RR
03/20/14
Item #11B

AN ORDINANCE 2014-03-20-0176

AUTHORIZING A CHAPTER 380 ECONOMIC DEVELOPMENT PROGRAM LOAN AGREEMENT BETWEEN THE CITY OF SAN ANTONIO AND OLIVA L.L.C. TO PROVIDE A FINANCIAL INCENTIVE IN AN AMOUNT NOT TO EXCEED $100,360.00 FOR TENANT FINISH-OUT OF 115 PLAZA DE ARMAS IN CITY COUNCIL DISTRICT 1.

* * * * * *

WHEREAS, Oliva L.L.C. ("Café Oliva") was awarded a lease of City-owned property located at 115 Plaza de Armas through a solicited proposal from the City for the location and operation of a retail establishment; and

WHEREAS, Café Oliva has agreed to operate a restaurant on the property for a period of three years which is anticipated to add to the economic revitalization of the City's downtown (the "Project"); and

WHEREAS, Café Oliva is seeking funds in the amount of $100,360.00 for the purpose of completing tenant finish-out of the City-owned property; and

WHEREAS, pursuant to Chapter 380 of the Texas Local Government Code, the City is authorized to create a program to loan funds to promote state or local economic development and to stimulate business and commercial activity in the municipality; and

WHEREAS, in accordance with City Ordinance No. 100684, the City created an Economic Development Program (the "Program") for the purpose of making loans available for economic development projects that the City finds will accomplish the purpose and goals of Chapter 380; and

WHEREAS, the City finds that the goals of Chapter 380 will be met by assisting Cafe Oliva in undertaking and completing the Project and has identified economic development funds for use in carrying out this purpose; **NOW THEREFORE**:

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The terms and conditions of an Economic Development Program Loan Agreement with Café Oliva are hereby approved. The City Manager, or her designee, is authorized to execute said Agreement in accordance with this Ordinance. A copy of the Agreement in substantially final form is included as "Attachment I" and made a part of this Ordinance. A final copy of the Agreement shall be attached when executed.

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SECTION 2. Funding in the amount of $100,360.00 for this Ordinance is available in Fund 11001000, Cost Center 7001990059 and General Ledger 5201040, as part of the Fiscal Year 2014 Budget and payment is authorized to Café Oliva. Payment is limited to the amounts budgeted in the operating budget funding sources identified and should be encumbered with a purchase order.

SECTION 3. Payment not to exceed the amount of $100,360.00 is authorized to Café Oliva through Fund 11001000, Cost Center 7001990059 and General Ledger 5201040 with Cost Center and General Ledger to be determined by the Office of Budget and Management.

SECTION 4. The financial allocations in this Ordinance are subject to approval by the Finance Director, City of San Antonio. The Finance Director may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific Cost Centers, WBS Elements, Internal Orders, General Ledger Accounts, and Fund Numbers as necessary to carry out the purpose of this Ordinance.

SECTION 5. This Ordinance shall become effective immediately upon its passage by eight (8) votes or more, or upon ten (10) days following its passage if approved by fewer than eight (8) votes.

PASSED AND APPROVED this 20th day of March 2014.

M A Y O R
Julián Castro

ATTEST:

Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

Robert F. Greenblum, City Attorney

Agenda Item:	**11B (in consent vote: 5, 6, 7, 8, 9, 10, 11, 11A, 11B, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 25, 27, 31, 31A, 31B)**
Date:	03/20/2014
Time:	09:30:59 AM
Vote Type:	Motion to Approve
Description:	An Ordinance authorizing a Chapter 380 Economic Development Loan Agreement with O'liva, LLC in the amount of $100,360.00 for tenant finish-out of 115 Plaza de Armas.
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x				x
Ivy R. Taylor	District 2		x				
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4		x			x	
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x				
Joe Krier	District 9		x				
Michael Gallagher	District 10		x				

STATE OF TEXAS	§	**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-

coupment 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 Borrrower'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

_____
Sheryl L. Sculley
CITY MANAGER

ATTEST:

_____
Leticia Vacek
CITY CLERK

APPROVED AS TO FORM:

_____
CITY ATTORNEY

O'LIVA, LLC
a _____

Charles E Hernandez
Charles E. Hernandez

ATTEST:

_____

20.05. *Effect if No Termination.* If Landlord repossesses the Premises without terminating the Lease, then Tenant is liable for and must pay Landlord, at the Address for Payment of Rent, all Rent accrued to the date of repossession, plus Rent due during the remainder of the term until the date of expiration. Tenant's obligation is diminished by any net sums thereafter received by Landlord through reletting the Premises (after deducting expenses of reletting). Tenant is liable for the full Rent for the remainder of the Lease term if the Premises are not relet. In no event is Tenant entitled to any excess of any rental obtained by reletting over and above the Rent. Actions to collect amounts due by Tenant to Landlord may be brought at one time or from time to time, on one or more occasions, without the necessity of Landlord's waiting until expiration of the Lease term. In the alternative, if Landlord relets the Premises, Landlord may recover from Tenant (A) the unpaid Rent accrued before Tenant's default, plus (B) the then present value of the amount by which the Rent for the remainder of the term exceeds the rental received from reletting the Premises. Present value is computed by allowing interest at 1% in excess of the discount rate of the Federal Reserve Bank of Dallas, Texas. No repossession of the Premises by Landlord hereunder is either an acceptance of surrender or an election to terminate this Lease. Neither does it cause a forfeiture of Rent remaining to be paid during the balance of the Lease term, unless a written notice of such intention is given to Tenant or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding Landlord's right to relet and collect the difference in rental values, Landlord may, at any time after default, terminate this Lease. Landlord also may decline to repossess the Premises, and may from time to time, without terminating this Lease, recover all rent as it becomes due.

20.06. *Liability for Costs Incurred.* If Tenant defaults, in addition to any other sum required by this Lease, Tenant must also pay to Landlord, at the Address for Payment of Rent, (A) brokers and management fees incurred by Landlord in connection with reletting the whole or any part of the Premises; (B) the costs of removing and storing Tenant's or any other occupant's property, (C) the costs of repairing, altering, remodeling, or otherwise putting the Premises into a condition acceptable to a new tenant or tenants, (D) all rental concessions as a result of reletting, and (E) any and all other costs, fees, and expenses associated with reletting the Premises and all reasonable expenses incurred by Landlord in repossessing the Premises and in enforcing or defending Landlord's rights and/or remedies, including reasonable attorney's fees, which shall be not less than 10% of all sums then owing by Tenant to Landlord.

20.07. *Obligation to Reimburse.* If Tenant fails to timely make any payment or cure any default, Landlord, without an obligation to do so and without waiving default, may make the payment or remedy the other default for the account of Tenant (and enter the Premises for such purposes). Thereupon Tenant must pay upon

demand, all costs, expenses, and disbursements (including reasonable attorney's fees) incurred by Landlord in taking the remedial action.

20.08. *Default by Landlord.* If Landlord defaults, Tenant's exclusive remedy is an action for damages (Tenant hereby waiving the benefit of any laws granting it a lien upon the property of Landlord or on rent due Landlord). Tenant is not permitted to withhold Rent. Before filing any such action Tenant must give Landlord 30-days prior written notice specifying the alleged default and giving Landlord opportunity to cure. Unless and until Landlord fails to timely cure a default after written notice, Tenant has no remedy or cause of action by reason thereof. All obligations of Landlord are covenants, not conditions. Landlord's liability to Tenant for default is limited to actual, direct, but not consequential, damages. **Tenant hereby waives its statutory lien under § 91.004 of the Texas Property Code.**

20.09. *Payments After Termination.* Tenant's payment of money to Landlord after termination or after notice of default (other than a demand for payment of money within any applicable cure period) does not reinstate, continue, or extend the term or affect any notice given to Tenant prior to the payment. After the service a suit or after any final judgment granting Landlord possession of the Premises, Landlord may receive and collect any sums due under the terms of this Lease or may otherwise exercise any of its rights and remedies hereunder. Such payment, whether as rent or otherwise, does not waive any notice or a termination of Tenant's right of possession, or in any manner affect any suit theretofore commenced or judgment previously obtained.

