

CITY OF SAN DIEGO CONCESSION PERMIT

THIS CITY OF SAN DIEGO CONCESSION PERMIT ("Permit") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), and HIKE BIKE KAYAK SPORTS, Inc. ("CONCESSIONAIRE"), to be effective upon execution by the parties and approval by the San Diego City Attorney (the "Effective Date"), as follows:

1. **Incorporated Documents.** This Permit is created pursuant to the City of San Diego REQUEST FOR PROPOSAL ("RFP") for Kayak Concessions issued by the Real Estate Assets Department October, 14, 2008, and CONCESSIONAIRE'S proposal in response to the RFP, dated November 17, 2008. Attached and incorporated herein are the following documents: Exhibit A, Site Map, Exhibit B, Tour Schedule, and Exhibit C, Kayak Concession Requirements. The Operating Plan submitted by CONCESSIONAIRE as part of its proposal is also attached hereto as Exhibit D and incorporated herein.
2. **Right to Enter.** Subject to the terms and conditions of this Permit, CITY hereby grants permission to CONCESSIONAIRE, its employees, agents and contractors to operate a kayak concession ("Concession") as defined in section 3 below on City beach known as La Jolla Shores, in the boat launch zone and on the beach which extends 185 feet north from the southern end of the westerly extension of Avenida De La Playa, as more specifically described on the attached Exhibit A ("Site").
3. **Use of Site.** This Permit is granted to CONCESSIONAIRE for the sole purpose of allowing CONCESSIONAIRE to operate a Kayak concession (Conducting kayak tours as well as delivering and removing rented kayaks) serving the general public under the terms and conditions of this Permit. There shall be no commercial use of Laureate or Kellogg Parks by the concessionaire. No solicitation or marketing is permitted on City beaches. Renting or selling of beach equipment or other merchandise is not allowed under this Permit. Any use other than the Concession use described herein will be cause for immediate termination of this Permit.
4. **Maximum Days and Hours of Operation.** No kayak tour/rental operations prior to 8 a.m. daily (June 13 – Sept. 1) and no operations prior to 9 a.m. (Sept. 2- June 12). All kayaks must be removed from the designated storage area by 8:30 p.m. All kayak tours are to be completed and out of the water fifteen (15) minutes before sunset daily. All operations are permitted seven days a week with the following exceptions:
 - a. Under no circumstances are operations permitted on the 4th of July holiday.

- b. Special Events. Unless otherwise authorized by the City Manager, CONCESSIONAIRE shall have no rights within certain areas of the Concession Site or designated portions thereof during days in which "Special Events" as defined in San Diego Municipal Code section 22.4003 are scheduled by CITY in this area. CITY shall give CONCESSIONAIRE advance written notice of any such "Special Events".
5. Competent Management. Throughout the term of this Permit, CONCESSIONAIRE shall provide competent management of the Site for the permitted uses to the satisfaction of the City Manager. CONCESSIONAIRE covenants to operate the Concession for the above-specified purposes and diligently conduct the operations to produce a reasonable and substantial gross income.
6. Term. The term of this Permit shall be one (1) year commencing on April 1, 2009 ("Commencement Date"). "Permit Year" as used in this Permit shall mean the twelve-month period commencing on the Commencement Date and any subsequent twelve-month extension exercised in accordance with Section 7, Extension of Term.
7. Extension of Term. Provided that the CONCESSIONAIRE is not in default of this Permit, the term of this Permit may be extended for two (2) one-year terms at the consideration specified in Section 12 and subject to all original agreements and conditions. Concessionaire must notify CITY in writing ninety (90) days prior to the expiration of the current term of its intention to extend. All extensions will be at the sole discretion of the CITY. Any extension of the term of the Permit beyond thirty-six (36) months shall result in a month-to-month license.
8. Termination. This Permit may be terminated at any time by either party upon ninety (90) days prior written notice to the other party.
9. Revocable License. This Permit is not a lease. It is a license to use CITY-owned property, and may be revoked by CITY, in its sole discretion. CITY shall not be obligated for any loss, financial or otherwise, which may be incurred by CONCESSIONAIRE as a result of such termination of this Permit. CONCESSIONAIRE expressly waives any claim for expense or loss which CONCESSIONAIRE might incur as a result of CITY'S termination of this Permit.
10. Special Provisions
 - a. Operating Plan. The Operating Plan(s) for June 2009 through May 2010 submitted with the CONCESSIONAIRE'S response to the CITY'S Request for Proposal, shall be revised by CONCESSIONAIRE, if required by CITY to meet CITY'S approval, and the final CITY approved Plan(s) shall be incorporated into this Permit as Exhibit D. Beginning April 1, 2010, and for every 12 months thereafter, the CONCESSIONAIRE shall

provide the CITY with an Operating Plan for the coming year for the CITY'S approval. All Operating Plans submitted to the CITY should be consistent with the format and content of the Plans included as Exhibit D. CITY shall have the right to approve or disapprove the proposed plan. Once approved, CONCESSIONAIRE shall not make any changes to the Plan without prior written approval of CITY.

