

Exhibit D

CITY OF SAN DIEGO KAYAK CONCESSION AGREEMENT

THIS CITY OF SAN DIEGO CONCESSION AGREEMENT ("Agreement") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), and OEX La Jolla ("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 Agreement is created pursuant to the City of San Diego REQUEST FOR PROPOSAL ("RFP") for Kayak Concessions issued by the CITY on October 3, 2011, and CONCESSIONAIRE's proposal in response to the RFP, dated 28 October, 2011. Attached and incorporated herein are the following documents: Site Map (Attachment A), Tour Schedule (Attachment B), and Kayak Concession Requirements (Attachment C). The Operating Plan submitted by CONCESSIONAIRE as part of its proposal is also incorporated herein. In addition to the terms and conditions set forth in the Agreement, CONCESSIONAIRE agrees to fully abide by the Tour Schedule, Kayak Concessions Requirements, and the Operating Plan.
2. Right to Enter. Subject to the terms and conditions of this Agreement, CITY hereby grants permission to CONCESSIONAIRE, its employees, and agents to operate a kayak concession ("Concession") as defined in section 3 below on the City beach known as La Jolla Shores, in the boat launch zone and on the beach which extends 125 feet north from the southern end of the westerly extension of Avenida De La Playa, as depicted on Attachment A hereinafter referred to as the "Site".
3. Use of Site. This Agreement is granted to CONCESSIONAIRE for the sole purpose of allowing CONCESSIONAIRE to operate a kayak concession, hereinafter referred to as "Concession". Concession means an operation involving the conducting of kayak tours and rentals as well as delivering and removing rental and tour kayaks serving the general public under the terms and conditions of this Agreement. There shall be no commercial use of Laureate or Kellogg Parks by the CONCESSIONAIRE. No solicitation or marketing is permitted on any portion of any City beach. Renting or selling of beach equipment or any other merchandise is not allowed under this Agreement. Any use other than as a Concession as described herein shall constitute good cause for immediate termination of this Agreement.

4. Maximum Days and Hours of Operation. CONCESSIONAIRE shall not conduct any Concession prior to 8 a.m. daily from June 13th through September 1st of each Agreement Year as defined in section 6. CONCESSIONAIRE shall also not conduct any Concession prior to 9 a.m. from September 2nd through June 12th of each Agreement Year. All kayaks must be removed from the designated storage area before dark. All kayak tours are to be completed and out of the water fifteen (15) minutes before sunset daily. All Concession operations are permitted seven days a week with the following exceptions:
 - a. Under no circumstances are Concession operations permitted on the 4th of July.
 - b. Special Events. Unless otherwise authorized by the City Manager, CONCESSIONAIRE shall have no rights within certain areas of the 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 Agreement, CONCESSIONAIRE shall provide competent management of the Concession and the Site for the permitted uses to the satisfaction of the City Manager. CONCESSIONAIRE covenants at all times to operate the Concession for the above-specified purposes and diligently conduct the Concession to maximize gross revenue.
6. Term. The term of this Agreement ("Term") shall be three years commencing on 1 April 2012 ("Commencement Date"). "Agreement Year" as used in this Agreement shall mean the twelve-month period during the Term commencing on the Commencement Date.
7. Termination. This Agreement may be terminated at any time by either party upon ninety (90) days prior written notice to the other party. Any written notice to this effect shall be served in accordance with Section 43 of this Agreement.
8. Revocable License. This Agreement 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 termination or suspension of this Agreement. CONCESSIONAIRE expressly waives any claim for expense or loss which CONCESSIONAIRE might incur as a result of CITY'S termination or suspension of this Agreement or for the scheduling of any Special Events pursuant to Section 4.b that conflict with or prohibit CONCESSIONAIRE's use of the Site.
9. Special Provisions

- a. Operating Plan. The Operating Plan(s) for April 1, 2012 through May 31, 2013 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 Operating Plan(s) shall be incorporated into this Agreement. Beginning April 1, 2012, and for every 12 months thereafter during the Term, the CONCESSIONAIRE shall provide the CITY with an Operating Plan for the upcoming year for the CITY'S approval. CONCESSIONAIRE shall submit such Operating Plan by February 1, 2012. All Operating Plans submitted to the CITY should be consistent with the format and content of the Operating Plans initially submitted to the CITY. CITY in its sole discretion shall have the right to approve or disapprove the proposed Operating Plan. Once approved, CONCESSIONAIRE shall not make any changes to the Operating Plan without prior written approval of CITY. CONCESSIONAIRE shall not operate the Concession at any time during the Term without an Operating Plan fully approved by the CITY valid for the time period of operation.
- 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 Attachment C.**
- c. Standard of Employees. CONCESSIONAIRE and its employees shall at all times conduct themselves and the operations of the Concession in a respectable and courteous 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 set forth as Attachment C to this Agreement.
- d. Exclusiveness of Agreement and Unauthorized Vending. CITY, by granting this Agreement 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. CONCESSIONAIRE's Storefront address. CONCESSIONAIRE's storefront address is:

OEX La Jolla
2243 Avenida de la Playa
La Jolla, CA 92037

- f. Concession Site. CONCESSIONAIRE shall erect no improvements on the Site without prior written approval by the CITY. 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.
- g. Improvements. Upon expiration or termination of this Agreement, 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 Site and shall become CITY's property free of all liens and claims. All personal property remaining on the Site after expiration or termination shall also become the property of CITY. Alternatively, the CITY, at its option, may require CONCESSIONAIRE to immediately remove any and all improvements, trade fixtures, structures, installations and additions to the Site at CONCESSIONAIRE's sole cost and expense
- h. 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 and expense. Site must be cleaned up by CONCESSIONAIRE each day prior to CONCESSIONAIRE vacating the Site on a nightly basis or more often, as may be required by the CITY in its sole discretion.

10. Fees.

- a. Percentage Fee. The Percentage Fee shall be calculated on a calendar month basis and shall consist of ten percent (10.00%) of the total Gross Income (as defined in Section 10.f of the Agreement) of CONCESSIONAIRE resulting from kayak tours, rentals, and all activities associated with the CONCESSIONAIRE's activities permitted under this Agreement. 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 10.e. Unauthorized Use Charge.

- b. Minimum Fee. The annual Minimum Fee established for the first two Agreement Years following the effective date of this Agreement is Nine Thousand Five Hundred and Twelve Dollars (\$9,512.00), or Seven Hundred and Ninety Three Dollars (\$793.00) on a monthly installment basis ("Monthly Minimum Fee").

If the Monthly Minimum Fee is greater than the Percentage Fee in a particular calendar month, the Monthly Minimum Fee is required to be paid for that month. The Monthly Minimum Fee is to be paid in monthly installments on or before the day of the calendar month when the percentage fee is due pursuant to Section 10.j. Time and Place of Payment. In the event that the combined total amount of fees paid by CONCESSIONAIRE (consisting of the percentage fee payments and the Monthly Minimum Fee paid) during any Agreement Year equal or exceed the required annual Minimum Fee for that year, for the balance of that year, CONCESSIONAIRE shall discontinue paying the Monthly Minimum Fee until the beginning of the next Agreement Year and shall only pay the Percentage Fee until such time.

- c. Minimum Fee Adjustment. Effective at the beginning of the first day of the third and fifth Agreement Years of this Agreement ("Adjustment Date"), the annual Minimum Fee shall be set at eighty percent (80.00%) of the annual average of the Total Fees Paid under this Agreement for the two (2) Agreement Years immediately preceding the Adjustment date. The annual average of the Total Fees Paid 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 years in order to determine the amount of the Minimum Fee for the remaining Term. Until such calculations are completed, CONCESSIONAIRE shall continue paying the Monthly Minimum Fee at the current 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 provided pursuant to Section 43 of the Agreement. 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. In the event that the Total Fees Paid prior to the Adjustment Date do not exceed the current annual Minimum Fee, the annual Minimum Fee shall be increased to one-hundred five percent (105.00%) of the annual Minimum Fee most recently in effect.
- d. Delinquent Concession Fee. If CONCESSIONAIRE fails to pay any Concession fees when due, CONCESSIONAIRE shall pay the delinquent fee plus a late fee equal to five percent (5%) of the delinquent fee. If fees remain unpaid more than fifteen (15) days past the due date, the late fee shall be increased to ten percent (10%) of the delinquent fee, which

CONCESSIONAIRE shall pay in addition to delinquent fee. The parties agree that such delinquent fees are 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.

- e. Unauthorized Use Charge. CONCESSIONAIRE shall pay to CITY, as an additional fee, an unauthorized use charge equal to hundred percent (100%) of the Gross Revenue (as defined in Section 10.f) received from any service or use of the Site by CONCESSIONAIRE that is not allowed under this Agreement. Such payment is subject to the due date provided in the Agreement for fee payments and the provisions for delinquent or unpaid fee. Neither the existence of such an unauthorized use charge nor the payment of such charge, or any part of it, shall constitute an authorization of an unauthorized use, and shall not be waiver of any of the CITY'S rights under the Agreement.
- f. Gross Revenue. "Gross Revenue," as used in this Agreement shall include all income resulting from the Concession whether received or to become due; provided, however, that Gross Revenue shall not include federal, state, or municipal taxes collected from the CONCESSIONAIRE (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 Revenue. Gross Revenues 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 Fee shall be calculated and paid by CONCESSIONAIRE on the basis of Gross Revenue whether the income is received by CONCESSIONAIRE or by any of CONCESSIONAIRE's agents, employees, permittees, or representatives, and all Gross Revenue received by any of CONCESSIONAIRE's agents, employees, permittees, representatives, or other party as a result of occupancy or operation of the Site shall be regarded as Gross Revenue of CONCESSIONAIRE for the purpose of calculating the Percentage Fee required to be paid by CONCESSIONAIRE to CITY, except as may be otherwise specified by this Agreement.
- g. Payment Procedure.