20.10. *Rights Respecting Personal Property.* If Landlord takes possession of the Premises under the authority of this Lease, Landlord may keep in place and use all furniture, fixtures, and equipment at the Premises, including that owned by or leased to Tenant at all times before foreclosure thereon by Landlord or repossession thereof by any lessor thereof or lienholder thereon. Landlord may also remove from the Premises (without obtaining a distress warrant, writ of sequestration, or other legal process) all or any part of the furniture, fixtures, equipment, and other property and place same in storage anywhere in the county in which the Premises are located. In such case, Tenant is liable to Landlord for costs incurred by Landlord in the removal and storage and must indemnify Landlord from all loss, damage, cost, expense, and liability arising from or relating to the removal and storage. Landlord also may relinquish all or any part of the furniture, fixtures, equipment, and other property to any person ("Claimant") who presents to Landlord a copy of any instrument represented to have been executed by Tenant, if the instrument purports to grant Claimant the right under various circumstances to take possession of the property. Landlord need not inquire into the authenticity of the instrument or Tenant's or Tenant's predecessor's signature thereon. Landlord further need not investigate or inquire into the validity of the factual or legal basis on which Claimant

purports to act. Tenant indemnifies Landlord from all loss, cost, liability, or expense arising from or relating to Landlord's relinquishment of property to a Claimant. These rights of Landlord are additional to any other rights that Landlord has or may hereafter have at law or in equity. Tenant stipulates that the rights herein granted Landlord are commercially reasonable.

20.11. *Cumulative Remedies.* Each right and remedy provided to Landlord in this Lease is cumulative to every other right or remedy provided to Landlord by this Lease or applicable law, including, but not limited to, suits for injunctive relief and specific performance. The exercise or beginning of the exercise by Landlord of one or more of the right or remedy does not preclude the simultaneous or later exercise by Landlord of another remedy. All costs incurred by Landlord in collecting any amounts and damages owed by Tenant under this Lease or to enforce any provision of it, including reasonable attorneys' fees from the date any such matter is turned over to litigation counsel, are also recoverable by Landlord from Tenant.

21. Landlord's Mitigation of Damages.

Any duty imposed by law on Landlord to mitigate damages after a default by Tenant under this Lease will be satisfied in full if Landlord undertakes to lease the Premises to another tenant (a "Substitute Tenant") in accordance with the following criteria:

21.01. Landlord will have no obligation to solicit or entertain negotiations with any other prospective tenants for the Premises until Landlord obtains full and complete possession of the Premises including without limitation, the final and unappealable legal right to relet the Premises free of any claim of Tenant;

21.02. Landlord will not be obligated to lease or show the Premises on a priority basis, or offer the Premises to a prospective tenant when other space in the Building suitable for the prospective tenant's use is (or soon will be) available;

21.03. Landlord will not be obligated to lease the Premises to a Substitute Tenant for a Rent less than the current fair market Rent then prevailing for similar uses in comparable buildings in the same market area as the Building, nor will Landlord be obligated to enter into a new lease under terms and conditions that are unacceptable to Landlord under Landlord's then current leasing policies for comparable space in the Building.

21.04. Landlord will not be obligated to enter into a lease with a Substitute Tenant whose use would:

(i) violate any restriction, covenant, or requirement contained in the lease of another tenant of the Building;

(ii) adversely affect the reputation of the Building; or

(iii) be incompatible with other users of the Building.

21.05. Landlord will not be obligated to enter into a lease with any proposed Substitute Tenant that does not have, in Landlord's reasonable opinion, sufficient financial resources to operate the Premises in a first class manner; and

21.06. Landlord will not be required to expend any amount of money to alter, remodel, or otherwise make the Premises suitable for use by a proposed Substitute Tenant unless:

(i) Tenant pays any such sum to Landlord in advance of Landlord's execution of a lease with the proposed Substitute Tenant (which payment will not be in lieu of any damages or other sums to which Landlord may be entitled as a result of Tenant's default under this Lease; or

(ii) Landlord, in Landlord's reasonable discretion, determines that any such expenditure is financially justified in connection with entering into a lease with the prospective Substitute Tenant.

