

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 operations permitted on the 4th of July holiday each year.
 - B. Special Events. Unless otherwise authorized by the CITY, CONCESSIONAIRE shall not be allowed to operate Concessions within certain areas of the Site 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 fourteen (14) days 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. 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 thirty-six (36) months commencing on April 1, 2015 ("Commencement Date"). "Agreement Year" as used in this Agreement means any of the four (4) consecutive twelve (12) month periods beginning with the Commencement Date. The City may extend this Agreement at the end of the initial term by up to two (2) additional twelve (12) month periods. This Agreement may be terminated at any time by either party upon thirty (30) days prior written notice to the other party. Any written notice to this effect shall be served in accordance with Section 42 of this Agreement. Following the third year, this Agreement may be extended on a month-to-month basis for up to two additional years at the sole discretion of the CITY.
 7. Holding Over. Any use of the Concession Site by CONCESSIONAIRE after the expiration of this Agreement is not permitted. Any extension of the term of the Agreement beyond sixty (60) months shall require the written approval of CITY.
 8. Revocable License. This Agreement is not a lease. It is a license to use CITY-owned property, and may be revoked, terminated, or suspended 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 the revocation, 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 revocation, 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 the Site.
 9. Special Provisions
 - A. Operating Plan. The Operating Plan(s) for April 1, 2015 through Mar 31, 2016, submitted with the CONCESSIONAIRE's response to the CITY'S RFP, 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 as Attachment B. Beginning with the second Agreement Year, and for every Agreement Year thereafter, the CONCESSIONAIRE shall provide the CITY with an Operating Plan for the coming Agreement Year for the CITY's approval. These Operating Plans must be submitted by March 1st of each calendar year for the upcoming season under this Agreement. All Operating Plans submitted to the CITY should be consistent with the format and content of the Operating Plans included as Attachment B. CITY 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. At all times, the CONCESSIONAIRE shall ensure that all operations permitted under this Agreement comply with the Kayak Concession Requirements incorporated herein as Attachment C. Failure to provide an Operating Plan as described in this paragraph will constitute a material breach of this Agreement.

The CITY reserves the right to make changes at any time to the tour schedules 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.**

- B. Exclusiveness of Agreement and Unauthorized Vending. In addition to Special Events described in Section 4.B., CITY may, during the term of this Agreement, enter into Agreements with other concessionaires to provide kayak concessions during times not scheduled for operations in the approved Operating Plan(s) at the Site permitted in this Agreement. In addition, should any existing launch times become vacant throughout the term of this Agreement, CITY may distribute these open times among the existing concessionaires at its own discretion. However, 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.
- C. Concession Site. CONCESSIONAIRE shall erect no improvements nor place any items 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.
- D. 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.
- E. 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 Site to the satisfaction of CITY and at CONCESSIONAIRE's sole cost. The Site must be cleaned up nightly by CONCESSIONAIRE or more often, as required.

- F. 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 in Attachment C of this Agreement.

10. Fees.

CONCESSIONAIRE is required to pay to CITY, on a monthly basis, the greater of either the Percentage Fee or the Monthly Minimum Fee, as described below. In the event that the combined total amount of fees paid by CONCESSIONAIRE during any Agreement Year equals or exceeds the Annual Minimum Fee for that Agreement Year, then CONCESSIONAIRE shall only pay the Percentage Fee each subsequent month until either a new Agreement Year begins or this Agreement ends. If, in any Agreement Year, Monthly Minimum Fees paid plus Percentage Fees paid exceed the Annual Minimum Fee and also exceed the annual fee which would have been paid if the Percentage Fee had been paid on Gross Revenue, 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.

- A. Percentage Fees. Percentage Fees will consist of ten percent (10.00%) of the Gross Revenue resulting from the Kayak Concession operations permitted under this Agreement during each month of an Agreement Year. CITY, in its 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. All such incidental services or operations must be approved in writing by the CITY prior to the commencement of the additional service or operation. 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 Fees. The Annual Minimum Fee established for the first Agreement Year following the effective date of this Agreement is fourteen thousand four hundred dollars (\$14,400), which is **one thousand two hundred dollars (\$1,200)** on a monthly installment basis ("Monthly Minimum Fee").

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.