On or before the last day of the calendar month following the calendar month in which the Gross Revenue subject to the Percentage Fee 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 shall be signed by CONCESSIONAIRE and its

authorized agent attesting to the accuracy of the income statement. Each statement will include:

- i. Total Gross Receipts for the subject month itemized as to business categories for which the separate Percentage Fee is established.
- ii. The Percentage Fee due CITY and the manner in which such Percentage Fee was computed and totaled.
- iii. The accumulated total of all fees previously paid to CITY for the current year.
- iv. Payments in the greater of the two following amounts: The Monthly Minimum Fee or the total Percentage Fee due CITY computed as described in Section 10.

h. Inspection of Records.

- i. Records. CONCESSIONAIRE shall at all times during the 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. 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 Revenue. 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 shall 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 fees, 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 each Agreement Year, CONCESSIONAIRE shall at its sole cost and expense, submit to CITY a statement in

which the total Gross Receipts and the corresponding amounts of Percentage Fees paid CITY for the year are classified according to the categories of business established for any Percentage Fees and for any other business conducted on or from the Site. The statement shall be signed by CONCESSIONAIRE and a duly authorized financial representative of CONCESSIONAIRE attesting to the accuracy thereof, which shall be legally binding upon CONCESSIONAIRE.

- iii. Right to Inspect. All of CONCESSIONAIRE's books of account, records, and supporting documentation, as described under Section 10.i, shall 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. The CITY, at its discretion, shall have the right to inspect and audit the business of CONCESSIONAIRE, its agents, representatives and permittees operating on, and in connection with, the Site as necessary and appropriate for CITY to determine the amounts of concession fees due CITY in compliance with the requirements of this Agreement. 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 Agreement 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):
 - A. The audit(s) reveal an underpayment by CONCESSIONAIRE to the CITY of more than five percent (5.00%) on an annual basis for any Agreement Year or more than \$5,000, whichever is less, between the Total Fees Paid as reported and paid by CONCESSIONAIRE pursuant to this Agreement and Concession fees owed as determined by the audit(s).

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

Any fee deficiency determined by the audit shall be considered a delinquent fee, subject to all penalties and remedies provided to CITY for delinquent Concession fees under this Agreement section 10.d. CITY shall credit any overpayment by CONCESSIONAIRE determined by the audit, without interest, against future fees due under this Agreement. If no future fees are due under this Agreement, CITY shall refund CONCESSIONAIRE any overpayment determined by the audit, without interest, within sixty (60) days after CITY's certification of the audit.

- i. Default. CONCESSIONAIRE's failure to keep complete and accurate records by means of double-entry bookkeeping and failure to make them available for CITY inspection is, like all other failures to comply with the covenants of this Agreement, a material breach of this Agreement and good 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 Revenue subject to the Percentage Fee 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 129030, San Diego, California 92112-9030, 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 any such postmark is 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. CONCESSIONAIRE shall deliver to CITY with the executed copies of this Agreement, a good faith deposit in the amount of two thousand five hundred dollars (\$2,500.00) in the form of a cashier's or certified check. All or any portion of the principal sum of the security deposit shall be available unconditionally to CITY for payment of delinquent concession fees, for correcting any default or breach of this Agreement 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 Agreement. If at the end of the term of this Agreement, CONCESSIONAIRE has performed all of the provisions of the Agreement, 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 the Minimum Fee. CONCESSIONAIRE shall maintain this security deposit throughout the Term of this Agreement. **Notwithstanding any other provision of this Agreement, if CONCESSIONAIRE fails or refuses to deposit or maintain a security deposit as required by this Agreement, CITY may terminate this Agreement 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 Agreement.
 - iii. Return. Provided CONCESSIONAIRE is not in breach or default of this Agreement, CITY shall return the security deposit, or any balance thereof, to CONCESSIONAIRE within sixty (60) days after the expiration or termination of this Agreement.
12. CITY'S Consent, Discretion. Whenever required under this Agreement, 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 Agreement. CONCESSIONAIRE further acknowledges that the Site is in the condition called for by this Agreement, that CITY has performed all work, if any, related to the Sites and required by this Agreement, 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 its 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 respectable and courteous 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). Higher insurance limits may be required by the CITY's Risk Management Department depending on the nature of the activity.
 - b. CONCESSIONAIRE must maintain current workers compensation coverage which meets statutory requirements for all employees. One Million Dollars (\$1,000,000) of employers' liability coverage is also required.
 - c. Automobile Liability Insurance for all bodily injury and property damage, with a limit of at least One Million Dollars (\$1,000,000) per occurrence subject to an annual aggregate of Two Million Dollars (\$2,000,000). Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-hired vehicles) operated in performing any and all Concessions or other services pursuant to this Agreement. Coverage shall be written on ISO form CA 00 01 12 90, or a later version of this form, or an equivalent form providing equivalent liability coverage.
 - d. Causes of Loss-Special Form Property Insurance. CONCESSIONAIRE shall obtain and maintain, at its own cause and expense, Causes of Loss-Special Form Property Insurance on all of CONCESSIONAIRE's insurable property related to the Site in an amount to recover one hundred percent (100%) of the replacement cost. CONCESSIONAIRE shall deliver to CITY a certificate of such insurance.
 - e. CONCESSIONAIRE must maintain a (marine) protection and indemnity policy, with limits of not less than One Million Dollars (\$1,000,000) per