22. Security Deposit.

22.01. Upon receipt of the Security Deposit, Landlord may hold it with out interest as security for Tenant's performance of its covenants and obligations under this Lease. The Security Deposit is not an advance payment of Rent or a measure of Landlord's damages in case of Tenant's default. Landlord may co-mingle the Security Deposit with other funds of Landlord. If, at any time during the Lease, Rent becomes overdue and unpaid, Landlord may, at its option, apply the Security Deposit to the delinquency. If Tenant defaults in any other respect, Landlord may apply the Security Deposit, or so much thereof as shall be necessary, to compensate the Landlord for loss or damage sustained or suffered by Landlord due to Tenant's breach. If Landlord applies some or all the Security Deposit to cure a Tenant breach, Tenant must, on written demand of Landlord, restore the Security Deposit to the original sum deposited, and Tenant's failure to do so within five days after receipt of demand is a default.

22.02. If Tenant pays all Rent timely and otherwise complies with this Lease, Landlord will return the Security Deposit to Tenant at the end of the Lease. Landlord may deliver the Security Deposit to any purchaser of Landlord's interest in

the Premises, and thereupon Landlord is discharged from other liability for the Security Deposit. If Landlord's claims exceed the Security Deposit, Tenant remains liable for the balance of the claims.

23. Tenant's Bankruptcy.

In addition to other available remedies, if Tenant becomes the subject of a voluntary or involuntary bankruptcy, reorganization, composition, or other similar proceeding under the federal bankruptcy laws:

23.01. "Adequate protection" of Landlord's interest in the Premises pursuant to Sections 361 and 363 (or their successor sections) of the Bankruptcy Code, 11 U.S.C., Paragraph 101, et seq., as amended from time to time ("Bankruptcy Code"), before assumption or assignment of the Lease by Tenant include but are not limited to all (or any part) of the following:

(i) continued payment by Tenant of all Rent due and owing hereunder and the performance of all other covenants and obligations hereunder by Tenant;

(ii) hiring security guards to protect the Premises if Tenant abandons or ceases operations, the obligation of Tenant only to be effective so long as Tenant remains in possession and control of the Premises to the exclusion of Landlord;

(iii) furnishing an additional/new security deposit by Tenant in the amount of three times the then-current monthly Base Rental and Additional Rent payable hereunder.

23.02. "Adequate assurance of future performance" by Tenant or any assignee of Tenant pursuant to Bankruptcy Code Section 365 includes (but is not be limited to) payment of an additional/new Security Deposit in the amount of three times the then-current monthly Base Rental and Additional Rent payable hereunder.

23.03. Any person or entity to which this Lease is assigned pursuant to the Bankruptcy Code, assumes, without further act or deed, all obligations of Tenant arising under this Lease on and after the effective date of such assignment. Any such assignee must, on demand by Landlord, execute and deliver to Landlord an instrument confirming the assumption of liability.

23.04. Despite anything in this Lease to the contrary, all amounts payable by Tenant to or on behalf of the Landlord under this Lease, whether or not expressly

denominated as "rent", constitute "rent" for the purposes of Section 502(b)(6) of the Bankruptcy Code.

23.05. If this Lease is assigned to any person or entity pursuant to the Bankruptcy Code, any and all monies or other considerations payable or otherwise to be delivered to Landlord (including Base Rentals and other rent hereunder) remain the exclusive property of Landlord and are not property of Tenant or of the bankruptcy estate of Tenant. Any and all monies or other considerations constituting Landlord's property under the preceding sentence not paid or delivered to Landlord must be held in trust by Tenant or Tenant's bankruptcy estate for the benefit of Landlord and must be promptly paid to Landlord.

23.06. If Tenant assumes this Lease and proposes to assign it to a specific assignee on specific terms, Tenant must deliver to Landlord notice of the proposed assignment. The notice must set forth (i) the name and address of the proposed assignee; (ii) all terms and conditions of the offer, and (iii) the adequate assurance to be provided Landlord to assure the assignee's future performance under the Lease. Tenant must deliver the notice no later than 20 days after Tenant's receipt of the proposal, but in no event later than 10 days before Tenant applies to a court of competent jurisdiction for authority and approval of the proposed assumption and assignment. Landlord thereupon has the prior right and option to accept the assignment itself on the same terms and conditions and for the same consideration, if any, as Tenant's proposed assignee, less any brokerage commission otherwise payable by the proposed assignee. Landlord must exercise its prior right and option by delivering notice to Tenant not later than 30 days after Landlord's receipt of the notice.