- C. Minimum Fee Adjustment. Beginning with the second Agreement Year, and continuing with each subsequent Agreement Year thereafter, the Annual Minimum Fee will be increased by five percent (5%) of the immediately prior Agreement Year's Annual Minimum Fee.
- D. Delinquent Concession Fee. If CONCESSIONAIRE fails to pay any 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 late 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 one 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 fees. 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 Revenue includes all revenue received by CONCESSIONAIRE from internet sales (for example, if using a website such as Groupon, Gross Revenue would include all money received by CONCESSIONAIRE from a Groupon sale). Gross Revenue includes revenue generated from all equipment rented or leased for use in CONCESSIONAIRE's Kayak Concessions conducted under this Agreement. All income collected by CONCESSIONAIRE from items rented for use in Concessions, whether used in a tour or with a rental, shall be included in Gross Revenue. Gross Revenues shall not include refund of deposits for CONCESSIONAIRE's tours or Concession related activities (for example, a payment to CONCESSIONAIRE refunded to a customer due to a cancelled tour would not be counted as Gross Revenue). 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.

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 Revenue in a form selected by CITY. This income statement shall be due to CITY by the end of the calendar month immediately following the month for which the income statement was generated. The income statement shall be signed by CONCESSIONAIRE and its authorized agent attesting to the accuracy of the income statement. Each income statement shall include:

- i. Total Gross Revenue for the subject month itemized as to business categories for which the separate Percentage Fee is established.
- ii. The amount of the Percentage Fee due to 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 Agreement 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.A.

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. Regarding

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 of other comparable devices provided such a system is approved by the CITY.

- ii. **Financial Statements.** Immediately following July 1, 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 Revenue and the corresponding amounts of Percentage Fees paid CITY for that Agreement 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. Failure to provide financial statements as described in this paragraph will constitute a material breach of this Agreement.
- iii. **Right to Inspect.** All of CONCESSIONAIRE's books of account, records, and supporting documentation, as described under Section 10.H.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. CITY intends to conduct an audit after the third Agreement Year of this Agreement, however, CITY reserves the right to conduct such audits at any time.
- 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 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. The CONCESSIONAIRE shall deliver to CITY with the executed copies of this Agreement, a good faith deposit in the amount of five thousand dollars (\$5,000.00) 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 termination, CONCESSIONAIRE shall immediately cease its use of the Site and commence and diligently pursue the removal of its property from the Site.

- i. Utilization. If CITY utilizes all or any portion of the security deposit, upon ten (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.
11. CITY'Ss Consent, Discretion. Whenever required under this Agreement, CITY's consent or approval shall mean the written consent of CITY, unless otherwise expressly provided.
12. 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 Site 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.
13. Maintenance of the Site. CONCESSIONAIRE shall, at CONCESSIONAIRE's sole cost and expense and to CITY's satisfaction, maintain the Site in a decent, safe, healthy and sanitary condition at all times during the Term.
14. 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.
15. Inspection. CITY may, at all times, enter and inspect the Site.
16. 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. Workers Compensation. 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. 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 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 Concession 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'Ss 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.

- 17. 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.
- 18. 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.
- 19. 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.

20. 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 Site 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.
21. 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.
22. 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.
23. 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.
24. No Assignment. CONCESSIONAIRE shall not assign any rights granted by this Agreement or any interest herein without CITY's prior written consent. Approval of any such proposed assignment may be withheld in CITY's sole and absolute discretion. Any assignment by operation of law shall automatically terminate this Agreement.
25. 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 Site, 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.

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. 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.
28. 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 Site. 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 Site, 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.
29. 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 or suspend this Agreement and all rights of CONCESSIONAIRE and of all persons claiming rights through CONCESSIONAIRE to the Concession Site or to possession thereof, and CITY may then enter and take possession of the Site 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 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 thirty (30) 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 terminate 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. CITY may also redistribute CONCESSIONAIRE's vacant launch times among the remaining concessionaires. 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.

30. 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.
31. 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.
32. 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 Site, 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.
33. 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.

34. 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.

- 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 Site, 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 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.
35. 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.

36. Survival. Any obligation which accrues under this Agreement prior to its expiration or termination shall survive such expiration or termination.
37. 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.
38. 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.
39. 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.
40. 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.
41. Entire Agreement. This Agreement, along with all attachments and incorporated documents, constitutes the entire Agreement between the parties and supersedes any and all prior understandings, representations, warranties and Agreements between them and pertaining to this Agreement and CONCESSIONAIRE's occupancy, use, development, and maintenance of the Site. Any modification, alteration, or amendment of this Agreement shall be in writing and signed by all the parties hereto.
42. 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:
La Jolla Sea Cave Kayaks, LLC
2164 Avenida de la Playa
San Diego, CA 92037

43. 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 Site. 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 Site.
44. 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.

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45. 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: 2/11/15

THE CITY OF SAN DIEGO, a California municipal corporation

BY: [Signature]
Name: Scott Chadwick
Title: Chief Operating Officer



Date: 3/17/15

LA JOLLA SEA CAVE KAYAKS, LLC:

BY: [Signature]
Name: Jennifer Kleck
Title: Managing Partner

APPROVED AS TO FORM:

Effective Date: 26 MAR 2015

JAN I. GOLDSMITH, City Attorney

BY: [Signature]
Noah J. Brazier
Deputy City Attorney

Environmental Analysis Section Environmental Clearance:

CEQA Section 15301 allows for the operation, repair, maintenance, permitting, leasing, licensing or minor alterations of existing public or private structures or facilities involving negligible or no expansion of use. This permit will allow use of limited areas where no environmental impacts would result; and where none of the exceptions listed in EQA Guidelines Section 15300.2 would apply.

Date: 3/18/15

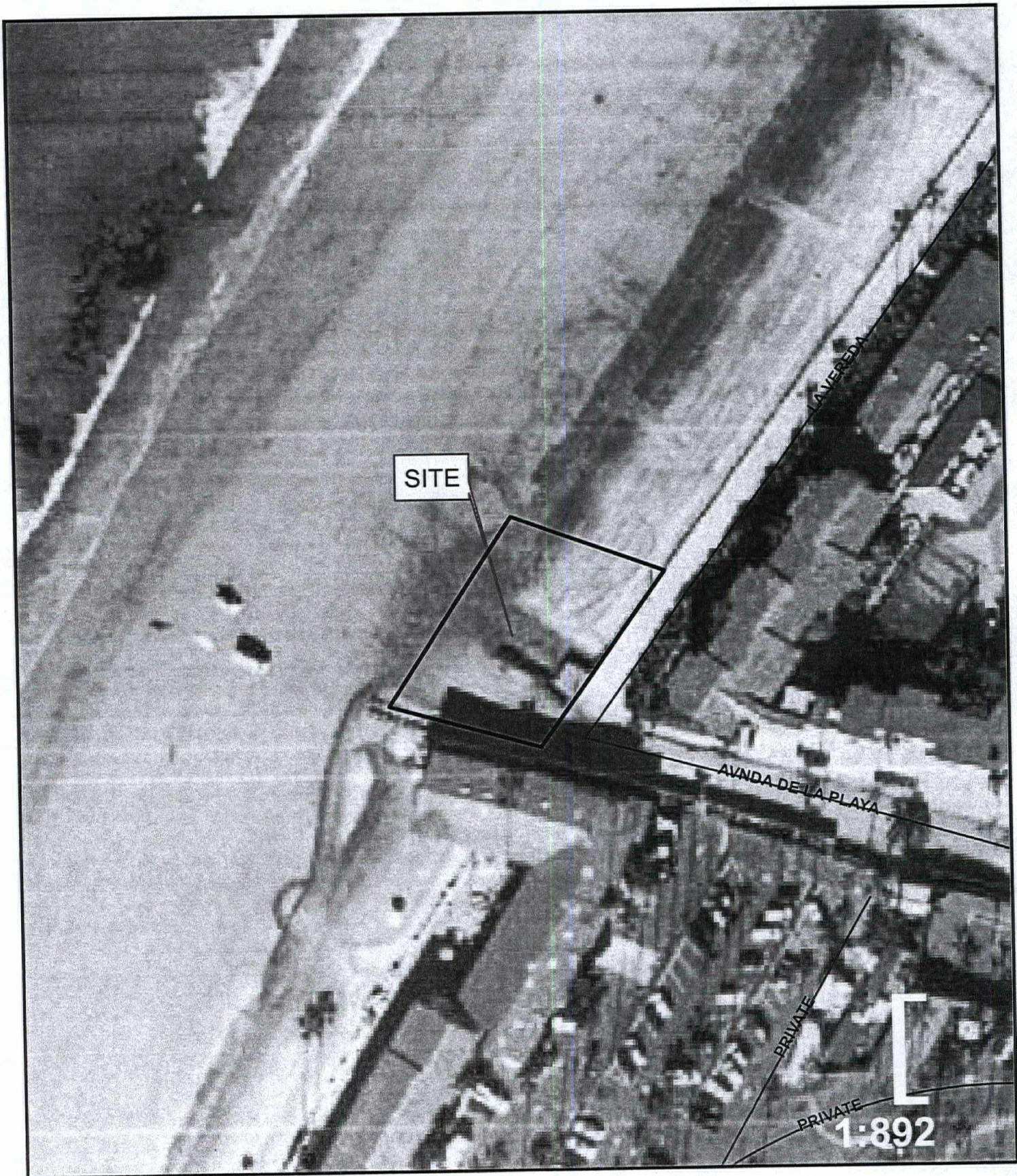
BY: [Signature]
Name & Title: Myra Herrmann, Senior Planner, Planning Department

RECEIVED
CITY CLERK'S OFFICE
15 APR - 1 PM 1:56
SAN DIEGO, CALIF.

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.

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SanGIS
San Diego Association of Governments

ATTACHMENT B
Operating Plan