occurrence subject to an annual aggregate of Two Million Dollars (\$2,000,000). 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 Agreement.
- iii. Qualified Insurer(s). All insurance required by the terms of this Agreement 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 Agreement. 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 Agreement. CONCESSIONAIRE shall provide proof of continuing insurance on at least an annual basis during the Term. If CONCESSIONAIRE's insurance lapses or is discontinued for any reason, CONCESSIONAIRE shall

immediately notify the CITY and immediately obtain replacement insurance.

- 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 coverage 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, changed circumstances, or CITY's reasonable re-evaluation of risk levels related to the Site in order to meet the requirements of this Agreement.
- vii. Accident Reports. PERMITTEE shall immediately report to CITY any accident causing property damage or injury to persons on the Site or person engaged in the activities permitted under this Agreement. 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 on the premium paid by the CITY 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 Agreement, if CONCESSIONAIRE fails or refuses to obtain or maintain insurance as required by this Agreement, or fails to provide proof of insurance, CITY may terminate this Agreement immediately upon such breach. Upon such termination, CONCESSIONAIRE shall immediately cease its use of the Site and commence and diligently pursue the removal of any and all of its personal 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 Agreement or CONCESSIONAIRE's occupancy, use, development, or maintenance of the Site, 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 Site, 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 Agreement 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 Manager'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 Agreement or any interest in this Agreement without CITY'S prior written consent, which may be withheld or delayed in CITY'S sole and absolute discretion. Any assignment by operation of law shall automatically terminate this Agreement.
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 Agreement 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 Agreement. Pursuant to City Charter Section 225, every person or entity that will have an interest in this Agreement 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 shall 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 Agreement 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 Agreement 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 Agreement 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 30.a.i of this section is not curable within thirty (30) days after written notice to CONCESSIONAIRE, CITY shall not terminate this Agreement 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 Agreement 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 Agreement 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 Attachment C that, in the CITY's sole discretion, relate to 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 Agreement.
- c. Abandonment by CONCESSIONAIRE. In the case that CONCESSIONAIRE breaches this Agreement and abandons the Site, this Agreement shall continue in full force and effect for so long as CITY does not terminate this Agreement, and CITY may enforce all its rights and remedies under this Agreement, 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 Agreement.
- ii. The appointment of a receiver upon initiative of CITY to protect CITY's interest under this Agreement.

31. Damages. CITY, in the event of CONCESSIONAIRE's default under this Agreement, may recover the outstanding annual Minimum Fees due for the remaining term of the Agreement, less any mitigation measures taken by CITY. 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 Agreement 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 be fully and solely responsible for payment of all such possessory interest taxes. CONCESSIONAIRE'S payment for taxes, fees, and assessments shall not reduce any payment due CITY under this Agreement.
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 CONCESSIONAIRE'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, CONCESSIONAIRE shall, at a 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 CONCESSIONAIRE's responsibility to prevent pollutant discharges to the storm drain system. Therefore, CONCESSIONAIRE shall 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 Agreement.
- c. 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.
 - d. 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.
 - e. 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.

- f. Environmental Assessment. At CITY's option upon expiration or termination of this Agreement, 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 therefore.
36. Waiver. CITY's failure to insist upon the strict performance of any of CONCESSIONAIRE's obligations under this Agreement, 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 Agreement 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 Agreement 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 Agreement.
39. Partial Invalidity. If any term, covenant, condition, or provision of this Agreement 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 Agreement 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 Agreement. The numbers of the paragraphs and pages of this Agreement may not be consecutive.

Such lack of consecutive numbers shall have no effect on the enforceability of this Agreement.

42. Entire Agreement. This Agreement constitutes the entire Agreement between the parties and supersedes any and all prior understandings, representations, warranties, agreements and permits between them and pertaining to this Agreement and CONCESSIONAIRE'S occupancy, use, development, and maintenance of the Sites. Any modification, alteration, or amendment of this Agreement shall be in writing and signed by all the parties hereto.
43. Notices. Any notice required or permitted to be given under this Agreement 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

CONCESSIONAIRE:
OEX La Jolla
2243 Avenida de la Playa
La Jolla, CA 92037

44. Governmental Approvals. By entering into this Agreement, 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.
45. San Diego's Strong Mayor Form of Governance. All references to "City Manager" in this Agreement 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.
46. City's Not-Liability. CITY shall not be liable to CONCESSIONAIRE, its employees, agents, or representatives for any loss of revenue, business, or otherwise as a result of any weather conditions, beach closures, surf alerts, floods, fire, or any other acts of God, strikes, lockouts, labor disputes, unusual

governmental delays, epidemics, freight embargoes, causes beyond the reasonable control of CITY, or in the CITY's performance of any act related to protecting the public health and safety.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

47. Authority to Contract. Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Agreement 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 Agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement 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 Agreement is executed to be effective as of the Effective Date.