- b. Operations. The CITY reserves the right to make changes at any time to the tour schedule and/or the number of individual kayak rentals permitted based on operational and safety considerations. **At all times, the CONCESSIONAIRE shall ensure that all permitted operations comply with the Kayak Concession Requirements incorporated herein as Exhibit C.**
- c. Standard of Employees. CONCESSIONAIRE and its employees shall at all times conduct themselves and the operations of the Concession in a creditable manner. CONCESSIONAIRE shall thoroughly train its employees in their duties and shall regularly monitor them to ensure that they behave in a courteous manner, do not disturb the quiet enjoyment of other beach users, and otherwise comply with all of the Kayak Concession Requirements in Exhibit C of this Permit.
- d. Exclusiveness of Permit and Unauthorized Vending. CITY, by granting this Permit to CONCESSIONAIRE, makes no warranty that the Site shall be free of unauthorized vending or that any specific level of police or lifeguard enforcement against such activities shall be maintained.
- e. Concession Site. CONCESSIONAIRE shall erect no improvements on the Site. The Site must be maintained so as to present a neat and attractive appearance to the satisfaction of the CITY. Any items or improvements brought on the Site by the CONCESSIONAIRE must be approved in writing by CITY and shall not remain on location after permitted hours of operation, unless prior written approval of CITY is obtained.
- f. Improvements. Upon expiration or termination of this Permit, any and all improvements, trade fixtures, structures, and installations or additions to the Site now existing or constructed on the Site by CONCESSIONAIRE shall be deemed to be part of the Sites and shall become CITY'S property free of all liens and claims. All personal property remaining on the Sites after expiration or termination shall also become the property of CITY.
- g. Maintenance of Site. CONCESSIONAIRE agrees not to commit or allow to be committed any waste or injury or any public or private nuisance, to keep the Site clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in or about said spaces to the satisfaction of

CITY and at CONCESSIONAIRE'S sole cost. Site must be cleaned up nightly by CONCESSIONAIRE or more often, as required.

11. Fees.

- a. Percentage Fees. Percentage fees will be calculated on a calendar month basis and will consist of eight percent (8.00%) of the gross income resulting from Kayak tours permitted under this Permit. The City Manager, in his sole discretion, may approve another percentage rate or minimum rate for each other incidental service or operation supplementary to the permitted uses stated in Section 3, Use of Site, as may be approved in writing by the City Manager prior to the commencement of any additional service or operation. Provided however, any activity conducted on the Site without the prior written approval of the City Manager shall be subject to the requirements of Section 12.f., Unauthorized Use Charge.
- b. Minimum Fee. The annual Minimum Fee established for the first year following the effective date of this Permit is Six Thousand Dollars (\$6,000.00), or Five Hundred Dollars (\$500.00) on a monthly installment basis.

If the Minimum Fee is greater than the percentage fee on a calendar month basis, one-twelfth (1/12) of the Minimum Fee is required to be paid for that month. Minimum Fees are to be paid in monthly installments on or before the day of the calendar month when percentage rent is due pursuant to Section 12.k., Time and Place of Payment. In the event that the combined total percentage fee payments and monthly installments of the Minimum Fee during any Permit Year equal or exceed the required Minimum Fee for that year, for the balance of that year, CONCESSIONAIRE shall discontinue paying monthly installments of the Minimum Fee until the beginning of the next Permit Year. If in any Permit Year, Minimum Fees paid plus Percentage Fees paid exceed the annual Minimum Fee and also exceed the fee which would have been paid if the Percentage Fee had been paid on total gross income, the excess over the total fee owed shall be credited against the next payable fee as it becomes due. It is the intent of this provision that CONCESSIONAIRE shall pay monthly installments of the annual Minimum Fee as a guarantee against the Percentage Fee requirement and that the greater of the two requirements, minimum or percentage, whichever occurs throughout the term, shall prevail on an annual basis.

- c. Minimum Fee Adjustment. Effective at the beginning of the first day of the 13th and 25th month of this Permit, the annual Minimum Fee shall be eighty percent (80.00%) of the annual average of actual fees paid in the first Permit Year plus any option terms exercised under this Permit. The annual average shall then be divided by twelve (12) to establish the new

monthly Minimum Fee. It is recognized that the adjustments shall be calculated by the CITY upon completion of payments due for the preceding year in order to determine the amount of the Minimum Fee for the option period. Until such calculations are completed, CONCESSIONAIRE shall continue paying monthly Minimum Fees at the prior rate. Any additional fees determined by the adjustment to be due for the months previously paid at the prior rate shall be paid to the CITY within thirty (30) days following written notice. In no event shall the Minimum Fee Adjustment result in a decrease in the Minimum Fee requirement in effect immediately prior to the adjustment date.