23.07. To the extent permitted by law, this Lease is a contract under which applicable law excuses Landlord from accepting performance from (or rendering performance to) any person other than Tenant.

24. Warranty Disclaimer.

24.01. Tenant takes the Premises "AS-IS," with any and all latent and patent defects. Landlord does not warranty that the Premises are fit for a particular purpose.

24.02. Tenant acknowledges that it is not relying on the accuracy or completeness of any representation, brochure, rendering, promise, statement, or other assertion or information about the Premises made or furnished by or on behalf of, or otherwise attributed to, Landlord or any of its agents, employees, or representatives. Tenant expressly and unequivocally disclaims all such

reliance. Instead, Tenant relies solely and exclusively on its own experience and its independent judgment, evaluation, and examination of the Premises.

24.03. Tenant further unequivocally disclaims (i) the existence of any duty to disclose by Landlord or any of its agents, employees, or representatives and (ii) any reliance by Tenant on the silence or any alleged nondisclosure of Landlord or any of its agents, employees or representatives. Tenant takes the Premises with the express understanding that there are no express or implied warranties (except for limited warranties of title set forth in the closing documents). Tenant expressly warrants and represents that no promise or agreement not herein expressed has been made to it and hereby disclaims any reliance upon any such alleged promise or agreement. This contract constitutes the entire agreement between the parties.

24.04. This provision was freely negotiated and played an important part in the bargaining process for this contract. Tenant disclaims reliance on Landlord and accepts the Premises "as-is" with full awareness that the Premises' prior uses or other matters could affect its condition, value, suitability, or fitness. Tenant confirms that it hereby assumes all risk associated therewith. Tenant understands that the disclaimers of reliance and other provisions contained herein could limit any legal recourse or remedy Tenant otherwise might have. Tenant acknowledges that it has sought and has relied upon the advice of its own legal counsel concerning this provision. Provisions of this paragraph survive closing and do not merge into the deed.

25. Abandoned Property.

Landlord may retain, destroy, or dispose of any property left on the Premises at the end of the Term.

26. Appropriations.

All obligations of the City of San Antonio under this instrument are funded subject to the discretion of City Council whether to appropriate funding. If the City Council fails to appropriate money for any obligation under this agreement, the City need not perform the obligation. Tenant's sole remedy for City's failure to perform is to terminate this Lease not later than 90 days after the due date for Landlord's omitted performance.

27. Sublease, Assignment.

Tenant cannot assign or sublease this lease without Landlord's prior written consent. Assignments include any transaction in which (A) a material part of Tenant's assets are sold outside the ordinary course of business or (B) a change in the identity of those owning, holding, or controlling the power to vote of 50% of the equity interest in Tenant.

28. Dispute Resolution.

28.01. Before bringing any action arising out of this agreement, including an action for declaratory relief but not an action specifically excepted below, the disputants must first submit in good faith to mediation. The parties may not assert limitations, laches, waiver, and estoppel based upon attempts to mediate.

28.02. Filing suit on a claim that should be mediated waives the filer's right to demand mediation. But one party's waiver does not affect another party's right. A defendant does not waive mediation for so long as, within a reasonable time after appearing, the defendant gives written notice to the plaintiff or its counsel of intent to require compliance with this paragraph.

28.03. Mediation must be conducted in San Antonio, Bexar County, Texas.

28.04 The party desiring relief has the burden to initiate mediation. Waiting for another party to initiate mediation does not waive the right to it.

28.05. If the parties can otherwise agree on a mediator, they may do so. Alternatively, either party may petition any court of competent jurisdiction to appoint a mediator. The only predicate issues the court need consider before appointing a mediator are whether (i) the copy of the contract before the court is authentic and (ii) the contract was duly signed and delivered by all parties to be bound to mediate. If neither of those issues is denied under oath, the court may appoint a mediator upon motion, without trial.

28.06. Mediator fees must be borne equally.

28.07. The parties need not mediate before going to court (1) for either party to seek emergency injunctive relief or (2) for Landlord to seek forcible entry and detainer relief against Tenant.