Date: 4-18-12

THE CITY OF SAN DIEGO, a California
municipal corporation

BY: [Signature]
Stacey LoMedico, Director
Park and Recreation Department

Date: 4/18/12

BY: [Signature]
Rick Wurts, Chief
San Diego Fire-Rescue Lifeguards

Date: 4/17/12

OEX LA JOLLA, LLC
CONCESSIONAIRE

BY: CHRIS LYNCH, MANAGING DIRECTOR
[Signature]

APPROVED AS TO FORM AND LEGALITY:

Effective Date: 23 Apr 2012

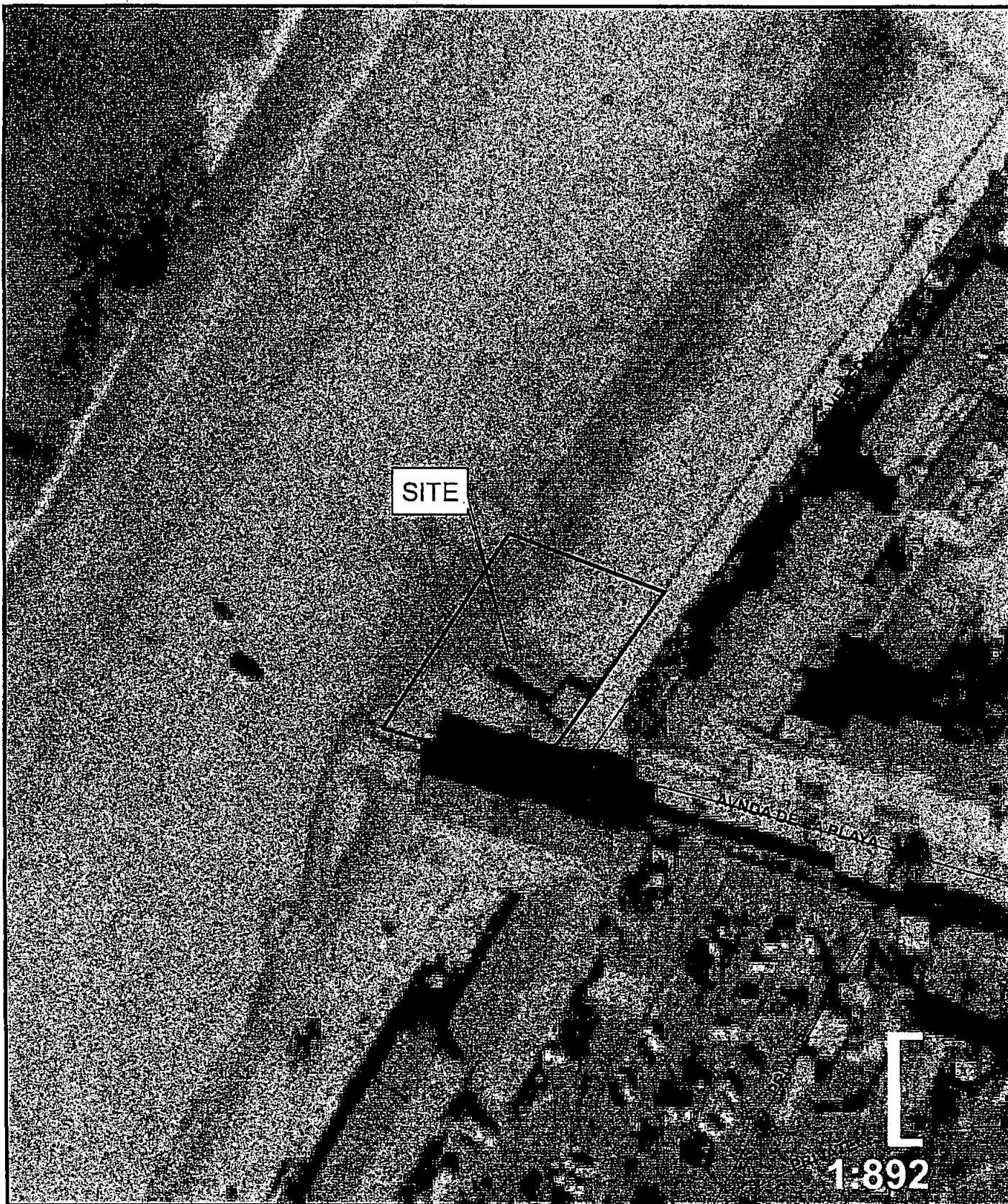
JAN I. GOLDSMITH, City Attorney

BY: [Signature]
Deputy City Attorney

Attachment A - Site Map

Exhibit A

Site Map



Every reasonable effort has been made to assure the accuracy of this map. However, neither the SanGIS participants nor San Diego Data Processing Corporation assume any liability arising from its use.