- d. Annual Percentage Adjustment to Minimum Fee. In the event that only the minimum fee is paid, every twelve (12) months, the Minimum Fee shall increase to one-hundred five (105.00%) of the previous year's Minimum Fee.
- e. Delinquent Concession Fee. If CONCESSIONAIRE fails to pay any concession fees when due, CONCESSIONAIRE will pay, in addition to the unpaid concession fees, a fee of \$25.00. If the fees are still unpaid at the end of the fifteen (15) days, CONCESSIONAIRE shall pay a fee of \$50.00, which is mutually agreed by the parties to this Permit to be appropriate to compensate the CITY for loss resulting from concession fee delinquency, including lost interest opportunities, legal costs, and the cost of servicing the delinquent account.
- f. Gross Income. "Gross Income" or "Gross Receipts", as used in this Permit shall include all income resulting from the Concession from whatever source derived whether received or to become due; provided, however, that Gross Income shall not include federal, state, or municipal taxes collected from the consumer (regardless of whether the amount is stated to the consumer as a separate charge) and paid over periodically by CONCESSIONAIRE to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by CONCESSIONAIRE in computing Gross Income. Gross Income shall not include refund of deposits. The amount of taxes and refunds shall be clearly shown on the books and records of CONCESSIONAIRE. The percentage concession fees shall be calculated and paid by CONCESSIONAIRE on the basis of Gross Income whether the income is received by CONCESSIONAIRE or by any permittee or licensee, or their agents, and all Gross Income received by any permittee, licensee, or other party as a result of occupancy or operation of the Site(s) shall be regarded as Gross Income of CONCESSIONAIRE for the purpose of calculating the percentage concession fees required to be paid by CONCESSIONAIRE to CITY, except as may be otherwise specified by or pursuant to this Permit.

g. Payment Procedure.

On or before the last day of the calendar month following the calendar month in which the gross income subject to fees was earned, Concessionaire shall provide City with a correct income statement for the Site operated by Concessionaire together with a payment of fees on all applicable gross receipts in a form selected by City. The statement will be signed by Concessionaire or its authorized agent attesting to the accuracy of the statement. Each statement will include:

- i. Total gross receipts for the subject month itemized as to business categories for which separate Percentage Fees are established.
- ii. The Percentage Fee due City computed and totaled.
- iii. The accumulated total of all fees previously paid for the current year.
- iv. Payments in the greater of the two following amounts:
One-twelfth of the annual Minimum Fee or the total Percentage Fee due City computed as described in this section.

h. Inspection of Records.

- i. Records. CONCESSIONAIRE shall, at all times during the Permit term, keep or cause to be kept true and complete books, records, and accounts of all financial transactions in the operation of all business activities conducted upon and financial transactions resulting from the use of the Site(s). The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices, tour lists, or other documents as necessary to allow CITY to easily determine the gross income. Any retail sales or charges will be recorded by means of cash registers or other comparable devices which display to the customer the amount of the transaction and automatically issue a receipt. The registers will be equipped with devices that lock in sales totals and other transaction numbers and sales details that are not resettable. Totals registered shall be read and recorded at the beginning and end of each business day. In the event of admission charges or concession rents, CONCESSIONAIRE shall issue serially numbered tickets for such admission or concession fees and shall keep an adequate record of such tickets, as well as a record of

unissued tickets. All retail sales and charges may be recorded by a system other than cash registers or other comparable devices provided such a system is approved by the CITY.

- ii. Financial Statements. Within sixty (60) days after the end of the First Permit Year, CONCESSIONAIRE will, at its expense, submit to CITY a statement in which the total gross receipts and the corresponding amounts of concession percentage fees paid CITY for the year are classified according to the categories of business established for any percentage concession fees and for any other business conducted on or from the Site. The statement shall be signed by CONCESSIONAIRE and Financial Representative of CONCESSIONAIRE attesting to the accuracy thereof, which shall be legally binding upon CONCESSIONAIRE.
- iii. Right to Inspect. All CONCESSIONAIRE'S books of account, records, and supporting documentation, as described under Section 12.i (i), will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. These books and records must be maintained separately from all other accounts not relating to the Site(s). The CITY, at its discretion, shall have the right to inspect and audit the business of CONCESSIONAIRE, its agents, permittees, and licensees operating on, and in connection with, the Site(s) as necessary and appropriate for CITY to determine the amounts of concession fees due CITY in compliance with the requirements of this Permit. At CITY'S request, CONCESSIONAIRE shall promptly provide, at CONCESSIONAIRE'S expense, any necessary data to enable CITY to fully comply with all requirements of the state and federal government for Permit information or reports concerning the Concessions. Such data will include, if required, a detailed breakdown of CONCESSIONAIRE'S receipts and expenses.
- iv. Audit Cost. The full cost of the CITY'S audit(s) will be borne by CITY unless one or both of the following conditions exists, in which case CONCESSIONAIRE agrees to pay CITY'S cost of audit(s):