29. Miscellaneous.

29.01. *Applicable Law.* This Agreement is entered into in San Antonio, Bexar County, State of Texas. **Its Construction And The Rights, Remedies, And**

Obligations Arising Under It Are Governed by The Laws of The State Of Texas. But the Texas conflicts of law rules must not be used to apply the laws of a jurisdiction other than Texas. Both parties' obligations under this agreement are performable in San Antonio, Bexar County, Texas, and venue for any action arising under this agreement is only in Bexar County, Texas.

29.02. *Severability.* If any part of this agreement is found invalid or unenforceable, the finding does not affect the remainder.

29.03. *Successors.* This Agreement inures to the benefit of and binds the heirs, representatives, successors, and permitted assigns of each party. This clause does not authorize any assignment not otherwise authorized.

29.04. *Integration.* **This Written Agreement Represents The Final Agreement Between The Parties And May Not Be Contradicted By Evidence Of Prior, Contemporaneous, Or Subsequent Oral Agreements Of The Parties. There Are No Oral Agreements Between The Parties.**

29.05. *Modification.* This Agreement may be changed only by a written agreement, signed by the party against whom enforcement of any modification is sought. Subject to that restriction, any of this Agreement's terms may be modified by the party entitled to their benefit, but no modification, express or implied, affects the right of the modifying party either (i) to apply any other term or condition or (ii) to apply the same term or condition to a later or earlier occasion. Any modification of this Lease must be authorized by an ordinance adopted by City Council that specifically addresses the modification.

29.06. *Third Party Beneficiaries.* This Agreement benefits the parties and their successors and permitted assigns only. It has no third party beneficiaries.

29.07. *Notices.* Notices must be in writing and by certified mail, return receipt requested, addressed to the parties at their respective addresses set forth at the beginning. If the addressee is a corporation, notices must be addressed to the attention of its President. Notice is complete three days after deposit, properly addressed and postage prepaid, with the United States Postal Service. Failure to use certified mail does not defeat the effectiveness of notice actually received, but such notice is effective only on actual receipt. Address for notice may be changed by giving notice.

29.08. *Pronouns.* Plural constructions include the singular, and singular constructions include the plural. Whether a pronoun is masculine, feminine, or neuter does not affect meaning or application of the relevant term. The words

"herein," "hereof," and other, similar compounds of the word "here" refer to the entire Agreement, not just to a part of it.

29.09. *Captions*. Paragraph captions are for ease of reference only and do not affect the interpretation.

29.10. *Counterparts*. This Agreement may be executed in multiple counterparts, each of which is an original, whether or not all parties sign the same document. Regardless of their number, counterparts constitute only one agreement. In making proof of this agreement, one need not produce or account for more counterparts than necessary to show execution by or on behalf of all parties.

29.11. *Further Assurances*. The parties must execute and deliver such additional documents and instruments as may be necessary to effect fully the provisions hereof. But no such additional documents can alter the rights or obligations of the parties stated in this agreement.

29.12. *Administrative Actions and Agreements*. The Director of East Point may, without further council action, agree to, sign, and deliver on behalf of the City all consents, certificates, memoranda, estoppels, and modifications of nonmaterial rights and obligations arising under this Lease and may declare defaults and pursue remedies for such defaults. This paragraph does not authorize lease amendments or renewals without council consent. In any case in which this lease requires Tenant to interact with Landlord's representative, that representative is Landlord's leasing manager.

29.13. *Conflicts Between Numbers Stated Two Ways*. Whenever this lease states numbers more than one way, either by using both words and numerals or by stating a fixed amount and a calculation for arriving at an amount, and there is a conflict, the highest number controls.

29.14. *Incorporation of Exhibits*. All exhibits to this Lease are incorporated into it for all purposes as if fully set forth.

30. Signs.

Tenant may erect not more than one sign. It must be a double-sided hanging sign of not larger than allowed by applicable law and hung over the front entry door. The sign is subject to approval by the appropriate City agencies having jurisdiction over such matters including, but not limited to, the City's Office of Historic Preservation. Tenant must not place any illuminated signs in the window or door area.

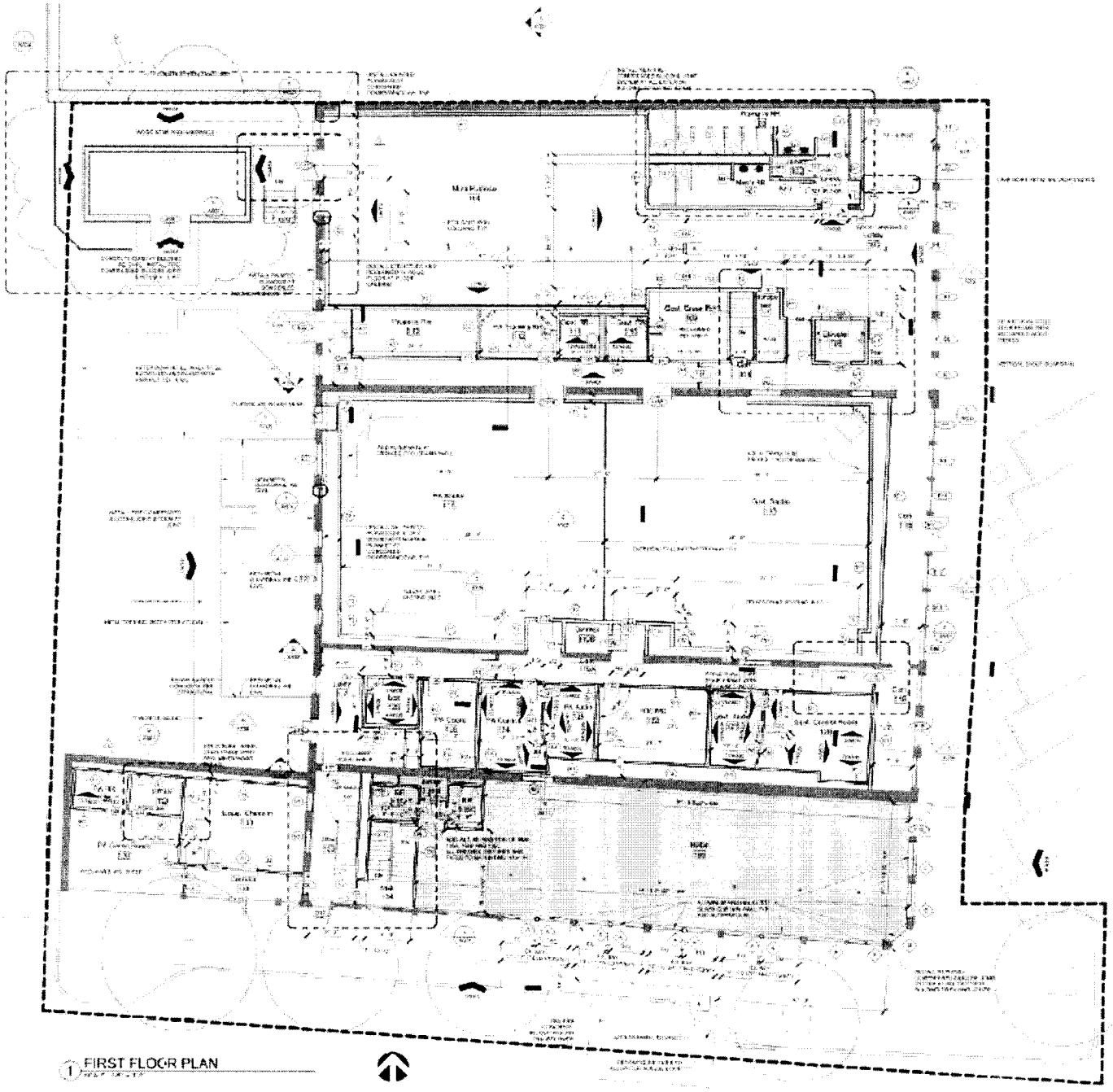
31. Public Information.

Tenant acknowledges that this instrument is public information within the meaning of Chapter 552 of the Texas Government Code and accordingly may be disclosed to the public. Nothing in this agreement waives an otherwise applicable exception to disclosure.

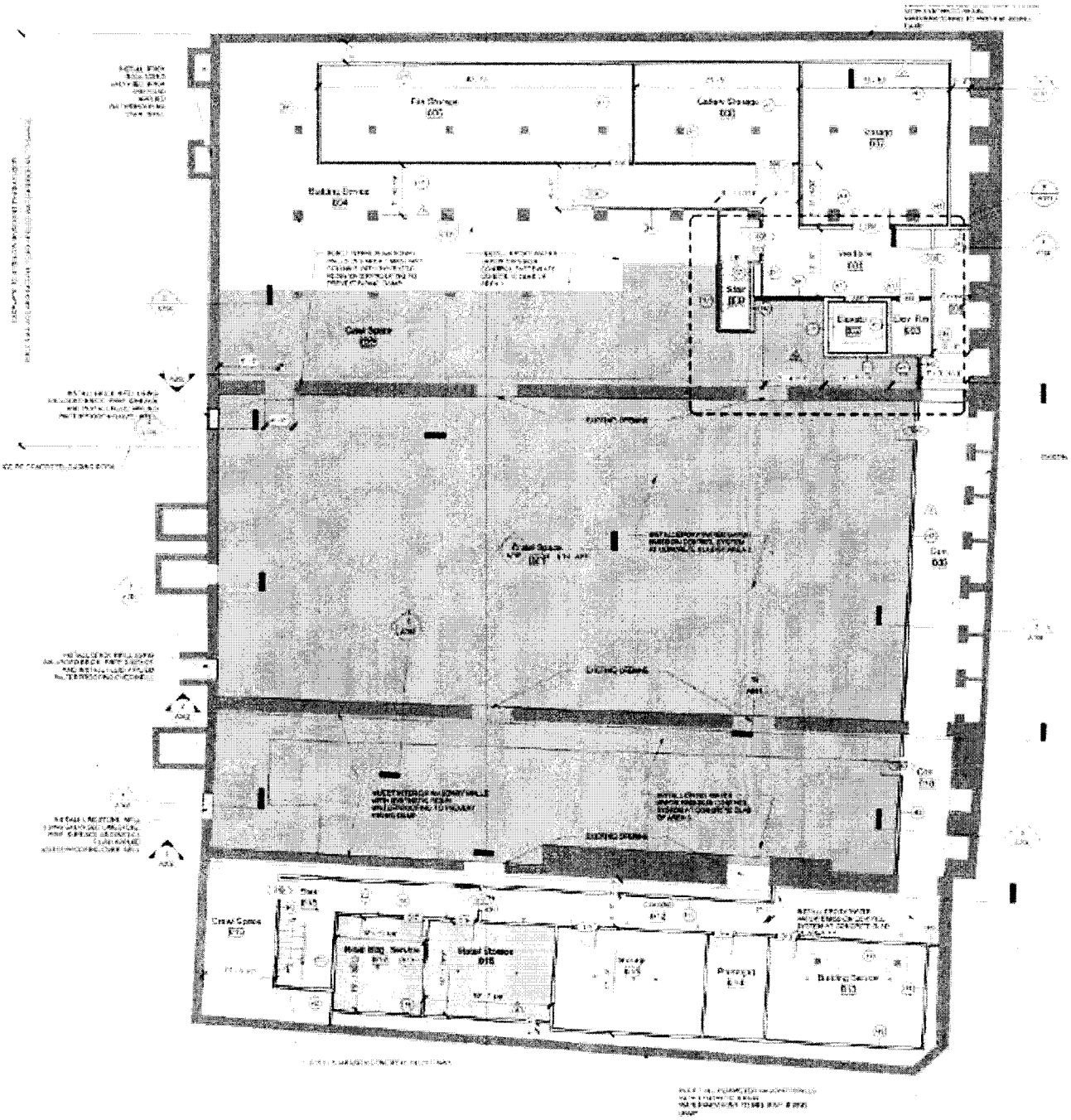
In Witness Whereof, the parties have caused their representatives to set their hands.

Landlord:	**Tenant:**
City of San Antonio, a Texas municipal corporation	**O'liva, LLC** , a Texas limited liability company
Signature:_____	Signature:_____
Printed Name:_____	Printed Name:_____
Title:_____	Title:_____
Date:_____	Date:_____
Attest:	**Approved as to Form**:
_____	_____
City Clerk	City Attorney

Exhibit A: Depiction of Ground-Floor Portion of Premises



The ground-floor premises are the shaded area in the lower right.Exhibit B: Depiction of Basement Portion of Premises



The basement portion of the premises are the two small shaded rooms at the bottom. The large shaded area in the middle is not part of the premises.