This map contains information from the San Diego Association of Governments (SANDAG) Regional Information System. This map cannot be reproduced without the written permission of SANDAG.

THIS MAP IS PROVIDED WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

This map contains information which has been reproduced with permission granted by Thomas Brothers Map Company. PROPRIETARY INFORMATION: The use of this information is prohibited to sublicense agreement only. Any resale or retransmission of this information is prohibited, except in accordance with such sublicensing agreements.



Attachment B – Kayak Tour Schedule

Exhibit B
Kayak Tour Schedule

Column1	Column2	Column3	Column4	Column5	Column6
1	9:00	Avail Slot	33	14:20	Avail Slot
2	9:00	Avail Slot	34	14:20	Avail Slot
3	9:20	Avail Slot	35	14:40	Avail Slot
4	9:20	Avail Slot	36	14:40	Avail Slot
5	9:40	Avail Slot	37	15:00	Avail Slot
6	9:40	Avail Slot	38	15:00	Avail Slot
7	10:00	Avail Slot	39	15:20	Avail Slot
8	10:00	Avail Slot	40	15:20	Avail Slot
9	10:20	Avail Slot	41	15:40	Avail Slot
10	10:20	Avail Slot	42	15:40	Avail Slot
11	10:40	Avail Slot	43	16:00	Avail Slot
12	10:40	Avail Slot	44	16:00	Avail Slot
13	11:00	Avail Slot	45	16:20	Avail Slot
14	11:00	Avail Slot	46	16:20	Avail Slot
15	11:20	Avail Slot	47	16:40	Avail Slot
16	11:20	Avail Slot	48	16:40	Avail Slot
17	11:40	Avail Slot	49	17:00	Avail Slot
18	11:40	Avail Slot	50	17:00	Avail Slot
19	12:00	Avail Slot	51	17:20	Avail Slot
20	12:00	Avail Slot	52	17:20	Avail Slot
21	12:20	Avail Slot	53	17:40	Avail Slot
22	12:20	Avail Slot	54	17:40	Avail Slot
23	12:40	Avail Slot			
24	12:40	Avail Slot			
25	13:00	Avail Slot			
26	13:00	Avail Slot			
27	13:20	Avail Slot			
28	13:20	Avail Slot			
29	13:40	Avail Slot			
30	13:40	Avail Slot			
31	14:00	Avail Slot			
32	14:00	Avail Slot			

Attachment C - Kayak Concession Requirements

EXHIBIT C
Kayak Concession Requirements

The following requirements are subject to revision at any time by the CITY:

A commercial kayak operator issued a Concession by the CITY ("Concessionaire") shall maintain continual adherence to all terms and conditions included herein and all applicable laws and shall take the necessary safety precautions to ensure that the public and beach are protected at all times.

1. Ocean Conditions and Safety

Concessionaire must **check the surf report** maintained by the San Diego Fire-Rescue Lifeguards (619/221-8824) each day. Concessionaire must provide information to clients of daily conditions and/or hazards and the dangers inherent in kayaking in open exposed bodies of water and in close proximity to the La Jolla sea caves and its rocky shoreline. Possible hazards include small craft warnings, surf size, Santa Ana winds, cold water, extreme heat, etc.

Concessionaire and its employees, agents and/or affiliates must adhere to all directions provided by lifeguards, other representatives of the CITY, or any other officer with authority to enforce local, state or federal law. In the case of disputes, supervisory personnel may be summoned, but the decision of lifeguards regarding any particular matter on a given day is final and should be brought to the attention of the area lifeguard lieutenant as necessary at a later time.

Concessionaire shall be aware of and adhere to the three stages of Surf Alerts implemented by the CITY's Lifeguard Division which are as follows:

- Surf Alert 0 – Conditions normal, permitted activity allowed.
- Surf Alert 1 - Conditions warrant increased safety measures; individual rentals are not allowed and guide to client ratios are increased (one guide for every three kayak tour boats). Additionally, kayaks are not allowed into the La Jolla sea caves during a Surf Alert 1.
- Surf Alert 2 – No commercial kayak operations allowed.

The on-duty lifeguard supervisor will determine if a Surf Alert 1 or 2 is needed, and Concessionaire shall be notified when a Surf Alert is implemented. The decision by the lifeguard supervisor is non-negotiable and shall be adhered to immediately by Concessionaire.

Lifeguards reserve the right to close the boat launch and/or terminate any kayak tours and/or rentals based on safety considerations.

2. Identifying Markers

Concessionaire, its employees, agents, and representatives must be readily identifiable as authorized employees and/or agents of the Concessionaire through the wearing of a company shirt or rash guard with a logo in plain view. Concessionaire's kayak tour guides must be clearly differentiated from clients through the use of such means.