The audit(s) reveal an underpayment of more than five percent (5.00%) or more than \$10,000.00, which ever is

less, between the concession fees due as reported and paid by CONCESSIONAIRE, pursuant to this Permit and concession fees determined by the audit(s).

CONCESSIONAIRE has failed to maintain complete and true books, records, accounts, and supporting documents in strict accordance with this section.

Any underpayment of concession fees less than five percent (5.00%) revealed by the audit may be paid within thirty (30) days written notice from the CITY without penalty. In lieu of late payment charges as provided herein, if an audit performed pursuant to the terms of this Permit reveals that CONCESSIONAIRE has underpaid concession fees by more than 5%, then CONCESSIONAIRE shall pay, in addition to the underpaid fees, an audited-deficiency charge of ten percent (10%) of the underpaid fees, plus interest at the rate of ten percent per annum on the underpaid fees until paid. CITY will credit any overpayment against incoming concession fees. Any overpayment determined after the end of this Permit will be refunded by CITY within thirty (30) days of confirmation by the City Manager of the audit(s) findings.

- i. Default. CONCESSIONAIRE'S failure to keep complete and accurate records by means of double-entry bookkeeping and make them available for CITY inspection is, like all other failures to comply with covenants of this Permit, a breach of this Permit and cause for termination.
- j. Time and Place of Payment. Payments are due on or before the last day of the calendar month following the calendar month in which the Gross Income subject to percentage fees was earned. Checks shall be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 122289, San Diego, California 92112-4165, or delivered to the Office of the City Treasurer, Civic Center Plaza, 1200 Third Avenue, First Floor, San Diego, California. The place and time of payment may be changed by CITY upon thirty (30) days prior written notice to CONCESSIONAIRE. Mailed payments shall be deemed paid upon the date such payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed paid upon actual receipt by the City Treasurer. CONCESSIONAIRE assumes all risk of loss and responsibility for late payment charges if payments are made by mail.
- k. Security Deposit. The CONCESSIONAIRE shall deliver to CITY with the executed copies of this Permit, a good faith deposit in the amount of

two thousand five hundred dollars (\$2,500.00). All or any portion of the principal sum shall be available unconditionally to CITY for payment of delinquent concession fees, for correcting any default or breach of this Permit by CONCESSIONAIRE, CONCESSIONAIRE'S successors or assignees, or for payment of expenses incurred by CITY as a result of CONCESSIONAIRE'S failure to faithfully perform all terms, covenants, and conditions of this Permit. If at the end of the term of this Permit, CONCESSIONAIRE has performed all of the provisions of the Permit, the deposit or any remaining balance shall be returned to the CONCESSIONAIRE without interest. The security deposit may be increased by CITY proportionate to any increase in Minimum Fees. CONCESSIONAIRE shall maintain the security deposit throughout the Term. **Notwithstanding any other provision of this Permit, if CONCESSIONAIRE fails or refuses to deposit or maintain a security deposit as required by this Permit, CITY may terminate this Permit immediately upon such breach. Upon such termination, CONCESSIONAIRE shall immediately cease its use of the Sites and commence and diligently pursue the removal of its property from the Sites.**

- i. Utilization. If CITY utilizes all or any portion of the security deposit, upon 10 days prior written notice, CONCESSIONAIRE shall reimburse the security deposit to the full required amount.
 - ii. Increase. Upon thirty (30) days prior written notice by CITY, CONCESSIONAIRE shall deliver to CITY additional funds as CITY may, in its sole determination, require to adequately secure CONCESSIONAIRE'S obligations under this Permit.
 - iii. Return. Provided CONCESSIONAIRE is not in breach or default of this Permit, CITY shall return the security deposit, or any balance thereof, to CONCESSIONAIRE within sixty (60) days after the expiration or termination of this Permit.
12. CITY'S Consent, Discretion. Whenever required under this Permit, CITY'S consent or approval shall mean the written consent or approval of the City Manager, unless otherwise expressly provided. CITY'S discretionary acts hereunder shall be made in the City Manager's sole and absolute discretion, unless otherwise expressly provided.
13. Acceptance of Site. CONCESSIONAIRE represents and warrants that it has independently inspected the Site and made all tests, investigations, and observations necessary to satisfy itself of the condition of the Site.

