

RESOLUTION NO. 2018-78R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS APPROVING A LEASE AGREEMENT WITH BECERRA CORP. FOR THE YEAR TO YEAR LEASE OF APPROXIMATELY 9,817 SQUARE FEET OF SPACE AT 201 SOUTH LBJ (THE SITE OF THE FORMER DIXIE CREAM DONUT SHOP); AUTHORIZING THE CITY MANAGER TO EXECUTE SAID LEASE; AND DECLARING AN EFFECTIVE DATE.


BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:

PART 1. The attached Lease of Property is hereby approved.

PART 2. The City Manager is hereby authorized to sign the Lease of Property on behalf of the City.

PART 3. This resolution shall become effective immediately from and after its passage.

ADOPTED on May 15, 2018.


John Thomaides
Mayor

Attest:


Jamie Lee Case
City Clerk

LEASE OF PROPERTY (YEAR TO YEAR)

This Lease is entered into on May 15, 2018, between the City of San Marcos, Texas, 630 East Hopkins Street ("Lessor") and Becerra Corp, 208 East Mimosa Circle, San Marcos, TX 78666 ("Lessee").

SECTION 1. PREMISES; USE.

Lessor leases to Lessee and Lessee leases from Lessor the premises ("Premises") in San Marcos, Texas, shown in Exhibit A, attached hereto and made a part hereof, subject to the terms and conditions in this Lease. The Premises may be used for maintenance and operation of one Lessee-owned building in connection with a retail food service operation, restaurant or bakery, and other purposes incidental thereto, only, and for no other purpose. Any other use shall be subject to approval of Lessor's City Manager in writing.

SECTION 2. TERM.

The term of this Lease shall commence effective as of February 1, 2018, and, unless sooner terminated as provided in this Lease, shall extend for one year and, thereafter, shall automatically be extended from year to year.

SECTION 3. FIXED RENT.

A. The annual 2018 ground lease rent is \$3,446.68 and will be paid in the following manner: Within 10 days upon the execution of this Lease by both parties, a payment of \$861.67 will be due payable to the City of San Marcos and three equal payments of the same amount each due on the first of the month of each month thereafter. Each year thereafter, Lessee shall pay to Lessor, in advance (on or before February 1), fixed rent annually. The fixed rent shall be automatically increased by three percent (3%) annually, cumulative and compounded.

B. Not more than once every three (3) years, Lessor may redetermine the fixed rent. If Lessor redetermines the rent, Lessor shall notify Lessee of such change.

SECTION 4. INSURANCE.

A. Before commencement of the term of this Lease, Lessee shall provide to Lessor a certificate issued by its insurance carrier evidencing the insurance coverage required under Exhibit B attached hereto and made a part hereof.

B. Not more frequently than one every two years, Lessor may reasonably modify the required insurance coverage to reflect then-current risk management practices of Lessor.

C. All insurance correspondence, certificates and endorsements shall be directed to: Risk Manager, City of San Marcos, 630 East Hopkins Street, San Marcos, TX 78666.

SECTION 5. SPECIAL PROVISION-CANCELLATION.

Effective upon the commencement of the term of this Lease, the prior lease between the parties by virtue of the assignment of such lease by Union Pacific Railroad Company shall be cancelled and superseded by this Lease.

SECTION 6. IMPROVEMENTS.

No improvements placed upon the Premises by Lessee shall become a part of the realty.

SECTION 7. RESERVATIONS, TITLE AND PRIOR RIGHTS.

A. Lessor reserves to itself, its agents and contractors the right to enter the Premises at such times as will not unreasonably interfere with Lessee's use of the Premises.

B. Lessor reserves (i) the exclusive right to permit placement of signs on the Premises, and (ii) the right to construct, maintain and operate new and existing facilities (including, without limitation, fences, communication facilities, roadways and utilities) upon over, across or under the Premises, and to grant to others such rights, provided that Lessee's use of the Premises is not interfered with unreasonably. No political signs shall be placed on the Premises or on adjacent city road right of ways.

C. Lessee acknowledges that Lessor makes no representations or warranties, express or implied, concerning the title to the Premises, and that the rights granted to Lessee under this Lease do not extend beyond such right, title or interest as Lessor may have in and to the Premises. Without limitation of the foregoing, this Lease is made subject to all outstanding rights, whether or not of record. Lessor reserves the right to renew any such outstanding rights granted by Lessor or Lessor's predecessors.

SECTION 8. PAYMENT OF RENT.

Rent (which includes the fixed advance rent and all other amounts to be paid by Lessee under this Lease) shall be paid in lawful money of the United States of America, at such place as shall be designated by the Lessor, and without offset or deduction.

SECTION 9. TAXES AND ASSESSMENT'S.

A. Lessee shall pay, prior to delinquency, all taxes levied during the life of this Lease on real property and improvements comprising the Premises, together with all personal property and improvements on the Premises.

SECTION 10. WATER RIGHTS.

This Lease does not include any right to the use of water under any water right of Lessor, or to establish any water rights except in the name of Lessor.

SECTION 11. CARE AND USE OF PREMISES.

A. Lessee shall use reasonable care and caution against damage or destruction to the Premises. Lessee shall not use or permit the use of the Premises for any unlawful purpose, maintain any nuisance, permit any waste, or use the Premises in any way that creates a hazard to persons or property. Lessee shall keep the sidewalks and public ways on the Premises, together with any public right-of-way abutting the Premises, free and clear from any obstructions or conditions which might create a hazard, or from any litter and debris. Lessee shall also be responsible for mowing the Premises and areas of public right-of-way abutting the Premises on a regular basis, but no less often than necessary to ensure that grass and weeds do not exceed 12 inches in height in accordance with Chapter 34, Division 2 of the San Marcos City Code.

B. Lessee shall not permit any sign on the Premises, except signs relating to Lessee's business that are authorized by permit from the Lessor. No political signs shall be placed on the Premises or on the adjacent city road right of ways.

C. If any improvement on the Premises other than the Lessor Improvements is damaged or destroyed by fire or other casualty, Lessee shall, within thirty (30) days after such casualty, remove all debris resulting therefrom. If Lessee fails to do so, Lessor may remove such debris, and Lessee agrees to reimburse Lessor for all expenses incurred within thirty (30) days after rendition of Lessor's bill.

D. Lessee shall comply with all governmental laws, ordinances, rules, regulations and orders relating to Lessee's use of the Premises and this Lease.

SECTION 12. HAZARDOUS MATERIALS, SUBSTANCES AND WASTES.

A. Without the prior written, consent of Lessor, Lessee shall not use or permit the use of the Premises for the generation, use, treatment, manufacture, production, storage or recycling of any Hazardous Substances, except that Lessee may use, if lawful, small quantities of common chemicals such as adhesives, lubricants and cleaning fluids in order to conduct business at the Premises. The consent of Lessor may be withheld by Lessor for any reason whatsoever, and may be subject to conditions in addition to those set forth below. It shall be the sole responsibility of Lessee to determine whether or not a contemplated use of the Premises is a Hazardous Substance use.

B. In no event shall Lessee (i) release, discharge or dispose of any Hazardous Substances, (ii) bring any hazardous wastes as defined in the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.*, as amended ("RCRA") onto the Premises, or (iii) install or use on the Premises any underground storage tanks.

C. If Lessee uses or permits the use of the Premises for a Hazardous Substance use, with or without Lessor's consent, Lessee shall furnish to Lessor copies of all permits, identification numbers and notices issued by governmental agencies in connection with such Hazardous Substance use, together with such other information on the Hazardous Substance use as may be requested by Lessor. If requested by Lessor, Lessee shall cause to be performed an environmental

assessment of the Premises upon termination of the Lease and shall furnish Lessor a copy of such report, at Lessee's sole cost and expense.

D. Without limitation of the provisions of Section 17, Lessee shall be responsible for all damages, losses, costs, expenses, claims, fines and penalties related in any manner to any Hazardous Substance use of the Premises (or any property in proximity to the Premises) during the term of this Lease or, if longer, during Lessee's occupancy of the Premises, regardless of Lessor's consent to such use or any negligence, misconduct or strict liability of any Indemnified Party (as defined in Section 17), and including, without limitation, (i) any diminution in the value of the Premises and/or any adjacent property of any of the Indemnified Parties, and (ii) the cost and expense of clean-up, restoration, containment, remediation, decontamination, removal, investigation, monitoring, closure or post-closure. Notwithstanding the foregoing, Lessee shall not be responsible for Hazardous Substances (i) existing on, in, or under the Premises prior to the earlier to occur of the commencement of the term of the Lease or Lessee's taking occupancy of the Premises, or (ii) migrating from adjacent property not controlled by Lessee, or (iii) placed on, in or under the Premises by any of the Indemnified Parties; except where the Hazardous Substance is discovered by, or the contamination is exacerbated by, any excavation or investigation undertaken by or at the behest of Lessee. Lessee shall have the burden of proving by a preponderance of the evidence that any of the foregoing exceptions to Lessee's responsibility for Hazardous Substances applies.

E. In addition to the other rights and remedies of Lessor under this Lease or as may be provided by law, if Lessor reasonably determines that the Premises may have been used during the term of this Lease or any prior lease with Lessee for all or any portion of the Premises, or are being used for any Hazardous Substance use, with or without Lessor's consent thereto, and that a release or other contamination may have occurred, Lessor may, at its election and at any time during the life of this Lease or thereafter (i) cause the Premises and/or any adjacent premises of Lessor to be tested, investigated, or monitored for the presence of any Hazardous Substance, (ii) cause any Hazardous Substance to be removed from the Premises and any adjacent lands of Lessor, (iii) cause to be performed any restoration of the Premises and any adjacent lands of Lessor, and (iv) cause to be performed any remediation of, or response to, the environmental condition of the Premises and the adjacent lands of Lessor, as Lessor reasonably may deem necessary or desirable; and the cost and expense thereof shall be reimbursed by Lessee to Lessor within thirty (30) days after rendition of Lessor's bill. In addition, Lessor may, at its election, require Lessee, at Lessee's sole cost and expense, to perform such work, in which event, Lessee shall promptly commence to perform and thereafter diligently prosecute to completion such work, using one or more contractors and a supervising consulting engineer approved in advance by Lessor.

F. For purposes of this Section 12, the term "Hazardous Substance" shall mean (i) substances included within the definitions of "hazardous substance," "pollutant," "contaminant," or "hazardous waste," in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 960 *et seq.*, as amended or in RCRA, the regulations promulgated pursuant to either such Act, or state laws and regulations similar to or promulgated pursuant to either such Act, (ii) any material, waste or substance which is (A) petroleum, (B) asbestos, (C) flammable or explosive, or (D) radioactive, and (iii) such other substances, materials and wastes which are or become regulated or classified as hazardous or toxic under any existing

or future federal, state or local law.

SECTION 13. UTILITIES.

A. Lessee will arrange and pay for all utilities and services supplied to the Premises or to Lessee that Lessee has contracted to pay for in Lessee's name.

B. All utilities and services will be separately metered to Lessee. If not separately metered, Lessee shall pay its proportionate share as reasonably determined by Lessor.

SECTION 14. LIENS.

Lessee shall not allow any liens to attach to the Premises for any services, labor or materials furnished to the Premises or otherwise arising from Lessee's use of the Premises. Lessor shall have the right to discharge any such liens at Lessee's expense.

SECTION 15. ALTERATIONS AND IMPROVEMENTS; CLEARANCES.

A. No alterations, improvements or installations may be made on the Premises without the prior consent of Lessor. Such consent, if given, shall be subject to the needs and requirements of the Lessor in the operation of its property and utilities and to such other conditions as Lessor determines to impose. In all events, such consent shall be conditioned upon strict conformance with all applicable governmental requirements.

B. All alterations, improvements or installations shall be at Lessee's sole cost and expense.

C. Any actual or implied knowledge of Lessor of a violation of the requirements of this Lease or of any governmental requirements shall not relieve Lessee of the obligation to comply with such requirements, nor shall any consent of Lessor be deemed to be a representation of such compliance.

SECTION 16. AS IS.

Lessee accepts the Premises in its present condition with all faults, whether patent or latent, and without warranties or covenants, express or implied. Lessee acknowledges that Lessor shall have no duty to maintain, repair or improve the Premises.

SECTION 17. RELEASE AND INDEMNITY,

A. *As a material part of the consideration for this Lease, Lessee, to the extent it may lawfully do so, waives and releases any and all claims against Lessor for, and agrees to indemnify, defend and hold harmless Lessor, its affiliates, and its and their officers, agents and employees ("Indemnified Parties") from and against, any loss, damage (including, without limitation, punitive or consequential damages), injury, liability, claim, demand, cost or expense (including, without limitation, attorneys' fees and court costs), fine or penalty (collectively, "Loss") incurred*

by any person (including, without limitation, Lessor, Lessee, or any employee of Lessor or Lessee) (i) for personal injury or property damage caused to any person while on or about the Premises, or (ii) arising from or related to any use of the Premises by Lessee or any invitee or licensee of Lessee, any act or omission of Lessee, its officers, agents, employees, licensees or invitees or any breach of this Lease by Lessee.

B. *The foregoing release and indemnity shall apply regardless of any negligence, misconduct or strict liability of any Indemnified Party, except that the indemnity, only, shall not apply to any Loss determined by final order of a court of competent jurisdiction to have been caused by the sole active direct negligence of any Indemnified Party.*

C. *Where applicable to the Loss, the liability provisions of any contract between Lessor and Lessee covering the carriage of shipments or trackage serving the Premises shall govern the Loss and shall supersede the provisions of this Section 17.*

D. *No provision of this Lease with respect to insurance shall limit the extent of the release and indemnity provisions of this Section 17.*

SECTION 18. TERMINATION.

A. Lessor may terminate this Lease for Lessee's default by giving Lessee notice of termination, if Lessee (i) defaults under any obligation of Lessee under this Lease and, after written notice is given by Lessor to Lessee specifying the default, Lessee fails either to immediately commence to cure the default, or to complete the cure expeditiously but in all events within thirty (30) days after the default notice is given, or (ii) Lessee abandons the Premises for a period of one hundred twenty (120) consecutive days.

B. Notwithstanding the term of this Lease set forth in Section 2, Lessor or Lessee may terminate this Lease without cause upon thirty (30) day's written notice to the other party; provided, however, that at Lessor's election, no such termination by Lessee shall be effective unless and until Lessee has vacated and restored the Premises as required in Section 20A, at which time Lessor shall refund to Lessee, on a pro-rata basis, any unearned rental paid in advance. Notwithstanding anything to the contrary in this Lease, if Lessee has not complied with the requirements of Section 20A, this Lease, together with all terms contained herein (including payment of rent) will remain in effect until the requirements of Section 20A are met, unless Lessor, in its sole discretion, elects to terminate this Lease.

C. Prior to execution of this Lease, Lessee shall provide Lessor with an executed, correct, and current copy of all lease documentation concerning Lessee's lease with Union Pacific Railroad Company of the 4,500 square feet of land immediately adjacent to the Premises upon which the balance of Lessee's building sits (the UPRR Lease) and shall provide Lessor with all revisions of such lease documentation within thirty (30) days of Lessee's receipt thereof. This Lease shall automatically terminate without notice effective as of the date of termination of the UPRR Lease. Upon such termination, rent shall be prorated and Lessor shall refund to Lessee, on a pro-rata basis, any unearned rental paid in advance, subject to Lessee's compliance with Section 20A and less any other offsets and amounts owed to Lessor under this Lease.

SECTION 19. LESSOR'S REMEDIES.

Lessor's remedies for Lessee's default are to (a) enter and take possession of the Premises, without terminating this Lease, and relet the Premises on behalf of Lessee, collect and receive the rent from reletting, and charge Lessee for the cost of reletting, and/or (b) terminate this Lease as provided in Section 18 above and sue Lessee for damages, and/or (c) exercise such other remedies as Lessor may have at law or in equity. Lessor may enter and take possession of the Premises by self-help, by changing locks, if necessary, and may lock out Lessee, all without being liable for damages.

SECTION 20. VACATION OF PREMISES; REMOVAL OF LESSEE'S PROPERTY.

A Upon termination howsoever of this Lease, Lessee (i) shall have peaceably and quietly vacated and surrendered possession of the Premises to Lessor, without Lessor giving any notice to quit or demand for possession, and (ii) shall have removed from the Premises all structures, property and other materials not belonging to Lessor, including all personal property and restored the surface to as good a condition as the same was in before such structures were erected, including, without limitation, the removal of foundations, the filling in of excavations and pits, and the removal of debris and rubbish.

B If Lessee has not completed such removal and restoration prior to termination of this Lease, Lessor may, at its election, and at any time or times, (i) perform the work and Lessee shall reimburse Lessor for the cost thereof within thirty (30) days after bill is rendered (ii) take title to all or any portion of such structures or property by giving notice of such election to Lessee, and/or (iii) treat Lessee as a holdover tenant at will until such removal and restoration is completed.

SECTION 21. UNDERGROUND FACILITIES.

Lessee shall, before conducting any excavation or installing any improvements, arrange for a cable, pipe, or utility locator, and make arrangements for relocation or other protection of any underground facilities. Notwithstanding compliance by Lessee with this Section 21, the release and indemnity provisions of Section 17 above shall apply fully to any damage or destruction of any telecommunications or utility system.

SECTION 22. NOTICES.

Any notice, consent or approval to be given under this Lease shall be in writing and personally served, sent: (1) by email to citymanagerinfo@sanmarcostx.gov; or (2) by reputable courier service, or sent by certified mail, postage prepaid, return receipt requested, to Lessor at: City of San Marcos, Attn: City Manager, 630 East Hopkins Street, San Marcos, TX 78666; and to Lessee by email to ruben@becerra.us; or, sent by certified mail, postage prepaid, return receipt requested, at the above address, or such other address as a party may designate in notice given to the other party. Mailed notices shall be deemed served five (5) days after deposit in the U.S. Mail. Notices which are faxed, emailed, are personally served or sent by courier service shall

be deemed served upon receipt.

SECTION 23. ASSIGNMENT.

A. Lessee shall not sublease the Premises, in whole or in part, or assign, encumber or transfer (by operation of law or otherwise) this Lease, without the prior consent of Lessor, which consent may be denied at Lessor's sole and absolute discretion. Any purported transfer or assignment without Lessor's consent shall be void and shall be a default by Lessee. Notwithstanding the foregoing, Lessee may sublease the Premises to Suenos and Rezo, LLC for the operation of a frozen yogurt shop, subject to: 1) written approval by Lessor's City Manager of the form of sublease, and any amendments or renewals to it, under which Lessee and such sublessee shall each be bound by all terms and conditions under this Lease; 2) and such sublessee's execution of a written acknowledgment, in a form approved by Lessor, regarding the requirements for disposition of the building and any other personal property on the Premises, as specified under Section 20, upon termination of this Lease.

B. Subject to this Section 23, this Lease shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

SECTION 24. CONDEMNATION.

If, as reasonably determined by Lessor, the Premises cannot be used by Lessee because of a condemnation or sale in lieu of condemnation, then this Lease shall automatically terminate. Lessor shall be entitled to the entire award or proceeds for any total or partial condemnation or sale in lieu thereof, including, without limitation, any award or proceeds for the value of the leasehold estate created by this Lease. Notwithstanding the foregoing, Lessee shall have the right to pursue recovery from the condemning authority of such compensation as may be separately awarded to Lessee for Lessee's relocation expenses, the taking of Lessee's personal property and fixtures, and the interruption of or damage to Lessee's business.

SECTION 25. DISPUTES; ATTORNEY'S FEES; VENUE.

If either party retains an attorney to enforce this Lease (including, without limitation, the indemnity provisions of this Lease), the prevailing party is entitled to recover reasonable attorney's fees. Venue for any dispute arising under this Lease shall be in the state courts having appropriate jurisdiction in Hays County, Texas, or, if in federal court, the United States District Court for the Western District of Texas, Austin Division.


SECTION 26. RIGHTS AND OBLIGATIONS OF LESSOR.

If any of the rights and obligations of Lessor under this Lease are substantially and negatively affected by any changes in the laws applicable to this Lease, whether statutory, regulatory or under federal or state judicial precedent; then Lessor may require Lessee to enter into an amendment to this Lease to eliminate the negative effect on Lessor's rights and obligations to the extent reasonably possible.

SECTION 27. ENTIRE AGREEMENT; AMENDMENT.

This Lease is the entire agreement between the parties, and supersedes all other oral or written agreements between the parties pertaining to this transaction, including any other lease under which all or any portion of the Premises was leased to Lessee. Notwithstanding the prior sentence, Lessee shall retain any and all obligations and liabilities which may have accrued under any other such agreements prior to the commencement of the term of this Lease, except as waived by Lessor in writing. This Lease may be amended only by a written instrument signed by Lessor and Lessee.

LESSOR:

By: 
Bert Lumbreras, City Manager

LESSEE:


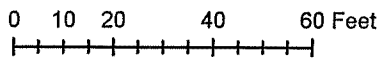
By: 
Name: Ruben Becerra
Title: Owner

Exhibit A



Lease Area
(approximately 9,817 sf)

EXHIBIT B
Insurance Requirements
(Lease of Land)

Lessee shall, at its sole cost and expense, procure and maintain during the life of this Lease (except as otherwise provided in this Lease) the following insurance coverage:

A. Commercial General Liability Insurance. Commercial general liability (CGL) with a limit of not less than \$2,000,000 each occurrence and an aggregate limit of not less than \$4,000,000. CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage).

B. Business Automobile Coverage Insurance. Business auto coverage written on ISO form CA 00 01 10 01 (or a substitute form providing equivalent liability coverage) with a combined single limit of not less \$2,000,000 for each accident, and coverage must include liability arising out of any auto (including owned, hired, and non-owned autos).

C. Pollution Liability Insurance. If the permitted use under this Lease includes any generation, handling, enrichment, storage, manufacture, or production of hazardous materials, pollution liability insurance is required. Pollution liability coverage must be written on ISO form Pollution Liability Coverage Form Designated Sites CG 00 39 12 04 (or a substitute form providing equivalent liability coverage), with limits of at least \$5,000,000 per occurrence and an aggregate limit of \$10,000,000. If hazardous materials are disposed of from the Premises, Lessee must furnish to Lessor evidence of pollution legal liability insurance maintained by the disposal site operator for losses arising from the insured facility accepting the materials, with coverage in minimum amounts of \$1,000,000 per loss, and an annual aggregate of \$2,000,000.

D. Umbrella or Excess Insurance. If Lessee utilizes umbrella or excess policies, these policies must "follow form" and afford no less coverage than the primary policy.

E. All policy(ies) required above must include Lessor as an "Additional Insured" using ISO Additional Insured Endorsement CO 20 11 (or a substitute form providing equivalent coverage). The coverage provided to Lessor as additional insured shall, to the extent provided under ISO Additional Insured Endorsement CG 20 11, provide coverage for Lessor's negligence whether sole or partial, active or passive, and shall not be limited by Lessee's liability under the indemnity provisions of this Lease.

F. Lessee waives all rights against Lessor and its agents, officers, directors and employees for recovery of damages to the extent these damages are covered by the workers compensation and employers' liability or commercial umbrella or excess liability insurance obtained by Lessee required by this agreement.

G. Punitive damages exclusion, if any, must be deleted (and the deletion indicated on the certificate of insurance), unless (a) insurance coverage may not lawfully be obtained for any punitive damages that may arise under this Lease, or (b) all punitive damages are prohibited by the state of Texas.

H. Prior to execution of this Lease, Lessee shall furnish Lessor with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements in this Lease.

I. All insurance policies must be written by a reputable insurance company acceptable to Lessor, and authorized to do business in the state of Texas.

J. The fact that insurance is obtained by Lessee, or by Lessor on behalf of Lessee, will not be deemed to release or diminish the liability of Lessee, including, without limitation, liability under the indemnity provisions of this Lease. Damages recoverable by Lessor from Lessee or any third party will not be limited by the amount of the required insurance coverage.