All kayaks used in Concessionaire's commercial kayak operations shall be marked with the name or logo of the Concessionaire and an individual, non-duplicated number. The markings shall be plainly visible and legible from a distance of fifty (50) feet.

3. Concession Site/Location

All business transactions must be conducted fully within Concessionaire's storefront address. Concessionaire shall meet all kayak tour participants inside of the Concessionaire's store and conduct all orientation/training inside of its store or in the area designated by the CITY. Any violation of this provision by Concessionaire, its employees, and/or its agents shall be considered a breach of Concessionaire's Concession Agreement and may constitute cause for its termination.

4. Boat Launch/Operator Vehicles

Concessionaire is fully responsible for ensuring that its vehicles and trailers used for the transport and delivery of kayaks and/or equipment, utilizing the boat launch comply with the following:

- Vehicles and trailers must possess current registration.
- Vehicles must be "all wheel drive", in that power is supplied to both axles and all of the wheels.
- Vehicles and trailers must be clearly marked with the Concessionaire's name by either permanent or magnetic signs, and plainly visible and legible from a distance of one hundred (100) feet.
- The boat launch area must be kept clear at all times. Kayaks must not be left in a position that obstructs free use of the launch area.
- Concessionaire, its agents, and/or employees must at all times obey all posted signs and any direction given by the CITY.

In addition to the foregoing, Concessionaire is responsible for ensuring that all vehicle operators possess a valid California driver's license.

5. Concession Site - Regulations

All outfitting and rigging of kayaks as well as any training of clients shall be conducted on dry land at a CITY designated site. The boat launch area must be kept clear at all times. Kayaks and equipment must not be left in a position that obstructs the free use of the boat launch area.

Space near the La Jolla Shores Boat Launch may be made available for local Concessionaires. A maximum of twenty (20) kayaks and forty (40) paddles owned or controlled by Concessionaire may be kept at the boat launch area at any one time.

Concessionaire vehicles must adhere to a fifteen (15) minute drop off and pickup of kayaks and materials on the beach.

Concessionaire must adhere to all of the laws, rules and guidelines for traffic at the boat launch and adjacent streets, including but not limited to speed, staging, parking and traffic flow with extra care and concern given for the safety of the public.

6. Maximum number of tour participants/ Student to instructor ratios

Concessionaire is fully responsible for ensuring that kayak tours shall never exceed twelve (12) kayaks total consisting of ten (10) client kayaks and two (2) kayak guide kayaks, and must adhere to the following criteria:

There shall be at least one (1) kayak guide for every five (5) client kayaks (5:1). In the event that a kayak tour exceeds five (5) client kayaks, an additional kayak guide will be required.

The ratio of client individuals to kayak guides shall never exceed ten (10) client individuals to one (1) kayak guide (10:1), regardless of the number of kayaks.

7. Water Activity Zones and Areas of Special Interest

Concessionaire is fully responsible for ensuring that all kayak tours adhere to San Diego Municipal Code section 63.20.2 defining Water Activity Zones and buoy demarcated use areas at all times including, but not limited to, swim zones, no board surfing zones, boat launch zone and no boat zone.

All kayak rentals, whether for tours or for individuals, shall adhere to San Diego Municipal Code section 63.20.9 defining rules for boat beaching and launching.

Concessionaire shall advise individual kayak rentals to not venture near the rocks or the caves. Additionally, Concessionaire shall advise individual kayak rentals to remain outside of the swim lane at La Jolla Cove.

8. Equipment:

Concessionaire shall ensure that at least one (1) kayak guide on each kayak tour must have a U.S. Coast Guard approved visual and auditory signaling device, a handheld VHF radio and/or cell phone, and that proper training is provided in their use.

Concessionaire shall also ensure that all individuals participating in kayak tours of the La Jolla sea caves area shall possess and wear a properly fitting and secured helmet, appropriate for whitewater use.

Concessionaire shall maintain all kayaks and operational equipment in proper working order and condition.

Concessionaire shall not deposit any kayaks at the designated rental kayak storage area prior to 8:00 a.m. and all kayaks must be removed before dark.

Concessionaire must provide an employee to monitor the rental kayak storage area at all times when any kayaks or equipment is on the beach.

Concessionaire shall maintain the kayak storage area in a neat and orderly manner at all times and shall ensure that all rental kayaks and/or equipment shall be neatly stacked within the designated area so as not to impede any other activities within the boat launch area.

The City of San Diego ("City") has the right at any time to adjust the location of the rental kayak storage site in its sole discretion based on safety or other considerations.

9. Waivers

Concessionaire must have on file a signed waiver from each individual renting a kayak and each individual participating in a kayak tour, or their legal guardian if under 18 years of age, which holds the CITY, its agents, officers and employees harmless and indemnifies the same from any claims relating to the participants' activities on the City beach which arise from or are in any manner connected with the services provided to the participants under the Agreement.