CONCESSIONAIRE agrees it is relying solely on its independent inspection, tests, investigations, and observations in entering into this Permit. CONCESSIONAIRE further acknowledges that the Site is in the condition called for by this Permit, that CITY has performed all work, if any, related to the Sites and required by this Permit, and that CONCESSIONAIRE shall hold CITY harmless for any defects, whether apparent or latent, in the Site, including without limitation the presence of any hazardous substances.

14. Maintenance of the Site. CONCESSIONAIRE shall, at CONCESSIONAIRE'S sole cost and expense and to CITY'S satisfaction, maintain the Sites in a decent, safe, healthy and sanitary condition at all times during the Term.
15. Standard of Conduct. CONCESSIONAIRE and its employees shall at all times conduct themselves and the operations on the Site in a creditable manner.
16. Inspection. CITY may, at all times, enter and inspect the Site.
17. Insurance. On or before the Effective Date, CONCESSIONAIRE shall deliver to CITY a current certificate of insurance for:
 - a. Commercial General Liability insurance providing coverage for bodily injury, including death, personal injury, and property damage with limits of at least One Million Dollars (\$1,000,000) per occurrence, subject to an annual aggregate of Two Million Dollars (\$2,000,000).
 - b. CONCESSIONAIRE must maintain current workers compensation coverage which meets statutory requirements for all employees. One million (1,000,000) dollars of employers liability coverage is also required.
 - c. CONCESSIONAIRE must maintain a (marine) protection and indemnity policy, with limits of not less than one million (1,000,000) dollars UNLESS proof is submitted that CONCESSIONAIRE's kayak operations are under the commercial general liability policy. A certified copy of the CGL policy will be sufficient to meet this requirement.
 - i. Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds in all policies.
 - ii. Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by CITY. The policies shall be kept in force for the duration

of the Term and any extended use. The certificate(s) of insurance shall be filed with CITY'S Real Estate Assets Department upon execution of this Permit.

- iii. Qualified Insurer(s). All insurance required by the terms of this Permit must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to CITY. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet CITY requirements.
- iv. Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of CONCESSIONAIRE and must be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- v. Continuity of Coverage. All policies shall be in effect on or before the first day of the Term of this Permit, except "course of construction fire insurance" shall be in force on commencement of all authorized construction on the Sites, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. At least thirty (30) days prior to the expiration of each insurance policy, CONCESSIONAIRE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Permit.
- vi. Modification. To assure protection from and against the kind and extent of risk existing on the Site, CITY, at its discretion, may require the revision of amounts and coverages at any time during the Term by giving CONCESSIONAIRE thirty (30) days prior written notice. CONCESSIONAIRE shall also obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this Permit.
- vii. Accident Reports. PERMITTEE shall immediately report to CITY any accident causing property damage or injury to persons on the Permit Area. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.

viii. Failure to Comply. If CONCESSIONAIRE fails or refuses to obtain and maintain the required insurance, or fails to provide proof of coverage, CITY may obtain the insurance. CONCESSIONAIRE shall reimburse CITY for the premiums paid, with interest at the maximum allowable legal rate then in effect in California. CITY shall notify CONCESSIONAIRE of such payment of premiums within thirty (30) days of payment stating the amount paid, the name(s) of the insurer(s), and rate of interest. CONCESSIONAIRE shall pay such reimbursement and interest on the first (1st) day of the month following CITY'S notice. **Notwithstanding any other provision of this Permit, if CONCESSIONAIRE fails or refuses to obtain or maintain insurance as required by this Permit, or fails to provide proof of insurance, CITY may terminate this Permit immediately upon such breach. Upon such termination, CONCESSIONAIRE shall immediately cease its use of the Site and commence and diligently pursue the removal of its property from the Site.**

ix. All insurers must be licensed to conduct business in the State of California and with exception of workers compensation, be rated "A-, VI" or better by AM Best. If coverage is provided by a surplus lines carrier, it must be listed on the current LESLI list. Any and all deductibles and/or self-insured retentions must be disclosed to the City at the time proof of insurance is provided. All insurers must be acceptable to the City.

18. Indemnification. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY, its elected officials, officers, representatives, agents and employees, harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to CONCESSIONAIRE'S officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with this Permit or CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites, and all expenses of investigating and defending against same, including without limitation attorney fees and costs; provided, however, that CONCESSIONAIRE'S duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of CITY, its elected officials, officers, representatives, agents and employees. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own

defense, or obtain independent legal counsel in defense of any claim related to this indemnification, CONCESSIONAIRE shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.

19. No Discrimination. CONCESSIONAIRE shall not discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in CONCESSIONAIRE'S use of the Sites, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
20. Local Business and Employment. CONCESSIONAIRE acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. CONCESSIONAIRE will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this Permit from local residents and firms as opportunities occur. CONCESSIONAIRE agrees to hire qualified local residents and firms whenever feasible.
21. Drug-free Workplace. CONCESSIONAIRE shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:
 - a. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances are prohibited on the Sites and specifying the actions that will be taken against employees for violations of the prohibition; and
 - b. Establish a drug-free awareness program to inform employees about all of the following:
 - i. The dangers of drug abuse in the workplace;
 - ii. CONCESSIONAIRE'S policy of maintaining a drug-free workplace;
 - iii. Any available drug counseling, rehabilitation, and employees assistance programs; and
 - iv. Penalties that may be imposed upon employees for drug abuse violations.
22. Disabled Access Compliance. CONCESSIONAIRE shall comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990

(ADA); and any other applicable state and federal laws and regulations hereafter enacted protecting the rights of people with disabilities.

23. CONCESSIONAIRE'S Risk. CONCESSIONAIRE shall bear all risks and liability arising out of or in any manner directly or indirectly connected with CONCESSIONAIRE'S occupancy, use, development and maintenance of the Site and any damages to the improvements on, under, or in the vicinity of the Site resulting directly or indirectly thereby.
24. No Nuisance. CONCESSIONAIRE shall not use the Site in any manner which, in CITY'S opinion, creates a nuisance or disturbs the quiet enjoyment of persons in and to the surrounding area.
25. No Assignment. CONCESSIONAIRE shall not assign or sublicense any rights granted by this Permit or any interest in this Permit without CITY'S prior written consent, which may be unreasonably withheld or delayed in CITY'S sole and absolute discretion. Any assignment by operation of law shall automatically terminate this Permit.
26. Charter Section 225. Pursuant to San Diego City Charter Section 225, CONCESSIONAIRE and assignees shall make a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved in this Permit and the precise nature of all interests of all persons therein. CONCESSIONAIRE'S failure to fully disclose all of the information required by Charter Section 225 or CONCESSIONAIRE'S failure to require each of its assignees to fully disclose such information shall be a default of this Permit. Pursuant to City Charter Section 225, every person or entity that will have an interest in this Permit as an assignee must be reviewed and approved by CITY.
27. Signs. CONCESSIONAIRE shall not erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings or similar devices or advertising without CITY'S prior written consent. If any such unauthorized item is found on the Sites, CONCESSIONAIRE shall remove the item at its expense within 24 hours notice by CITY, or CITY may thereafter remove the item at CONCESSIONAIRE'S cost.
28. Advertisement and Marketing. Any advertising or marketing which reference the City of San Diego may not be distributed by the CONCESSIONAIRE without the advanced written approval of the CITY. If CONCESSIONAIRE uses the City of San Diego in any context to promote its business operations without prior written approval by CITY, CONCESSIONAIRE will be considered to be in default. No advertising or marketing materials of any kind may be posted or distributed on any City beach without the advanced written approval of the CITY.

29. Encumbrances. CONCESSIONAIRE shall keep the Site free from all encumbrances and liens of any nature which arise out of or are in any manner directly or indirectly connected with this Permit or CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY harmless from and against any and all such encumbrances and/or liens, and from and against any claim, liability, cost or expense, including without limitation all attorney fees and costs, relating to or charged against the Sites, including without limitation CONCESSIONAIRE'S failure or the failure of any contractor or subcontractor hired by CONCESSIONAIRE to pay any person or persons referred to in Section 3181 of the California Civil Code or other applicable sections thereof.

30. Defaults and Remedies.

a. Default by CONCESSIONAIRE. Except for Safety Violations (as defined under subsection b., below) which are grounds for immediate termination, in the event that:

- i. CONCESSIONAIRE shall default in the performance or fulfillment of any covenant or condition required by this Permit to be performed or fulfilled by CONCESSIONAIRE, including any covenant or condition in CONCESSIONAIRE's Operating Plan and shall fail to cure the default within thirty (30) days following written notice from CITY; or if any default is not curable within thirty (30) days, and CONCESSIONAIRE shall fail to commence to cure the default(s) within said thirty (30) day period and diligently pursue cure to completion;
- ii. CONCESSIONAIRE shall voluntarily file or have involuntarily filed against it any petition under bankruptcy or insolvency act or law; or
- iii. CONCESSIONAIRE shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon CONCESSIONAIRE or upon any person claiming rights through CONCESSIONAIRE, immediately terminate this Permit and all rights of CONCESSIONAIRE and of all persons claiming rights through CONCESSIONAIRE and expel CONCESSIONAIRE and all persons so claiming rights thereto. Provided; however, in the event that any default described in Part (1)a. of this section is not curable within thirty (30) days after written notice to CONCESSIONAIRE, CITY shall not terminate this Permit pursuant to the default if CONCESSIONAIRE immediately commences to cure the default and diligently pursues cure to completion.

