



## City Council Staff Report

DATE: October 17, 2012

SUBJECT: APPROVE OPERATIONS COVENANT WITH PACIFICA COMPANIES, LLC OF SAN DIEGO FOR THE REDEVELOPMENT OF THE SPANISH INN, 640 NORTH INDIAN CANYON DRIVE

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

BY: Community & Economic Development Department

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### SUMMARY

In January, 2008, the City Council adopted a Hotel Incentive Program which was intended to spur the revitalization of the City's hotel stock. The 2008 program expires at the end of December 2012.

Staff made a presentation to City Council on September 5, 2012, seeking direction from Council to allow it to negotiate one-on-one Hotel Incentive Agreements with developers of hotel properties based on a number of factors: (1) the need for the particular hotel product in the City's inventory; (2) the demonstrated financial need for the incentive by the Developer; and (3) the public benefit provided through the development or redevelopment of the hotel.

One of the projects on which the Council provided direction was a five year Hotel Incentive Assistance Agreement (Operations Covenant) with the new owners of the Spanish Inn for a Marriott Autograph Collection Hotel. This agreement would provide for a rebate of up to 50% of TOT collected and paid to the City for the first five years of operation. This is the Covenant documenting that agreement.

### RECOMMENDATION:

1. APPROVE OPERATIONS COVENANT WITH PACIFICA COMPANIES, LLC OF SAN DIEGO FOR THE REDEVELOPMENT OF THE SPANISH INN, 640 NORTH INDIAN CANYON DRIVE
2. Authorize the City Manager to execute all documents related to the Operations Covenant.

ITEM NO. 2V

**BACKGROUND:**

In January, 2008, the City Council adopted a Hotel Incentive Program which was intended to spur the revitalization of the City's hotel stock in two ways: (1) incentivize the construction of new hotels, and (2) spur the renovation and upgrading of existing hotels. Generally, the program provided for up to a 50% rebate of TOT to developers of new hotels for prescribed periods of time, based on the quality of the hotel. For those hotels undergoing renovation, the City would keep the historical "base" TOT and share a portion of the TOT above the base.

Over the past four years, the renovation aspect of the Hotel Incentive Program was extraordinary successful, generating in excess of a \$180 million investment in the rebranding and upgrading of hotel properties throughout the City, resulting in more than 1,600 Palm Springs hotel rooms being totally upgraded. This type of development has had a positive and significant effect on tourism in the City, with other positive spillover effects.

As the ordinance provides, the 2008 Hotel Incentive Program expires at the end of December 2012 for most hotel projects with the exception of newly-constructed first class hotels.

In September, 2012 staff recommended to the Council that it allow the Hotel Incentive Program to expire on schedule, but to reserve the power to enter individual, case-by-case agreements with developers of new hotels or those renovating key existing properties. One of the first two projects that Staff is seeking direction was the Spanish Inn property at 640 North Indian Canyon Drive, which has been purchased from foreclosure by Pacifica Companies, LLC of San Diego. The new owner proposes to finish the property and open it as a Marriott Autograph Collection Hotel. The finished property would provide approximately 50 hotel rooms.

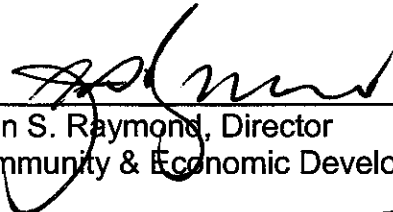
Due to the nature of the Spanish Inn project as a "remodel" of a long-vacant hotel (more than 15 years out of service) it did not exactly qualify for participation in the original 2008 incentive program: there was no identifiable "base" from which to determine incremental TOT, as under the Renovation program, nor was it really a "new" hotel. Finally, it would not have been completed and operating by December 31, 2012.

However, the developers propose to invest in finishing the remodel and bringing it up to the standard of a Marriott Autograph Collection hotel, Marriott's boutique hotel brand. They sought 50% of TOT for a period of 10 years in order bring their return from an "unassisted" 3.69% to an amount close to 6%. Staff's recommendation was an agreement that would provide 5 years of rebate at 50% of annual TOT, collected and paid to the City. This would close about half of the financing gap and improve their return to approximately 5%.

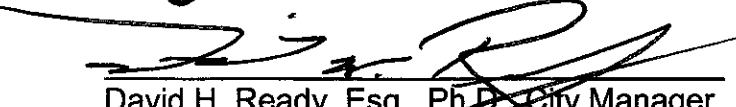
The proposed agreements would include commitments from the developers regarding the quality, standards, services, maintenance, and operation of each hotel appropriate for each hotel and consistent with the expectations of the Council in providing the incentive. The owners project opening the hotel in the first quarter 2013.

FISCAL IMPACT:

The Fiscal Impact for this property would be an increase in general fund revenues at approximately 50% of the TOT generated by the property for the first five years of its operation, after which the City would receive 100% of the TOT generated by the hotel. In the case the Spanish Inn, the share of TOT to be received by the owner would be about \$425,575 based on their projections, with the City receiving a similar amount of new TOT during that period.

  
\_\_\_\_\_  
John S. Raymond, Director  
Community & Economic Development

  
\_\_\_\_\_  
Thomas Wilson, Assistant City Manager

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

Attachment:

1. Operations Covenant

FREE RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:

THE CITY OF PALM SPRINGS  
3200 E. Tahquitz Canyon Way  
Palm Springs, CA 92262  
Attention: City Clerk

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(Space Above This Line for Recorder's Office Use Only)

### **OPERATIONS COVENANT**

THIS OPERATIONS COVENANT AND DECLARATION OF COVENANTS AND RESTRICTIONS (this "Covenant") is made and entered into this 17th day of October, 2012, by and between the CITY OF PALM SPRINGS, a municipal corporation and charter city (the "City"), and Pacifica Companies LLC, a California limited liability company ("Operator").

### **RECITALS:**

A. The City Council of City on September 5, 2012, authorized the negotiation of hotel assistance agreement with Operator for the Spanish Inn – Marriott Autograph Collection Hotel to provide a share of transient occupancy tax and ensure the operation and maintenance of hotel facilities that enhance the tourist and travel experience for visitors to the City, maximize the use of the City's Convention Center, provide attractive and desirable visitor serving facilities and experiences, and assist the City in achieving its tourism goals.

B. Operator is the owner of the Spanish Inn – Marriott Autograph Collection Hotel ("Operator's Hotel" or the "Project"), consisting of approximately fifty (50) total hotel rooms, on real property generally located at 640 North Palm Canyon Drive in the City of Palm Springs, County of Riverside, State of California, more particularly described in Exhibit "A" attached hereto and incorporated herein by reference (the "Site"). Operator warrants and represents that Operator's Hotel is a deluxe hotel and Operator has provided City with independent, third-party certification acceptable to the City of the level of quality of Operator's Hotel is at least that equal to a deluxe hotel. For the purposes of this Covenant, the term "deluxe hotel" means a hotel which provides standards of physical features and operational services which include operation of the hotel on a twenty-four hour per day/seven days per week basis, housekeeping services, meeting room services, bellman services, and parking services.

C. City and Operator desire to place restrictions upon the use and operation of the Project and the Operator's property interest, in order to ensure that the Project shall be operated continuously as a hotel available for short-term rental for the term of this Covenant.

D. City and Operator also agree that in return for participation in the Program, Operator shall agree to operate the Project as a hotel; participate in the Palm Springs Convention Center's Committable Rooms Program; and provide City with up to two (2) room-nights per month for official City use; and, City agrees to share a percentage of Transient Occupancy Tax

Increment with Operator pursuant to the provisions of this Operations Covenant and any guidelines as the City Manager of City may implement.

E. The City finds that the approval of this Covenant is categorically exempt from CEQA under Section 15301 of the California Administrative Code as this Covenant applies to the operation, repair, maintenance, or minor alteration of existing structures, facilities, mechanical equipment involving no material expansion of use beyond that previously existing.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Operator hereby commits to the City to undertake the covenants described herein (the "Operating Covenants") and the City hereby agrees to provide the Operator with funds as provided under this Covenant and as set forth hereinafter.

## ARTICLE 1

### STATEMENT OF OPERATING COVENANTS

1.1. OPERATION AND USE COVENANT. Operator covenants to operate, maintain, and use the Operator's Hotel in accordance with this Covenant. All uses conducted on the Site, including, without limitation, all activities undertaken by the Operator pursuant to this Covenant, shall conform to requirements of this Covenant and the Program.

1.2. HOTEL USE. The Operator hereby agrees that the Project is to be owned, managed, and operated as a hotel in a first-class manner, and the Project's participation in the Program shall continue in accordance with the terms of the Program, for a term equal to ten (10) years, commencing upon the date Operator first receives from the City the Operator's share of transient occupancy tax revenues pursuant to the Program, unless and until Operator's participation in the Program is terminated prior thereto in accordance with this Covenant (the "Term").

1. Housing Uses Prohibited. None of the rooms in the Project will at any time be utilized as a non-transient residential property including without limitation dormitory, fraternity or sorority house, rooming house, nursing home, hospital, sanitarium, or trailer court or park without the City's prior consent, which consent may be given or withheld in its sole and absolute discretion.

2. Conversion of Project. No part of the Project will at any time be owned by a cooperative housing corporation, nor shall the Operator take any steps in connection with the conversion to cooperative housing or condominium ownership, or to any other similar form of ownership, without the prior written approval of the City Council, which approval may be given or withheld in its sole and absolute discretion.

## ARTICLE 2

### WARRANTIES AND COVENANTS

2.1. WARRANTIES AND COVENANTS. For the Term of this Covenant, the Operator hereby represents, covenants, warrants and agrees as follows:

1. The City shall pay to Operator an amount equal to fifty percent (50%) of the transient occupancy tax Operator collects and pays to the City pursuant to Palm Springs Municipal Code Section 3.24.080, as amended from time to time, and in strict compliance thereof. The City's obligation to pay Operator pursuant to this Section shall commence with the first return and remittance of transient occupancy tax from the Operator and will cease on the 60<sup>th</sup> month thereafter.

2. Operator hereby agrees to subscribe to the Palm Springs Convention Center's Committable Rooms Program or any similar successor program as identified by the City Manager without being obligated to incur any additional costs or expenses.

3. Operator agrees to participate in the City's convention center hotel shuttle service on a proportional basis equal to the number of total hotel rooms in Operator's hotel.

4. Upon the City's prior request, Operator shall provide the City at no cost up to two (2) rooms for one night (or one or more rooms for a total of two (2) room-nights) each month for use for City purposes as approved or designated by the City Manager, provided that such use by the City shall be subject to the rooms being available at the time of the City's request. Such accommodations shall include all services and amenities for which the Operator would normally collect transient occupancy taxes but will not include services and amenities that are optional to transient guests and for which transient guests are not required to pay transient occupancy taxes. City shall be responsible for any transient occupancy taxes for any occupancy provided to City under the provisions of this paragraph. Notwithstanding anything in this Covenant to the contrary, if the City does not use rooms during any month, then its right to use rooms with respect to that month shall expire at the end of that month and shall not accrue; provided, however, if the City was unable to use rooms because Operator's Hotel had no rooms available when the City requested a room in accordance with this Section 2.1.3, then the City's right to use rooms shall not expire and may be used by the City in a subsequent month. Operator's obligations under this Section shall cease when the City's obligations to pay Operator pursuant to Section 1 above ceases.

### ARTICLE 3

#### MAINTENANCE

##### 3.1. MAINTENANCE.

1. Maintenance Obligation. Operator, for itself and its successors and assigns, hereby covenants and agrees to maintain and repair or cause to be maintained and repaired the Site and all related on-site improvements and landscaping thereon, including, without limitation, buildings, parking areas, lighting, signs and walls, in a first class condition and repair, free of rubbish, debris and other hazards to persons using the same, and in accordance with all applicable laws, rules, ordinances and regulations of all federal, state, and local bodies and agencies having jurisdiction, at Operator's sole cost and expense. Such maintenance and repair shall include, but not be limited to, the

following: (i) sweeping and trash removal; (ii) the care and replacement of all shrubbery, plantings, and other landscaping in a healthy condition; and (iii) the repair, replacement and restriping of asphalt or concrete paving using the same type of material originally installed, to the end that such paving at all times be kept in a level and smooth condition.

2. Parking and Driveways. The driveways and traffic aisles on the Site shall be kept clear and unobstructed at all times.

3. Right of Termination. In the event Operator fails to maintain the Site in the above-mentioned condition, and satisfactory progress is not made in correcting the condition within thirty (30) days from the date of written notice from City (which notice shall reasonably identify the required maintenance), City may, at City's option, and upon notice to Operator, terminate this Covenant.

#### ARTICLE 4

##### COMPLIANCE WITH LAWS

4.1. COMPLIANCE WITH LAWS. Operator shall comply with all ordinances, regulations and standards of the City applicable to the Site. Operator shall comply with all rules and regulations of any assessment district of the City with jurisdiction over the Site.

#### ARTICLE 5

##### NONDISCRIMINATION

5.1. NONDISCRIMINATION. There shall be no discrimination against or segregation of any person, or group of persons, on account of race, color, creed, religion, sex, marital status, national origin or ancestry in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Site, or any part thereof, nor shall Operator, 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 guests or vendees of the Site, or any part thereof.

#### ARTICLE 6

##### INDEMNIFICATION

6.1. INDEMNIFICATION. Operator agrees for itself and its successors and assigns to indemnify, defend, and hold harmless City and its respective officers, members, officials, employees, agents, volunteers, and representatives from and against any loss, liability, claim, or judgment relating in any manner to the Project, excepting only any such loss, liability, claim, or judgment arising out of the intentional wrongdoing or gross negligence of the City or its respective officers, officials, employees, members, agents, volunteers, or representatives. Operator, while in possession of the Site, and each successor or assign of Operator while in possession of the Site, shall remain fully obligated for the payment of property taxes and assessments in connection with the Site. The foregoing indemnification, defense, and hold

harmless agreement shall only be applicable to and binding upon the party then owning the Site or applicable portion thereof.

6.2. ATTORNEYS' FEES. In the event that a party to this Covenant brings an action against the other party hereto by reason of the breach of any condition, covenant, representation or warranty in this Covenant, or otherwise arising out of this Covenant, the prevailing party in such action shall be entitled to recover from the other party reasonable expert witness fees, and its reasonable attorney's fees and costs. Attorney's fees shall include attorney's fees on any appeal, and in addition a party entitled to attorney's fees shall be entitled to all other reasonable costs for investigating such action, including the conducting of discovery.

6.3. AMENDMENTS. This Covenant shall be amended only by a written instrument executed by the parties hereto or their successors in title, and duly recorded in the real property records of the County of Riverside.

6.4. NOTICE. Any notice required to be given hereunder shall be made in writing and shall be given by personal delivery, recognized overnight courier, certified or registered mail, postage prepaid, return receipt requested, at the addresses specified below, or at such other addresses as may be specified in writing by the parties hereto:

City: City of Palm Springs  
3200 E. Tahquitz Canyon Way  
Palm Springs, CA 92262  
Attn: City Manager

Copy to: City of Palm Springs  
3200 E. Tahquitz Canyon Way  
Palm Springs, CA 92262  
Attn: City Attorney

Operator: Pacifica Companies, LLC  
1785 Hancock Street, Suite 200  
San Diego, CA 92110  
Attn:

The notice shall be deemed given three (3) business days after the date of mailing, one (1) business day after sending by recognized overnight courier, or, if personally delivered, when received (or receipt is denied).

6.5. SEVERABILITY/WAIVER/INTEGRATION

1. Severability. If any provision of this Covenant or portion thereof, or the application to any person or circumstances, shall to any extent be held invalid, inoperative, or unenforceable, the remainder of the provisions, or the application of such provision or portion thereof to any other persons or circumstances, shall not be affected thereby; provided, that if any material terms or provisions of the Operating Covenants are rendered invalid, void and/or unenforceable, or changes in the law would materially alter the terms of the transactions contemplated herein, the parties agree to meet and negotiate



in good faith to attempt to reform the Operating Covenants to accomplish the intent of the parties.

2. Waiver. A waiver by either party of the performance of any covenant or condition herein shall not invalidate this Covenant nor shall it be considered a waiver of any other covenants or conditions, nor shall the delay or forbearance by either party in exercising any remedy or right be considered a waiver of, or an estoppel against, the later exercise of such remedy or right.

3. Integration. This Covenant contains the entire agreement between the parties and neither party relies on any warranty or representation not contained in this Covenant.

4. Third Parties. No third party beneficiaries are intended, and the only parties who are entitled to enforce the provisions of this Covenant are the City, any mortgagees that may succeed to Operator's leasehold interest under the ground lease between Operator and fee owner of the Site or a replacement thereof, Operator and each of their respective successors and assigns.

6.6. GOVERNING LAW. This Covenant shall be governed by the laws of the State of California.

6.7. COUNTERPARTS. This Covenant may be executed in any number of counterparts, each of which shall constitute one original and all of which shall be one and the same instrument.

6.8. TERMINATION. The City may elect to terminate this Covenant pursuant to Section 3.1.3 hereof. Operator may elect to terminate its participation in the Program and this Covenant by providing written notice to the City (a) if the City fails to deliver to Operator any amounts owed to Operator pursuant to the Program within thirty (30) days after Operator's written request for payment. In the event of any early termination of this Covenant, Operator (or its successor, as applicable) shall not be obligated to return any amounts previously paid to it by the City pursuant to the Program.

[END -- SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the City and Operator have executed this Covenant by duly authorized representatives on the date first written hereinabove.

"CITY"

THE CITY OF PALM SPRINGS,  
a municipal corporation and charter city

By: \_\_\_\_\_  
David H. Ready  
City Manager

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_  
City Clerk

**APPROVED AS TO FORM:**

WOODRUFF, SPRADLIN & SMART

By: \_\_\_\_\_  
Douglas Holland  
City Attorney

"OPERATOR"

Pacifica Companies LLC,  
a California limited liability company

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

**ACKNOWLEDGMENT**

State of California )  
County of \_\_\_\_\_ )

On \_\_\_\_\_, before me, \_\_\_\_\_,  
(insert name of notary)

Notary Public, personally appeared \_\_\_\_\_,  
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.

Signature \_\_\_\_\_

(Seal)

**ACKNOWLEDGMENT**

State of California )  
County of \_\_\_\_\_ )

On \_\_\_\_\_, before me, \_\_\_\_\_,  
(insert name of notary)

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WITNESS my hand and official seal.

Signature \_\_\_\_\_

(Seal)

**ACKNOWLEDGMENT**

State of California )  
County of \_\_\_\_\_ )

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(insert name of notary)

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the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

(Seal)

**ACKNOWLEDGMENT**

State of California )  
County of \_\_\_\_\_ )

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(insert name of notary)

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who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
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the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

(Seal)

**EXHIBIT "A"**

**LEGAL DESCRIPTION OF SITE**

That certain real property located in the City of Palm Springs, County of Riverside, State of California, more particularly described as: