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CHICAGO TITLE CO.

DOC# 2015-0575043



Nov 03, 2015 03:55 PM

OFFICIAL RECORDS  
Ernest J. Dronenburg, Jr.,  
SAN DIEGO COUNTY RECORDER  
FEES: \$0.00

PAGES: 15

ISP  
NF

00042591-450  
~~RECORDING REQUESTED BY~~  
AND WHEN RECORDED MAIL TO:

City of El Cajon  
200 Civic Center Way  
El Cajon, CA 92020  
Attn: Douglas Williford, City Manager

SPACE ABOVE THIS LINE FOR RECORDER'S USE

This document is exempt from the payment of a recording  
fee pursuant to Government Code Section 27383.

### OPERATING COVENANT

**THIS OPERATING COVENANT** ("Operating Covenant") is made this 30<sup>th</sup> day of October, 2015 (the "Effective Date"), by and between the **CITY OF EL CAJON**, a charter city and municipal corporation (the "City"), and **EL CAJON HOTEL LP**, a California limited partnership (the "Developer"), with reference to the following:

A. The City and the Developer have executed a Disposition and Development Agreement ("Agreement"), dated as of August 7, 2015, which provides, inter alia, for the development of that certain real property located in the City of El Cajon, County of San Diego, State of California, more fully described in Exhibit "A" attached hereto and incorporated herein by this reference (the "Property"), and Developer's construction and operation thereon of the "Project" as further defined in the Agreement. The Agreement is available for public inspection and copying at the office of the City Clerk, El Cajon City Hall, 200 Civic Center Way, El Cajon, CA 92020.

B. Developer holds fee title to the Property.

C. Pursuant to the Agreement, Developer has agreed to purchase the Property and construct the Project on the Property, and City has agreed to provide the Developer with certain financial assistance for costs associated therewith.

D. The Agreement also provides for the recordation of this Operating Covenant against the Property to memorialize certain covenants, conditions, and restrictions regarding the use, maintenance, and operation of the Property by Developer and Developer's successors and assigns.

E. The City has fee interests in parks, City Hall, and in various streets, sidewalks, and other property within the City of El Cajon (collectively, the "Benefited Public Property"), and is responsible for planning of land uses within the City in such a manner as to provide for the health, safety, and welfare of the residents of the City. The Benefited Public Property is legally described in Exhibit "B" attached hereto and incorporated herein by this reference.

NOW, THEREFORE, Developer hereby covenants, agrees, and declares by and for itself and its successors and assigns that the Property shall be held, sold, conveyed, hypothecated, encumbered, used, occupied, and improved subject to the following covenants, conditions, and restrictions (sometimes collectively referred to hereinafter as the "Covenants"). These Covenants

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shall run with the Property and shall be binding on all parties having or acquiring any right, title, or interest in the Property or any part thereof and shall inure to the benefit of the City and its successors and assigns regardless of whether the City holds any interest in any real property benefited thereby.

**1. Covenant Regarding Specific Uses.**

Developer covenants and agrees for itself, its successors, assigns, and every successor in interest to Developer's interest in the Property or any part thereof, that within the times set forth in the Schedule of Performance attached to the Agreement as Attachment 3 (the "Schedule of Performance"), but subject to delays as contemplated by Section 9.3 if the Agreement, Developer shall commence, diligently proceed with, and satisfactorily complete construction of the Project so as to entitle Developer to the City's issuance of a Release of Construction Covenants for the Project as provided for in Section 7.14 of the Agreement. The foregoing covenant shall be deemed satisfied and shall terminate upon the City's issuance of a Release of Construction Covenants.

For a term (the "Term") commencing upon the Effective Date hereof and ending on the fifteenth (15<sup>th</sup>) year anniversary of the date the Release of Construction Covenants for the Project is issued (the "Operating Covenant Termination Date"), the Developer hereby covenants and agrees to devote the Property for the exclusive purpose and use of development and operation of the Project as a seventy-four thousand (74,000) square foot, approximately 120-room, Courtyard by Marriott Hotel (or a Permitted Replacement Hotel, as defined in the Agreement) with pool, recreation room, meeting room, outdoor patio, and parking area (the "Hotel"), and will comply with the other obligations contained herein. Notwithstanding anything herein to the contrary, the nondiscrimination covenants contained in subdivision (a) of Section 4 hereof shall run with the land in perpetuity and shall not terminate on the Operating Covenant Termination Date. Except as provided below, or with the prior written consent of the City for each instance, which consent may be granted or withheld in the City's sole and absolute discretion, the failure of the Developer (or its tenant) to operate any portion of the Project on the Property as required herein for thirty (30) or more consecutive days following written notice thereof to Developer (the "Failure to Operate Notice") shall, at the City's option, constitute a default hereunder; provided, however, that the Developer shall for purposes of this Section 1 be deemed to be operating such portion of the Project during any period that the Developer is prevented from operating such portion due to (i) required or necessary repair, restoration or rehabilitation of such portion of the Project (provided that the period during which such portion of the Project is not operated as a result of the repair, restoration or rehabilitation shall in no event exceed thirty (30) days), unless the repair, restoration or rehabilitation cannot reasonably be completed within such thirty (30) day period, in which case the period shall extend as necessary for completion, provided such repair restoration or rehabilitation was commenced within the thirty (30) period and is diligently pursued to completion or (ii) war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; lack of transportation; governmental restrictions or priority; litigation; unusually severe weather; inability to secure necessary labor, materials or tools; delays of any contractor, subcontractor or supplier; acts or omissions of any third party; or acts or failures to act of the City other public or governmental agency or entity or any other causes beyond the control or without the fault of the Developer. Notwithstanding anything to the contrary herein, (a) an extension of time for any cause listed in romanette (ii) above shall be for the period of the enforced delay and shall

commence to run from the time of the commencement of the cause, if notice by the Developer is sent to the City within ten business (10) days following receipt of the Failure Notice, and (b) Developer is not entitled pursuant to this Section 1 to an extension of time to perform because of past, present, or future difficulty in obtaining financing necessary to operate the Project because of economic or market conditions.

**2. Performance of Maintenance.**

Developer shall maintain the Project, the Property and all "improvements" (as defined hereinafter) thereon in accordance with the Maintenance Standards, as hereinafter defined. As used herein, the term "Improvements" shall mean and include, but not be limited to, buildings, sidewalks, pedestrian lighting, landscaping, irrigation of landscaping, architectural elements identifying the Property and any and all other improvements on the Property.

To accomplish said maintenance, Developer shall either staff or contract with and hire licensed and qualified personnel to perform the maintenance work, including the provision of labor, equipment, materials, support facilities, and any and all other items necessary to comply with the requirements of this Operating Covenant.

The following standards ("Maintenance Standards") shall be complied with by Developer and Developer's maintenance staff, contractors or subcontractors:

(a) Landscape maintenance shall include, but not be limited to: watering/irrigation; fertilization; mowing; edging; trimming of grass; tree and shrub pruning; trimming and shaping of trees and shrubs to maintain a healthy, natural appearance and safe road conditions and visibility, and irrigation coverage; replacement, as needed, of all plant materials; control of weeds in all planters, shrubs, lawns, ground covers, or other planted areas; and staking for support of trees.

(b) Clean-up maintenance shall include, but not be limited to: maintenance of all sidewalks, paths and other paved areas in clean and weed-free condition; maintenance of all such areas clear of dirt, mud, trash, graffiti, debris or other matter which is unsafe or unsightly; removal of all trash, litter and other debris from improvements and landscaping prior to mowing; clearance and cleaning of all areas maintained prior to the end of the day on which the maintenance operations are performed to ensure that all cuttings, weeds, leaves and other debris are properly disposed of by maintenance workers.

(c) All maintenance work shall conform to all applicable federal and state Occupational Safety and Health Act standards and regulations for the performance of maintenance.

(d) Any and all chemicals, unhealthful substances, and pesticides used in and during maintenance shall be applied in strict accordance with all governing regulations. Precautionary measures shall be employed recognizing that all areas are open to public access.

(e) The Project and Property shall be maintained in conformance and in compliance with the approved Property construction and architectural plans and design scheme, and reasonable commercial development maintenance standards for similar projects, including but

not limited to: painting and cleaning of all exterior surfaces and other exterior facades comprising all private improvements and public improvements to the curb line.

**3. Failure to Maintain Property.**

In the event Developer does not maintain the Property in the manner set forth herein and in accordance with the Maintenance Standards, City shall have the right to maintain such private and/or public improvements, or to contract for the correction of such deficiencies, after at least thirty (30) written notice thereof to Developer. However, prior to taking any such action, City agrees to notify Developer in writing if the condition of the Project or Property does not meet with the Maintenance Standards and to specify the deficiencies and the actions required to be taken by Developer to cure the deficiencies. Upon written notification of any maintenance deficiency, Developer shall have thirty (30) days within which to correct, remedy or cure the deficiency. If the written notification states the problem is urgent relating to the public health and safety of the City, then Developer shall have forty-eight (48) hours to rectify the problem.

In the event Developer fails to correct, remedy, or cure (or for deficiencies which cannot reasonably be corrected, remedied, or cured within thirty (30) days has failed to commence correcting, remedying or curing such maintenance deficiency and diligently pursue such correction, remedy, or cure to completion) after written notification and after the period of correction has lapsed, then City shall have the right to maintain such improvements.

**4. Compliance with Law.**

Developer shall comply with all local, state and federal laws relating to the uses of or condition of the Property and the Project. The operation of the Project shall be in compliance with the requirements of any entitlements issued by the City for the Project, including, as applicable, a conditional use permit, site development permit, and specific plan amendment.

(a) Nondiscrimination Covenants. Developer covenants by and for itself and any successors in interest to all or any portion of the Property that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, sexual preference, marital status, national origin or ancestry in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property, nor shall Developer itself or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, subleases or vendees of the Property. The foregoing covenants shall run with the land.

Developer shall refrain from restricting the rental, sale or lease of the Property any portion thereof on the basis of race, color, religion, sex, sexual preference, marital status, ancestry or national origin of any person. All such deeds, leases or contracts shall contain or be subject to substantially the following nondiscrimination or nonsegregation clauses:

(1) In deeds: "The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of race, color, creed, religion, sex, sexual preference, marital status, national

origin or ancestry in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the land herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the land herein conveyed. The foregoing covenants shall run with the land."

(2) In leases: "The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions: "That there shall be no discrimination against or segregation of any person or group of persons, on account of race, color, creed, religion, sex, sexual preference, marital status, national origin, or ancestry in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased."

(3) In contracts: "There shall be no discrimination against or segregation of, any person, or group of persons on account of race, color, creed, religion, sex, sexual preference, marital status, national origin, or ancestry, in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the premises, nor shall the transferee himself or herself or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees of the premises."

(b) No Violation of Statutes Relating to Direct Assistance by City. Developer represents and warrants that it is using the City financial assistance for the sole and exclusive purpose of causing the construction of the Project on the Property and for no other purpose. Developer further agrees to indemnify, defend, and hold harmless the City, its subdivisions, departments and its respective appointed and elected officers, officials, agents and employees from and against any claims, proceedings, losses, costs, or expenses incurred as a result of any such violation arising out of actions by Developer.

5. Sales and Use Tax Covenant.

From the date this Operating Covenant is recorded against the Property until the Operating Covenant Termination Date, Developer shall designate the Property as the point of sale for sales tax purposes for all goods and services sold or leased on the Property, whose sales and leases originate from the Property.

6. Covenant to Pay Taxes and Assessments.

From the date this Operating Covenant is recorded against the Property until the Operating Covenant Termination Date, Developer shall pay or cause to be paid, prior to delinquency, all ad valorem real estate taxes, special taxes, and assessments levied against the Property and any improvements thereon, subject to Developer's right to contest any such tax or assessment in good faith. During such period Developer shall remove or have removed any levy or attachment made

on the Property or any part thereof or assures the satisfaction thereof within a reasonable time and prior to a sale of the Property.

7. **Use of Property by City, Other Governmental Agencies.**

From the date this Operating Covenant is recorded against the Property until the Operating Covenant Termination Date, Developer shall allow the City use of the Hotel's conference room only (the "Conference Facilities"), at no cost, but at all times for governmental use, up to six (6) days each calendar year. Developer shall also allow the following local agencies the use of Hotel's Conference Facilities only, at fifty percent (50%) of the normal rental rate, but at all times for governmental use, up to six (6) days each calendar year:

- (a) Cajon Valley Unified School District
- (b) Grossmont Union High School District
- (c) Grossmont-Cuyamaca Community College District.

Charges for the rent of the Conference Facilities in excess of the rates provided herein shall be waived by the Developer provided, however, that City and the other governmental agencies utilizing the Conference Facilities shall be responsible for (1) all fees for food and beverage services provided by the Developer, if any, (2) standard set-up and clean-up fees, and other standard taxes and fees, all based on the requirements for the use of the Conference Facilities and (3) any other standard taxes and fees that would be applicable based on the meeting space requirements.

The use of the Conference Facilities as contemplated by this Section 7 shall be subject to its availability, and shall require reservation in advance, and the coordination by the City or other governmental agency, with the Developer (or other operator) of the Hotel.

All standard rental policies of the Developer (or other operator) of the Hotel shall apply to the City or other governmental agency utilizing the Conference Facilities pursuant to this Section 7.

8. **Defaults.**

Failure or delay by either party to perform any term or provision of this Operating Covenant constitutes a default under this Operating Covenant. A party claiming a default shall give written notice of default to the other party, specifying the default complained of and the actions required to correct such default.

Unless otherwise provided by the Agreement, the claimant shall not institute proceedings against the other party if the other party within thirty (30) days from receipt of such notice immediately, with due diligence, commences to cure, correct or remedy such failure or delay and completes such cure, correction or remedy as soon as reasonably practicable after receipt of such notice.

**9. Legal Actions.**

In addition to any other rights or remedies and subject to the notice and cure provisions in Section 8 above, any party may institute legal action to seek specific performance of the terms of this Operating Covenant, or to cure, correct or remedy any default, or to obtain any other legal or equitable remedy consistent with the purpose of this Operating Covenant. A party shall also have the right to pursue damages for the other party's defaults, but in no event shall a party be entitled to damages for economic loss, lost profits, or any other economic or consequential damages of any kind. Such legal actions must be instituted in the Superior Court of the County of San Diego, State of California or in the Federal District Court in the Central District of California. Each party hereby expressly waives any right to remove any such action from San Diego County as is otherwise permitted by California Code of Civil Procedure section 394. In the event of any litigation between the parties hereto, the prevailing party shall be entitled to receive, in addition to the relief granted, its reasonable attorney's fees and costs and such other costs incurred in investigating the action and prosecuting the same, including costs for expert witnesses, costs on appeal, and for discovery.

The internal laws of the State of California shall govern the interpretation and enforcement of this Operating Covenant, without regard to conflict of laws.

In the event that any legal action is commenced by the Developer against the City, service of process on the City shall be made by personal service upon the City's Director, as defined in the Agreement, in addition to such other manner as may be provided by law.

In the event that any legal action is commenced by the City against the Developer, service of process on the Developer shall be made by personal service upon an agent designated for service of process as filed with the California Secretary of State, whether made within or outside the State of California, or in such other manner as may be provided by law.

Except as otherwise expressly stated in this Operating Covenant, the rights and remedies of the parties are cumulative, and the exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

Any failures or delays by either party in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies, or deprive either such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

**10. Effect of Violation of the Terms and Provisions of this Operating Covenant.**

The covenants established in this Operating Covenant shall, without regard to technical classification and designation, be binding for the benefit and in favor of the City, and each of their successors and assigns, as to those covenants which are for their benefit. The covenants contained in this Operating Covenant shall remain in effect for the periods of time specified therein. The City is deemed the beneficiary of the terms and provisions of this Operating Covenant and of the covenants running with the land, for and in their own rights and for the purposes of protecting the interests of the community and other parties, public or private, in whose favor and for whose





With a copy to:

El Cajon City Attorney  
200 Civic Center Way  
El Cajon, CA 92020  
Attention: Morgan Foley, Esq.

To Developer:

El Cajon Hotel LP  
10660 Scripps Ranch Blvd., Suite #100  
San Diego, CA 92131  
Attention: Neil Patel

**[Signatures on next page]**

IN WITNESS WHEREOF, the parties hereto has executed this instrument the day and year first hereinabove written.

"Developer"

**EL CAJON HOTEL LP,**  
a California limited partnership

By: Excel Hospitality, Inc., a California  
corporation, its General Partner

By:  \_\_\_\_\_  
Mr. Suresh Patel, President

Date: 10 | 21 |, 2015

"City"

**CITY OF EL CAJON,**  
a charter city and municipal corporation

By: \_\_\_\_\_  
Bill Wells, Mayor

Date: \_\_\_\_\_, 2015

ATTEST:

\_\_\_\_\_  
Belinda Hawley, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Morgan L. Foley  
City Attorney

IN WITNESS WHEREOF, the parties hereto has executed this instrument the day and year first hereinabove written.

"Developer"

**EL CAJON HOTEL LP,**  
a California limited partnership

By: Excel Hospitality, Inc., a California  
corporation, its General Partner

Date: \_\_\_\_\_, 2015

By: \_\_\_\_\_  
Mr. Suresh Patel, President

"City"

**CITY OF EL CAJON,**  
a charter city and municipal corporation

Date: October 30, 2015

By: Bill Wells Mayor Pro Tem  
for Bill Wells, Mayor

ATTEST:

Belinda Hawley  
Belinda Hawley, City Clerk

APPROVED AS TO FORM:

Morgan L. Foley  
Morgan L. Foley  
City Attorney



ALL PURPOSE ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA )  
 ) SS:  
COUNTY OF SAN DIEGO )

On OCT. 30, 2015, before me, CAROL T. STAAB, a Notary Public, personally appeared Walter Edwin McClellan, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

*Carol T. Staab*

Signature



(SEAL)



**EXHIBIT "A"**

**LEGAL DESCRIPTION OF PROJECT SITE**

PARCEL A: APN: 488-072-43 & 44

PARCELS 1 AND 2 OF PARCEL MAP NO. 21258, IN THE CITY OF EL CAJON, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY, JULY 24, 2015 AS INSTRUMENT NO. 2015-07000284 OF OFFICIAL RECORDS.

RESERVING UNTO THE OWNER OF PARCEL 3 OF SAID PARCEL MAP NO. 21258, AN EASEMENT FOR INGRESS AND EGRESS ACROSS PARCEL 1, SHOWN ON SAID PARCEL MAP NO. 21258 AS "FUTURE 24' ACCESS EASEMENT".

PARCEL B:

A NON-EXCLUSIVE, IRREVOCABLE AND PERPETUAL EASEMENT FOR PARKING, INGRESS AND EGRESS OVER, UPON AND ACROSS THE PARKING AREAS AND ROADWAYS OF PARCEL 3 OF SAID PARCEL MAP NO. 21258, PURSUANT AND SUBJECT TO THE TERMS AND PROVISIONS OF THE DECLARATION OF PARKING EASEMENT, RECORDED November 3, 2015, AS INSTRUMENT NO. 2015-0575041 OF OFFICIAL RECORDS, AS SHOWN ON THE SITE PLAN ATTACHED THERETO.

EXHIBIT "A"

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**EXHIBIT "B"**

**DESCRIPTION OF BENEFITED PUBLIC PROPERTIES IN EL CAJON**

City Hall, 200 Civic Center Way  
APN: 488-111-30

El Cajon Public Safety Building, 100 Civic Center Way  
APN: 488-072-42

Fire Station No. 6, 100 East Lexington Ave.  
APN: 488-192-09

Heartland Fire Training Facility, 1301 North Marshall Ave.  
APN: 482-131-16

Fletcher Hills Center and Pool, 2345 Center Place  
APN: 481-430-47 & 481-430-44

Hillside Center and Park, 840 Buena Terrace  
APN: 481-521-01 & 481-520-12

Judson Park, NW corner of Magnolia and Park Avenues  
APN: 487-172-67

Kennedy Center and Park, 1675 East Madison Avenue  
APN: 511-210-13

Renette Center and Park, 935 South Emerald Avenue  
APN: 492-320-01 & 492-320-02

Wells Center and Park, 1153 East Madison Avenue  
APN: 489-140-63

EXHIBIT "B"

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