In any event, either party may terminate this Permit without cause by giving ninety (90) days written notice of intent to terminate to the other party.

- b. Safety Violations by CONCESSIONAIRE. Notwithstanding subsection (a) above, in the event CONCESSIONAIRE shall default in the performance or fulfillment of any covenant or condition required by this Permit to be performed or fulfilled by CONCESSIONAIRE, including any covenant or condition in CONCESSIONAIRE's Operating Plan, and said default by CONCESSIONAIRE consists of any violation of municipal, state or federal law, or any covenants or conditions in CONCESSIONAIRE's Operating plan or Exhibit C that, in the CITY's sole discretion, impinge on public safety ["Safety Violations"], CITY may, at its option, require CONCESSIONAIRE to immediately cure said default, or, without further notice or demand upon CONCESSIONAIRE or upon any person claiming rights through CONCESSIONAIRE, suspend or revoke this Permit.
 - c. Abandonment by CONCESSIONAIRE. In the case that CONCESSIONAIRE breaches this Permit and abandons the Site, this Permit shall continue in full force and effect for so long as CITY does not terminate this Permit, and CITY may enforce all its rights and remedies under this Permit, including, but not limited to, the right to recover the concession fee as it becomes due, plus damages. For purposes of this section, the following do not constitute a termination of CONCESSIONAIRE'S right to possession or operation:
 - i. Acts by CITY of maintenance, preservation, or efforts to negotiate a new Permit.
 - ii. The appointment of a receiver upon initiative of CITY to protect CITY'S interest under this Permit.
31. Damages. Damages which CITY may recover in the event of default under this Permit include the worth, at the time of the award, of the amount by which the unpaid concession fee for the balance of the term after the date of award or for any shorter period of time specified in this Permit exceeds the amount of concession fee loss for the same period that the CONCESSIONAIRE proved could be reasonably avoided. The remedies provided by this section are not exclusive and shall be cumulative to all other rights and remedies possessed by CITY, and nothing contained herein shall be construed so as to defeat any other rights or remedies possessed by CITY, and nothing contained herein shall be construed so as to defeat any other rights or remedies to which CITY may be entitled.

32. Compliance with Laws. CONCESSIONAIRE shall, at its sole cost and expense, comply with all the requirements of all rules, regulations, ordinances, laws and direction of governing authorities now in effect or which may hereafter be in effect, which pertain to CONCESSIONAIRE'S occupancy, use, development, and maintenance of the Site.
33. Taxes. CONCESSIONAIRE shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon CONCESSIONAIRE by reason of the business or other CONCESSIONAIRE activities related to the Sites, including any licenses or permits. CONCESSIONAIRE acknowledges that this Permit may create a possessory interest subject to property taxation, and that CONCESSIONAIRE may be subject to the payment of taxes levied on that interest. CONCESSIONAIRE shall pay all such possessory interest taxes. CONCESSIONAIRE'S payment for taxes, fees, and assessments shall not reduce any payment due CITY under this Permit.
34. Water Quality Assurances.
The CITY and CONCESSIONAIRE are committed to the implementation of control (best management practices, or BMPs) to manage activities on the Premises in a manner which aids in the protection of the City of San Diego's precious water resources. It is the LESSEE's responsibility to identify and implement an effective combination of BMPs so as not to cause pollutant discharges to the storm drain system in violation of Section 43.03, Stormwater Ordinance.

Therefore, LESSEE shall, at minimum, implement and comply, as applicable, with the BMPs for industrial and commercial facilities adopted under the San Diego Municipal Code Section 43.0307 (a).

It is ultimately the LESSEE's responsibility to prevent pollutant discharges to the storm drain system. Therefore, the LESSEE will identify and implement any additional BMPs that may be required to avoid the discharge of pollutants to the storm drain system.

35. Hazardous Substances. CONCESSIONAIRE shall not allow the installation or release of hazardous substances in, on, under, or from the Site. CONCESSIONAIRE and CONCESSIONAIRE'S agents and contractors shall not store, utilize, or sell any hazardous substance on the Site without CITY'S prior written consent. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State of California's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated into this Permit.

- a. Remediation. If any release of a hazardous substance occurs, CONCESSIONAIRE shall pay all costs of remediation and removal of the hazardous substance in accordance with all applicable laws and rules and regulations of governmental authorities.
- b. Indemnity. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites, including but not limited to costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.
- c. Notice of Release. If CONCESSIONAIRE knows or has reasonable cause to believe that any hazardous substance has been released on or beneath the Site, CONCESSIONAIRE shall give written notice to CITY within three (3) days of receipt of the knowledge or cause for belief. If CONCESSIONAIRE knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, CONCESSIONAIRE shall notify CITY immediately upon receipt of such knowledge or belief and shall take all actions necessary to alleviate the danger. CONCESSIONAIRE shall notify CITY immediately of any notice of violation received or initiation of environmental actions or private suits related to the Site.
- d. Environmental Assessment. At CITY'S option upon expiration or termination of this Permit, an environmental assessment of the Site shall be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at CONCESSIONAIRE'S sole cost and expense, and shall establish what, if any, hazardous substances exist on, in, or under the Site, and in what quantities. If any hazardous substances exist in quantities greater than that allowed by CITY, county, state, or federal laws, statutes, ordinances, or regulations, then the environmental assessment shall include a discussion of these substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes, and estimates of the cost of such remediation or removal. CONCESSIONAIRE shall cause the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved, and CONCESSIONAIRE shall pay all costs and expenses therefor.

36. Waiver. CITY'S failure to insist upon the strict performance of any of CONCESSIONAIRE'S obligations under this Permit, in one or more instance, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. The property constituting the Site is CITY-owned and held in trust for the benefit of CITY'S citizens. CITY'S failure to discover a breach of any obligation of this Permit or take prompt action to require the cure of any such breach shall not result in an equitable estoppel, but CITY may at any and all times require the cure of any such breach.
37. Survival. Any obligation which accrues under this Permit prior to its expiration or termination shall survive such expiration or termination.
38. Joint and Several Liability and Responsibility. If CONCESSIONAIRE includes more than one person or legal entity, each such person and legal entity shall be jointly and severally liable and responsible for the performance of each and every obligation of CONCESSIONAIRE under this Permit.
39. Partial Invalidity. If any term, covenant, condition, or provision of this Permit is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.
40. Number and Gender. Words of any gender used in this Permit shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
41. Captions. Section headings and captions shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Permit. The numbers of the paragraphs and pages of this Permit may not be consecutive. Such lack of consecutive numbers shall have no effect on the enforceability of this Permit.
42. Entire Permit. This Permit constitutes the entire Permit between the parties and supersedes any and all prior understandings, representations, warranties and Permits between them and pertaining to this Permit and CONCESSIONAIRE'S occupancy, use, development, and maintenance of the Sites. Any modification, alteration, or amendment of this Permit shall be in writing and signed by all the parties hereto.
43. Legal Proceedings. If either party commences legal proceedings to enforce or interpret any right or obligation under this Permit, the prevailing party shall be entitled to an award of costs related thereto, including without limitation reasonable attorney fees and court costs.

44. Notices. Any notice required or permitted to be given under this Permit shall be in writing and may be served personally or delivered by United States mail, postage prepaid, and addressed to CITY or CONCESSIONAIRE, respectively, as follows:

THE CITY OF SAN DIEGO
Real Estate Assets Department
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Ste. 1700 MS 51A
San Diego, CA 92101

45. Governmental Approvals. By entering into this Permit, neither CITY nor CITY'S City Council is obligating itself to any governmental agent, board, commission, or agency with regard to any other discretionary action relating to CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites. Discretionary action includes but is not limited to re-zonings, variances, environmental clearances, or any other governmental approvals which may be required for CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites.
46. San Diego's Strong Mayor Form of Governance. All references to "City Manager" in this Permit shall be deemed to refer to "the Mayor or his/her designee." This section shall remain in effect for the duration CITY operates under the mayor-council (commonly referred to as "Strong mayor") form of governance pursuant to Article XV of the San Diego City Charter.

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47. Authority to Contract. Each individual executing this Permit on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Permit on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing Permit, and that this Permit is binding upon such person or entity in accordance with its terms. Each person executing this Permit on behalf of another person or legal entity shall provide CITY with evidence, satisfactory to CITY, that such authority is valid.

IN WITNESS WHEREOF, this Permit is executed to be effective as of the Effective Date.

Date: 3/27/09

THE CITY OF SAN DIEGO, a California
municipal corporation

BY: [Signature]
James Barwick, Director
Real Estate Assets Department

Date: 3/27/09

HIKE BIKE KAYAK SPORTS, Inc.
CONCESSIONAIRE

BY: [Signature]
[Signature]
Angela Harrell, Owner
Davis Teafatiller, Owner

APPROVED AS TO FORM AND LEGALITY:

Effective Date: 4/1/09

JAN I. GOLDSMITH, City Attorney

BY: [Signature]
Deputy City Attorney