10. Safety Precautions/Emergency Response Plan

Concessionaire must maintain a written record of each client's full name, local contact number and kayak identification number to aid with locating the client in the event of an emergency.

Concessionaire shall provide each rental kayak client with a waterproof map of the adjacent water area, clearly depicting all Water Activity Zone Areas as set forth in San Diego Municipal Code section 63.20.2, known hazards, and off-limits areas.

Concessionaire is fully responsible for making each client aware of known hazards, off-limit areas, and Water Activity Zones, preferably by referencing the provided map, and that any violations may result in a citation and/or injury.

Concessionaire shall provide a properly fitting U.S. Coast Guard approved Type III or Type V personal flotation device to each client.

If a client reports an injury to Concessionaire or Concessionaire is aware of an injury or accident that requires medical attention or services and the injury occurs during the performance of Concessionaire's services from launch to beaching, Concessionaire shall inform the SD Fire-Rescue Lifeguards in writing of such injury.

Concessionaire shall keep a file on record of all accident reports for three (3) years after each event.

11. Minimum Requirements for Guides

Concessionaire shall ensure that all kayak guides are at least eighteen (18) years of age.

Concessionaire is fully responsible for ensuring that its kayak guides complete and maintain the minimum qualifications as outlined below:

- A valid Basic First Aid certification from the American Red Cross or the equivalent.
- A valid CPR certification by either the American Red Cross as a Professional Rescuer or American Heart Association as a Healthcare Provider or the equivalent.
- Certificate of completion for the Lifeguard Division Kayak Guide Orientation Training Course.
- A certificate of completion of kayak guide training. Each Concessionaire will be required to provide annual training for its guides. An outline of training subjects and course content is required with the Concessionaire's Operating Plan and must at the minimum include the following:

- Review of La Jolla coastal geography
 - Review of Kayak Concession Requirements (as set forth in Exhibit C)
 - Weather and surf conditions
 - Hazards: large surf, wind, location of local caves and cliffs
 - Emergency action plan
 - Floatation devices, emergency signaling devices
 - Instructing others on the topics of kayak paddling and maneuvering skills
 - Local rules and laws pertaining to Water Activity Zones
 - Laws pertaining to the La Jolla Ecological Preserve
 - Signs and symptoms of hypothermia
 - Types of different local marine life
 - Review of general Lifeguard Operations
 - Proper use of marine band VHF radio and cell phone
 - Applicable federal and state laws and regulations for vessel operation
- Supervise and instruct clients and be fully capable of giving a suitable orientation talk to all clients while in kayaks on relevant subjects which may include, but not limited to, overall safety, personal floatation devices, emergency signaling devices, kayak paddling/maneuvering skills.
 - Possess a general knowledge of emergency access and evacuation routes, and how to summon and assist any emergency response personnel.

Concessionaire may request variations from the kayak guide qualifications set forth in this section. Any request for variation must be made in writing to the Fire-Rescue Department, Lifeguard Division and the request shall substantiate that the variation does not reduce the intent of the qualification set forth in this rule.

Documents relating to the requirements of this section shall be kept at the Concessionaire's storefront for inspection by the CITY representative.

Concessionaire understands and fully agrees that keeping patrons safe while engaged in kayak tours and kayak rentals shall be its highest priority. Should San Diego Fire-Rescue Lifeguards or other official City personnel find violations or a pattern of violations of any requirement of the Concession Agreement, then a "Violation of Concession Agreement/Safety Notice" will be issued by the Fire-Rescue Department Lifeguards Division.

12. Violations/Safety Notice

The CITY reserves the right to perform inspections and/or reviews with or without advance notice. These inspections and/or reviews may be for any or all aspects related to the Concession Agreement and its attachments, including, but not limited to, ensuring that Concessionaire: (a) possesses all of the requisite certificates and qualifications of its tour guides; (b) properly addresses all safety issues; (c) adheres to the Tour Schedule; and, (d) maintains necessary records pertaining to kayak renters and kayak tour participants. Violation of any aspect of the Concession Agreement may result in suspension or revocation of the Agreement. With regard to safety, the CITY or any other officer with authority to enforce local, state or federal law, has the

right to terminate any tour or individual kayak rental if there is a violation of any safety requirements.

When a Concessionaire, its employee, agent, or representative is issued a "Violation of Concession Agreement/Safety Notice" or convicted for any violation related to their kayak operations the CITY shall evaluate the conviction or notice of violation for an appropriate and reasonable sanction, up to and including a suspension or revocation of the Concession Agreement. Such punishment will be in addition to any penalty assessed by the courts.

13. Additional Concession Stipulations

Concessionaire must at all times have all valid licenses and permits to do business within the City of San Diego and must have a storefront not located on CITY beach or park property where business shall be conducted.

No business transactions or solicitation for business are permitted on CITY property (i.e. advertising, signing of waivers, collecting of money, etc.). All business transactions must be conducted within Concessionaire's storefront address stated in the Agreement.

Attachment D - Operating Plan

Approved Operating Plan on File with Lifeguard Division