

AMENDMENT NO. 1 TO REIMBURSEMENT AGREEMENT

This AMENDMENT NO. 1 TO A REIMBURSEMENT AGREEMENT ("Amendment") is entered into as of this 12th day of SEPTEMBER, 2012, by and between the CITY OF PALM SPRINGS, a California public entity ("City"), and JOHN WESSMAN, an individual, and WESSMAN HOLDINGS, LLC, a California limited liability company (collectively the "Owner").

RECITALS

A. Owner and City entered into that certain Reimbursement Agreement related to the development of the Desert Fashion Plaza ("Property") on or about March 2, 2011.

B. The City and Owner desire to enter into this Agreement to provide for City to reimburse Owner for 50% of Owner's costs for architectural and engineering costs ("Pursuit Costs").

C. It was originally estimated that the Pursuit Costs would not exceed \$400,000, and the City's share of the Pursuit Costs was estimated at the time not to exceed Two Hundred Thousand Dollars (\$200,000.00). Owner has incurred a total of \$460,238.20 in Pursuit Costs City and Owner now desire to amend the Agreement to cover the costs of additionally beneficial design work.

AGREEMENT

Based upon the foregoing Recitals and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by both parties, City and Owner hereby agree as follows:

1. **Pursuit Period.** The "Pursuit Period" shall be from March 2, 2011, until November 1, 2012.

2. **City Reimbursement.** The total reimbursement obligation of City for Pursuit Costs shall be Two Hundred Thirty Thousand, One Hundred Nineteen Dollars and Ten Cents (\$230,119.10).

3. **No Other Amendment.** Except as expressly amended herein, the Reimbursement Agreement shall remain in full force and effect.

(signatures on next page)

ORIGINAL BID
AND/OR AGREEMENT

IN WITNESS WHEREOF, City and Owner have entered into this Amendment as of the date set forth above.

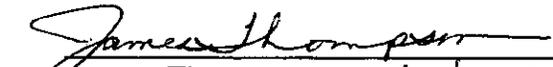
"CITY"

CITY OF PALM SPRINGS

By:

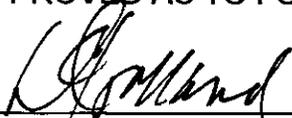

David H. Ready, Esq., Ph.D.
City Manager

ATTEST:


James Thompson 09/12/2012
City Clerk

orig. APPROVED BY CITY COUNCIL
3/2/11 1A A6085

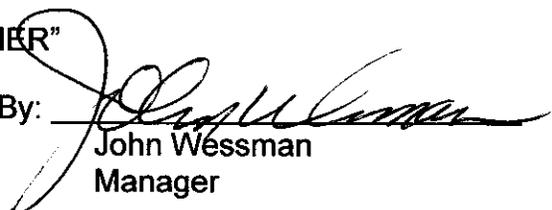
APPROVED AS TO FORM:


Douglas C. Holland, Esq.
City Attorney

Amend 1. APPROVED BY CITY COUNCIL
9/5/12 4A A6085

"OWNER"

By:


John Wessman
Manager

REIMBURSEMENT AGREEMENT

This REIMBURSEMENT AGREEMENT ("Agreement") is entered into as of this 31 day of March, 2011, by and between the CITY OF PALM SPRINGS, a California public entity ("City"), and JOHN WESSMAN, an individual, and WESSMAN HOLDINGS, LLC, a California limited liability company (collectively the "Owner").

RECITALS

A. Owner is the owner of the Desert Fashion Plaza and the Town and Country Center ("Properties"), two developed properties that make up the planning area of the adopted Museum Market Plaza Specific Plan. On or about March 2, 2010, Owner presented a plan for the redevelopment of the Properties ("Project") to the City Council of the City of Palm Springs as a part of the City Community Visioning Process for the implementation of the Specific Plan. A description of the Project ("Project Description") is attached hereto as Exhibit "A" and incorporated herein by reference.

B. The City agreed to enter into a reimbursement agreement with Owner for a portion of all costs reasonably incurred by Owner in pursuit of the Project ("Pursuit Costs").

C. City and Owner desire to enter into this Agreement to provide for City to reimburse Owner for a portion of Owner's predevelopment costs, including without limitation architectural, planning, and engineering costs ("Pursuit Costs").

AGREEMENT

Based upon the foregoing Recitals and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by both parties, City and Owner hereby agree as follows:

1. **Pursuit Period.** The City and Owner acknowledge that time is of the essence and agree, for the Pursuit Period (as hereinafter defined), to work diligently and in good faith to pursue the Project, and cause preparation of preliminary design plans, drawings, and schematics in sufficient detail to allow the City of Palm Springs to process and review a Development Agreement, and related financial agreements for the implementation of the Project. The duration of this Agreement ("Pursuit Period") shall be from March 2, 2011, until November 2, 2011, unless the period has been mutually extended by the City and the Owner or terminated earlier pursuant to Section 7 of this Agreement. (Note: Fees and charges by Alan Sanborn for work performed prior to March 2, 2011, in connection with preparing and revising Project Description, shall be reimbursable Pursuit Costs.)

2. **Owner's Responsibility for Design.** Owner shall be solely responsible for design of the Project, consisting of the preparation of preliminary plans, drawings, and schematics as described in Section 1. Owner shall submit all design documents to the Agency, conforming to all applicable legal authority and standards, in accord with established City policies and procedures and compliance with all applicable authority, and City shall receive and expeditiously review and process same. The adequacy of "work product" with respect to design

documents shall be subject to the City's reasonable satisfaction. All parties acknowledge that the City shall have, with respect to any formal applications submitted by Owner, normal discretionary approval rights as provided under State law and City Ordinances.

3. City Reimbursement. City shall promptly, within 30 days after receipt from Owner of bills and reasonable supporting information, reimburse Owner for 50% of Owner's Pursuit Costs, as from time to time incurred; provided, however, the total reimbursement obligation of City shall not exceed Two Hundred Thousand Dollars (\$200,000.00).

4. Compliance With Laws. All work performed under the terms of this Agreement shall be in strict conformity with all laws, ordinances, rules, regulations applicable to the Project and shall require the design professionals retained to prepare the design documents to comply with all such requirements.

5. Insurance.

5.1 Owner's and Contractor's Insurance.

5.1.1 At all relevant times during this Agreement and until the City has accepted the work, the Owner shall, if requested by City, require each design professional to maintain at least \$1,000,000 in errors and omissions (professional liability) insurance applicable to his/its design work, and to defend, indemnify and hold harmless the City and its respective officers, employees, and agents, from any and all claims due to the design professional's negligent acts or omissions or intentional wrongful conduct in its performance of design work. Such insurance shall be in form and substance as reasonably acceptable to City.

5.1.2 Design professionals shall also provide the following insurance for its work on the Project:

(a) Workers' compensation insurance in at least the minimum amounts required under California Law.

(b) Comprehensive general liability insurance, for injuries to persons and property, and automobile liability insurance, each with limits not less than \$1,000,000 combined single limit, per occurrence and \$2,000,000 in the aggregate.

5.1.3 Each insurance policy required to be maintained pursuant to this Section 5.1 shall be issued by a company admitted in California and having an A.M. Best's Guide Rating of "A-", Class VII or better. The Owner shall, if requested by City, require its design professionals to obtain and provide to City an endorsement for each of the policies providing the above insurance (except for worker's compensation insurance and errors and omissions insurance) naming the City and its respective officers, employees and agents as additional insureds. Each policy shall be endorsed to require 30 days advance notice to the City of cancellation or material modification of the policy. Each worker's compensation policy shall be endorsed to waive any right of subrogation against the City.

6. **Indemnification.** To the maximum extent authorized by law and except for claims arising out of the negligence of the City, its officers, employees, or agents, or the violation of any obligation of the City under the terms of this Agreement, including, without limitation, the failure of the City to make any reimbursement due pursuant to this Agreement, the Owner agrees to protect, defend, indemnify and hold harmless the City and the City and its elected and appointed boards, officers, agents and employees (1) from any and all claims, liabilities, expenses, stop notices, or damages of any nature, including attorneys' fees and expert costs, for injury to, or death of, any person, for injury to any property, and for any other monetary damage of any nature resulting from, arising out of or in any way connected with the breach of this Agreement by or on behalf of the Owner, and (2) from violation of any statute, law, regulation or other legal requirement applicable to the design of improvements. The obligations set forth in this Section 6 shall survive the termination of this Agreement until all such obligations are fully and finally resolved.

7. **Termination.** City may terminate this Agreement upon giving Owner thirty (30) days written notice, in the event of substantial failure by the Owner to fulfill its obligations under this Agreement, through no fault of the City; provided, however, Owner shall have fifteen (15) days to commence any cure of any such substantial failure, and the Agreement shall not be terminated so long as Owner commences and diligently pursues such cure. Upon any final termination, the Owner shall (1) promptly cause all design contractors to discontinue all affected work (unless the notice directs otherwise), and (2) deliver or otherwise make available to the City copies of all data, drawings, specifications, reports, estimates, summaries and such other information and materials as may have been accumulated by the Owner in performing this Agreement whether completed or in progress. Owner shall be entitled to reimbursement for all reimbursable expenses incurred through the date of final termination in accordance with Section 3, above.

8. **Miscellaneous.**

8.1 **Entire Agreement, Waivers, and Amendments.** This Agreement constitutes the entire understanding and agreement of the parties with respect to the subject matter set forth herein and supersedes all previous negotiations, discussions, and agreements between the parties with respect to all or the subject matter hereof. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the party to be charged. A waiver of the breach of the covenants, conditions or obligations under this Agreement by any party shall not be construed as a waiver of any succeeding breach of the same or other covenants, conditions or obligations of this Agreement. Any amendment or modification to this Agreement must be in writing and executed by the appropriate authorities of City and Owner.

8.2 **Successors and Assigns.** This Agreement shall be binding upon the parties and shall inure to all successors in interest of City and to all successors in interest and assigns of Owner in and to the Property.

8.3 **Attorneys' Fees and Costs.** If either party to this Agreement commences an action against the other party to this Agreement arising out of or in connection with this

Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees, expert fees, costs of investigation, and costs of suit from the losing party.

8.4 Interpretation; Governing Law. This Agreement shall be construed according to its fair meaning and as if prepared by both of the parties hereto. This Agreement shall be construed in accordance with the internal laws of the State of California without regard to conflict of law principles.

8.5 Severability. If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of this Agreement shall not be affected thereby to the extent such remaining provisions are not rendered impractical to perform taking into consideration the purposes of this Agreement.

8.6 Non-Liability of Officials and Employees of the City. No official or employee of City or the City shall be personally liable to Owner in the event of any default or breach by City, or for any amount that will become due to Owner, or any obligation under the terms of this Agreement.

8.7 No Third-Party Beneficiaries. This Agreement is made only for the benefit of the parties hereto; it is not intended that any rights under this Agreement shall accrue to any third person.

8.8 Independent Contractor. It is expressly understood and agreed by the Parties that the Owner, while engaged in carrying out the terms and conditions of this Agreement, is an independent contractor and not an employee of the City.

8.9 Authority to Execute. The persons executing this Agreement warrant and represent that they have the authority to execute this Agreement and represent that they have the authority to bind the parties for which they are signing to the performance of the obligations hereunder.

8.10 Execution in Counterpart. This Agreement may be executed in several counterparts, and all so executed shall constitute one agreement binding on both parties hereto, notwithstanding that both parties are not signatories to the original or the same counterpart.

8.11 Cooperation. Subject to the City's discretionary approval rights as set forth in Section 2 above, each party agrees to do and perform such other and further acts, and execute and deliver such other and further acts as may be reasonably necessary to effectuate the intents and purposes of this Agreement.

(signatures on next page)

IN WITNESS WHEREOF, City and Owner have entered into this Agreement as of the date set forth above.

"CITY"

CITY OF PALM SPRINGS

By: [Signature]
Its: CITY MANAGER

ATTEST:

[Signature]

APPROVED AS TO FORM:

[Signature]

APPROVED BY CITY COUNCIL

03/02/2011 I.A

A6085

"OWNER"
Palm Springs Promenade, LLC
By: Palm Springs Promenade, Inc.
Its: MANAGING MEMBER

By: [Signature]
Its: PRESIDENT

WESSMAN HOLDINGS, LLC
By: [Signature]
JOHN WESSMAN
ITS MANAGING MEMBER

**PROJECT DESCRIPTION
FOR MUSEUM MARKET PLAZA
REIMBURSEMENT AGREEMENT**

I. BACKGROUND.

A. **Specific Plan.** On December 2, 2009, the City Council ("Council") of the City of Palm Springs ("City") adopted Ordinance 1764, which approved the Museum Market Plaza Specific Plan ("Specific Plan"). The Specific Plan covered two existing downtown commercial complexes, i.e., the area commonly known as Desert Fashion Plaza ("DFP Area"), and the area (shown on the Specific Plan as Blocks K-1 and K-2) commonly known as Town & Country Center ("TCC Area"). In granting such approval, the Council found that the Specific Plan was consistent with applicable provisions of the State Government Code, and the General Plan of the City. Among other things, the Specific Plan established criteria, standards, restrictions, requirements and limitations (collectively "criteria") for major redevelopment, in phases until build out ("Build Out"), of both the DFP Area and the TCC Area. Such criteria included without limitation, criteria for land use (allowed and prohibited uses), development standards (minimum setbacks and maximum heights), land regulations (allowable square footage and building mass), and design guidelines (architectural themes and concepts). The Specific Plan also included a substantially more moderate and less ambitious plan ("Renovation Plan"), which contemplated that existing buildings within the DFP Area would largely remain intact but be upgraded with exterior architectural improvements. In Section V.C of the Specific Plan, the Renovation Plan, which was approved as an optional "phase one" of the Specific Plan.

B. **EIR Certification.** Concurrently with approval of the Specific Plan, the Council approved and adopted Resolution 22625, which certified an Environmental Impact Report for the Specific Plan. Such Resolution included, without limitation, the making of amendments to the General Plan and Zoning Ordinance of the City, the making of certain findings relative to environmental effects identified in the EIR, the adoption of a Statement of Overriding Considerations, and the adoption of a Mitigation Monitoring Plan and Reporting Plan. The Resolution also included the incorporation of the Renovation Plan as an option, i.e., a phase one for remodeling the DFP Area.

II. CURRENT PROPOSAL

A. **Project Description for Revitalization Plan.** The Revitalization Plan is intended to expand upon the prior Renovation Plan, and continue to remain in substantial conformance with the Specific Plan. In essence, the Revitalization Plan will constitute part of the redevelopment "phasing" process recognized and approved in the Specific Plan. Relevant aspects of the Revitalization Plan are considered below.

1. **New Site Plan.** The new site plan for the Revitalization Plan ("New Site Plan") is attached hereto as *Exhibit "A"* and, as can be seen, it contains some

modifications from the prior site plan for the Renovation Plan ("Prior Site Plan"). With respect to the New Site Plan (and the Revitalization Plan) the comments below are relevant.

2. **Internal Street Improvements.** The New Site Plan shows the main internal street running the full distance from Indian Canyon Drive to Museum Drive(?). In this respect, it is consistent with ultimate Specific Plan redevelopment concepts, and provides an important part of the solution to making the DFP Area commercially successful, i.e., direct east-west access from Indian Canyon Drive into the DFP Area. The New Site Plan also shows an extension from the roundabout at the "center" of the DFP Area southerly to become part of an extension of Belardo Road into the DFP Area. (Note: [1] Construction of the Belardo Bridge over Tahquitz Creek will provide a large new segment of residential areas with direct northerly access to the DFP Area. [2] Under the New Site Plan, internal streets will be public, i.e., owned by the City rather than the Developer.)

3. **New Building Improvements.** The Prior Site Plan contemplated that existing buildings within the DFP Area would largely remain in place but be upgraded with exterior architectural improvements. The New Site Plan contemplates the demolition, reconfiguration and replacement of some buildings, particularly in the southeast corner of the DFP Area. In that location, existing buildings will be demolished, a new open space area will be located at the northwest corner of Tahquitz Canyon Way and North Palm Canyon Drive, and a landscaped pedestrian walkway will extend from the corner open space area into the center of the DFP Area, connecting to the "roundabout" described in Section 2. above. New retail building improvements are planned for location in the area shown as Block 2 on the New Site Plan. A new movie theater complex is planned for location directly north of the roundabout in the center of the DFP Area. (The Prior Site Plan showed the theater as being located immediately southwest of the center of the DFP Area - at the site of the former Pavilion Theatre tent.)

4. **Retention and Use of Existing Building Improvements.** The New Site Plan contemplates the retention, upgrade and use of some existing building improvements, as follows: (1) the former Saks Fifth Avenue building located on Palm Canyon Drive may be retained and used for major retail purposes, (2) the former I. Magnin building located directly northwest of the center roundabout in the DFP Area may be retained and used as an entertainment venue, such as for fitness/spa uses and/or recreational bowling purposes, (3) existing building improvements shown as Block 1 on the New Site Plan (located on Palm Canyon Drive), may be retained and used for retail purposes, and (4) existing building improvements located immediately adjacent to the Hyatt Hotel may be retained and used for hotel ballroom and conference center purposes. Depending on the condition of these properties, the needs of potential tenants, and economic feasibility, any of these buildings could be replaced with new structures. (Note: The foregoing identification of potential uses is not intended to preclude other uses authorized by the Specific Plan.)

5. **Retention of Block 6 for Future Development.** The New Site Plan calls for the area shown thereon as Block 6 to be retained by the Developer and be held for future development for a variety of potential uses including, without limitation, boutique gourmet grocery, bar/restaurant, entertainment, multi-story housing and/or office uses.

6. **City Purchase of Improvements for Public Parking.** The Revitalization Plan calls for certain parking improvements within the DFP Area to be purchased by the City from the Developer, and be used by the City in perpetuity as and for free public parking. These may include all or part of the above-ground parking structure at the northwest corner of the property, the parking deck and associated underground parking at the southwest corner of the property, the parking underneath developed portions of the DFP property, and all associated ramps, driveways and approaches currently owned by the Developer.

7. **City Purchase of Land for Public Streets.** The Revitalization Plan calls for the City to purchase from the Developer the ground upon which the interior streets shown on the New Site Plan will be built. This purchase could be the ground only or the purchase from the Developer the full street in a finished condition.

8. **City Purchase of Land (Parcels A and B) for Future Use.** The Revitalization Plan calls for two parcels within the DFP Area, i.e., the two parcels directly east of the Palm Springs Art Museum (the "Art Museum") which are currently used for open space and sculpture garden purposes ("Parcels A and B"), to be purchased by the City from the Developer and be held for future development opportunities including, without limitation, possible expansion of Art Museum facilities.

B. **City Administration and Processing of Revitalization Plan.** With respect to City Administration and processing, a number of matters need to be considered, as follows:

1. **Development Agreement.** Under certain provisions of the State Government Code, local governments are authorized to enter into binding contracts with developers known as development agreements. Among other things, a development agreement, once consummated, gives the developer a vested right to proceed to develop his property in the manner specified in the development agreement and/or entitlements adopted concurrently therewith or prior thereto. In this case, the Developer has filed an application for approval of a Development Agreement. Once approved and executed, the Development Agreement will, among other things, grant the Developer the vested right to develop the DFP Area in accordance with the Revitalization Plan, and the TCC Area in accordance with the Revitalization Plan (construction of the public street from Indian Canyon Drive to Palm Canyon Drive) and other entitlements authorized by the Specific Plan (hotel and retail use), but subject to all criteria (restrictions, standards, requirements and limitations) contained in the Specific Plan.

2. **Major Architectural Review.** Section V.A of the Specific Plan provides that implementation tools will be major architectural reviews, conditional use permits, subdivision maps and, in certain circumstances, planned development permits. For purposes of the subject Revitalization Plan, the Planning Commission and City Council will consider and act on the Development Agreement application, in conjunction prior to major architectural review of proposed revitalization improvements.

3. **Substantial Conformance of Revitalization Plan.** For reasons indicated herein, the Revitalization Plan and New Site Plan are consistent and in substantial conformance with the Specific Plan in general, and the prior Renovation Plan in particular. Land uses under the Revitalization Plan will be fully consistent with land uses allowed under the Specific Plan, development standards and land use regulations set forth in the Specific Plan will be followed in the Revitalization Plan, and architectural and design concepts under the Revitalization Plan will be consistent with those contained in the Specific Plan.

4. **Project Funding Agreement.** Section V.D of the Specific Plan acknowledges (1) that although the Specific Plan occurs in an area in which infrastructure is generally complete, improvements and alterations will be required throughout the development of Museum Market Plaza, and (2) that financing for such improvements and alterations is likely to come from a number of sources, both public and private.