, performances and provisions herein set forth.

C. City will have the right to suspend or terminate this Agreement in accordance with Sections 15 and 16 herein if there is a dispute as to the legal authority, of either BORROWER or the person signing this Agreement, to enter into this Agreement, any amendments hereto or failure to render performances hereunder. Borrower is liable to City for any money it has received from CITY for performance of the provisions of this Agreement if City suspends or terminates this Agreement for reasons enumerated in this Section 12.

SECTION 13. LITIGATION AND CLAIMS

A. Borrower shall give City immediate notice in writing of any action, including any proceeding before an administrative agency, filed against Borrower arising out the performance of any subcontract hereunder. Except as otherwise directed by City, Borrower shall furnish immediately to City copies of all pertinent papers received by Borrower with respect to such action or claim. Borrower shall notify the City immediately of any legal action filed against the Borrower or any subcontractor, or of any proceeding filed under the federal bankruptcy code. Borrower shall submit a copy of such notice to City within 30 calendar days after receipt. No funds provided under this Agreement may be used in the payment of any costs incurred from violations or settlements of, or failure to comply with, federal and state regulations. The above notwithstanding Borrower is not required to notify City of claim litigation which arise out of Borrower's operations on the Project, including without limitation, personal injury actions (slip and falls) and other operational activities or relationships.

B. City and Borrower acknowledge that CITY is a political subdivision of the State of Texas and is subject to, and complies with, the applicable provisions of the Texas Tort Claims Act, as set out in the Civil Practice and Remedies Code, Section 101.001 et. seq., and the remedies authorized therein regarding claims and causes of action that may be asserted by third parties for accident, injury or death.

C. This Agreement shall be interpreted according to the Constitution and the laws of the State of Texas. Venue of any court action brought directly or indirectly by reason of this Agreement shall be in Bexar County, Texas.

SECTION 14. CHANGES AND AMENDMENTS

A. Except as provided in Section 14(C) below, any alterations, additions, or deletions to the terms of this Agreement shall be by amendment hereto in writing and executed by both parties to this Agreement upon City approval and authorization of Borrower.

B. It is understood and agreed by the parties hereto that performances under this Agreement shall be rendered in accordance with the laws and rules governing the Economic Development Program as set forth in Texas Local Government Code Chapter 380, and the terms and conditions of this Agreement.

C. Any alterations, additions, or deletions to the terms of this Agreement required by changes in state law or regulations are automatically incorporated into this Agreement without written amendment hereto, and shall become effective on the date designated by such law or regulation.

SECTION 15. SUSPENSION

A. Notwithstanding the provisions of Chapter 2251 of the Texas Government Code, in the event Borrower fails to comply with the terms of any agreement with the City, including those in the Lease Agreement and this Agreement, City shall provide Borrower with written notification as to the nature of the non-compliance. City shall grant Borrower a sixty (60) day period from the date of the City's written notification to cure any issue of non-compliance under such agreement. Should Borrower fail to cure any default within this period of time, the City may, upon written Notice of Suspension to Borrower, suspend this Agreement in whole or in part and withhold further payments to Borrower or accelerate the due date of the repayment of the loan, and prohibit Borrower from incurring additional obligations of funds under this Agreement. Such Notice of Suspension shall include: (1) the reasons for such suspension; (2) the effective date of such suspension; and, (3) in the case of partial suspension, the portion of the Agreement to be suspended.

B. In the case of default for causes beyond Borrower's reasonable control, which cannot with due diligence be cured within such sixty (60) day period, the CITY may, in its sole discretion, extend the cure period provided that Borrower shall: (1) immediately upon receipt of Notice of Suspension advise City of Borrower's intention to institute all steps necessary to cure such default and the associated time frame; and (2) institute and thereafter prosecute to completion with reasonable dispatch all steps necessary to cure same.

C. A suspension under this Section 15 may be lifted only at the sole discretion of the City upon a showing of compliance with or written waiver by City of the term(s) in question.

D. With the exception of payment for work in progress or materials ordered prior to receiving a Notice of Suspension, City shall not be liable to Borrower or to Borrower's creditors for costs incurred during any term of suspension of this Agreement.

SECTION 16. TERMINATION

A. City shall have the right to terminate this Agreement for non-compliance, in whole or in part, at any time before the date of completion specified in Section 5 of this Agreement whenever City determines that Borrower has failed to comply with any term of any Agreement with the City. City will provide Borrower with written notification as to the nature of the non-compliance, and grant Borrower a sixty (60) day period from the date of the City's written notification to cure any issue of non-compliance under such Agreement. Should Borrower fail to cure any default within this period of time, the City may as its sole and exclusive remedies, upon issuance to Borrower of a written Notice of Termination, terminate this Agreement in whole or in part and either: (1) withhold further payments to Borrower; or (2) accelerate the repayment of the loan. Such notification shall include: (1) the reasons for such termination; (2) the effective date of such termination; and, (3) in the case of partial termination, the portion of the Agreement to be terminated.

B. In the case of default for causes beyond Borrower's reasonable control, which cannot with due diligence be cured within such sixty (60) day period, the City may, in its sole discretion, extend the cure period provided that Borrower shall: (1) immediately upon receipt of Notice of Termination advise City of Borrower's intention to institute all steps necessary to cure such default and the associated time frame; and (2) institute and thereafter prosecute to completion with reasonable dispatch all steps necessary to cure same.

C. Except as provided in Section 16(A), the Economic Development Program Loan may be terminated in whole or in part only as follows:

1. By the City (with the consent of the Borrower) in which case the two parties shall agree upon the termination conditions, including the repayment of funds, the effective date and in the case of partial termination, the portion to be terminated; or
2. By the Borrower upon written notification to the City, setting forth the reasons of such termination, a proposed pay-back plan of any funds loaned, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of partial termination, the City determines in its sole discretion that the remaining portion of the award will not accomplish the purpose for which the award was made, the City may terminate the award in its entirety under Section 16(A).

D. Notwithstanding any exercise by City of its right of suspension under Section 15 of this Agreement, or of early termination pursuant to this Section 16, Borrower shall not be relieved of repayment of loaned funds under this Agreement or any liability to City for actual damages due to City by virtue of any breach by Borrower of any agreement with City, including the Lease Agreement and this Agreement.

SECTION 17. SPECIAL CONDITIONS AND TERMS

Borrower understands and agrees that if Borrower is a "business" and if the City's contribution under this Agreement is a "public subsidy" as that term is defined in Chapter 2264 of Subtitle F, Title 10 of the Government Code (80 (R) HB 1196), then Borrower is required to refund money, pursuant to 80(R) HB 1196, that Borrower has received from City under this Agreement, in the event of a conviction of knowingly employing an undocumented worker, with repayment required within six months of final conviction. Interest shall accrue at the rate of 0.5% per month until the time of such repayment from the date of final conviction.

SECTION 18. SUBCONTRACTS

A. Borrower shall use reasonable business efforts to ensure that the performance rendered under all subcontracts complies with all terms and provisions of this Agreement as if such performance were rendered by Borrower.

B. Borrower, in subcontracting any of the performances hereunder, expressly understands that in entering into such subcontracts, City is in no way liable to Borrower's subcontractor(s).

SECTION. 19. DEBARMENT

By signing this Agreement, Borrower certifies that it will not award any funds provided under this Agreement to any party which is debarred, suspended or otherwise excluded from or ineligible for participation in assistance programs by the City.

SECTION 20. RIGHTS UPON DEFAULT

It is expressly understood and agreed by the Parties hereto that any right or remedy provided for in this Agreement shall not preclude the exercise of any other right or remedy under any other agreements between Borrower and the City or under any provision of law, nor shall any action taken in the exercise of any right or remedy be deemed a waiver of any other rights or remedies. Failure to exercise any right or remedy hereunder shall not constitute a waiver of the right to exercise that or any other right or remedy at any time.

SECTION 21. NON-ASSIGNMENT

This Agreement is not assignable without the written consent of City and the passage of a City Ordinance approving such assignment. Any other attempt to assign the Agreement shall not relieve Borrower from liability under this Agreement and shall not release Borrower from performing any of the terms, covenants and conditions herein. Borrower shall be held responsible for all funds received under this Agreement.

SECTION 22. ORAL AND WRITTEN AGREEMENTS

All oral and written agreements between the Parties to this Agreement relating to the subject matter of this Agreement that were made prior to the execution of this Agreement have been reduced to writing and are contained in this Agreement.

SECTION 23. AUTHORIZED RELIEF FROM PERFORMANCE (*Force Majeure*)

City may grant temporary relief from performance of this Agreement if the Borrower is prevented from compliance and performance by an act of war, order of legal authority, act of God, or other unavoidable cause not attributed to the fault or negligence of the Borrower. The burden of proof for the need for such relief shall rest upon the Borrower. To obtain release based upon *force majeure*, the Borrower must file a written request with the City. Should City grant temporary relief to Borrower, it shall in no case relieve Borrower from any repayment obligations as specified in Section 3(B) and 3(C) of this Agreement.

Signatures appear on next page.

WITNESS OUR HANDS, EFFECTIVE as of February 25, 2014:

Accepted and executed in triplicate originals on behalf of the City of San Antonio pursuant to Ordinance Number 2014- - - , dated _____, 2014, and O'liva, LLC pursuant to the authority of its Owner.

CITY OF SAN ANTONIO,
a Texas Municipal Corporation

O'LIVA, LLC
a _____

Sheryl L. Sculley
CITY MANAGER

Charles E. Hernandez

Charles E. Hernandez

ATTEST:

ATTEST:

Leticia Vacek
CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY