Alamogordo City Commission

NOTICE OF MEETING

Special Meeting Agenda

October 26, 2017 - 6:30 PM
City Hall, City Commission Chambers
1376 E. Ninth St.

Richard Boss .... Mayor
Al Hernandez .... Mayor Pro-Tem, District 5
Jason Baldwin .... District 1
Nadia Sikes .... District 2
Susan Payne .... District 3
Jenny Turnbull .... District 4
Erica Martin .... District 6

Maggie Paluch .... City Manager
Petria Schreiber .... City Attorney
Rachel Hughs .... City Clerk

MISSION STATEMENT as Adopted by the City Commission on March 24, 1995.
The City of Alamogordo is a Municipal Corporation that exists solely for the purpose of providing the best possible services to our customers, the citizens of Alamogordo. We are committed to providing these services with honesty, integrity, compassion, fairness, and a commitment to excellence.

We are committed to the long-term financial stability and responsible growth of the City and all decisions will be driven by our commitment to provide the best services possible in a financially sound and responsible manner given the economic realities facing the City.

In accordance with Section 10-15-1.D, NMSA 1978 (2010 Cumulative Supplement), this agenda has been posted on the bulletin board located in the east/west lobby of the City Hall and in the glass case located outside a the north entrance of the City Hall, distributed to the appropriate news media, and posted on the City website: http://ci.alamogordo.nm.us within the required time frame. As a courtesy, the entire Agenda Packet has also been posted on the City of Alamogordo website: http://ci.alamogordo.nm.us

The Mayor and City Commission request that all cell phones be turned off or set to vibrate. Members of the audience are requested to step outside the Commission Chambers to respond to or to conduct a phone conversation. The Alamogordo Commission Chambers is wheelchair accessible. Other special assistance for disabled attendees must be requested 48 hours in advance by contacting the City Clerk's Office at 575-439-4205.

CALL TO ORDER & ROLL CALL

Announce the presence of a Quorum.

APPROVAL OF AGENDA

NEW BUSINESS

1. Consider and act upon, agreements for the Family Fun Center and first publication of Ordinance 1550. *(City Manager, Maggie Paluch, Petria Schreiber, City Attorney, Darron Williams, City Planner)*

PUBLIC COMMENT

Residents must sign up with the City Clerk to address the City Commission. Comments are limited to 3 Minutes, and there will be a maximum of 21 Minutes allowed for Public Comment.

ADJOURNMENT

AGENDA REPORT
CITY OF ALAMOGORDO
CITY COMMISSION

Meeting Date: 10/26/2017 **Report Date:** 10/23/2017 **Report No:** 1.

Submitted By: Petria Schreiber

Subject: Consider and act upon, agreements for the Family Fun Center and first publication of Ordinance 1550. *(City Manager, Maggie Paluch, Petria Schreiber, City Attorney, Darron Williams, City Planner)*

Fiscal Impact: $500,000.00
Amount Budgeted: $500,000.00
Fund: 011-2400-419.57-34 Project # ED1802 DTVC Loan

Additional Fiscal Impact: $1,500,000.00
Amount Budgeted $ 1,500,000.00
Line Item 105-0407-450.60-00 Project #: ED1803 Basin Lanes PPA

Recommendation: Approve all agreements and approve ordinance 1550 for first publication.

Background: These documents represent the entirety of the agreements between Downtown Venture Corporation and the City of Alamogordo. Attached are both of the promissory notes, as well as the ordinance, the lease, and the project participation agreement for the LEDA funds.

PROMISSORY NOTE

Date:______________________ Amount: $1,500,000.00

RECITALS

Downtown Venture Corporation, a for profit California corporation registered with the New Mexico Secretary of State (the “Borrower”), will borrow One Million and Five Hundred Thousand Dollars and 0/100ths ($1,500,00.00) Dollars from the City of Alamogordo, New Mexico, (“Lender” or “City”), to be paid within four years under the terms and conditions of this Promissory Note, to be secured by a security agreement.

This Promissory Note is executed by Borrower in furtherance of a Project Participation Agreement entered into between Borrower and the City pursuant to Ordinance No. 983, adopted August 13, 1996, in accordance with the requirements of the Local Economic Development Act, Section 5-10-1, et seq., NMSA 1978, as amended, which Project Participation Agreement is attached hereto as Exhibit A and made an integral part of this Promissory Note.

TERMS

PROMISE TO PAY

For value received, Borrower promises to pay to the City, in one lump sum payment, One Million and Five Hundred Thousand Dollars and 0/100ths ($1,500,000) Dollars, in cash, check or money order, with interest as herein provided, not later than four years from the date of this Promissory Note.

INTEREST

Interest shall accrue on this Promissory Note as of the date the same is executed, which date shall be concurrent with the date the proceeds are delivered to Borrower, at the rate of three percent (3%) per annum, with a final maturity date for principal and interest fifteen years from the date hereof.

OBLIGATION EXTINGUISHED IF PPA FULFILLED

It is understood that the proceeds which are the subject of this Promissory Note, are made for the purchase by Borrower of certain items of tangible personal property as described in the Project Participation Agreement which is Exhibit A hereto, and that if Borrower fulfills its obligations to the City under said Project Participation Agreement, the obligation hereunder will be extinguished and the proceeds will be deemed paid in full, and this Note will be canceled and the security interest released.

FAILURE TO FULFILL OBLIGATONS UNDER PPA

It is understood that if Borrower fails to fulfill its obligations under the Project Participation Agreement which is Exhibit A hereto, Borrower will be in default of said Project Participation Agreement, and in default under and by this Promissory Note, whereupon the following terms and conditions shall be exercised by the City, and shall control payment of the amount due under this Promissory Note:

1. The City shall give Borrower written notice of its default of and under the Project Participation Agreement, advising Borrower of the default and demanding that said default be cured and remedied within ninety (90) days of said written notice, which shall be delivered to Borrower personally or by certified mail, return receipt requested.

2. Upon Borrower's failure to cure and remedy the default within the time specified, the entire principal and interest due under this Promissory Note shall immediately be due and payable to City, and upon failure of Borrower to pay the same, the City may enforce its security interest in, and execute upon, the leasehold improvements, as evidenced and protected in favor of the City by the Security Agreement which is executed contemporaneously herewith; and the City may otherwise collect this Note and enforce its rights hereunder, by any other remedy, legal or equitable, available under law.

3. If the City is required to enforce payment as provided herein, the City shall be entitled to collect from Borrower, all reasonable costs and expenses of collection, including attorney fees.

4. Presentment and dishonor, and any other technical requirements for demand for payment under this Note, are hereby waived by Borrower.

5. Notice of default under this Note, and all other notices required or to be made hereunder, shall be made by written notice to any one of the Borrowers individually, as identified in the Recitals clause hereinabove, by certified mail to 3751 Mesa Village Dr, Alamogordo, NM 88310, or by personal delivery.

SECURITY AGREEMENT

It is expressly understood that this Promissory Note shall be secured by a security interest in the form of a Security Agreement giving to the City the absolute right to execute its security interest in, and execute upon, the leasehold improvements described in the Security Agreement, and upon its filing in the office of the Otero County Clerk, shall constitute a perfected security interest in said property, with priority over any and all other creditors or lien holders, as provided in the New Mexico Uniform Commercial Code, Section 55-9-103, et seq., NMSA 1978, as amended.

IN WITNESS WHEREOF, Borrower, Downtown Venture Corporation, has executed this Promissory Note as of the day and year first above written.

DOWNTOWN VENTURE CORPORATION

By:__________________________________
Jay Chun

STATE OF NEW MEXICO)
) SS.
COUNTY OF OTERO)

The foregoing Promissory Note was acknowledged before me this ____ day of _______, 2017, by Jay Chun, Chief Executive Officer of Downtown Venture Corporation, a for profit California corporation registered with the New Mexico Public Regulation Commission, on behalf of said corporation.

____
Notary Public

My Commission Expires:

(S E A L)

PROMISSORY NOTE

Borrower: Downtown Venture Corporation, 3751 Mesa Village Dr, Alamogordo, NM 88310 (the "Borrower")

Lender: City of Alamogordo, 1376 E Ninth St, Alamogordo, NM 88310 (the "Lender")

Principal Amount: $500,000

Interest Amount: 0%

1. FOR VALUE RECEIVED, the Borrower promises to pay to the Lender at such address as may be provided in writing to the Borrower, the principal sum of $500,000.00 USD, with interest payable on the unpaid principal at the rate of 0% per annum, calculated yearly not in advance, beginning on the ___ day of ____________, 2017.

2. This Note will be repaid in consecutive monthly installments on the first day of each month commencing the month following execution of his Note and continuing until the ____ day of ___________, 2032 with the balance then owing under this Note being paid at that time.

3. At any time while not in default under this Note, the Borrower may pay the outstanding balance then owing under this Note to the Lender without further bonus or penalty.

4. Notwithstanding anything to the contrary in this Note, if the Borrower defaults in the performance of any obligation under this Note, then the Lender may declare the principal amount owning under this Note at that time to be immediately due and payable.

5. All costs, expenses and expenditures including, and without limitation, the complete legal costs incurred by the Lender in enforcing this Note as a result of any default by the Borrower, will be added to the principal then outstanding and will be immediately paid by the Borrower.

6. If any term, covenant, condition or provision of this Note is held by a court of competent jurisdiction to be invalid, void, or unenforceable, it is the parties' intent that such provision be reduced in scope by the court only to the extend deemed necessary by that court to render the provision reasonable and enforceable and the remainder of the provisions of this Note will in no way be affected, impaired or invalided as a result.

7. This Note will be construed in according with and governed by the laws of the State of New Mexico.

8. This Note will enure to the benefit of and be binding upon the respective heirs, executors, administrators, successor and assigns of the Borrower and the Lender. The Borrower waives presentment for payment, notice of non-payment, protest and notice of protest.

IN WITNESS WHEREOF, Borrower, Downtown Venture Corporation, has executed this Promissory Note as of the day and year first above written.

DOWNTOWN VENTURE CORPORATION

By:_________________________________

Jay Chun, CEO

STATE OF NEW MEXICO)

) SS.

COUNTY OF OTERO)

The foregoing Promissory Note was acknowledged before me this ____ day of _______, 2017, by Jay Chun, Chief Executive Officer of Downtown Venture Corporation, a for profit California corporation registered with the New Mexico Public Regulation Commission, on behalf of said corporation.

____

Notary Public

My Commission Expires:

(S E A L)

PROJECT PARTICIPATION AGREEMENT

THIS PROJECT PARTICIPATION AGREEMENT entered into this __ day of October, 2017, by and between the City of Alamogordo, a New Mexico municipal corporation (the "City") and Downtown Venture Corporation, a for profit California limited liability company registered with the New Mexico Secretary of State, whose business address is 3751 Mesa Village Drive, Alamogordo, NM 88310(the "Qualifying Entity").

RECITALS

A. The purpose of this Agreement is to allow the Qualifying Entity to construct and operate a value added, family entertainment center in Otero County, New Mexico that will include a bowling alley, laser tag, an arcade, and a restaurant/bar. Completion of the Project as hereinafter described pursuant to the terms and conditions hereof is in the best interests of the City and the health, safety, and welfare of the residents and the taxpayers of the City of Alamogordo, and is in accord with the public purposes and provisions of applicable state and local laws.

B. By Ordinance No. 983, adopted August 13, 1996, the City has adopted an ordinance pursuant to the statutory authority conferred upon municipalities to allow public support of economic projects to foster, promote and enhance local economic development efforts (N.M. Stat. Ann. Section 5-10-1 through Section 5-10-13 1978). The Ordinance was adopted as part of the City's Economic Development Plan.

C. By Ordinance No. _____, adopted the ____ day of _____________, 2017 ("Approval Date"), the City has adopted an Ordinance which establishes that the Qualifying Entity meets the requirements of the Local Economic Development Act and that Qualifying Entity has provided information pertaining to its intent to make infrastructure improvements and purchase equipment needed to operate a family entertainment center located at 3751 Mesa Village Drive, Alamogordo, New Mexico. This operation and management will create a minimum of twenty (20) new jobs with an hourly wage of at least nine ($9.00) dollars per hour, and will thereafter maintain the twenty (20) jobs and create sufficient additional new jobs necessary to fulfill its obligation to repay the Economic Development Incentive during the term of this Agreement (the "Project"), all of which qualifies for assistance under the City's Economic Development Ordinance.

D. A material inducement to City to enter into this Agreement is the agreement by the Qualifying Entity to expand its business operations and initially create no less than twenty (20) new jobs, which must have an average hourly wage of at least nine dollars ($9.00) per hour, and thereafter maintain those jobs while creating additional new jobs in accordance with the provisions hereof, and the City would be unwilling to enter into this Agreement in the absence of an enforceable commitment by Qualifying Entity to create and thereafter maintain the jobs in accordance with the provisions of this Agreement.

E. Location of the Qualifying Entity's business operations in Otero County will provide additional jobs and substantially improve the economic conditions in accordance with the purposes and goals of the City's Economic Development Plan.

F. As a condition precedent to its receipt of public assistance, the Qualifying Entity is required to execute this Project Participation Agreement.

NOW THEREOF, the Parties agree as follows:

1. Authority. The City's execution of this Agreement is authorized by the Local Economic Development Act, NMSA 1978 §5-10-1 through §5-10-13 (2007) (LEDA), Ordinance No. 983, which established the Alamogordo Economic Development Strategic Plan that promotes economic development projects in the City of Alamogordo; and Ordinance No. _______, which approved the Project. Qualifying Entity's execution and performance of this Agreement constitutes a valid and binding obligation of the Qualifying Entity in the event the Qualifying Entity proceeds with the Project. The Qualifying Entity and, if applicable, each member has full power and authority to execute, deliver and perform, as applicable, this Project Agreement, to make the obligations hereunder, to execute and deliver the Promissory Note and to grant to the City the security as hereinafter described.

2. Definitions. For all purposes of this Agreement, except as otherwise expressly provided or unless the context clearly requires otherwise, the following terms have the meanings assigned to them:

"Approval Date" means October 26, 2017.

"Eligible Project Costs" means the costs and expenditures directly related to the various infrastructure upgrades that need to be accomplished in order to open and operate the 'family entertainment center'. Examples of eligible infrastructure upgrade costs include various construction change orders, purchases of systems and equipment to operate the fun center, and installation costs.

"Facility" shall mean the Qualified Entity's family entertainment center facilities located at 3751 Mesa Village Dr., Alamogordo, New Mexico, and legally described on the attached Exhibit "A".

"Job Credit" is calculated at one dollar ($1.00) for one dollar ($1.00) for every job created that pays nine dollars ($9.00) per hour or over with a minimum requirement of twenty jobs per year.

"Job Period" means every twelve (12) month period from the Approval Date through the Term of Agreement during which the Qualified Entity is obligated to create and maintain New Jobs.

"New Job" shall mean at least 2,080 hours of paid employment over 365 days. For example, 2 persons working 1,040 hours each over 365 days is one (1) New Job. One (1) person working 2,600 hours over 365 days is 1.25 New Jobs. The determination of New Jobs shall be made at the end of each Job Period and shall be based on whether over such entire period the Qualifying Entity provided such minimums. The annual minimum for jobs hours worked is, 41,600. Should the Qualifying Entity create additional jobs, those job will be credited towards hours worked for the job credit, and the outstanding balance will be reduced accordingly. Paid vacation or other paid times off will be included as hours worked in the New Job calculations.

"New Jobs Payroll" shall mean all monies paid annually to all persons holding New Jobs, whether paid by the hour, day, week, semi-monthly, monthly, or yearly, and includes, but is not limited to, overtime, bonuses, and piecework.

3. Qualifying Entity's Obligations. The Qualifying Entity acknowledges that a material inducement for City to accept the Qualifying Entity's proposal and enter into this Project Agreement was the Qualifying Entity's representation that it would, within the term of this Project Agreement expand its business through the opening and operating of a family entertainment center thereby creating sufficient New Jobs to permit City to recapture its investment in full during the term of this Project Agreement based on the value of each New Job created and maintained. Therefore, in furtherance of that representation, the Qualifying Entity specifically agrees and covenants that the following performance measures shall be met:

A. Purchase of Equipment and Installation of Infrastructure

  i. The Qualifying Entity shall purchase and install in the family entertainment center the following items:

    i. Arcade Card System
    ii. Arcade Machines
    iii. Redemption Products
    iv. Additional kitchen equipment
    v. Point of Sale system
    vi. Security Camera system (with at least 30 cameras)
    vii. Additional HVAC (heating, ventilation and air conditioning) system
    viii. Additional furnishings for the party rooms and family area
    ix. A beer tap system to be installed between the cooler and bar area
    x. Audio and visual system to cover the entire family entertainment center
    xi. Additional lighting to included LED lighting
    xii. Additional signage to help promote the facility off site

  ii. Qualifying Entity shall diligently pursue such installation to completion. In the event that Qualifying Entity is unable to obtain the necessary permits, or fails to commence the purchase and installation of the above mentioned items within one-hundred eighty (180) days of the Approval Date, this Agreement shall terminate and be of no further effect.

B. Employment Opportunities. The Qualifying Entity shall create and thereafter maintain during each Job Period at least twenty (20) New Jobs with an hourly wage of at least nine ($9.00) dollars unless the Qualifying Entity "pays off" its obligation earlier by creating job in excess of the total required number as hereinafter described.

  i. The Qualifying Entity shall further use its best efforts during the term of this Project Agreement to create additional New Jobs with an hourly wage of at least nine ($9.00) dollars so as to permit City to recapture its investment in full during the term of this Project Agreement. The Qualifying Entity agrees and expressly acknowledges that it will not earn sufficient Job Creation Credits to satisfy its obligations under the terms of this Project Agreement if it fails to create the number of New Jobs requirement of the twenty (20) New Jobs.

ii. The Qualifying Entity shall only be credited for the creation of jobs performed within Otero County, New Mexico, and will not receive credit for its Existing Employment Base.

C. Local Preferences. The Qualifying Entity shall use its best efforts to contract with local contractors to accomplish the installation of the utility infrastructure in order for the City to receive gross receipts tax revenue from the performance of installation services. During the term of this Agreement, the Qualifying Entity shall make available to the City upon request records verifying the use of local contractors and the making of local purchases. For purposes of this Agreement, a local contractor is a contractor meeting the requirements of section 2-13-180 of the Alamogordo City Code.

4. City Obligations. The City agrees to provide $1,500,000 of upfront Economic Development Incentives to the Qualifying Entity to assist in the purchase of the items described in Section 3(a)(i) for use in Otero County (the "Eligible Project Costs"). Subject to the terms and conditions set forth herein, the City will make advances to the Qualifying Entity from time to time during the Funding Period for the payment of Eligible Project Costs, which in the aggregate shall not exceed the amount of $1,500,000. The Qualifying Entity will be responsible for any additional costs or expenses related to the Project.

A. This Agreement shall not be construed as a commitment, issue or obligation of any specific funds other than those funds to be received by the City from its Municipal Infrastructure Gross Receipts Tax.

B. The functions and duties assumed by the City include only those described in this Agreement, and the City is not obligated to act except in accordance with the terms and conditions of this Agreement. The Qualifying Entity acknowledges that the City does not warrant any equipment, materials, or services purchased with the funds. The Qualifying Entity shall be obligated hereunder even if the equipment, materials, or services are defective or fail to conform to the warranties extended by the supplier. The obligations of the Qualifying Entity shall not be affected by any dispute the Qualifying Entity may have with any manufacturer, distributor, contractor or supplier. The Qualifying Entity will not assert any claim or defense which it may have against any manufacturer, distributor, supplier or contractor against the City. The City is under no duty to supervise or inspect the installation or construction contemplated by this Agreement. Any inspection or examination by the City is for the sole purpose of protecting the City's security and preserving the City's rights under this Agreement. No default of the Qualifying Entity will be waived by any inspection by the City. In no event will any inspection by the City be a representation that the installation or construction is free from defective materials or workmanship

5. Disbursement of Economic Development Incentive. Disbursement of the Economic Development Incentive shall be made upon the City's receipt and approval of a request for the disbursement and supporting documents. The supporting documents shall include itemized invoices from contractors and suppliers, and a report detailing the dollar amount and purpose of the Eligible Project Cost. The City, in its sole discretion, may withhold disbursements if the City determines that the Qualifying Entity has failed to comply with and/or is in default under the terms and conditions of this Agreement, or has failed to provide adequate documentation of the Eligible Project Cost. Qualifying Entity hereby authorizes and directs the City to pay a contractor or supplier of Eligible Project Costs directly upon receipt of invoices delivered to the City for an Eligible Project Cost. Qualifying Entity acknowledges that (i) any delivery to the City of an invoice by a contractor or supplier shall be deemed as a request for an advance of Economic Development Incentive by the Qualifying Entity, and (ii) each such advance constitutes an advancement by the City to Qualifying Entity pursuant to this Agreement as if the Qualifying Entity received the proceeds directly from the City.

6. Obligation to Repay the Economic Development Incentive. The Qualifying Entity understands and agrees that the failure of the Qualifying Entity to perform its obligations in accordance with the terms provided in Sections 3(A) and (B) of this Agreement will result in a forfeiture of the Economic Development Incentive. In the event of a forfeiture, or upon termination of this Agreement, the Qualifying Entity agrees to pay to the City the balance of the Economic Development Incentive not otherwise repaid through the creation of jobs. The Qualifying Entity's obligation to pay to the City the balance of the Economic Development Incentive not otherwise repaid is evidenced by a Promissory Note, a copy of which is attached hereto as Exhibit "A". In, the City may demand repayment of any remaining portion of the Economic Development Incentive provided to the Qualifying Entity not otherwise reduced pursuant to the terms of this Agreement.

7. Security/Collateral

A. Security Interest. To secure Qualifying Entity's obligations and liabilities under the Promissory Note, the City shall retain a purchase money security interest in and to all of the Qualifying Entity's right, title and interests in and to the items purchased under 3(A)(i) with the exception of the initial redemption products.

B. Such security interest shall be superior to any other security interests in the items listed in 3(A)(i). The Qualifying Entity shall not remove the items listed from Otero County without the City's written approval. Said security interest shall be duly recorded with the New Mexico Secretary of State's Office in order to protect the City's interests in the event of default. This security interest shall not terminate until Qualifying Entity's obligations hereunder have been achieved in full. Upon satisfying its obligation, the Qualifying Entity may request City to release the security interest. Upon such request, City will file the appropriate termination of security interest within ten (10) business days of receipt by the City of the Qualifying Entity's written request.

8. **Insurance.** The Qualifying Entity, at its sole cost and expense, procure and maintain, with financially sound and reputable insurers authorized to do business in the State of New Mexico:

(i) insurance on the value of the improvements on a replacement basis with no limiting modification including the City as named insured party; and

(ii) an insurance policy which covers damage to, or the destruction of, the Facility on a replacement basis for the full insurable value covering all improvements on the Facility. The Qualifying Entity will furnish to the City, upon its written request, the insurance certificates with respect to such insurance. Should the Facility at any time become located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, the Qualifying Entity agrees to obtain and maintain Federal Flood insurance for the full unpaid principal balance of the Promissory Note and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Programs, and to maintain such insurance for the term of this Agreement.

9. Evidence of Job Creation, Job Audit. A "Job Audit" will be performed by the City or its agent within 60 days after the end of each Job Period. The Qualifying Entity will provide to the City no later than 20 days after the job creation period a completed and certified Job Audit Certificate in substantially the form attached hereto as Exhibit "B". The Qualifying Entity shall make available the necessary records in order to allow the City to perform its Job Audit. The Qualifying Entity further agrees to provide the City such other documents and evidence that it may reasonably require to satisfy the accuracy and veracity of the information provided in the report. The Qualifying Entity will provide the City reasonable access (subject to the Qualifying Entity's security policies) to its records and facilities for the purpose of conducting on-site audits for compliance with this section. Such on-site audits shall be at reasonable times, upon not less than 10 days prior written notice to the Qualifying Entity. Within sixty (60) days after the close of a Job Creation Period, the City will determine whether during the relevant periods the Qualifying Entity has met its obligations to create jobs as required by this Agreement.

10. Job Credit. Provided the City has determined that the Qualifying Entity has complied with the terms and conditions of this Agreement, the City shall annually apply a Credit against the funds disbursed based on the number of actual New Jobs created in the preceding Job Period. For each new job created with an hourly rate in excess of $9.00 per hour, a credit shall be applied in an amount equal to the total wages paid during the Job Period. For each new job created with an hourly rate less than $9.00 an hour, a credit will be applied in an amount equal to $0.050 per dollar of total wagers paid during the job period.

<u>For example:</u> If the Qualifying Entity creates 25 jobs all with an hourly wage of $9.00 per hour, for a total annual payroll of $468,000, then a total of $468,000 would be credited. However, if the Qualifying Entity creates 25 new jobs that pay $8.00 an hour, for a total annual payroll of $416,000, a job credit of only $208,000 would apply. (Receiving a credit of .50 for every job under $8.00)

11. Pro-rated Credit. In the event the Qualifying Entity fails meet its annual creation/maintenance obligation for any Job Period, the Qualifying Entity shall receive a pro- rated credit. The amount of the pro-rated credit shall be calculated using the above described formula.

By way of example, if in Job Period # 4 the Qualifying Entity only created and/or maintained 15 New Job Hours for which it paid a New Jobs Payroll of $280,000 the Qualifying Entity would receive an Annual Job Credit of $280,000.

12. Additional Credit. The Qualifying Entity may receive Additional Credit for any New Job created or maintained during a Job Period in excess of its New Job creation/maintenance obligation under paragraph 3(b) for that particular Job Period. The amount of the pro-rated credit shall be calculated using the above described formula.

13. Term. The term of this Agreement shall commence on the Approval Date and continue for five (5) years unless terminated sooner as provided herein. If the term of the Promissory Note is extended for any reason, then the term of this Agreement shall automatically be extended so that the agreements are of the same duration.

14. Obligation to Perform. The failure of the City to insist, in any one or more instances, upon performance of any of the terms or covenants of this Agreement shall not be construed as a waiver or relinquishment of the City's right to the future performance of any such terms and covenants, and the obligations of the Qualifying Entity with respect to such future performance shall continue in full force and effect.

15. Termination and Recovery of Incentive.

- <u>Events of Default</u>. The following events shall constitute events of default under this Agreement:
    - Failure of the Qualifying Entity to fulfill, in whole or in part, any obligation required by this Agreement.
    - Cessation by the Qualifying Entity of its operation of the family entertainment center located at 3751 Mesa Village Dr. in Alamogordo, NM or reduction of those operations in Otero County to a level below the performance measures set forth in paragraph 3(b) of this Agreement.
    - Filing by the Qualifying Entity of a petition, case, proceeding, or other action against the City as a debtor under any debtor relief law or seeking appointment of a receiver, trustee, custodian, or liquidator of the Qualifying Entity.
    - The abandonment by the Qualifying Entity of all or a portion of the Facility.
    - The discovery by the City that any representation, warranty, or covenant made by the Qualifying Entity in connection with this Agreement was or has become false, materially misleading, erroneous, or breached in any material respect.
    - The Qualifying Entity assigns, sells, hypothecates, or transfers a majority interest in its business entity, whether in a single transaction or a series of transactions. (If the Qualifying Entity desires to assign, sell, hypothecate, or transfer a majority interest in its business entity, whether in a single transaction or a series of transactions, before expiration of this Agreement, the City retains the right to reject any and all assignments, sales, hypothecations, or transfers of any interest in the Qualifying Entity's business entity

until, in the sole discretion of the City, adequate assurances are given that the assignee, buyer, hypothecatee, or transferee is a qualifying entity under the Alamogordo Economic Development Plan and that terms of this Agreement will be satisfied by the assignee, buyer, hypothecatee, or transferee.)

- Qualifying Entity's Response to Default. Upon the occurrence of an event of default by the Qualifying Entity specified in this Agreement, the City shall notify the Qualifying Entity in writing that an event of default has occurred under this Agreement. Within thirty (30) days of the receipt of such notice, the Qualifying Entity shall:
    - Cause the default to be cured; or
    - Furnish a written response indicating:
        - the factors which caused or contributed, in whole or in part, to the occurrence of default;
        - The measures the Qualifying Entity has undertaken to avoid the reoccurrence of default in the future;
        - Whether any performance measure not achieved can still be achieved in a timeframe acceptable to the City; and
        - What further action the Qualifying Entity plans to take to achieve the performance measure in a timeframe acceptable to the City.
- City Response to Default. The City staff shall review the response furnished by the Qualifying Entity and within thirty (30) days from the receipt of such response, recommend to the City Commission whether to modify or terminate this Participation Agreement. The Qualifying Entity shall have an opportunity to make a presentation to the City Commission at any meeting where such recommendation will be acted upon. The decision of the City Commission will be final and binding. Other than the opportunity for the Qualifying Entity to make a presentation to the City Commission, in the event of default nothing herein shall be construed to limit in any way the power and authority of the City Commission to terminate this Agreement and to demand immediate repayment of the Economic Incentive, including all interest both accrued and deferred; and to foreclose upon, collect, and recover all collateral pledged by the Qualifying Entity as security for the Promissory Note if repayment is not made;

16. Effect of Termination. Except for any obligations that accrue prior to such termination or except as otherwise provided in this Agreement, which obligations shall survive the termination of this Agreement, other rights, responsibilities and liabilities of the parties under this Agreement shall be extinguished upon the applicable date of termination of this Project Agreement.

17. Facility Closure Clawback. Should the Qualifying Entity cease operation of the Project (i.e., cease its operations from the Facility) before the economic development incentive is repaid pursuant to the terms of this agreement, the Qualifying Entity shall, within ninety (90) days of the cessation of operations, pay to the City, in cash, an amount equal to the balance left unpaid on the economic development incentives. Any clawbacks not paid when due shall bear interest at the rate of prime plus 2% per annum from the due date until paid. Should the facility close because of mutual agreement, a natural disaster, or through a closure at no fault of the Qualifying Entity, the Qualifying Entity shall be released from all further obligations under this agreement. However, a lack of sales or revenue and participation from the community shall be foreseeable and not a reason for the Qualifying Entity to escape the clawback provision of this Agreement.

18. No Joint Venture. It is acknowledged and agreed by the parties that the terms of this Agreement are not intended to and shall not be deemed to create a partnership or joint venture among the parties. Neither party shall have any authority to act on behalf of the other party under any circumstances of this Agreement.

19. Appropriations. The performance by the City of any of the terms, covenants, or conditions in this Agreement that the City is obligated to perform shall be subject to the availability of appropriated funds that may be lawfully used for such purpose.

21. Miscellaneous Provisions:

(a) If any legal action should be necessary for the enforcement of this Project Agreement or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provision of this Agreement, the City shall be entitled to recover its reasonable attorney fees and/or other costs incurred in that action or proceeding in addition to any other relief which the City may be entitled to under the law.

(b) The parties agree that in the event of any dispute, venue for such dispute shall be laid and established in the District court of Otero County, New Mexico and no other.

(c) City and the Qualifying Entity will do all things reasonably necessary or appropriate to carry out the terms and provisions of this Agreement, and to aid and assist each other in carrying out such terms and provisions.

IN WITNESS WHEREOF, the Parties hereto have entered into this Agreement as of the day and year first written

DONE this _______ day of ________________, 2017.

CITY OF ALAMOGORDO, NEW MEXICO
a New Mexico municipal corporation

By:___________________________________
Margaret Paluch, City Manager

DOWNTOWN VENTURE CORPORATION

By:___________________________________
Jay Chun, President

ATTEST:

____
Rachel Hughs, City Clerk

APPROVED AS TO FORM:

____
Petria Schreiber, City Attorney

LEASE, MAINTENANCE AND OPERATIONS AGREEMENT

THIS LEASE AGREEMENT, is made and entered into as of the date set forth in the Basic Lease Information (this lease agreement, together with all amendments and supplements hereto, this "Lease"), by and between the City of Alamogordo, a New Mexico municipal corporation, having an address at 1376 East 9th Street, Alamogordo, New Mexico 88310 (the "Landlord"), and Downtown Venture Corporation, a limited liability corporation, having an address at 3335 Isabel, Rosemead Ca, 91770 (together with any successor or assign permitted by this Lease, hereinafter collectively called the "Tenant").

1. DEFINITIONS

Capitalized terms used herein shall have the following meanings for all purposes of this Lease and shall be equally applicable to both the singular and plural forms of the terms herein defined.

"Bowling Equipment" means all pin setting machines (pinsetters/pinspotters), ball returns, settees, scoring systems (including front desk systems), lanes, lane cleaning machines, bumpers, approaches, foul lights, gutters, and masking units located at the Facility, including any Site, from time to time.

"Business Days" or "Business Day" means any day excluding Saturday, Sunday and any day which is a legal holiday under the laws of the State of New Mexico or is a day on which banking institutions located in such state are closed.

"Capital Reserve Account" is an interest-bearing account managed by the landlord into which all "rent" moneys are paid by tenant. The express purpose of this account is to pay, in part or in whole, the costs of Capital Improvements, significant repairs, or extraordinary maintenance.

"Casualty" means any damage or destruction caused to the Facility by any reason, including fire.

"Claims" shall mean Liens (including lien removal and bonding costs), liabilities, obligations, damages, losses, demands, penalties, assessments, payments, fees of Mortgagee, fines, claims, actions, suits, judgments, settlements, costs, expenses and disbursements (including legal fees incurred and expenses and costs of investigation and environmental remedial action) of any kind and nature whatsoever.

"Commencement Date" is the date that all parties have signed this agreement.

"Grand Opening" for lease purposes, is the date which begin accumulation of "rent" moneys.

"Excluded Taxes" means any income or franchise taxes based upon, measured by, or calculated with respect to net income or profits (but not including any franchise tax based upon gross receipts with respect to the Rent), inheritance, estate, succession, transfer or any similar taxes.

"Extraordinary Maintenance" as part of and use under "Capital Reserve Account" is solely intended to offset in whole, or in part, the landlord's costs of "extraordinary" maintenance of the building, grounds, or equipment deemed landlord's responsibility. This is above and beyond what is considered as "normal" maintenance and upkeep under tenant's responsibilities.

"Improvements" means all buildings, structures, improvements, equipment, heating, ventilation, air conditioning, plumbing, electrical, mechanical, utility and life safety systems, cribbing, and all fixtures therein (including parking areas, and driveways) now or hereafter located on the Land, other than and specifically excluding Tenant's Personal Property and any Bowling Equipment owned by

Tenant. To the extent Landlord acquires title to any Bowling Equipment, the term “Improvements” shall include such Bowling Equipment located at the Facility.

Lease Expiration Date: _______________, 20___, which is the last day of the _____________ full calendar month following the Commencement Date, unless extended pursuant to paragraph 4(b) of the Lease.

“Land” means the title and interest of Landlord in and to the real estate described on Exhibit A hereto, and to the extent any such real estate shall include by law, then any land lying in the bed of any existing dedicated street, road or alley adjoining thereto, all strips and gores adjoining thereto, and all rights, ways, easements, privileges and appurtenances thereunto belonging, including all of Landlord’s right, title, and interest in and to all other property rights, tangible or otherwise, arising out of or connected with Landlord’s ownership thereof, but none of the Improvements thereon.

“Tenant’s Personal Property” means all personal property of Tenant in or on the Facility, affixed or not, which is not necessary for the operation of the Improvements, including, without limitation the following: bowling balls; bowling shoes; ball racks; pins; x-treme bowling systems; bowling tools; spare parts; bowling cleaning machines; vending and amusement game machines; billiard tables; ATM and credit card machines; copiers; computers; telephone systems; point-of-sale systems; audio and visual entertainment equipment; satellites and related equipment; alarm systems and related equipment; Tenant’s trade fixtures, equipment, supplies, consumables, and inventories, including, without limitation, tables, chairs, desks, filing cabinets, ovens, refrigerators, freezers, stoves, food preparation equipment, kitchen utensils, glassware, inventory of food, beverages, liquor, and paper goods; liquor licenses; signs; signage; advertising and marketing materials and equipment; trademarks and trade names (including, without limitation, any sign, symbol, or mark containing the name of “AMF” or Tenant’s logo, each as now or hereafter existing), patents, goodwill, and related intangible property; records of confidential or proprietary information including, but not limited to, financial information, operating manuals, employee records, league records, and customer lists; and any other equipment ancillary to a Permitted Use, but specifically excluding the Bowling Equipment.

Completion Date means the first day of the first month following the earliest date upon which (i) the Facility has been substantially completed in accordance with the plans approved by the Landlord and Tenant and a certificate of occupancy issued and (ii) possession of the Facility shall have been delivered to Tenant.

FF&E means all furniture, furnishings, trade fixtures, apparatus and equipment, including without limitation maintenance vehicles and equipment, cash registers, scoreboards, interior signage, sports equipment, benches, kitchen equipment, appliances, office equipment, computers, copy machines, facsimile machines, telephone systems (not including pay telephones) and other personal property used in or held in storage for use in the operation of the Facility, other than Operating Inventory. FF&E includes both (i) fixtures and related items of furniture, furnishings and equipment to be purchased and installed by the contractor selected to construct the Facility Improvements as part of the construction contract and (ii) furniture, furnishings and equipment to be purchased by the Landlord separately from the construction contract.

Full Operating Year means the 12 month period during the Term starting July 1 and continuing through June 30 of the following calendar year.

Operating Inventory means consumable items used or held in storage for use in the operation of the Facility, including; retail pro shop merchandise, food and beverage inventory, kitchen supplies, paper and plastic ware, bathroom supplies, paper towels, fuel, cleaning materials, fertilizers, pesticides, seed, maintenance parts and supplies, office supplies and other similar items.

Operating Year means either a Full Operating Year or a Partial Operating Year.

Partial Operating Quarter means any calendar quarter in which the Completion Date falls on any day other than the first day of such calendar quarter.

Partial Operating Year means any calendar year in which the Completion Date falls on any day other than July 1 or any calendar year in which the Term ends on any day other than June 30.

Sound Practice means managing and operating the Facility in a manner calculated to increase Gross Revenues subject to maximizing profits, on a long-term basis and consistent with Sound Standards and safe, conservative and sound financial management and operating practices.

Sound Standards means operate and maintain the Facility in a manner (i) equal to normal and fair business practice); (ii) using commercially reasonable efforts to maximize the safety of participants and spectators using the Facility and minimize liability to the Landlord arising from the operation and maintenance of the Facility; and (iii) intended to enhance the quality of experience for all patrons attending events at the Facility make the Facility an attractive venue to promote and book events.

2. DEMISE OF FACILITY, TENANT'S EQUIPMENT, BOWLING EQUIPMENT, LANDLORD WAIVER

2.1 Landlord hereby demises and leases to Tenant and Tenant hereby leases and rents from Landlord the Facility, IN ITS "AS IS" CONDITION, SUBJECT TO THE EXISTING STATE OF TITLE (WITHOUT EXPRESS OR IMPLIED WARRANTY OF LANDLORD WITH RESPECT TO THE CONDITION, QUALITY, REPAIR OR FITNESS OF THE FACILITY FOR A PARTICULAR USE OR TITLE THERETO, ALL SUCH WARRANTIES BEING HEREBY DISCLAIMED BY LANDLORD AND WAIVED AND RENOUNCED BY TENANT). The "Facility" consists of collectively, Landlord's interest in the Land, the Improvements, together with any easements, rights, and appurtenances in connection therewith or belonging to said Land and Improvements. The foregoing disclaimer in this paragraph has been negotiated by Landlord and Tenant, each being represented by independent counsel, and is intended as a complete negation of any representation or warranty by Landlord, express or implied, with respect to the condition, quality, repair, or fitness of the Facility for a particular use, or title thereto.

2.2 The "Facility" includes the Land and Improvements located at ____________________. The Land and Improvements at all such locations collectively constitute the Facility.

2.3 Landlord does further shall lease to Tenant, and Tenant leases from Landlord, governmental liquor license #_______ for the purpose of fulfilling its contractual obligation under this Agreement for the operation of the Facility for lease duration only.

3. USE

3.1 Tenant shall, subject to applicable zoning restrictions and any recorded covenants or restrictions in the public records upon the Commencement Date, use and occupy the Facility only as a bowling center, with ancillary uses including dining establishments, banquet facilities, game rooms, amusement arcade, karaoke, darts room, laser tag, pro shops, including live music entertainment and other ancillary entertainment uses, uses permitted pursuant to the next succeeding sentence, and other lawful purposes which are incidental thereto (including beverage service, including the sale of alcohol) (collectively, the "Permitted Use"). The foregoing restriction on use shall not apply to any minor sublease for a portion of the Facility if such sublease is supporting or ancillary to the Permitted Use. Tenant shall not use, suffer or permit the Facility, or any portion thereof, to be used by Tenant, any third party or the public, as such, without restriction or in such manner as might adversely affect Landlord's title to or interest in the Facility, or in such manner as might make possible a claim or claims of adverse possession by the public, as such, or third Persons, or of implied dedication of the Facility, or any portion thereof.

3.2 So long as no Event of Default under this Lease shall have occurred and be continuing, Tenant shall not be disturbed in its possession of the Facility by Landlord except for such access to the Facility as specifically provided for and subject to the terms and conditions of this Lease. This covenant shall be construed as a covenant running with the Facility and is not a personal covenant of Landlord. So long as no Event of Default under this Lease shall have occurred and be continuing, Landlord's use of any portion of the Facility shall not interfere, in any material respect, with any or all of (i) Tenant's rights to occupy and use the Facility (in the manner and for the purposes contemplated hereunder), (ii) Tenant's right to utilize the vehicular parking areas located on the Facility, and (iii) Tenant's right of access, ingress and egress to and from the Facility.

4. TERM

4.1 **Primary Term.** The primary term of this Lease (the "Primary Term") shall be for a period of approximately fifteen (15) years, beginning on the Commencement Date and ending on the Lease Expiration Date.

4.2 **Option Term.** Provided Tenant is not in default of this Agreement, Tenant is hereby given the option(s) to extend the Primary Term of this Agreement for two separate option periods of ten (10) years each with original based terms stated in 5.1.1 (each, an "Extended Term") following the expiration of the Initial Term (the Initial Term and the Extended Term(s) are collectively referred to herein as the 'Term"). The City shall have the right to review and approve the extension of this Agreement into the option periods, which approval shall not be unreasonably withheld or conditioned. The option periods must be exercised successively, to run from the end of the Primary Term, and shall be exercised only by giving notice of exercise of the option ("Option Notice") to City at least four months before the expiration of the Primary Term or the first Extended Term, as applicable. If Tenant, following notice and the expiration of all applicable opportunity to cure periods, is in default hereunder, it may not give an Option Notice and this Agreement shall expire at the end of the then-current Term.

5. RENT; SECURITY DEPOSIT; REVENUES; CAPITAL IMPROVEMENTS, MAINTENANCE AND REPAIRS

5.1 **Lease Amount.** Tenant shall pay the City an amount for the privilege of occupying the Facility (the "Lease Amount") according to the calculation procedure and schedule of payment set forth below:

5.1.1 **Lease Amount Calculation**. The Lease Amount shall be a base lease rate of two thousand dollars ($2,000) per month or ($ 24,000) per year as a base rate. Landlord will deposit lease payments into an interest-bearing account, identified as Capital Reserve Account, for the purposes of capital improvements, major repairs, and extraordinary maintenance.

5.1.2 **Lease Amount Payment.** The Lease Amount shall be calculated annually; however Tenant shall pay the Lease Amount to the City in quarterly estimates, with an annual reconciliation amount equal to the difference between the quarterly estimates and the actual, calculated Lease Amount. Tenant shall pay to the City quarterly in arrears with respect to each calendar quarter during the Term, an estimate of the Lease Amount due for that Operating Year based on Gross Revenues earned to date (each, an "Estimated Payment"), less prior Estimated Payments thereof. Each Estimated Payment shall be due within 45 days after the end of the quarter. Tenant shall pay to the City annually in arrears any Lease Amount due for that Operating Year less prior Estimated Payments. Each annual payment shall be due within 90 days after the end of the Operating Year. In the event this Agreement is terminated prior to the end of the Term hereof, Tenant shall pay the City, not later than 30 days after the early termination date, any portion of the Lease Amount due on the date of such early termination.

5.1.3 **Liquidated Damages.** If Tenant fails to operate the Facility or breaches the terms of this Agreement at any time prior to the natural expiration of the Agreement, Tenant hereby agrees that, upon its default hereunder and expiration of the cure period set forth below, it shall pay the City, as liquidated damages, within 30 days of receipt of the City's written demand therefore, 100% of the amount that would have been due to the City as Lease Amount according to the calculation set forth above as of the date of the City's written demand. If tenant elects to exercise paragraph 7.2 of this agreement to terminate the lease within first (7) years of this lease, Tenant will only be liable for Personal Guarantee of balance of the $500,000 operations loan amount, and the six-months lease termination notice period as defined in paragraph 7.2.

5.2. **Net Profit and Facility Expenses.** Subject to payment of all amounts due City under this Agreement and to the payment of Facility Expenses, Tenant shall be entitled to all income, revenues and profits from the Facility during the Term. After the Commencement Date, Tenant shall bear and pay all of the following ("Facility Expenses"): all routine and ordinary maintenance and repairs to the Facility required to preserve it in good working repair during their projected useful life, including (A) any costs incurred by or imposed on Tenant in the performance of its obligations under this Agreement, (B) all fees payable to City under this Agreement, and (C) any cost expressly identified as a Facility Expense in this Agreement, but expressly excluding (1) any cost allocated to the City under this Agreement and (2) any financing cost incurred by the City.

5.3. **Financials**

5.3.1 **Sales Recording and Records.** All records will be kept at the facility. The semi-annual P&L statement and the balance sheet to be furnished to the City as provided herein shall be prepared in accordance with generally accepted accounting principles (either cash or accrual basis). Tenant shall also be responsible for maintaining and reporting any documents or reports needed in accordance with the project participation agreement.

5.3.2 **Semi-Annual P&L Statements and Balance Sheets.**

(a) Semi-Annual Financial Reports. Tenant shall furnish the City with a Semi-Annual P&L Statement and Balance Sheet certified as correct by an authorized member or Officer of Tenant. This Report is due 45 days after the end of each reporting period during the Term, Such terms normally end July 1st and January 1st.

(b) Annual Financial Reports. Within 90 days following the end of each Operating Year commencing with respect to the first Full Operating Year, Tenant shall furnish the City with an Annual P&L Statement and an Annual Balance Sheet certified as correct by an authorized member or officer of Tenant.

(c) Form and Content. Each Semi-annual P&L Statement and Annual P&L Statement shall be in the form of the financial statement attached as Exhibit C. The Parties may change the form of the P&L Statements from time to time by mutual agreement. The P&L Statements and the Balance Sheets shall be prepared on a cash or accrual basis, as determined by Tenant, provided the method chosen for a particular Operating Year shall be consistently used throughout such Operating Year and subject to the requirements of Section 5.3 with respect to the Annual P&L Statement and the Balance Sheet.

5.3.3 Examination Rights.

(a) Examination of Books. Tenant shall, for a period of seven years following the delivery of each Annual P&L Statement, including the seven year period following the end of the Term, keep and maintain, safe and intact, all of the records, books and accounts required under this Section, and shall from time to time, upon request, make these records available to the City, the City's auditor, representative or agent for examination at any reasonable time on five days advance written notice. Tenant's books and records shall be made available for inspection by the City or its representative at the Facility. The City shall also have the right to make abstracts from the records, to make copies of any or all the records and to examine and make copies of any or all contracts, leases, licenses and concession agreements. In addition, on request of the City or the City's representatives, Tenant shall furnish copies of Tenant's state and local gross receipts tax returns.

(b) City Staff Inspections. City staff shall have the right, from time to time to visit and inspect the operations of the Facility to confirm compliance with this Agreement.

5.5 Capital Improvements, Repairs and Maintenance.

5.5.1 Capital Reserve Account. Commencing on the Commencement Date and continuing thereafter on each anniversary thereof until the Lease Expiration Date, City shall deposit $24,000 for the previous operating year into a separate interest bearing account established solely for the purpose of holding funds for use in making Capital Repairs or Improvements (the “Capital Reserve Account”). All interest shall be added to the Capital Reserve Account.

Notwithstanding anything to the contrary contained herein, Tenant’s maintenance, repair and replacement obligations under this Lease shall in no way be limited by the amount of funds from time to time held in the Capital Reserve Account.

LEASE RENT OR CAPITAL RESERVE ACCOUNT

5.5.2 Repairs and Maintenance. “Routine and Ordinary Repair or Replacement" means any maintenance and repair expense that individually is less than ($ 12,000). All such maintenance or repair expenses shall be a Facility Expense. A Capital Improvement means any repair or improvement that is individually in excess of ($ 12,000). All Capital Improvements, repairs, or maintenance projects shall require the City's prior authorization and, to the extent funds are available, are to be paid out of the Capital Reserve Account. At all times on and after the Commencement Date, to and including the date of the termination of the Term, by lapse of time or otherwise, the Tenant shall maintain the Facility in good repair and condition and in conformity with all requirements and shall make or cause to be made all Minor Repairs and Replacements. In making any such repairs, all work done by the Tenant, or on its account, shall be of first class quality in both materials and workmanship. In the event that the Tenant refuses or neglects to make any repairs required by this Agreement, or if Landlord is required to make any repairs necessitated by the negligent acts or omissions of the Tenant, its employees, agents, servants, or licensees, Landlord shall have the right, but shall not be obligated, to make such repairs on behalf of or for the account of the Tenant upon prior written notice to Tenant. In the event that Landlord shall make such repairs, such work shall be paid for by the Tenant upon receipt of a statement therefore in the amount of Landlord's costs plus an amount for overhead as shall be determined from time to time by Landlord or by offset to amounts owed by Landlord to the Tenant. Nothing herein contained shall prevent Landlord from determining that the failure of the Tenant to comply with the terms of this provision constitutes a material breach of this Agreement permitting Landlord to terminate this Agreement. Any amount unpaid shall accrue interest at the then existing Prime Rate plus five percent (5%) from the date incurred.

Maintenance for the facility parking lot will be the responsibility of the Tenant for the first two (2) years of the lease, except for the parking lot lighting, and thereafter shall revert back to the City.

5.5.3 Capital Improvements. Tenant and Landlord agree that all rent monies collected by Landlord from Tenant shall be deposited into an account known as the Capital Reserve Account. Landlord shall have control over these monies to make capital improvements to the building. Prior to April 1st of each Operating Year, Tenant shall submit a written request to the City Manager or authorized designee, of any Capital Improvement projects to be included in the City's annual capital improvement projects budget. Landlord agrees to meet with Tenant and discuss the feasibility and need for the requested capital improvements, but reserves the right to deny the requested improvements without explanation. However, the Landlord cannot deny an improvement that must be made in order to keep preserve the essential functions of the building. The cost of all City-approved Major Improvements shall be charged against the Capital Reserve Account. In the event that the cost of a Capital Improvement project exceeds the amount in the Capital Reserve Account, the shortfall shall be paid by the Landlord. Upon the sale of the building to the Tenant, all amounts then on deposit in the Capital Reserve Account shall be paid over by the Landlord to the Tenant.

6. TAXES

6.1 Tenant agrees that it is solely responsible for complying with all Local, State and Federal laws regarding taxation, including but not limited to, Gross Receipts Tax (GRT), and any and all employment taxes that may be due from time to time. Property Tax is a responsibility of the Landlord.

7. TERMINATION PROCEDURE; RIGHT OF FIRST REFUSAL

7.1 Tenant shall pay when due, and save Landlord harmless from and against, any and all costs, charges and expenses attributable to the Facility, including each fine, fee, penalty, charge (including governmental charges), assessments, sewer rent, Impositions, insurance premiums as may be required under this Lease, utility expenses, costs, expenses and obligations of every kind and nature whatsoever, general and special, ordinary and extraordinary, foreseen and unforeseen, the payment for which Landlord or Tenant is, or shall become liable by reason of any rights or interest of Landlord or Tenant in, to or under the Facility or this Lease or in any manner relating to the ownership, leasing, operation, management, maintenance, repair, rebuilding, use or occupation of the Facility, or of any portion thereof; provided, however, that nothing herein contained shall be construed as imposing upon Tenant any obligation to pay any Excluded Taxes of Landlord arising out of, or levied in connection with, this Lease or Landlord's right or interest in the Facility or the Rent.

7.2 At any time during the first seven (7) years of this lease, Tenant may, in writing, advise the Landlord that they wish to terminate the lease. Tenant is required to give the Landlord six (6) months notice before terminating the lease, and will be required to keep the business open and operational, with continued lease payments, during those last six (6) months at the same standards set forth elsewhere in this agreement. At the time that notice is given, Tenant must immediately make available its financial statements and books to the City, and must allow City to inspect and advertise the business for lease.

7.3 Landlord agrees that during the pendency of Tenants lease, Landlord will not advertise the building for sale, nor will Landlord actively look for any prospective buyers. Landlord agrees to not sell the building to any prospective with the buyer during the pendency of the lease. At any time if Tenant elects to buy the building and or at the expiration of the lease, tenant will have the first opportunity to buy the building at fair market value as determined by an appraisal at any time during the lease. At the end of the lease, should the Tenant decline to purchase the building, the City is free to sell the building to any qualified buyer, as deemed fit by the City. At the time of the sale of the building or property, Tenant will continue to remain as a tenant unless removed due to default clause stated in this agreement.

8. SERVICES

8.1 Commencing upon the Commencement Date and continuing through the Term, Landlord grants to Tenant the exclusive right to occupy, maintain and operate the Facility pursuant to this Agreement, and Tenant covenants and agrees to maintain and operate the Facility according to Sound Standards and Sound Practice and pursuant to the terms and conditions set forth in this Agreement.

8.2 Tenant shall during the Term, at Tenant's sole cost and expense, be responsible for supplying the Facility with electricity, heating, ventilating and air conditioning, water, natural gas, lighting, replacement for all lights (except for the parking lot lighting), restroom supplies, telephone service, window washing, security service, janitor, pest control and disposal services (including, if applicable, hazardous and biological waste disposal), and such other services as Tenant determines to furnish to the Facility. Landlord shall not be in default hereunder or be liable for any damage or loss directly or indirectly resulting from, nor shall the Lease Amount or Additional Rent be abated or a constructive or other eviction be deemed to have occurred by reason of, the installation, use or interruption of use of any equipment in connection with the furnishing of any of the foregoing services, any failure to furnish or delay in furnishing any such services, whether such failure or delay is caused by accident or any condition beyond the control of Landlord or Tenant or by the making of repairs or improvements to the Facility, or any limitation, curtailment, rationing or restriction on use of water, electricity, gas or any form of energy serving the Facility, whether such results from mandatory governmental restriction or voluntary compliance with governmental guidelines. Tenant shall pay the full cost of all of the foregoing services and all other utilities and services supplied to the Facility as Additional Rent.

8.3 **Operation Services.** Tenant shall have the right and responsibility to: (i) determine, establish, and implement the policies, standards, fees and schedules for the operation and maintenance of the Facility and all matters affecting customer relations; (ii) hire, train, and supervise all Facility employees; (iii) supervise and direct advertising, sales and business promotion; and (iv) establish accounting and payroll procedures and functions. Without in any way limiting Tenant's right and responsibility to operate the Facility in accordance with the terms of this Agreement, Tenant shall perform the following operations and maintenance services, or cause the same to be performed for the Facility. Unless specifically set forth otherwise in this Agreement, all expenditures of Tenant and costs and expenses incurred by Tenant in performing these services shall be Facility Expenses:

8.3.1. League, tournament, open and private bowling activities to be offered at the Facility.

8.3.2. Consummate arrangements with concessionaires, licensees, tournament promoters, contractors or other intended users of the Facility.

8.3.3. Enter contracts for the furnishing of utilities and maintenance and other services to the Facility.

8.3.4. Incur such expenses as shall reasonably be determined to be necessary for the proper operation of the Facility, including without limitation rental expenses for leased FF&E as necessary.

8.3.5. Maintain a level of Operating Inventory deemed appropriate by Tenant for supplying the needs of the Facility and its customers.

8.3.6. Use commercially reasonable efforts to do, or cause to be done, all such acts in and about the Facility as shall be reasonably necessary to comply with all requirements of each insurance policy applicable to the Facility (the "Insurance Requirements").

8.3.7. Use commercially reasonable efforts to market the Facility and maximize Gross Revenues, consistent with Sound Practice.

8.3.8. Purchase additional FF&E as necessary to operate and maintain the Facility in a first-class manner.

8.3.9. Pay initial activation charges or connection fees for utilities and services for the Facility.

8.3.10. Not permit any mechanic's or materialmen's liens to be asserted against the Facility for work or materials by or on behalf of Tenant.

8.3.11. Comply with all applicable laws, statutes, ordinances, orders, rules, regulations, permits, licenses, authorizations, directives and requirements of all governments and governmental authorities, which now or hereafter may be applicable to Tenant, the Facility or the operation of the Facility (the "Legal Requirements").

8.4 **Maintenance and Repair.** Tenant shall furnish, maintain and repair the Facility to keep it in first class condition and in good repair (damage by casualty or condemnation and reasonable wear and tear excepted) throughout its useful life.

8.4.1 General Maintenance, Repair and Upkeep. Tenant shall maintain the Facility in a clean, safe and attractive state, including, but not limited to the surrounding sidewalk and landscape areas, telephone and data lines, offices, rest rooms and open areas. A clean and attractive state includes replacing bulbs and ballasts in lamps and lighting fixtures; cleaning, repairing and replacing signs; maintaining fire alarm call boxes, fire extinguishers and hose boxes and systems in proper working condition; general facility maintenance and repairs by tradesmen as required to ensure a clean, attractive and safe environment such as maintenance and repairs of electrical equipment, plumbing fixtures; painting pedestrian areas, offices, rest rooms, etc., other repairs as necessary; supplying rest rooms with soap, towels, toilet paper and providing for their disposal.

8.4.2 Garbage Removal. Tenant shall arrange for the storage, removal and disposal of all waste material in connection with the Facility. Tenant shall also be responsible for all storage and disposal of all waste materials throughout the entire Facility. Tenant shall comply with all applicable ordinances, statutes and regulations for storage, removal and disposal of waste materials.

8.4.3 Pest Control. Tenant shall maintain a pest control program that minimizes the infestation of pests and vermin in accordance with all applicable ordinances, statutes and regulations.

8.4.4 Graffiti Removal. Tenant shall remove or cause to be removed all graffiti applied to surfaces of the Facility and elsewhere in and around the Facility in a manner (chemicals and process) approved by the Landlord.

8.4.5 Maintenance and Custodial Equipment. Tenant shall keep all maintenance and custodial equipment in good repair and working order.

8.4.6 Maintenance of Electronic Security and Surveillance Equipment. Tenant shall keep all electronic security and surveillance equipment in good repair and working order.

8.4.7 Maintenance of Score Boards, Sound System and Video Boards. Tenant shall maintain the scoreboards, sound system, video boards, and video production equipment at the Facility in good repair and working order.

8.4.8 Window Washing. Tenant shall be responsible for window washing.

8.5 **Personnel**. Except for Landlord employees working at the Facility for the Landlord in connection with Landlord Activities, all employees working at the Facility shall be full or part time employees of Tenant or an Affiliate. The number of employees working at the Facility, and the compensation (salaries or wages, benefits and commissions) paid to them, shall be reasonably established by Tenant. Tenant shall recruit, hire, train, discharge, promote and supervise the Facility staff, all of whom shall be Tenant employees and Tenant shall be solely responsible for paying all federal, state and local taxes and all benefits for all such employees. The compensation (including benefits) of the Facility staff and all other Facility employees shall be a Facility Expense.

8.6 **Specific Operating Procedures.** In addition to the more general responsibilities of Tenant for operations of the Facility as provided herein, Tenant shall operate the Facility in accordance with the following operating procedures:

8.6.1 Facility Operating Hours. Tenant shall operate the Facility on days and at hours consistent with Sound Practice, subject to closure due to, casualty, condemnation, Force Majeure Events or major alterations or improvements.

8.6.2 Fees and Charges. Tenant shall set and establish fees and charges accordingly to maintain operations of the business

8.6.3 Security and Crowd Control

i. Security. Tenant shall be responsible for the general safety, security and well being of all occupants of the Facility at all times, including providing and arranging for security and crowd control as reasonably necessary in connection with the Facility and events to be held therein. To the extent consistent with Sound Standards, Tenant shall provide security by means of electronic surveillance and foot patrols.

ii. Medical Staffing. To the extent consistent with Sound Standards, Tenant shall be responsible for (a) implementing appropriate medical policies as required on an event-by-event basis or (b) ensuring the access of on-call public medical services.

iii. Safety Plans. In conjunction with the Landlord, Tenant shall develop and implement (a) an emergency and evacuation plan and (b) a public safety and fire management plan for the Facility.

8.6.4 Landscape and Irrigation System Maintenance. Tenant shall maintain, repair and upkeep the landscape.

8.6.5 Tobacco. Tenant shall not allow the sale of tobacco products, either manually or through vending machines, anywhere within the Facility.

8.6.6 Management, Operation and Maintenance Plans. Tenant shall create a set of books, plans, or documents, which define management, operations, and maintenance of the facility. These documents shall be physically located within the facility.

8.7 **Contracts and Agreements.** All leases and financing agreements for additional FF&E beyond those initially provided by Landlord, and all contracts and agreements relating to the operation and maintenance of the Facility (including without limitation contracts for maintenance and repair services, pest control, supplies and landscaping services, and agreements for tournaments, banquets and other group functions), entered during the Term shall be entered by Tenant as the contracting party. Tenant shall not enter any contract or agreement which extends beyond the Term of this Agreement unless such contract or agreement is cancelable on 30 days' notice.

8.8 **Compliance with Environmental Laws.** Subsequent to the Commencement Date, Tenant shall comply with all federal, state and local laws and regulations pertaining to the storage, use and disposal of "Hazardous Materials", meaning any material, substance or matter which is flammable, explosive, corrosive, radioactive or toxic, or which contains asbestos, or is a pesticide, or is a chemical known to cause cancer or reproductive toxicity or which is defined as a hazardous substance, material or waste, or as a toxic substance, material or waste, in any federal, State of New Mexico or applicable local law, regulation or order. All expenditures of Tenant and costs and expenses incurred by Tenant in performing the foregoing services or in remediating damage to the Property resulting from the storage, use or disposal of such Hazardous Materials by Tenant subsequent to the Commencement Date shall be considered Facility Expenses and shall be paid or borne solely by Tenant. Landlord shall be responsible for all costs and expenses associated with the remediation of, and liability arising from or related to, damages to the Property from the storage, use or disposal of Hazardous Materials ("Hazmat Costs"): (A) before the Completion Date; or (B) percolating under the property whether before or after the Completion Date. Tenant will be responsible for all Hazmat Costs by Tenant, its employees, agents and contractors after the Commencement Date.

8.9 Tenant shall maintain, and (to the extent in its possession) turn over to Landlord upon expiration or termination of this Lease, then current operating manuals and original warranties (to the extent assignable) for all equipment and fixtures then located at the Facility specifically excluding, in all cases, Tenant's Personal Property at the Facility which Tenant's Personal Property may and which are subsequently removed by Tenant upon expiration or earlier termination of this Lease.

9. DESTRUCTION OF OR DAMAGE TO FACILITY

If the Facility is damaged by fire or other casualty during the Term of this Lease, Tenant shall (a) repair such damage and restore the Facility to substantially the same or better condition as existed before the occurrence of such fire or other casualty using materials of the same or better grade than that of the materials being replaced (herein, a "Casualty Repair") and (b) this Lease shall remain in full force and effect. Such repair and replacement by Tenant shall be done in accordance with the terms and the standards of this Agreement and Tenant shall, at its expense, obtain all permits required for such work. An architect or engineer selected by Landlord shall review, at Tenant's expense, all plans and specifications and all draw requests hereunder. In no event shall Lease Amount or Additional Rent abate, nor shall this Lease terminate by reason of such damage or destruction. Provided that no Event of Default by Tenant shall then exist under this Lease (and no event has occurred which, with the passage of time, the giving of notice, or both, would constitute an Event of Default), and provided Tenant has: (i) delivered to Landlord plans and specifications and a budget for such Casualty Repair (all of which Landlord shall have approved), and (ii) deposited with Landlord cash or a letter of credit meeting the requirements (other than amount) of a Letter of Credit outlined in Section 5 above, in the sum equal to the excess, if any, of the total cost set forth in such approved budget over the amount of insurance proceeds received on account of such casualty, Landlord shall make available to Tenant all insurance proceeds actually received by Landlord on account of such casualty, for application to the costs of such approved repair and restoration, as set forth below.

10. INSURANCE, HOLD HARMLESS AND INDEMNIFICATION

10.1 To the fullest extent permitted by law, Landlord shall not be liable to Tenant for any damage to or loss or theft of any property or for any bodily or personal injury, illness or death of any person in, on or about the Facility arising at any time and from any cause whatsoever. Tenant waives all claims against Landlord arising from any liability described in this paragraph 10.

10.2 Tenant hereby agrees to indemnify and defend Landlord against and hold Landlord harmless from all third-party claims, demands, liabilities, damages, losses, costs and expenses, including attorneys' fees and disbursements, arising from or related to any use or occupancy of the Facility, or any condition of the Facility, or any damage to any property (including property of employees and invitees of Tenant) or any bodily or personal injury, illness or death of any person (including employees and invitees of Tenant) occurring in, on or about the Facility or any part thereof or any part of the building or the land constituting a part of the Facility arising at any time and from any cause whatsoever or occurring outside the Facility when such damage, bodily or personal injury, illness or death is proximately caused by any act or omission of Tenant or its agents, officers, employees, contractors, invitees or licensees. This paragraph 10.2 shall survive the termination of this Lease with respect to any damage, bodily or personal injury, illness or death occurring prior to such termination.

10.3 Insurance

10.3.1 Tenant's Insurance. Tenant shall obtain, pay for and maintain at all times during the Term the following insurance on or in connection with the Facility:

(a) Commercial General Liability Insurance, against claims for personal and bodily injury, death or property damage occurring on, in or as a result of the use of the Facility, in an amount not less than $1,000,000 per occurrence/annual aggregate on a claims occurrence basis; and liquor legal liability (or so-called Dram Shop Liability) insurance in an amount not less than $1,000,000 per occurrence/annual aggregate.

(b) Business Automobile Liability Insurance (including Non-Owned and Hired Automobile Liability), against claims for personal and bodily injury, death or property damage occurring on, in or as a result of the use of the Facility, in an amount not less than $250,000 per occurrence/annual aggregate on a claims occurrence basis; and liquor legal liability (or so-called Dram Shop Liability) insurance in an amount not less than $1,000,000 per occurrence/annual aggregate.

(c) Workers' Compensation and Employers Liability Insurance as required by New Mexico Law. Tenant shall comply with the provisions of the New Mexico Workers' Compensation Act, the Subsequent Injury Act, and the New Mexico Occupational Disease Disablement Law. Tenant shall procure and maintain during the term of this Lease complete Workers' and Employer's Liability Insurance in accordance with New Mexico laws and regulations. Such insurance shall include coverage permitted under Section 52-1-10, NMSA 1978, for safety devices. With respect to Workers' Compensation Insurance, if Tenant elects to be self-insured, Tenant shall comply with the applicable requirements of law. If any portion of the work is to be sublet, Tenant shall require the subtenants similarly to provide such coverage (or qualify as a self-insured) for all the latter's employees to be engaged in such work. Tenant hereby covenants and agrees that City, its officers, or employees will not be liable or responsible for any claims or actions occasioned by Tenant’s failure to comply with the provisions of this subparagraph and that the Indemnification provision of this Agreement shall apply to this paragraph. It is expressly agreed that the employees of Tenant are not City employees for any purpose.

(d) Business Interruption Insurance at limits sufficient to cover 100% of the period of indemnity not less than twelve (12) months from time of loss, including extended period of indemnity which provides that after the physical loss to the Improvements and equipment has been repaired, the continued loss of income will be insured until such income either returns to the same level it was at prior to the loss, or the expiration of six (6) months from the date that the Facility is repaired or replaced and operations are resumed, whichever first occurs.

(e) During any period in which Capital Improvements, Capitalized Repairs, or any other substantial alterations at the Facility are being undertaken, builder's risk insurance covering the total completed value, including all hard and soft costs (which shall include business interruption coverage) with respect to the Improvements being constructed, altered or repaired (on a completed value, non-reporting basis), replacement cost of work performed and equipment, supplies and materials furnished in connection with such construction, alteration or repair of Improvements or Building Systems Equipment, together with such other endorsements as

Landlord may reasonably require, and general liability, worker's compensation and automobile liability insurance with respect to the Improvements being constructed, altered or repaired.

(f) Tenant shall, at all times during the Term, maintain, at Tenant's sole cost and expense, an insurance policy naming Landlord as an additional insured covering the Landlord's Personal Assets, insuring the Landlord's Personal Assets against loss by fire and other casualty or theft, with such coverage and deductibles to be agreed to between Landlord and Tenant and consistent with insurance coverage previously maintained on the Landlord's Personal Assets (whether by Landlord or any prior owner of the Landlord's Personal Assets).

(g) Such other insurance (or other or different terms with respect to any insurance required pursuant to this Article 10.3.1, including without limitation amounts and types of coverage, deductibles, form of mortgagee clause, insurer rating) on or in connection with any of the Facility as Landlord may reasonably require; provided that such insurance is available to Tenant on a commercially reasonable basis and is consistent, as to types of coverage and amounts, with the requirements generally of prudent owners or operators of similar properties.

10.3.2 Policies of insurance shall be written by companies authorized to write such insurance in New Mexico. When requested by City, Tenant shall allow City to review in the presence of Tenant’s insurance representatives any or all policies of insurance for the insurance coverage required in this Section.

10.3.3 Each policy required by any provision of Section 10.3.1 except clause (d) thereof, shall provide that it may not be cancelled, substantially modified or allowed to lapse on any renewal date except after at least thirty (30) days' prior written notice to Landlord.

10.3.4 Tenant shall pay as they become due all premiums for the insurance required by Section 10.3.1, shall renew or replace each policy and deliver to Landlord evidence of the payment of the full premium therefor or installment then due at least ten (10) days prior to the expiration date of such policy, and shall promptly deliver to Landlord all original certificates of insurance evidencing such coverages.

10.3.5 Each policy obtained by Tenant shall contain an effective waiver by the carrier against all claims for payment of insurance premiums against Landlord and shall contain a full waiver of subrogation against the Landlord. Each policy obtained by Landlord, if any, shall contain an effective waiver by the carrier against all claims for payment of insurance premiums against Tenant and shall contain a full waiver of subrogation against Tenant. Tenant waives subrogation against Landlord to extent of insurance proceeds actually received or would have been received if adequate coverage had been in place.

10.3.6 Landlord's Right to Obtain Tenant's Insurance. Notwithstanding anything to the contrary contained in this Article10.3.1, if at any time Tenant fails to provide evidence of the insurance required to be maintained by Tenant hereunder within ten (10) Business Days of Landlord's request for same (said requests not to be made more than once per calendar quarter), Landlord shall have the right, but not the obligation, by providing written notice of such election to Tenant, to itself obtain and maintain all or any portion of such insurance, in which event Landlord shall charge Tenant the cost of such insurance as Additional Rent hereunder. In the event that Landlord so elects to obtain and maintain such insurance, Landlord shall cause Tenant, if Tenant so requests in writing, to be added as additional insureds and loss payees under the applicable insurance policy(ies), as its interests may appear. Landlord and Tenant agree to reasonably cooperate with each other in order to coordinate the acquisition and maintenance of any such insurance by Landlord, which may include, without limitation, the execution of any required forms and applications and providing relevant information to Landlord's insurance carrier.

10.3.7 During the continuance of any Event of Default, Tenant shall pay to Landlord on the first day of each calendar month an amount equal to one twelfth (1/12) of the premiums for property and casualty insurance required by this paragraph 10, as reasonably estimated by Landlord on the basis of bills and estimates thereof. If such premium payments shall have been made by Tenant, such amounts shall be held by Landlord, without interest, and shall not be deemed to be trust funds and may be commingled with the general funds of Landlord. Landlord shall apply such amounts to the payment of the insurance premiums with respect to which such amounts were paid. Landlord shall make no charge for holding and applying such amounts. If at any time the amount on deposit pursuant to this paragraph shall be less than the amount deemed necessary by Landlord to pay such premiums as they become due, Tenant shall pay to Landlord the amount necessary to make the deficiency within five (5) calendar days after notice from Landlord requesting payment thereof. Upon the expiration or termination of the term of this Lease (other than as a result of an Event of Default), Landlord shall promptly refund to Tenant any amount held by Landlord pursuant to this paragraph.

11. COMPLIANCE WITH LAWS, COVENANTS

11.1 Tenant shall with respect to the Facility and Bowling Equipment throughout the Term promptly comply or cause compliance with or remove or cure any violation of any and all present and future laws including the Americans with Disabilities Act of 1990 as the same may be amended from time to time (“ADA”) (Landlord acknowledges that Tenant shall only be required to make accommodations under the ADA to the extent required by the ADA), ordinances (zoning or otherwise), orders, rules, regulations and requirements of all Federal, State, municipal and other governmental bodies having jurisdiction over the Facility and the appropriate departments, commissions, boards and officers thereof, or any other body now or hereafter constituted exercising lawful or valid authority over the Facility (collectively, “Legal Requirements”), or any portion thereof, and whether the compliance, curing or removal of any such violation and the costs and expenses necessitated thereby shall have been foreseen or unforeseen, ordinary or extraordinary, and whether or not the same shall be presently within the contemplation of Landlord or Tenant or shall involve any change in governmental policy, or require structural or extraordinary repairs, alterations or additions by Tenant and irrespective of the amount of the costs thereof.

11.2 In connection with its operations or other activities at the Facility, Tenant shall at all times and in all respects comply with all Environmental Laws included Federal, State and local laws, ordinances and regulations pertaining to Hazardous Substances, which are applicable to the Facility and Tenant’s activities. Upon expiration or earlier termination of this Lease, Tenant shall cause all Hazardous Substances introduced to the Facility by Tenant or its agents or invitees to be removed from the Facility as required by and in compliance with applicable environmental laws, and transported for use, storage, or disposal in accordance and in compliance with all applicable Environmental Laws. “Environmental Laws” means the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §§6901, et seq. (RCRA), as amended, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§9601 et seq. (CERCLA), as amended, the Toxic Substance Control Act, as amended, 15 U.S.C. §§2601 et seq., the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. §§136 et seq., and all applicable federal, state and local environmental laws, ordinances, rules and regulations, as any of the foregoing may have been or may be from time to time amended, supplemented or supplanted, and any other federal, state or local laws, ordinances, rules and regulations, now or hereafter existing relating to regulations or control of Hazardous Material or materials. The term “Hazardous Materials” as used in this Lease shall mean substances defined as “hazardous substances”, “hazardous materials”, “hazardous wastes” or “toxic substances” in any applicable federal, state or local statute, rule, regulation or determination, including the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. §§1801, et seq.; the Resource, Conservation and Recovery Act of 1976, 42 U.S.C. §§6901, et seq.; and, asbestos, pcb’s, radioactive substances, methane, volatile hydrocarbons, petroleum or petroleum-derived substances or wastes, radon, industrial solvents or any other material as may be specified in applicable law or regulations.

12. PARTIAL TAKING

If less than substantially all of any Site shall be taken for public or quasi-public purposes, Tenant will promptly, at its sole cost and expense, restore, repair, replace or rebuild the improvements so taken in conformity with the requirements of this agreement as nearly as practicable to the condition, size, quality of workmanship and market value thereof immediately prior to such taking, without regard to the adequacy of any condemnation award for such purpose. There shall be no abatement of Rent during such period of restoration. In performing its obligations, Tenant shall be entitled to all condemnation proceeds available to Landlord for restoration or repair of the Facility under the same terms and conditions for disbursement set forth for casualty proceeds. Tenant shall, at its sole cost and expense, negotiate and, if necessary, litigate, the amount of the award, and Landlord shall have the right to participate in such process, at its sole cost and expense (it being acknowledged and agreed by Landlord that Tenant shall have the right to control such proceeds and settle all awards), and if Tenant fails to diligently prosecute such efforts, Landlord may take control of the process. Any condemnation proceeds in excess of the amounts used or requested as are made by Tenant for restoration or repair of the Facility, shall be the sole and exclusive property of Landlord. Tenant shall have the right to control all condemnation proceedings on Landlord’s behalf, and shall also be entitled to receive any award made by the condemning authority in respect of business loss or, if available, business relocation and any other claim permitted by law which does not, in any such case, diminish Landlord’s recovery.

13. SUBSTANTIAL TAKING

In the event the whole of the Facility shall be taken or condemned in any eminent domain, condemnation, compulsory acquisition, expropriation, or like proceeding (including transfers in lieu thereof) by any competent authority for any public or quasi-public use or purpose, or in the event such a portion thereof shall be taken or condemned (or transferred in lieu thereof) as to make it imprudent or unreasonable to use the remaining portion of the Facility for the permitted uses of the type and class immediately preceding such taking or condemnation (or transfer in lieu thereof) then, in any of such events, this Lease shall terminate as of the date of the taking and the parties hereto shall have no further liability under the lease .

14. DEFAULT: EVENTS OF DEFAULT

14.1 The occurrence of any one or more of the following events (“Event of Default”) shall constitute a breach of this Lease by Tenant:

14.1.1 Tenant fails to pay any Lease Amount as and when such Lease Amount becomes due, and such failure continues for five (5) calendar days after written notice thereof, provided that if Tenant is more than five (5) calendar days late in the payment of Lease Amount once in any twelve (12) consecutive month period, only one notice need be given by Landlord during such 12 month period and any subsequent failure to pay Lease Amount on or before its due date within such twelve (12) consecutive months shall constitute an Event of Default after five (5) calendar days without notice;

or

14.1.2 An Event of Default occurs under paragraph 21, subletting/assignment; or

14.1.3 Tenant fails to perform or breaches any agreement or covenant of this Lease not separately covered in this paragraph 14 to be performed or observed by Tenant as and when performance or observance is due and such failure or breach continues for more than thirty (30) calendar days after Landlord's giving written notice thereof to Tenant; provided, however, that if, by the nature of such agreement or covenant, such failure or breach cannot reasonably be cured within such period of thirty (30) calendar days, an Event of Default shall not exist as long as Tenant commences with due diligence and dispatch the curing of such failure or breach within such period of thirty (30) calendar days and, having so commenced, thereafter prosecutes with diligence and dispatch and completes the curing of such failure or breach within a reasonable time not to exceed one hundred eighty (180) calendar days, provided, further, that in the event that the cure of such failure or breach cannot be cured within such one hundred eighty (180) day period and the cure of such failure or breach does not involve a cost in excess of $100,000, then the Event of Default shall be waived so long as Tenant is diligently continuing to prosecute the curing of such failure or breach; or

14.1.4 Tenant (i) files, or consents by answer or otherwise to the filing against Tenant of, a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction, (ii) makes an assignment for the benefit of Tenant's creditors, (iii) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of Tenant or of any substantial part of Tenant's property, or (iv) takes corporate action for the purpose of any of the foregoing; or

14.1.5 A court or government authority enters an order, and such order is not stayed or vacated within sixty (60) calendar days, (i) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Tenant or with respect to any substantial part of Tenant's property, or (ii) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy, insolvency or other debtors' relief law of any jurisdiction, or (iii) ordering the dissolution, winding-up or liquidation of Tenant; or

14.1.6 Any event occurs which is specifically stated to be an Event of Default under this Lease; or

14.1.7 An event of default shall occur under any loan agreement, indenture or other agreement related to Debt of Tenant securing or relating to an amount in excess of $75,000 and which event of default causes the lenders (or other parties) under such loan agreement, indenture or other agreement to exercise the right to accelerate the Debt or other obligations secured thereby. Tenant shall promptly give notice of any such default or acceleration to Landlord; or

15.1.8 Any representation or warranty of Tenant contained in this Lease shall have been materially and adversely false as of the date it was made and not corrected within thirty (30) calendar days after Landlord gives written notice thereof to Tenant; or

14.1.9 This Lease or any estate of Tenant hereunder is levied upon under any attachment or execution and such attachment or execution is not stayed or vacated within thirty (30) calendar days; or

14.1.10 Tenant shall abandon the Facility for thirty (30) calendar days; or

14.1.11 Any judgment or order for the payment of money in excess of $50,000 shall be rendered against Tenant and not paid or otherwise covered under any policy of insurance within thirty (30) calendar days after all rights to appeal shall have expired; or

14.1.12 Tenant fails to continuously maintain all insurance required to be maintained by Tenant in accordance with the terms and conditions of this Lease.

14.2 Landlord may treat the occurrence of any one or more of the foregoing Events of Default as a breach of this Lease. For so long as such Event of Default continues, Landlord, at its option and with or without notice or demand of any kind to Tenant or any other Person, may have any one or more of the remedies provided in this Lease, in addition to all other remedies and rights provided at law or in equity.

15. REMEDIES

15.1 Upon the occurrence of and during the continuance of an Event of Default, Landlord shall, in addition to, and not in derogation of any remedies for any preceding breach, with or without notice of demand (except as otherwise expressly provided herein) and without limiting Landlord in the exercise of any right or remedy which Landlord may have by reason of such Event of Default have all of the following remedies available:

15.1.1 Landlord shall have the right to terminate Tenant's right to possession of the Facility and repossess the Facility by any lawful means without terminating this Lease. Landlord shall use good faith and reasonably prompt efforts, to the extent required by applicable law of the state where the Facility are located, to re-let the Facility for the account of Tenant for such rent and upon such terms as may be satisfactory to Landlord. For the purposes of that re-letting, Landlord may repair, and perform normal remodeling and alterations to the Facility. If Landlord fails to re-let the Facility, Tenant shall pay to Landlord the Rent in this Lease for the balance of the Term as those amounts become due in accordance with the terms of this Lease. If Landlord re-lets the Facility, but fails to realize a sufficient sum from the re-letting to pay the full amount of Rent in this Lease for the balance of the Term as those amounts become due in accordance with the terms of this Lease, after paying all of the costs and expenses of all normal and customary decoration, repairs, remodeling, alterations and additions and the expenses of the re-letting and of the collection of the rent accruing from the re-letting, Tenant shall pay to Landlord the amount of any deficiency upon Landlord's demand from time to time made.

15.1.2 Landlord shall have the right at any time to give a written termination notice to Tenant and, on the date specified in such notice, Tenant's right to possession shall terminate and this Lease shall terminate. Upon such termination, Landlord shall have the right to recover from Tenant:

(a) The "worth at the time of determination" of all unpaid Rent which had been earned at the time of termination;

(b) The "worth at the time of determination" of the amount by which the unpaid Rent for the balance of the then Term of this Lease after the time of termination, excluding the potential Lease Term under any unexercised options for any Extension Terms, exceeds the greater of (A) the net rental proceeds actually received or to be received from any actual subsequent replacement tenant(s) for any Site or (B) the amount of such rental loss that Tenant proves could be reasonably avoided; and

(c) All other amounts necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform all of Tenant's obligations under this Lease or which in the ordinary course of things would be likely to result therefrom. The "worth at the time of determination" of the amounts referred to in clause (i) above shall be computed by allowing interest at the Overdue Rate. The "worth at the time of determination" of the amount referred to in clause (ii) above shall be computed by discounting such amount to present value by using the discount rate equal to the sum of two percent (2%) plus the then Treasury Rate. For the purpose of determining unpaid Rent under clause (i) and (ii) above, the Rent reserved in this Lease shall be deemed to be the total Rent payable by Tenant under paragraph 5 hereof.

15.1.3 Even if Landlord terminates Tenant's possession under this Lease, this Lease shall continue in effect and Landlord shall have the right to enforce all its rights and remedies under this Lease, including the right to recover all Rent as it becomes due under this Lease up to the time of the termination. Acts of maintenance or preservation or efforts to relet the Facility or the appointment of a receiver upon initiative of Landlord to protect Landlord's interest under this Lease shall not constitute a termination of the Lease unless and until written notice of such termination is given by Landlord to Tenant. Landlord shall have unrestricted rights of entry for such purposes following an Event of Default. Landlord shall be entitled to an administrative fee of five percent (5%) of all amounts expended under this paragraph 15.

15.1.4 All agreements and covenants to be performed or observed by Tenant under this Lease shall be at Tenant's sole cost and expense and without any abatement of Lease Amount or Additional Rent. If Tenant fails to pay any sum of money to be paid by Tenant or to perform any other act to be performed by Tenant under this Lease as and when due or required to be performed, Landlord shall have the right, but shall not be obligated, and without waiving or releasing Tenant from any obligations of Tenant, to make any such payment or to perform any such other act on behalf of Tenant in accordance with this Lease. All sums so paid by Landlord and all necessary incidental costs shall be deemed Additional Rent hereunder and shall be payable by Tenant to Landlord on demand, together with interest on all such sums from the date of expenditure by Landlord to the date of repayment by Tenant at the Overdue Rate. Landlord shall have, in addition to all other rights and remedies of Landlord, the same rights and remedies in the event of the nonpayment of such sums (plus interest at the Overdue Rate) by Tenant as in the case of default by Tenant in the payment of Rent.

15.1.5 If Tenant abandons or surrenders the Facility, or any portion thereof, or an Event of Default by Tenant pursuant to paragraph 14.1.11 above shall have occurred, or Tenant is dispossessed by process of law or otherwise, any movable furniture, equipment, trade fixtures or personal property belonging to Tenant and left in the Facility, or any portion thereof, shall be deemed to be abandoned, at the option of Landlord, and Landlord shall have the right to sell or otherwise dispose of such personal property in any commercially reasonable manner. If an Event of Default by Tenant pursuant to paragraph 14.1.11 above shall have occurred Landlord shall have the right, but not the obligation, to sublet the Facility, or any portion thereof, on reasonable terms for the account of Tenant, and Tenant shall be liable for all costs of such subletting, including the cost of preparing the Facility, or any portion thereof, for subtenants and leasing commissions paid to brokers.

15.1.6 Landlord shall be entitled to collect from Tenant Landlord's costs and expenses, including attorneys' fees and expenses, in connection with the enforcement of its remedies and/or the defense of any matter, including during an appeal and whether suit is actually filed or not.

15.1.7 Upon the occurrence of and during the continuance of an Event of Default, Landlord shall have the right to commence an action in any court of competent jurisdiction located in the State of New Mexico for the purpose of adjudicating the Event of Default and any or all of Landlord's rights and remedies under the Lease. Tenant hereby consents to the exercise of personal jurisdiction over Tenant in any such court in New Mexico and to New Mexico as the choice of venue.

16. LANDLORD'S RIGHT OF ENTRY

Landlord, and its respective designees, shall have the right to enter the Facility, and any part of the Facility, at any time during normal business hours and any part of the Facility on Two (2) Business Days' advance notice and to inspect the same, post notices of non-responsibility, monitor construction, perform appraisals, perform environmental site assessments and engineering studies, and during the last twenty four (24) months of the Term or at any time after and during the continuance of an Event of Default, exhibit the Facility to prospective purchasers, and examine Tenant's books and records pertaining to the Facility, insurance policies, certificates of occupancy and other documents, records and permits in Tenant's possession with respect to the Facility; provided, however, that such entry shall (i) not unreasonably interfere with Tenant's conduct of its business operations and (ii) be subject to the escort of Tenant.

17. NOTICES

Notices, statements, demands, or other communications required or permitted to be given, rendered or made by either party to the other pursuant to this Lease or pursuant to any applicable law or requirement of public authority, shall be in writing (whether or not so stated elsewhere in this Lease) and shall be deemed to have been properly given, rendered or made, when received by personal delivery or overnight delivery or overnight courier delivery (or, if such delivery is refused, upon the date that delivery would have occurred but for such refusal) or facsimile transmission (with electronic confirmation therefor) with a confirmation copy of the entire original transmittal sent by overnight delivery or by overnight courier delivery addressed to the other parties as follows:

To Landlord: City Of Alamogordo
City Manager's Office
1376 E 9th St
Alamogordo, NM 88310

To Tenant: Downtown Venture Corporation
3751 Mesa Village Dr
Alamogordo, NM 88310

Any party listed in this paragraph 17 may, by notices as aforesaid, designate a different address for addresses for notice, statements, demands or other communications intended for it.

18. MECHANICS' LIENS

18.1 Except for liens created by or through the act of Landlord, Tenant shall not suffer or permit any mechanic's lien or other lien to be filed or recorded against the Facility, equipment or materials supplied or claimed to have been supplied to the Facility at the request of Tenant, or anyone holding the Facility, or any portion thereof, through or under Tenant. If any such mechanic's lien or other lien shall at any time be filed or recorded against the Facility, or any portion thereof, Tenant shall cause the same to be discharged of record or bonded over within sixty (60) calendar days after the date that Tenant receives notice of filing or recording of the same. However, in the event Tenant desires to contest the validity of any lien it shall (i) on or before thirty (30) calendar days prior to the due date thereof (but in no event later than sixty (60) calendar days after the filing or recording thereof), notify Landlord, in writing, that Tenant intends to so contest same; (ii) on or before the due date thereof, if such lien involves an amount in excess of $10,000, bond over or deposit with Landlord security (in form and content reasonably satisfactory to Landlord) for the payment of the full amount of such lien, and from time to time deposit additional security so that, at all times, adequate security will be available for the payment or bonding over of the full amount of the lien together with all interest, penalties, costs and other charges in respect thereof.

If Tenant complies with the foregoing, and Tenant continues, in good faith, to contest the validity of such lien by appropriate legal proceedings which shall operate to prevent the collection thereof and the sale or forfeiture of the Facility, or any part thereof, to satisfy the same, Tenant shall be under no obligation to pay such lien until such time as the same has been decreed, by court order, to be a valid lien on the Facility. If an Event of Default exists, Landlord may apply any deposit then held by Landlord with respect to any such lien to discharge such lien. If no Event of Default exists, then any deposit then held by Landlord will be so applied upon Tenant's written direction. Any surplus deposit retained by Landlord, after the payment of the lien shall be repaid to Tenant. Provided that nonpayment of such lien does not cause Landlord to be in violation of any of its contractual undertakings, Landlord agrees not to pay such lien during the period of Tenant's contest. However, if Landlord pays for the discharge of a lien or any part thereof from funds of Landlord (and not amounts deposited with Landlord by Tenant for such event), any amount paid by Landlord, together with all costs, fees and expenses in connection therewith (including attorney's fees of Landlord plus an administration fee equal to 5% of such costs and expenses), shall be repaid by Tenant to Landlord on demand by Landlord, together with interest thereon at the Overdue Rate. Tenant shall indemnify and defend Landlord against and save Landlord and the Facility, and any portion thereof, harmless from and against all losses, costs, damages, expenses, liabilities, suits, penalties, claims, demands and obligations, including attorney's fees, resulting from the assertion, filing, foreclosure or other legal proceedings with respect to any such mechanic's lien or other lien or the attempt by Tenant to discharge same as above provided.

18.2 All materialmen, contractors, artisans, engineers, mechanics, laborers and any other Person now or hereafter furnishing any labor, services, materials, supplies or equipment to Tenant with respect to the Facility, or any portion thereof, are hereby charged with notice that they must look exclusively to Tenant to obtain payment for the same. Notice is hereby given that Landlord shall not be liable for any labor, services, materials, supplies, skill, machinery, fixtures or equipment furnished or to be furnished to Tenant upon credit, and that no mechanic's lien or other lien for any such labor, services, materials, supplies, machinery, fixtures or equipment shall attach to or affect the estate or interest of Landlord in and to the Facility, or any portion thereof.

18.3 Tenant shall not create, permit or suffer, and, subject to the provisions of paragraph 21(a) hereof, shall promptly discharge and satisfy of record, any other lien, encumbrance, charge, security interest, or other right or interest which, as a result of Tenant's action or inaction contrary to the provisions hereof, shall be or become a lien, encumbrance, charge or security interest upon the Facility, or any portion thereof, or the income therefrom, other than Permitted Encumbrances. However, in the event Tenant desires to contest the validity of any other lien, encumbrance, charge, security interest, or other right or interest it shall (i) on or before sixty (60) calendar days prior to the due date thereof (but in no event later than sixty (60) calendar days after Tenant receives notice of the filing or recording thereof), notify Landlord, in writing, that Tenant intends to so contest same; (ii) on or before the due date thereof, if such lien, encumbrance, charge, security interest, or other right or interest involves an amount in excess of $10,000, bond over or deposit with Landlord security (in form and content reasonably satisfactory to Landlord) for the payment of the full amount of such lien, encumbrance, charge, security interest, or other right or interest, and from time to time deposit additional security so that, at all times, adequate security will be available for the payment or bonding over of the full amount of such lien, encumbrance, charge, security interest, or other right or interest together with all interest, penalties, costs and other charges in respect thereof.

19. END OF TERM

19.1 Upon the expiration or earlier termination of this Lease in its entirety, Tenant shall surrender the Facility to Landlord in good operating condition and repair suitable for the use of the Facility for the Permitted Use, except as repaired, rebuilt or altered as required or permitted by this Lease (or, in the case of termination pursuant to paragraph 13, as condemned). Upon expiration of this Lease in its entirety, Tenant shall remove all alterations not consented to by Landlord and all of Tenant’s Personal Property from the Facility and the Bowling Equipment, unless Landlord has previously acquired the Bowling Equipment, in which event all Bowling Equipment shall remain with the Facility. Tenant shall repair at its sole cost any damage caused by such removal. Any Personal Property not so removed, including Tenant’s Personal Property shall become the property of Landlord at no cost, expense or liability to either party. Twelve (12) months prior to the expiration or earlier termination of the Lease in its entirety and for each Site, Landlord and Tenant shall jointly prepare an inspection report identifying those matters requiring repair, restoration or replacement prior to surrender of the Facility. Without limitation of Landlord’s regular inspection rights under this Lease, if the Lease is not extended for any Extension Term then 24 months prior to the expiration or termination of the Primary Term and if the Lease is extended for any Extended Term then eighteen (18) months prior to the expiration or termination of the Term, Landlord and Tenant shall re-evaluate the condition of the Facility and update the inspection report. Tenant covenants not to defer any replacement work during the final twenty (24) months of the Term.

19.2 If the Facility is not surrendered as above set forth, Tenant shall indemnify, defend and hold Landlord harmless from and against loss or liability resulting from the delay by Tenant in so surrendering Facility, including any claim made by any succeeding occupant founded on such delay. Tenant’s obligation to observe or perform this covenant shall survive the expiration or other termination of this Lease for six (6) years. In addition to the foregoing, and in addition to the Additional Rent, Tenant shall pay in advance and on a monthly basis to Landlord a sum equal to 1/12 of one hundred fifty percent (150%) of the Lease Amount payable during the preceding year during each month or portion thereof for which Tenant shall remain in possession of the Facility or any part thereof after the termination of the Term or of Tenant’s rights of possession, whether by lapse of time or otherwise. The provisions of this paragraph 19.2 shall not be deemed to limit or constitute a waiver of any other rights or remedies of Landlord provided herein, at law or at equity.

19.3 All property of Tenant not removed on or before the last day of the Term of this Lease shall be deemed abandoned. Tenant hereby agrees that Landlord may remove all property of Tenant, including Tenant's Personal Property, from the Facility upon termination of this Lease and to cause its transportation and storage, all at the sole cost and risk of Tenant and Landlord shall not be liable for damage, theft, misappropriation or loss thereof and Landlord shall not be liable in any manner in respect thereto and Landlord shall be entitled to dispose of such property, as Landlord deems fit, without the requirement of an accounting. Tenant shall pay all costs and expenses of such removal, transportation and storage. Tenant shall reimburse Landlord upon demand for any expenses reasonably and actually incurred by Landlord with respect to removal or storage of abandoned property and with respect to restoring said Facility in accordance with the terms and conditions of this Lease.

19.4 Except for surrender upon the expiration or earlier termination of the Term hereof as expressly provided herein, no surrender to Landlord of this Lease or of the Facility shall be valid or effective unless agreed to and accepted in writing by Landlord.

20. MEMORANDUM OF LEASE

The parties agree to simultaneously with the execution of this Lease promptly execute a Memorandum of Lease in recordable form and either of the parties shall have the right, without notice to the other party, to record such Memorandum of Lease. If a Memorandum of Lease is recorded, Landlord and Tenant shall execute such customary amendments and terminations related thereto as may be required or requested by Landlord or Tenant.

21. SUBLETTING/ASSIGNMENT

21.1 Except as set forth in paragraph 21.2 below, Tenant shall not, directly or indirectly, without the prior written consent of Landlord, assign this Lease or any interest herein, or any interest in Tenant, or sublease the Facility or any part thereof, or permit the use or occupancy of the Facility or any portion thereof, by any Person other than Tenant, such consent not to be unreasonably withheld, conditioned or delayed. This Lease shall not, nor shall any interest herein, be assignable as to the interest of Tenant involuntarily or by operation of law without the prior written consent of Landlord, such consent not to be unreasonably withheld, conditioned or delayed. For purposes of this paragraph, the occurrence of a Corporate Control Event, shall be deemed to be an assignment of this Lease which is prohibited by the preceding paragraph unless Tenant obtains Landlord's prior written consent as set forth above. Any of the foregoing prohibited acts without such prior written consent of Landlord, if required, shall be void and shall, at the option of Landlord, constitute an immediate Event of Default that entitles Landlord to all remedies available at law and pursuant to this Lease. Tenant agrees that the instrument by which any assignment or sublease to which Landlord consent is accomplished shall expressly provide that the assignee or subtenant will perform all of the covenants to be performed by Tenant under this Lease (in the case of a partial assignment or a sublease, only insofar as such covenants relate to the portion of the Facility subject to such partial assignment or a sublease) as and when performance is due after the effective date of the assignment or sublease and that Landlord will have the right to enforce such covenants directly against such assignee or subtenant. Any purported assignment or sublease without an instrument containing the foregoing provisions shall be void. Unless and until expressly released by Landlord, Tenant shall in all cases remain primarily liable (and not liable merely as a guarantor or surety) for the performance by any assignee or subtenant of all such covenants, as if no assignment or sublease had been made.

21.2 If Landlord consents in writing, Tenant may complete the intended assignment or sublease with its terms and conditions approved in writing by the Landlord.

21.3 Unless and until expressly released by Landlord (it being agreed that Landlord shall not be required to give such release), no assignment or sublease whatsoever shall release Tenant from Tenant's obligations and liabilities under this Lease (which shall continue as the obligations of a principal and not of a guarantor or surety) or alter the primary liability of Tenant to pay all Rent and to perform all obligations to be paid and performed by Tenant. The acceptance of Rent by Landlord from any other Person shall not be deemed to be a waiver by Landlord of any provision of this Lease. Consent to one assignment or sublease shall not be deemed consent to any subsequent assignment or sublease. If any assignee, subtenant or successor of Tenant defaults in the performance of any obligation to be performed by Tenant under this Lease, Landlord may proceed directly against Tenant without the necessity of exhausting remedies against such assignee, subtenant or successor. Landlord may consent to subsequent assignments or subleases or amendments or modifications to this Lease with assignees, subtenants or successor of Tenant, without notifying Tenant or any successor of Tenant and without obtaining any consent thereto from Tenant or any successor of Tenant, and such action shall not release Tenant from liability under this Lease.

21.4 Tenant shall have no right to mortgage, grant a lien upon, encumber or otherwise finance Tenant's interest under this Lease or record a lien upon Tenant's interest in the Facility under this Lease, and Tenant shall not permit, cause or suffer to be recorded in the real estate records of the county in which the Facility are located any mortgage, deed to secure debt, deed of trust, assignment, UCC financing statement or any other document granting, perfecting, or recording a lien upon Tenant's interest in this Lease or interest in the Facility under this Lease.

21.5 If Tenant shall assign this Lease or sublet the Facility or any portion thereof to any Person other than Landlord, or request the consent of Landlord to any assignment, subletting, or other action which requires Landlord's consent hereunder, Tenant shall pay (i) Landlord a processing fee in each instance equal to $200 and (ii) Landlord's attorneys' fees and costs incurred in connection therewith.

22. DISPUTE RESOLUTION.

In order to provide a mechanism for resolving disputes regarding the foregoing provisions of this Lease, the Parties agree as follows:

22.1 Negotiations. Within thirty (30) calendar days after either Party's receipt of a written notice of a dispute from the other Party, the Dispute shall be submitted for resolution through good faith negotiations between representatives of the Parties with authority to resolve the matter. Such persons shall negotiate in good faith to resolve the matter within sixty (60) calendar days (unless the Parties mutually agree to extend the negotiations). The negotiations shall be considered to have failed if, after at least three (3) joint meetings, either Party determines that no reasonable resolution can be reached and provides written notice to the other representatives of a request for mediation.

22.2 Mediation. Any Dispute which cannot be resolved by the negotiation provisions of paragraph 26.1 shall be subject to the following mediation process:

22.2.1 The mediation shall be conducted by one mediator who shall be selected jointly by the Parties within ten (10) calendar days after notice of the request for mediation. If the Parties cannot agree on a mediator, the third shall be appointed by a court of competent jurisdiction upon motion of either Party. Each Party shall share equally in the cost of the jointly appointed or court appointed mediator.

22.2.2 The mediation shall be non-binding and shall commence within five (5) calendar days after the selection of the mediator.

22.2.3 The mediation shall continue until the earlier of (i) thirty (30) calendar days after selection of the mediator, or (ii) the date the Dispute is settled or the mediator declares that the Parties are at an impasse and the Dispute cannot be resolved.

23 MISCELLANEOUS PROVISIONS

23.1 This Lease and all of the covenants and provisions hereof shall inure to the benefit of, and be binding upon, the parties hereto and the heirs, personal representatives, successors and permitted assigns of the parties.

23.2 The titles and headings appearing in this Lease are for reference only and shall not be considered a part of this Lease or in any way to modify, amend or affect the provisions thereof.

23.3 This Lease contains the complete agreement of the parties with reference to the leasing of the Facility, and may not be amended except by an instrument in writing signed by Landlord and Tenant.

23.4 Any provision or provisions of this Lease which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other provision hereof, and the remaining provisions hereof shall nevertheless remain in full force and effect.

23.5 This Lease may be executed in one or more counterparts, and may be signed by each party on a separate counterpart, each of which, taken together, shall be an original, and all of which shall constitute one and same instrument.

23.6 The term “Landlord” as used in this Lease shall mean only the owner or owners at the time in question of the Facility and in the event of any transfer of such title or interest, Landlord named in this Lease (and in case of any subsequent transfers, then the grantor) shall be relieved from and after the date of such transfer of all liability as respects Landlord’s obligations thereafter to be performed hereunder, provided that any funds in the hands of Landlord or the then grantor at the time of such transfer, in which Tenant has an interest, shall be delivered to the grantee. The obligations contained in this Lease to be performed by Landlord shall, subject as aforesaid, be binding on Landlord’s successors and assigns, only during their respective periods of ownership.

23.7 This Lease shall be governed by and construed and enforced in accordance with and subject to the laws of the State of New Mexico

23.8 Any claim based on or in respect of any liability of Landlord under this Lease shall be enforced only against the Facility (and the proceeds therefrom) and not against any other assets, properties or funds of (1) Landlord or any director, officer, member, shareholder, general partner, limited partner, or direct or indirect member, partner, employee or agent of Landlord or any of its members (or any legal representative, heir, estate, successor or assign of any thereof), and (2) any predecessor or successor partnership, corporation or limited liability company (or other entity) of Landlord or any of its members, either directly or through Landlord or its predecessor or successor partnership, corporation of limited liability company of Landlord or its general partners.

23.9 Without the written approval of Landlord and Tenant, no Person other than Landlord, Tenant and their respective successors and assigns shall have any rights under this Lease.

23.10 There shall be no merger of the leasehold estate created hereby by reason of the fact that the same Person may own directly or indirectly, (1) the leasehold estate created hereby or any interest in this Lease or such leasehold estate and (2) the fee estate in the Facility. Notwithstanding any such combined ownership, this Lease shall continue in full force and effect until terminated by an instrument executed by both Landlord and Tenant.

23.11 Whenever in this Lease either party is required to take an action within a particular time period, delays caused by acts of God, war, major casualty, strike, labor shortage or other cause beyond the reasonable control of such party shall not be counted in determining the time in which such performance must be completed (except in the case of the obligation to pay money) so long as such party shall, promptly after becoming aware of the commencement of such delay, shall give the other party notice thereof and estimating the duration thereof.

23.12 If at any time a dispute shall arise as to any amount to be paid by one party to the other hereunder, the obligor may make payment "under protest", and such payment shall not be deemed a voluntary payment, and the right of the obligor to contest its liability for such payment shall survive such payment without prejudice to the obligor's position.

23.13 Landlord and Tenant each represent that they have dealt with no broker, finder or other Person who could legally charge a commission in connection with Landlord's acquisition of the Land or with the Lease or Tenant's Other Lease.

23.14 The parties hereto specifically acknowledge and agree that, notwithstanding any other provision contained in this Lease, it is the intent of the parties that their relationship hereunder is and shall at all times be that of landlord and tenant, and not that of partners, joint venturers, lender and borrower, or any other relationship other than that of a landlord and tenant.

23.15 The parties hereto specifically acknowledge and agree that time is of the essence with regard to all obligations under this Lease.

23.16 TO THE EXTENT PERMITTED BY APPLICABLE LAW, LANDLORD AND TENANT HEREBY WAIVE TRIAL BY JURY IN ANY ACTION OR PROCEEDING, AND WITH RESPECT TO ANY CLAIM ASSERTED IN ANY SUCH ACTION OR PROCEEDING, BROUGHT BY EITHER OF THE PARTIES AGAINST THE OTHER ON ANY MATTER WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT, TENANT'S USE OR OCCUPANCY OF THE FACILITY, ANY CLAIM OF INJURY OR DAMAGE, OR ANY EMERGENCY OR OTHER STATUTORY REMEDY WITH RESPECT THERETO.

IN WITNESS WHEREOF, the parties have hereunto set their hands under seal on the day and year first above written.

TENANT	**LANDLORD**
By: ____________________________________ Title: Jay Chun President of Downtown Venture Corp Date: ___________, 201__	**City of Alamogordo** By ____ Richard Boss, Mayor Date: ___________, 201_ ATTEST:

	______________________________ Rachel Hughs, City Clerk APPROVED AS TO FORM: ______________________________ Petria Schreiber, City Attorney

STATE OF NEW MEXICO)
)SS.
COUNTY OF OTERO)

The foregoing instrument was acknowledged before me this _________ day of ________________, 201__, by Susie Galea, the Mayor of the City of Alamogordo, a New Mexico municipal corporation, on behalf of the corporation.

____
NOTARY PUBLIC

My Commission Expires:

____

STATE OF NEW MEXICO)
)SS.
COUNTY OF OTERO
)

The foregoing instrument was acknowledged before me this _________ day of ________________, 201__, by ____on behalf of the Tenant.

____
NOTARY PUBLIC

My Commission Expires:

____

ORDINANCE NO. 1550

APPROVING A LOCAL ECONIMIC DEVELOPMENT PROJECT FOR SECURED FINANCIAL ASSISTANCE PROPOSED BY DOWNTOWN VENTURE CORPORATION

BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF ALALMOGORDO, NEW MEXICO that the following is added to the municipal code:

Pursuant to the City of Alamogordo Economic Development Plan, Ordinance No. 983 and NMSA 1978 Section 5-10-1, et seq. (Local Economic Development Act, the "Act"), the proposed economic development project of Downtown Venture Corporation ("the Company") is approved for the purposes set forth in NMSA 1978 Section 5-10-1, et seq., and the City of Alamogordo is authorized to enter into a Project Participation Agreement ("the Agreement") with the Company as required by Section 10 of the Act, and in substantially the same form as attached hereto, the terms of which are incorporated herein.

The City Commission finds as follows:

1. The Company is an entity as defined in NMSA 1978, Section 5-10-3(G);

2. Under the Agreement, the Company will provide a substantive contribution for the proposed project as described in NMSA 1978 Section 5-10-10(B);

3. The Agreement complies with the requirements of the Act and Ordinance No. 983;

4. The benefit of the proposed project to the City of Alamogordo is repayment of the financial assistance through the creation of jobs and other benefits arising from employment and economic activity under the project which exceeds the cost to the City of providing to the Company the assistance specified in the agreement, and,

5. The Agreement complies with the requirement of Section 10 of the Act and is hereby adopted and approved.

BE IT FURTHER ORDAINED, that the Mayor of the City of Alamogordo, New Mexico is authorized and directed to do all things necessary to implement this ordinance that is lawfully adopted.

PASSED APPROVED AND ADOPTED this ______ day of ___________, 2017.

CITY OF ALAMOGORDO, NEW MEXICO
a New Mexico municipal corporation

By: ___________________________________
Richard A. Boss, Mayor

ATTEST:

____
Rachel Hughs, City Clerk

APPROVED AS TO FORM:

____
Petria Schreiber, City Attorney

PERSONAL GUARANTEE

THIS GUARANTEE dated this ____ day of _______, 2017.

From: Mr. Jay Chun of 269 S La Fayette Park Pl #321, Los Angeles, Ca 90057 (The "Guarantor")

To: City of Alamogordo, 1376 E Ninth St, Alamogordo, NM 88310 (The "Lender")

Re: Downtown Venture Corporation (The "Debtor")

IN CONSIDERATION OF the Lender extending a loan of five hundred thousand dollars ($500,000) to the Debtor plus other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Guarantor personally guarantees the prompt, full and complete performance of any and all present and future duties, obligations and indebtedness (the "Debt") due to the Lender by the Debtor, up to a limit of $500,000, under the terms of the _________, 2017 Promissory Note signed by Debtor (the "Agreement") and under the following terms and conditions:

1. The Guarantor guarantees that Debtor will promptly pay the full amount of principal and interest of the Debt as and when the same will, in any manner, be or become due, either according to the terms and conditions provided by the Agreement or upon acceleration of the payment under the Agreement by reason of a default;

2. The Guarantor agrees not to pledge, hypothecate, mortgage, sell or otherwise transfer all or substantially all of Guarantor's assets without the prior written consent of the Lender;

3. To the extent permitted by law, the Guarantor waives all defenses, counterclaims or offsets that are legally available to the Guarantor with respect to the payment of the Debt of Debtor; and

This Personal Guarantee shall be construed exclusively in accordance with, and governed by, the laws of the State of New Mexico. Any dispute arising hereunder may only be brought within the State Courts of the State of New Mexico. This Personal Guarantee embodies the entire promise of Guarantor to personally guarantee Debtor's Debt and supersedes all prior agreements and understandings relating to the subject matter here, whether oral or in writing. This Personal Guarantee may not be assigned or transferred without a written document, signed by the Guarantor, Debtor, and Lender, permitting such assignment or transfer.

Dated this __ day of _______, 2017.

IN WITNESS WHEREOF, Guarantor, Jay Chun, has executed this Personal Guarantee as of the day and year first above written.

DOWNTOWN VENTURE CORPORATION

By:___________________________________

Jay Chun

STATE OF NEW MEXICO)
) SS.
COUNTY OF OTERO)

The foregoing Promissory Note was acknowledged before me this ____ day of _______, 2017, by Jay Chun.

____

Notary Public

My Commission Expires:

(S E A L)